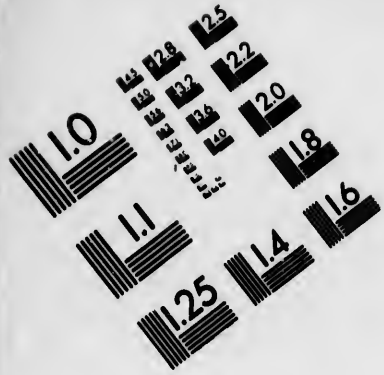

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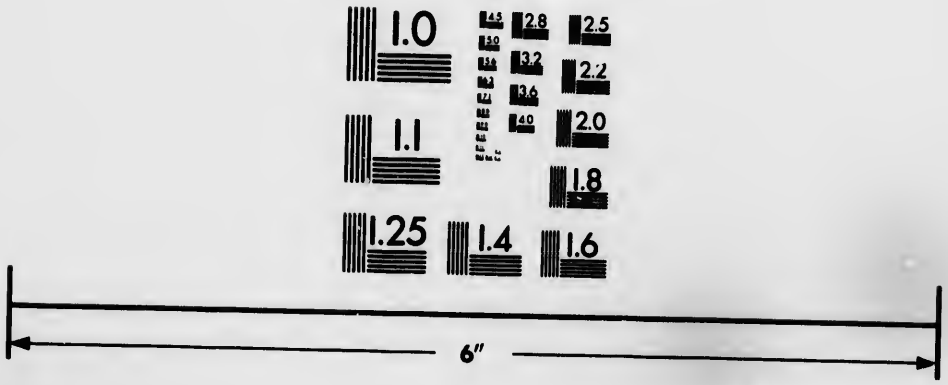

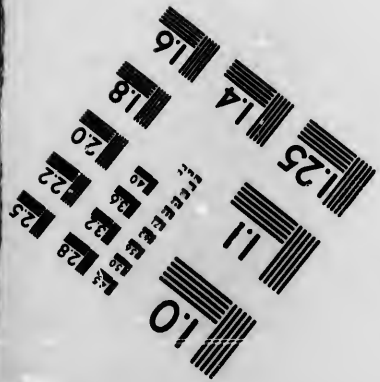

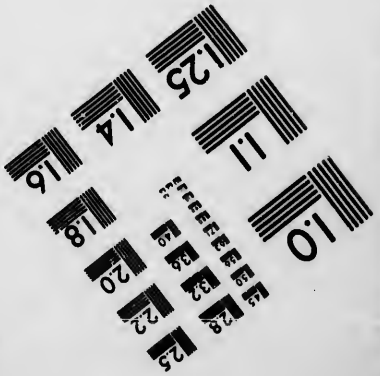

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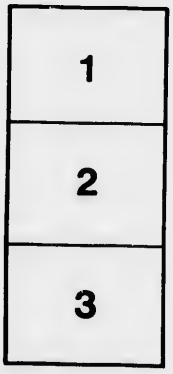

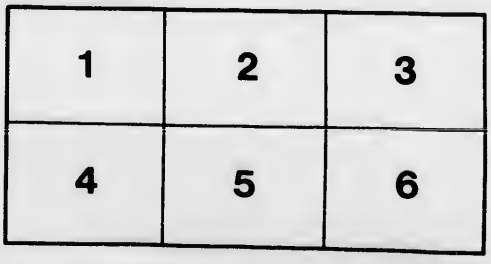

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

ONTARIO,

BY

ALEXANDER GRANT, BARRISTER,

REPORTER TO THE COURT.

VOLUME XVI.

TORONTO:
ROWSELL & HUTCHISON,
KING STREET.

1872.

ROWSELL AND HUTCHISON, LAW PRINTERS, TORONTO.

THE HON. P. M. S. VANKOUGHNET, *Chancellor.*

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

" J. C. P. ESTEN, } *Vice-Chancellors.*
" OLIVER MOWAT, }

" JOHN SANDFIELD MACDONALD, *Attorney-General.*

A TABLE

OF

CASES REPORTED IN THIS VOLUME.

Versus is always put after the plaintiff's name.

A.

B.

B.

B.

C.

C.

D.

D.

E.

F.

F.

G.

H.

I.

J.

J.

K.

L.

M.

Mc.

N.

O.

P.

Q.

R.

R.

S.

S.

T.

T.

W.

W.

Y.

A TABLE

OF

CASES CITED IN THIS VOLUME.

REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING JANUARY, 1860.

BROUSE v. STAYNER.

Act for Quieting Titles—Practice—Newly discovered evidence after adjudication.

There is no rule that a petition of review, on the ground of the discovery of new evidence, will not lie when the new evidence is of conversations and admissions.

In a case of considerable suspicion as to the title of a petitioner under the Act for Quieting Titles, the Court stayed the Certificate on the ground of the discovery of new evidence, though witnesses had been twice examined *viva voce*, and nearly a year had elapsed since the second examination; the applicants satisfactorily accounting for their not having adduced the new evidence at an earlier date.

Where the question involved, on an application for a Certificate of Title, was the legal title to the property, and the proper determination of the question depended on the credibility of witnesses against, or in favor of, certain old documents which were impeached as forgeries, the Court directed an action of ejectment to be brought, in order that the question might be tried by a jury of the county where the principal witnesses resided.

Statement.

On the 28th November, 1866, *John Gordon Brouse* presented a petition under the Act for Quieting Titles (*a*),

(*a*) 29 Vic. ch. 25.

1869.

Brouse v. Stayner.

claiming to be owner of lot No. 23, in the second concession of the township of Plympton, and praying that his title might be investigated and declared under the said Act. The petitioner claimed title under a conveyance dated 6th April, 1860, from *James Parlow*, of the Township of Matilda, in the County of Dundas, the grantee of the Crown. The claim was contested by *Thomas Allen Stayner*, since deceased, who asserted title under a deed from the same *James Parlow* to *Allan Napier MacNab*, dated 21st October, 1835, executed by *David A. MacNab*, under a power of attorney, dated 29th of October, 1833, from *Parlow* to *David A. MacNab*, and *John Radenhurst*, and a bond of the same date, whereby *Parlow* bound himself to convey the lot to the said *Allan Napier MacNab*. The claimant *Brouse* denied the genuineness of these two instruments. At the date of them the patent had not issued; but, on the 21st August, 1833, *James Parlow*, who was entitled to a grant of land as the son of a U. E. Loyalist, had, with his relative *Nicholas Brouse*, attended the Quarter Sessions at Brockville, and executed the papers necessary to enable him to obtain a grant. This *Nicholas Brouse* made the affidavit as to the identity of *James Parlow;* and the petition which *Parlow* signed prayed the Lieutenant-Governor to permit *Brouse* to locate the lot and take out the patent. The petition, affidavits, and certificates are all on one side of a sheet of paper, and are partly printed and partly written. *Nicholas Brouse* was the subscribing witness to the impeached power of attorney and bond. The name of *John Parlow* also was subscribed to the bond as a witness. The genuineness of *Nicholas Brouse's* signature to both documents was not disputed; and if the signatures of the *Parlows* were forgeries, it seemed to be admitted that *Nicholas Brouse* was the forger.

Statement.

On the 3rd April, 1868, Mr. *Turner*, to whom the petition of the claimant *John Gordon Brouse* had been

referred, reported in his favor. Against this report the contestant appealed; and on the 17th April, the Court (*Spragge*, V.C.,) made an order giving the contestant liberty to set the matter down for examination of witnesses and hearing at the ensuing sittings at Cornwall. The matter was accordingly heard at Cornwall before Vice Chancellor *Spragge* on the 28th April, 1868. The onus of impeaching the documents being on the petitioner, he produced as witnesses, *James Parlow*, the grantee of the Crown, and his brother *John Parlow*. *James Parlow* swore that his name to the document was not his signature; that he had never sold his U. E. right; and had never executed documents of the nature of those impeached. *John Parlow* swore that the name *John Parlow* subscribed as a witness was like his signature, but was not in his hand-writing. The Vice Chancellor thought both witnesses truthful, and there being no evidence on the other side, he gave judgment for the claimant with costs. These costs were afterwards taxed and paid.

1869.
Brouse v. Stayner.
Statement.

After the hearing at Cornwall, viz., on the 23rd of June, 1868, Mr. *Stayner*, the contestant, died; and subsequently his devisees made an application for a stay of the proceedings until they should have an opportunity of moving in respect of some new and important evidence which they said they had discovered. There was some misapprehension as to the time that had been allowed for this purpose; and on the 22nd February, 1869, no motion having been made meanwhile, the Certificate was issued to the claimant. On the 9th March, however, Vice Chancellor *Spragge* granted an injunction restraining *Brouse* from selling, incumbering, or otherwise dealing with the land for fifteen days, with liberty to the devisees to move on or before the 23rd March, to continue the injunction. They thereupon presented a petition, alleging that they had lately discovered new and important evidence as to the genuineness of the impeached instruments (the

1869.

Brouse v. Stayner.

particulars of which the petition set forth), and praying that the judgment of the Court should be reviewed; that the matter should be reheard, the finding thereon reversed, and the Certificate of title set aside; that the injunction should be continued until the matter of this petition should be disposed of; and for general relief. The new evidence alleged to have been discovered was, that before the institution of the proceedings in this matter, *John Parlow*, the witness had, at the instance of the petitioner *John Gordon Brouse*, under an assumed name, and upon the false pretence of being an intending purchaser of the land in question, procured from Mr. *Stayner* an inspection of the instruments in question; that after this inspection, and before the hearing at Cornwall, the said *John Parlow* informed the petitioner *Brouse*, that, in his belief, the signatures to the said instruments were genuine, and that the signature of *John Parlow* thereto was the genuine signature of the father of the witness *John Parlow*; that thereupon the petitioner *Brouse* suggested to this *John Parlow*, in case he should be called upon to give testimony, to suppress the fact of this belief in the genuineness of the instruments, and to confine his evidence, as far as possible, to the question whether the signature was or was not his own. The contestants further alleged that they had discovered evidence that *James Parlow* had, before the date of the instruments in question, sold his right as the son of a U. E. Loyalist, to one *Jacob Brouse*, his brother-in-law, for a valuable consideration; that *Jacob Brouse* afterwards, for a valuable consideration, transferred the same to *Nicholas Brouse*; and that since the hearing at Cornwall the said *James Parlow* had admitted this to be the fact. The contestants further alleged that they had discovered that since the said hearing the petitioner *Brouse* had admitted that if the witness *John Parlow* had stated on his examination his real belief as to the genuineness of the said instruments, his, the said petitioner's case must have failed.

Statement.

1869.

Brouse v. Stayner.

Mr. *McLennan*, for the petitioner.

Mr. *S. H. Blake*, contra.

MOWAT, V.C.—That the circumstances set forth in the petition of the contestant, if true, are very material, is clear; but is it consistent with the rules of the Court to re-open a matter for the purpose of letting in such oral evidence as the petition mentions? The case was likened on both sides to a bill of review on discovery of new matter; and I do not find that leave to file such a bill was ever refused on that technical ground. In *Willan* v. *Willan* (*a*) before Lord *Eldon*, and *Thompson* v. *Rawlings* (*b*), before the Master of the Rolls, and afterwards before the Lords Justices (*c*), the admissibility of such evidence was assumed by the Court.

It was argued with great force by the learned counsel for *Brouse*, that the affidavits which the contestants produce on the points relied on in their petition are false; and that their falsity appears from the cross-examinations of the deponents, and from the counter affidavits filed. But, having given my best attention to all that was urged, I have been unable to satisfy myself that the statements of the contestants' witnesses may not be substantially true. I think that a satisfactory conclusion on that point cannot be come to without the examination of the witnesses on both sides in open Court. If, instead of applying to this Court for an investigation under the Statute, the claimant had been a party to an ejectment suit, and had obtained judgment therein against the contestant, the judgment would be no difficulty in the way of another action by the latter in which the new evidence could be brought forward; and the purpose of the Act is to quiet titles, but only after

Judgment.

(*a*) 16 Ves. 87. (*b*) 34 Beav. 50.
(*c*) 10 Jur. N. S. 1192.

1869.

Brouse v. Stayner.

thorough investigation of their validity. Would it, in view of the policy of the Act, and of all the circumstances, be a proper exercise of the jurisdiction to refuse or to grant, the further investigation desired in the present case? It is to be observed, that the case of the petitioner for a Certificate depended on the truthfulness of two brothers, they being (I think it was said) his relatives, namely, *James Parlow*, his grantor, and *John Parlow*, the grantor's brother; that both are persons of little education; that their evidence related to matters which had occurred (if at all) thirty-three years previously; that the petitioner's case, according to the judgment of my brother *Spragge*, is, that his deceased father, *Nicholas Brouse*, forged the signatures to the impeached documents; that *James Parlow*, for twenty-five years or more after his right accrued, did no act, and made no claim, of ownership, did nothing towards the locating of the land, and did not even know what land had been located until informed by the petitioner at the end of that long period; that for these twenty-five years he acted precisely as if he had parted with his right, and contrary to what men do who are entitled to property; that no intelligible explanation of his conduct has been offered; that after a quarter of a century had passed without his claiming the property or inquiring after it, he was induced by the present claimant, *Brouse*, to execute a conveyance in his favor (6th April, 1860,) for the small consideration of £50; that this consideration is to be paid if *Brouse* establishes a title to the land, and not otherwise; that seven or eight years more elapsed before *Brouse* appears to have done anything to make good his claim of ownership thus acquired; that he appears to have left the late contestant even to pay the taxes during this period; that when the petitioner *Brouse* commenced proceedings to establish his claim, both *Nicholas Brouse* and Sir *A. N. MacNab* had been long dead; that the title of Sir *Allan* passed through several hands before the conveyance to *Stayner*,

Judgment.

1869.

Brouse v. Stayner.

that the good faith of Sir *Allan's* purchase is not impeached, nor the good faith of the purchases made by the successive parties to whom the title, or supposed title, of *MacNab* has since belonged; that Mr. *Stayner* had no personal knowledge of the impeached transaction; that he was a stranger in the part of the country where the *Brouses* and *Parlows* lived or are known, and where the evidence which was to meet the attack on his title had to be looked for; that the son of *Nicholas Brouse*, who might have been expected to assist the contestant in vindicating the father's memory from the stain of felony, was his opponent, having made it his interest to establish his own father's infamy; that the late contestant thus laboured under great and unusual disadvantages in ascertaining the facts, and getting evidence of them; and that his disadvantages arose in a considerable degree from the extraordinary laches of the claimant's grantor and associate in the contest. In view of all these considerations, I think that—if the contestant and his representatives have not been guilty of such negligence in regard to bringing forward this evidence as disentitles him to the indulgence of the Court (a point I have yet to consider)—the case is not one in which the Certificate should be allowed to stand without giving the devisees an opportunity of adducing the new evidence which is said to have come to their knowledge. Believing the testimony of *John Parlow* and *James Parlow*, my brother *Spragge* gave judgment in accordance with it; as their evidence, if true, outweighed the circumstantial evidence which would otherwise have led to a different conclusion. But, if their evidence was false and deceptive, if admissions or boasts to that effect slipped from them when they thought there was no danger in making them, I do not think that the proceedings which have since taken place in the matter ought to shut out these alleged admissions from investigation.

Judgment.

The new matter was brought to the knowledge of the

1869.

Brouse v Stayner.

contestants after the Autumn Sittings of last year. Part of the new evidence consists of admissions made since the hearing at Cornwall; and as to the other new matter, I think that the affidavits sufficiently shew that it was through no want of reasonable diligence that it was not known at an earlier date; indeed, the contrary was hardly contended, except as to the supposition, (to which the alleged admission of *John Parlow* has given rise) that the name *John Parlow* subscribed as a witness, is the signature of the father of the witness, and not of the son, as until lately had been supposed. It appeared from the evidence of *John Parlow* the witness, that his father, who had been dead for many years, was named *John Parlow;* and counsel for the claimant contends that the omission of counsel for the late contestant to ask whether the signature was not the father's, was such a want of reasonable diligence as precludes the present contestants from now setting up the fact, if fact it is.

Judgment.

But I have not been able to take that view. The circumstances of the case which I have already mentioned must be borne in mind; and in connexion with them, other circumstances bearing on this particular point have to be considered, namely, that the late contestant or his agents had not before heard anything of the father *John Parlow;* that he had been dead for many years; that from the age of *John Parlow* the son, and from other circumstances, the contestant and his agents had always been led to suppose that this *John Parlow* was the witness to the instruments; that this *John Parlow* in his evidence said the signature was like his own; that when he mentioned in his evidence that his father's name was *John Parlow*, it did not in fact occur to Mr. *Stayner's* counsel that the signature might be that of the father; that the claimant, on whom the onus of proving the forgery rested, insisted that he had established the forgery when *John Parlow*, the son, swore the hand-writing was not his; and that the idea that another *John Parlow* was the real witness, had not occurred to the late contestant, or anybody

acting for him, until October last, when the alleged admission of *John Parlow*, the son, to that effect was made known to the contestant's representatives, through a letter addressed to the contestant by one of the persons whose evidence they now wish to get in. I think that under these circumstances there has been no such negligence on the part of Mr. *Stayner* or his representatives as disentitles the latter to relief. 1869. Brouse v. Stayner.

There remains to be considered the mode in which the new evidence should be brought forward. The question involved is as to the legal title to the property; and the proper determination of the question depends on the credibility of the witnesses against or in favor of two old documents. I think that the most satisfactory way of determining the matter will be by an action of ejectment, to be tried at the ensuing assizes by a jury of the county where the principal witnesses live. The injunction will continue meantime, and until the further order of the Court. I reserve claimant's costs of and incidental to the petition, until after judgment in the ejectment. Judgment.

LIVINGSTONE v. THE WESTERN INSURANCE COMPANY [IN APPEAL.*]

Fire insurance—Mortgage.

A fire policy in favor of a mortgagor, contained a clause providing that in the event of loss under the policy, the amount, the assured might be entitled to receive, should be paid to *A. L.*, mortgagee.

Held, by the Court of Appeal that this clause did not make *A. L.* the assured; and that a subsequent breach by the mortgagor of the conditions of the policy, made it void as respected *A. L.* as well as himself. [SPRAGGE, V.C., dissenting.]

This was an appeal by the defendants from the decree

**Present.*—Draper, C.J. E. & A., Richards, C.J. Q.B., VanKoughnet, C., Hagarty, C.J. C.P., Spragge, V.C., A. Wilson, J., Mowat, V.C., and Gwynne, J. [Mowat, V.C., was absent when judgment was pronounced.]

1869. of the Court below, as reported, *ante* Vol. XIV., page 437.

Livingstone v. The Western Ins. Co.

Mr. *Blake*, Q. C., and Mr. *D. A. Sampson*, for the appellants, contended that the decree was erroneous and ought to be reversed, on the grounds that the right, if any, of the plaintiff in the Court below, against the appellants under the policy in the pleadings mentioned was, according to the true construction of the policy, a right merely to receive what, if any, insurance moneys might, under the policy, become payable to the insured, *Francis Porte;* that under the conditions of the policy the same was avoided by the other insurance effected by *Porte* in the pleadings mentioned, and therefore no insurance moneys ever became payable to *Porte*, and that no insurance moneys ever became payable under the policy to either *Porte* or the plaintiff.

Mr. *McLennan*, for the plaintiff, submitted that the decree was right, on the grounds that the intention of the parties and the effect of the instrument in question was to insure the plaintiff to the extent of his interest in the property; that the plaintiff's insurance could not be affected by any acts of the mortgagor in contravention of the terms of the policy.

Judgment.

DRAPER, C. J.—On the 3rd June, 1865, *Francis Porte* mortgaged a house and some land, in the first concession of the township of Kingston, to *Archibald Livingstone*, to secure payment to the latter of $300, with interest at seven per cent. within two years. The mortgage deed contained a covenant that the mortgagor should, during the continuance of the security, insure the premises and keep them insured for at least $300, and should on the making or renewing any and every policy of assurance, assign the same to the mortgagee; and it was agreed that if the mortgagor did not fulfil this covenant, the mortgagee might effect the insurance at the expense and charge of the mortgagor.

1869.

Livingstone v. Western Ins. Co.

On the 15th August, 1865, the plaintiff *Livingstone* having previously spoken to *Mr. Shaw*, who was agent for the defendants at Kingston, (telling him that he wanted *Porte* to insure the premises; that he wanted *Porte* to insure to secure his mortgage), paid such agent $4.50 as premium on an assurance to the extent of $300, and obtained an interim receipt, which refers to the property to be insured as described in application No. 870, but contains nothing to shew the name in which the policy was to be granted, nor the interest of the party to be assured. The agent had applied several times to *Porte*, telling him that the plaintiff desired him to insure to secure the mortgage, and *Porte* made the application and then the plaintiff paid the premium, and received the interim receipt. Upon this the appellants (the defendants below) granted a policy to *Thomas Porte*, against loss by fire, on the property mentioned in the application, which policy was delivered to the plaintiff, and was in the ordinary printed form, except that immediately following a written description of the premises, was further written: "In the event of loss under this policy the amount the assured may be entitled to receive shall be payable to *A. Livingstone*, mortgagee."

Judgment.

Among other conditions indorsed on this policy there was one (the 6th) to the effect that in case of subsequent assurance, notice thereof must be given in writing at once, and such subsequent assurance indorsed on this policy, or otherwise acknowledged in writing, in default whereof the policy would become of no effect.

Francis Porte did, however, after this policy was granted, and without the knowledge of the plaintiff, effect an insurance with the Hartford Fire Insurance Company on the same property, of which insurance no notice was given to the defendants,

1869.

Livingstone v. The Western Ins. Co.

There was parol evidence that the defendants had a rule to insure owners only, and that if applications were made in the name of a mortgagee for insurance, they were returned at once, and cancelled.

On the 5th December, 1865, the house was damaged and destroyed by fire to the amount of $300.

In May, 1866, the plaintiff filed his bill, praying that the policy might be reformed by substituting the name *Francis* for *Thomas*, and that he might be declared to be entitled to be paid the amount of the loss or damage sustained by him as mortgagee, and that the Western Assurance Company, the appellants, might be ordered to pay the same to him.

The cause was heard first before *Spragge*, V. C., who decided it in the plaintiff's favor. It was afterwards reheard before the Chancellor and both the Vice-Chancellors; and the Court, the Chancellor dissenting, affirmed the decree with costs.

Judgment.

There is no room for doubt that the name *Thomas* was inserted in the application and consequently in the policy by the mistake of the defendants' agent, and was properly changed to *Francis*. The application to insure was made by *Francis*, who was owner and occupant of the premises.

The bill asserts that *Livingstone* made the application for insurance, to which assertion the interim receipt gives some apparent support, for the premium is acknowledged to be paid by him, and no other person is named in the receipt, but the premium is stated to be received on an insurance on property, described in application No. 870, and though the application was not put in evidence, yet the evidence of *Mr. Shaw* contradicts the assertion that the plaintiff was the applicant.

It shews that his instigation and pressure upon *Porte*, made through *Mr. Shaw*, procured an application to be made by *Porte*, and that the money for the premium was paid by the plaintiff, but the act of applying was incontestably that of *Porte*, who is recognized as the owner and occupier of the building, and is, in connection with the ownership and occupation, designated as tho "assured." It is also a matter of obvious inference from the parol evidence, coupled with the contents of the policy, that the appellants were aware that the relation of mortgagor and mortgagee existed between *Porte* and the plaintiff, and that *Porte* was willing or even desirous that the insurance should be a security to the plaintiff for his mortgage money, and I think it exceedingly probable that the appellants were informed that *Porte* was bound to obtain an assurance for that object, and with that knowledge agreed that whatever money became due under the terms of the policy should be payable to the plaintiff.

Judgment.

It cannot be asserted on the evidence that *Livingstone* was the applicant for the insurance or that *Porte* was not. Given then a covenant entered into by *A* to procure and effect an insurance on a house belonging to *A*, and the grant of a policy to *A*, founded upon an application by *A* to insure that house. Upon these facts, who is the assured? I cannot conceive a doubt but that *A* is. Add to these data, that the assurers have made it a settled rule in the conduct of their business not to grant a policy to assure the interest of a mortgagee; that *A* in his application, after stating that he is owner and occupant, subject to a mortgage to *B*, and that he desires that if any sum shall become payable to him (*A*) under the policy, the assurers will pay that sum to *B*, without further reference to or authority from him (*A*), and the assurers agree to this, will not these words, "the amount the assured shall be entitled to receive shall be payable to *B*," simply but unequivocally express the

1869.

Livingstone v. The Western Ins. Co.

intention and desire of the assured, and the undertaking of the assurers to give effect to it? If *Porte* had assigned this very policy, as he covenanted to do, will it be asserted that (the assurers consenting) the assignment had nothing to operate upon because *Porte* was not the assured. It is to the absence of that assignment, and to *Porte's* breach of the said condition indorsed on the policy that this litigation is owing. I should have added, probably, to *Porte's* inability to make compensation for his breach of the covenant to assign.

Judgment.

The construction of the words "the amount the assured may be entitled to receive shall be payable to *A. Livingstone*, mortgagee," for which the plaintiff contends is, that they make *Livingstone* or shew that he is "*the assured.*" It seems to me, if it rests on those few words, to be reasoning in a circle, starting thus: *Livingstone* is the assured because he is to receive the money; and returning, *Livingstone* is entitled to receive the money because he is the assured. If the construction rests on a more general view, then we find that the assurance is on a building "owned and occupied by *assured.*" Who owned and occupied it? *Francis Porte.* Whom do the Company at the beginning of the policy declare they insure? *Francis Porte.* So far at least *Francis Porte*, not the plaintiff, is *the assured.* I do not see any inaccuracy of expression in what follows. Surely the owner of the building insured, the applicant for the insurance, the person who is declared by the Company to be insured by them, is with perfect accuracy called the assured; and it is to the assured that the indemnity for loss by fire is to be made, not necessarily by money, but in the option of the Company, by repair or rebuilding. The inaccuracy, therefore, if any, is in the construction put on the words "payable to *A. Livingstone.*" They import an undertaking on the part of the Company to pay the money, which is *Porte's* under the policy, to *Livingstone*,

1869.

Livingstone v. The Western Ins. Co.

Porte's mortgagee; and as the policy was granted solely on *Porte's* application, I infer that *Porte* requested and authorized this disposition of the money which he might be entitled to receive; and I think this is doing far less violence to the language used, than to make the plaintiff the assured, when he never made any application for insurance, and when his interest was one on which the Company would not grant a policy.

I do not mean to say that this undertaking of the Company made to *Porte*, and, as I infer, at his request, gave the plaintiff no right to the money, but in my humble judgment it was not as the assured.

Entertaining then the opinion that *Porte* was the assured, it follows that the conditions of the policy were to be observed and kept by him. A violation of the sixth condition has, it appears, taken place, and the consequence is, the policy became of no effect.

Judgment.

Therefore, in my opinion, the decree should be reversed, and the plaintiff's bill dismissed with costs.

I should add that I have considered the case of *Burton* v. *The Gore Mutual Insurance Company* (*a*). The fact that there was an assignment in that case may be sufficient to distinguish it, but if not, it would require more consideration than I have yet given to it, before I could follow it to the extent necessary to decide this case in favor of the plaintiff.

SPRAGGE, V.C., said that in disposing of this case originally he had proceeded mainly on the case of *Burton* v. *The Gore District Mutual Insurance Co.*, from which he had found it impossible to distinguish the case, and subsequent consideration had failed to convince him that he was wrong.

(*a*) 12 Grant, 156.

1869.

Livingstone v. The Western Ins. Co.

GWYNNE, J.—Admitting that the policy may be rectified by the insertion of the name of "*Francis*" instead of "*Thomas*" *Porte*, I entirely concur in the judgment delivered by his Lordship the Chancellor in the Court below, that the bill should be dismissed with costs.

The bill does not pray any rectification of the policy by the insertion of the plaintiffs' name as the insured; nor if it did, would such a prayer be granted, for in that respect, it is utterly denied by the defendants that there was any mistake, and unless the mistake be mutual there can be no rectification.

When rectified, however, by the insertion of the name of "*Francis*" *Porte*, the policy then becomes a contract between the Company and him, the terms and conditions of which avoid the policy in the event which has happened —and in the face of such forfeiture the plaintiff cannot succeed without an alteration in the terms of the contract, which no court has any power to make to the prejudice of one of the contracting parties.

Judgment.

Per Curiam.—Decree of Court below reversed, and the plaintiff's bill dismissed with costs.—[SPRAGGE, V.C., dissenting.]

1869.

KIRKPATRICK v. LYSTER—[IN APPEAL.*]

Lease by rector — Renewal — Covenants to pay for improvements — Estoppel.

By letters patent dated in January, 1824, certain lands were granted to three parties upon the trust, amongst others, to convey the same to the incumbent, whenever the Governor should erect a parsonage or rectory in Kingston and duly appoint an incumbent thereto, such conveyance to be upon trusts similar to those thereinbefore expressed. In January, 1836, a rectory was created in Kingston. In May, 1837, the trusts for which the patent of 1824 had been issued, having been carried out, and one of the trustees named therein appointed rector, the other two joined in a conveyance to him as such rector, to hold to him and his successors, subject to the uses and trusts set forth in the grant to them. In 1842 this incumbent created a lease for twenty-one years (under which the plaintiffs claimed), whereby he covenanted for himself and his successors to pay for certain improvements made by the lessee of the premises, or that he or they would execute a renewal lease on terms to be agreed upon, and that until such payment for improvements or renewal of lease, the lessee should retain possession of the premises.

Held, that the incumbent, either as trustee or rector, had no power to bind his successors to pay for improvements, or to enter into any agreement which *a priori* would extend the lease beyond the twenty-one years.

This was an appeal by the plaintiffs from the decree of the court below, as reported *ante* vol. xiii., page 323.

Mr. *Strong*, Q. C., and Mr. *Crooks*, Q. C., for the appellants, contended that the decree was erroneous, on the grounds that the appellants, as plaintiffs in the Court of Chancery, on the pleadings, evidence and admissions in the cause, were entitled to an injunction to restrain the defendant *Lyster* from further proceeding with the action of ejectment in the pleadings mentioned; that Statement.

Present.—Draper, C.J. Q.B., VanKoughnet, C., Richards, C.J. C.P., Spragge, V.C., Morrison, J., A. Wilson, J., J. Wilson, J., and Mowat, V.C.

1869.

Kirkpatrick v. Lyster.

under the covenants contained in the lease in the pleadings mentioned, the plaintiffs were entitled in equity to be protected in their possession of the demised premises, until the permanent improvements effected by the lessee thereon were valued, and compensation made therefor by the defendant *Lyster*, or until a new lease of the premises was granted; that the lease in the pleadings mentioned was a valid lease, both at law and in equity, and binding on the defendant *Lyster*, and the defendant *Lyster* cannot, as rector or otherwise, refuse to be bound by its provisions; that even if the lease were invalid, yet under the principles of a Court of Equity, the lessee and his assigns, under the circumstances of this case, are entitled to compensation for permanent improvements made on the demised premises, and to a lien and charge thereon for the value of such improvements, and in default of payment to realize the same by a sale of the premises; that the decree of the Court of Chancery was erroneous in ordering payment to be made to the defendant *Lyster* by all the plaintiffs for damages, in the nature of *mesne profits*.

Statement.

Mr. *Blake*, Q.C., for the plaintiffs, submitted that the decree was correct on the following, amongst other grounds:—That the powers authorizing the execution of any lease of the premises in question, other than an ordinary rectorial lease, had come to an end before the date of the execution of the lease in question, and the said premises were at that date vested in the lessor as rector, either as to the entirety or at least as to two undivided third parts thereof, and the said lease was therefore void at law and in equity; that if the powers authorizing the execution of any lease, other than an ordinary rectorial lease, be adjudged by this Court to have been still in existence at the date of the said lease, then the said lease is valid or void according as it is or is not within the said powers. If it were valid, the appellants had a defence at law to the action; if void, they had

no right in equity to restrain the action. In either event, they cannot succeed in this suit; that the lease is not within these powers, and is therefore void; that the provisions, the benefit of which the appellants claim, are vague and uncertain, and for this and other reasons are not fit subjects for specific performance, and the only remedy of the appellants in respect thereof is by action at law for the breach thereof; that there is no equity upon which the respondent can be prevented from asserting his legal rights as rector in respect of the said premises, nor is there any ground upon which the appellants are entitled to compensation for improvements on the premises, or to a lien for the amount of such compensation, or to a sale of the premises in order to realize such amount; that if the lessor was at the date of the said lease seized of one undivided third part of the said premises as trustee thereof, and not as rector, yet he was so seized upon trust only to convey that part to himself as rector, and not upon trusts which would authorize the said or any lease of the said part; and the said lease was a breach of the trusts on which he was so seized of the said part, and the plaintiffs, or those through whom they claim, were parties to such breach of trust, and the defendant was entitled to recover in equity, if not at law, the possession of the said undivided third part, and compensation for the profits thereof accrued since he became rector, and he being so entitled, the decree had properly given him that relief for which by his answer he specially prayed.

Judgment.

DRAPER, C. J.—The different letters patent and other deeds and instruments put in evidence in this cause, were also before the Court of Queen's Bench in the case of *Lyster* v. *Kirkpatrick* and others (*a*).

From them it appears that on the 19th of January, 1824, the Crown granted certain lands in the town (now

(*a*) 26 Q. B. U. C. 217.

1869.

Kirkpatrick v. Lyster.

city) of Kingston, of which lands the premises in question in this cause form part, to the Venerable *George Okill Stuart*, Archdeacon of York, *George H. Markland* and *John Macaulay*, to hold in fee on trust.

1. To ratify and confirm all such leases and agreements for leases as were then subsisting, and had been entered into by the clergymen and church-wardens on behalf of the inhabitants of Kingston, of any part of the land granted.

2. To give leases of the residue, at the best rent, for any term not exceeding twenty-one years, under such provisoes, conditions and covenants, and to renew and grant fresh leases at the expiration of such as had been or might be granted, as to the grantees or any future trustees might seem fit.

3. To receive the rents and apply them, first, in liquidation of any sum not exceeding £3000, which might be borrowed for erecting a new church; and after payment of such sum and interest.

Judgment.

4. To pay the rents to the clergyman for the time being doing duty in the said church.

Subject to a proviso that when the Governor should erect a rectory in Kingston, and present an incumbent thereto; then the trustees for the time being should by writing, under their hands and seals attested, &c., convey the land to such incumbent and his successors for ever as a sole corporation, upon the same uses and trusts as were thereinbefore expressed.

A rectory in Kingston was erected by letters patent, dated 21st January, 1836.

The Venerable *George Okill Stuart* was, on the 18th of October, 1836, duly inducted into the said rectory.

By deed-poll, dated the 10th of May, 1837, *George H. Markland* and *John Macaulay*, in fulfilment of the powers and duties of the trusts set forth in the letters

1869.

Kirkpatrick v. Lyster.

patent of the 19th of January, 1824, granted, assigned, conveyed and confirmed the said land to the said *George Okill Stuart*, *habendum* to him and his successors forever, "subject and under the uses and trusts set forth" in the said letters patent.

The said *George Okill Stuart* immediately after executed a deed-poll, declaring for himself and his heirs, that as one of the trustees he consented and agreed to this assignment, and that he now received, and took and held the same in his capacity as rector and incumbent of Kingston, and not otherwise.

Archdeacon *Stuart*, by lease dated the 16th August, 1842, describing himself as rector of Kingston, (after reciting the foregoing instruments, and that it was desirable that the buildings and improvements upon the lot should be in brick or stone, and that the lessee therein named had proposed to build in brick or stone "upon getting a lease for twenty-one years," and that the lessor, by virtue of the powers in him vested by the said letters patent and deed-poll, was willing to grant such lease, subject to certain conditions and provisoes, for the valuation of such buildings of brick or stone as might be upon the premises at the expiration of the term, or for the renewal of the lease "for such further term as should be agreed upon,") demised, leased, and to farm let to *John R. Forsyth*, the premises in question, with the appurtenances, *habendum* to him, his executors, administrators and assigns, from the 24th of January, 1842, to the full end and term of twenty-one years, yielding and paying, &c., with covenants for the payment of rent, and that the lessor might enter in default; and the lessor for himself and his successors, covenanted that at the end of twenty-one years, all buildings of brick or stone that might be erected upon the demised premises should be valued by arbitrators, one to be appointed by the lessor or his successors, another by the lessee, his executors,

Judgment.

1869.

Kirkpatrick v. Lyster.

&c., which two arbitrators shall appoint a third, and they three shall value the buildings, and their award, or that of two of them, shall be conclusive. "And the lessor or his successors shall pay or cause to be paid to the" lessee, his executors, &c., "the amount of the valuation of the buildings as aforesaid, or execute to the" lessee, his executors, &c., "a new lease of the said premises, upon such terms as may be agreed upon; *Provided always that until the said valuation be paid, or such new lease be executed, the said" lessee, his executors, &c., "shall remain in possession of the said premises, subject to the rents and conditions hereinbefore mentioned.*" It is further agreed that if either party neglect or refuse to appoint an arbitrator, having received thirty days' notice in writing to do so, the party giving the notice may appoint his arbitrator, and the arbitrator so appointed shall name a second, who shall have the same powers and authority as if he had been appointed in the manner hereinbefore mentioned.

Judgment.

The plaintiffs *Kirkpatrick* and *Callaghan*, on behalf of the Kingston Building Society, mortgagees of the estate and interest which *Forsyth*, the original lessee had, and the plaintiff *Mary Catherine McDonell*, as the executrix of *Archibald John McDonell* deceased, are entitled to the equity of redemption of that mortgage.

Since the filing of this bill, *George Okill Stuart*, heir-at-law of Archdeacon *Stuart*, released and conveyed his interest in the lands in question to the defendant *Lyster*.

Archdeacon *Stuart* died in 1862. Dr. *Lauder* succeeded him as rector in November, 1862, and upon his resignation the defendant *Lyster* was, in June, 1864, inducted as rector.

The trustees named in the letters patent, raised £3000 to build the new church, and paid it off with interest, out

1869.

Kirkpatrick v. Lyster.

of rents and profits received under various leases made by authority of the letters patent of 1824.

The defendant *Lyster*, in September 1865, commenced an ejectment to recover possession of the premises in question, and the defendants *Kirkpatrick* and *Callaghan* were let in to defend as landlords.

The defendant *Lyster* recovered judgment for two undivided thirds, leaving the plaintiffs the remaining undivided one-third, and Dr. *Lyster* intends issuing execution as to two-thirds of the premises and the costs.

The Attorney-General is only made defendant in respect of the interest of the Queen's subjects in the premises.

The object of the suit is to enforce upon the defendant *Lyster* the proviso contained in the lease granted by Archdeacon *Stuart* to *John R. Forsyth*, in August, 1842, contending that it amounts to a covenant, and that adequate relief to protect the plaintiffs under its provisions can only be obtained in equity.

Judgment.

The case was, I think, very fairly put by Mr *Strong*, on the part of the appellants. He rests it upon the proviso, that until the valuation of the buildings be paid, or until a new lease of the premises be given, the lessee shall remain in possession of the premises, subject only to the rents and conditions contained in the original lease. He contends that the power to grant leases such as the one in question, under which the lessee was entitled to be compensated for the ascertained value of his buildings, or to have a new lease, was not merely incidental but was absolutely necessary to enable the trustees to raise £3000 and to repay it with interest, and that the transfer of the land, which the trustees were required to make to the incumbent when one was appointed and his

1869.

Kirkpatrick v. Lyster.

successors, was to be for the same uses and upon the same trusts as those upon which the land was granted in the first instance; and that as the trustees might or (as he argues) must have granted a lease (for a limited term of twenty-one years) of such a character, and had express power to renew it, the incumbent would have been bound to fulfil what they contracted to do, and he had the same authority, when the land was transferred to him, to grant similar leases and to bind his successors, who would take the lands under the terms and conditions of the grant, and not merely as appurtenant to the rectory.

Judgment.

I am not prepared to concede the necessity on which this argument to some extent rests, for it involves the assumption that the ground rent without this stipulation, would have been inadequate as a security to raise £3000, and to pay that sum and interest. The letters patent, as appears by the recital, unequivocally shew that the borrowing powers were based on the security of *the rent*, and that after the debt was discharged such rents were to be paid directly to the rector and his successors. A lease of a part of the land, only twenty-three feet frontage, dated in November, 1824, has been put in, and it appears that the rent per foot was $2.61 nearly. The lease contains a covenant on the part of the lessee to build a house of a specified character. And a covenant by the lessee, with the lessors, their heirs and assigns, and the survivors or survivor of them, that the lessors and their heirs, and the survivors or survivor, shall pay the lessee, at the expiration of the lease, the value of the house to be erected by him. If this is to be read as the covenant of the lessors, it could only amount to their personal covenant, for I apprehend it could not bind their successors in the trust, and still less the rector *in posse*, to whom in that character, and as a corporation sole, they were to transfer the land when the debt was discharged.

1869.

Kirkpatrick v. Lyster.

It may also be observed that the lessee, in the lease in question in this cause, did not enter into a covenant to build at all, and if he had erected buildings of other material than brick or stone, he would have had no claim to be paid for them, according to the terms of the proviso relied upon. There is nothing to shew that this lot had been leased before, and before 1842, the £3000 and interest had apparently been paid off. A rectory had been erected, a rector inducted, and a conveyance of the land had been made by two of the trustees to the rector, who was then co-trustee, and who also executed a declaration of the character in which he took or would hold the land. These instruments, to borrow the language of *Sir J. Knight Bruce*, in *Gibson* v. *Goldsmid* (*a*), seem "*artlessly prepared*," but they shew an intention to fulfil the trusts set out in the letters patent of 1824.

The question then arises: Did any, or if any, which, of these trusts remain unfulfilled at the date of the lease to *Forsyth* ? Judgment.

It is not shewn that any lease or agreement for a lease, affecting the premises now in question, had been made prior to 1824; if not, then there could have been nothing for the trustees to ratify or confirm. Nor did the three trustees make any lease of these premises. The debt of £3000 had been discharged. So far the trusts were fulfilled. There remained for the trustees to receive the rents and profits, and to pay them over to the resident clergyman doing duty in the new church, but the erection of the rectory and the prosentation of Archdeacon *Stuart* took place, and to him as rector, his co-trustees conveyed and transferred the premises, following he language of the patent. Unless he still continued to be trustee to receive and to pay himself as *cestui que* trust, that trust was at an end, and then no trust could remain but to

(*a*) 1 Jur. N. S. 1.

1869.

Kirkpatrick v. Lyster.

demise and lease such land as had not been already leased, for the best rent that could be obtained, and to renew the same and to grant fresh leases at the expiration of existing or of future leases.

In my opinion, upon the true construction of the letters patent, and on the state of facts when the lease of 1842 was made, or at all events after the heir-at-law of Archdeacon *Stuart* had conveyed to the defendant *Lyster*, all the trusts had come to an end.

The leading objects, to effect which the grant of 1824 was made, appear to me to have been—(1.) To provide money for building a new church, and when this was done, (2.) To secure an income for the clergyman doing duty therein; and (3.) Whenever a rectory should be erected, to transfer the land granted, to the rector, whose duty it would be to perform all the ministrations of the church.

Judgment.

There was probably no more convenient method at that time than to make the grant to trustees, defining the objects and conferring on them the necessary powers to effect them. The first, after raising £3000, was to pay it off with interest. How long it would take to do this was uncertain; but as soon as it was done, the trust to pay the clergyman would arise. Then the succession of trustees was provided for, and lastly came the proviso, which, from the moment of the creation of the rectory and the presentation of an incumbent, left the trustees nothing to do but to transfer the lands to the rector as a sole corporation, having as a necessary incident perpetual succession. The proviso was to take effect without reference to the condition of the trust estate. It arose in full force when there was a rectory and an incumbent. It might have arisen before the new church was built, or before there was a resident clergyman doing duty in it; or before the £3000 was paid off. It was absolutely

necessary that the obligations lawfully entered into by the trustees should be binding upon the rector, that he should complete whatever they had validly contracted for, or had only in part fulfilled, of the trusts imposed on them, and hence the introduction of the words "to and for the same uses and upon the same trusts as are hereinbefore mentioned and expressed," in the conveyance which the proviso required the trustees to make to the rector. In October, 1836, Archdeacon *Stuart*, who had long been resident minister, was presented to the rectory; in May following, his co-trustees conveyed to him as the letters patent directed.

We have then the trusts for raising the money and re-paying at an end. The land conveyed to the rector as a corporation sole, by his two co-trustees, and he the *cestui que* trust, as the clergyman who did the duty in the church, and the then trustee under the patent in possession of the lands granted, subject to such leases as were then in force as to any parts of them; and at this time the present rector (the defendant Dr. *Lyster*) has also in his corporate capacity the legal estate which was vested in the late Archdeacon *Stuart* under the letters patent of 1824. The question is reduced to this: Does he hold these lands as a trustee under those letters patent, and with the powers and subject to the trusts therein; or as an ecclesiastical corporation, with all the legal incidents attaching upon him as rector? I think the latter is the correct conclusion. Judgment.

To my mind it seems clear that as soon as the new church was built, the debt incurred for that purpose satisfied, and a rector appointed, the Crown meant that this land should be transferred to him as part of the endowment appertaining to his rectory. The trustees derived their powers of leasing from the patent; but the rector possessed such powers in his corporate capacity, and it appears to me more reasonable to hold that the

1869. Kirkpatrick v. Lyster.

Crown meant he should so take them, than that as to these lands his powers of leasing should be of one character, and as to any other lands which might form part of the endowment, that his powers should be the subject of the enabling and disenabling statutes. The powers are not identical, and I do not find any reason for holding that the Crown intended that the rector should hold these lands after the immediate and temporary objects as to building were complete under a trust, to receive the rents as trustee, and to pay them to himself as *cestui que* trust. Unless it be assumed that the grant was intended to provide for the contingency that the rector—who, in the language of the grant, must be a minister of the Church of England, duly ordained according to the rites of the said church—would not be the resident minister doing duty in the new church, the rector for the time being would be the only person beneficially interested, as well as the sole trustee for himself. The whole trust would belong to him, and if the principle enunciated by Lord *Macclesfield*, in *Carteret* v. *Carteret*, (*a*) is applicable, he could claim a conveyance to himself from the trustees, if he did not in his capacity as a sole corporation, unite the two characters.

Judgment.

I think it was neither competent for the three trustees, nor for the rector as sole trustee or as rector, to bind those to come after him or them to pay the valuation of the buildings, and it appears to me a contract to grant a new lease in default of an act for the performance of which they could not legally engage themselves as trustees, or as rector, would be void. The question of *renewal* can hardly be said to arise in this case, and as to granting new leases, the rector derives authority from his presentation and induction, for the latter gives him possession of the temporalities, and together with institution makes him the complete incumbent.

(*a*) 2 P. Wms. 134.

It appears to me, therefore, upon the events that have happened, the objects of the trusts have all been fulfilled; that the legal estate is now vested in the same corporation sole as that which has the whole beneficial interest, namely, the rector of Kingston, and that he holds not upon the trusts and powers created and granted by the letters patent of 1824, but as rector simply, with the powers and subject to the restrictions which the law gives to or imposes on him in that capacity. The lease of 1842 was clearly *ultra vires* of the archdeacon as to binding his successor, and does not entitle the plaintiffs to the relief they seek.

VanKoughnet, C., Spragge, V. C., & Morrison, J., concur.

A. Wilson, J.—The provisions contained in the lease, that Archdeacon *Stuart* or his successors should pay to the lessee the value of the buildings erected by the lessee, or should execute to him a new lease upon such terms as might be agreed upon; and that until the price was paid or the new lease executed, the lessee should remain in possession, subject to the rent and conditions of the old lease—are not such conditions as the lessor could impose on his successor if the property were in England, and was governed by the law and statutes specially relating to church property.

Judgment.

But this lease has not to be determined by these rules, because it was made under a power contained in the patent of 1824, and so long as it is conformable to the power it must be sufficient.

There is no necessity, therefore, for confirmation by any one. It need not have been approved by the Crown, because the Crown had already given its sanction and direction by the power as had conferred.

1869.

Kirkpatrick v. Lyster.

Nor need it have been allowed by the Ordinary, because it was an act done in the exercise of a trust, in which the Ordinary had no part; and perhaps also because there may be a parsonage, the complete seisin and enjoyment of which was perfected by the gift or collation of the Crown.

The trusts on which the grant was made, were:

(1.) To confirm leases theretofore created.

(2.) To make new demises for the best rent that could be obtained for any term not exceeding twenty-one years, "and under and subject to such provisoes, conditions and covenants, and to renew the same, or to grant fresh leases at the expiration of such as are now or thereafter may be granted, as to the trustees may seem fit."

Judgment.

(3.) To pay out of the rents the £3000 the trustees had been authorized to borrow, and the interest thereon;

(4.) After payment of that sum and interest, to pay the rents to the clergyman for the time being, who shall be resident and doing duty in the church. And

(5.) When a parsonage or rectory was erected in Kingston, to transfer the land to such incumbent or minister and his successors forever, as a sole corporation, "to and for the same uses, and upon the same trusts as are hereinbefore mentioned."

The first and third trusts have been performed, and the fifth also, for the property has been transferred to the incumbent. The second and fourth trusts are only now in operation—the power to make leases and to apply the rents tothe incumbent's use.

The leases are not to exceed twenty-one years, but as they may be "subject to such provisoes," &c., above

mentioned, the question is, can they, when made for twenty-one years, be made subject also to a renewal for twenty-one years, at the expiration of the term? 1869. Kirkpatrick v. Lyster.

A covenant for renewal runs with the land; it is a continuation of the old lease: trustees, mortgagees and others of that class taking it, will be deemed to hold as if it were the former lease. The tenant's right of renewal is a part of his interest in the lease. *Winslow* v. *Tighe* (*a*).

Knight Bruce, V. C., said in *Richards* v. *Richards*, (*b*), "I take it that the term *renewal* means a renovation a restoration of something to a former or original state, a repetition—a beginning again. It may mean each or either of these things, so far as there is any difference between them. It must, however, be a renewal, a renovation, or repetition, or restoration of the same subject, as far as it is possiblo to restore that subject. A renewal of a lease, where the context does not require any different interpretation to be given to it, must therefore mean the obtaining a lease as near as possible in every particular circumstance to the existing lease, as if the subject worn or wearing out were to begin again. What the testator here means, therefore, according to the correct interpretation of the word, a departure from which is not required by the context, is in my opinion a new lease exactly upon the same terms as the other; that is to say, a lease for thirty years more, under the same rents and covenants, so far as the circumstances will permit." Judgment.

It is said there is "a distinction between a clause to grant a new lease, and one to renew a lease. In the latter case there is an implied covenant to give a new

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2 Ball & B at p. 205. (*b*) 2 Y. & C. Ch. at p. 427.

1869. Kirkpatrick v. Lyster.

one, for the same term, rent and conditions." *Whitlock* v. *Duffield*.

An hospital had power to lease for not longer than twenty-one years. The hospital covenanted to renew from time to time, till the term should be sixty years. This was held void, being the same, and as much to the prejudice of the hospital as to grant a lease of sixty years at first. The lessee had got the covenant on binding himself to lay out £100 in building. *Lydiatt* v. *Foach* (*b*); *Taylor* v. *Dullidge Hospital* (*c*).

And any body not having the power to grant leases exceeding twenty-one years, can no more covenant for a renewal of the term than he could originally grant a lease exceeding the prescribed limits (*d*). *Watson* v. *The Master &c., of Hemsworth Hospital* (*e*).

Judgment.

I think the terms of the patent, "To demise for the best rent that can be obtained therefor, for any term not exceeding twenty-one years, and under such provisoes, conditions and covenants, and to renew the same, or to grant fresh leases at the expiration of those granted —as to the trustees shall seem fit," may be properly expounded in this manner:—The leases are to be for a term not exceeding twenty-one years at the best rent that can be obtained therefor, and the trustees or incumbent may in such leases covenant for the renewal, but not at the same nor at any particular rent, but only at such rent as shall at the commencement of the renewal term, be the best rent that can be obtained therefor.

In this manner the words, "and to renew or to grant

(*a*) 1 Hoff. Ch. Rep. 100.
(*b*) 2 Vern. 410.
(*c*) 2 Eq. Cas. abr. 198, pl. 2.
(*d*) 2 Eq. Ca. ab. 198.
(*e*) 14 Ves. at pp. 333, 340.

1869.

Kirkpatrick v. Lyster.

fresh leases," will have full operation; for a *renewal* is not the same as a *fresh* lease.

No possible injustice or injury can be done to the Church by such a construction, for the incumbent will always be getting the rack rent. But what advantage this will be to the tenant who pays the rack rent, excepting that he will have the preference in getting the lease, it is hard to see.

The rent, too, would have to be calculated on the improved value of the land as it then was. *Simpson* v. *Clayton* (*a*).

As a mere abstract question of law, I am of opinion that a covenant to renew for twenty-one years, contained in a lease for twenty-one years, is a valid covenant by the trustees or incumbent, under the authority of the patent.

Judgment.

The renewal can only be at a new or valuation rent.

The clauses in the lease, that the person who is incumbent at the expiration of the lease shall pay to the lessee the value of the buildings, or execute a new lease on terms as may be agreed on, cannot altogether be said to be void if the incumbent and lessee *agree* upon terms; for the new lease would be good during the new term, if his incumbency lasted so long.

The covenant to pay for the buildings cannot be enforced, however, against the successor, if he object to pay. Nor can he be obliged to execute a new lease because he refuses to pay. Nor can he be compelled to arbitrate—nor has the tenant the right to remain in possession at the old rent and on the old terms until the valuation is made or the new lease given.

(*a*) 4 B. N. C. 759.

1869.

Kirkpatrick v. Lyster.

The whole clause is useless and inoperative if it is to be dependent on the parties *agreeing* as to what they are to do, for that is optional with them or either of them, and it is void if it is to be considered in any other light.

Effect cannot be given to these provisions just as they stand, but I think the Court of Chancery may and can determine what is the best rent that could have been obtained on the renewal for twenty-one years, commencing at the expiration of the former lease.

This clause does not avoid the whole lease, and the other parts of it which may be given effect to. *Fuller* v. *Abbott* (*a*), *Davenant* v. *Bishop of Salisbury* (*b*).

In *Powell* v. *Thomas* (*c*), a road was made across the defendant's land to the plaintiff's colliery, and used by the plaintiff for some time to the defendant's knowledge,

Judgment.

the plaintiff having been in treaty for the right, but he had never actually got it—no price was ever mentioned. The Court restrained an ejectment by the defendant upon the plaintiff giving judgment in that action, and paying £200 into court, a sum sufficient for a security for the price of the land.

In *Gourlay* v. *The Duke of Somerset* (*d*), the principle is stated on which the Court will act in fixing the terms of a bargain between parties.

The Master of the Rolls said—"When the agreement is that the price of the estate shall be fixed by arbitrators, and they do not fix it, there is no contract, as the price is the essence of the contract, and the court cannot make a contract where there is none. But where the court has determined that the agreement is binding and concluded, and such as ought to be executed, it does not

(*a*) 4 Taunt. 105. (*b*) 1 Ventr. 223. (*c*) 6 Hare 300.
(*d*) 19 Ves. 429.

require foreign aid to carry the details into execution," and therefore when a person named was to settle what conditions should reasonably be in a lease between the parties, the court, giving specific performance, undertook the whole subject, and referred the matter to the Master to settle.

So where the agreement is to sell *at a fair price*, that is a matter which the court can ascertain. *Milnes* v. *Gery* (*a*). And this will more especially be done in favour of possession and expenditure, referable to the agreement. *Meynell* v *Surtees* (*b*).

In *Gregory* v *Mighell* (*c*), the Master of the Rolls said —"The rent was not fixed in the manner stipulated by the agreement; after it was known the arbitrators had not fixed any rent, and that no other means provided by the agreement were resorted to, the defendant still acquiesced in the plaintiff's possession of these lands; that is a case in which the failure of the arbitrators to fix the rent, can never affect the agreement, it is in part performed, and the court must find some means of completing the execution," and it was thereupon sent to the Master.

Judgment.

I entertain no doubt then, that there being a contract in fact, and in this case accompanied by possession, the payment of rent, and expenditure on the faith of that agreement, the Court of Equity will give effect to that contract, by determining the amount of rent to be paid by the tenant for the renewal term; and that the words of the patent, "for the best rent that can be obtained therefor," are plainly such terms, according to the authorities, upon which the court can act efficiently, when the parties differ between themselves.

(*a*) 14 Ves. 400. (*b*) 3 Sm. & Giff. 101, affirmed 1 Jur. N. S. 737.
(*c*) 18 Ves. 328, 328.

1869.

Kirkpatrick v. Lyster.

There seems also to be no doubt, I think, that if Archdeacon *Stuart* had let at a preposterously low rent, and far below the best rent that could have been obtained for the purpose of giving some unfair advantage to the tenant, his successor, as incumbent, upon shewing these facts, could have had the rent re-settled by the Court at a fair sum; and what the Court can do during the term, it may do on beginning the term, so long as there is a subsisting contract between the parties.

In my opinion the plaintiff was and is entitled to a renewal lease for twenty-one years, commencing at the expiration of the former one, and at a rent to be fixed by the Court of Chancery as the best rent which could have been obtained for the property at the termination of the former lease, improved as it was, and without regard to the tenant having made these improvements at his own expense, and upon the idea that he was to be compensated for them; and that the other clause, as to the valuation of buildings, should be omitted in the renewal, as contrary to the powers and trusts of the patent; and that a proper title should be given to the tenant, which will make it necessary for the incumbent to get the whole legal title, and the legal title to the whole vested in himself; and that the bill filed may be given effect to in this manner.

Judgment.

MOWAT, V. C., was inclined to concur in the opinion expressed by A. WILSON, J.

Per Curiam—Appeal dismissed with costs.—[A. WILSON, J., and MOWAT, V. C., dissenting.]

McDONALD v. McDONALD. [IN APPEAL].* 1869.

Lunacy—Vendor and Purchaser.

A vendor was insane, but not on all subjects; and apart from his delusions a stranger might not perceive his insanity; in the course of the negociation for a sale of land, he said to the purchaser that he was bewitched, which, it was shewn, was one of his delusions:

Held, that this statement was not sufficient indication of insanity to affect the vendee with notice of the vendor's condition.

This was an appeal from the decree of the court below, as reported ante volume xv., page 545.

Mr. *Blake*, Q. C., and Mr. *Wells*, for the appellant contended that the decree was erroneous on the grounds that as according to the finding of the court below, *William McDonald* was, at the time of the sale in question, rational enough to know what he was doing; knew he was indebted to *James McDonald* and the appellant; meant to sell the lot in question; and understood that he was selling it, and the consideration he was receiving; and as it is conceded that no fraud was practised on him, the sale he made should not be set aside; that the appellant had no notice that *William McDonald* was a lunatic; and therefore the appellant's purchase from him should not be set aside; that as the respondent's equity is by the bill based on the ground that the appellant was guilty of actual fraud towards *William McDonald*, in the premises, and so obtained the letters patent in the pleadings mentioned, and as no such fraud has been established against the defendant, and it is expressly conceded that there is no ground for charging him with such fraud, the bill should have been dismissed; that having regard to the frame and prayer of the bill, Statement.

* PRESENT.—Draper, C.J. E. & A., Richards, C.J.Q.B., Vankoughnet, C., Hagarty, C.J.C.P., Spragge, V.C., Morrison, J., A. Wilson, J., Mowat, V.C., and Gwynne, J. [Mowat, V.C., was absent from illness when judgment was pronounced.]

1869.

McDonald v. McDonald.

and to the circumstances of the case, if any relief should be granted to the respondent, such relief should be confined to a cancellation of the patent in the pleadings mentioned; and that having regard to the charges of fraud made by the bill, and to the circumstances of the case, the premises in question should not be wrested from the appellant, except on terms of payment of his costs of suit, and at any rate the respondent should not be permitted to deduct his costs of suit from the amount of the appellant's demand; but any relief to be given to the respondent should be given on payment of costs, or at furthest, without costs.

Statement.

Mr. *Strong*, Q. C., for the respondent contended that the decree was right, and should be sustained, for the following amongst other reasons: that *William McDonald* was of unsound mind at the time of the execution of the conveyance which is impeached, to such a degree that a person dealing with him must have known it; that *William McDonald* was of unsound mind, and even if the defendant did not know of such unsoundness, yet the contract was not a fair *bonâ fide* contract, but one grossly disadvantageous to the said *William Macdonald*; that the defendant had notice, or must be taken to have had notice of *William McDonald's* insanity before the time of the execution of the conveyance impeached; that the defendant at all events had notice before he paid the whole of his purchase money —*i. e.*, at the time of *William McDonald's* being imprisoned in the gaol at Cornwall, and *James McDonald* having notice of *William McDonald's* insanity, could not have recovered the amount of the note which the defendant gave him, if the defendant had rescinded the contract.—This, at all events, was enough to put the defendant on inquiry, and consequently the defendant cannot plead a plea of purchase for value without notice; that notice is unnecessary to be proved in a case of this kind; that the patent issued in error; that at all

events the conveyance was liable to be set aside, on the ground that the defendant being a mortgagee of the estate had taken advantage of the embarrassment of *William McDonald* to procure a conveyance of the equity of redemption at an under value; that a sufficient case to warrant the decree is made by the bill; that the defendant should be charged with the costs, because after notice of the insanity of *William McDonald* he chose to defend this suit; and that by the decree all parties are restored to their original positions.

DRAPER, C. J.—This is a suit between the heir of a deceased owner of a lot of land and a purchaser to whom that owner conveyed it for a valuable consideration.

The plaintiff's allegations are that, the consideration was inadequate, and that the vendor was a lunatic at the time of the sale and conveyance, of unsound mind, memory, and understanding, and charges fraud in the bill.

Judgment.

But the plaintiff's counsel expressly disclaimed all ground for charging fraud, either on the ground that the vendor was not rational enough at the time to know what he was doing, or that he did not know at that time that he was indebted to *James McDonald* and the defendant, or that he did not intend to dispose of the lot, or did not understand that the consideration was in part the debts due to *James McDonald* and to the defendant. And the learned Vice Chancellor after noticing this proceeds to say: "There was nothing in the appearance of the deceased at this time that would alone make a stranger or one who had not been intimately acquainted with the deceased and had not heard of his affliction, perceive that he was not in his right mind. It is clear, however, that *William* was of unsound mind at this time."

The decree is based by the learned Vice Chancellor

1869. McDonald v. McDonald.

on this, that on the occasion of this purchase the vendor *William McDonald* told the defendant, when the two were alone together, that he was "bewitched." It appears the two were alone together, and, as the result shewed, were discussing the arrangement respecting this land; that the defendant called *James McDonald* into the room, where he and *William* were, and told *James* that *William* had said to him he was bewitched, *James* replied, that he did not know anything about that, meaning, as he afterwards explained, that for all he knew *William* might be bewitched, that he knew nothing about it one way or the other. It is *held*, that the defendant being made aware by *William* of the particular delusion, had in his hands the clue which if followed would have put him in possession of a good deal more —the learned Vice Chancellor adds, "if more was necessary."

Judgment.

The *ratio decidendi* is that *William McDonald* is proved to be a lunatic, both before and after this transaction, though of this, the defendant, so far as appears, was wholly ignorant. That *William McDonald* came at his own instance to the defendant to try and sell this land to him, and pending the discussion said to the defendant "I am bewitched." That this was sufficient to put defendant on inquiry, and if he had inquired, he would have discovered that *William McDonald* was insane. Therefore the deed to the defendant is void, as he neglected to make the inquiry which would have given him that information.

It appears that when *William McDonald* first resolved to make the offer to defendant to sell this land to him, he invited *James McDonald*, to whom he was indebted, to accompany him; and having made one ineffectual attempt to find defendant, he came again, and, at an interview with defendant, told him he was bewitched.

1869.

McDonald v. McDonald.

It is apparently plain from the evidence, not only that his insanity had no connexion with the sale of the land to the defendant, but that he perfectly understood what he was doing, and acted deliberately in coming to defendant to make this sale, nor did he say anything while in defendant's office except in relation to this matter. Mr. *McLennan's* evidence is very strong to shew that *William McDonald's* conduct and conversation at defendant's office were not such as to create in the mind of a stranger or disinterested observer any suspicion that he was not of sound mind; and the defendant's conduct in stating almost immediately what *William* had said to him, repels the idea, that he was desirous of concealing the fact that *William* had said so. If *James McDonald* had desired to mislead the defendant he could scarcely have used language more likely to do so. His words (severed from his own gloss of them), "I know nothing about that," certainly were not calculated to produce the impression that he (*James*) thought from the first time he saw *William*, on the latter's return from the United States, that he was not in his right mind, but he says he did not tell defendant so, as he considered that being told by *William McDonald* that he was bewitched, the defendant knew as well as the witness did that *William* was not in his right mind, in effect that such a statement by William was by itself enough to shew he was a lunatic.

Judgment.

I do not doubt that there are many persons who would think a man wanting in common sense if he seriously asserted he believed in witchcraft, and still more if he asserted he was himself bewitched, and yet they stop a long way short of the conclusion that such a man was, within the proper acceptation of the legal phrase, of unsound mind, memory and understanding; and as much might be said as to believers in spirit rapping or other alleged modes of communication with the invisible world.

1869.

McDonald v. McDonald.

I have heard of persons affirming even more direct communication with departed spirits, whose conduct and intelligence were sufficient to enable them to conduct business or to discharge official duties, and whose sanity was never questioned. I am not questioning that *William McDonald* was a lunatic: there is no room to question it; but I am considering whether his mere statement, coupled with all that attended it, amounts to constructive or implied notice of *William McDonald's* insanity at the time of his sale and conveyance to the defendant.

From *James McDonald's* evidence it is not unreasonable to deduce that he believed in the possibility of *William McDonald* being bewitched, or he would scarcely have used the following language in explanation of his words to defendant that "he knew nothing about that": "I meant that I did not know whether he was bewitched or not, I had only *William's* word for it." Like the belief in second sight this is among the traditionary beliefs which still linger and find place among simple and uneducated people. I remember to have read of a trial which took place in England in 1857. A substantial Yorkshire farmer believed that he himself and some of his family, together with his horses and a cheesekettle (!) were all bewitched, and he employed a "wise man" to assist him and counteract the spell. This "wise man" went and lived with the farmer several months, and obtained from him a considerable sum of money for his services; but his wisdom failed in this, that he was convicted for obtaining money under false pretences. Now *William McDonald* belonged to the county of Glengarry, and was of Highland descent, and so were many of the witnesses examined in this case. It is precisely among such people, living where the majority of their friends and neighbours are of the same race that their ancient language and their traditions and beliefs continue, little affected by their intercourse with others of different

Judgment.

1869.

McDonald v. McDonald.

blood and modes of thinking from their own. Among other beliefs it appears to me the evidence sufficiently shews, that in witchcraft forms one. To the appellant —himself of Highland origin—connected with the county of Glengarry, and in all probability familiar with the habits of thought and feeling prevailing among these people, the declaration of *William McDonald* that he was bewitched would not give rise to the same surprise that it might have done if made by one of a different class, and would not suggest the idea of unsoundness of mind, however absurd or silly he may have considered it for any person to entertain such a supposition; and still less would it suggest itself to him, that as a reasonable and prudent man he should not carry out his arrangement with *William McDonald* until he had made inquiries respecting his sanity. It was very natural for the appellant to mention to *James McDonald* what *William* had said to him; he does not appear to have done so by way of an inquiry, but if he had, the answer he got was, as it seems to me, calculated to remove rather than to increase any suspicion.

Judgment.

Adopting fully the opinion of the learned Vice Chancellor, as thus expressed: "I have no doubt that *William* was rational enough at the time to know what he was doing; that he knew that he was indebted both to *James McDonald* and the defendant; that he meant to dispose of the lot; that he understood he was selling it; and that he understood the consideration was in part the debts due *James* and the defendant"; bearing in mind also, that there is no reason whatever for thinking that the defendant had any knowledge of the conduct or condition of *William McDonald* after his return from the United States, I cannot bring myself to the conclusion at which that learned Judge has arrived. I do not think that this declaration of *William McDonald* was so like *insanity*, that the defendant at his own peril

1869.

McDonald v. McDonald.

dealt with him. It must be remembered that every charge of fraud is disclaimed. Even conceding that the "serious belief" of *James McDonald* was that *William's* statement was true, I fail to discover in that a reason for holding that the appellant should have placed that interpretation on the expression "I am bewitched," or some equivalent words, which would have made it necessary for him to make further inquiries, or which would justify the conclusion that he abstained from making them lest he should be affected with notice.

I ground my opinion on the language of Lord *Cranworth* in *Ware* v. Lord *Egmont* (*a*), "It is highly inexpedient to extend the doctrine" (of constructive notice,) "so as to make it apply to cases to which it has not hitherto been held applicable. Where a person has actual notice there can be no danger of doing injustice, and he is held to be bound by all the consequences of that which he knows to exist; but when he has not actual notice he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say that not only he might have acquired, but also that he ought to have acquired the notice with which it is sought to affect him, and which he would have acquired but for his own gross negligence in the conduct of the business in question. The question by which it is sought to affect a purchaser with constructive notice is not whether he had the means of obtaining, and might by prudent caution have obtained, knowledge, but whether not obtaining it was an act of gross or culpable negligence. Now it is obvious that no definite rule as to what will amount to gross and culpable negligence, to meet every case, can possibly be laid down."

Judgment.

I refer also to *Jones* v. *Smith* (*b*), and the cases therein remarked upon by Lord Lyndhurst.

(*a*) 1 Jur. N. S. 97.

(*b*) 1 Phil. 244.

1869.

McDonald v. McDonald.

I feel it quite impossible upon the facts before the court, to hold that the appellant in not obtaining knowledge of the unsoundness of mind of *William McDonald*, was guilty of gross or culpable negligence. I do not think that the imputation of such negligence can be fixed upon him from the statement of *William McDonald* that he was bewitched, immediately followed by the remark of his companion *James McDonald* that he (*James*) "knew nothing about that," an expression upon the natural meaning of which I have already observed. It is abundantly clear to me that *William McDonald* knew everything about the transaction in which he was engaged; that he adopted in it that course which he thought most for his own advantage; that he came to the appellant to get him to become the purchaser, and that notwithstanding his assertion that he was bewitched, his faculties were in no way that appears, or is suggested, affected so as to induce a suspicion that he was not perfectly rational, except this one expression. I do not think that enough to warrant the conclusion, which alone can invalidate his deed, and I therefore am of opinion the bill should have been dismissed with costs.*

Judgment.

HAGARTY, C. J.—The case is narrowed down to one point, viz., whether the few words that passed on the execution of the conveyance were sufficient notice to the appellant; or, putting it in the strongest way against him, sufficient to put him upon inquiry which would have clearly informed him of his vendor's incapacity to make a valid conveyance.

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* NOTE.—In *Hewitt* v. *Loosemore*, 15 Jur. 1097, (S. C. 9 Hare, 449) V. C. *Turner* defines constructive notice as a "knowledge which the court imputes, on a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated." And later on he adds, "I think that in transactions of sale and mortgage, if no inquiry is made as to title deeds, which constitute the title to the property, the court is justified in assuming that the purchaser abstained from making the inquiry *from a suspicion* that the title would be affected by the inquiry, if made, and is therefore bound to impute to the purchaser or mortgagee a knowledge of the facts which would have been disclosed by inquiry.—*Vide* also *Campbell* v. *Hooper*, 1 Jur. N. S. 670.

1869.

McDonald v. McDonald.

Every view of the circumstances attending the execution of the deed is opposed to the suggestion that the appellant was acting in bad faith.

He said to the witness *James McDonald*, in the vendor's presence, that the latter said he was bewitched, and the witness replied that he knew nothing about that. I think it would be a very dangerous doctrine that this concise statement by itself vitiates a sale in other respects unimpeachable.

A perusal of the criminal trials and police reports, say of the last ten years, must, I think, convince us that a belief in witchcraft or in the existence of a state called "being bewitched," is widespread amongst the uneducated classes in Great Britain, especially in the rural districts; and this superstition is, beyond all doubt, quite compatible with worldly shrewdness and perfect competency for the ordinary transactions of buying and selling.

Judgment.

A great man of the last half century (of undisputed sanity) declared that to disbelieve in witchcraft was to disbelieve the Bible. Unable to join in this view, I refer to it as a remarkable instance of opinion on this point.

A very large portion of the evidence, relating to *William McDonald's* diseased fancies, may find its ready parallel in the details of cases of alleged "witchcraft" within the last half century; and we may easily find beliefs, and fancies, and actions, as fantastic and absurd among persons not supposed to be incapable of transacting the ordinary business of life. I refer to this not with a view of contesting this alleged insanity, but in its bearing upon the weight to be attached to the mere declarations of a man that he was bewitched.

1869.

McDonald v. McDonald.

I have arrived at the same conclusion as that of the learned Chief Justice of this court, and think there was not sufficient evidence to impeach the deed made to the appellant, and that it ought not to be disturbed.

GWYNNE, J.—The case alleged in the bill in substance is that the defendant, being a creditor of *William McDonald*, and also his solicitor in this particular transaction, and in virtue of these relationships having *William McDonald* under his complete control, took advantage of his embarrassed circumstances and his unsound state of mind to procure the land, to be conveyed to him at an inadequate price. A graver case of fraud could scarcely be stated, nor one so utterly unsupported by the evidence, as it appears to me, be well imagined.

Judgment.

The evidence is absolutely defective, in so far as it establishes, or indeed professes to establish, any of the allegations of relationship of solicitor and client, or even of creditor and debtor. The power of exercising, or the fact of exercising, any control over *William McDonald* to induce him when in embarrassed circumstances to execute this deed to the defendant, which charges are made the foundation of the case set forth in the bill, and which, if proved, would have been quite sufficient to entitle the plaintiff to relief independently of any unsoundness of mind.

Then as to any independent fraud based upon unsoundness of mind. The case made by the bill is that it was of such a nature as in itself to be sufficient, without charging the defendant with any notice, actual or constructive, to avoid the deed.

Molton v. *Camroux* (*a*); *Beavan* v. *McDonell* (*b*); *Harrod* v. *Harrod* (*c*), and *Elliott* v. *Nice* (*d*), are

(*a*) 2 Exch. 487 and 4 Exch. 17.
(*b*) 9 Exch. 309.
(*c*) 18 Jur. 852.
(*d*) 8 Jur. N. S. 597.

1869.

McDonald v. McDonald.

conclusive authorities that non-apparent lunacy alone, in the absence of notice and fraud, will not avoid a deed. The defendant not being by the bill charged with any notice of the alleged unsoundness of mind, it is not, in my opinion, proper that a decree should be sustained as upon a fraud alleged to be established in evidence which is not averred in the bill; but not to rest my judgment upon this point, I am of opinion that the case of unsoundness of mind itself, as alleged in the bill, has not been established by the evidence. That *William McDonald* labored under perversions of intellect and delusions which are inconsistent with a perfectly sane state of mind may be admitted, but to what extent his mind was affected by mere delusions at the time of the execution of the deed does not, I think, sufficiently clearly appear; the most reliable portion of the evidence, I think, establishes that it was after this time that he became as bad as he is represented to have been by the plaintiff's sister. What the bill alleges is that in the year 1860, the said *William McDonald* became of unsound mind, memory, and understanding, and so continued without any lucid interval down to the time of his death.

Judgment.

Now that no such unsoundness of mind as that which is here alleged was established, and that none such was established as shews *William McDonald* to have been incapacitated to execute the deed which is impeached, a passage in the judgment of the learned Vice-Chancellor seems to me to place beyond all doubt. He says: "I have no doubt that *William* was rational enough to know what he was doing; that he knew that he was indebted to both *James McDonald* and the defendant; that he meant to dispose of the lot; that he understood he was selling it, and that he understood the consideration was in part the debts due *James* and the defendant. Indeed, the learned counsel for the plaintiff expressly disclaimed all ground for charging the defendant with

fraud in these matters. There was nothing in the appearance of the deceased *at this time* that would alone make a stranger, or one who had not been intimately acquainted with the deceased, and had not heard of his affliction, perceive that he was not in his right mind." If then *William McDonald* was, as is admitted, at the time of his executing the deed, not only to all appearance in his right mind, but in reality so, in so far as to know perfectly well what he was doing, the state of his liabilities, to know that he was disposing of his land and to intend to dispose of it to pay these liabilities, and to know the consideration he was getting for it. I cannot see wherein he was incapacitated to complete his intention and design by setting his hand to the instrument expressing that intention and design.

1869.

McDonald v. McDonald.

In *Selby* v. *Jackson* (*a*), it is said that the principle upon which a deed is held fraudulent upon the ground of lunacy is that it has been obtained from a person who *at the time of the execution* was not capable of apprehending its effect. Now it seems plaintiff knew very well the effect of what he was doing, for he agreed with the defendant that notwithstanding the deed he should retain possession for a year.

Judgment.

The condition of *William McDonald* being, at the time of the execution of the deed, such as above described, it does not appear to me that the question arises whether the defendant had notice that he was so insane as to be incompetent to execute the deed: but assuming that point to arise in the case, I must confess that, in my judgment, the evidence fails to establish that the defendant, in the transaction which is impeached, dealt with him otherwise than upon the faith of his being a person of competent understanding, for whatever meaning may be attached to the term "bewitched," I think it would

(*a*) 6 Bea. 192.

1869.

McDonald v. McDonald.

be carrying the doctrine of notice beyond all recognized or reasonable limits to hold that the use of this term, as spoken of in the evidence, can affect a party with notice that a person to all appearance of sound mind, and capable of disposing of his property, was in reality of so unsound mind that it would constitute a fraud to take a conveyance of property from him. The deliberate manner in which it appears that *William McDonald* appears to have gone down to Cornwall to see the defendant for the purpose of selling the land to him with the view, apparently, of satisfying his debt to *James McDonald*, who had recently recovered a judgment against him, and his calling upon James to accompany him, all this done with the knowledge of *William's* brother *John*, who is the present plaintiff, shews not only that *William* was sufficiently sane, notwithstanding his delusions, to retain a deliberate intent in his mind for some time, but also that his brother *John* could not then have supposed him to be incapable of dealing with his property or he would most probably have interposed to prevent his carrying his design into effect; and that *John* must for some time, and until a very recent period before this bill was filed, have been under the impression that the deed could not be assailed by reason of any unsoundness of mind, may, I think, be reasonably inferred from the fact that although in July certainly, if not in May, 1861, *John* was aware of the execution of this deed, which is now impeached, he does not appear to have taken any steps to impeach it for five years.

Judgment.

On the 10th June, 1861, we find the plaintiff asserting, in his letter of that date to the Crown Lands Agent, in support of a claim made by him to the lot, that he paid *McLeod*; whereas we find by the evidence that *McLeod* was paid by the loan effected by *William* from *James McDonald*, which constituted the debt, to pay which appears to have been *William's* impelling motive to sell the land.

1869.

McDonald v. McDonald.

On the 17th July, 1861, he writes to the Commissioner of Crown Lands requesting him to review the position of the lot, asserting that *he had a special interest in it.*

In September, 1861, he had supplied to him copies of all the instruments in virtue of which the defendant had obtained the patent to issue, and yet he appears not to have moved until the spring of 1866, when he obtained the deed, to be executed by his sisters without any consideration paid therefor; and no claim to avoid the deed to defendant appears to have been made until this bill was filed in September, 1866. If the condition of *William McDonald* was really as bad in the early part of May, 1861, when the deed to the defendant was executed, as the plaintiff and his sisters would now desire to represent it to have been, it would have been more natural to expect that the claim would have been made as soon as they became aware of the execution of the deed. It certainly would seem that the plaintiff obtained the deed to be executed by his sisters for the purpose of using them as witnesses, and upon a comparison of their testimony with that of other witnesses as to the condition of *William* at the particular period of the execution of the deed, I think it is not too much to say that their interest in the plaintiff's success induces the belief that in the coloring which they give of that condition they confuse that period with a later period, when, having become worse, it was deemed necessary to confine him in the gaol.

Judgment.

Per Curiam.—The decree reversed, and the bill in the court below dismissed with costs.

1869.

READ v. SMITH—[IN APPEAL.*]

Mortgages—Opening foreclosure—Costs.

L. and *S.* were joint owners of certain lands, and *L.* had created a mortgage on a part of his undivided interest, in favor of *R.* With a view of effecting a partition, *L.* conveyed his interest to his co-tenant *S.* who thereupon re-conveyed to *L.* a certain defined portion; and in order to protect *S.* against the mortgage outstanding in *R*'s hands, *L.* executed back to *S.* an indemnity mortgage: *L*, did not pay off *R.*'s mortgage; and *R.* having obtained a final decree of foreclosure, sold his interest in the property to *S.* *L.* after the partition. had sold a portion of the estate to the plaintiffs who in respect of their interest had been made parties to the foreclosure suit by *R.* Subsequently in an action of ejectment *S.* set up title under the indemnity mortgage from *L.*

Held, that he had thus let in the plaintiffs to redeem who were entitled to do so upon paying what *S* had paid or was liable to pay to *R.*, and all expenses reasonably incurred, together with costs as of an ordinary redemption suit—beyond those *S.* was ordered to pay the costs.

Statement. This was an appeal by the defendant *Smith* from a decree of the court below, as reported *ante* volume xiv., page 250.

Mr. *Strong*, Q. C., and Mr. *Hodgins*, for the appellant, contended that the decree was erroneous, and ought to be reversed, on the grounds that the defendant, having acquired the estate which he purchased from *Peter Ruttan* absolutely as a *bona fide* purchaser for value, was not liable to be redeemed in respect thereof; that the mortgage in the pleadings mentioned given by *Levisconte* to the defendant by way of indemnity had never been acted upon by the defendant since he purchased from *Ruttan;* and that the absolute legal and equitable estate in the lands comprised in the indemnity

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* *Present.*—Draper, C.J. E.& A., Richards, C.J. Q.B., VanKoughnet, C., Hagarty, C.J.C.P., Spragge, V.C., A. Wilson, J., Mowat, V.C., and Gwynne, J.

mortgage, having been acquired by the defendant under his purchase from *Ruttan*, the estate which before was vested in him irredeemably was not rendered redeemable by his merely including such indemnity mortgage in his notice of title in ejectment. 1869. Read v. Smith.

Mr. *Blake*, Q. C., contra, submitted that the decree was right, as it appeared from the pleadings and evidence that, under the circumstances of the case, the respondents were entitled to redeem the premises in question in this cause, and to have the mortgage to *Ruttan* released or discharged; that the appellant set up, acted and relied upon the indemnity mortgage in the action of ejectment in the pleadings mentioned; and having so acted upon it, the appellant had admitted that he acquired under it the legal estate to the property embraced in it; and he cannot, at the same time, use it as a subsisting instrument and refuse to be redeemed in respect of it; that the mortgage foreclosed by *Ruttan* affected only an undivided 3-70ths of the whole premises, and the foreclosure thereof only gave him the right to have a partition of the premises in respect thereof; that the appellant had not acquired, by his purchase from *Ruttan*, the absolute legal and equitable estate in the lands comprised in the indemnity mortgage, but acquired at most the right to have the like partition as *Ruttan* was entitled to, save in so far as his right thereto had been affected by the partition agreed to and made between the appellant and *Levisconte*; that it would be inequitable that *Levisconte*, and those claiming under him, should lose the whole of their land simply because the appellant acquired from *Ruttan* this right of partition, if he had so acquired it; that the indemnity mortgage was made for the very purpose of securing the appellant against loss or injury from the *Ruttan* mortgage, and it could not be contended that by the foreclosure of the latter or the subsequent purchase by the appellant from *Ruttan* the indemnity mortgage had Statement.

1869. Read v. Smith.

been discharged or become useless; that the proper course for the appellant to have pursued was to have proceeded for a partition of the 3-70ths which he had acquired from *Ruttan*, and then submit to be redeemed in respect of the indemnity mortgage upon payment to him of the amount of his loss occasioned by the foreclosure of the *Ruttan* mortgage; and that the appellant, in obtaining payment of the amount paid by him to *Ruttan*, with interest, and his reasonable expenses occasioned or arising out of the default of *Levisconte*, and his costs of the actions of ejectment and the costs of a redemption suit, had obtained the fullest measure of his rights in the premises.

HAGARTY, C. J.—To simplify the case we may suppose that *Smith* and *Levisconte* owned an estate in undivided moieties, and that *Ruttan* had a mortgage over the whole. *Smith* and *Levisconte* agree to make partition, and it is arranged that *Levisconte* alone should pay off *Ruttan* and indemnify *Smith* therefrom.

Judgment.

Each makes a deed to the other of his respective portion, and *Levisconte* to secure *Smith*, then mortgages *his* share to *Smith*, conditioned for his paying off *Ruttan*, *Ruttan* forecloses, and then *Smith* buys from him. I am of opinion that in such a case *Smith* cannot use the estate acquired from *Ruttan* in any way to derogate from or destroy his own deed to *Levisconte*, but he must rely wholly on his indemnity mortgage from *Levisconte*.

If *Smith* bring ejectment against *Levisconte*, relying on the title acquired from *Ruttan*, he would be met at once by his own absolute deed to *Levisconte*, and could only answer such a defence by producing the indemnity mortgage from *Levisconte*. In my judgment he could rely on nothing else, and is remitted wholly to it for his remedies. I do not understand that we are called on to consider the amount of the shares of any of the parties. I think the decree should be affirmed.

1869.

Read v. Smith.

MOWAT, V. C.—This is an appeal from a decree made by the Chancellor on the 17th of June, 1867, allowing the plaintiffs a right of redemption in respect of certain land in the town of Belleville (*a*).

John Canniff was the owner of lot No. 6 in the first concession of the township of Thurlow, and he sold portions of it. At the time of his death he appears to have owned about 126 acres of the lot, and he devised it to his four daughters *Phœbe Foster*, *Mary Miller*, *Aulay Ruttan*, and *Elizabeth Nugent*, "for and during the period of their natural lives and no longer." Further, he willed and devised that after the decease of his said daughters, their shares of his real estate should descend in equal shares to their heirs in fee simple, for the use of them, their heirs and assigns forever. He gave other property to his sons *Daniel* and *Joseph*. With reference to all these devises, the will contained the following direction: "I will and devise that as many of my said children as shall die without issue, that their share of my real estate shall be equally divided among the survivors, to have, use, occupy, possess, and enjoy, during their natural lives and no longer, which I will and devise shall descend in equal shares to their heirs and assigns for ever."

Judgment.

Previous to the 19th November, 1855, the appellant *Smith* had purchased, and he then owned under the devisees, certain interests in the said lot. *Levisconte* had purchased from the eldest son of *Aulay Ruttan* all his interest. The parties are not agreed as to what interest her eldest son had, and the point was not argued on the appeal. It seems to me at present that each of the daughters took an estate in fee simple, with an executory devise over in case she should die without issue leaving one or more of the testator's other

(*a*) 14 Gr. 259.

1869.

Read v. Smith.

children surviving her (*a*). One of the daughters, *Elizabeth Nugent*, did die without issue, and her share thereupon went to her three surviving sisters and two brothers, say one-fifth of her one-fourth (or five-twentieths), that is, one-twentieth of the whole estate to each, making the share of each of the survivors six-twentieths. Afterwards, another daughter, *Aulay Ruttan*, died a widow, devising her interest to her seven children equally—each of whom would under this devise have one-seventh of her six-twentieths, equal to 6-140ths or three-seventieths, of the whole estate. The interest of her eldest son, which *Levisconte* had got, was, therefore, three-seventieths. This is the proportion which the Chancellor assumed or held to belong to *Levisconte*, and which the respondents insisted in their reasons of appeal to be the extent of his interest. The late Vice Chancellor *Esten*, in a suit to which *Smith* was not a party, is said to have construed the will in the same way, but I have not been able to find the case. On the argument of this appeal, nothing, I think, was urged in support of a different construction.

Judgment.

It is admitted, as I understand, that the remaining interests in the property were ultimately purchased by *Smith*. But when he had some of them only, he entered into an agreement with *Levisconte*, conditional on *Smith's* effecting purchases of the shares of certain of the other parties, that *Levisconte* should accept in severalty 18¾ acres, which is the property now in dispute, in exchange for his undivided interest in the residue of the lot, he paying all incumbrances on his undivided interest, including a mortgage theretofore given to one *Peter Ruttan*. *Smith* having afterwards obtained conveyances of the other shares, *Levisconte* on the 22nd August, 1856, conveyed to *Smith* his interest in the whole lot, covenanting to

(*a*) Ex p. Hooper, 1 Drew, 264; Greenwood v. Verdon, 1 K. & J., 7; 2 Jarm. 3 ed. p. 487; Dale v. McGuin, 15 Gr. 101.

1869.

Read v. Smith.

pay the incumbrances in two years. On the 15th September, 1856, *Smith* conveyed to *Levisconte* in severalty the 18¾ acres agreed upon; and on the 17th November, 1856, *Levisconte* executed a mortgage thereon to *Smith*, conditioned for the indemnification of the latter against the mortgage already executed, and all other incumbrances.

The position of *Levisconte* and *Smith* after the execution of these instruments was this: *Levisconte* had 18¾ acres in severalty, subject to the mortgage to *Ruttan* on *Levisconte's* original undivided three-seventieth interest therein; and *Smith* had (1) the residue of the lot in severalty, subject to *Ruttan's* mortgage—which *Levisconte* was to pay; and (2) *Smith* had a mortgage on the 18¾ acres (not on *Ruttan's* three-seventieths merely, but on the other 67-70ths also), to secure him against *Ruttan's* mortgage as respects the residue of the lot.

Judgment.

Levisconte did not pay off *Ruttan's* mortgage, as he had agreed: and by reason of his default *Smith*, as mortgagee, became entitled to the possession of the 18¾ acres whenever he chose, and to use his mortgage in an action of ejectment for that purpose.

Long after such default, namely, in the year 1861, *Ruttan* filed a bill for the foreclosure of his mortgage, to which bill all the parties to the present suit were defendants. The amount found due to *Ruttan* for principal, interest, and costs, was $5971.69: and the same not being paid, *Ruttan* on the 31st of March, 1866, obtained a final order for the foreclosure of all parties.

The contention of the appellant is, that the effect of this foreclosure, in connection with the transactions between him and *Levisconte*, was to deprive *Levisconte*, and those claiming under him, of all interest in the undivided 67-70ths of the 18¾ acres which he had

1869.

Read. v. Smith.

acquired under the contract with the appellant, as well as in *Ruttan's* three-seventieths. But I see no solid ground for the contention. There was no stipulation to that effect between the parties *Smith* and *Levisconte;* and it would be contrary to the settled rule of equity that the non-performance of the condition should work a forfeiture of the equity of redemption of the mortgagor. In a transaction like the present, the mortgaged property might, through improvements and otherwise, at the time of the default largely exceed in value the damages sustained by the mortgagee through the default; and that really was so here. *Smith* after the foreclosure, purchased *Ruttan's* interest, not only in the residue of the lot, but in the 18¾ acres also, for $4000; and the improvements alone on the latter, without the land itself, are sworn to be worth $11,300. It would be contrary to all propriety that by reason of a default which had cost the appellant $4000 or less, he should get property worth at the least three or four times that sum.

Judgment.

The next question to be considered is, what was the effect of the appellant's purchase from *Ruttan*? That purchase gave the appellant all the rights which *Ruttan* had, but no more, and it left untouched those rights which the appellant already possessed. The appellant was thenceforward entitled to use *Ruttan's* foreclosed mortgage to get possession at law of *Ruttan's* three-seventieths of the 18¾ acres as absolute owner; and was entitled to use his own mortgage to get possession of the remaining 67-70ths as mortgagee, for his indemnity in respect of the residue of the lot. His purchase at $4000 helped also to ascertain the amount of damages he had sustained through *Levisconte's* default. That sum was what the appellant had to pay to retain the mortgaged three-seventieths of the residue of the lot, but he got for his money not only the three-seventieths in the residue but three-seventieths also of the 18¾ acres; and of the

1869.

Read v. Smith.

latter three-seventieths, he has become, by his purchase, the absolute owner. The plaintiffs are entitled to redeem the remaining 67-70ths only, in these 18¾ acres, and have to pay a corresponding proportion only of the $4000, in addition to the interest, costs, &c.

The decree, as drawn up, gives the plaintiffs the whole interest in the 18¾ acres, and not 67-70ths only, and requires them to pay the whole $4000; but in the defendants' reasons of appeal no objection is made to these directions. The decree, as it stands, may therefore be preferred by both parties to a decree in accordance with their strict rights. But if not, as the point was alluded to at the close of the argument, I think the decree should now be varied to the effect I have suggested. The variation should not affect the costs of the appeal. The appellant, having failed in the substantial purpose of the appeal, should pay the respondent's costs.

Judgment.

GWYNNE, J.—The question presented to us in this case arises in this manner: One *John Canniff* being seized of very considerable real estate, departed this life in the year 1841, leaving two sons and four daughters, having first made his will, whereby, after devising certain parts of his estate to his two sons, he devised as follows:—

"*Fifth.* I give and bequeath to my four daughters, *Phœbe Foster*, *Mary Miller*, *Aulay Ruttan*, and *Elizabeth Nugent*, lot No. six in the first concession of the township of Thurlow (and other lands, naming them), for and during the period of their natural lives and no longer; further, I will and devise that after the decease of my said daughters, that their share of my real estate and premises shall descend in equal shares to their heirs in fee simple, for the use of them, their heirs and assigns for ever.

1869.

Read v. Smith.

"*Sixth.* I will and order that the portion of my real estate and premises severally bequeathed to my two sons, and also the portion bequeathed to my four daughters shall be severally and separately valued, and if either one shall be found to have a greater portion or share thereof than another, he or they shall pay back to the other in such manner such amount as shall make each one of them an equal sharer of my real estate and premises, as heretofore bequeathed to them, my said children.

"*Seventh.* I will and devise that as many of my said children as shall die without issue, that their shares of my real estate shall be equally divided among the survivors, to have, use, occupy, possess, and enjoy, during their natural lives and no longer, which I will and devise shall descend in equal shares to their heirs and assigns for ever."

Judgment

John Canniff's daughter, *Elizabeth Nugent*, departed this life intestate and without issue, on or about the 30th September, 1844. Assuming her share in the lands devised to her to have passed under the seventh paragraph of *John Canniff's* will, it passed in equal fifth parts to her two brothers and her three surviving sisters.

Aulay Ruttan departed this life in the year 1851, leaving her surviving seven children, having first duly made her will, whereby she gave and bequeathed to all her surviving children an equal proportion of all the real estate willed to her by her father, or which should fall to her from her father's estate.

If the accrued share of the one twentieth part which had come to her, passed under this will, as well as her own share directly devised to her by her father; then each of her seven children took three-seventieth parts in the lot No. 6, whereas if by reason of the terms of *John Canniff's* will, her will did not operate, then her

1869.

Read v. Smith.

eldest son, *Peter Ruttan*, took the whole twenty-one seventieth parts or six-twentieth parts.

It does not seem to be necessary so far as this case is concerned, to draw any distinction, if there be any, between the share directly bequeathed to her by her father and the accrued share derived through her sister, *Elizabeth Nugent's*, death without issue.

In 1852 the defendant, *Smith*, seems to have conceived the design of purchasing portions of the undivided shares in this lot, and he seems to have adopted the conclusion, either under or without the advice of counsel, that *Aulay Ruttan's* will did operate to pass the estate in the lot, for by a deed dated the 29th of July, 1852, he purchased and acquired in fee simple from *John C. Ruttan*, one of the children of *Aulay Ruttan*, all his estate in the lands devised.

Judgment.

On the 25th of June, 1853, *Peter Ruttan*, as the eldest son and heir-at-law of *Aulay Ruttan*, claiming in virtue of the terms of *John Canniff's* will to inherit all the real estate whereof his mother had been seized in her life time, conveyed by deed of that date the whole undivided 6-20th or 21-70th parts, comprising his mother's original one-fourth part, and her one-fifth of one-fourth accrued from her sister *Elizabeth Nugent*, to one *Benjamin Dougall*.

By indenture of mortgage of the same date, *Dougall* re-conveyed the same undivided parts so conveyed to him, to *Peter Ruttan*, as a security for the payment of $3000.

The defendant *Smith*, notwithstanding this assertion of claim by *Peter Ruttan*, and still insisting that *Peter* only took, under his mother's will, equally with his brothers and sisters, continued to purchase their interests, and by deeds dated respectively the 19th

1869. Read v. Smith.

December, 1853, 14th March, 1854, the 3rd January, 1855, and 1st of August, 1855, he purchased the several estates and interests of four others of the children of *Aulay Ruttan.*

On the 24th of February, 1855, by deed of that date he purchased the whole of *Mary Miller's* interest in the land.

In the month of November, 1855, the defendant *Smith*, was then, according to his own contention and construction of the wills of *John Canniff* and *Aulay Ruttan*, seised of undivided interests in fee simple, in the lot No. 6, as follows:—

Five of the three-seventieth parts which, as he insisted, each of the children of *Aulay Ruttan* took under their mother's will ..... $\frac{15}{70}$

Judgment.

Mary Miller's share of $\frac{6}{20}$ ..... $\frac{21}{70}$

Making together ..... $\frac{36}{70}$

While according to his contention, *Peter Ruttan*, as one of *Aulay Ruttan's* children, and *Levisconte*, as purchaser at Sheriff's sale of *Dougall's* equity of redemption conveyed to *Levisconte* by deed dated 19th of May, 1854, were together interested in only ..... $\frac{3}{70}$

And *Robert Read*, by virtue of a deed dated 15th June, 1853, executed by *David Ruttan*, the only other child of *Aulay Ruttan*, of only. $\frac{3}{70}$

While there was still outstanding and unacquired by either *Peter Ruttan*, or *Levisconte*, or *Read*, or the defendant, *Smith*, other ..... $\frac{28}{70}$

Smith still entertaining the design of acquiring as much as he could, if not all, of the shares of all parties, on the 19th November, 1855, enters into an agreement of that date with *Levisconte*, which, in so far as is material, is as follows:—

1869.

Read v. Smith.

Memorandum of agreement between *Charles George Levisconte* and *Albert Lewis Smith*:—The said *Levisconte agrees to sell said Smith* all the right, title, and interest which he has in and to lot No. 6 in the first concession of Thurlow (all which right, title, and interest the said *Levisconte* acquired by purchase at Sheriff's sale), on the following terms, that is to say: that whereas the said *Smith* is now possessed of claims to the said land, and is desirous of (*purchasing ?*) partitioning of the said lands between himself and the other claimants, the said *Levisconte* agrees to take, and the said *Smith* agrees to give to the said *Levisconte*, a deed in fee simple of 18¾ acres of the said land, of which the said *Levisconte* is to be the sole owner. This agreement to be conditional on the said *Smith* being able to effect an agreement with *Joseph Canniff* for the purchase of his interest, and with *Thomas Canniff* for the purchase of his interest in the said lot, and the said *Levisconte* agrees that the assignment of his interest in the said lot shall be free and clear of all incumbrances, *and the said Smith also agrees that the deed of the said* 18¾ *acres shall also be free and clear of all incumbrances.* A mortgage from *Benjamin Dougall* to *Peter Ruttan* to be considered as an incumbrance of the said *Levisconte.*

Judgment.

The shares of *Joseph* and *Thomas Canniff* above referred to, are the two one-twentieth parts accrued to *Joseph* and *Daniel Canniff*, brothers of *Elizabeth Nugent* from her share.

In order to perfect the above arrangement on his part, *Smith* by deeds dated respectively on the 2nd January and 11th July, 1856, purchased these shares. On the 22nd August, 1856, by deed of that date, he acquired by purchase *Phœbe Foster's* share, amounting to 21-70ths.

According to Smith's contention, the several shares and interests in the lot then stood as follows:—

1869. Read v. Smith.

Smith was seized in fee of..... ..... $\frac{64}{70}$
Peter Ruttan in fee, subject to mortgage, of ..... $\frac{3}{70}$
And *Robert Read* of..... ..... $\frac{3}{70}$

As to which latter part held by *Read*, *Smith* says in his answer that he had entered into a binding *agreement for partition*, as he had also with *Foster*, in order to acquire *Phœbe Foster's* share.

According to *Peter Ruttan's* contention, the several shares and interests in the lot stood as follows :—

Peter Ruttan .... $\frac{21}{70}$
Smith.. .... $\frac{49}{70}$
Read, nothing

That *Smith* insisted to the last upon his own construction, and that his interest was sixty-four seventieths,
Judgment. appears from everything done by him, and from his recognizing *Read's* interest in the three-seventieths purchased from *David Ruttan*, who, in fact, acquired nothing, if *Peter Ruttan's* contention was correct.

Levisconte, apparently to make his title to *Dougall's* equity of redemption more perfect, by deed, upon the 21st August, 1856, took a conveyance of it from *Dougall*. This being then the state of the case, the deed agreed upon by the agreement of the 19th November, 1855, was upon the 22nd August, 1856, executed by *Levisconte* to *Smith*.

By that deed *Levisconte* for the expressed consideration of £1000, bargained, sold, assigned, released, and confirmed, unto *Smith*, all the estate, right, title, and interest, of him, *Levisconte*, to lot No. 6 in the second concession of Thurlow, and the broken-front in front thereof, not sold by *John Canniff* in his life-time, to have and to hold, to *Smith*, his heirs and assigns, forever; and

by that deed *Levisconte* covenanted with *Smith* that he, *Levisconte*, would within six months from the date thereof, discharge or have discharged in the registry office in the county of Hastings, all judgments recorded or appearing therein against him, *Levisconte*, or against any former owner or owners through, or under whom he claims which shall or may be binding, or in force against the said hereditaments, and will also have discharged therefrom all mortgages made or executed by any such former owner or owners thereof, *which shall or may be binding*, and that he will at any reasonable request of *Smith* execute any further or other conveyance in the law for the more perfectly conveying the property herein mentioned so as such conveyances contain no covenant for title, or do not operate to convey any estate or interest which *Levisconte* might acquire after the execution of that deed.

1869.
Read v. Smith.

The moment this deed was executed, *Smith*, according to his own contention, was absolutely seized in fee simple of the legal estate in sixty-four seventieth undivided parts in the lots and in the equity of redemption in other three-seventieths, admitted by *Smith* to be in *Ruttan* subject to a mortgage. *Smith* was therefore then the only person entitled to the equity of redemption in the *Ruttan* mortgage, and the only person who, other at least than *Read*, could contest, or had any direct interest in contesting, what proportions of the lot that mortgage affected.

Judgment.

Levisconte had an indirect interest, if the extent of *Ruttan's* original interest conveyed to *Dougall* should be determined to be only three-seventieths, to contend that the amount secured by the mortgage should be ratably reduced, and so that the amount secured by his covenant with *Smith* to discharge the deeds from all mortgages created by a former owner, *which might be binding*, should be limited to such reduced amount.

1869.

Read v. Smith.

As to the judgments against *Levisconte*, *Smith* had a most material interest in insisting upon the correctness of his contention and construction of the two wills, and that *Ruttan* took only three-seventieths, so as to prevent any judgment registered against *Levisconte* affecting more than his equity of redemption in three-seventieths.

Smith did not then convey the 18¾ acres to *Levisconte*, perhaps he had not then arranged with *Read*, so as to get rid of his asserting any interest in the 18¾ acres, after they should be conveyed, or perhaps the particular 18¾ acres had not all been ascertained.

The 18¾ acres upon the 15th September, 1856, by a deed of bargain and sale of that date, were conveyed by *Smith* to *Levisconte* in fee simple absolute.

Judgment.

In virtue of this deed, and by deeds of bargain and sale subsequently executed by *Levisconte*, the several plaintiffs have acquired by purchase several parts of the 18¾ acres, upon which they have severally made more or less considerable improvements and buildings, the property being situated in the town of Belleville.

For the purposes of this case we may assume that the binding agreement stated in *Smith's* answer to have been entered into with *Read* was such, for what it was in particular is not stated, as to prevent *Read* asserting in respect of his claim an interest in the 18¾ acres, so as he could not interfere with the proposed sale thereof by *Smith* to *Levisconte*; it was most probably the apportionment of another portion to him in severalty.

Upon the above deed of 15th September, 1856, being executed, *Smith* upon this assumption and according to his own contention and construction of the wills, conveyed to *Levisconte* and his assigns the absolute undivided legal

1869.

Read v. Smith.

estate in sixty-seven seventieths, while *Ruttan* was only in a position to affect with his mortgage the 18¾ acres to the extent of three-seventieth parts, while even granting *Ruttan's* contention to be correct, he, *Ruttan*, could affect the 18¾ acres only to the extent of twenty-one seventieths, and the absolute, legal, and equitable estate in forty-nine seventieth undivided parts passed by the deed from *Smith* to *Levisconte*.

The effect of this deed was that thereafter *Levisconte*, and all claiming by, through, or under him, must trace their title through and under *Smith*, and the only protection which *Smith* had, against the *Ruttan* mortgage and the registered judgments, was *Levisconte's* covenant contained in the deed of the 22nd August, 1856.

A mortgage of the 18¾ acres does not appear up to this time to have been contemplated between the parties. The agreement of the 19th November, 1855, seems rather to have contemplated that the mortgage and other incumbrances should have been got rid of before the contemplated conveyances should be executed.

Judgment.

Nine months had expired when the deed of the 22nd August, 1856, was executed by *Levisconte* to *Smith*, and the circumstance of the incumbrances not having been then removed, was the occasion, no doubt, for *Levisconte's* covenant therein contained. No mortgage appears to have been ever spoken of. We must then take it that *Smith* was quite content to rest upon the security of the covenant; but that he afterwards procured *Levisconte* to give him a mortgage as a further security, seems to me to have been a very fortunate circumstance for *Smith*; for otherwise he would have been bound to *Levisconte* and his assigns by the deed of the 15th September, 1856, and would have had nothing to fall back upon but *Levisconte's* covenant.

1869.

Read v. Smith.

It would seem that the agreement made between *Smith* and *Foster* in consideration of which *Foster's* share was conveyed to *Smith* by the deed of the 22nd August, 1856, so as to enable *Smith* to convey the 18¾ acres free from *Foster's* claim, was, that *Smith* assigned some other portion of the estate to *Foster* to hold in severalty, for we find that on the 23rd September, 1856, he enters into a bond to *Shubael Foster*, under a penalty of £2000, subject to the condition that if the said *Albert Smith* shall indemnify and save harmless the said *Shubael Foster*, his heirs, and assigns, of, from, and against, all claims, demands, incumbrances, and liens, on certain land and premises, situate, lying, and being, in the town of Belleville, which are better described on a plan of the same called "*Foster's* plan," which is duly registered in the registry office in and for the county of Hastings, on the 9th day of September, 1856, which claims, demands, incumbrances, or liens, have or shall come on the said lands and premises, by, through, or by means of any act done or suffered, either by the said *Albert Smith* or by *Charles George Levisconte*, or by *Benjamin Dougall* or any of the heirs of *John Canniff*, of whose titles, shares, and claims, the said *Albert Lewis Smith* has become purchaser, then this obligation to be void.

Judgment.

Smith thus became bound in a penalty of £2000 to protect certain lands of *Foster*, which we may reasonably take to be a part set aside to him in severalty in right of *Phœbe Foster*, his wife, against *Ruttan's* mortgage.

The necessity of giving this obligation to *Foster* may perhaps account for the mortgage upon the 18¾ acres executed by *Levisconte* to *Smith*, by deed dated the 17th November, 1856, for it does not appear to have been contracted for by the original agreement of the 19th November, 1855, nor yet by the deed of the 22nd August, 1856.

1869.

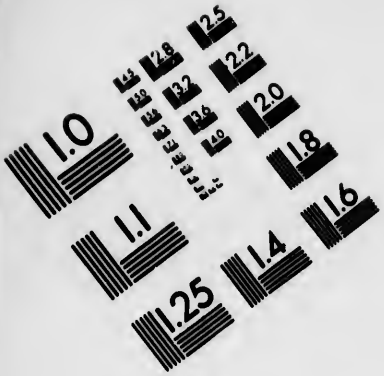
Read v. Smith.

But what the motive for the execution of this mortgage was, is of little consequence; it is with its effect that we have to do, and that effect was to reconvey to *Smith* the 18¾ acres *by way of mortgage*, as an additional security to *Levisconte's* covenant subject to a proviso for redemption and for avoiding the mortgage if the said *Charles George Levisconte* should within two years from the date thereof "pay off, discharge, and have discharged from the books in the registry office of the county of Hastings, all judgments *which form a lien or charge upon said lot No.* 6, which are or appear in the said registry office against the said *Levisconte*, *Benjamin Dougall*, or *Peter Ruttan*, and do and shall within the same time pay and have discharged in the said registry office, the said indenture of mortgage made by the said *Benjamin Dougall* to the said *Peter Ruttan, so far as the same may be binding on the lot*: so that the said *Albert Smith*, his heirs and assigns, shall and may have and hold the tenements, parcel of the said lot No. 6, conveyed by the said *Levisconte* to him, freed and absolutely exonerated from any lien, charge, mortgage, or other incumbrance, made or caused, suffered or done, by the said *Levisconte*, *Dougall, and Ruttan*, during their respective estates or the continuance thereof, then these presents shall be void."

Judgment.

The mortgage contained also a covenant to perform the matters contained in the proviso, within the said two years.

Now when those two years had elapsed, the proviso not having been fulfilled, a right in equity accrued, I apprehend, to *Smith* to file a bill to compel *Levisconte* and all purchasers from him, to indemnify him. In law the estate became absolute in *Smith*, but in equity it was still a mortgage, and would so continue until redeemed or foreclosed; no collateral act of *Smith's* could change its nature or destroy its existence. When



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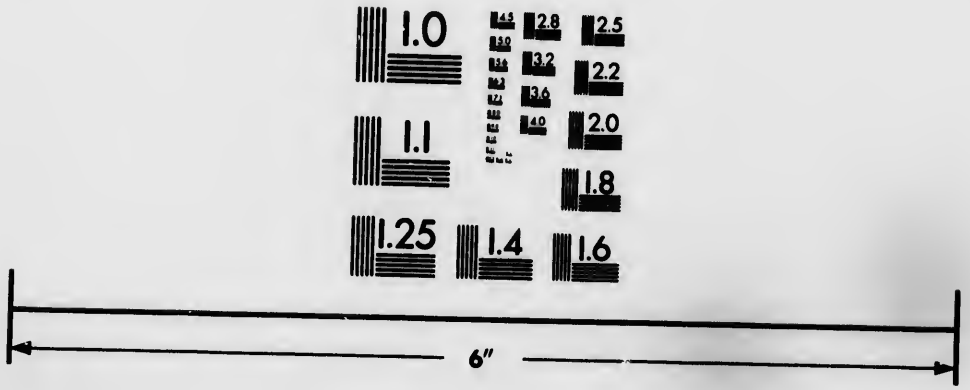

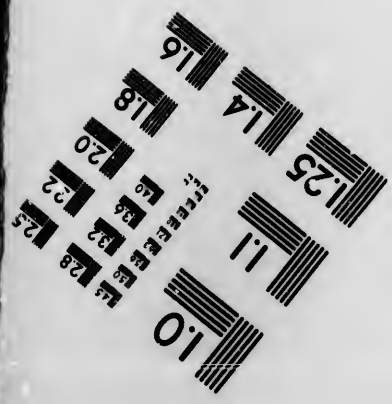

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1860.

Read v. Smith.

Ruttan filed his bill to foreclose *his* mortgage, *Smith* was party thereto, not because of the existence of the mortgage of the 17th September, 1856, but because of his being seized of the equity of redemption, under the deed of 22nd of August, 1856, in the undivided part held by *Ruttan* in mortgage. *Levisconte* and all those who are interested in parts as purchasers from him, were only necessary parties, *in virtue of their tenure under Smith's deed of the* 15*th* September, 1856. In that suit I apprehend that it would have been competent for *Smith* to have tested the correctness of his construction of the wills of *John Canniff*, and *Aulay Ruttan*, and to have endeavoured to restrict *Ruttan's* right to affect the estate to the limit of three-seventieths, which he had always contended was the utmost limit of his right.

Judgment.

Levisconte had an interest in the same contest for the purpose of reducing the amount of the sum secured by the mortgage proportionably to the extent that *Ruttan's* title, purported to be conveyed to *Dougall* was defective. *Levisconte* was not personally bound to *Ruttan* for the amount secured by the mortgage, but his obligation to *Smith* was to discharge the mortgage so far as binding on the lot only, and if that should be found to be three-seventieths only, of course that would be for *Levisconte's* benefit.

Those claiming by purchase from *Levisconte* had an interest in the question to restrict *Ruttan's* right to affect the estate to the least possible limit, but *Smith* had an undoubted interest in having the point decided, or in getting control himself of *Ruttan's* mortgage, for he was bound by his bond to *Foster* to protect his share from being affected by anything done by *Ruttan* under the mortgage. The purchasers from *Levisconte* may well have thought, as they traced their title from *Smith*, and had made considerable improvements on the strength of that title, and as he had a mortgage upon the 18¾

acres, in which they were alone interested, that he stood as a protection between them individually and *Ruttan*, for it would be unreasonable that any particular *one* of the purchasers of small lots from *Levisconte* should redeem the *Ruttan* mortgage. *Levisconte* may have thought (more especially if he was then, as is now suggested, insolvent), that *Smith* was the person to protect the property in the interests of *Smith* himself and those claiming by purchase from him, and the more especially from the wording of the mortgage upon the 18¾ acres, which *Levisconte* had executed as a security to him, by which it would seem that it was intended to leave open to the last, so far as it could possibly be done, *Smith's* right to dispute the extent of *Ruttan's* interest, for the proviso in *Levisconte's* mortgage is that *Levisconte* should discharge *Ruttan's* mortgage, *so far as the same may be binding on the lot.*

1869. Read v. Smith.

Smith, then, as it appears to me, had an undoubted interest in ascertaining to what extent *Ruttan* had an interest in the lot, and to acquire the mortgage on the land after foreclosure, for the protection of those to whom he had sold, and the *Fosters* and those claiming under them, to whom he was bound in a penalty of £2000; while it may have been imprudent in all not to raise the question, or among them to provide for the redemption, it appears to me it would have been suicidal in *Smith*, unless he felt satisfied that he could acquire the property from *Ruttan* after foreclosure; that he treated with him for that purpose before foreclosure is apparent, and perhaps it may be true, as suggested by the plaintiffs, that he and *Ruttan* understood each other in the proceedings to foreclosure.

Judgment.

When then *Ruttan* obtained his decree of foreclosure, he only foreclosed the equity of redemption in an uncertain quantity of the estate, whatever it was, which had passed by his deed to *Dougall*, unless the decree of

1869. Read v. Smith.

foreclosure had the effect of estopping *Smith* and all claiming under him from afterwards insisting that it was less than the quantity named in *Ruttan's* deed to *Dougall* and *Dougall's* mortgage to him, viz., six-twentieths or twenty-one seventieths. If the decree had that effect, *Smith*, as it appears to me, is to some extent responsible for that effect, and in equity, therefore, he should not be heard to found upon it an argument to defeat his own deed to *Levisconte*, or to acquire to himself the benefit of all the improvements made upon their several parts by the purchasers from him, and unless it had this effect, then the extent of *Levisconte's* liability under the mortgage does not appear to have been yet ascertained, so as to determine the extent of *Levisconte's* liability to indemnify *Smith*.

Judgment.

Admitting then that the effect of the foreclosure was to define, by implication, *Ruttan's* interest to be twenty-one seventieths, and not three-seventieths, as *Smith* had always contended (for in the view which I take it matters not which it was), *Ruttan* after the foreclosure had a right only to obtain a partition; he had an interest to the extent of twenty-one seventieth undivided parts in the lot; *Smith* and those claiming under him had the residue, or forty-nine seventieths. *Smith's* bond to *Foster* was an imperative power operating upon him to acquire the twenty-one seventieths, to protect the *Fosters* and those claiming under them, and he asks a Court of Equity to hold that although the purchase from *Ruttan* should have the effect of perfecting their title to the portion given to them in severalty by *Smith*, it should have the effect of defeating the estates of all the purchasers from *Levisconte*, who had improved and built upon the lands upon the faith of *Smith's* own deed to *Levisconte*. I must say that I cannot recognize the principle of equity or of conveyancing that would enable a grantor, by such a purchase of any paramount title, to defeat his own grant, or which should give to

the same conveyance, namely, that from *Ruttan* to *Smith* a healing influence in *Foster's* case, and a baneful influence in the cases of *Levisconte* and those claiming under him. 1866. Read v. Smith.

If A. acquires by purchase the equity of redemption in lands held in mortgage by B., and afterwards, but before redemption of the mortgage, conveys a portion of the mortgaged lands to C. and takes back a mortgage to secure part of the purchase money from C., and C. afterwards conveys certain small portions of the land so conveyed to him to twenty other persons, and afterwards B. forecloses his mortgage against all, and then A. purchases the foreclosed estate from B., was it ever heard that equity would hold that A. had thereby defeated his own deed to C. and cut out all claiming under C. and could upon such a title resist the right of those claiming under C. to redeem C.'s mortgage?

Judgment.

The case before us is stronger in favour of the present plaintiffs than that which I have put, because admitting *Peter Ruttan's* contention to its fullest extent, the deed of the 15th September, 1856, passed forty-nine seventieths in the 18¾ acres, in which *Ruttan* never had any interest, and in which *Smith* alone was interested when he conveyed to *Levisconte*. How then could the purchase of any estate by *Smith* from *Ruttan* defeat the conveyance of the forty-nine seventieths, in which *Ruttan* never had any interest? and if the estate to the extent of forty-nine seventieths in the 18¾ acres conveyed by *Smith* to *Levisconte* cannot be defeated, how can the residue of the estate, equitable though it was, which passed by the same deed be defeated? What principle can enable *Smith's* deed to *Levisconte* to be forfeited in part but be good as to the residue?

The contention is that the legal estate in the twenty-one seventieths, acquired from *Ruttan*, united in *Smith*

1869.
Read v. Smith.

absolutely with his own forty-nine seventieths, which it is said he also held absolutely so as to make one absolute whole and to cut out his deed to *Levisconte*. In this sentence the whole fallacy, which is a simple *petitio principii*, is involved, for the forty-nine seventieths in the 18¾ acres *Smith* held *not absolutely but conditionally*, and in virtue only of *Levisconte's* mortgage, and consequently the estate purchased from *Ruttan* could not unite with *that portion* of the estate held by *Smith*, otherwise than through *Levisconte* and his mortgage.

In short, it appears to me to be very clear that the operation of *Smith's* purchase from *Ruttan* was to support and not to defeat the title of the present plaintiffs as purchasers *from Smith through Levisconte, and that the legal estate in the twenty-one seventieths purchased from Ruttan, so far as the* 18¾ *acres were concerned, upon the very instant* of the execution of the
Judgment. deed by *Ruttan* to *Smith, united with the legal estate in the forty-nine seventieths*, in the same 18¾ acres which the deed of the 15th September, 1856, executed by *Smith* to *Levisconte* had effectually passed to *Levisconte*. It fed the estoppel as to so much of the estate conveyed by that deed, as *Smith* had not at the time of its execution complete title to convey, and so it fed *Levisconte's* mortgage to *Smith* so as to vest the 18¾ acres in *Smith*, but under *Levisconte's* mortgage and subject to redemption in the terms of the proviso in that mortgage.

What took place in the action of ejectment seems to me to be of no importance, except as affording an argument to establish that the *Levisconte* mortgage can not have lost its existence, since it is the only title in virtue of which *Smith* ever could recover any part of the 18¾ acres by action of ejectment at law, for if he should assert title in any other way, his own deed to *Levisconte*, under which the plaintiffs all claim, would be an effectual bar. How then can a mortgage which is *Smith's* sole

1860.

Read v. Smith.

title to recover at law be irredeemable in equity? In effect the relief which the appellant asks this court to grant him is, a decree pronouncing that in the events which have happened the appellant is entitled to the benefit of a forfeiture by the plaintiffs of the estate by them respectively derived from the appellant himself, although there is no forfeiture at law. Now the particular province of a court of equity is in certain cases to relieve against legal forfeitures which the severity of the law creates. It does not create forfeitures of estates, the effectual existence of which the clemency of the law recognizes.

The plaintiffs have, in my judgment, an undoubted right to redeem the mortgage of the 17th September, 1856: the only question is, upon what terms? If there could be, and are, any such judgments as are mentioned in the proviso, as do now constitute a lien upon any part of the equity of redemption, which *Dougall*, or *Levisconte* through him, had in the land, *Smith* would be entitled to protection from them; but if there were any such judgments they have been got rid of by the foreclosure of the *Ruttan* mortgage.

Judgment.

As to the *Ruttan* mortgage the terms of the proviso are in effect to indemnify *Smith* only *so far as the same might be binding on the lot.*

The plaintiffs do not seek, if they could, to open this question, which, however, was one of *Smith's* own raising; it was he who always acted on the assumption that *Peter Ruttan's* interest was only the three-seventieths. The plaintiffs offer to redeem him by payment of what he paid *Ruttan*. The mortgage is an indemnity only. The amount paid to *Ruttan* defines the utmost extent of his damnification.

The plaintiffs, I think, are right in their contention,

1869. Read v. Smith.

so far as the mortgage is concerned, that the purchase fixes the utmost extent of their liability.

The decree therefore should be affirmed as made, and the appeal dismissed with costs.

Per Curiam.—Appeal dismissed with costs.

WASHBURN v. FERRIS—[IN APPEAL.*]

Fraud—Trust.

A. took a conveyance as trustee for B. B., in answer to a bill by a person who claimed the property against both, was induced by A. to swear that he (B.) had not any interest in the property.

Held, in a subsequent suit by B. against A., that he (B.) was not precluded from shewing the trust.

Statement. This was an appeal by the defendants from a decree of the court below, (reported ante volume xiv., page 516).

Mr. *Strong*, Q. C., for the appellants, contended that the decree should be reversed, as the respondents were bound by the answer of *Jarvis Alexander Washburn* in the suit of *Purdy* v. *Ferris*, in the pleadings mentioned, and could not be permitted to controvert his statement, therein contained, that *Arthur Ferris* was the absolute purchaser of the lands in question for his own behoof, and free from any trust, and because *Stephen Henry Washburn* acquiesced in the defence in that suit, being conducted by *Jarvis Alexander Washburn* without his being made a party, and because he acquiesced in, and approved of, the answer so put in by *Jarvis Alexander Washburn*; because the evidence is insufficient to establish that *Arthur Ferris* purchased and

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**Present.*—Draper, C. J., E. & A.; Richards, C. J., Q. B.; Vankoughnet, C.; Hagarty, C. J., C. P.; Spragge, V. C.; A. Wilson, J.; Mowat, V. C.; Gwynne, J.

took a conveyance as a trustee for the respondents, and because parol evidence is not admissible to prove *Arthur Ferris* to be a trustee.

1869.

Washburn v. Ferris.

Mr. *Blake*, Q.C., and Mr. *McMichael*, for the respondents, urged as reasons in support of the decree, that the appellant, *Arthur Ferris*, gave instructions for the answer of *Jarvis Alexander Washburn* in the suit of *Purdy* v. *Ferris*, and the same was prepared upon his instructions only, and sent to *Arthur Ferris*, who took it to *Jarvis Alexander Washburn*, in the country, who swore to the same before a commissioner, without understanding it, and without considering it, and without any explanation of it being offered to him, and having no legal adviser there, and not having seen his solicitors, and believing that the said *Arthur Ferris* had given correct instructions for the preparation of such answer; that *Arthur Ferris* gave instructions for the defence of the suit of *Purdy* v. *Ferris*, and managed the same until the dismissal of the bill therein, and the said *Arthur Ferris* wrote all the letters to the solicitors during the progress of the suit, and so acted that the said *Washburn* had no opportunity of giving instructions therein, or of taking advice from his solicitors; and the said *Arthur Ferris* deceived the said *J. A. Washburn*, as he did also the solicitors, and indeed the said *J. A. Washburn* did not think it necessary to consult a solicitor, having then full confidence in the said *Arthur Ferris*; and the said *J. A. Washburn* is not, under the circumstances, bound by the said answer in the suit of *Purdy* v. *Ferris*, even if he did understand the same; that the said *Stephen Henry Washburn* is not, in any event, bound by the statements in the said answer, and he did not acquiesce therein, or in the said suit being conducted as it was; that the evidence is abundantly clear that *Arthur Ferris* purchased and took a conveyance as an agent or trustee for the respondents, and that parol evidence is admissible to prove the said agency or trusteeship.

Statement.

1869.

Washburn v. Ferris.

The judgment of the court was delivered by—

DRAPER, C. J.—I agree entirely with the judgment of *Spragge*, V. C., and I should have thought it to be regretted that the defence set up by the appellants in this case must, from any stringent rule, have been successful, for in my opinion, it would have been to give effect to a palpable fraud. On either side, appellants and respondents, there is much to condemn. *Jarvis Alexander Washburn* has evidently, on his own shewing, sworn falsely in his answer in *Purdy's* suit; but looking at the whole evidence, I feel convinced that *Arthur Ferris* knew that such answer was false, and that he was instrumental in procuring it, and furnished the statements upon which it was prepared. This does not alleviate or diminish *Jarvis A. Washburn's* criminality in swearing to it, but it shews *Arthur Ferris* as the promoter of the offence of which he seeks to take advantage in order to carry into effect a fraud for his personal advantage.

Judgment.

We think this appeal should be dismissed with costs.

HUTCHINSON v. SARGENT.

Will—Dower—Election.

A testator devised to his daughter for life a house and four acres of land; and the will shewed that he contemplated that the devisee should reside on the property so devised:

Held, that, according to the authorities, the testator had thereby sufficiently indicated his intention to devise free from his widow's dower; and that, therefore, the widow could not have dower in either this land or the other lands devised, without foregoing the provisions in her favour which the will contained.

This was a suit in the names of the infant children of *William Hutchinson*, for the administration of the estate of their father, who died in December, 1862. There

1869.

Hutchinson v. Sargent.

were three defendants, two of them being *Richard Sargent* and his wife; the latter was the widow of the deceased, and the administratrix of his estate. The third defendant was *Ruth Hutchinson*, the widow of *John Hutchinson*, the father of the intestate *William*. The case came before Vice Chancellor *Mowat* by way of motion for decree, on the pleadings and the examination of the administratrix.

Mr. *Morgan*, for the plaintiff.

Mr. *S. M. Jarvis*, for the defendants *Sargent* and wife.

Mr. *Thorne*, for *Ruth Hutchinson*.

MOWAT V.C.—The bill alleges, that *John Hutchinson* devised a parcel of land, which is described in the bill, to *William Hutchinson*, subject to the payment of a certain mortgage theretofore executed by the testator; and that the defendant *Ruth Hutchinson*, the widow of *John*, claims to be entitled to dower in this land. The bill does not charge that this claim is unfounded; and the answer of *Ruth Hutchinson* admits that she claims dower. But at the hearing counsel for the other two defendants insisted, that she was not entitled to dower, and that the will gave her certain benefits which were in lieu of dower, and put the widow to her election. This point, though stated, was not argued on either side, but all parties expressed a desire that I should give my opinion on the question. I think that the widow was not entitled to dower, in addition to the provision which the testator made for her. I find that by one of the clauses in the will the testator gave to another son, *George Hutchinson*, the east half of lot No. 15, in the first concession of the township of Albion, subject to a reservation which the testator expressed thus: "Reserving to my daughter *Mary Ann* the use of four acres and a house, on the west corner of

Judgment.

1869.

Hutchinson v. Sergent.

the said lot, during her natural life, and then to revert to my son *George*. But if my said daughter *Mary* does not wish to reside thereon, she shall receive therefor twenty dollars per year, or to have the power to sell her right of said property to my son *George*, and no other person." The testator thus contemplated a personal occupancy by *Mary* of this part of the lot. That, according to the authorities, is a sufficient indication of his intention that the devisee should hold the property free of dower (*a*); and wherever a testator's intention as to one part of his property is shewn to be, that it should not be subject to dower, it follows that neither that nor any other part of the devised property is subject to dower (*b*). I had occasion to refer to several authorities on these points, in *Grant* v. *McLennan* (*c*), and *Stewart* v. *Hunter* (*d*). I understood that if put to her election, the widow had elected, or would elect, to take the provision given her by the will. I therefore dismiss the bill against her without costs.

Judgment.

The bill alleges, that the mortgage is payable out of the personal assets of the intestate, and that the defendants pretend the contrary. I see no object in raising that question by the bill; nor do I see that the children have any interest in insisting that the mortgage is payable out of the personalty. It does not appear from the pleadings or evidence, that any question on the subject was raised before the filing of the bill. As between real and personal representatives, where they are not the same persons, resort must first be had to the personal estate for the payment of the debts of the deceased, whether secured by mortgage or otherwise; but this rule is confined to the deceased's own debts, and does not apply where an estate is devised to a party charged with a

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(*a*) Miall v. Brain, 4 Madd. 125.
(*b*) O'Hare v. Chaine, 1 J. & La. T. 665.
(*c*) 15 Gr. 69. (*d*) 2 Chanc. Chamb. 336.

mortgage. In that case, on the death of the devisee, the land is the fund for paying the mortgage, and not the devisee's personal estate. The doctrine applicable to the subject is fully stated, and the authorities collected, in Mr. Justice *Williams's* book on Executors (*a*).

The bill charges, that the defendant *Sargent* is a person of no means, and that he and the administratrix are wasting the assets; and claims that a receiver should be appointed. These charges of insolvency and misconduct are denied, and no proof of them has been offered.

There will be the usual administration decree; reserving further directions and costs.

MASON v. PARKER.

Injunction—Distress under mortgage.

Two persons were in joint possession of property of the one, and carried on business therein as partners when the owner of the property mortgaged it, giving a power of distress in case of default, and the mortgagee afterwards distrained on the partnership property. On a bill by the assignee of the other partner, it not appearing that the latter assented to or had notice of the mortgage, the court granted an injunction to the hearing of the cause.

Statement.

This was a motion for an injunction to restrain the defendants from selling goods which they had seized on certain premises that had theretofore been conveyed to them by way of mortgage, with clauses for distraining in default of payment of interest. *Henry Fettinger* was the mortgagor and was the owner of the premises. He and *Robert McCord*, at and before the time of the execution of the mortgage, were in joint possession of the premises, carrying on therein the busi-

(*a*) 6 ed. p. 1564, et seq.

1869.

Mason v. Parker.

ness of vinegar manufacturers as partners; and they so continued until after the goods were distrained. It did not appear whether the partnership agreement was in writing; or whether it contained any provision with respect to the premises in question; or whether the mortgage containing the clause of distress was executed with the knowledge of *McCord*, or when he had notice of it. Both partners had become insolvent, and the plaintiff was their assignee.

Mr. *George D. Boulton*, for the plaintiff.

Mr. *Moss*, contra.

Judgment.

MOWAT, V.C.—The learned counsel for the plaintiff contended, that, *McCord* being in possession at the time of the mortgage, no right of distress against him or his property could be given without his consent. He cited no authority in support of this contention; and the position was controverted on the part of the defendants. Having since the argument looked into the authorities, I have come to the conclusion that the injunction should go, in order to afford an opportunity of ascertaining the facts with greater exactness, before the rights of the parties are decided, and of arguing the law more fully.

It is hard that the goods of a stranger should be seised to pay the debt of another person, or should be distrained without any act on his part authorising the distress. But where the tenant has had full possession of demised property, any goods of a stranger which may thereafter be brought upon the premises, are, no doubt, liable to be distrained by the landlord; and the rule does not seem to be confined to goods thereafter brought on the premises (*a*). I have no doubt, however, that an owner who is not in possession cannot, by executing a lease to

(*a*) See Eaton v. Southby, Willes, 131.

1869.

Mason v. Parker.

another person who is not in possession and does not get possession, entitle himself to distrain on the goods of persons who were in possession before the lease, and continued to be so afterwards. Unless possession is obtained by the lessee the right of distress does not ordinarily exist even as against the lessee. That is illustrated by the case of *Watson* v. *Wand* (*a*). There the defendant had demised to the plaintiff certain premises from the 15th May, 1851. The lease of a previous tenant had expired two days before that time, but an under tenant of his was still in possession of part of the premises; and though she does not appear to have had any right to remain, she would not go out unless ejected by suit. The defendant distrained for the plaintiff's rent when it fell due; and the question in the cause was, whether the distress was legal? Lord Chief Baron *Pollock*, in giving judgment, said: "It is quite clear that if no new agreement had been come to, the case of *Neale* v. *McKenzie* (*b*) would have applied, and the defendant could not have distrained; because the plaintiff, not having had all he bargained for, for which he was to pay his rent of £145, was not bound to pay it; and the law would not apportion the rent, and make him liable to pay a part proportioned to the part enjoyed, as it does in the case of eviction by title paramount." (The court held that a new agreement which the parties had entered into removed the difficulty). If in the case put by the Lord Chief Baron, the goods of the lessee could not be distrained, *a fortiori* would a seizure of the goods of the refractory under-tenant not be legal. So, if one of several persons who are in possession attorn to the true owner, I do not see that such attornment can give any right against the others, whether they are in exclusive possession of portions of the premises, or whether all are in joint possession of the whole.

Judgment.

I reserve the costs of both parties to the hearing.

(*a*) 8 Ex. 335.

(*b*) 1 M. & W. 747.

1869.

HUME v. COOK.

Setting aside deeds.

An old man greatly addicted to drinking executed deeds of all his property, real and personal, to the tavern keeper with whom he boarded, and he accepted in consideration therefor the bond of the latter for his support for life, which was an inadequate consideration. Within five months afterwards the grantor died; and, one of his heirs having filed a bill to set aside the deeds, the court made a decree for the plaintiff with costs.

Hearing at Cornwall at the Spring sittings, 1869.

Mr. *S. Blake* and Mr. *James Bethune*, for plaintiff.

Mr. *James McLennan*, and Mr. *D. B. McLennan*, for defendant *Cook*. The other defendants did not appear.

Judgment. MOWAT, V. C.—This is a suit by one of the heirs of *Andrew Hume*, deceased, to set aside certain deeds, executed by *Hume* on the 20th January, 1868, conveying to *Cook* all his real and personal property.

Hume was a farmer in the township of Osnabruck, had been an extremely shrewd man, and was possessed of a considerable amount of property. At the time of executing the deeds in question he was about sixty-six years old. He had had an attack of paralysis some years before, and was lame in consequence from that time until his death. For the last twenty-five years or more of his life, he was an habitual drunkard, becoming worse and worse; for five or six years before the transaction in question, he had ceased attending personally to his farm; and, leasing portions to different persons on shares, and leaving other portions to the care of his wife and children, he gave himself wholly up to the gratification of his passion for strong drink. In October, 1867, he sold his farm; and part of the price

1869.

Hume v. Cook.

was paid to his wife in consideration of releasing her dower; for another part *Hume* accepted a tavern which he had been in the habit of frequenting, which was situate in the village of Aultsville, about half a mile from the house on *Hume's* farm, and which was occupied by the defendant *Cook;* and for the residue ($933.05) of the price of his farm, he accepted the buyer's promissory notes of unequal sums, payable with interest in one, two, three, four, and five years.

His farm stock and other chattels, he disposed of about the same time—their value, or what he got for them, does not appear. He and his family (who had led a wretched life with him for many years) then separated, and the latter removed for a time to the United States.

Judgment.

Immediately after the sale of the farm, he gave the notes for safe keeping to a brother of the maker, and went to board at the tavern he had bought, agreeing with *Cook* who kept it, that his board and lodging should be $2.50 a week. Four months later, viz., on the 28th January, 1868, he executed the deeds which the bill impeaches. One of these was a conveyance of the tavern stand to *Cook* in fee. The other was a transfer to the defendant of the rest of the property of the deceased by the following disposition: "All moneys, bills, bonds, notes, and securities for money of which I am now possessed, and all my personal property and effects; all notes belonging to me, and now in the hands and keeping of any other person or persons, and particularly in the hands and keeping of *I. R. & S. Ault*, or in the hands or keeping of *Simeon N. Ault.*" Both deeds are expressed to be in consideration of one dollar. In consideration of these instruments, the defendant executed a bond in the penal sum of $1000 (less than half the value of the assigned property), conditioned as follows: "The condition of the above obligation is such

1869.

Hume v. Cook.

that, if the above *Guy H. Cook*, his heirs, executors or administrators, or some one or more of them, do and shall well and truly support and maintain, in a manner suitable to his station in life, the said *Andrew Hume*, during the term of his natural life, at the dwelling house of the said *Guy H. Cook* at the township of Osnabruck aforesaid, or at such other place as the said *Guy H. Cook* may happen to reside; and do and shall furnish the said *Andrew Hume* during the term of his natural life with good and sufficient clothing; and also do and shall pay unto the said *Andrew Hume*, yearly and in each and every year during the term of his natural life, the sum of $20; and also do and shall furnish the said *Andrew Hume* with necessary medical attendance during the said term of his natural life, then this bond shall be null and void," &c.

In June, 1868, *Hume* died.

Judgment.

The documents were prepared by an attorney in Morrisburgh, with whom *Hume* had had no previous acquaintance, and whose name was suggested to him by a friend of *Cook*. *Hume* had been in the habit of employing a solicitor who resided in Cornwall, but this gentleman was not referred to on this occasion. All that the attorney did was to draw the documents according to instructions given to him. He was not asked to advise as to the transaction, and did not do so.

Now, looking at the transaction as a mere matter of business, it is plain that the consideration which *Cook* agreed to allow was greatly less than the value of the property which he got. Indeed, the rent alone of the tavern ($200) would probably have been sufficient for the support of the deceased in the way in which he had been accustomed to live, thus leaving untouched the reversion in the tavern, and all the notes and other personal property. *Hume* was an old man, too, it is to

1869.

Hume v. Cook

be remembered, greatly enfeebled in body and mind, as compared with what he had been, and his life was a very bad one. So unfit had he become to manage his affairs that several of *Cook's* witnesses testify to having advised him to make over his property without delay to secure himself a home: they thought he would soon squander everything. The purchase of his support duly secured for life, for a proper and even liberal consideration, was probably a very desirable thing for him to do; but the law does not permit advantage to be taken of a man who is in such a state as *Hume* was, to obtain from him all his property, instead of a reasonable part of it; or to procure from him any sort of a bargain to which his consent can be obtained, and to enforce it against him and his heirs; and the plaintiff's case is, that *Hume* gave up everything for a mere unsecured promise of support, that the price he was thus to pay for his support was excessive; and that he had not such advice as by the rules of equity, in the relative position of the two parties, was necessary to give validity to such a transaction. I think that these averments are made out.

Judgment.

Not only was the consideration which *Hume* was promised totally inadequate, but, viewing the transaction as a means of securing to *Hume* a comfortable home and support for the remainder of his short life, the bargain was extremely improvident and defective in its details; and to give validity to the transaction, if that were possible, it was necessary to have proved that the defects were considered by a competent adviser, and were shewn to *Hume*; that he was made alive to them, and to the way of removing or alleviating them; and that, with his eyes open to all that was objectionable in the transaction, he, voluntarily and deliberately, and without any pressure from *Cook* or influence of any kind on his part, determined to carry out the transaction as it stands. But there is no such proof. Nor would satisfactory proof of entire freedom from undue influence on the part of

1869. Hume v. Cook.

the tavern keeper who was getting a drinking lodger's property on such unequal terms, be easily made.

Some of the improvident aspects of the transaction require but to be stated in order to be admitted. I have already referred to the fact that *Hume* had no security, by mortgage on the place or otherwise, for the due performance of the agreement in case *Cook* should die before him, or should become unable to keep his agreement. Then, he was bound to live with *Cook* as long as *Cook* duly supported him, however uncomfortable he might be made; he was to live with *Cook* wherever, in Canada or elsewhere, *Cook* might thereafter find it convenient to reside; if *Hume* did not care to go with him, there was no provision that he should have anything; he had either to go, starve, or accept any third alternative which *Cook* might choose to offer. If *Cook* should not keep even the letter of the agreement, *Hume's* only remedy was the (to him) useless one of a suit for damages, without means of paying the costs or maintaining himself while the suit was going on. His comfort would thus depend altogether on *Cook's* good will, and continued ability. Well considered stipulations might, perhaps, have met most or all of these difficulties; but such stipulations were not made, nor does it appear that the desirableness of any one of them was pointed out to *Hume*, or was perceived by him.

Judgment.

The impossibility of upholding such a transaction is manifest on a reference to the authorities. In *Harvey* v. *Mount* (*a*), for example, an assignment had been made by the plaintiff, *Sarah Beake*, to her elder sister *Grace* in consideration of support; and although the assignor's interests had been much more carefully guarded than in the present transaction, the Master of the Rolls in setting aside the deed made the following observations: "Then

(*a*) 8 B. 439.

1869.

Hume v. Cook.

comes the assignment, and *Grace* covenants with *Sarah* during her life, to find for her sufficient meat, drink, &c., and all other necessaries fitting her degree and quality. Who is to be the judge of that? * * *Sarah* had parted with everything, with all her present as well as all her future property, and she was to be provided for with what is here called sufficient food, &c., fitting to her degree and quality. How indefinite! What might they judge proper for her degree and quality? * * In vain do I look for any power to revoke. So that however they might behave to her, or however wretched she might have been made, she had no power to revoke the grant which she had made; and her trustee was the husband of the person who alone entered into the obligation with her." *Hume* had no trustee. The protection which the party in the case at the Rolls had was insufficient; but in the case before me the party was to have no protection. I refer also to the language of the court in *Sharp* v. *Leach* (*a*), and *Philipson* v. *Perry* (*b*).

Judgment.

The case is very strong against such a transaction where the grantee is a tavern keeper who was dealing with a drinking lodger. I understand the rule of equity to be (*c*), that a conveyance by an intemperate man of all his property to the tavern keeper with whom he lives, and at whose house he has been supplied with the drink which he prefers to all earthly objects of desire, and to all hope of future happiness, is subject to the same rules as a conveyance to a person occupying towards the grantor a relation of confidence or influence. The danger in consequence of which those rules have been laid down, exists in a much larger degree in the former case than in the latter, and needs to be guarded against with greater caution.

(*a*) 31 B. 491. (*b*) 32 B. 628.

(*c*) Clarkson v. Kitson, 4 Gr. 255; McGregor v. Boulton. 14 Gr. 94.

1869.

Hume v. Cook.

Besides this consideration, however, the transaction in the present case affords clear testimony of unbounded confidence in *Cook* on the part of *Hume*—assuming that *Hume* had still judgment enough to form any clear notion of what he was doing; for he was stripping himself of everything on the mere promise of *Cook* to support him for the remainder of his life; he was giving *Cook* not merely the tavern stand, which, without anything more, *Cook* was willing to accept, as he well might be, for the consideration he was to give; but also $900 of notes, as well as all *Hume's* other means, reserving nothing whatever; he was taking no security from *Cook* for the performance of his promise except *Cook's* own bond; and the bond itself, a few days after receiving it, he returned to *Cook* for safe keeping, and thus parted with the only evidence he had of what he was to receive for his property. It is seldom that a client shews such confidence in his solicitor, a principal in his agent, or *cestui que trust* in his trustee, as *Hume* thus manifested towards *Cook*; and the rules which sound policy has required courts of equity to enforce in regard to transactions between parties occupying these relations to one another, manifestly apply *a fortiori* to the transaction here in question. The rules referred to have been so often stated and illustrated in reported cases, in England and here, that I need only add that, consistently with them, it is impossible to refuse the plaintiff relief.

Judgment.

The decree must be for the plaintiff with costs.

FULLER v. PATTERSON. 1869.

Interpleader.

Where a person in good faith, but from wrong information, replevied property which did not belong to him; and after a verdict against him, a new claimant insisted that the property was his, and threatened an action:

Held, that the case was not one for an interpleader in this court.

This was a bill of interpleader, and came on before Vice-Chancellor *Mowat* on a motion for decree.

The plaintiffs alleged that one of them, *Cynthia Fuller*, wife of the other plaintiff, was the owner of lot No. 29, 10th concession of the township of Dawn, and had been so for many years; that during the winter of 1867–68, two of the defendants, namely, *Patterson* and *Dobbyn*, wrongfully cut down a number of timber trees, manufactured them into timber, and removed them from the lot, for the purpose of appropriating them to their own use; that to facilitate this object they mixed the same up with other similar timber of which they claimed to be owners; that the plaintiffs did not discover the wrongful acts of the defendants until March, 1868, when they were informed and believed that 200 pieces had been cut on their lot by the defendants; that they thereupon commenced an action of replevin to recover possession of the 200 pieces; that they gave the sheriff the usual replevin bond, and the sheriff replevied and delivered to them 200 pieces of timber which were in the possession of the defendants; that, the timber being in its nature perishable, and liable to deterioration in value, and to be lost by theft and otherwise, the plaintiffs sold part, and had the rest still in their possession; that at the trial of the action it was found that forty-three pieces only of the timber replevied had been cut on the plaintiffs' land, and that these were not identified in any way; that since the trial the plaintiffs had been ready to return the

Statement.

1869. Fuller v. Patterson.

timber which they had still in their possession, and to pay to the defendants the value of the pieces sold, after detaining, or deducting the price of, the forty-three pieces belonging to the plaintiff; but that two other defendants, *Kerr* and *Ramsey*, claimed to be the owners of the said pieces replevied, except the forty-three pieces, on the ground that the same were cut in trespass on their lands, and they threatened and intended to recover the same or the value thereof from the plaintiffs; that the plaintiffs made no claim to the timber replevied, except the forty-three pieces, or to the proceeds thereof, and were ready to deliver the timber and pay the proceeds to whichever of the claimants was entitled thereto; and that the plaintiffs were not colluding with any of the defendants. The prayer of the bill was, that the defendants might be restrained from suing the plaintiffs, and might interplead with one another. The defendants, *Patterson* and *Dobbyn* filed answers denying the wrong which the bill alleged against them, and claiming to be entitled to the timber. The other defendants, by their answers, submitted to interplead.

Mr. *Rae*, for the motion.

Mr. *James McLennan*, for defendants *Kerr* and *Ramsey*.

Mr. *S. H. Blake*, for *Patterson* and *Dobbyn*.

Judgment.

MOWAT, V. C.—The case presented on the part of the plaintiffs is one in which there ought in justice to be a remedy, but I am afraid I have no jurisdiction. It is not in every case of opposite claims to property or money in the hands of a party that he can call on the claimants to interplead, under our law. The civil law and the French law appear to be more liberal and just in this respect (*a*). But with us this remedy appears to

(*a*) Story on Bailments, sec. 118.

1869.

Fuller v. Patterson.

be confined to cases in which the opposing titles are connected by reason of one being derived from the other, or of both being derived from a common source. Here, it appears from the bill, that the two sets of defendants claim in absolutely adverse rights.

The way in which the plaintiffs became possessed of this timber creates further difficulty in their way; for their replevying it was wrongful in fact, though not in intention; they, unfortunately, from misinformation, seized by process of law what they had no right to; and to such a case interpleader seems from the cases to be inapplicable.

The verdict at law is a further difficulty in the way of relief. In *Crawshay v. Thornton* (*a*), the plaintiffs had, in ignorance of the claim of one of the parties, consented to hold the property at the disposal of the other; and that consent was held to disentitle them to call on the claimants to interplead; the Lord Chancellor holding, that the case tendered by a bill of interpleader must be, that the plaintiff is not under any liability to either claimant beyond what arises from the title to the property; that, if the plaintiff had come under any personal obligation, independently of the question of property, so that either of the claimants might recover against him at law without establishing a right to the property, the case is not a proper subject for a bill of interpleader. Here, there was a verdict (and I presume a judgment), —which is a stronger case than a consent that merely might entitle a party to obtain a verdict and judgment.

Judgment.

I must dismiss the bill with costs.

(*a*) 1 M. & C. 1.

1869.

SULLIVAN v. SULLIVAN.

Administration suit—Costs.

An executor who obtains an order for the administration of his testator's estate, is not always entitled to the costs.

An executor took out an administration order for the purpose of establishing a claim which he made against the estate, and of having it paid by sale of the realty; but he failed to prove his claim, and, on the contrary, a small balance was found against him. It appeared, also, that he had not kept proper books of account as executor:

Held, that he should pay the costs of the suit.

This case came before Vice-Chancellor *Mowat* for further directions, and on the question of costs.

Statement.

On the 18th January, 1868, the usual administration order was made in the matter of the estate of *John Sullivan*, who died on the 13th May, 1859, leaving a widow and two sons, both minors. By his will he gave all his worldly property to his executors, in trust to apply the rents for the benefit of his wife and children in manner therein specified until his children became of age; he directed his personal property to be applied, so far as necessary, to the payment of his debts, and the balance to be invested; and he appointed *James Sullivan* and another person his executors. *James Sullivan* alone took probate of the will and acted; and it was on his application that the administration order was made. In his affidavits filed in support of the application, he claimed that he had expended for the estate $400 more than he received, and that the testator owed him at his death $[illegible]. Both of those sums he claimed against the estate. He stated, also, that there were some other small claims against the estate which were unpaid, and that there was no personal estate to satisfy them; that one of the sons was of age on the 26th December, 1867, and that the other would be of age on the 14th October,

1868. He declared that his application was made in good faith, for the purpose of reimbursing himself moneys paid for the estate, for payment of the debts, and to obtain his discharge from the trusts of the will by having them wound up under the direction of the court.

1869. Sullivan v. Sullivan.

The result of the accounts which had been taken under the decree was not in accordance with the executor's affidavit; it appearing that, instead of being a creditor to the amount of $800, he was a debtor in a small amount, and that, too, after obtaining credit for $82.29 as commission.

Mr. *Ferguson*, for the executor, cited *Low* v. *Carter* (*a*), *Knatchbull* v. *Tearney* (*b*), *Taylor* v. *Tabrum* (*c*), *Blain* v. *Terryberry* (*d*), *Wiard* v. *Gabel* (*e*), *Moodie* v. *Leslie* (*f*).

Mr. *S. H. Blake*, contra, referred to *White* v. *Cummins* (*g*), *Chisholm* v. *Barnard* (*h*), *Smith* v. *Roe* (*i*), *Bartlet* v. *Wood* (*j*).

MOWAT, V. C.—The only question argued on the present occasion was as to the costs of the suit. Counsel for the executor submitted to pay the costs attending the litigation of the various items in regard to which the executor was unsuccessful; but he claimed the other costs of the suit, on the ground that, as executor, the plaintiff was entitled to have the accounts taken by the court. *White* v. *Cummins* (*k*) was relied on as opposed to the executor's claim; and in that case it was cer- Judgment.

(*a*) 1 Beav. 426.
(*b*) 3 M. & C. 123.
(*c*) 6 Sim. 281.
(*d*) 12 Gr. 22.
(*e*) 8 Gr. 458.
(*f*) *Ib.* 537.
(*g*) 3 Gr. 602.
(*h*) 10 Gr. 479.
(*i*) 11 Gr. 34.
(*j*) 9 W. R. 817.
(*k*) 3 Gr. 602.

1869.

Sullivan v. Sullivan.

tainly held very distinctly, by the three learned Judges who then composed this court, that an executor had no right to file a bill at the expense of the estate, merely to obtain an indemnity by passing his accounts under the decree of the court; that, in order to entitle him to the costs of a suit brought by himself there must be some real question to submit to the court, or some dispute requiring its interposition. Counsel for the executor did not dispute the necessity of shewing some special ground for the suit, but he argued that the later authorities laid down a less stringent rule than was done in *White* v. *Cummins*. The later cases referred to as favoring the claim of the executor to costs were cases in which executors were defendants, and the rules which govern the question in dealing with executors as defendants are not, necessarily, the same as those which apply to them as plaintiffs; and I understand that my brother *Spragge* has lately held that, in administration suits generally, the fact that executors now receive a commission is to be taken into account in considering their right to costs according to preceding cases. But *Smith* v. *Roe* (*b*) was an administration suit against the executors, and yet, the court being satisfied that their misconduct was the occasion of the suit, charged them with all the costs of it, and the Vice Chancellor referred to several reported decisions as warranting and requiring that course.

Judgment.

Now, in the present case, I am satisfied that the sole object of the executor in obtaining the administration order was to enforce his own claim of $800, and to obtain payment of it out of the testator's real estate; that but for that claim, which he has failed to establish, he would not have brought the suit; and that no such suit would have been necessary or would have been brought by any one else. It appears, also, that the executor did

(*b*) 11 Gr. 34.

not keep proper books of account; and that his claim to have the costs paid out of the estate would render necessary the sale of the testator's land, which otherwise may be avoided. I think that, under these circumstances, the proper conclusion is, that the executor should pay the defendants' costs of the suit up to this time; of course as between party and party only.

1869.
Sullivan v. Sullivan.

The defendants having offered to pay into court a sufficient sum to cover the debts proved, including the creditors' costs, there will be no sale.

ROMANES v. FRASER.

Married woman's deeds—Magistrates interested—Evidence against certificate.

Magistrates interested in the transaction are not competent to take the examination of a married woman for the conveyance of her land. The solicitor of the husband is not as such disqualified.

Where, after the decease of one of the Justices of the Peace by whom an examination was taken, the other, an old man of seventy-three, gave evidence that he did not recollect and did not believe that the wife was examined as the certificate stated, the court gave credit to the certificate notwithstanding the evidence.

Hearing at Kingston at the sittings in the spring of 1869.

Mr. *James McLennan* and Mr. *George McDonnell*, for the plaintiff.

Mr. *James Bethune*, for the defendant.

MOWAT, V. C.—This is a suit against a husband and wife to foreclose a mortgage for $5,000 on the wife's property. The mortgage bears date 16th June, 1862. Judgment.

1869.

Romanes v. Fraser.

On the back there is the usual certificate signed by two magistrates. But the defendants contend (1) that the wife was not duly examined, as the law requires and as the certificate testifies; and (2) that one of the magistrates (the Recorder at Kingston, now deceased) was the solicitor for the husband in the transaction, and was therefore not qualified to take the examination. It is urged that by reason of these defects the deed is void.

In support of the first ground of defence, the survivor of the two magistrates was called as a witness, and the scrupulous honesty of his evidence was fully and justly acknowledged by the learned counsel for the plaintiff. This gentleman does not recollect that any questions were put to Mrs. *Fraser* before the signing of the deed, and his belief is that he and the other magistrate did not ascertain from her what the certificate states. It is not suggested that there was any want of good faith towards her in the matter, or that the alleged omissions arose from any other cause than carelessness in regard to what all parties considered a useless formality. The witness is an old man of seventy-three: his memory had evidently failed considerably: the occasion to which he spoke had occurred nearly seven years before he gave his evidence: he had no personal interest in what then took place, and for more than six years had had no occasion to call it to mind; and it was proved, that an important part of what certainly occurred at the same time, he had wholly forgotten. It is impossible for me, under such circumstances, to hold that the state of his recollection as to the circumstances attending the signing of the deed by Mrs. *Fraser* ought to weigh more with a court than the solemn certificate signed by himself and the other magistrate at the time, acted upon by the parties in good faith, and not questioned until long after the death

Judgment.

of the other magistrate who was the active party in the matter (*a*). 1869.

Romance v. Fraser.

The other question is as to the competency of the husband's solicitor to take the examination. The learned counsel for the defendants said that the duty was judicial, for which he cited *The Queen* v. *Ashburn* (*b*); and that any interest in a judicial officer rendered his act void, for which he referred to *The Queen* v. *Suffolk* (*c*), and *Dimes* v. *The Grand Junction Canal Co.* (*d*). I agree with him on both points; but it does not appear here that the solicitor had any interest in the matter; and the view taken by the Court of Common Pleas in 1834 of certain enactments in the English act abolishing Fines and Recoveries (*e*), and what occurred in *Banks* v. *Ollerton* (*f*), and *Re Ollerton* (*g*), seem to shew that a solicitor is not necessarily disqualified, because his client is. Those cases related to the same deed, which was executed by a married woman under the provisions of the act mentioned. The act provided for an examination of a married woman, and a certificate (*h*) not differing materially from the examination and certificate required in this country; and the learned judges in the cases I have named were clear that a "commissioner cannot act in his own case any more than a judge," and that "the statute requiring two commissioners obviously means that they both should be commissioners who could legally act;" but the judges seem to have considered that a solicitor for the party would be in a different position. The act authorized the Court of Common Pleas to make rules respecting the mode of examination, &c. (a provision which our

Judgment.

(*a*) See Howard v. Braithwaite, 1 V. & B. 208; Goodtitle v. Clayton 4 Burr. 2224, &c,

(*b*) 8 Q. B. 871.
(*c*) 18 Q. B. 416.
(*d*) 3 H. L. 759.
(*e*) 3 & 4 W. IV. c. 74.
(*f*) 10 Exch. 180.
(*g*) 15 C. B. 796.
(*h*) 3 & 4 W. IV., c. 74, ss. 79, 80.

1869.

Romanes v. Fraser.

statutes do not contain); and that court had at an early date made a rule that "one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein, as attorney, solicitor or agent, or as clerk to any attorney, solicitor or agent, so interested or concerned." The Court of Common Pleas in 1834 was thus of opinion that the act did not itself disqualify any such persons as this rule named. If the rule was meant to apply to a party (a point which is perhaps not quite certain from the language employed), Lord Chief Baron *Pollock* said that "the rule *to that extent* would be void as being beyond the powers given to that court by statute;" but neither he nor any other of the judges let fall any expression which implied that the rule was void except to that extent. There is thus the opinion of the Court of Common Pleas in 1834 against the disqualification of the solicitor, and that opinion apparently acquiesced in by the courts in 1854. I think that, sitting here as a single judge, I should regard that view as binding on me, and as relieving me from the duty of considering how I might regard the point without that guide (*a*). I may add that in the vacation after *Re Ollerton* was argued, the British Parliament passed an act (*b*) reciting that "it is apprehended that deeds executed by married women under the provisions of the said act may be liable to be invalidated by the circumstance that the Judge, or Master in Chancery, or one or both of the commissioners, taking the acknowledgment may be, or may have been, interested or concerned, either as a party or otherwise, in the transaction giving occasion for such acknowledgment, and it is not expedient that deeds executed in

Judgment.

(*a*) See 19 & 20 Vic. ch. 120, sec. 137; Re Bradley's Settled Estates, 24 Beav. 220; Re Haye's Settled Estates 6 W. R. 7; Elliott v. South Devon Railway Co., 12 Jur. 445, &c.; Hopson v. Hopson, 13 Hare app. 4; 1 Danl. Pr. 4 ed. 95, 100.

(*b*) 17 & 18 Vic. ch. 75.

1869.

Romanes v. Fraser.

good faith under such circumstances should be invalidated;" and enacting, that no such deed which had theretofore been or should thereafter be acknowledged, should be impeachable by reason only of the commissioners &c., or either of them, being concerned or interested "either as a party or parties, or as attorney or solicitor, or clerk to the attorney or solicitor of one of the parties, or otherwise, in the transaction giving occasion for such acknowledgment." The English Parliament was thus of opinion that the importance of the examination was not such as to require that the officers by whom it is taken should be disinterested persons; and from the course of legislation hitherto in this country, I apprehend that the view which legislators would take here would not be different.

Judgment.

I think that the plaintiff is entitled to the usual decree.

FRASER v. HILLIARD.

Married Woman's Act—Rights of Creditors.

The Married Woman's Act does not exempt personal property of a wife who was married on or before the 4th May, 1859, from liability for debts contracted by the husband before that date.

Where a wife who was married before the 4th May, 1859, purchased after that date property in her own name, and paid for it (as was alleged) with money theretofore given to her by her son, it was *held*, as between her and a creditor of her husband, whose debt was contracted before the 4th May, 1859, that money so given to the wife became instantly her husband's money, and that the land bought with it was liable to the creditor.

Hearing at Kingston, Spring sittings, 1869.

Mr. *James McLennan* and Mr. *George McDonnell*, for the plaintiff.

1869.

Fraser v. Hilliard.

Mr. *Blake*, Q.C., and Mr. *George Kirkpatrick*, for the defendants.

MOWAT V.C—This is a suit by a judgment creditor of the defendant *John Hilliard*, to have equitable execution of certain lands standing in the name of his wife and co-defendant *Margaret Hilliard*. The plaintiff has a *fi. fa.* lands in the sheriff's hands.

The wife claims to be the owner of the lands in question to her separate use, alleging that they were acquired by her, "partly by gift from persons in no wise indebted or under obligation to the said *John Hilliard*, and partly by purchase out of moneys to which he had no right or claim.

Judgment.

By the somewhat barbarous law which prevailed in all cases before the passing of the Married Women's Act (*a*) where there was no marriage settlement, the earnings of a wife, and all the personal property which she had at the time of her marriage, or which she acquired afterwards by gift to her (not expressly to her separate use), belonged to the husband. It is by this law that the present case is to be tried, the marriage having taken place, and the debt having been contracted, before the passing of this act—a case which is expressly excepted from the operation of the act (*b*); and there was good reason for the exception, as it is obvious that, before the act, persons may have trusted the husband on the credit of the wife's means and expectations, rather than of his own; and that is not unlikely from the evidence to have been the fact in the present instance.

Certain of the lands mentioned in the bill were purchased by the wife, and were paid for by her, with, according to her own contention, money which was

(*a*) 22 Vic. ch. 34 Consol. U. C., ch. 73. (*b*) Vide s. 2.

1869.

Fraser v. Hilliard.

theretofore given to her by her son, and which she chose to invest for herself in that way; but the moment that any money was given to her it became her husband's money, and, according to the law applicable to the case, she had no more right to put it beyond the reach of those who were her husband's creditors before 4th May, 1859, than she had to divert any other money of the husband to her separate use. I am not satisfied that so large a portion of the purchase moneys of the properties which she bought was paid with money belonging to the son and given by him to her, as she represents; but the question is immaterial. I must treat the money as the husband's, whether she obtained it from the son as a gift, or from her husband's business, or from her own earnings. Mrs. *Hilliard* appears to have for many years managed her husband's business, but she did not thereby become personally liable for debts contracted in carrying it on; and there can be little doubt that one object which she had in view in using her own name in making the purchases and taking the conveyances, was to keep the property from her husband's creditors; but property so purchased and conveyed, if paid for with what I must hold for the purposes of this suit to have been the husband's money, was in equity the husband's property, as between his wife and the plaintiff; and the 13th section of the Married Woman's Act, on which the learned counsel for the defendants relied, and which exempts a husband's interest in his wife's real property from liability for his debts during her life, has no application to the case.

Judgment

It was objected on the part of the defendants, that the plaintiff should have obtained and put in evidence, the conveyances to Mrs. *Hilliard*, in order to sehw that they were of estates which are subject to an execution against lands. But I think that, for the present purpose, that stands admitted by the defendants. The answer of Mrs. *Hilliard* does not suggest any question as to the nature

1869.

Fraser v. Hilliard.

of the estate she took, but sets up that she "acquired the lands mentioned in the bill, partly by gift and partly by purchase;" and in her examination (which was read on the part of the plaintiff), she says that she "owns" the lands, and that she "bought" them. These expressions are those commonly employed where the estate owned, bought or acquired was the fee; and, in the absence of any ground for supposing that the fact was not so here, Mrs. *Hilliard* must be construed as so intending and admitting.

With regard to the property which was purchased from the Rev. *Pères Oblats*, and was to be paid for in meat, I do not think that the plaintiff's case is made out. Sufficient is not proved to shew the butchery business to have been at this time the husband's business, and not the son's; and the only payments on the property have, as I understand the evidence, been made in meat by the son. If no part of the consideration was paid out of the husband's means, or out of what I must regard as his means for the purpose of the suit, the mere circumstance of the purchase being by the wife in her own name does not, I apprehend, make her estate subject to the husband's debts. The lot conveyed to her by her father-in-law, by way of gift, is also exempt from liability to the plaintiff.

Judgment.

The decree will declare the other lands mentioned in the bill to be liable for payment of plaintiff's debt, and will contain the usual directions for sale. The costs of the suit are to be added to the plaintiff's debt.

WALKER V. FRIEL. 1869.

Injunction to stay waste—Proof of plaintiff's title.

Such proof of possession as is sufficient to maintain a suit at law against a wrong-doer, is sufficient *primâ facie* proof of title to enable a party to obtain a decree for an injunction to restrain waste.

Hearing at Kingston, at Spring sittings, 1869.

Mr. *James McLennan* and Mr. *Machar*, for the plaintiff.

Mr. *Britton*, for the defendant.

MOWAT, V. C.—This is a suit for an injunction to restrain the defendants from committing waste by cutting down timber and other trees on certain lots in the township of Storrington. The plaintiff has proved the cutting by three defendants, *John Friel*, *Benjamin Friel*, and *Edward Hart*. There is another defendant *David Gilmour*, who is not shewn to have cut any, but who bought 170 cords from the defendant *Hart*, and has paid him for it without notice of the plaintiff's claim. The three defendants who have been cutting are mere wrong-doers without any colour of title. On the other hand, the plaintiff has not proved a paper title, but has shewn that he and those under whom he claims, have been in possession, exercising acts of ownership and claiming title, for eight years or perhaps more. The possession thus proved was admitted to be sufficient to maintain trespass, and it seems sufficient also to maintain ejectment. Is such a possession sufficient to entitle a party to an injunction? No authority was cited on this point, but I do not see why more strict proof of ownership should be required against a wrong-doer who is committing waste than would be needed at law. Why should a stranger be permitted to destroy with impunity property of which Judgment.

1869.

Walker v. Friel.

another is in possession, claiming to be the owner, though there may be some link in his title which he cannot produce? I must either hold that possession is sufficient *primâ facie* in support of a bill against a mere trespasser and wrong-doer, or I must leave without remedy here every owner who has not at hand complete proof of his title.

I shall therefore grant an injunction to restrain future cutting; I say nothing as to what has been cut already. The three defendants, *John Friel*, *Benjamin Friel* and *Edward Hart*, must pay the plaintiff's costs. *Hart* will pay *Gilmour's* costs.

JONES v. WOOLEY.

Covenant in restraint of trade—Interest of plaintiff therein.

The plaintiff purchased the defendant's business as an exchange broker at Kingston, and the latter agreed not to go into the business there again. The plaintiff afterwards sold out to one *C.* and entered into a like agreement with him:

Held, that the plaintiff after this sale had not such an interest in the contract with the defendant as entitled him to an injunction, and that his remedy, if any, was at law.

Hearing at Kingston, Spring sittings, 1869.

Mr. *Walkem*, for the plaintiff.

Mr. *J. O'Reilly*, Q. C., and Mr. *Britton*, for the defendant.

Judgment.

MOWAT, V. C.—This is a bill to restrain the defendant from carrying on business in Kingston as an exchange broker. On the 1st July, 1864, the defendant, who was then carrying on this business, sold it to the plaintiff, and I am satisfied that one term of the sale was

that the defendant should not again go into the business there; and I am satisfied also that the defendant has violated that stipulation. 1869. Jones v. Wooley.

But, six months before filing his bill, the plaintiff sold out the business to one *Francis C. Cline*, and agreed not to go into a like business in Kingston again as long as the purchaser should remain in the business. *Cline* is not a party to the suit, and it is not suggested that the suit is carried on in his behalf, or in fulfilment of any liability entered into by the plaintiff on the sale to him. The plaintiff's interest in the relief he seeks was referred to the right he may have of resuming the business on the death of *Cline*, or on the business being voluntarily discontinued by him.

Now the contract between the plaintiff and defendant may continue binding notwithstanding the sale to *Cline* (*a*). But after such a sale, is there a remedy in equity? In *Pigley* v. *The G. W. R. Co.* (*b*), the defendants had leased to the plaintiff certain buildings at one of their stations, to be used as refreshment rooms, and the company covenanted that their trains should stop at this station for ten minutes for the refreshment of passengers. The plaintiff afterwards made a sub-lease to one *Griffith*, and covenanted to enforce for his benefit the company's covenants; and it was held that the right of the plaintiff to maintain a suit for an injunction depended on the question whether he was under liability to the sub-lessee to institute the suit, and that unless he could make out such a liability he was not entitled to an injunction; the Lord Chancellor observing: "It is quite clear that, as far as relates to the plaintiff's interest in the lease, he has no *locus standi*, for the damage complained of by the bill is immediate damage to a business which he is

Judgment.

(*a*) Elves v. Scott, 10 C. B. 241; Kerr on Injunctions 509, 510.
(*b*) 2 Ph. 44, 49.

1869.

Jones v. Wooley.

not carrying on" (*a*). On the same principle, the court refuses an injunction to restrain breaches of contract at the suit of a person entitled to property in remainder, unless material damage to him is shewn (*b*).

These authorities shew that the plaintiff has not now such an interest in this contract as entitles him to an injunction, and that his only remedy (if any) is at law. I must therefore dismiss his bill; but, as my opinion is with him on the issues of fact, there will be no costs.

CAMPBELL v. BELFOUR.

Setting aside for want of consideration.

Where a debtor died owing more than he had the means of paying, and a month afterwards his mother, who wished to pay all his debts, was induced to give her promissory note to one of the creditors for an amount which was less than one-eighth the value of her property, it was *held* that, in the absence of fraud, the note, though given without professional or other advice, could not be impeached in equity.

Hearing at Kingston Spring sittings, 1869.

Mr. *Walkem* and Mr. *George Kirkpatrick*, for the plaintiffs.

Mr. *James McLennan* and Mr. *George McDonnell*, for the defendants.

Judgment.

MOWAT, V. C.—The bill in this cause was filed on the 13th May, 1867, by *Bethina Nesbitt Campbell*, who died on the 1st August, following. The suit has been revived by her heirs.

(*a*) See also Thorne v. the Towvale Railway and Dock Co., 13 Beav. 10, 21.

(*b*) Johnstone v. Hall, 2 K. & J. 423.

1869.

Campbell v. Belfour.

Mrs. *Campbell* was a widow; and very old, upwards of ninety; and though she had, no doubt, failed considerably, as compared with what she had once been, yet she was still wonderfully vigorous, in both mind and body, for her age. She had lived with her son *Andrew Donaldson Campbell* for many years before his death, on a valuable farm of 150 acres, 50 acres belonging to her, and 100 to the son. He died on the 7th August, 1864, unmarried, leaving a will bearing date 6th January, 1857, whereby he gave to his mother all his real and personal property charged with his debts; but omitting to name an executor. He was considerably in debt at the time of his death; owed somewhat more than he had the means of paying; and suits against him were pending in the Division Court. Mrs. *Campbell*, immediately after his death, applied herself to pay his debts; and some of them she seems to have paid in money, and others in chattels and property which the creditors accepted from her. On the 10th September, she was induced to give to the defendants her promissory note at three days for $200.16, with interest, being the amount due to them by her son for a shop account. On the same day, she gave over to them in part payment of this sum, chattels of her son to the amount of $62, leaving a balance of $138.16, for which she was responsible under her promissory note. On the 22nd September, she gave the defendants a confession of judgment for this balance. On the 24th September, they entered up judgment on the confession, and put a *fi. fa.* goods into the sheriff's hands. This writ having been returned *nulla bona*, a writ against lands was on the 17th October, delivered to the sheriff. On the 21st April, 1866, the sheriff sold Mrs. *Campbell's* fifty acres under this writ, the defendants being the purchasers at the sum of $560; and on the 27th April, the sheriff conveyed to them the property. The object of the suit is, to set aside the note, confession, sale, and deed, as void.

Judgment.

1869.

Campbell v. Belfour.

The principal ground on which the case for this relief is rested in the bill is, that Mrs. *Campbell* did not understand the note and confession when she signed them; that she had no knowledge of their nature or effect; that she was in such a state of mental incapacity by reason of her age and infirmity, and of grief for the loss of her son, as to be incapable of understanding the nature, object and effect of either document; and that had she understood the same, she would not have signed or executed the documents. But these allegations have not been established by the evidence. It is proved that she was anxious to pay all her son's debts; and I am satisfied that she was quite competent, without assistance, to understand the note, and that she did understand it. I think that the plaintiffs' own evidence justifies this conclusion. As to the confession, she had the protection which the law in this country requires in the case of such an instrument. Mr. *Thomas Kirkpatrick*, a gentleman of long professional experience, and of the highest integrity, acted as her attorney for this purpose; and his firm are her solicitors in this suit. He states that he explained to her the nature of the confession, and that she seemed to him to understand it; and, accordingly, he permitted her to execute it, and he signed his name to it as her attorney. The rule at law (*a*) requires, that there shall be present some attorney on behalf of any person signing a confession, specially named by him, and attending at his request to inform him of the nature and effect of the instrument before the same is executed. Mr. *Kirkpatrick* was familiar with the letter and purpose of this rule, and satisfied himself at the time of all the particulars which were necessary. The chief argument of the plaintiffs' counsel on this part of the case was, that Mrs. *Campbell* was under the false notion that she was liable for the debt; and that Mr. *Kirkpatrick*, being ignorant of the facts bearing on this point, was not in a condition to advise her.

Judgment.

(*a*) No. 26, Trin. 1856.

1869.

Campbell v. Belfour.

This alleged error of hers is not averred in the bill, which was prepared in Mrs. *Campbell's* lifetime, and, as I should presume, under her instructions; but the argument of counsel at the hearing was rested to a large extent on this alleged error; and he relied on *Coward* v. *Hughes* (*a*) as entitling the plaintiffs to a decree. That like the present, was the case of a promissory note obtained by a creditor from a widow. The debt was her husband's, who had died nine days before the creditor induced her to give the note. The husband had died intestate and insolvent; and no one had administered to his estate. The widow had no separate estate, but appears to have had a policy of insurance for £1000, which would be payable in three months. The note was for £400; and it was set aside as obtained by surprise, and under a false belief that she was liable for the debt on a note which she had previously signed jointly with her husband. But the court had the positive allegation and oath of the plaintiff, that she did not know she was not liable on that note; and the court was satisfied from the defendant's own evidence, that the fact was as the plaintiff alleged. But here I have neither the allegation nor the proof on which the court in that case proceeded. The mere giving of the note would not justify me in inferring that Mrs. *Campbell* gave it under the supposition that she was already liable for the debt; and there was no other evidence from which I could draw that conclusion.

Judgment.

The bill further alleges, that Mrs. *Campbell* was under the influence and control of the defendant *Gabriel Belfour;* and that the impeached documents were obtained by the undue exercise of his influence. But there was no confidential relation between them; and there was no proof that she was otherwise under his influence.

(*a*) 1 K. & J. 442.

1869.

Campbell v. Belfour.

Apart from these grounds, it was insisted, that the giving of the note to the defendants was a gift to them, and that the note can only be sustained by the same evidence of due advice and deliberation as is necessary in equity to sustain a gift. But it is to be remembered, that the doctrine thus invoked does not apply to the gift of a trifling part of a person's means, or to a liability which involves but a trifling part of them. In *Rhodes* v. *Bates* (*a*) the court upheld a transaction by which a young lady with a fortune somewhat less than £4000 became surety for her brother-in-law for the sum of £221, though there was no proof of independent advice; and I took occasion in *McConnell* v. *McConnell* (*b*), to intimate an opinion, that a larger gift, in proportion to the donor's means, might be sustainable where the donee, though in a position of influence, was the donor's son, than where they occupied towards one another no such relation: while I stated, and I am still of opinion, that, in such a case, a gift of the whole of the father's means, if large, could not be upheld without clear proof, not only of the fact of the gift, but also, of due deliberation, explanation and advice.

Judgment.

Now, $138.16 was the amount for which, in effect, Mrs. *Campbell* made her private property liable. The land which at the same time she owned, was worth $2000, according to the bill; from $1500 to $1800, according to the plaintiffs' witnesses; and from $800 to $1200, according to the varying testimony of the witnesses called for the defence. I think the real value was probably not less than $1200; so that the liability she assumed was not much more than one-ninth of her means. There were mortgages of *Andrew's* on the whole 150 acres; but the 100 acres which belonged to *Andrew* were sufficient to pay the mortgages, and were

(*a*) Law R. 1 Ch. App. 257. (*b*) 15 Gr. 25.

1869.

Campbell v. Belfour.

shortly afterwards sold by Mrs. *Campbell* for a trifle over what was due on them. If, therefore, I am to treat the note as a gift, it was a gift of a small proportion of her means, by a mother, to pay a creditor of her deceased son; and, such being the case,—in the absence of fraud, of which there is no evidence and which I cannot assume unless proved,—I do not find any warrant for holding the defendants bound to prove more than the fact that Mrs. *Campbell* did assume the liability. I may add that various transactions of Mrs. *Campbell's* in settling with her son's other creditors, and disposing of his property, are referred to in the evidence, and none of them appears open to the charge of improvidence. A considerable amount of caution and shrewdness, remarkable at her age, would rather seem from the evidence to have marked her conduct in most of the transactions.

Judgment.

If the note and confession could not be successfully impeached, it was not suggested that the sheriff's sale, or the defendants' purchase, was open to objection. It is extremely unlikely, and I do not suppose, that the acquisition of the property for so small a price, was designed by the defendants, when they procured the note or confession. Their purpose was to secure their debt; and, but for some oversight of a professional gentleman who had agreed with Mrs. *Campbell* to purchase at the sale on terms agreed on between them, or but for the misapprehension of the agent whom this gentleman employed to attend on his behalf, the sale to the defendants at so small a sum would not have occurred. It was, no doubt, the disaster of this sale that led to the bill; and otherwise I do not imagine any counsel would have advised the suit; yet, confessedly, the disaster itself, though it has occasioned the suit, does not afford a ground on which, consistently with settled rules, relief can be sought.

1869.

Campbell v. Delfour.

Baker v. *Monk* (*a*) was referred to in support of the bill. That was the case of a purchase from a woman not so old as Mrs. *Campbell*, but illiterate,—which Mrs. *Campbell* was not; of a much humbler station in life—Mrs. *Campbell* was the widow of a writer to the signet in Edinburgh; and infirm and incapable, to a degree which the evidence does not warrant me in predicating of Mrs. *Campbell*. The inequality between the parties in the case cited was far greater than in the case before me; and there is the further prominent distinction, that the purchase in the former case was of the whole of the old woman's property at an undervalue, while the liability which Mrs. *Campbell* assumed was to an amount which constituted but a fraction of the value of her property.

Judgment.

While I am thus obliged to hold, that the plaintiffs have failed to impeach successfully the defendants' title, I must say that the defendants were rather hard and sharp towards this old lady, in getting from her the note, as well as in their subsequent proceedings, and finally in insisting on their purchase at the sheriff's sale. They have, by these means, got her property for little more than one-third of its value, and have, at the same time, secured their debt which otherwise they might have lost; while she and her heirs, through her honorable desire to pay the defendants this trifling debt of her son's, have lost a property worth several times the amount which she was to pay. Under these circumstances I think it right to leave the defendants to pay their own costs; and I dismiss the bill without costs.

(*a*) 33 B. 419.

1869.

CAMPBELL v. BELL.

Advances to executors—Infants.

A widow and children were entitled under a will to support out of the testator's property, and goods were supplied for this purpose to the executors:

Held, that the creditor who advanced the goods had no charge against the estate, but must proceed against the executors personally.

This was an appeal from an order of the county court of Ontario, over-ruling a demurrer to the plaintiff's bill.

The bill alleged, in effect, that *Henry Bell* made a will appointing his widow and the other defendants, respectively, his executrix and executors, and devising and bequeathing to them certain real and personal property, upon trust to use and employ the same, among other things, to and for the maintenance and support of his widow and children; that he died on the 24th of November, 1866; that the defendants proved his will; that the widow, as such executrix, and for and on behalf of herself and her co-executors, and in the exercise of the said trusts, contracted for and purchased from the plaintiffs divers goods which were necessary for the support of the widow and children, and were used for that purpose; that the plaintiffs sold and delivered the same to the defendants as such executrix and executors, for such use and purpose; that the defendants, though repeatedly applied to for payment, had not paid for the said goods; and that they had in their hands property and money, which they held on the said trusts, and which were more than sufficient to pay the plaintiffs. Statement.

The prayer was, that the defendants should pay the plaintiffs for the goods out of the money in their hands as executors; and in the event of their not having sufficient, that the plaintiffs' debt might be declared a lien on the testator's real and personal estate, or on the

1869. widow's interest therein, and that provision should be made for its payment out of the same; and for other relief.

Campbell v. Bell.

The demurrer was for want of equity.

Mr. Roaf, Q. C., for the appeal.

Mr. *Fitzgerald*, contra.

MOWAT, V. C.—I think that the demurrer should have been allowed.

Executors are personally liable on the contracts they make in the execution of their duty, and the estate is not liable on them. No case was cited in which creditors, in respect of such contracts, had got relief in equity against the estate. The case of *Marlow* v. *Whitfield* (*a*) was referred to, in which the court treated advances of money to a minor for necessaries, as creating a binding debt on the minor, to the same extent as a sale of the necessaries themselves would have been. The case of *Glass* v. *Munsen* (*b*) was also mentioned, in which I held that a plaintiff who, at the request of the mother and natural guardian of infant heirs, had advanced money to pay debts of their ancestor in order to save the costs of suits therefor, stood in equity in the place of the creditors whose debts he had thus paid. But the advances in the present case were not to the minors; nor were they made to creditors of their ancestor, entitled at law to seize the minors' property, and in that way to enforce payment at the expense of the minors. On the contrary, the bill alleges the advances to have been made to the executors themselves. If a man buys goods or borrows money to pay off a mortgage, that does not give his creditor a lien on the mortgage or the mortgaged property:

Judgment.

(*a*) 1 P. W. 558. (*b*) 12 Grant 77.

the purpose of the purchase or loan is immaterial. The creditor has his personal remedy at law against the debtor; and the use to which the latter applied, or intended to apply, the goods or money, does not extend the creditor's remedy. This familiar principle is the rule both of this court and at law, and applies to executors as well as to others. Thus, in the case of an intestacy, a solicitor has no charge on the estate, but only against the administrator, for his costs in obtaining letters of administration (*a*).

The demurrer should have been allowed with costs.

No costs of the appeal.

HARRIS v. MEYERS.

Practice—Revivor, order to discharge.

Where, after a defendant's lands were seized under a writ of sequestration, the defendant died intestate, it was *held* that his widow was not a proper party to the order to revive.

A motion to discharge an order to revive cannot, without leave of the court, be made after fourteen days from the service of the order; and mere service of notice within the fourteen days is not a sufficient compliance with the General Order 339.

The notice of motion in such a case need not set forth the previous proceedings

Statement.

This was a motion on behalf of *Sophia Meyers*, widow of *Elijah W. Meyers*, to discharge an order for revivor, so far as the same affected her. The plaintiff had obtained a writ of sequestration against *Elijah W. Meyers* in his life time, under which certain lands were seized. He afterwards died intestate, and the plaintiff's order of revivor was against his co-heirs and widow.

(*a*) See Tanner v. Carter, 2 Jur. N. S. 413.

1869.

Harris v. Meyers.

Mr. *Bain*, for the widow, moved to discharge this order. On the motion coming on before Vice Chancellor *Mowat*,

Mr. *Hodgins*, for plaintiff, objected (1) that the motion was too late, fourteen days after the service of the order having expired, though the notice of motion had been given within the fourteen days. He also objected (2) that the notice of motion was defective in not setting out the previous proceedings, &c.

Reference was made to the Consolidated Orders, 83, 211, 252, 253, 324, 329, 339, and to *Jackson* v. *Gardner* (*a*).

The motion was argued subject to these objections.

Judgment.

MOWAT, V. C., thought that, consistently with *Re Miller* (*b*) followed by *Jackson* v. *Gardner*, he could not hold that notice within the fourteen days was all that 339 of the Consolidated Orders required. The court had power to allow the application to be made after the expiration of the fourteen days, but leave for this purpose must be obtained, which had not been done here.

His Honor was against the plaintiff as to the form of the notice; and was of opinion that, as the widow's title as dowress was paramount to the plaintiff's interest under the sequestration, the widow was not a proper party to the order of revivor.

On the Vice Chancellor's expressing these views at the close of the argument, the widow, with the consent of the plaintiff, took an order discharging the order to revive as against her, without costs.

(*a*) 15 Gr. 425. (*b*) 12 Gr. 72.

SANDERSON v. BURDETT. 1869.

Pleading— Vendor and purchaser—Time of essence—Lien—Purchase by two in name of one.

Where the locatee of the Crown assigned his interest absolutely, and the purchaser gave his bond for the purchase money, payable if the title should prove good, it was *held*, that a bill was wrong in treating the transaction as a contract and praying specific performance; and that the bill must be amended and a lien prayed, in order to entitle the vendor to relief.

Where lands which have a fluctuating value are the subject of a contract, time is, from the nature of the case, of the essence of the contract.

Land was sold for $400, and the purchasers bound themselves that, in case of gold being found on the land in paying quantities, a joint stock company should be formed and incorporated for working the same; and that the grantor should in that case, in addition to the $400, have $600 in paid-up shares of the capital of the company. No company was formed; and it was *held*, that this contingent agreement did not prevent the grantees from defending themselves, to the extent of their interest, as purchasers for value without notice.

A vendor who has conveyed without receiving the purchase money, is entitled against the vendee to a decree for the sale of the property and payment of any deficiency.

Where a purchase is made by one in his own name, but on the joint behalf of himself and another, the decree for payment of the purchase money may be against both.

Where a purchase was completed, conveyance executed, and purchase money paid without notice of an outstanding equity, but a bill claiming it was afterwards filed and *lis pendens* registered, before registration of the purchasers' deed:

Held, that they did not thereby lose their defence as purchasers for value without notice.

Statement.

The plaintiff contracted for the purchase from government of the north half of 31, in the 7th concession, and lot number 32 in the 4th concession, of Madoc, and paid part of the purchase money, previous to the 1st April, 1867. On or about that day he assigned his interest in these lands to the defendant *Burdett* by two

1869. Sanderson v. Burdett.

deeds; one, bearing date the 1st April, conveying lot 32; and the other, bearing date the 3rd April, conveying the north half of lot 31. The defendant, *Donald Cameron*, was a witness to both deeds, and the bill stated him to be a joint purchaser of the properties though the assignments were to *Burdett* alone. Two instruments of corresponding dates, not under seal, were signed by *Burdett*. By one of them he bound himself to pay to the plaintiff $1250 for lot 32, subject to the following conditions: that the plaintiff had a good and indefeasible right and title to the lot; that the money was to be payable as soon as *Burdett* should be satisfied that the plaintiff had such title; that the lot contained 140 acres; and that if it contained less, there should be a corresponding diminution of the amount to be paid. By the other instrument *Burdett* bound himself to pay $1250 for the other lot, subject to the condition that the plaintiff had the title in fee simple, and the right to convey the same to *Burdett*. The plaintiff appeared to have been a man of little education, and the papers were drawn by the other parties. The plaintiff had no legal or other adviser in the matter. *Burdett* was a law-student. The defendants had the assignments recorded in the Crown Lands Office. On the 25th April, *Burdett* executed an assignment of both lots to *Cameron*, which was recorded in May. On the 18th May, the patent for lot 31 was issued. The defendants declined to take a patent for lot 32 until the quantity should be ascertained. The government surveyor, it appeared, completed his survey of this and some adjoining lots on the 8th June, but did not complete his report thereon until the 16th August. On the 20th November, *Cameron* conveyed lot number 31 to *Lawrence Heyden*, junr. and *Daniel McCarthy Defoe*, who were not made parties until after the first hearing of the cause. On the 23rd December, 1867, *Cameron* re-assigned lot 32 to *Burdett*. On the 9th September, 1868, the plaintiff filed his bill against *Burdett* and *Cameron*, treating his transactions

Statement.

with them as resting in contract, and praying, amongst other things, that the contracts should be specifically performed, the lands sold in default of payment of the amount due, and that the defendants should be ordered to pay any deficiency.

1869.
Sanderson v. Burdett.

The cause came on to be heard before Vice-Chancellor *Spragge*, at the sittings of the court at Belleville, in the spring of 1868.

Mr. *Hodgins* and Mr. *A. R. Dougall*, for the plaintiff.

Mr. *McMichael*, for the defendant *Cameron*.

Mr. *Ferguson*, for the defendant *Burdett*.

SPRAGGE, V. C.—Since the case was before me at Belleville, I have carefully read over the evidence, and correspondence and other documents.

There is one point upon which the defendants themselves differ, viz: whether the contracts entered into by *Burdett* with the plaintiff were entered into on his own behalf only, or on behalf of himself and the defendant *Cameron*. *Burdett*, who was called by the plaintiff, establishes clearly that it was a joint purchase by *Cameron* and himself; and the conduct and letters of *Cameron* lead to the same conclusion. Judgment.

The purchases were of land in Madoc: the contracts being dated, the one the 1st of April, the other the 5th of April, 1867. Lands in that township having, at the time these contracts were entered into, acquired a speculative value, altogether beyond their value for farming purposes, upon the supposition that gold was to be found there, they had a market value which was extremely fluctuating, and the defendants purchased, and I have no doubt that the plaintiff believed they purchased, in order to make a profit upon a re-sale, not with any idea of mining themselves.

1869.

Sanderson v. Burdett.

The defendants set up, that representations were made by the plaintiff as to the character of the land, and also as to his title. I do not think there is anything in the former. The plaintiff did not profess to have ascertained, by inspection or otherwise, that the land he was selling contained gold or any indications of gold. It was land in what was generally believed to be, and which may actually be, a gold bearing region, and nothing more.

As to his title, *Burdett* knew that the plaintiff had not the patent; but he says the plaintiff told him that he was entitled to it: that he had paid the whole purchase money to the Crown. However this may be, it is clear that *Burdett* was informed by letter from his agent of the 3rd of April, of the amount due upon lot 31, and that there was a difficulty as to lot 32, arising from a doubt as to the existence of such a lot in the township.

Judgment.

The assignments from the plaintiff to *Burdett* were promptly registered by the defendants' agent, who by his letter of the 5th of April informed *Burdett* of this being done.

I said at the hearing, and repeat now, that in contracts for the sale of lands of a fluctuating value, as was emphatically the case in regard to these lands, time is, from the nature of the thing dealt in, of the essence of the contract. It is in the highest degree essential to the purchaser that he should be in a position to place his lands in the market at any time, and if his position was prejudiced in this respect, by his title not being what the vendor represented it to be, the vendor could not have specific performance in this court.

I will consider the case first in relation to lot 31. Taking the plaintiff's representation to have been that the purchase money due the Crown had been all paid,

could it, or did it, create any real difficulty? There was in fact a considerable amount of purchase money due to the Crown, but still very much less than the sum to be paid by the defendants on their purchase, and that was payable presently. 1869. Sanderson v. Burdett.

The right of the purchasers clearly was to apply so much of the purchase money as was necessary, to pay off the arrears due to the Crown. It is in substance the same as if a purchase were made of land upon which there was an incumbrance less in amount than the purchase money. In such case it is not a question of title, but the purchaser exercises his right to apply so much of the purchase money otherwise payable to the vendor as is necessary to remove the incumbrance.

If, however, the existence of an incumbrance in the shape of unpaid purchase money, or of any other incumbrance, prevent a purchaser from dealing with lands of fluctuating value as freely as if it had not existed, the representation that there was no unpaid money, or that there was no incumbrance, would be material. It is only where it is a mere question of the application of purchase money, and where no delay is occasioned thereby; and no obstacle thereby created to the purchaser dealing with the lands, as he might have dealt with them, if the representation were literally true, that the representation can be held to be immaterial. Judgment.

So far as to the position of the parties, apart from any conduct of the purchaser, after discovering that the vendor was not entitled to a patent at the time that he represented that he was so entitled. He may by his conduct have waived his right to repudiate the contract. If he continued to act upon it as a subsisting contract, to derive, or to attempt to derive a benefit from it, to continue to assume the character of a purchaser, he cannot now say that the contract was then at an end,

1869.

Sanderson v. Burdett.

and the question will be how long this continued. It was in the power of the purchaser so to act, and the vendor could not gainsay it. The purchaser may have had the right all this time to repudiate the contract, but if instead of doing so, he acted upon it as still subsisting, he is bound by his conduct.

There is a good deal of correspondence between *Burdett* and his agents at Ottawa in regard to the patent; *Burdett* pressing for its issue, and exhibiting impatience at obstacles that occurred in its way—among others a *caveat* filed by the plaintiff. The money to pay the government was advanced chiefly, if not wholly, by *Cameron*, and on the 25th April *Burdett* assigned lot 31 to *Cameron*. This was an unequivocal act of ownership. *Burdett* continued pressing for the patent to issue; one of his letters to his Ottawa agent written with that purpose was as late as the 8th of May, and the patent issued on the 11th.

Judgment.

All this time the plaintiff had received only $30: the purchase money of each parcel of land being $1250. He proposed at one time, through a friend, a cancellation of the whole bargain, and to this *Burdett* gave an apparent assent, but upon terms which it was hardly to be expected that the plaintiff should agree to. *Cameron* states in his answer that he has conveyed lot 31 to some third persons, two of whom he names, and that he has re-conveyed lot 32 to *Burdett*.

As to lot 31, I should think the plaintiff's case made out and established, and that the defences raised by the answers fail. But there is this difficulty in the case. The bill is filed for specific performance, assuming that the matter still rested in contract. The pleadings on both sides have been framed, and witnesses were examined and other evidence adduced upon that presumption. But, upon looking at the documents upon which

1869.

Sanderson v. Burdett.

the plaintiff's case is founded, they appear to me to be, not contracts for the conveyance of land upon payment of the purchase money, but absolute assignments of all the estates of the plaintiff in the parcels named, upon a consideration of $1,200 expressed to be received; and in a separate instrument *Burdett* binds himself to pay the purchase money. These instruments were appropriate conveyances for passing the estate of the vendor, *i. e.*, the equitable estate of a purchaser from the Crown, and would, I apprehend, be effectual to pass the legal estate in the event of the patent having issued. If this be so the whole of the proceedings have been conducted under a misconception, as I suppose, of the true position of the parties. At the hearing the objection was taken by Mr. *McMichael* for *Cameron*, followed by Mr. *Ferguson* for *Burdett*, and then for the first time.

Judgment.

Counsel for the plaintiff suggest that I may properly permit an amendment converting this bill into a bill for enforcing a vendor's lien. Assuming that this might properly be done, some questions would arise which have not been mooted before me. The primary remedy upon such a bill is a sale of the premises upon which the lien exists. If this bill were converted into a bill for a lien, *Cameron* should be allowed to prove his sale of lot 31; at any rate no sale should be made without purchasers from *Cameron* being made parties, and if they are innocent purchasers without notice the lien would not attach upon the lands in their hands. Then as to personal remedy;—it seems agreed on all hands that the present market value of the lands is very much less than the consideration money to be paid, is there a personal remedy for any deficiency upon a re-sale, or if by reason of a sale by *Cameron* to innocent purchasers the land, lot 31, cannot be reached, is there a personal remedy for the whole consideration money, and, if so, in what court, in a court of equity or of common law, and against whom, against *Burdett* only, or against him and *Cameron* also?

1869.

Sanderson v. Burdett.

The parties, the plaintiff at all events, came to a hearing treating the whole matter as still in *fieri*, and prepared to discuss it only in that view, and they were assisted in that error by the answers of the defendants. Supposing an amendment now made as proposed, I am not prepared to make a personal order, nor, without inquiry as to the alleged sale by *Cameron*, any order for sale. The points that I have suggested must be discussed if the plaintiff retains his bill in this court.

As to lot 32, most of the remarks I have made will apply to it, and I may add that if the matter were still in *fieri*, I am by no means clear, considering the nature of the property and the obstacle in the way of a patent being issued, that it would be a proper case for specific performance. It did not appear even at the hearing that that obstacle had been removed.

Judgment.

It seems to me very clear that the vendor has been very ill-used by both the defendants. Considering that, and the frame of their answers, I should not in any event give them their costs.

The bill was amended accordingly, and put into the form suggested. Messrs. *Heyden* and *Defoe* were made defendants. They answered the bill, claiming to be purchasers for value without notice, and a replication having been filed, the cause came on before Vice-Chancellor *Mowat*, at the sittings of the court at Belleville, in the spring of 1869.

Mr. *Hodgins*, for the plaintiff.

Mr. *Fitzgerald*, for *Heyden* and *Defoe*.

Mr. *Ferguson*, for *Cameron* and *Burdett*.

1869.

Sanderson v. Burdett.

MOWAT, V. C.—The first question which I have to decide is as to the defence of the new defendants. They had no notice of the plaintiff's claim, but counsel for the plaintiff contended, that they were bound by the registration of *lis pendens* on the 31st December, 1867, their deed not having been registered until the 16th January following. But their deed was executed, and their purchase money paid, on the 20th November, 1867; and registration before notice was not necessary to entitle them to set up this defence.

Then it was argued that the transaction is incomplete, and the defence therefore unavailable. The bond from which this inference is drawn, and which bears date 21st November, 1861, is a bond from *Heyden* and *Defoe* to *Cameron*; and the condition recites the purchase of the lots from *Cameron* at and for the price or sum of $400, and then proceeds thus: "And whereas it was the agreement between all the said parties, that a reliable and skilful person should be sent to examine and explore the said lot for gold, and that in the event of his reporting sufficient indications of its presence therein in quantities to warrant the expenditure of capital in mining therefor, that then the above named should proceed and form a joint stock company limited, and cause the same to be incorporated, for the purpose of mining for gold on the said lot; and that on the formation of the said company, the said parties above named should cause to be assigned or allotted to the said *Cameron* shares to the par value of $600, free of all charges therefor, entirely paid up, and free from all assessments or calls: *Now know ye* that, on formation of the company above mentioned, if the said obligors shall assign, or cause to be assigned or allotted, shares to the value of $600 in the paid up capital of the said company, to the said *Donald Cameron*, his executors or administrators, or assigns, then this obligation to be void." A skilful man was sent to examine and explore

Judgment.

1869.

Sanderson v. Burdett.

the lot, and his report was a favourable one; but no company has been formed as the parties contemplated, and probably no company can or will be formed, as the gold excitement has gone down, and the prospect of profitable mining in Madoc at any early period is not promising. It is to be observed, that in one event nothing beyond the $400 was to be received by *Cameron* for the property, and in the other event he was to have an interest in the property in the shape of shares in the company formed for mining on it; that the purchase money which *Heyden* and *Defoe* were to pay was in no event to exceed the $400; but that, instead of having the whole interest in the property, they were in the contingency named to have a partial interest only. I see nothing in this arrangement which disentitles them to set up the defence of purchasers for value. Such a defence is open to the purchasers of any interest in land, and not merely to purchasers of an absolute fee simple.

Judgment.

I think that the bill must be dismissed against these two defendants, with costs to be paid by *Cameron*, as he wrongfully made the sale before he had paid the plaintiff his purchase money, without giving notice of the plaintiff's interest to the vendees.

As to the plaintiff's case against *Burdett* and *Cameron*, my brother *Spragge* was of opinion at the former hearing, that their defences failed, and I see no good reason for coming to a different conclusion. My brother expressed doubt as to the form and extent of the decree to which the plaintiff was entitled, and required that these should be discussed, if the plaintiff retained his bill. They were accordingly discussed on the hearing before me, and I have given to them my best consideration.

I think the plaintiff entitled to a sale of lot number 32, subject to the money due to the government thereon —which must first be ascertained, and is to be deducted from the purchase money payable to the plaintiff. The

plaintiff is also entitled to a sale of *Cameron's* contingent interest in lot 31.

1869.

Sanderson v. Burdett.

I think that the plaintiff is entitled to a personal decree against the defendants for payment of any deficiency. This matter of a personal decree is one of those on which the learned Vice Chancellor desired further discussion; and the defendants have failed to discover and cite any authority in their favour on the point. In *Adams's* Equity (*a*), speaking of the vendor's lien for unpaid purchase money it is said that, "it is treated as a security in the nature of a mortgage; and the remedy under it is by suing in equity to have the estate re-sold, and the deficiency, if any, made good by the defendant." That, I apprehend, is a correct statement of the rule; it would be contrary to all analogy to hold that after giving partial relief to the plaintiff by selling the property, equity should send him to law to recover the balance of his debt. I may add, that, from the peculiar terms of the two documents signed by *Burdett*, there might be found insuperable technical difficulty in recovering at law—which would be another reason for giving complete relief here.

Judgment.

I think that the order for payment must be against *Cameron* as well as *Burdett*. The learned Vice Chancellor held at the former hearing, that the purchase from the plaintiff was a joint one, though in the name of *Burdett* only; and joint liability follows from this, on the same principle that a principal, even an undisclosed principal, is liable on the contract of his agent.

After reading the correspondence put in, I must say that the conduct of the defendants towards the plaintiff was entirely indefensible. They complain indeed of his having filed a *caveat* to prevent their obtaining the

(*a*) p. 128.

1869.

Sanderson v. Burdett.

patents, but he only did that because they would not pay him the purchase money, and the danger there was in allowing the patents to go without his being paid, is shewn by the transaction with *Heyden* and *Defoe*. I must give the plaintiff the costs of the suit.

The decree will also direct the proper accounts to be taken. I observe that there are some other defendants to the amended bill, but I understand that the plaintiff has dismissed his bill as against them under some mutual agreement.

SMITH v. THE SCHOOL TRUSTEES OF BELLEVILLE.

School trustees—Principal and agent—Indemnity.

A school trustee, by desire of the board, attended an auction, and bought for the board a piece of property for a school-site, and he signed the contract with his own name only. The board afterwards by several resolutions, during three years, unanimously recognized the purchase as their own, and paid three instalments of the purchase money. In an estimate under the corporate seal, the board applied to the town Council for money to pay "for school premises for a central school, contracted for and agreed to be paid, $1,570; for building a central school-house on said purchased premises, $7,870." It was shewn that there was no other property or contract to which this language could refer than the property or contract mentioned. The town council did not comply with the requisition, and ultimately trustees were elected a majority of whom determined to repudiate the purchase:

Held,—in a suit against the board, by the person in whose name the purchase had been made, for indemnification in respect of the remainder of the purchase money,—that the plaintiff was entitled to relief.

Hearing at Belleville at the Spring sittings of 1869.

Mr. *Hodgins* and Mr. *A. R. Dougall*, for the plaintiff.

1869.

Smith v. School Trustees of Belleville.

Mr. *Blake*, Q. C., and Mr. *Holden*, for the School Trustees.

Mr. *Diamond*, for the defendant *Dickson*.

MOWAT, V. C.—On the 2nd of January, 1866, the school trustees of the town of Belleville, of whom the plaintiff was one, determined to purchase for a school site certain lots at the corner of John and Queen Streets, in Baldwin Ward, which were to be sold at auction on the 5th of the same month, by the defendant *George Dean Dickson*, as assignee of one *James Blacklock*, an insolvent. The purchase was decided upon unanimously at a board meeting, at which all the trustees were present; a maximum price was named; and the chairman was instructed to attend to the purchase. There is a dispute whether a formal resolution to this effect was put into writing and passed; the weight of evidence is, that there was such a written resolution; but it was not entered in the minute book; and the witnesses are agreed as to the reason of this. The trustees feared, that the chances of their intention to buy becoming known outside of the board would thereby be increased, and that, if their purpose should become known, persons interested in the insolvent's estate would bid up the property so as to increase the price which the board would have to pay. The terms of payment on which the sale proceeded were, one-fourth down, and the balance in three equal annual instalments with interest at seven per cent. The chairman, to carry out the purpose of the board, requested the plaintiff to attend the sale with him, and to make some bids on the property for the board, in order to avert the possible suspicion that might arise from the bids of the chairman alone. I have no doubt that an arrangement of this kind was within the spirit and meaning of the authority which the board had meant that the chairman should possess.

Judgment.

1869.

Smith v. School Trustees of Belleville.

The plaintiff agreed to do as the chairman requested, and he accordingly attended the sale; both the chairman and he made bids; and it was to the plaintiff that the property was knocked down, the price being $1,450. It is not suggested that this price was high; and the trustees at the time thought it cheap. On the 12th January, the chairman reported the purchase to the board, and an entry of it was made in the minute book. I have no doubt that all the trustees were aware from the first that the purchase had been made in the plaintiff's name.

The existing school house in Baldwin Ward was in a dilapidated condition, and it stood on land of which the board were mere tenants at sufferance. The board, having acquired the property in question, had to determine whether they would build upon it a ward school; or a central school, or superior kind of common school, for the whole town—a project which seems to have been under consideration previously. On the 16th May, the board adopted the report of a committee to the effect that, "it would be desirable to establish a central school, and to build a school house for such purpose on the lot lately purchased by the board on the corner of John and Queen Streets; and that plans and specifications be procured at as early a date as possible for said school house." A requisition seems accordingly to have been made on the town council for the funds necessary, but I do not find the document among the papers put in. The town council, it appears, was unwilling to raise the money; and, therefore, on the 6th August, the board passed the following resolution: "The corporation for the town of Belleville having failed to provide the means for the payment of a school site purchased by the board after requisition being made therefor, it is resolved that the board hereby authorize the chairman to take such steps as he may deem fit to enforce attention thereto by the corporation, by mandamus or otherwise; and that prompt measures be adopted." Mean-

Judgment.

while, viz: on the 14th August, the treasurer, by verbal instructions from the board, paid the vendor the first instalment of the purchase money, amounting then to $376.20 (a). 1869. Smith v. School Trustees of Belleville.

On the first of October a resolution was passed, "That the chairman be authorized to inform the council of the corporation of Belleville that the amount required by this board for the purchase of a school lot, and the erection of a suitable school house thereon, will be about $6000, but that only an instalment of $370 will be required this year, $4500 next year, and $570 for the next following years."

On the 20th May, 1867, the board passed the following resolution:—"That plans and specifications be procured for the building of a school house on the lot purchased from the assignee of the estate of *James Blacklock*; and that as soon as said plans and specifications have been adopted by this board, tenders shall be advertised for the building of the said school house, and an estimate of the requirements of the board for the purchase of the said lot, and of the building of the said school house, &c., be laid before the town council." Plans and specifications having been prepared accordingly, and discussed and amended, the board on the 26th July resolved: "That the plans and specifications of a central school building as amended be adopted; and that a requisition be made upon the corporation of the town of Belleville for the following sums, that is to say: * * *

Judgment.

For purchasing school premises..... $1570
For building a central school .... $7880"

In pursuance of this resolution, a requisition or estimate was prepared in pursuance of the Common School

(a) See Angell and Ames on Corporations, secs. 283, 284.

1869.

Smith v. School Trustees of Belleville.

Act, sec. 79, sub-sec. 11 (*a*), and was signed by the chairman and sealed with the corporate seal, calling upon the municipal council of the town to provide the sums mentioned in the resolution. These sums are described in one part of the estimate in the same way as in the resolution, and in another part as follows:

"For purchasing school premises for a central school contracted for and agreed to be paid $1570
For building a central school house on said purchased premises .... $7880"

Shortly afterwards, namely, on the 5th August, 1867, the board adopted a resolution to the effect "that tenders for the central school be advertised for at once;" and this was done.

Judgment.

The town council, however, continued adverse to the proposed expenditure, and did not provide the funds required. The building was, therefore, not proceeded with. On the 2nd December, 1867, the treasurer, by verbal directions from the board, paid the 2nd instalment of the purchase money, $362.50, out of the money in the hands of the board; and in the same month they called a meeting of the inhabitants to ascertain the public opinion on the subject of having a central school. This meeting was against the proposal; and the board then abandoned their project. The land, however, had to be paid for, and on the 6th January, 1868, the board passed the following resolution: "That whereas the corporation of the town of Belleville have failed to provide the money necessary to pay for the lot purchased for school purposes from the estate of *James Blacklock*, steps be taken at once to enforce payment of said claim, and that *A. R. Dougall*, Esq., be employed to conduct said suit." On 3rd February, 1868, the board resolved: "That the treasurer be instructed to pay the sum of

(*a*) Consol. U. C. 22 Vic. ch 64.

$413.25 out of any funds in his hands, the same being requested from the corporation of Belleville for school lot." This payment was made accordingly, being for the 3rd instalment of the purchase money and the costs of a suit which had been brought by the vendor against the plaintiff for that instalment.

A committee was now appointed to consider the propriety of disposing of the lot. This committee on the 21st July, 1868, made their report, declaring "that they did not recommend the sale of the said lot, but that it be retained by the board for future disposition." This report was adopted by the board by resolution the same day. The project then contemplated was the building of a ward school house on the lot; and on the 14th December, 1868, the board passed a resolution appointing a committee to confer with the town council, or with a committee thereof, "on the matter of a school lot in Baldwin Ward, and the finances in respect of the same."

Judgment.

On the 5th January, 1869, the last instalment of the purchase money being unpaid, the vendor commenced an action for it against the plaintiff. On the 11th of January, 1869, the board passed the following resolution: "That the secretary be directed to represent to the town council that the lot situate on John Street, immediately in rear of the grammar school, belongs to the board of common school trustees of the town of Belleville, and that the same has been improperly assessed to Mr. *James Smith* (the plaintiff), and that they be pleased to order the taxes assessed against Mr. *Smith* for the same to be remitted." But soon afterwards the board took a new view of the position of the corporation, and on the 29th January, by a majority of one, passed a resolution calling on the plaintiff to repay what the board had theretofore paid on the purchase, and threatening him with a suit therefor. That resolution

1869.

Smith v. School Trustees of Belleville.

was rescinded on the 3rd February. On the 8th February judgment was recovered in the suit against the plaintiff; and on the 1st and 16th March resolutions were passed by the board directing the sale of the property. The judgment remaining unpaid, the plaintiff on the 30th March filed the present bill, to which the defendants having put in answers, the cause came before me for hearing at Belleville on the 22nd May last.

Judgment.

The defence set up by the board is, that, there having been no contract under the seal of the board, and no authority under seal to the plaintiff to buy, the transaction is not binding on the board. It is not pretended that there was any interested motive or bad faith on the part of the plaintiff in entering into the contract, or any on the part of the trustees who have from time to time recognized the purchase. I have no reason to doubt that they all acted with a single view to the faithful discharge of their duty as trustees, and according to their best judgment as to what was for the interest of their constituents; but the present board have determined to wholly repudiate the purchase if they can, and to throw the possible loss either on the vendor or on the plaintiff personally, whose name was used in the purchase for the benefit of the board. No sort of argument was offered to maintain the justice of this course; but on behalf of the defendants it was contended that, technically, they had a right to take it in consequence of the absence of a seal. A more purely technical defence would be impossible, as all the proceedings had had for three years the unanimous concurrence of the trustees who from time to time composed the board; the resolutions manifesting such concurrence had been regularly passed at board meetings, and with a single exception which I have already mentioned, had been entered in the minute book, with the other proceedings of these meetings. The learned counsel for the plaintiff contended that no seal was necessary; and, having reference to decided cases

1869.

Smith v. School Trustees of Bellsville.

(*a*), and to the various enactments which define the powers and duties of school trustees, I am not at present prepared to decide that a seal is essential for the purpose of a suit of this kind. But, assuming the seal to be necessary, the requisition of the 26th July, 1867, which was under seal, seems to be sufficient. That document speaks of requiring so much money for "purchasing school premises for a central school, contracted for and agreed to be paid," and no other premises than those in question are pretended to have been under contract of purchase at this time; nor is it pretended that there was any contract as to these, except that which was in the plaintiff's name. There is also in the depositions ample direct evidence that these are the premises to which reference was made; and, indeed, the contrary was not argued. If a seal is indispensable, what has to be made out by a sealed instrument is, a recognition or ratification of the agency of the plaintiff in entering into the contract—not the full terms of the contract, for these appear in the paper which the plaintiff signed at the time of the purchase, and which clearly did not need a seal. Proof under seal of subsequent recognition or ratification is as effectual to bind the corporation as like proof of prior authority; and no proof of such recognition or ratification could well be more satisfactory than a reference by the corporation to the contract as their own (*b*). I do not perceive any

Judgment.

(*a*) Gillies v. Wood, 13 U. C. Q. B. 357; The Great Northern Railway Co. v. The Manchester, Sheffield and Lincolnshire Railway Co., 5 DeG. & S. 138; In re Athenæum Society, 4 K. & J. 549; Thorne v. Commissioners Public Works, 32 B. 49; Re The British Provident, &c., Assurance Society, 1 DeG. J. & Sm. 488; Bargate v. Shortridge, 5 H. L. 297; Fotherdell v. Fareham Brick Co., L. R. 1 C. P. 674; Buffalo and Lake Huron Railway Co. v. Whitehead, 7 Gr. 351; S. C. 8 *ib.* 157; Angell and Ames on Corporations, secs. 229, 231, 281.

(*b*) Smith v. Hull Glass Co., 11 C. B, 897; Reuter v. Electric Telegraph Co., 7 E. & B. 341; Wilson v. The West Hartlepool Railway Co., 34 Beav. 187; S. C. 2 DeG. J. & Sm. 475; Broom's Legal Maxims, 4th ed. 833, et seq.

1869.

Smith v. School Trustees of Belleville.

principle on which I could hold that more is necessary for the plaintiff's purpose than this instrument contains (*a*). I therefore hold that he has made out his right to a decree against the board for indemnification in respect of the purchase money and costs.

The bill prays that, in default of payment, the premises may be sold, and the proceeds applied to pay what is due *Dickson* and to indemnify the plaintiff. I think that a decree to that effect would have been proper, even had the plaintiff failed to satisfy me, that he was entitled to any other relief; for the board has made payments on the contract, and had a right to do so. The trustees were under no obligation to refuse to affix their corporate seal to the various resolutions which they had passed and then to refuse payment because there was no seal. Nor had the town council any right to say, that the money paid to the board should be devoted to the other items in the requisition. The law gives the town council no discretion as to the amount of money which the trustees demand, or as to the application of it. When the trustees paid to *Dickson* the three instalments out of money which they had in hand, they were under no mistake as to the facts, which would give them a right of action at law, and were committing no breach of trust which might give their successors a right to come here, to recover back the money. The vendor has a lien on the property for what remains due to him, and if the plaintiff is compelled to pay the money, that lien is transferred to him. In that view, a sale, to provide the means of paying, is of course. The balance, after indemnifying the plaintiff, must, in any event, go to the board, as no one else has any right to it.

Judgment.

The answer of the board sets up that the vendor's title is defective. There must be a reference as to title,

(*a*) Taylor on Evidence, 5th edition, sec. 1082, et seq.

1869.

Smith v. School Trustees of Belleville.

if these defendants desire it; and payment and sale ordered, only if the Master finds that a good title can be made. If *Dickson* desires an opportunity of shewing that, through any act of the board, they have no right to call on him now to shew a good title, an inquiry on that point must be directed. If a reference as to title is taken, the board must meantime pay the costs of the other parties up to the hearing; and subsequent costs will be reserved until after the Master makes his report. If the board does not desire a reference as to title, the decree will direct an account, payment, and sale, in the usual way, and the board will pay the whole costs of the other parties. I do not see that I can give the plaintiff an injunction against *Dickson*, for no case entitling him to an injunction is made against *Dickson* in the bill.

Stevenson v. Franklin.

Suit by creditors to set aside deeds for fraud—Return of fi. fa. pending suit.

A *fi. fa.* lands was placed in the hands of the sheriff, and, before the return day, the plaintiffs filed their bill in respect of property of the debtor fraudulently conveyed away. During the pendency of this suit the sheriff returned the writ "no lands," and the plaintiffs thereupon issued an *alias* writ and delivered it to the sheriff:

Held, that the plaintiffs had not thereby lost their right to proceed with the suit in equity.

A person being embarrassed made a deed of land to his son in alleged pursuance of a prior agreement, but he remained in possession of the property, and kept the deed in his own hands and unregistered, for fifteen months; and there were other circumstances against the good faith of the transaction: *Held*, that the deed was void as against subsequent creditors, the prior creditors having been paid.

Hearing at Belleville, Spring sittings, 1869.

1869.

Stevenson v. Franklin.

Mr. *Blake*, Q. C., and Mr. *Ponton*, for the plaintiffs.

Mr. *J. D. Armour*, for the defendants.

MOWAT, V. C.—On the 7th November, 1866, the plaintiffs recovered judgment for $2,290.06 damages, and $22.15 costs, against *Henry Squires* and *Bildad Franklin*. A *fi. fa.* against goods was issued on this judgment, and the sheriff returned thereto $200 made, and *nulla bona* for residue. On the 14th November, 1866, a *fi. fa.* against lands was issued; and on the 25th January following, the bill in this suit was filed against *Bildad Franklin* and his son *Washington L. Franklin*, praying, that a certain deed executed by *Bildad* to *Washington* should be declared fraudulent and void as against the plaintiffs, and that the land therein mentioned should be declared to be subject to the plaintiffs' execution, and for further relief.

Judgment.

An objection was made on the part of the defendants, that the *fi. fa.* lands mentioned in the bill had, since the filing of the bill, been returned "no lands;" that the plaintiffs had accepted this return, and issued successively *alias* and *pluries* writs; and that they had thereby lost the right which the bill was filed to enforce. The defendants have not set up this defence by supplemental answer; and if set up and adjudged valid, the only effect would be, to render it necessary for the plaintiffs to abandon the present suit and commence a new one. But I am not prepared to pronounce the objection valid. It certainly has no equity in it, and I am not aware of any authority supporting it. Filing a bill has been held to be equivalent to a seizure; and I understand the defendants' contention to be, that the proceedings in question amounted to an abandonment of such seizure. But abandonment was said by Mr. Justice *A. Wilson*, in *Hall* v. *Goslee* (*a*), to "be a matter of fact arising

(*a*) 15 U. C. C. P. 106.

very much from intention;" and that there was no intention to abandon the seizure here, is shewn by the continued prosecution of the suit. Again, in *Bull* v. *King* (*a*), the Court of Common pleas allowed an erroneous return of *nulla bona* to be amended though the confessed object of the amendment was to maintain or restore the priority of the writ over others which had subsequently been placed in the sheriff's hands; and there is no question in the present case between the plaintiffs and other execution creditors. I refer to *Jackson* v. *Hill* (*b*), and *Standish* v. *Ross* (*c*), and to the cases there cited, as to the effect of an erroneous return. On a bill like the present the practice of the court in giving relief is, not to act through the sheriff, but to sell through its other officers without further reference to the sheriff; and I think that, in the absence of any authority to the contrary, it may well be held that, the jurisdiction having attached by the filing of the bill, the suit may proceed notwithstanding a subsequent return by the sheriff of no lands and the issuing of *alias* writs thereon by the plaintiffs.

1869.

Stevenson v. Franklin.

Judgment.

I shall therefore consider the case on the merits. At the time that the greater part (and probably the whole) of the plaintiffs' debt was contracted, and for many years previously, the debtor *Bildad Franklin* was the registered and apparent owner of the property in question; and he was also, during the same period, in the actual occupation of it. Two years after becoming a debtor to the plaintiffs, viz., on the 9th March, 1866, he procured to be registered the deed in question, which bears date the 13th December, 1864, and purports to convey the property to his son, the defendant *Washington Lafayette Franklin*, who had left the country in 1862. The plaintiffs impeach this deed as

(*a*) 8 U. C. C. P. 474.

(*b*) 10 A. & E. 477.

(*c*) 3 Exch. 527, 533.

1869.

Stevenson v. Franklin.

having been made without consideration and to delay or defeat creditors, and they charge also that the deed was ante-dated. The evidence shews that the deed was signed and formally executed about the time it bears date, though it was not delivered to the grantee; and the defendants allege, that it was so executed in good faith, in discharge of a debt which the father had owed the son at the time the latter left the country, and in pursuance of a verbal agreement then made between them. But there was no evidence whatever of this debt or agreement except the evidence of the father, whose evidence was extremely unsatisfactory; and it has been remarked in other cases, that transactions of this kind ought not to be held sufficiently established by the single testimony of one of the parties (*a*).

Judgment.

Various circumstances bear strongly against the defendants with reference to this part of the case. It appears that in 1861, and for some years previously, the father carried on business as a tanner; that in 1861 he took this son into partnership, the son being then about twenty-one years old, and having no means whatever of his own. The defendants' story is, that when the son was thus taken into partnership the father made him a present of half the stock in the tannery, the stock being worth about $3,000; that on the withdrawal of the son from the business a year afterwards, the son gave back his interest in this stock for the property in question, which the father thereupon verbally agreed to convey to him as soon as all debts were paid; and that these debts were paid before December, 1864, when the impeached deed was signed.

Now, this alleged gift of half the stock was not in writing; nor is it pretended that any one, except the two parties, was present when the gift was made; nor does

(*a*) Douglass v. Ward, 11 Gr. 38; Ball v. Ballantyne, Ib. 202.

1869.

Stevenson v. Franklin.

it appear whether, if made at all, it was so made that it could have been enforced by the donee—a consideration which in a subsequent contest with creditors is very material (*a*). Indeed, the fact of partnership articles having been executed which took no notice of the alleged gift, and contained no evidence of half the stock having become the son's,—there being no other writing on the subject,—is almost conclusive against there having been such a gift. That these articles contained no such evidence I must assume, as the document was not produced, or its destruction or loss proved. Further, the father continued in possession of the property as before, and shortly afterwards (in October, 1863), without seeking for or getting the son's authority, the father mortgaged the property to secure $500, raised to carry on his business. Upon this evidence, I cannot hesitate to hold that the son has failed to establish that the deed of 1864 was more than a gift at that date.

Judgment.

The question then is, can the deed be supported against the plaintiffs as a mere deed of gift? I gather from the father's evidence, that his other means were not at this time sufficient, or more than sufficient, to pay his debts. He said that his property when this son went away in 1862, consisted of a tannery (since burnt down), worth $800; a house in Colborne, $600; stock (including the son's supposed interest therein) from $3000 to $4000. These particulars, amounting in all to between $4400 and $5400; and his debts at the same time were about $1000, according to his own evidence. But his business between that time and the making of the deed was most unfortunate, he having lost $5000 during that period, the greater part of it in the very year that he made the deed,—a sum which was quite as much as, without the property in question, he was worth. While his affairs were in this condition, he made the deed in

(*a*) Penhall v. Elwin, 1 Sm. & Giff. 258, 278.

1869.

Stevenson v. Franklin.

question of his own motion, without any application by the son or on his behalf, and without any communication with him; and, after executing the deed, he did not deliver possession of the property to the son, or cease personally to occupy it with his family, or begin paying rent for it; nor did he part with the possession of the deed or procure it to be registered, for fifteen months, or until after, as a member of the firm of *Squire & Franklin*, he had become liable to the plaintiffs, and probably to other creditors, in large sums of money. He then sent the deed to the registry office, and had it registered. It is said that all the debts which he owed at the date of the deed have since been paid; but it is impossible to hold that a deed of gift executed under these circumstances is valid against the plaintiffs, any more than it would be against prior creditors: I think that the fair inference from the facts, judged in the light of the authorities, is, that the conveyence was made with intent to defeat and delay future if not also existing creditors. He had, and meant to have, the same use of the property after the conveyance as before, and he designed to retain, and did retain, the control and apparent ownership of it until the property was in danger of being taken from him by creditors.

Judgment.

It was contended on behalf of the defendants, that the plaintiffs had discharged *Bildad Franklin* by an agreement which they entered into in December, 1866, with the other defendant *Squires*. Under this agreement, *Squires* made over to the plaintiffs on account of the judgment certain private property of the former for $1166.44; and the plaintiffs, in effect, agreed to proceed for the balance against the property of the partnership and the private property of *Bildad Franklin*, and to release *Squires* as soon as the private property of *Bildad Franklin* was exhausted. The remedy against *Bildad* was thus expressly reserved. *Bildad Franklin* swore that, as between him and *Squires*, the latter should have

1869.

Stevenson v. Franklin.

paid the plaintiffs' debt. But there is no evidence of this except *Bildad's* own oath; and there is no evidence that the plaintiffs knew of any such arrangement at or before entering into their agreement with *Squires*. If *Squires* is liable as between him and *Bildad* to pay this debt, and has the means of paying it, the latter has it in his power to enforce the obligation by suit in this court, or otherwise.

Some evidence was by arrangement put in after the hearing: viz., an affidavit by the Registrar, *Bildad Franklin's* letter to the Registrar, a certified copy of the memorial of the impeached deed, and an affidavit as to the *fi. fa.* lands, and of its delivery to the sheriff. The decree will refer to the evidence thus given after the hearing.

The decree is for the plaintiffs, and will contain the usual directions; with costs against both defendants —except the costs of the evidence supplied on the part of the plaintiffs since the hearing; and if the defendants have incurred any costs in respect of this evidence, the amount is to be allowed against the costs they are to pay. Judgment.

GAGE v. MULHOLLAND.

Tenant in common—Contribution to costs of suit to stay waste.

Where costs were incurred by a tenant in common, suing on behalf of himself and his co-tenants, in restraining the committing of waste on the joint property by a stranger, it was *Held* that, on its being shewn that the suit was necessary and proper, and that it resulted in benefit to the co-owners, they should share the expense, in proportion to the advantage they had derived from the suit.

This was a partition suit, and the property had been sold under the decree of the court for the joint benefit

1869.

Gage v. Mulholland.

of the parties interested. The proceeds ($2,565) had not been distributed. One of the co-tenants, *Thomas Mulholland*, presented a petition, claiming to be allowed out of the fund certain costs incurred by him in a former suit, for an injunction to restrain a trespasser from committing waste on the property. The bill in this former suit was by *Mulholland* on behalf of himself and all other owners of the property, and an injunction was obtained therein, and an order on the trespassing defendant for payment of the costs of the suit, but no property of his had been found out of which to make the money. The co-tenants, who, with *Mulholland*, represented about nine-tenths of the estate, raised no objection to the application for contribution, and, of those who represented the remaining one-tenth, some were minors.

Mr. *Hodgins* for the petitioner.

Mr. *S. H. Blake*, Mr. *Graham*, and Mr. *D. M. McDonald* for the other parties.

Judgment.

MOWAT, V. C.—By the 5th rule of the Consolidated Order No. 58, it was provided, that "in all cases in the nature of waste one person may move on behalf of himself and of all persons having the same interest;" but whether or in what circumstances he can call on his co-tenants to contribute to the expense, no direct authority was cited. It was not suggested that the suit was instituted at the instance of the other owners, and it was said that they could not be ascertained at the time of the bill being filed. On the whole, I think that, if the suit is shewn to have been necessary and proper, and to have resulted in benefit to the co-owners, they should share the expense of protecting their common property, according to the advantage they are shewn to have respectively derived from the petitioner's proceeding. I shall therefore direct a reference to ascertain the

facts, reserving further directions and costs. Or, the petitioner may waive his claim against the parties who oppose the petition, and may, without a reference, take an order for contribution by the concurring parties alone, to the extent of their respective shares, without costs. The costs of the guardian of the minors will in that case come out of their share of the fund.

1869.

Gage v. Mulholland.

LINDSAY PETROLEUM OIL COMPANY v. HURD.

Vendor and purchaser—Agency—Rescission.

A person agreed with the two owners of oil lands for the purchase of certain lots at stipulated prices, and he was to have a certain time to accept. His purpose was to form a company to buy at an advance. To facilitate this the real prices were to be concealed; one of the vendors was to write a letter purporting to offer the whole at an advanced price which he named, the intention of the other was not to appear, and he was to write a letter recommending the transaction. The project was successful; the property was bought, conveyed, and paid for. The lands having afterwards fallen in value, and the shareholders becoming acquainted with the private arrangement, the company filed a bill against the three parties for a rescission of the contract: and it was *Held* that the company were entitled to this relief, and to an order for all the defendants jointly to repay the purchase money.

Statement.

The defendant *Hurd* was desirous of getting up a company for the purchase of oil lands, at a time when considerable excitement prevailed in the province in regard to such property. The defendant *Kemp* owned eighty-five acres of land in Enniskillen, and was willing to sell twenty-five of these; the defendant *Farewell* owned twelve-and-a-half acres in Enniskillen and twenty-five acres in Dawn, which he was willing to sell. There was a prospect of finding oil on all these parcels. The defendant *Hurd* applied to *Kemp* and *Farewell* respecting the purchase of the lands mentioned, for a company which he hoped to form. *Kemp* agreed to

1869.

Lindsay Petroleum Oil Co. v Hurd.

sell his twenty-five acres at one hundred dollars an acre; and *Farewell* agreed to sell his parcel in Enniskillen at five hundred dollars an acre, and his parcel in Dawn for fifty dollars an acre. Each was willing to give *Hurd* a certain time to accept the terms proposed. *Hurd* was to accept if he could get the company to take the three parcels at an advance on the rates named; and to facilitate his object he proposed that the nominal prices should be, for *Kemp's* twenty-five acres, one hundred and fifty dollars an acre; for *Farewell's* Enniskillen lot six hundred and fifty dollars, and for his Dawn lot, seventy-five dollars; making for the three parcels thirteen thousand seven hundred and fifty dollars; and, in order that *Hurd's* dealing should appear to be with one person, that *Farewell* should give *Kemp* the option as to *Farewell's* lots, and that *Kemp* would then sign a writing purporting to give *Hurd* the option of purchasing the whole at thirteen thousand seven hundred and fifty dollars, and that *Farewell* should write *Hurd* a letter, stating what he could in favor of the lots, so that *Hurd* might shew this letter as proof of the desirableness of the property. *Kemp* and *Farewell* agreed to all these proposals and they were carried out.

Statement.

The letter was thus described by *Farewell* in his evidence—"It set out the three oil centres of Canada, viz: Bothwell, Petrolia, and Oil Springs; that Mr. *Hurd* had made a good selection, having chosen lots within the charmed circle at Oil Springs, which was regarded the best of the three; that the lot in Dawn was in direct line with Bothwell, and that the general as well as my own opinion was that oil would be found at intervals along that line; that the twenty-five acres in Enniskillen lay in a direct line between Oil Springs and Petrolia, and that my own as well as the general opinion was that oil would be found on that line at intervals, and that probably oil would be found on this lot,—and further stated with regard to the twelve-and-a-half

1869.

Lindsay Petroleum Oil Co. v. Hurd.

acres that it was within the charmed circle; that within a few rods a well had been sunk, producing largely, and mentioned other circles; I mentioned a high price that had been paid for an abutting piece. I spoke of the three pieces separately and of the whole in favorable terms, and that the whole was a good investment at the price. I also said that had I known one of the parcels (not saying which parcel) had been for sale at the price I would have bought it myself."

Hurd was successful in establishing the company, the lands were taken at the prices named, the purchase money was paid to *Kemp;* and *Hurd's* share and *Farewell's* share was paid over to them respectively by *Kemp*.

Subsequently oil lands fell in the market, the company became aware of the private arrangement *Hurd* had made, and they filed this bill to be relieved against the purcha

The cause came on to be heard before Vice Chancellor *Spragge*, at the Autumn sittings of 1868, in Whitby.

The principal evidence was the depositions of the defendants.

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

Mr. *Roaf*, Q. C., and Mr. *E. Farewell*, for the defendants.

At the close of the argument—

Judgment.

SPRAGGE, V. C.—The defendant *Hurd* made an optional purchase of three parcels of land in oil regions, one from defendant *Kemp* and two from *Farewell*. The

1869.

Lindsay Petroleum Oil Co. v. Hurd.

three parcels were comprised in one written agreement entered into between *Hurd* and *Kemp*, and one gross sum $13,750 was named therein as the purchase money. This was not the true purchase money; the contract being to pay *Kemp* $100 an acre for his parcel of twenty-five acres, while the nominal price was $150 an acre; and to pay *Farewell* $50 an acre for the twenty-five acre parcel, the nominal price being $75 an acre; and to pay him $500 an acre for the twelve-and-a-half acre parcel, the nominal price being $650 an acre. *Hurd* stated that he was purchasing to sell again, and that he projected the formation of a company, naming Lindsay and one or two other places, at one of which he projected the formation of a company; he mentioned also that he might perhaps sell again to individuals.

Hurd did succeed in forming a company. It is made a question between the parties whether he formed the company before or after he made the purchase; he and his co-defendants say that he did not purchase for the company, but that he had already purchased and formed the company with the purpose known to him and the company, of the company acquiring from him the land in question. It is proved that he made the agreement and then formed the company. The company would naturally suppose that the price to be paid for the land to *Kemp* and *Farewell* was the price named in the agreement, or rather that *Kemp* was the sole vendor at that price. *Farewell* wrote a letter to *Hurd* setting forth the situation of the land; its advantageous position and value, and the letter contained a passage to the effect that if the writer had been aware that the property was in the market, he would himself have purchased at the price. It is suggested that this passage applied only to one of the three parcels, the *Kemp* lot—but upon the whole of the evidence it is in favor of its relating to the whole property. This letter was used by *Hurd* at a meeting called by him with a view to the formation of a company,

Judgment.

and had, as appears by the evidence, great weight in inducing the formation of the company. 1869.

Lindsay Petroleum Co. v. Hurd.

At this meeting two papers were produced, one the agreement with *Kemp*, the other the letter of *Farewell*. From the former it would appear that *Kemp* was the sole vendor, and *Hurd* the purchaser—optionally—at the price named in the agreement. The letter of *Farewell* was produced as the opinion and judgment of one conversant with the subject, and with the purpose of assisting the judgment of those to whom it was read. It conceals two important considerations, one that the purchase money expressed was not the true purchase money, but some thousands of dollars more; the other, that the writer was not giving a disinterested opinion, but was himself interested, being a vendor of the greater part in quantity, and very far the greater part in price of the land sold.

As to *Hurd*, his representations to the meeting amounted to this: that the purchase money he was to pay was that expressed. His production of the agreement amounted to this, looking at the occasion upon which it was produced. It is different from the expressed consideration in a conveyance. What was produced was an offer from an assumed owner of land to sell at a certain price, provided the offer was accepted within a limited time, and with it was produced a letter predicated upon the expressed purchase money being the true purchase money. This, without explanation, was a representation that the true purchase money was the same as that expressed. This was a misrepresentation and a fraud upon those to whom it was made. It was also a fraud to use the letter of *Farewell* to guide the judgment of these to whom it was read. The conclusion from the agreement being in the name of *Kemp* only, was that he was the sole owner and vendor, concealing the fact that the writer was the owner of the greater

Judgment.

1869.

Lindsay Petroleum Oil Co. v. Hurd.

part; this was a *suppressio veri*, which was equivalent to a fraudulent representation. The letter would of course have had less weight if known that the writer was owner of a large portion. In this view it is not material that there was no fiduciary relation between *Hurd* and the company. If there was not, there was still a relation of confidence between the parties. He proposes that others shall embark with him in a common adventure; that they shall become partners together. Their position is not that of vendor and purchasers, but it was one of confidence in which he was bound to use perfect good faith with those with whom he was dealing.

The claim in *Hurd's* answer that it was understood that he should be compensated by what he calls (miscalls) commission is not established. It is in fact negatived, from the nature of the transaction and from what transpired at the meeting when *Hurd* asked, and the meeting agreed, that he should be compensated in a different way. As to the company not relying upon these representations, but judging for themselves, and relying upon their judgment, after personal inspection of two of their number; the evidence as to this fails altogether to establish anything of the kind. Two members of the company went up to examine for themselves, they were not deputed by the company, one of the two examined proves this: supposing it proved that a committee was deputed, was their report the only thing relied upon. It would be difficult to say that the representations of *Hurd* and the letter of *Farewell* had no weight. But the company did not by a committee or otherwise form an independant judgment. So far as to *Hurd*.

Judgment.

As to *Farewell*. He was cognizant of the fact that the amount of purchase money expressed in the agreement was not the true purchase money, but greatly exceeded the true amount. He knew this as to his own land, and

had reason to suppose the same as to the *Kemp* land, and he knew also that *Hurd* contemplated the formation of such a company as he did form. He gave the letter for the purpose of its being used as it was used. It could not indeed have been used, or intended to be used for any other purpose. He joined *Hurd* and combined with him in two things: in writing the letter, and in giving the agreement the form that it had—without its having that form the letter would have been useless. In addition to this is what passed at the personal conference at which *Brown* and *Sadler* were present. The remarks applicable to *Hurd's* case apply generally to *Farewell*. As to reinstating them in their position. The defendants may, if they desire it, have an account of any profits (if any) made by the company. *Hurd* and *Farewell* are in *pari delictu*. They were both active in the representations made to the company, and the decree against both of them will be for repayment of the whole sum paid by the company for the purchase of the lands in question—the whole of the parcels, as well those sold by *Kemp* as those sold by *Farewell*.

1869.

Lindsay Petroleum Oil Co. v. Hurd.

Judgment.

As to *Kemp*, he also was in the wrong; but the wrong on this point was of a somewhat different character, as well as less in degree. He lent himself improperly to the design of *Hurd*, but was not active in the misrepresentations by which the company was deceived. I think the justice of the case will be satisfied by a decree as against him for payment to the company of the sum which he enabled *Hurd* to represent to the company was the price of the land sold by him, the payment to be with interest; the company, on their part, reconveying at the expense of the defendants the land conveyed to them. If *Kemp* should pay the sum adjudged to be paid by him, he to have a re-conveyance of the twenty-five acre parcel sold by him: in case of *Hurd* or *Farewell* paying the whole sum, the whole to be conveyed to the party

1869.

Lindsay Petroleum Oil Co. v. Hurd.

paying. If *Kemp* should pay his proportion, and *Hurd* and *Farewell* the balance, then the parcels sold by *Farewell* to be conveyed to the party paying.

Subsequently, after looking at the authorities—

SPRAGGE, V. C.—I disposed of this suit at the hearing, except that I desired to consider further whether I ought to make any distinction in the remedy to which I thought the plaintiffs entitled as against the several defendants. I was inclined to think that *Kemp* had been less active than the other two in the scheme by which the plaintiffs were imposed upon, and I doubted whether the justice of the case would not be satisfied by a decree as against him for payment to the company of the sum which he enabled *Hurd* to represent to the company was the price of the lands sold by him.

Judgment.

I have since, again referred to the evidence, and I find from *Kemp's* own mouth, and from what is a necessary inference from what he says, that he was an active participator in the scheme by which the plaintiffs were deceived, and knew that the lands sold by *Farewell* as well as that sold by himself was put down at a fictitious price, and that the fictitious price was to be represented as the true price; without his aid, indeed, this scheme could not have been carried out. He took the part assigned to him in it, which, though less active than that of the other two, was still a part of the scheme and contributed to its success. They were all confederates, and must all be made answerable to the full extent to those who have been aggrieved. In the cases of *Cullen* v. *Johnson* (*a*), and *Walsham* v. *Stainton* (*b*), there were differences in the degree of complicity and of the culpability in the defendants, but no distinction was made in the extent of their liability to the plaintiff, and this is

(*a*) 6 L. T. N. S. 873. (*b*) 9 L. T. N. S. 357.

probably a salutary rule. Repayment is to be made with interest. The company, on their part, re-conveying at the expense of the defendants the land conveyed. The re-conveyance to be to the party or parties who may repay the plaintiffs. 1869. Lindsay Petroleum Oil Co. v. Hurd.

The decree to be with costs against all parties.

The defendant *Farewell* being dissatisfied with the decree then pronounced, had the cause re-heard before the full court.

Mr. *Strong*, Q. C., and Mr. *E. Farewell*, for the defendant *Farewell*.

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

After taking time to look into the authorities—

VanKoughnet, C.—I think the judgment of my brother *Spragge* right, and that *Farewell* acting for himself in part, and also acting for *Hurd* as to his part of the land, has made himself responsible for the whole amount paid to himself as well as to *Hurd*, on the principle that by his misrepresentations, or concealment of facts which he ought to have communicated, he has or may have induced the company to pay him and *Hurd* sums of money which otherwise neither of them would or might have received. Judgment.

In addition to the authorities cited on the argument, I refer to *Henderson* v. *Lacon* (*a*).

Spragge, V.C., retained the opinion expressed by him on the original hearing.

(*a*) L. R. 5 Eq. 249.

1869.

Lindsay Petroleum Oil Co. v. Hurd.

MOWAT, V. C.—Mr. *Farewell* is stated in the plaintiffs' bill to be a man of known integrity; and the evidence is to the same effect. In fact, it was that circumstance which gave special weight to any opinion he expressed as to the value of the lands in question. I have no doubt that the letter which he wrote to help *Hurd* in getting up the company contained no more than Mr. *Farewell* acknowledges in his own deposition, and that it contained neither misrepresentation nor exaggeration as to the value, situation, or prospects of the property, or as to either the general opinion or his own with respect to the matters to which the letter referred. Indeed, no attempt has been made to shew the contrary. But, though the prices to which the letter referred may have been fair prices, and such as any one skilled in such matters at the time might reasonably have considered low enough to afford a good profit to a company of purchasers, still the supposed prices were not the prices which *Hurd* had bargained for with *Kemp* and *Farewell*, and were considerably in excess of those prices. *Hurd* was the real purchaser from the other defendants, and his purpose was to conceal the real prices and to resell to a company at an advance, a design which he was successful in carrying out. It is quite clear that as between him and the company of which he was the projector, and which was formed by his agency, such a transaction is not sustainable; and *Hurd* acquiesces in the decree. The sort of arrangement which he planned may have been so common that persons who knew that it was so might not perceive that expected shareholders would have any just right to complain, if the property was really worth the price named, and if the shareholders had the same means as others of judging of the prospects of the projected company. But courts of equity forbid all such transactions. The agent who employs himself in getting up a company is bound to be frank and open with subscribers, and is not at liberty to sell to them his own land, or

Judgment.

land in which he has an interest, while he represents it as belonging to another (*a*); nor can he lawfully stipulate for any private advantage which is concealed from the shareholders (*b*).

1869.

Lindsey Petroleum Oil Co. v. Hurd.

The transaction was therefore voidable as against *Hurd*; but we cannot hold that it was voidable as to him only. His co-defendants were associated with him in it. As between them and the company there was but one transaction; they knew of the illegal plan, though they were not aware of its illegality; and it was their active concurrence in it as a whole, including its objectionable features, which enabled *Hurd* to carry out the transaction. Mr. *Kemp* is not now objecting to the joint liability which my brother *Spragge* decreed; and the letter which Mr. *Farewell* wrote affords, in point of law, a ground for relief against him which does not apply to *Kemp*. By that letter *Farewell* put himself into the situation of an adviser of the projected company, a voluntary adviser it is true, but still an adviser; and he assumed that position because he believed that his advice would probably have influence with those to whom *Hurd* meant to apply to take shares in the company. In his deposition *Farewell* frankly stated this, and indeed nothing could be more candid than his evidence throughout: "I wrote this letter in order that *Hurd* might shew it to parties wishing to purchase, and in order that they might be influenced by my opinion expressed therein. I expected it would be shewn, and that it would influence the opinion of such parties, as I was pretty generally known through that part of the country, and also known to have acquired knowledge respecting oil lands." This letter was read by *Hurd* to persons whom he wished to take shares; and, indeed, it was the

Judgment.

(*a*) 1 Wh. & Tud. 143 notes.

(*b*) East India Co. v. Henchman, 1 Ves. Jr. 287; Massey v. Davies 2 Ves. Jr. 317; Chaplin v. Young, 33 Beav. 416.

1869.

Lindsay Petroleum Oil Co. v. Hurd.

only evidence which we hear of his offering, in addition to his own assertions, as to the value and desirableness of the property.. Some persons wrote to *Farewell* on the same subject, and he recommended them to join the company, and expressed his opinion to be that the investment was a good one. I do not doubt that that advice was honestly given; and, in fact, prices rose afterwards, so that, when the conveyances were executed and the purchase moneys paid, the property was worth more than at the date of the letter. I am sure that Mr. *Farewell* was not aware he was violating any rule of law in the part which he took in the matter, and that he would not knowingly have been a secret party to any thing which was illegal. But as he undertook the part of advising intending subscribers, and as his advice had weight with them, (which I think must be presumed from the evidence), it cannot be doubted that any undisclosed interest of his in the property, which he advised about, made the transaction voidable with respect to him, as well as with respect to the projector of the company (*a*).

Judgment.

It was argued that at all events he was not liable for *Kemp's* share of the purchase money; and there are some cases in which decrees were made that afford some countenance to that contention (*b*). But having reference to the case of *Walsham* v. *Stainton* (*c*) before the Lords Justices, to what was said by *Lord Westbury* in *Tyrrell* v. *Bank of London* (*d*), and to the decree in

(*a*) See cases cited in Atkins v. Delmage, 12 Ir. Eq. 11; also Dent v. Bennett, 4 M. & C. 276, 277; Billage v. Southee, 9 H. 530; Hobday v. Peters, 28 B. 349; Cases in notes, Fox v. Mackreth 1 W. & T. Lead. Ca. 146 et seq. 3rd ed.; Walsham v. Stainton, 1 DeG. J. & Sm. 678; Tyrrell v. Bank of London, 10 H. L. 47.

(*b*) Powell v. Aiken, 4 K. & J. 343, 358, and decrees in Berry v. Armistead, 2 Keen. 225; Lovell v. Hicks, 2 Y. & C. Ex. 46; Madrid Bank v. Pelly, L. R. 7 Eq. 444; See S. C. Exp. Williams L. R. 2 Eq. 216.

(*c*) 1 DeG. J. & S. 678.

(*d*) 10 H. L. 47.

1869.

Lindsay Petroleum Oil Co. v. Hurd.

Henderson v. *Lacon* (*a*), as well as to other cases (*b*), in connection with the facts which Mr. *Farewell* states in his evidence, I concur in the opinion that the decree was not incorrect in charging him, jointly with the others, with the whole purchase money.

It was said in argument that, after becoming aware of the facts, the company offered the property for sale, and, notwithstanding their knowledge of everything, did not repudiate the transaction with the defendants until prices had fallen hopelessly; and it was contended that this conduct was a bar to relief. But no evidence was given to prove the circumstances on which this argument was based.

Judgment.

Per Curiam.—Decree affirmed, with costs.

LAPP v. LAPP.

Will—Mortgage after will—Dower—Extrinsic evidence.

A testator by his will made certain gifts to his widow, not saying they were in lieu of dower. It was suggested that the estate was not sufficient to answer these gifts in addition to the dower:

Held, that the other devisees were entitled to an inquiry as to this, and the weight to be attached to the circumstance would be considered after the result of the inquiry was ascertained.

Where a testator devised property and afterwards mortgaged it, and the personal estate was insufficient to pay the debts and legacies, it was *held* that the devisee of the mortgaged property was entitled as against the legacies to have the property exonerated from the mortgage at the expense of the personal estate.

Examination of witnesses and hearing.

Mr. *Blake*, Q. C., and Mr. *J. D. Armour*, for the plaintiff.

(*a*) 5 Eq. 249.

(*b*) Cited supra.

1869.

Lapp v. Lapp.

Mr. *Strong*, Q.C., and Mr. *Kerr* for the defendants.

The testator died seised of several parcels of land. One which may be called lot 8, was his homestead; a parcel called the mill property composed of part of lot 7; and two village lots in the town of Cobourg. There was also a parcel of fifty acres part of lot 9, of which he was mortgagee. Before his death he filed a bill for the foreclosure of the mortgage, and a final order of foreclosure was obtained after his death.

His will, which is very inartificially drawn, was made in 1847, he died in 1863. By his will he devised the homestead to his wife for life, one of the lots in Cobourg he devised to her absolutely, and the other to his father-in-law for life; he gave a legacy of $1000 to his wife; to one of his daughters a legacy of $500, to each of two other daughters a legacy of $800, each of the legacies to the daughters being expressed to be to equalize the amount with that of his other children. The legacy to the wife is followed by the words "to be made out of my other property;" those to the daughters by the words "the above sums to be levied out of my estate," and then follow these words "together with all my household goods, debts, and movable effects, and whatsoever should be left after the above sums are paid shall be equally divided among my children by my executors, and what I have above deeded to my wife save the lot in Cobourg, which is hers to do with as she pleases, shall, after her death, be also equally divided between my children."

Judgment.

Upon this will, and the circumstances that have arisen since, several questions arise. Several years after the making of it, in the year 1858, the testator mortgaged the homestead for $1,062.50. The mill property is not in terms referred to in the will. After the death of the testator it was sold by the devisees, for the purpose as

1869.

Lapp v. Lapp.

the answer sets up, of paying off the mortgage debt on the homestead, and other debts of the testator, the purchaser being one *Hugh Weir;* and the answer alleges that the sale was with the assent and approbation of the widow. The answer states the personal assets of the testator at $445, but that is obviously meant to be exclusive of the mortgage on lot 9, which was for $800.

The bill is filed by the widow, against *Henry Lapp*, one of the sons of the testator, by whom it is alleged the rights and interests of all the other beneficiaries under the will have been acquired; and against *Hugh Weir;* and claims dower in the mill property with arrears since the death of her husband; her legacy, and that it may be charged with interest upon the same premises; and an administration, if necessary, of the estate of the testator. The bill also claims dower upon lot 9, alleging that the testator died seized, but that claim was abandoned at the hearing. A part only of the purchase money of the mill property has been paid, a mortgage having been given for the balance. *Henry Lapp* alone proved the testator's will.

Judgment.

It is objected that the bill is multifarious. I think, inasmuch as the defendant *Lapp* is interested in all the questions raised by the bill, that the bill is not multifarious, because the defendant *Weir* is interested in only some or one of them.

It is objected also that the widow is put to her election between her dower, and the provision made for her by the will. There is nothing upon the face of the will itself to put her to her election. But it is suggested that an inquiry, would shew that the estate was insufficient to satisfy both the dower of the widow, and also the provision made for her by the will. An inquiry was directed by Lord *Loughbough* in *Pearson* v. *Pearson* (*a*)

(*a*) 1 B. C. C. 292.

1869. Lapp v. Lapp.

as to what was the value of the testator's real estate at the date of his will, and at the time of his death. This was in order to ascertain whether the value of the land was sufficient to satisfy two annuities given by the will, and also the dower. Lord *Thurlow* doubted the propriety of the inquiry; but Lord *Alvanley* in *French* v. *Davies* (*a*), referring to Lord *Thurlow's* doubt said, "but I am not willing to assent to that. I admit with him that nothing is so dangerous as to construe a will by extrinsic circumstances, unless it is so clear as to exclude all doubt. The doctrine of election is much more an argument of conscience than anything else, and it would be unconscientious in her to claim both, if there is an irresistible presumption that it is against his intention," and in *Becker* v. *Hammond* which was before me upon further directions, the decree, which I believe was made by the late Vice Chancellor, directed the like inquiry. The annual value of a testator's estate may throw more light upon his intention, when he gives an annuity to his wife, than when he gives a gross sum by way of legacy; but still it is impossible to say that an inquiry as to the nature and value of the testator's estate, may not disclose that, which taken with the disposition of his property made by his will, may enable the court to see with sufficient distinctness that, as put by Lord *Cranworth* in *Parker* v. *Sowerby* (*b*), "the testator intended to dispose of his property in a manner inconsistent with the wife's right to dower." I quote Lord *Cranworth* for the rule as to what must appear in order to put the widow to her election. It was not a case of interpreting a will by the aid of extrinsic evidence. Mr. *Jarman*, in his Treatise on Wills, p. 434, disapproves of such an inquiry as was directed in *Pearson* v. *Pearson*, and says that the notion derives no countenance from any of the recent cases. But it is only an

Judgment.

(*a*) 2 Ves. Jur. 572.

(*b*) 4 D. M. & G. 321.

application of the doctrine of reading a will by the light of the circumstances by which the testator was surrounded; and I confess I see no reason for excluding that doctrine where the question is, whether a testator intended a provision be made for his widow in lieu of dower. It is confessedly a question of intention, and I see no ground for making it an exceptional case. I had occasion to consider the doctrine in a case that was before me last year, *Davidson* v. *Boomer* (*a*). The propositions enunciated by Sir *James Wigram*, in his Treatise on the Admission of Extrinsic Evidence in the Interpretation of Wills, are sustained by recent as well as by contemporaneous and previous authority. I have referred to some of them in *Davidson* v. *Boomer*, and have quoted from Sir *James Wigram's* work. I will only repeat one passage here "they (cases to which he has referred) appear to justify the conclusion that every claimant under a will has a right to require that a court of construction, in the execution of its office shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare." I think that I cannot refuse to the defendants the inquiry asked, unless I am able to say that the nature and value of the testator's estate can be no aid in discovering his intention upon the question before me. I am not able to say this. The weight to be attached to these circumstances when shewn is another question; one to be dealt with hereafter.

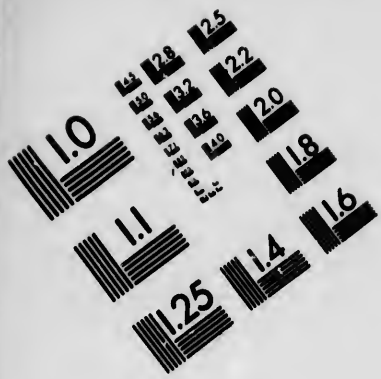
1869.

Lapp v. Lapp.

Judgment.

Another question made between the parties is, whether the widow took the homestead devised to her for life, charged with the incumbrance created by the testator after the date of his will. The mortgage is not put in, but it was not contended that the mortgagor did not thereby make himself personally liable for the payment of the mortgage money, as well as charge his land therewith.

(*a*) 15 Gr. 218.



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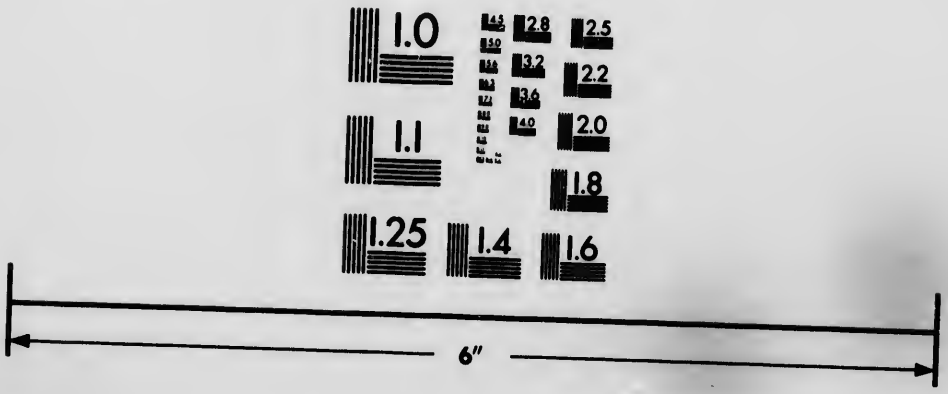

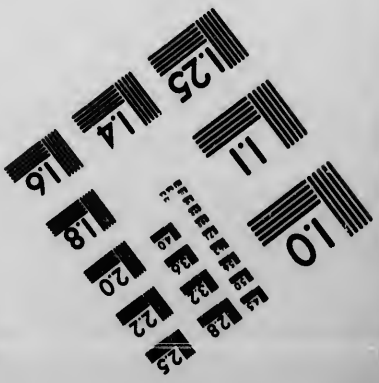

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1869.

Lapp v. Lapp.

The most that could be contended, as against the tenant for life, is that she was bound to keep down the interest; and, assuming that as between the devisee and pecuniary legatees, who would be disappointed of their legacies unless she took the devise *cum onere* she would be held so to take it, if the mortgage had been created at the date of the will, the question remains whether the mortgage having been made, after the will the devisee is not entitled to have the land devised exonerated at the expense of the personalty. There are two things to be considered, one that a will speaks, as to real estate, from the time of its being made: the other that in the eye of a court of equity a mortgage is no more than a pledge for the payment of money. The testator in this case devised to his wife an unincumbered piece of property. Unless his subsequent mortgage was a revocation of that devise, which in equity it is not, the devise of course remains in force. What he did was to pledge the

Judgment.

devised land for the payment of a debt, which debt he engaged by personal covenant to pay. The principle upon which the devisee of a mortgaged estate is held to take subject to the mortgage, where the personal estate is insufficient for the payment of debts and legacies, is stated by Sir *James Wigram* in *Johnson* v. *Child* (*a*) to be, that the court under those circumstances discovers an intention on the part of the testator that the devisee of his real estate should take it *cum onere*. This principle can only apply where the mortgage is in existence at the date of the will. Where it is created afterwards there is no room for presuming such an intention: on the contrary it is excluded by the fact of the non-existence of the mortgage: and the general rule must, I apprehend, apply, that the devisee is entitled to have the land exonerated. That the rule should be otherwise where the personal estate is insufficient for the payment of debts and legacies is treated by Sir *James Wigram* as

(*a*) 4 Hare 87.

1869.

Lapp v. Lapp.

an exception; and in his judgment a somewhat anomalous one. I may, observe in passing, that the exception to the rule which I have just referred to, is an example of interpreting wills by the aid of extrinsic evidence, and extrinsic evidence of the same nature as I have thought applicable to the question, which I have just discussed, evidence that is, of the nature and extent of the testator's estate. My conclusion is that the devisee is entitled to have her estate devised, exonerated by the personal estate. As a fact the mortgage has been paid off: the Master will inquire out of what funds. The evidence shews nothing in the way of assent or otherwise to affect her rights.

I think the legacy to the wife is given, as are the legacies to the daughters, absolutely. The only thing in the will that could raise a doubt upon this point is what may perhaps be read as a restrictive clause at the end, "and what I have above deeded to my wife, save the lot in Cobourg, which is hers to do with as she pleases, shall after her death * * be divided:"—a doubt occurred to me at the hearing, and even now is not entirely removed. This restrictive clause was wholly unnecessary, as to the real estate devised, for that had already been expressed to be for life "during the period of her natural life:" it was not intended to apply to the Cobourg lot, for that was to be in fee, and the only thing left in doubt to which it could apply was the legacy. Hence my doubts; but this construction of the will was not raised by the answer, nor contended for by the learned and able counsel who appeared for the defendants until suggested by myself. I think, upon the whole, that the legacy is absolute. It is so in terms "I also give and bequeath to her $1000 to be made out of my property." The clause which I have pointed to as perhaps a restrictive clause is not necessarily so; the object of the testator may have been, and as I think probably was, not to restrict or cut down the estate

Judgment.

1869.

Lapp v. Lapp.

previously disposed of, but to provide for its disposition after the death of his wife. In that case it would be only lot 8 that was pointed at, *i. e.*, the real estate devised to his wife, with the exception of the Jobourg lot. In the preceding clause he had disposed of the residue after payment of his legacies: that residue was to be divided presently. He had then to make some disposition of what he had devised to his wife for life, and that he does in the subsequent clause. I incline to think it was introduced for that purpose only. And further, the word "deeded," though not strictly applicable, would popularly be more likely to be applied to real than to personal estate.

I think all the legacies are by the will charged upon the real estate. The testator makes the real and personal estate a mixed fund, and directs all the legacies to be paid out of it.

Judgment.

It is contended for the widow that her legacy is not to abate *pro rata* in case of a deficiency. The question probably will not arise practically. The present inclination of my opinion is against it. There is no ground for the contention unless in the *place* where her legacy is mentioned in the will, being before that of the other legacies. But the will is drawn without method: the dispositions made by it are in no order, either as regards subjects or objects, and nothing can be gathered from it as to the intention of the testator from the part of the will in which any disposition of his estate is to be found.

A question is made as to the costs, there having been no written demand of dower under the statute 13 & 14 of the Queen (*a*), The statute can scarcely apply to a case like this where the right to dower

(*a*) C. S. U. C. ch. 25, sec. 7.

is denied; but all costs will in this case be reserved. 1869.

Lapp v. Lapp.

The necessary inquiries will involve substantially an administration of the estate. The inquiries should at the same time be made with special reference to the points to which I have referred. Costs and further directions reserved.

DEEDES v. GRAHAM.

Will—Appointment under power.

The donee of a power of appointment made a will, not referring to the power, disposing of "the moneys now or at my death invested in mortgages or otherwise." The settled estate was invested in mortgages, and the donee had no other mortgages:

Held, that the intention of the testatrix to appoint the settled estate sufficiently appeared.

Examination of witnesses and hearing.

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

Mr. *Moss* and Mr. *Totten*, for the defendant *F. A. Graham.*

Mr. *Strong*, Q.C., and Mr. *Richardson*, for the defendant *Vernon N. G. Graham.*

Mr. *Stevens*, for the defendants *Lay* and wife.

Mr. *D. G. Miller*, for the defendants *Miller* and wife.

SPRAGGE, V. C.—The principal question in this case is whether certain personal property, representing certain personalty settled upon the marriage of *George* Judgment.

1860. Deedes v. Graham.

Percival Graham with *Mary Grinton*, and as to which the survivor had power of appointment among children, issue of the marriage, was validly appointed by the will of Mrs. *Graham*, who survived her husband.

The marriage took place in England in 1816, and the parties having afterwards settled in Upper Canada, where the husband died, the settled estate was subsequently transferred to Canada by means of instruments, which, it was contended by some of the parties, operated as a valid execution of the power of appointment. These instruments, which were executed in 1856 by the widow, were not intended to be, and were not in fact, an execution of the power. They were in the eye of the law a fraud upon the power, and I held them to be so at the hearing.

Judgment.

The will of *Mary Graham* bears date 8th December, 1859. The present plaintiffs had become trustees of the marriage settlement in 1856. The material parts of the will are as follows: "I, *Mary Graham*, of Woodstock, do make this as my last will and testament. I give, devise, and bequeath all the property, real and personal, that I shall die possessed of to *Edmund Deedes* and my son *Fortescue Arnett Graham*, and the survivor of them, and the heirs, &c., of such survivor, upon the following trusts: First. For the payment of all my just debts and funeral expenses. Secondly. Whenever the moneys now or at the time of my death invested in mortgages or otherwise are paid, to pay each of my unmarried daughters (naming them), the sum of £1000, and until such payment to pay to each of them the interest of the said sum of £1000, whatever the amount of interest may be that the said principal sum of £1000 each may produce." Then follow legacies to sons of the testatrix, then legacies to married daughters, "out of the £400 of consols which have reverted to me on the death of *Mary Price*." These £400 consols formed no part of the settled estate.

1869.

Deedes v. Graham.

The will then divides china, pictures, and furniture, among daughters of the testatrix. By codicils—one made in 1860, one in 1861, and two in 1863,—the testatrix varied in some particulars the disposition of the property made by the will, but they have no bearing upon the question at issue. The testatrix died in 1866.

By the evidence of Mr. *Deedes*, one of the trustees of the marriage settlement, and also one of the executors of the will, it appears that at the date of the will all the settled property was invested in mortgages in Upper Canada, and that the testatrix had no moneys other than the settled property invested in mortgages, and no property of her own except the £400 consols and the chattels specifically bequeathed.

Judgment

The cases upon the subject in question are numerous. The greater number of them have arisen upon wills from the comparative informality with which they are very frequently drawn. The cases where the settled property has consisted of personalty are not all reconcilable in principle, as is most ably and lucidly pointed out by Lord *St. Leonards*, in his Treatise on Powers. There are, however, some well settled principles not open to any question. One is, that the intention of the testator must in all cases govern: the difficulty in many of the cases has been to get at the intention with sufficier ·r-tainty. Another principle is, that where a testato . ·s an interest in certain personalty, and a power of appointment as to other personalty, and his will does not point specifically to the settled property, it will be held only to apply to the property in which the testator has an interest (*a*). *Prima facie*, indeed the will will be taken only to refer to personalty in which the testator has an interest; and though at the time of making his will he has no property of his own, still if the language

(*a*) Hob. Rep. 159, 60.

1860.

Deedes v. Graham.

be general it will not cover personalty over which he has a power of appointment, because the will speaking from the death of the testator will be taken to apply to property acquired after the date of the will. And herein, as I understand, consists the difference between the cases of real and personal estate. In the case of realty the will speaking as of its date (I refer to the time in England before the statute), and the testator having at that date only a power of appointment over realty and no realty of his own, and by his will making a disposition of realty, must be taken to refer to that over which he has a power of appointment, because, in other words, there is nothing else for the will to operate upon. At the same time it may, I apprehend, be shewn in the case of personalty that there is nothing else but settled estate over which the testator has power of appointment for his will to operate upon, not that this can be shewn when the words of the will and the subject disposed of

Judgment.

are general; but the will may point to that which, it may appear from the will itself or from surrounding circumstances, is referable only to the settled property. It is quite clear that the rule that a will is to be interpreted by the aid of surrounding circumstances applies to wills of personal as well as real estate,—it would be a strange anomaly if it did not. The principle of the rule, that the court should by means of extrinsic evidence place itself in the situation of the testator, the meaning of whose language it is called upon to declare, is as applicable to the one class of wills as the other, and I have therefore no doubt that the evidence of Mr. *Deedes* upon this point was properly admitted.

There are admittedly two modes in which the intention of a testator to execute a power may be shewn: first the very obvious one of a reference to the power itself, and secondly by a reference to the subject of the power; and there is a third, as put by Mr. Justice *Story* in his learned and able judgment in *Blagge* v.

1809.

Deedes v. Graham.

Miles (*a*), "where the provision in the will or other instrument executed by the donee of the power would otherwise be ineffectual or a mere nullity: in other words, it would have no operation except as an execution of the power." The language of Sir *William Grant*, in *Bennett* v. *Aburrow* (*b*), is to the same effect; and Lord *St. Leonards* makes the like classification.

I have examined all the cases to which I have been referred and a number of others. I do not purpose to go through them now, it would be unprofitable, and would occupy more time than I have at my disposal. In some of them the language is very strong as to the degree of certainty and the exclusion of room for doubt as to the intention of the testator, and in some it is difficult to see how any doubt could exist that the testator was consciously dealing with that which was the subject of the power. In other cases again the court has felt itself able to see the intention of the testator without any express reference to the power or the subject of it. The leading case of *Standen* v. *Standen* (*c*), before Lord *Rosslyn*, is an instance of this. The reasoning of Lord *St. Leonards* upon it is so clear and convincing that I quote it at some length: "The gift was held valid as to the real estate, because she (the testatrix) had no real estate of her own, but this did not apply to the personal estate properly within the power which was equally held to pass. The ground upon which that passed of course was that the fact of the testatrix not having real estate, gave to her disposition the character of an execution of the power over the real estate; it shewed her *intention* to execute her power, and that when she talked of her real estate she meant the real estate in the power; and the same intention was held to govern the *entire gift*. Upon what ground can a distinction be drawn? She

Judgment.

(*a*) 1 Story Rep. 447. (*b*) 8 Ves. 609.
(*c*) 2 Ves. Jun. 589.

1869.

Dordes v. Graham.

gives her real and personal estate without further explanation. But the extrinsic evidence introduces a fact which proves, what her language by itself does not, that she is dealing with some of the property in the power. A due construction of the will requires the same force to be given to the whole sentence, and it is altogether indifferent when the intention is thus ascertained that the same words will also carry her personal estate." The real point decided in *Standen* v. *Standen* was, Lord *St. Leonards* says, that where distinct properties are subject to the power, and there is evidence of the intention to comprehend one description of the property in the power within the general disposition, the whole ought to be held to pass. No doubt that is so, but the case also shews that the court will get at the intention of the donee of a power as to what property he was intending to dispose of, by seeing whether he had any to dispose of besides that which was the subject of the power. It is true that if in that case the only property disposed of had been personalty, the court could not have seen this, and an inquiry would probably have been refused because of the rule as to a will speaking from the death.

Judgment.

In *Grant* v. *Lynam* (*a*), a testator by his will "gave and bequeathed his present dwelling house, garden premises and land adjoining, now in the occupation of Mr. *Charles Baker*," to his wife for life, with power of appointment among relations; also his furniture, plate, &c., with like power of appointment. The wife by her will gave and bequeathed all her leasehold property, her moneys and securities for money, goods, furniture, chattels, personal estate and effects whatsoever, subject to the payment of her just debts, funeral and testamentary expenses and legacies, to trustees upon trust to convert the same into money for the use of a relation

(*a*) 4 Russ. 292.

1860.

Deedes v. Graham.

of the donor of the power. It was proved in the cause that the dwelling house and premises of the husband were leasehold, and that the wife at the time of the making of her will and of her death had no other leasehold property than the dwelling house bequeathed to her. It was contended that there was no appointment; that in all the cases in which evidence had been received to shew that there was no property to answer a devise except that which was the subject of the power the question related to freehold lands, and that the same rule is not extended to chattel interests or personalty, and *Jones* v. *Tucker* (*a*) and *Jones* v. *Currey* (*b*) were cited in support of the position. It is to be observed that there was no real estate in the case, and strictly, taking the will to speak from the death, it might be said that leaseholds and other personalty thereafter to be acquired were in the contemplation of the testatrix; but Sir *John Leach*, after taking time to consider, held otherwise, observing: "There is no distinction between freeholds and leaseholds in the nature of the subjects, the difference is only in the quantity of interest; and there does not appear to me to be any solid ground upon which it is to be maintained that a gift of leasehold, where the donee of the power has no other leasehold than the subject of the power, is not equally to manifest an intention to execute the power as a gift of freehold under the same circumstances." He adds: "A general gift of moneys, securities for moneys, and other personal chattels, which are in their nature subject to constant change and fluctuation, stands upon very different principles, and as to them the will must refer to them as the subjects of the power or they will not pass." There was in that case, as in the case before me, a direction for the payment of the testatrix's own debts and legacies, but that was not held sufficient to override the manifest intention of the testatrix (*c*).

Judgment.

(*a*) 2 Mer. 533. (*b*) 1 Swan. 66.
(*c*) Sugden on Powers, p. 322, s. 81.

1860.

Deedes v. Graham.

Walker v. *Mackie* (*a*), before the same learned Judge, is perhaps still nearer to this case in its circumstances. The testatrix in that case had power to appoint by will a certain leasehold estate and certain sums of three per cent. stock which were standing in the name of the Accountant General of the Court of Chancery. She was entitled to both for life. The stock had been transferred to the Accountant General upon a bill filed by her. She began her will by bequeathing certain pecuniary legacies, and then gave all the rest and residue of her bank stock to her god-daughter, *Mary Wood*, with her wearing apparel, goods and chattels of every kind whatsoever, and all other property she possessed, excepting £50 of her bank stock, which she gave thereout to her executors. Evidence was given as in *Grant* v. *Lynam*, and it was proved that she had no bank stock nor any stock whatever except the stock in court, over which she had a power of appointment.

Judgment.

The Master of the Rolls held that the will was a good execution of the power so as to pass the stock; that her pecuniary legacies were payable out of it; and that the will was also a good execution of the power of appointment as to the leasehold estate, it being plain that she meant to describe the property over which her power extended under the words "all other property that she possessed, by excepting out of it £50 of her bank stock, which she gave to her executors" (*b*). Lord *St. Leonards* thought the case rightly decided as to the leaseholds as well as the stock, observing that although it may not be reconcilable with *Webb* v. *Honnor* (*c*), (a decision of Sir *Thomas Plumer's*, with which certainly it scarcely appears to be reconcilable), still *Webb* v. *Honnor* is not entitled to more weight, and he observes that it was followed by Sir *Launcelot Shadwell* in *Elliott* v. *Elliott* (*d*). I refer also to *Churchill* v. *Dibbin* (*e*), before Lord

(*a*) 4 Russ. 76. (*b*) Powers, 321. (*c*) 1 J. & W. 352.
(*d*) 15 Sim. 321. (*e*) L. Kenyon, 2, part 68.

Hardwicke, and to *Reid* v. *Reid* (*e*), before Lord *Romilly*.

1869.

Deedes v. Graham.

The cases before Sir *John Leach*, both of which I take to be good law,—they are considered to be so by Lord *St. Leonards*,—establish these two points, that extrinsic evidence is admissible in the case of wills of personalty as well as realty; and that where the will is not in mere general terms, the court will receive evidence of the state of the testator's own property, and of the property over which he has a power of appointment *at the date of the will* as well as at the time of the death of the testator; and certainly nothing can be more reasonable. Bearing always in mind, as a cardinal point, that the question to be got at is the *intention* of the donee of the power, it would be an anomaly to exclude any fact that will help to throw light upon his intention.

Judgment.

The question in this case is whether Mrs. *Graham*, being the donee of a power of appointment, has by her will manifested an intention to dispose of certain personalty over which she had the power of appointment, the court placing itself in her position in order to interpret her will. We have the fact that when she made her will the settled property consisted of moneys invested in mortgages, and that she had no moneys invested in mortgages of her own. What she disposes of by her will is, "the moneys now, or at the time of my death, invested in mortgages or otherwise." It is not a cast-iron rule that a will can as to personalty speak only from the time of the death of the testator. If it were so, evidence of the state of the property *at the date of the will* would necessarily be excluded—but such evidence is admissible. In the case of this will, the testatrix contemplates and deals with two dates—the date of making her will and the date of her death. She

(*e*) 25 Bea. 469.

1869.

Deedes v. Graham.

refers in terms to certain property and its condition at the date of her will. She speaks of property "*now*," at the date of her will, invested in mortgages or otherwise, the words "or otherwise" being probably introduced as a matter of caution. Taking the words she uses in connection with the fact that the settled property, the subject of the power, and no other was invested in mortgages, it does appear to me that the conclusion is irresistible that she was consciously dealing with that over which she had power of appointment, and the word "now" excludes the notion that she might be referring to some property of the like nature thereafter to be acquired.

This will read by the light of surrounding circumstances shews, in two of the three modes in which it may be shewn, the intention of the testatrix to appoint the settled property. She refers to that which is the subject of the power—"moneys now invested in mortgages,"—and the will would be inoperative as to that unless held to apply to the settled property, and this is shewn in a manner so clear and convincing as to leave no room for doubt.

Judgment.

At the time of argument, and before looking at the cases, I stated it to be my strong impression that the settled property was duly appointed by the will. An examination of the cases has confirmed the impression that I then entertained.

The plaintiffs are justified in obtaining the opinion and direction of the court, and the question was sufficiently doubtful to warrant the respective parties interested in litigating it. The costs of all parties should come out of the settled property.

1869.

BALD v. THOMPSON.

Mortgage—Two mortgages for portions of loan.

A. lent *B.* $2000 and took two mortgages from the borrower each for $1000 on separate property. The mortgagee foreclosed one of the mortgages and then parted with the property:
Held, no bar to a foreclosure of the other mortgage.

Examination of witnesses and hearing.

Mr. *McLennan*, for the plaintiff.

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

SPRAGGE, V. C.—This is a very peculiar case. On the 3rd of July, 1865, the defendant borrowed from the plaintiff the sum of $2000, and to secure repayment, a mortgage for $1000, with interest at ten per cent, was given upon one property, which may be called the farm; and a conveyance was made of another property, the mill property, and a bond was executed by the lender to reconvey the same on payment of one thousand dollars and interest, "and all other moneys that may then be due to the said *Bald* from the said *Archibald Thompson*." It is explained in evidence that "these other moneys" referred to an unsettled account between the parties upon a wood transaction. All these instruments bear the same date, and in each the principal is made payable at one year from the date. In the mortgage the interest is made payable half yearly; in the bond the principal and interest are together made payable at the expiration of a year, and the bond is silent as to the rate of interest. It appears by the evidence of the gentleman who drew the papers that ten per cent. was to be the rate of interest as to the whole amount borrowed: he was not asked as to the difference in the time of payment of interest. He says the transaction was spoken of as a loan of a

Judgment.

1869.

Bald v. Thompson.

sum of $2,000, and that the parties did not explain to him why there were to be two sets of papers.

The defendant was examined by the plaintiff, and speaks of the $2,000 as one loan, which he received by a cheque for that amount. He refers to a previous examination before the local master, and says that the reason for a mortgage on one property, and a deed and bond as to the other, was pretty much as stated in that examination. In that examination he says that the reason he did not give one mortgage was because he wanted his wife to get the mill property. He says: "I proposed that the security should be taken as it was given;" and adds "I did not tell the plaintiff that my wife wished to get the mill property eventually." In his examination at the hearing he says: "To get back the land comprised in the deed I was to pay $1000 and any other moneys I might owe upon the wood transaction." As to the $2000 being one loan, he qualifies this in his examination before the master, saying that there was nothing said between them about its being so; that he never heard the plaintiff say that it was so, or was to be considered so, that he recollects; and that he never told the plaintiff that he considered it to be so." It is true, that upon the same examination, in answer to his own solicitor, he says broadly: "the whole loan was one transaction, and the whole security was one security"; but that I count as literally nothing after what he had previously stated, except that it shews how far he was prepared to go to sustain his case.

Judgment.

I think it immaterial whether the advance of the sum of $2000 was looked upon by the parties as one advance or as an advance of two sums of equal amount, the aggregate of which was $2000. The material point is whether the securities were to be separate, each for $1000, or whether each property and both properties were to be liable for $2000. Where separate mortgages,

1869.

Bald v. Thompson.

made at different times, upon different properties, to secure different debts, are made to the same person, or come into the same hands, the right of the holder is founded upon equity, not upon contract: originally upon the equity of one of the mortgages being a deficient security, and that a party coming into equity—a mortgagor coming to redeem—must do equity. Afterwards it was settled that this was the equity of the mortgagee, whether defendant or plaintiff: *Watts* v. *Symes* (*a*). In all the cases that I have seen this right of the mortgagee is treated as an equity to which he is entitled. I do not find anywhere that it is a necessity of his position; that he is not at liberty, if he pleases, to forego it, that he may not foreclose as to one estate and leave his mortgage outstanding as to the other. Before it was settled that a mortgagee in his bill to foreclose had the same equity as he had, when defendant to a bill to redeem, it was held first in *Holmes* v. *Turner* (*b*), and subsequently in *Smeathman* v. *Bray* (*c*) that in a bill by the mortgagee he was bound upon payment of the amount due upon each of several mortgages in his hands, to reconvey the premises comprised in that mortgage. In that state of the law there was nothing to prevent his foreclosing one mortgage, and afterwards filing his bill to foreclose another. There might be a question as to costs, if he acted vexatiously; but no question, I apprehend, as to his right; and, the extension, to suits where he is plaintiff, of his equity to be redeemed as to all, can make no difference in his right. And in this there is no hardship upon the mortgagor, for he can always redeem at his own suit.

Judgment.

The question in this case arises from the mortgagee having taken that course. He filed his bill for the foreclosure of the farm property, the premises comprised in the mortgage, (I have not the date of its being filed)

(*a*) 1 D. M. & G. 240. (*b*) 7 Hare, 567, *n*. (*c*) 15 Jurst, 1051.

1869.

Bald v. Thompson.

and claimed only the sum secured thereby. To this bill the defendant put in no answer, nor any note contesting the amount; and the usual decree was made on the 26th of November, 1866, giving six months to redeem, on payment of $1221. The plaintiff not having redeemed, a final order for foreclosure was made on the 1st of June, 1867. The plaintiff subsequently dealt with the property as his own, and on the 6th of April, 1868, filed his bill for the foreclosure of the mill property.

If I am correct as to the rights of a mortgagee holding several mortgages, what has been done by the mortgagee in this case has been perfectly regular; and that apart from the peculiar circumstance of two mortgages on different properties, made in terms to secure different sums of money being made at the same time by the same mortgagor, to the same mortgagee, so unusual, and, as far as I know, so unprecedented a departure from the ordinary course, could scarcely have been without a purpose. Looking at the instruments, without more, as a question of construction only, I incline to the opinion that they would have to be taken as a contract between lender and borrower, that the lender should hold each pledge only for the sum for which it was expressed to be a security; the borrower to be entitled to redeem for that sum without either estate being onerated with the sum for which the other was pledged. The evidence, too, sufficiently shews, I think, that such was the contract. The borrower himself knew that the ordinary course would have been to give one mortgage upon the two properties; for he professes to give a reason why one mortgage was not given, viz., his desire that his wife might get the mill property: this can have but one meaning, that he should be at liberty to redeem that property upon payment of the sum for which it was expressly pledged, which he could not do if there had been one mortgage; and it was

Judgment.

at his request, and for that reason influencing him, that the securities took the shape they did. He contemplated the loss of one property, that which has been foreclosed; and was anxious to preserve the other, that which he may now redeem. 1869. Bald v. Thompson.

If such was the contract of the parties, not only was the mortgagee not entitled to be redeemed as to both, but it was the right of the mortgagor to redeem either estate separately,—but it is not necessary to determine that point. It was, in my opinion, the right of the mortgagee to proceed as he has done, and I am satisfied that in doing so, he has not violated in letter or in spirit the agreement or the intention of the parties. After final foreclosure the property was absolutely his; he was not a trustee for the defendant to account for its proceeds; he has not sued for the mortgage debt after foreclosing for its non-payment, or done any other act to open the foreclosure: and he has, in my judgment, a right to proceed, as he is now doing, to foreclose the property comprised in the conveyance of July, 1865. Judgment.

The decree will be in the usual shape, except that it will direct that the defendant pay the costs occasioned to the plaintiff by his resistance to his bill, whether he redeems or not. The other costs as usual, only in the event of his redeeming.

1869.

SCOTT v. WILSON.

Damages—Detention of personal property.

A debtor, whose business was the manufacture of reaping machines, conveyed his personal property to trustees; and having afterwards compounded with them and his other creditors, the trustees entered into a covenant to re-assign to him the property on certain terms and conditions. The debtor filed a bill, alleging amongst other things a breach of the covenant, and claiming damages:

Held, that he might be entitled to damages for the detention of the machinery necessary for carrying on his business; and it was referred to the master to inquire into the nature of the personal property withheld, and if it was machinery or chattels of a like nature to inquire and report as to damages.

Examination of witnesses and hearing.

Mr. *Proudfoot*, for the plaintiff.

Mr. *Osler* and Mr. *Bruce*, for the defendants.

Judgment. SPRAGGE, V. C.—The plaintiff was a manufacturer of reaping machines, and carried on his business at Dundas. The defendants were trustees of his estate for the benefit of his creditors; some of the trustees, if not all of them, being themselves creditors.

Under the instrument of assignment, which is dated 2nd November, 1866, the trustees were to carry on the business of the plaintiff; and by subsequent instruments the plaintiff assigned to the trustees all his personal property, and to one of them, *Turnbull*, all his real property. The plaintiff's business was carried on for about a year; when disputes arose; and a suit in this court was the consequence. The disputes and the suit were compromised by an agreement which resulted in an instrument dated 6th December, 1867, by which it was agreed that the defendants should be relieved from the trust; and should re-convey the lands, and personal

property in their hands upon certain terms and conditions; and there is a covenant by the trustees to re-assign upon those terms the personal property, and by *Turnbull* to re-convey the real estate, which he has done. The questions upon which this bill is filed arise out of the instrument of December, 1867.

1869.

Scott v. Wilson.

At the hearing it appeared a clear case for an account of the dealings of the trustees with the trust estate; and I referred it to the master to take an account of such dealings. But the plaintiff raised this further question, that under the statute 28th of the Queen, chapter 17, section 3, he is entitled to an inquiry as to the damages which he has sustained by the omission of the defendants to re-convey, and re-deliver to him, the personal property in their hands.

The first question that is made is, whether this suit falls within any of the classes to which the act applies. They are those "in which the court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act; or for the specific performance of any covenant, contract or agreement." This bill is framed rather as a bill for bringing trustees to account, than as a bill for specific performance of an agreement: nevertheless it does allege an agreement *inter alia* to re-assign and to deliver personal property; and, after praying for an account, prays, that the defendants may be ordered to deliver the same to the plaintiff. It is true that such a prayer would be proper apart from the agreement of the defendants; but there being such an agreement the prayer is referable to that agreement; and is so none the less because it would be the duty of the trustees apart from their agreement. It is therefore a case in which the court has jurisdiction to enforce the specific performance of the agreement, and so a case within the act.

Judgment.

1869.

Scott v. Wilson.

It is next objected that the damages are too remote. The damages claimed I take to be those pointed at by the 14th paragraph of the bill, viz., those resulting from the plaintiff's inability, as he puts it, to carry on his business by reason of the withholding from him by the defendants of his personal property. It would have been well if the pleadings and the evidence were more full and explicit upon this point. They do not shew what personal property is withheld, or even the nature of that personal property, except in one particular;—evidences of debt. The withholding of these or of money would not be a case for damages under the statute, while, on the other hand, the withholding of machinery, to the re-delivery of which the plaintiff was entitled, and with which he had manufactured his reaping machines, and which were necessary for that purpose, might be a proper case for damages. I am not prepared to say that such damages would be too remote. I think my proper course will be to direct the master to inquire and report as to the nature of the personal property withheld, and if it is machinery or chattels of the like nature, to inquire and report as to damages. If it was only of a nature to cripple the means of the plaintiff, then I apprehend it would not be a case for damages. It may be desirable that the master should report separately if either party should desire it, and if the master should be in doubt as to its being a case for damages. If the plaintiff's right to re-delivery under the agreement did not accrue, the question of course will not arise.

Judgment.

Costs and further directions will be reserved.

1869.

WORKMAN v. THE ROYAL INSURANCE COMPANY.

Demurrer—Pleading—Practice.

A bill against an Insurance Company on a policy, alleged that the policy was made by the Company, but did not state that it was under seal.

Held—Sufficient.

The policy was stated to be to pay such loss or damage as should happen to the property by fire, "subject to the conditions thereon indorsed."

Held—That the language did not imply that the conditions were conditions precedent, and therefore that it was not necessary to show due performance.

The bill alleged that the policy had been destroyed.

Held—That an affidavit of the fact must be annexed to the bill.

The plaintiffs filed their bill against *The Royal Insurance Company of Liverpool, Adrien Giberton*, and *James S. Yarker*, alleging that *Giberton* and *Yarker* having been copartners in trade, on the 2nd of January, 1867, effected a policy of insurance with the company whereby the Company undertook and agreed to pay or make good to the assured all such damage by fire as should happen to their stock in trade, *subject to the conditions thereon indorsed;* that the said stock in trade, together with the house in which the parties carried on their business, was destroyed by fire on the 16th of July following, and that thereupon the Company became liable to pay *Giberton* and *Yarker* the full amount secured by such policy ($3,000), and that they had assigned such claim against the Company to the plaintiffs in trust for the benefit of creditors; that the plaintiffs had applied to the Company to pay them such amount, but the Company had refused to do so; that the policy of insurance was destroyed by the fire which consumed the goods, and therefore the plaintiffs were unable to produce the same; that *Giberton* and *Yarker* refused to join as co- Statement.

1869. Workman v. Royal Ins. Co.

plaintiffs in this suit, or to allow the plaintiffs to use their names to sue at law for the recovery of their claim; and that the plaintiffs had no sufficient or adequate remedy at law in the premises.

The prayer of the bill was for an account of the amount due in respect of such loss, and that the Company might be ordered to pay the same to plaintiffs.

To this bill the Company filed a demurrer, on the following grounds:

"1. That it is not alleged in the said bill that the contract of insurance therein mentioned was contained in a sealed instrument, and if it was so contained, there does not appear to be, nor is there any affidavit annexed to the bill, of the loss or destruction of such instrument, so as to give jurisdiction to a court of equity, in respect of the matters in the said bill contained.

Statement.

"2. That the said bill contains no sufficient allegation that there is not sufficient evidence to maintain an action at law against these defendants, at the suit of the defendants *Adrien Giberton* and *James S. Yarker*, in respect of the contract of insurance in the bill mentioned, or that any discovery from these defendants is necessary for the maintenance of such an action, or that there is any impediment whatever to the plaintiffs' instituting a suit in a court of law in the name of the said *Adrien Giberton* and *James S. Yarker*, against these defendants; but on the contrary, it does appear that full and complete redress can be effectually obtained by the plaintiffs in such action at law, and that a court of law is the proper court for trying the question of the liability of these defendants upon the said contract of insurance, and for determining the the loss or damage, if any, which has been sustained by the assured within the terms and provisions of the said contract of insurance.

1860.

Workman v. Royal Ins. Co.

"3. That it appears by the said bill that by the contract of insurance in the said bill mentioned, these defendants only became liable to pay or make good to the assured such loss or damage by fire as should happen to the property insured, subject to the conditions on the said contract of insurance indorsed; but the said bill does not allege what these conditions were, nor that the assured had fulfilled all conditions precedent necessary to entitle them to demand payment from these defendants of such loss or damage.

"4. That it appears by the said bill that *Adrien Giberton* and *James S. Yarker*, in the bill mentioned, are the only persons in whose names as plaintiffs any suit can be maintained against these defendants in respect of the contract of insurance in the bill mentioned; and the only persons who as plaintiffs are competent to make the affidavit of the loss or destruction of the said contract of insurance necessary to give to this honorable court jurisdiction in the premises if for such loss or destruction complete redress cannot be obtained at law upon the said contract of insurance, yet they are wrongly made defendants in the said bill of complaint; wherefore," &c.

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

Mr. *Blake*, Q. C., contra.

Judgment.

SPRAGGE, V. C.—The defendants, The Insurance Company, demur upon several grounds. They object that the bill does not allege that the policy of assurance set out in the bill is under seal. I think this objection is not tenable. The demurring defendants are a corporate body, and an allegation that a policy of insurance was made by a corporate body imports, *ex vi termini*, that it was sealed with its corporate seal, inasmuch as it is the ordinary mode in which such a corporate body enters into formal contracts.

1869.

Workman v. Royal Ins. Co.

It is next objected that the contract of the Company under their policy being to pay such loss or damage as should happen to the property by fire, "subject to the conditions thereon indorsed;" it is not alleged in the bill that such conditions have been performed; and that it must be taken as against the pleader, who has not alleged whether these conditions were conditions precedent or subsequent; that they are conditions precedent, the performance of which must be alleged. There is no allegation of the performance by the assured of the conditions upon which they should, upon loss, become entitled to the insurance money, other than this: After alleging the fact of loss by fire, the bill states that the "company thereupon became liable to pay to the said (the assured) the full amount of the said policy under the terms and conditions thereof." I think that this is not a sufficient averment of the performance by the assured of any conditions which were to be performed on their part precedent to their becoming entitled. It is nothing more than an averment of a conclusion of law. If the allegation as to conditions in the contract is to be taken as an allegation that they were conditions precedent, a specific allegation of their performance was necessary, otherwise the plaintiffs do not distinctly aver all the facts that are necessary to constitute their title to relief, *Houghton* v. *Reynolds* (*a*); and *Walburn* v. *Ingilby* (*b*), is an authority upon the same point, and also to the point that the general allegation contained in the statement of the liability of the Insurance Company is not sufficient. The real question is whether the allegation as to conditions in the contract, is to be taken as an allegation that they are conditions precedent; and it is a question upon which I confess I have felt considerable doubt. Of the cases that I have seen the one that comes nearest to this is *Tod* v. *Bessant* (*c*). The bill was filed

Judgment.

(*a*) 2 Hare 264. (*b*) 1 M. & K. 61.
(*c*) 3 Y. & C. 320.

by two plaintiffs, and it alleged a demise by one to the other, without saying whether the demise was by parol or by deed; if by parol the suit was rightly constituted; otherwise if the demise was by deed. The language of Mr. Baron *Alderson* is apposite to the case before me: "Now two senses may reasonably be put on the expression 'demised'; and if so, why am I necessarily bound to put that construction upon it, which it is obvious the plaintiffs never intended should be put upon it, because such a construction would make the suit erroneous? Besides, the defendant is in no manner prejudiced by the statement for he might easily have raised the question. * * * Taking all the allegations in the bill together, I think I ought to read the expression 'demised' as if it had been 'demised by parol,' adopting that construction as the most natural, and, at all events, as the most reasonable, because it will give effect to the whole bill taken together, whilst the contrary construction would render the bill altogether erroneous." In the case from which I have quoted, the question arose upon the hearing, the defendant having by his answer set up that the party who had made the alleged demise had no interest in the subject matter of the suit, and no right or title to maintain the same, claiming the same benefit as if he had demurred. At the hearing the usual ground was taken that it is a settled rule of pleading that every allegation shall be taken most strongly against the pleader. It was in fact a demurrer *ore tenus*. At the conclusion of the argument Baron *Alderson* seems to have inclined in favor of the objection, observing: "The present inclination of my opinion is that I must take the statement in the bill most strongly against the pleader; and if so, holding the demise to be a demise by deed, the vicar would appear to be improperly joined; but if by parol, then he would seem to be a proper party." After taking some time to consider he overruled the objection upon the grounds which I have quoted from his judgment.

1860.

Workman v. Royal Ins. Co.

Judgment.

1869.

Workman v. Royal Ins. Co.

The case seems at first sight to conflict with the rule that where the language of a pleading is ambiguous it shall be taken most strongly against the pleader; but the case seems to proceed upon this, that where the court sees from the whole of the allegations that the pleader must have meant his language in a sense not against him, it shall not be taken in a sense against him; and that a test of the sense in which it is intended by the pleader is, its making or not making the suit erroneous; that when taking it in one sense would make the suit erroneous, and taking it in another sense would make it not erroneous, it shall be taken in the latter sense. This, if a qualification of the rule, is at any rate founded in good sense. It amounts in effect to this, that the ambiguity is removed by what is seen to be the scope and intent of the pleading.

Judgment.

Another ground of demurrer is that the bill is a bill for relief in respect of an instrument which the bill alleges to be destroyed, and that no affidavit of the fact is annexed to the bill. It is admitted that an affidavit is necessary where the allegation is that the instrument is lost or mislaid, but it is contended that it is not necessary where the allegation is that it is destroyed. I do not find any authority for this distinction, unless it be that the ordinary form of affidavit concludes with the allegation that the plaintiff does not know where the instrument is unless it is in the hands of the defendant, *i. e.*, if it does so conclude as is stated in some of the text books (*a*): I incline to think that this is erroneous, for Lord *Redesdale* puts two cases, one where an instrument is lost, the other where the suggestion is that it is in the custody or power of the defendant. In both cases he states an affidavit to be necessary, in the former stating loss, and only in the latter adding the words that he knows not where it is, unless in the custody or power

(*a*) Mitford Plg. 124.

1869.

Workman v. Royal Ins. Co.

of the defendant; and it is obviously proper in that case, but not in any other cases.

The form of affidavit given in several of the authorities, among them *Whitchurch* v. *Golding* (*a*) is that the instrument is not in the custody or power of the plaintiff which would apply to destroyed as well as lost instruments. In Judge *Story's* Treatise on Pleading, destruction and loss are in terms placed upon the same footing. He states the rule thus (*b*): "if a plaintiff should seek to obtain a discovery from the defendant of a bond lost or destroyed, and also relief consequent upon the discovery, he is required to make a suggestion in his bill that without such discovery he has not evidence sufficient to maintain a suit at law; and also to annex an affidavit of the loss or destruction of the bond." It is probably American law that a suggestion, that without discovery the plaintiff has not evidence, is necessary to give a court of equity jurisdiction. I quote the passage for the classing together by the learned author of instruments lost and destroyed. There is besides a reason given in the English authorities that applies to both equally, that the defendant has a right to the protection which the oath of the plaintiff may afford him as to the truth of the fact which he alleges as his ground for coming into equity: *Bromley* v. *Holland* (*c*).

Judgment.

This ground of demurrer, however, is not material in the view that I take of the case. It is agreed that an affidavit is necessary, only where the absence of the instrument is the sole ground of coming into equity. There are two grounds alleged in this bill, one the destruction of the policy, the other that the assured of whom the plaintiffs are assignees, refuse to allow the plaintiffs to use their names as co-plaintiffs to sue at law on the policy. Upon this the objection is that there is

(*a*) 2 P. Wm. 541. (*b*) Sec. 313. (*c*) 7 Ves. at p. 20.

1869.

Workman v. Royal Ins. Co.

no sufficient allegation that there is any impediment whatever to the plaintiffs instituting a suit in a court of law in the name of the assured against the Insurance Company. And it is contended that something more than a refusal by the party whose name must be used as plaintiff at law, is necessary. I find no authority for this. In *Hammond* v. *Mesecnger* (*a*) it is put as a sufficient reason; also, in a case in our own court, *Ross* v. *Munro* (*b*) when judgment was delivered by the late Vice Chancellor, and there are other cases to the same effect, and none that I have met with in favor of the objection.

Judgment.

The demurrer is overruled with costs.

WIGHT v. CHURCH.

Will, construction of—Distribution, period of—Vested interests.

A testator devised all his real estate to his two daughters and a grand-daughter "during their lives or the lives of any one of them for their support; and in the case of the marriage of any of them, to those above-named remaining unmarried;" and after their decease the property was to be sold for the benefit of all his grandchildren. At the time of his death all were living and unmarried; subsequently one of the daughters married, but became a widow; then the other daughter died unmarried and intestate, and afterwards the grand-daughter married:

Held—[SPRAGGE, V. C., dissenting,] that on the marriage of the grand-daughter, the property was to be sold and distributed among the grandchildren.

Rehearing. The judgment on the hearing is reported ante vol. xv., page 413.

Mr. *Kingsmill*, for the plaintiffs.

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

(*a*) 9 Sim. 332. (*b*) 6 Grant, 432.

1869.

Wight v. Church.

Luxford v. *Cheek* (*a*), *Brainbridge* v. *Cream* (*b*), *Tudor's* Real Property, p. 740, *et seq.*; *Jarman* on Wills, pages 686, 687, were referred to.

After taking time to consider,

VANKOUGHNET, C., delivered the judgment of the court. He stated that he had written a judgment in the case, which he had mislaid. The result of it was, that the will, in his opinion, sufficiently shewed the intention of the testator to be, that his two daughters and his grand-daughter named should have the income of the real estate for a provision until their marriage, or for life if they did not marry; and that on the death or marriage of all three, the gift in favour of all the testator's grandchildren should take effect.

SPRAGGE, V. C., retained his former opinion.

MOWAT, V. C., concurred in the views expressed by The Chancellor. Judgment.

Per Curiam—Decree reversed on this point. [SPRAGGE, V. C., dissenting.]

EWART v. STEVEN.

Agent and executor, advances to—Claiming against testator's estate.

A sum of money was advanced to an agent, who was also executor, avowedly to pay taxes, for which the lands of the testator were liable, and it was shewn that a part only of the sum advanced was so applied:

Held, that the lender was entitled to claim against the estate to the extent to which the money was shewn to have been expended thereon, and that, too, without reference to the state of account as between the executor and agent and the estate.

Examination of witnesses and hearing.

(*a*) 3 Lev. 125. (*b*) 16 Beav. 25.

1869.

Ewart v. Steven.

Mr. *Cattanach*, for the plaintiff.

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

SPRAGGE, V.C.—A sum of $1000, moneys of the estate of the late *James Bell Ewart* was lent by *Josiah M. Babington*, one of the executors of that estate to the late *James McIntyre*, in order to its being applied for the purposes of the estate of the late *Andrew Steven*. *McIntyre* was at the time acting administrator in Canada of the estate of *Steven*; the widow of *Steven*, who was joined with him in the administration of the estate, residing abroad. *McIntyre* was also agent of the widow; the heirs-at-law and next of kin, for the management of the *Steven* estate in Canada, real as well as personal.

Judgment.

A portion of the real estate consisted of what was called the *V. H. Tisdale* property, and on the 25th of November, 1865, that property stood advertised for sale for default in payment of taxes; and on that day the sum of $1000 was lent by Mr. *Babington* to *McIntyre*, the receipt given by *McIntyre* at the time expressing it to be "a loan to pay taxes on the *V. H. Tisdale* property."

After the close of the case the pass-book of *McIntyre* with the bank, was introduced in evidence, and its contents admitted as evidence of the facts and figures therein appearing. From this it appears that on the day that *McIntyre* obtained the loan from *Babington*, he paid into the bank the sum of $810, and that, independently of that sum, his account was overdrawn; and further, that on the same day the sum of $808.55 was paid out upon his cheque. By the evidence of the collector it appears that he was paid the above sum by *McIntyre* on that day for taxes on the *V. H. Tisdale* property, and as he believes by cheque. It is possible

1869.

Ewart v. Steven.

of course that the sum paid by *McIntyre* into the bank was not a portion of the sum borrowed by him from *Babington*. If it was a portion of it, then it is positively certain that the taxes were paid out of the money borrowed: and as it is, looking at the circumstances, the proper conclusion of fact from them is, that of the money borrowed $808.55 was so applied.

The position taken by the defendants I understand to be that the *Ewart* estate cannot recover this sum against the *Steven* estate, unless it be shewn that at the time of the money being borrowed, *McIntyre* had not in his hands moneys of the *Steven* estate to answer those taxes; and only so far as he had not moneys in hand. It is not a case of the pledging of the assets of the estate by an executor as a security for money borrowed; that stands upon a different principle, which is thus put by Sir *Richard Kindersley* in *Miles* v. *Durnford* (*a*): "Now the authority of an executor dealing with his testator's assets, rests upon this principle. It is of importance to give to executors an uncontrolled power over the assets; and therefore the law gives him the right of dealing with the assets to raise money for the purposes of his testator's estate, and then the *onus* of shewing that it was not wanted for such purposes is not thrown upon the parties advancing the money. It is sufficient for him to shew that he had no fair ground or reason to believe that the money was not wanted for executorship purposes." *McLeod* v. *Drummond* (*b*) before Sir *William Grant*, and the same case subsequently before Lord *Eldon* (*c*); as also *Keane* v. *Robarts* (*d*) before Sir *John Leach*, all proceeded upon the same principle: and the later case of *Collinson* v. *Lister* (*e*) first at the Rolls, and in appeal before the Lords Justices (*f*) is not, I think, an exception.

Judgment.

(*a*) 2 Sim. N. S. 239.
(*b*) 14 Ves. 358.
(*c*) 17 Ves. 172.
(*d*) 7 D. M. & G. 634.
(*e*) 4 Mad. 333.
(*f*) 20 Bea. 356.

1869.

Ewart v. Steven.

I am not referred to any case where there has been simply a loan without a pledge of the assets by way of security. In *Miles* v. *Durnford* the security was given subsequently to the loan; and, upon the ground that the loan was not made upon the security of the assets, the Vice Chancellor directed an inquiry whether the money lent had been applied to the purposes of the estate; or rather he held that such would have been the proper course but for another difficulty in the case (*a*). On appeal the Lords Justices differed with the Vice Chancellor as to the effect of the loan having been made originally without security, and security being given afterwards, considering it as a circumstance deserving attention, but as not going far. Their Lordships thought the presumption in favor of the propriety of the transaction, and upheld the security. The point upon which the Lords Justices thus differed from the Vice Chancellor was only as to the effect of security being taken subsequently to, not at the time of the advance. There is nothing in their judgment to impeach the doctrines enunciated by him, except in that particular. I except, however, another point not at all in question here.

Judgment.

I refer to the ground upon which the Vice Chancellor was overruled, because I desire to refer to him as an authority for the proposition that where money borrowed by an executor for the purposes of an estate is actually applied to the purpose for which it was borrowed, the lender is entitled to recover it against the estate. The Vice Chancellor's position was that where security was not given at the time, the lender was in the same position as if security had not been given at all. His language is that in such a case "the *onus* of proof is on the person who advances the money to shew that the moneys advanced *were applied* to the purposes of the testator's estate. That rule is just and proper,

(*a*) 2 D. M. & G. 641

and I am not aware of any case in which the contrary has been decided."

1869.

Ewart v. Steven.

The language of Lord *Romilly* in *Collinson* v. *Lister* (*a*), in which he decided in favor of the estate, is to the same effect: "If a man, without taking any security, advances money to another who is an executor, and the executor informs the lender that he requires the money for the purposes of the testator's estate, but in fact misapplies the money, that cannot bind the persons interested in the testator's estate but constitutes simply a general debt from the borrower to the lender. * * where the person lends money to an executor in order that he may apply it for the purposes of the testator's assets this is a personal debt of the executor; but if in addition to that the lender claims repayment out of the testator's assets, it can only be in case he can shew that the executor himself would be allowed that sum in taking the accounts of the testator's estate." I have no doubt that Sir *Richard Kindersley* and Lord *Romilly* stated the law correctly, and the obvious corollary from what they say is, that where money borrowed for the purposes of an estate by the representatives of an estate is so applied, the estate which has the benefit of it is liable for its repayment: and I do not understand that it is liable only where, upon a taking of the accounts between the executor and the estate, the balance would be found at the time to be in favor of the executor or not against him; but that the lender would be entitled to claim against the estate in case he can shew, as put by Lord *Romilly*, that the executor himself would be allowed the sum advanced. The executor himself would of course be allowed the sum so advanced and so applied whatever might be the state of the accounts as between himself and the estate.

Judgment.

It was not indeed as personal representative of the

(*a*) 20 Bea. 356-371.

1869. Ewart v. Steven.

Steven estate that *McIntyre* borrowed and applied this money, and the law as to pledge of assets by an executor would probably not apply. The question rather is whether what he did fall within the scope of his duty and authority as agent for the management of real property. It was not, however, distinguished in argument from the case of an executor. I incline to the opinion that money lent and applied as this was, is recoverable by the lender against those who have received the benefit of the loan, the plaintiff in effect following the money by shewing its application.

Judgment.

I think the plaintiff entitled to a decree with costs. The decree will be for payment of $808.55 and interest.

Bleakley v. The Niagara District Mutual Insurance Company.

Insurance—Principal and agent.

The travelling agent of an insurance company obtained from the plaintiff his application for an insurance, and in filling up the answers to the questions, the question as to the existence of incumbrances, was answered in the negative, when in fact a mortgage was in existence on the land on which one of the houses insured stood.

Held, that this circumstance vitiated the policy, not only as to a house situate on the land covered by the mortgage; but also as to another building standing on land not comprised therein, although separate sums were named in respect of each building.

At the foot of the paper containing the answers to the several queries propounded by an insurance company, a memorandum was inserted stating that their agents were the agents of the applicants, so far as related to the making of applications, &c. And that the company would not be bound by any statement made to the agent not contained in the application.

Held, that the applicant was bound by a false statement, contained in the application, even if the agent had, as was alleged, filled in the answer to the question without putting the question to the applicant.

Examination of witnesses and hearing.

1869.

Bleakley v. N.D.M. Ins. Co.

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

Mr. *Moss*, for the defendants.

SPRAGGE, V. C.—The plaintiff's policy of insurance stands, as corrected, upon several buildings, a sum being set opposite to each, and the aggregate being $3000. The premises were destroyed by fire during the currency of the policy.

The defendants object to pay for the loss on several grounds. The first is, that the premises were incumbered by mortgage to one *Ephraim Cook*, and that upon the application for insurance made by the plaintiff, the existence of such mortgage was not disclosed. This objection is anticipated by the plaintiff's bill and is met by an allegation that the plaintiff's application or proposal for assurance was made through one *Hill* who was the company's travelling agent for procuring insurances. The proposal contains a series of printed questions, the answers to be made by the applicant for insurance. Among the queries are two: "Is there any incumbrance thereon?" "If any, state the amount and to whom incumbered?" Opposite the first of these queries there is a rather indistinct piece of writing, which is sworn by the agent to mean "none," and opposite the second an ink mark signifying, I should say that there was nothing which it was necessary there to note. The plaintiff's case is, that the answers to all the queries were filled in by *Hill*, the company's agent; and as to the queries concerning incumbrances says, that no questions were put to him; that the other queries were read to him one by one, and his answers taken down by *Hill*, who informed him that that was all the information that was required of him. This case is not supported by evidence: the testimony of *Hill* is, that he asked the plaintiff if there was any incumbrance on the property, if there was any mortgage, and that the

Judgment.

1869.

Bleakley v. N.D.M. Ins. Co.

plaintiff's answer was "no." It is strange, certainly—strange that such answer should be given; and strange, on the other hand, that *Hill*, reading the queries one by one, should have omitted this. But supposing this query to have been omitted by *Hill*, would it have bettered the plaintiff's case? The proposal is signed by the plaintiff, it is his application, his statement: and *Hill*, while agent of the company to solicit insurance, is not therefore necessarily the agent of the company when performing a duty for the applicant for insurance: but all question upon this point seems to be removed by a provision contained in the application itself: "The agents are considered the agents of the applicant so far as relates to the making of applications, and the delivery of all notices connected therewith, or with the insurance granted thereon, as shall be given or transmitted to him. The company will not be bound by any statements made to the agent not contained in the application." This note is explicit upon two points; that in the matter of the application the travelling agent of the company should be considered the agent of the applicant; and that the company would go upon the written application, not upon the statements made to the agent not contained therein. It may be that this note was not read by the plaintiff; very probably it was not; for we find an unaccountable carelessness on the part of persons effecting assurances in making themselves acquainted with the terms upon which they are insuring. I do not see any omission on the part of this company in giving all necessary information to parties about to insure. On the first page of the application, or "proposal" as it is called, there is the heading in large type "Laws, By-laws, and conditions of Insurance." And the first is thus headed: "Manner of effecting Insurances;" then follows this: "By-law 8, That every person wishing to become a member of this company shall, previous to being insured, deposit his application, which said application shall be held, taken, and received to be, and form

Judgment.

1869.

Bleakley v. N. D. M. Ins. Co.

part of the policy of insurance granted thereupon, and shall be held, and read in connection therewith." And the same by-law under the same head is indorsed (the first thing) on the policy. It would be almost a premium upon carelessness, and it would be most unfair to the company, with all this before the assured to make the company responsible for what passed verbally between him and *Hill*, even if *Hill* did omit the queries respecting incumbrances. There is no evidence in proof of the allegation that *Hill* informed the plaintiff that the answers that he had given comprised all the information that was required of him. In *Henry* v. *The Agricultural Mutual Assurance Association* (*a*) I had to consider the effect of representations by a travelling agent of an insurance company, and upon referring to the view I then took of them, I see no reason to alter it.

Then there is the statute, "An act respecting Mutual Insurance Companies" (*b*), the 27th section of which is as follows: "If the assured has a title in fee simple unincumbered to the building or buildings insured, and to the land covered by the same, any policy of insurance thereon issued by the company, which is signed by the president and countersigned by the secretary, shall be deemed valid and binding on the company, but not otherwise; but if the assured has a less estate therein, or if the premises be incumbered, the policy shall be void unless the true title of the assured and of the incumbrance on the premises be expressed therein and on the application therefor." This provision of the statute is indeed only in affirmance of what I take to be the law without it. The existence of an incumbrance upon the assured premises is a material fact; and an applicant for insurance is bound to state to the assurers all material facts; and he is not excused by his ignorance that material facts undisclosed are really material.

Judgment.

(*a*) 11 Grant, 125.

(*b*) C. S. U. C. 952.

1869.

Bleakley v. N. D. M. Ins. Co.

This is clear from *Lindenau* v. *Desborough* (*a*) in the King's Bench, approved of in the Common Pleas in *Jones* v. *The Provincial Insurance Company* (*b*), and the same principle is affirmed in the late case of *Bates* v. *Hewitt* (*c*). It is not necessary to determine whether, independently of the statute, this principle would apply where the assurers had propounded a series of questions, and there was some material fact not contained within these questions and left undisclosed in ignorance of their materiality. *Jones* v. *The Provincial Insurance Co.* is an instructive case upon that point.

Another point made by the plaintiff is that the company is estopped from setting up the non-disclosure of the mortgage by accepting, after the fire, payment of the sum of $58.30. This sum was due by the plaintiff before the fire. It was an assessment on the premium notes given by the plaintiff to the company for the period between 31st May, 1866, and 1st June, 1867.

Judgment.

In July a receipt for the amount, with the date blank, was sent from the head office at St. Catharines to the travelling agent, *Hill*, who transmitted the amount to the head office with other moneys in the December following; and it was then, as is alleged, and as I assume to be the case, credited to the plaintiff in the books of the company. The company appears to have been notified of the fire within a day or two of its taking place; and some two or three days afterwards the inspector of the company, Mr. *Graydon*, was on the spot, and was then and there informed of the existence of the mortgage. The local agent, *Tidy*, was already aware of it; *Graydon* was probably aware of it before the payment of the $58 by the plaintiff to *Hill*. I do not think that this payment or what was done afterwards can estop the company from objecting the non-disclosure of the mortgage.

(*a*) 8 B. & C. 586, 92. (*b*) 3 C. B. N. S. 65.
(*c*) L. R. 2 Q. B. at 607.

1869.

Bleakley v. N. D. M. Ins. Co.

The policy was void; what was done that could set it up as a valid policy? The receipt of this money by *Tidy*, agent for specific purposes, after knowledge by another agent, *Graydon*, could not have such operation. Assuming that *Graydon* communicated the existence of the mortgage to the head office, as probably he did, and that this same money was subsequently received and credited at the head office, neither could this, in my judgment, have such operation. The course of dealing was this: *Hill* was the company's agent to receive within his district, comprising it appears two counties, the moneys payable by the assured upon assessments on their policies; receipts were sent to him for the purpose. He collected from time to time, and it was his duty at the end of the year to remit all moneys collected. The money paid in October by the plaintiff was so collected and remitted, and was credited to the plaintiff, as it would be as a matter of course, unless special instructions to the contrary were given to the treasurer or book-keeper. The money has not been returned to the plaintiff, probably under the idea that he was not entitled to it, as it was payable before the fire and before the company had knowledge of anything wrong in the insurance. The money indeed reached the head office and was credited there after the repudiation by the board of the plaintiff's claim for loss. Strictly, the policy being void, the money should have been returned to the plaintiff, but the omission to do this, probably from a misapprehension of his rights, could not operate to set up a void policy.

Judgment.

A fact came out upon the hearing, which does not appear upon the pleadings of either party, that the mortgage to *Cook* does not cover the whole of the assured premises. The mortgage is of two village lots, each numbered seven, on different streets. The assurance is on a brick dwelling-house, $1,600; a frame town hall, $1000; a barn, $200; and furniture, $200.

1869.

Bleakley v. N. D. M. Ins. Co.

The dwelling-house and a few feet of one end of the town hall are on the lots covered by the mortgage: the barn is wholly on another lot; and I am asked to allow an amendment setting up this fact in order, as separate sums are assured upon each building, that the plaintiff may recover *pro tanto;* and I ought, I think, to allow it if the plaintiff would be entitled to recover *pro tanto*, and if he has a *locus standi* in court.

Judgment.

To take first the case of the barn. It appears by the diagram indorsed on the proposal to be within such a distance from the other buildings assured as to increase the risk of each. If the barn had been alone insured, it would have been a true answer to the query as to any incumbrance upon it, that there was none. But there is only one contract of insurance, and the effect of insuring separate buildings for separate sums is only to limit the liability of the assurers as to each. Insuring in the way that the plaintiff did insure, several buildings in one policy, there was a fact which he was called upon to disclose, and I must see clearly that as to the barn at any rate its non-disclosure was immaterial, that it could not be an element in the consideration of the assurers whether they would assure or not. I cannot see this; on the contrary, I can understand assurers refusing to take a risk on a building because of there being a mortgage on another, belonging to the same person, within a distance not free from risk. It is not my province to say that if the existence of this mortgage had been disclosed I feel satisfied that the company would still have taken the risk. Looking at the amount of the mortgage, at the fact that the town hall was built after the mortgage was given, and other circumstances, I may think so. But there is the contract, and the court is not at liberty to speculate upon what the company would have done if a fact, which cannot be called immaterial, had been disclosed. I think the plaintiff is not entitled to recover for the loss of the barn: *a fortiori*, that he is

not entitled to anything in respect of the portion of the town hall not covered by the mortgage. 1869. Bleakley v. N. D. M. Ins. Co.

Other points were raised which it is not necessary to determine. I think the plaintiff makes out no equity, and that his bill must be dismissed: and I cannot do otherwise than dismiss it with costs.

As it is a void policy, the plaintiff would seem to be entitled to a return of the premiums paid by him, and the learned counsel for the plaintiffs concedes that such is his right. I do not see, however, how I can direct repayment in this suit, as it would be granting some relief to a plaintiff who has established no equity; and he can, I apprehend, recover them at common law. The best course will be to set them off against the costs. Judgment.

BUTLER v. CHURCH.

Specific performance—Statute of Frauds—Pleading.

Where a defendant denies an alleged agreement of which a plaintiff seeks specific performance, the defendant should claim the benefit of the Statute of Frauds in order to exclude parol evidence of the contract.

Continued possession by a tenant, coupled with acts inconsistent with a tenancy, is sufficient part performance to let in parol evidence of a contract of sale.

Examination of witnesses and hearing.

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

Mr. *Blake*, Q. C., and Mr. *Lees*, for the defendants.

1869.

Butler v. Church.

SPRAGGE, V. C.—The plaintiff's case is that several years ago he became the purchaser from the late *William Hodgins* of one hundred acres of land in the township of Goulburn. The plaintiff has been in possession of the land ever since the year 1842, or thereabouts, originally as tenant of *Hodgins*, working the farm on shares: and his case is, that in October, 1856 (stated in the bill, obviously by mistake, as 1854), a contract was made between himself and *Church* for the purchase of the lot for the sum of £650; that he ceased to work the farm on shares, and to deliver produce of the farm as he had theretofore done by way of rent; and that thenceforth he made payments on account of the agreed purchase money partly in cash, partly in work, and partly in farm produce, and thenceforth also dealt with the land as his own, using it and making improvements upon it as an owner would do. There was no agreement in writing between the parties, and the bill puts it as a verbal contract of purchase. The answer denies the contract to the belief of the defendant, but does not set up the statute of frauds. *Hodgins* died in July, 1867, possessed of a very considerable amount of real and personal property. By his will, after devising his homestead to his wife for life, he devised the residue of his real estate to trustees. The land in question was allotted to *Susan Church*, a daughter of the testator, upon a division of the property among the beneficiaries, under his will. She and her husband *Coller M. Church*, are the defendants in this suit. *Coller M. Church* is one of the trustees under the will, and one of the executors who proved the same. Notice to the defendant of the plaintiff's contract of purchase is alleged by the bill; and is not in terms denied by the answer. It is, moreover, clear from the evidence that the husband had notice, and I think the wife also.

Judgment.

The effect of the statute of frauds not being set up by the answer, appears to be that the defendants are not entitled to the benefit of it.

1869.

Butler v. Church.

It was so held by Sir *J. L. Knight Bruce* in *Parker* v. *Smith* (*a*), and again in *Skinner* v. *McDouall* (*b*); in the latter case the learned judge intimating his impression to be, that the defendant could successfully have pleaded, or claimed by his answer, the benefit of the statute. If the statute is out of the question, the logical conclusion would appear to be, that the question of contract or no contract, becomes a question of fact, requiring no particular mode of proof, but a fact that may be established by the same kind of evidence as any other fact, and that it is not necessary to prove part performance in order to take the case out of the statute.

The plaintiff establishes his case by evidence that is to my mind clear and satisfactory. There is the direct evidence of two persons, who were present when the contract was entered into. They both prove the amount agreed upon as the purchase money; that there was some discussion about interest, that interest was to be charged, and that £20 on account was paid in hand, and they each relate a circumstance that probably helped to impress it upon their minds, which was that, upon the £20 being laid upon the table, a son of the plaintiff's took it up saying it would be time to pay it when the writings were drawn; that *Hodgins* was angry at the son's interference, and one of the witnesses adds that the plaintiff got the money back from his son and handed it to *Hodgins* who took it: the other witness does not recollect what became of the money. The other witness states that upon the discussion about interest, *Hodgins* said he would have the interest; but that he would give £100 to the plaintiff's wife, who was his niece. Both these witnesses were intelligent, and as I judge, entirely truthful.

Judgment.

There is besides a good deal of confirmatory evidence.

(*a*) 1 Coll. 615. (*b*) 2 DeG. & S. at 273.

1869.

Butler v. Church.

There was a third witness who was present on the same occasion, and who speaks as to what passed, though with less particularity. He had lived with *Hodgins* from his childhood, and was then only about ten years old; he adds this circumstance, that on the following day he drove *Hodgins* home, the plaintiff also being with him. The bargain had been made at Richmond, where the parties had met at a fair. He thus states what occurred: "when I drove Mr. *Hodgins* and *Butler* home the next day they were rather high, they had been drinking; we stopped at *Butler's* gate and Mrs. *Butler* was there, and Mr. *Hodgins* said, you need not scold him now, you have made a purchase," and the witness adds, "I remember this as if it had been yesterday;" this witness, too, I entirely believed. Another witness speaks of a conversation with *Hodgins* in which the latter, in answer to a question from the witness, said, he had sold the land to the plaintiff for £650. The defendant *Coller M. Church*, was also called, principally in relation to the payment of moneys by the plaintiff to *Hodgins*, and to entries in certain books of *Hodgins*. From his evidence, I have no doubt that the payments were on account of the purchase of the land in question. There is also the evidence of a son of *Hodgins* who, while contradicting some evidence of a son of the plaintiff's as to the preparation of a conveyance, says, "I am convinced that it could not have occurred, from my father having said that *Butler* should not have a deed, for he had not paid the interest, let alone the principal," an observation only consistent with there being a contract of purchase. There is besides the testimony of books of account kept by *Hodgins*. Both the plaintiff and the defendants agree that the plaintiff first occupied the land as tenant of *Hodgins*, working the farm on shares, and accordingly we find this entry in one of the books:— "1850—*Benjamin Butler*, an account of the grain received from him on account for the past year." Then follow a number of items of grain received in 1850, and

Judgment.

1869.

Butler v. Church.

successive years until 1856, the last entry being of March in that year, and ending above the middle of the page. All these entries are of grain, there is not one of cash, or of any farm produce other than grain. In the same book after a number of pages containing accounts with other persons, we come to a page headed thus:—"1856—Received from *Benjamin Butler*," and the first item is October 14th, the sum of £20, which there can be no reason to doubt is the £20 spoken of by witnesses as paid by the plaintiff to *Hodgins* at the fair at Richmond; then follow other items of cash: and entries of cash and farm produce are carried through the same and another book up to October, 1866. The items are principally of cash in various amounts, there are items of farm produce, lambs, sheep, pork, and a few items of grain. The accounts before October, 1856, and the accounts in and after October of that year differ in several particulars. The previous accounts are of grain only; and with the exception of the first three items they are not added up. In the subsequent accounts the entries are of a different character, there are but three items of grain in all; the rest is what I have described; they were added up from time to time; one addition makes an aggregate of £190 15*s.* 9*d.*, another of £307 10*s.* 9*d.*, another £341 11*s.* 6*d.*, this was in November, 1863. The whole amount (not however added up in the books) is £476 16*s.* 7*d.* Assuming the statute of frauds to be out of the question, as in my opinion it is, I think the evidence is clear and convincing in favor of the contract of purchase alleged by the plaintiff. There is some suggestion in the evidence of the defendant *Coller M. Church*, of there having been a contract of purchase which was abandoned by the plaintiff; but no such case is made by the answer, and the evidence upon that point really amounts to nothing.

Judgment.

I have not treated the case hitherto, as one of parol contract partly performed, but I incline to think that

1869.

Butler v. Church.

part performance within some of the cases is proved. Mr. Justice *Story* (*a*) puts the case of a continued possession by one who entered as tenant, and says "if in the case of a tenancy, the nature of the holding be different from the original tenancy, as by the payment of a higher rent, or by other unequivocal circumstances referrible solely and exclusively to the contract, then the possession may take the case out of the statute;" he goes on to say that especially will this be so when the party let into possession has expended money in building or repairs or other improvements. I can hardly say that there is much difference in the character of the improvements before and since October, 1856, except in the erection of a barn which was put up to replace one, the roof of which had fallen in, and one would say certainly that the expense of such an erection would rather be by the owner of the land than by a tenant. But that the nature of the holding was changed is abundantly evi-

Judgment.

dent; any one examining the entries of the books must be convinced of this; what the new holding was is another thing, it might be a tenancy of a different nature, or it might be a contract of purchase. The occupier was in possession in a different character; it was in substance a new possession, though without the formality of giving up the one possession and being put into possession in a new character: but, being in possession in a character not referrible to his former tenancy, it was open to him, I apprehend, to shew how and in what character he was in possession.

Notwithstanding the reluctance expressed by successive judges to break in upon the statute of frauds, and their misgivings at the length to which some of the decisions had gone, we do not find in modern cases the statute at all more rigidly adhered to: as long ago as *Cooth* v. *Jackson* (*b*), decided nearly seventy years ago,

(*a*) Eq. Jur., s. 763.

(*b*) 6 Ves. at p. 37.

1869.

Butler v. Church.

we find Lord *Eldon* saying, "I feel all the disinclination which has been lately expressed, and strongly expressed, in many cases, to carry what may be called the struggles of courts of justice, to take cases out of the reach of that statute, further than they have been carried;" yet nearly forty years afterwards (*a*) we find Lord *Cottenham* expressing himself thus: "Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance; for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into upon the ground of the statute of frauds, after the other party to the contract has upon the faith of such engagement expended his money, or otherwise acted in execution of the agreement—under such circumstances the court will struggle to prevent such injustice from being effected." And I may quote *Sutherland* v. *Briggs* (*b*), before Sir *James Wigram*, and *Parker* v. *Smith* (*c*), before Sir *J. L. Knight Bruce*, as instances of the struggles of the court to take cases out of the statute. The late case of *Nunn* v. *Fabian* (*d*), may be cited as another instance. It resembles the case before me in this, that there was possession under a tenancy when the contract, specific performance of which was decreed, was made. Lord *Cranworth* in almost the beginning of his judgment says, "Now I should yield to no judge of a court of equity in my desire to refrain from extending the cases in which the court gets over the statute of frauds; but there being an established rule on this subject a judge ought not to depart from it." There was some correspondence and a memorandum by a solicitor, but no writing within the statute of frauds. The alleged agreement was for a new lease for twenty-one years, at an increased rent, with the option of purchasing the

Judgment.

(*a*) Mundy v. Jolliffe, 5 M. & C. at 177. (*b*) 1 Hare 26.
(*c*) 1 Coll. 608. (*d*) L. R. 1 Chy. App. 35.

1869.

Butler v. Church.

freehold within a limited time. The plaintiff had expended about £100 in altering the shop-front, and had paid the first quarter's rent at the increased rate. Speaking of the alteration in the shop-front Lord *Cranworth* said, "Now I do not think that we can exactly call this part performance. The parol agreement was embodied in the lease which is silent about the alterations. But although it was not part performance, it is important as shewing that there was an agreement for a lease. * * * But here I am not driven to rely on this evidence, because I think that there was clear part performance by payment of the michaelmas rent at the increased rate fixed by the agreement." What is called a lease in the judgment was never executed.

Judgment.

The case before me is, in my judgment, a stronger case for part performance—supposing it necessary for the plaintiff to shew it—than the case of *Nunn* v. *Fabian*. The payment of the £20 is itself as strong a circumstance as the payment of the increased rent.

It is objected by the answer that the other trustees under the will of *Hodgins*, besides the defendant *Church*, are necessary parties, and the objection is renewed at the hearing. I do not think that they are necessary parties: nothing is sought against the estate of *Hodgins*, and the defendants having taken this land with notice of the plaintiff's contract of purchase, they may properly be left to settle with the other beneficaries under the will, and the other trustees, any questions that may arise among them, if any do arise, from the plaintiff's contract of purchase being established.

ARNOLD V. ALLINOR. 1869.

Injunction—Equitable plea—Practice.

Where a party had a clear right in regard to certain equities to set them up by way of equitable defence to an action at law, or, to come to this court; and by mistake pleaded them at law as a *legal* defence only, upon which he *necessarily* failed.

Held, [reversing the decree of V. C. MOWAT,*] that this did not form any bar to relief, on the same grounds, in this Court.

This was a rehearing of the decree pronounced by Vice Chancellor *Mowat*, as reported *ante* volume xv., page 357.

Mr. *Roaf*, Q. C., and Mr. *Douglas*, for plaintiff.

Mr. *Blake*, Q. C., and Mr. *S. Blake*, for defendant.

SPRAGGE, V. C.—The question presents itself to my mind in this view: The plaintiff comes into court upon a clear acknowledged equity; not an equity which it is in the discretion of this court to grant or refuse, according to circumstances; but upon a clear equitable right. Then how is this equity sought to be displaced? By this: that the defendant having the legal right had sued the plaintiff at law; and that the plaintiff had in that action set up as a matter of *legal bar* that, which was in truth only his right in equity; and that he had failed at law, upon demurrer to his plea being allowed, and the verdict of the jury being against him. It was his clear right in regard to his equity, to put it by way of equitable defence to the action at law, or, to come to this court. At law he could avail himself of it only by pleading it specially as an equitable defence. The statute is explicit upon this point. His pleading it as a legal bar was simply a mistake—a putting in of a bad legal plea; and he *necessarily* failed. Judgment.

Where a defendant at law has a defence upon equitable grounds, he has a choice of two *fori*, in either of which

*Was not present when the case was re-heard.

1869.

Arnold v. Allinor.

he may assert his equity, and if he elect to put himself upon one, and obtain the judgment of that one, and that be against him, he is bound by his election, and cannot resort to the other. This was the ground of decision in *Terrill* v. *Higgs* (*a*): the defendant at law elected to put himself upon the *equitable jurisdiction* of the common law court, and he was held bound by it. There is, so at least it appears to me, this broad distinction between that case and the case in judgment, that in the case before us the defendant at law did not elect the court of law as an equitable *forum*, as did the defendant at law in *Terrill* v. *Higgs*.

The question then is, upon what ground are we at liberty to deny the equitable right. It has not been adjudicated upon in another court, nor has the plaintiff in equity elected that it should be so. The matters set out in his plea have simply been adjudged to be no de-

Judgment.

fence *at law;* and there was a trial upon which a jury found the facts against him. It is clear that the allowance of the demurrer could be no bar to his coming to this court. Can the trial at law be a bar? The trial was really of an immaterial issue; and if the verdict had been for the defendant at law, the plaintiff would, I apprehend, have been entitled to judgment *non obstante veredicto*. Further, the defendant at law was at this disadvantage: that however clear the case of the defendant may have been in the opinion of the judge at law for a new trial; however contrary to evidence he might have considered the verdict, he could not grant a new trial, consistently with his right view of the law.

The only ground then upon which the plaintiff's equity can be denied, seems to me to be reduced to this, that the defendant at law might, by leave of the court, have converted his legal plea, into an equitable plea. I cannot

(*a*) 1 DeG. & J. 488.

think that this is a sufficient ground. It would be attaching a penalty to his not choosing a county court for his equitable *forum*, which, I venture to think, we have no right to attach; and it would be compelling him *to choose* his *forum*, though at a late stage of the proceedings at law. We have no ground for assuming that he elected to have an equitable right tried at law; his pleading what he did as a bar at law, shews that he conceived that he had no equitable right. He was misadvised, but *non constat* if he had been rightly advised, that he would not have come to this court. 1869. Arnold v. Allinor.

Shortly the ground upon which I come to my conclusion is this, that the matter in question is not *res judicata;* and that the plaintiff has not put himself upon any other equitable *forum* for the adjudication of his case; that in the belief that he had a good legal defence, he pleaded a plea which was properly adjudged in a legal *forum* to be no defence at law; that he has a good equitable case; and that nothing that has occurred entitles us to deny it to him in this court. Judgment.

If it were a matter of *discretion*, such as this court exercises, when, what has been called the extraordinary jurisdiction of this court is appealed to, I should still doubt if it would be proper to refuse a plaintiff relief under the circumstances I have detailed. But this is not a case of that class. It is the equitable right of a surety to be discharged in such a case as is stated by the plaintiff's bill, and I think that what has occurred does not displace it.

VanKoughnet, C.—I agree in the view taken by my brother *Spragge*, that the plea at law is, for the reasons stated by him, no bar to the equity set up here.

I have great doubts as to the plaintiff being a mere surety, or standing in any other position than his son

1869.

Arnold v. Allinor.

Oscar, who signed the note with him as joint maker; but my brother *Mowat*, who heard the case, does not report that he could reject the evidence of *Oscar Arnold*, or of *Higgins*, who does not seem to have any interest in the matter; accepting this evidence, the plaintiff is entitled to the relief he seeks.

DUNLOP v. THE TOWNSHIP OF YORK.

Municipal corporation—Compensation to mortgagee for land taken for highway—Dedication—User.

Land which had been mortgaged by the owner, was taken by a township council for a road, and the compensation having been ascertained by award, the corporation paid the amount to a creditor of the mortgagor, by whom it had been attached:

Held, that the mortgagee had the prior right; that his mortgage being a registered mortgage, the corporation must be taken to have acquired the land with notice of it; and that the mortgagee was entitled to recover the amount from the corporation with costs.

In a new country like Canada, user of a road by the public is not to be too readily used as evidence of an "intention" on the part of the owner to dedicate it.

Examination of witnesses and hearing.

Mr. *Strong*, Q. C., and Mr. *Barrett*, for the plaintiff.

Mr. *Blake*, Q. C., and Mr. *Bain*, for the defendants *The Corporation of York*.

The bill was *pro confesso* against the defendant *John A. Scarlett*, the mortgagor.

Judgment.

SPRAGGE, V. C.—Apart from the question raised by the municipality, that the piece of land belonging to *John A. Scarlett*, and which he had mortgaged to the plaintiff with other land adjoining, was and had been dedicated to

1869.

Dunlop v. York.

the public before the passing of the by-law establishing it as part of a public highway, I think that section 326 of the Municipal Institutions Act (*a*) entitles the plaintiff to a decree. The section runs thus, "all sums agreed upon or awarded in respect of such real property shall be subject to the limitations and charges to which the property was subject." Here was real property taken; and "such real property" as is referred to, and it was subject to a charge, the mortgage to the plaintiff. Money was awarded to be paid in respect of it, and that money is made subject to the same charge. The municipality instead of paying it to the mortgagee, or holding it to answer his charge, paid it to a creditor of the mortgagor, under certain garnishee proceedings. If the mortgagee was entitled to it, the municipality made this payment in its own wrong, as I thought and held in *Farquhar* against *The City of Toronto* (*b*).

Judgment.

Then, if the mortgagee was entitled, can the municipality for any reason say, that the payment they made was a proper payment, or a payment to be excused as against the mortgagee. The mortgage was registered, and registry is by the law made in equity to constitute notice to all persons claiming any interest in the lands comprised in the registered instrument, subsequent to the registration. It is contended that this applies only to persons claiming under the party, not to those claiming by paramount title. Assuming it to be so, the municipality, at any rate, do not claim by paramount title. Their title is derived through the same party as is the title of the mortgagee. It is true that, for public reasons, the assent of the party was not requisite; still, the municipality were in law grantees, and the owner of the land taken, is in such cases, grantor *in invitum* of the land taken. The municipality cannot take by title paramount, when under the

(*a*) C. S. U. C. ch. 54. (*b*) 12 Gr. 191.

1869.
Dunlop v. York.

statute they pay to the owner the price of the land they get, which price may be fixed by agreement between them. They are purchasers from the owner, and acquire title from or through him; and in no proper sense hold by title paramount. I think the registration was notice to them of the plaintiff's mortgage.

It is further contended, that if the claim for compensation had been made by the mortgagee, the municipality might have made other objections besides those made by them to the claim of the mortgagor, *e. g.*, that they might say that the road being kept in repair by the corporation was a benefit to the owner. The statute fixes the principle upon which compensation is to be made: it is for any damages necessarily resulting from the exercise of the powers of the municipality "beyond any advantage which the claimant may derive from the contemplated work." It was the duty of the municipality to concede nothing to the mortgagor, and I cannot hear them say that they did concede anything, or that they might have done so. That which it is suggested they might have urged in reduction of compensation, or as an element of consideration in fixing the price, I ought to assume that they did urge. There can really be no reason for two scales of compensation; for this reason among others, that it is the owner and he alone that is compensated; for it is he that is compensated whether the money passes directly into his own hands, or goes to reduce his debt to a third person.

Judgment.

Apart from the express enactment, the principle upon which compensation is allowed shews how just it is that the price to be paid should be subject to the charge upon the land. The compensation is measured by the diminution in value; and so unless the charge upon the land were made a charge upon the compensation, the security would be impaired, at the expense of the chargee.

1869.

Dunlop v. York.

It is not necessary to consider whether the municipality was right in dealing with the mortgagor alone in fixing the amount of compensation to be paid. The mortgagee does not seek to disturb what was done in that respect. Supposing him to have been entitled to intervene, he may waive his right; and adopt what was done, and he is willing to do so. It cannot lie in the mouth of the municipality to say that they dealt behind his back with that in which he had an interest, and that for that reason, his position shall be worse than if they had given him an opportunity to protect it. He now acquiesces, thinking probably that his interests were protected sufficiently by one, who had a common interest with himself, and it cannot lie with the municipality to open the matter.

There is besides really nothing to open. The moment the sum was awarded it was in the hands of the municipality impressed with a trust in favor of the mortgagee, and it was so when paid away by the municipality. It is in principle the case of a purchaser paying his purchase money to the mortgagor instead of the mortgagee with a registered mortgage: with this difference that in the case of an ordinary purchaser the land remains liable, while in the case of the municipality it is the purchase money that is made liable, the land itself becoming public property.

Judgment.

The other position taken by the municipality, that the land was already dedicated; and so was already a public highway, is a peculiar one. It is that the land was already what they by solemn acts professed to make it. Their by-law is entitled, "A By-law to open and establish a Public Highway in the Township of York," and the enactment is, "that a new line of road from Weston to Dundas street in the Township of York, surveyed and laid out by Messrs. *Dennis & Gossage*, provincial land surveyors, known and described as follows,"

1869.

Dunlop v. York.

then follows a description of the line of road, such line running through, among other lots, those comprised in the plaintiff's mortgage.

But assuming it to be open to the municipality to shew that the land comprised in the plaintiff's mortgage had been in fact dedicated to the public by the mortgagor before the making of his mortgage, or by a former owner, I am of opinion that the evidence fails to establish any dedication. Dedication is, as has been often observed, a question of intention. User by the public, acquiesced in by the owner of the land, may be evidence of such intention; as was said by Lord *Wensleydale*, then Baron *Parke*, in *Poole* v. *Huskinson* (*a*), "there must be an *animus dedicandi* of which the user by the public is *evidence* and no more; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment."

Judgment.

There was for many years a line of road running through private property; the road ran from Dundas street to Weston, as does the road established by the by-law of the Township of York, but unlike the road established by the township, the whole of which runs through the township, this old road ran partly in the township and partly (the greater part) in the township of Etobicoke. The old road as well as the new ran across lots 6, 7, 8 & 9, in York; lots 7 & 8 are those comprised in the plaintiff's mortgage. The whole line of the old road ran through property of Mr. *John Scarlett*, the father of the mortgagor, with the exception of one lot adjoining the village of Weston. This old road was in existence some forty years ago, and has been used by the public ever since, unless discontinued upon the opening of the new road; but though used by the public it is evident that such user was permissive

(*a*) 11 M. & W. 830.

1869.

Dunlop v. York.

only, and with a continuous claim of ownership by Mr. *Scarlett*. Mr. *Scarlett* had several sons, four at any rate, and appears to have apportioned the greater part of his large property among those sons from time to time; without, however, at first giving them title; and retaining the control of the road throughout the whole of the property until at all events, he gave them title. He placed his son, the mortgagor, upon lots 7 & 8 some twenty years ago, and afterwards did considerable work in planking and in excavation upon the part of the road running through those lots. When he gave him a title to them does not appear. The mortgage was made in November, 1860, and it may be assumed to have been before that time. According to the evidence of Mr. *William Gamble*, who knew the road intimately from 1835 to 1859, a toll-gate was placed upon the road by Mr. *Scarlett*, the father, about 1854 or 1855; before that Mr. *Gawble* says the road was always a private road for Mr. *Scarlett*, the father, and for his sons; and that the public were absolutely excluded as Mr. *Gamble* explains, for he says that when he first knew it it was travelled by the public, but he adds that Mr. *Scarlett* would not let them go through unless it served his purposes; and he says, "I know of my own knowledge that he stopped people on it and sometimes turned them back;" and he adds that there were gates across the road as far back as he can remember to prevent cattle from straying along the road, and that these gates also prevented people from travelling along the road. Another gentleman speaks of the toll-gate as put up at a much earlier date, he thinks about 1843, and he is probably right, as he compounded with Mr. *Scarlett* for the toll.

Judgment.

The date of the erection of the toll gate is not material. The first gate in York was on lot 8, it was afterwards removed to lot 9. Several witnesses were examined: they differ somewhat as to dates, and as to

1869.

Dunlop v. York.

some minor circumstances. They certainly do not prove any dedication by *Scarlett*, the father; their evidence upon the whole is quite against it, and I hardly think it can be seriously contended that there was any dedication by him. But it is contended that ever since the removal of the toll-gate from lot 8 some fifteen or twenty years ago, the son, the mortgagor, has allowed the public the undisturbed use of a line of road through his property; and that this is evidence of an intention to dedicate. What would be the proper view, if this were not part of a line upon which toll was being actually collected, it is not necessary to say; but the fact of its being a part of such line makes it impossible to regard it as dedicated. As long as the title remained in the father, and as long as he retained control over the line, he took toll for passing along the whole line, and he certainly dedicated no part of it. When the mortgagor acquired title is not shewn. It may have been any time before November, 1860; but suppose it to have been at an earlier date, and that he had a right to close the line; and allowed its use by the public, still the character of his conduct would be not that of a dedication to the public, but of permitting the line to continue to run through his land as a feeder to the rest of the line. There is no room to infer an *animus dedicandi* from such a course of conduct.

Judgment.

As further evidence against dedication, is the fact that this line of road had been kept in repair by the proprietors of the road, and that no public money or labor was expended upon it, a fact that was commented upon as against the fact of dedication by Lord *Denman* in *Davies* v. *Stephens* (*a*).

I may add that in a new country like Canada it would never do to admit user by the public too readily as

(*a*) 7 C. & P. 571.

1869.

Dunlop v. York.

evidence of an intention to dedicate. Such user is very generally permissive, and allowed in a neighbourly spirit, by reason of access to market or from one part of a township to another, being more easy than by the regular line of road. Such user may go on for a number of years with nothing further from the mind of the owner of the land, or the minds of those using it as a line of road, than that the rights of the owner should be thereby affected.

I have dealt with the question of dedication, though I doubt very much whether it was open to the township to raise it. If upon the award being made the sum awarded was impressed with a trust in favor of the mortgagee, I should incline to think that the township could not go behind the award; but this point was not raised by the plaintiff's counsel; and I have thought it better to dispose of the question of dedication as well as of the question of title to the money awarded.

Judgment.

A question was made as to the *quantum* to which the plaintiff is entitled, supposing him to be entitled to something. The sum awarded appears to have been, partly in respect of the value of the land taken, simply as so much land at so much per acre, and partly by way of compensation for road work, excavation and planking done upon the line of road; and it is contended that the mortgagee is only entitled to the former. I do not agree in this. In the first place, the evidence leads me to think that the planking and excavation were the work of *Scarlett*, the father, and consequently upon the land at the date of the plaintiff's mortgage; but if not so, the mortgagee is entitled not to the bare land merely, or to the land as it stood at the date of the mortgage, but also to any improvements made by the mortgagor since; to the benefit of anything done that has enhanced the value of the land. The compensation under the statute is for damages resulting from the taking of the land:

1869.

Dunlop v. York.

the award therefor must be taken to be for so much as the property of the claimant was thereby reduced in value: to apply it to the case of a mortgagee, so much as his security was impaired.

It appears, however, that some deductions were made from the gross sum awarded; the award being that each party should pay one half of the costs of the arbitration and award. The whole cost of this was $160. The sum payable, therefore, was $520; and that, the plaintiff is in my judgment entitled to claim from the township, with interest from the date of the award, or whenever it was made payable. The award is not among the papers put in. The decree will be for the plaintiff, with costs, to be paid by the township.

MOORE v. DAVIS.

Married woman—Fraud on creditors.

A married woman, living apart from her husband, accepted some property for her wages:

Held, that the transaction was binding on the grantor, and all claiming under him.

A person indebted to his housekeeper in $600, conveyed to her some land in satisfaction of the debt, the consideration being not inadequate. On a bill by another creditor, to set aside the conveyance as fraudulent and void, the court being satisfied that the debt was owing, and that the conveyance was intended to be effectual, *held* the conveyance valid and dismissed the bill; but under the circumstances, without costs.

Examination of witnesses and hearing.

Mr. *Blain* and Mr. *Ferguson*, for the plaintiffs.

Mr. *Morphy* and Mr. *Fleming*, for the defendants.

Judgment.

MOWAT, V. C.—The plaintiffs brought an action against the defendant, *John Davis*, on a note for $200,

given by *Davis* three years previously. On the 5th of June they recovered judgment for $254.88, debt and costs, and on the same day placed in the hands of the sheriff of the county of York *fi. fas.* against goods and lands. The *fi. fa.* against goods has been returned *nulla bona*; and the object of the present suit is to obtain payment out of land conveyed by *Davis* to the defendant *Ann Lawson*, wife of *Charles Lawson*, on the 16th of March, 1867. The bill alleges, that this conveyance was voluntary, and without consideration; and, besides, was executed by both parties "with intent to delay, defeat, hinder, and defraud, the plaintiffs." The prayer is, that the deed may be declared fraudulent against the plaintiffs; and that the land may be sold, and the plaintiffs paid out of the proceeds.

1869.
Moore v. Davis.

The answer of Mrs. *Lawson* denies these charges; and alleges, that the consideration for the conveyance was a debt of $600 due to her for wages as housekeeper to the grantor; that at the time the deed was executed she was not aware, and had no notice that the grantor was indebted to the plaintiff; and that the conveyance was accepted by her in good faith, and without any intention of defeating, hindering, or defrauding, the said plaintiffs or any other person. On the whole, I think that this defence has been established.

Judgment.

The bill does not allege, that the grantor was insolvent when he made the conveyance, or that he owed any debts besides the small debt due to the plaintiffs, or that the property conveyed to Mrs. *Lawson* was all the property which he owned. The debt to her arose in this way: She had been living in *Davis's* service for upwards of six years. He appears to have occupied and farmed the land in question when Mrs. *Lawson* went into his service. Afterwards, viz., in 1865, he left the farm in charge of his mother and brother, and went into the business of an inn-keeper, at Bradford; and Mrs. *Lawson*

1869.

Moore v. Davis.

went with him as housekeeper. She was examined as a witness by the plaintiffs, and she stated that *Davis*, when he employed her, agreed to pay her £25 a year, besides allowing her to keep and sell some poultry for her own benefit, which yielded her £2 10s. more, making in all about $9 a month; and there is no evidence or suggestion that this was not a reasonable sum to pay her as wages for the work she did. There is no evidence that any part of her wages was paid to her, except a sum of $10; and both she and *Davis* swear that no more was ever paid to her, she having paid her expenses out of some previous savings of her own. Her evidence was given with the appearance of truthfulness. It is not alleged in the bill (as I have already said), that *Davis*, at the time of the transaction, owed any debt except to the plaintiffs, and it is not proved that Mrs. *Lawson* was aware or had notice of that debt. The only evidence from which the plaintiffs would have me infer notice, is her statement at the hearing, that she had heard a "rumor" that *Davis's* brother "was taking away things," and that that had led her to speak to *Davis* about her unpaid wages. The plaintiffs' debt is on a note made by *Davis* in favor of his brother, but which the brother had transferred to the plaintiffs a year and more previously to the transaction in question; so that for a considerable period before the time of the rumor, the brother had had nothing whatever to do with the note. I cannot say that notice of the rumor, under all these circumstances, was notice of the plaintiffs' debt. Besides the plaintiffs' debt, it appears from the examination of *Davis* at the hearing, that *Davis* owed another debt to a man for wages; which debt was subsequently paid by a sale of chattels. This debt, together with the mortgage on the land, and the debts due to the plaintiffs and Mrs. *Lawson* respectively, are the only debts which are mentioned in the evidence as having been due by *Davis* at the time of the impeached transaction. I should say, however, that he was a

Judgment.

somewhat thriftless and unsteady man, and he seems to have been gradually losing his property. That the conveyance to Mrs. *Lawson* was meant, between them, to be an effectual conveyance, and to vest the property in her for her own use, the bill does not seem to dispute; and I am satisfied that such was the fact. Mrs. *Lawson* had been married, in 1844, to a husband who was alive, and in gaol, when the cause was heard. She had lived apart from him for twelve months before *Davis* engaged her to go into his service as housekeeper; and it is not suggested, on behalf of the plaintiffs, that the husband was directly or indirectly a party to the impeached transaction. Indeed, counsel for the plaintiffs found an argument on his not having been a party to the deed, contending that it is void on that account. But, whatever the husband's right may be, the transaction is binding, in the meantime, on *Davis* and all claiming under him; and the circumstance of the conveyance being to the wife directly, put it out of her power to dispose of the property without the husband's concurrence, and tends to remove any suspicion that the secret purpose of the parties was, that she should be a mere trustee of the property for *Davis*, and should hold and dispose of it for his benefit.

Judgment.

The property is stated in the bill to have been worth $1,600 at the time of the conveyance; and there was a mortgage on the property for $800; so that the equity of redemption which Mrs. *Lawson* got, was worth $800 only. She received it for $600, a difference too small to create any legal difficulty in the way of sustaining the transaction.

The case is thus one of a conveyance, intended to be effectual in passing the property from the grantor forever; executed in consideration of an antecedent debt, very nearly equal to the plaintiffs' own estimate of the value of the property; and made public by regis-

1869.

Moore v. Davis.

tration on the day of the execution of the conveyance; the grantee not having, till long afterwards, notice of the plaintiffs' debt, which is the only notice charged against her. Now, it is to be remembered, that an intent to prefer one creditor to another was not sufficient, by the common law, to invalidate a transaction; and that such an intent, by means of a conveyance of land, is not yet sufficient for that purpose, unless the case falls within the provisions of the insolvency laws. To invalidate such a transaction, where the alleged consideration is not inadequate, the impeaching creditor must shew that the alleged debt was not due to the grantee, or has not been proved; or that the transaction was not real, and that the conveyance was in trust for the grantor. I have already said that my opinion on these points is against the plaintiffs.

Judgment.

The plaintiffs' counsel pointed out that the consideration named in the deed to Mrs. *Lawson* was a money consideration, and that the deed was not expressed to be subject to the mortgage, though she confesses that that was the intention of the transaction, and that she undertook to pay the mortgage. The form of the deed, in regard to these particulars, was very properly remarked upon on the part of the plaintiffs; but evidence of the real intention of the deed is clearly admissible to support the deed against the attack of a creditor of the grantor. I refer, on that point, to the case of *Mulholland* v. *Williamson*, before the Court of Appeal (*a*).

Plaintiffs' counsel relied on another transaction which occurred between the parties about the same time, as throwing light on the character of the transaction in question. This other transaction is not mentioned in the bill, and, so far as appears, was not connected with the conveyance which the plaintiffs impeach. It seems

(*a*) 14 Gr. 291

that *Davis*, about this time, made a sub-lease to Mrs. *Lawson* of the inn and furniture, for £100; that he thereafter took no part in carrying on the business, and that finding the business burdensome, though not unprofitable, she gave it up in few months, paying *Davis* however the full sum of £100 for the part of the year that she had held the place, and charging him nothing for his board. The lease under which *Davis* held the premises is not produced; the nature or extent of his interest, in either the house or the furniture, does not appear; and the evidence in regard to the whole transaction is so meagre, that I find it impossible to say that the transaction could have defeated or delayed, or did defeat or delay, any creditor. The liberality with which Mrs. *Lawson* appears to have acted towards *Davis* in this matter, and some other matters, had there been nothing else to explain it, might be sufficient to make one suspect a trust in favor of *Davis*; but the plaintiffs have given evidence that an improper intimacy had sprung up between the two parties, after Mrs. *Lawson* went into *Davis's* service; and this unfortunate relation accounts for the conduct of these defendants in some particulars which would otherwise suggest fraud towards others as the motive of the parties; but I do not see that their criminal intimacy can cancel a debt for wages which would otherwise be recoverable, or can invalidate a transfer which could not otherwise be successfully impeached. It is not alleged that any criminal relationship was contemplated when the bargain for the wages was made, or when Mrs. *Lawson* entered into the service of *Davis*.

Judgment.

I think that the decree must be for the defendants, but that there was in the transaction enough that was suspicious to justify a creditor in filing a bill. The decree will therefore be without costs.

1869.

MASON V. PARKER.

Mortgage by one partner.

A mortgage with distress clause, by the legal owner of property of which, at the time, he is in possession, and to all appearance in sole possession, is valid at law and in equity against an unknown partner, whose only claim to the possession, when the mortgage was executed, was as tenant at will.

This cause came on for the examination of witnesses, and hearing, at the autumn sittings of 1869, in Toronto. An interim injunction had previously been granted (*a*).

Mr. *Geo. D. Boulton*, for the plaintiff.

Mr. *Moss*, for the defendant, referred to the *Royal Canadian Bank* v. *Kelly* (*b*).

Judgment. MOWAT, V. C.—I granted an interlocutory injunction in this cause to afford an opportunity, as I stated at the time, of ascertaining the facts more exactly, and of having the law more fully argued, than was done on the motion. At the subsequent hearing, it appeared that the partnership agreement between *Fettinger* and *McCord* was in writing, but the agreement was not produced, and no evidence whatever was given of its contents, the plaintiff relying on the admission of the answer that "some partnership between them did exist," the terms of which the defendants did not know. The property mortgaged to the defendants was property of *Fettinger* individually—he was the legal owner, and, subject to any rights created by his partnership with *McCord*, he was also the beneficial owner. Having no evidence of the terms of partnership, I must assume against the plaintiff that the only interest which *McCord* had was as tenant-at-will; and the mortgage to the defendants, which was

(*a*) See *ante* p. 81. (*b*) 19 U. C. C. P. 196.

executed with the knowledge of *McCord*, was sufficient to determine the will I cannot say from the evidence that there was afterwards any joint possession, except that *Fettinger*, who was in visible possession, held possession for *McCord* and himself jointly. That kind of constructive possession was all the joint possession, which I can say from the evidence, that *McCord* had. During most of the time that the partnership existed, *McCord* was in New York; and for the greater part of nine months that he was in Canada, he was confined to bed from illness in a house away from the property. Whether indeed he was ever on the premises does not appear. A mortgage with a distress clause by the legal owner, he being at the time in the actual possession of the premises, and to all appearance in sole possession, is, I apprehend, perfectly valid at law as against an unknown partner whose only claim to the possession when the mortgage was executed, was as tenant-at-will.

1869.

Mason v. Parker.

Judgment.

In equity, the case against the plaintiff is still stronger; for the defendants set up that they had no notice of the partnership at the time of the mortgage being given, and the plaintiff has not proved notice. On the other hand, it appears that *McCord* was well aware of the negociations for the mortgage, but gave no notice of the partnership, and made no objection to the transaction.

The facts being thus against the plaintiff's claim, I think the bill must be dismissed with costs.

1869.

KITCHEN v. KITCHEN.

Pleading—Demurrer—Allegations as to notice of plaintiff's equity.

A bill, setting forth that one of the defendants procured a conveyance from the plaintiff by fraud, and afterwards mortgaged the property to another defendant, is not demurrable for want of a charge that the latter had notice of the fraud at or before he received his mortgage. It is for the defendant, in such a case, to set up the defence of no notice.

This was a demurrer by the *Canada Landed Credit Company* to a bill against them and *William Whitney Kitchen*, to set aside a deed which had been executed by the plaintiff for the purpose, as the bill alleged, of conveying to the defendant *William Whitney Kitchen* ten acres of land, but which, in fact, had conveyed a much larger quantity (of which the plaintiff was in possession), the deed having been fraudulently prepared in that form by the grantee, its purport having been misrepresented to the plaintiff, and the instrument having been signed by him without its being read to him, and without reading it himself.

Mr. *S. Jarvis*, for the demurrer.

Mr. *Moss*, contra.

Hughes v. *Garner* (*a*), *Pennington* v. *Beechey* (*b*), *Hardy* v. *Reeves* (*c*), were cited.

Judgment. MOWAT, V. C.—That this bill shews sufficient equity for relief against the grantee of the deed, the demurring defendants do not dispute. Their interest is under a subsequent mortgage of the whole parcel from *William Whitney Kitchen* to them; and their contention is, that the statements of the bill do not shew any ground for relief against this mortgage, as there is no allegation

(*a*) 2 Y. & C. Ex. 355. (*b*) 2 S. & S. 282.
(*c*) 5 Ves. 432.

that at the time they received it they had notice of the facts which constitute the plaintiff's equity against the mortgagor. 1869. Kitchen v. Kitchen.

But I am of opinion that it was not necessary for the plaintiff to allege such notice, and that the defence of no notice must come from the defendants by their answer. If they do not deny notice by their answer, it is clear that at the hearing the admission or proof of the facts which the bill alleges would entitle the plaintiff to relief against them. The defence of a purchase for value without notice, is peculiar to a court of equity, and must be set up by the party who claims the benefit of it. The bill might anticipate the defence according to the old practice of the court, for the purpose of putting interrogatories to the defendant on the subject; or for the purpose of putting in issue conversations (*a*) and admissions by the defendant, which were evidence of notice, but which by the rules of pleading could not be proved unless expressly mentioned in the bill. Or, where the plaintiff relies on constructive notice it may, in strictness, be necessary, in order to let in the evidence, that the bill should state the facts which are to establish such notice (*b*). But no such charges were ever held to be necessary for the purpose of preventing a demurrer. The rule was stated by Baron *Alderson* in *Hughes* v. *Garner* (*c*), cited by Mr. *Moss*. In that case the defence was a purchase without notice. The bill contained a charge of notice, but a charge in such terms as not to cover the evidence of notice which the plaintiff had given. The plaintiff's counsel accordingly argued that "notice need not have been charged at all;" and he put this case: "Where a bill is filed to restrain the setting up an outstanding term in bar of an ejectment, the court will grant relief in all cases except one, that of the defend- Judgment.

(*a*) See Hardy v. Reeves, 5 Ves. 432.
(*b*) Lewis on Eq. Pl. p. 24.
(*c*) 2 Y. & C. Ex. 335.

1869.

Kitchen v. Kitchen.

ant being a purchaser for valuable consideration without notice. Suppose this defendant had so pleaded, did any one ever hear of any other than an ordinary replication?" The court concurred in that view, observing: "The rule in equity is, that a person claiming under a subsequent deed cannot set up a prior outstanding estate, unless he be a purchaser for valuable consideration without notice. That must therefore be made out by the defendant; and the plaintiff is fully at liberty, I think, in answer to that defence, to shew any facts establishing notice. I am of opinion, therefore, that on these pleadings I ought to hear the evidence of Mr. *Henry R. Williams*, although the facts there deposed to are not charged in the bill." The same point appears from the 6th resolution in *Brace* v. *Duchess of Marlborough* (*a*). A similar rule as to notice was acted upon in a contest respecting a legacy which the legatee had assigned to secure a debt, and afterwards he became bankrupt. The defendants,

Judgment.

the assignees of the bankrupt, claimed at the bar, that the plaintiff's assignment was not good without notice to the executors; and the bill did not allege such notice. But neither had the defendants alleged that there had been no such notice; and the Master of the Rolls held, that in the absence of such allegation he was not at liberty to adjudicate on that question. I think, on reason and authority, that the rule is as stated in Mr. *Kerr's* book on Frauds (*b*): that "it is not necessary to charge notice in a bill to which a plea [of purchase] for valuable consideration without notice might be pleaded." There are other statements besides want of notice, which are necessary for that defence, and which this bill does not relieve the defendants from the duty of making in their answers.

The demurrer must be overruled with costs.

(*a*) 2 P. W. 495. (*b*) p. 300.

1869.

STEWART v. FLETCHER.

Infants—Payments out of capital—Practice.

In a proper case Trustees may be allowed payments made by them, for the maintenance and education of children, out of their capital.

Under a general administration decree, the Master may, without any special direction, take evidence as to payments by executors, for the maintenance and education of infants, out of their shares of capital, and report the facts.

This was an administration suit. The usual decree had been made, and in the prosecution of it before the master at Hamilton, the executors and executrix claimed to be allowed certain sums which they said that they had necessarily paid out of the *corpus* of the shares of infant children for their education and maintenance; but the master declined receiving the evidence, as not authorized by the decree. The claimants did not appeal against this refusal; but, acquiescing therein, they presented a petition praying, that they might be declared to be entitled to be allowed all sums expended by them out of the testator's estate for the proper maintenance and education of the infants, and that it might be referred to the master to take an account thereof. On behalf of the infants, affidavits were filed negativing the case set up by the petition and by the affidavits filed in its support.

Mr. *Edgar*, for the petitioners.

Mr. *A. Chadwick*, contra.

Fielder v. *O'Hara* (*a*) and other cases were referred to.

MOWAT, V. C.—In *Fielder* v. *O'Hara* (*a*), the Chancellor held, that under a decree of this kind a master Judgment.

(*a*) 2 Cham. Rep. 255.

1869.

Stewart v. Fletcher.

has no power to make the allowance claimed, but may report the facts as special circumstances, and that the court will make the allowance on further directions where the circumstances reported warrant the allowance. I would regret to find that, notwithstanding the large terms of the general orders (*a*), a special petition was necessary to get authority for the master to act, as this additional expense may be avoided by the course approved of by the Chancellor in the case cited; and I shall therefore make no order on the petition, especially as the weight of evidence is against the petitioners. The master, after this expression of opinion, will, no doubt, receive the evidence and report the circumstances. The modern rule is not against allowing payments made by trustees out of principal, where a sufficient case for the allowance is made out (*b*).

Judgment.

If the Master's attention was not called to the case cited, the petitioners should pay the costs of the present application; if the case was cited to the master, I reserve the respondents' costs until the cause comes on for further directions.

ROBERTS v. THE CORPORATION OF THE CITY OF TORONTO.

Claim for damages by way of compensation—Sequestration.

The claim of a debtor to compensation for misrepresentations of parties in obtaining a patent of land, is not liable to be seized, attached, or sequestered, before the amount is determined by decree or otherwise.

The plaintiff was a creditor of *William Rees*, under a decree of this court in a suit of *Roberts* v. *Rees*, bearing

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(*a*) Consol. No. 220 *et seq.*

(*b*) Lewin on Trusts, 421, 422.

1869.

Roberts v. Corporation of Toronto.

date November 9th, 1858. On the 5th of November, 1867, a writ of sequestration was issued to enforce the decree, and it remained in the sheriff's hands. On the 28th of January, 1869, writs against the goods and lands of *Rees*, for some costs, were delivered to the sheriff; and on the 30th of January, 1869, the plaintiff took out an attaching order, which he served on the Corporation of Toronto. On the 1st of February, 1869, the present bill was filed against the Corporation, *Rees*, and certain assignees of *Rees*, one only of which assignees, *Edward E. W. Hurd*, was retained as a defendant, the bill having been dismissed against the other by consent. By this bill the plaintiff claimed to have, by virtue of his writs and attaching order, a lien on what might be found coming to his debtor *Rees*, in a suit by the latter against the Corporation of Toronto.

Judgment.

A decree had been pronounced by Vice-Chancellor *Spragge*, in that suit, on the 20th of January, 1869, but had never been drawn up. *Rees* had claimed by his bill that the Corporation of the City, by misrepresentations, procured a patent for some property to which he had an equitable (or rather moral) claim, and which he had occupied and improved. The court was of opinion, that had the Crown known the truth a patent would not have been granted to *Rees*, but that the Crown had been induced to grant the patent to the City without compensating *Rees* for his improvements, by means of misrepresentations which were traceable to the Corporation; and, therefore, that the Corporation, if the patent was maintained, should pay the value of the improvements. The court offered *Rees* a decree to that effect, and a reference to the master to ascertain the amount; or a decree setting aside the patent as to so much of the land as the city had not disposed of, and leaving the government to settle the claims of the parties.

Mr. *Hodgins*, for the plaintiff, referred to *Lowten* v.

1869.

Roberts v. Corporation of Toronto.

The Mayor of Colchester (*a*), *Attorney-General* v. *Sand* (*b*), *Clark* v. *Scroggs* (*c*), *Web* v. *Moore* (*d*), *Anon* (*e*), *Beverley's* case (*f*), *York* v. *Allen* (*g*), *Protector* v. *Lumley* (*h*), *Aldridge* v. *Bullen* (*i*), *Harrison's* Ch. Prac. 141, 142, 333, 334, *Tidd's* Prac. vol i. p. 134, (8th ed.), *Brooke's* Ab. Patent, pl. 98, Trespass, pl 172.

Mr. *C. W. Cooper*, for the City of Toronto.

Mr. *Hurd*, for the other defendants.

MOWAT, V. C.—I am of opinion that the claim of *Rees* cannot, in its present form, be made available by the plaintiff under any of his writs, or under his attaching order. At the close of the argument I said that I was clear about this, except as to the sequestration, the effect of which I wished to consider a little. In the elaborate judgment of my brother *Spragge*, in *Irving* v. *Boyd* (*j*), he shews that there are choses in action of both a legal and an equitable kind which cannot be reached by a sequestration; and he instanced rights at law arising *ex delicto*, and rights in equity to set aside a conveyance. The right which the plaintiff here seeks to sequester is, the right of his debtor to compensation for the misrepresentations of the Corporation, the amount not having been ascertained or determined; such a case clearly falls within the principle of the choses in action referred to by the learned Vice-Chancellor as not liable to sequestration. It is not necessary to remark on the effect of the assignment by Dr. *Rees* to Mr. *Hurd*, the solicitor.

Judgment.

(*a*) 2 Mer. 395.
(*b*) Hard. 490.
(*c*) 2 Lutw. 513.
(*d*) 2 Vent. 282.
(*e*) 2 Leo. 197, pl. 250.
(*f*) Moore's Rep. 241, pl. 378.
(*g*) Lane's Rep. 20.
(*h*) Hard. 22.
(*i*) 2 M. & W. 412.
(*j*) 15 Gr. 157.

The bill must be dismissed, with costs. The master, in taxing, will consider whether the answers are of unnecessary length, and whether separate answers were necessary.

1869.

Roberts v. Corporation of Toronto.

LONG V. LONG.

Mortgage—Redemption—Parties—Gift by parol.

To a suit by a second incumbrancer, to redeem the prior incumbrancer, the owners of the equity of redemption are necessary parties.

The owner of property mortgaged it, and then died, having devised one-half the property to one son, and the other half to another, charging each half with an annuity to the testator's widow. One of the sons afterwards died intestate, and his widow paid off the mortgage and took an assignment to herself:

Held, that the one annuity not being in arrear, and the assignee of the mortgage being willing to pay the arrears of the other annuity, the testator's widow could not insist on redeeming the mortgage.

A parent was not permitted to recall a gift, which, in view of the marriage of one of her two sons, she had made verbally to the two, of certain arrears of an annuity which had accrued due from them while she lived with them; the attempt to recall the gift not having been made until after the marriage and death of the son.

Examination of witnesses and hearing at Barrie, autumn sittings, 1869.

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

Mr. *Boys*, for the defendant.

MOWAT, V. C.—One *Charles Long*, by his will, gave to his wife, the plaintiff, for the term of her natural life, amongst other things, one bedroom of her own choice, together with the bed, bedding, and other furniture, in the dwelling-house in which the testator lived, situate on

Judgment.

1869.

Long v. Long.

the north-half of the west-half of lot No. 8, in the 3rd concession of Oro; also, an annuity of $50 to be paid by their two sons, *Erastus* and *George*, half-yearly, in lieu of dower, out of the real estate devised to them, half to be paid by each; and he devised the said north-half (fifty acres) to *Erastus*, subject to half the annuity, or $25 a-year; and the south-half (fifty acres) to *George*, subject to the like yearly sum. Afterwards the testator mortgaged the one hundred acres for $360; and in July, 1863, he died, leaving the mortgage and other debts unpaid. On the 8th April, 1868, *Erastus* died, intestate, leaving *Martha Long*, his widow, and an infant son. Subsequently, the mortgage becoming due, *Martha's* father advanced money on her behalf to pay it; and on the 31st August, 1868, the mortgage was assigned to her. The plaintiff wished to redeem this mortgage, and to get an assignment of it; and her daughter-in-law being unwilling to assign it,

Judgment.

the plaintiff on the 17th November, 1868, filed her bill, claiming a right to that relief. The cause came before me on the 4th May, 1869, when I ordered it to stand over for want of parties. The plaintiff then added as parties *George Long* and the infant heir of *Erastus*; and the cause again came before me on the 30th September, 1869, for hearing. The amended bill prays no relief against the new parties, and does not ask for payment of the plaintiff's annuity, or for foreclosure in default of payment; but prays, as before, that the plaintiff may be let in to redeem the mortgage, and that the defendant, *Martha Long*, may be ordered to execute an assignment of it to the plaintiff.

It is quite clear that the plaintiff has not, by reason of the provisions in her favor in the will, an absolute right to redeem the mortgage. Her right to redeem the prior mortgage is only ancillary to her right to work out, if necessary, her remedy against the mortgaged estate by

foreclosure (*a*). If *Martha Long*, who holds the mortgage and is interested in the equity of redemption as dowress, does not insist on the plaintiff's paying the mortgage, and is willing to pay the arrears of the annuity charged on her husband's half, the plaintiff is not entitled to anything more. The annuity charged on *George's* half is not in arrear. 1869. Long v. Long.

Leave was asked to re-amend the bill by adding a prayer for foreclosure. If I should grant this prayer; it could only be on payment of the costs of the suit hitherto, for I am satisfied, from both the pleadings and evidence, that the object of the suit was to obtain an assignment of the mortgage, and not a foreclosure or payment of the arrears of the annuity, and that *Martha Long's* resistance to the relief prayed arose from a fear that the plaintiff meant to use, or to attempt to use, the power of sale which the mortgage contains, in order to destroy the equity of redemption of the widow and son of *Erastus*. I am satisfied that but for the plaintiff's claim of an absolute right to an assignment of the mortgage, no suit would have been brought. Since the suit was commenced, *George Long* has sold out his interest in the other half of the lot to a person who is not before the Court. Judgment.

There has been a dispute since the death of *Erastus* as to whether the plaintiff can now claim the annuity for the first two years after the testator died, she having verbally made a gift of the two years' arrears to her two sons in February, 1867; and both parties have requested me to decide the point on the evidence which is before me. *Erastus* was then about to get married; and the plaintiff and *George Long* were preparing to remove from the house in which they had theretofore resided with *Erastus*

(*a*) Fisher on Mortgages, sec. 540, p. 312, 2nd ed., and cases there cited.

1869.

Long v. Long.

on his fifty acres, and to live in a house which stood on *George's* land. The two sons, in view of these changes, divided between them the chattel property which their father had left, and which amounted in value to about £100, including, I presume, what the sons had acquired after their father's death. The settlement between them took place on the 9th September, 1867, with the assistance of mutual friends, and it occupied several hours of that day. The plaintiff, on this occasion, announced that she would forgive her sons the two years' arrears in question; and she repeated the statement in the presence of her sons and others several times during the negociations that day. She afterwards, and both before and after the marriage of *Erastus*, said to various persons that she had forgiven the same arrears. She made this statement to her intended daughter-in-law's mother, as well as to others, before the marriage. The plaintiff had lived with her sons on the farm since her husband's death, and had managed the house with some assistance, receiving from her sons her food and clothes; and the reasons she gave for the gift of the two years' arrears were, on various occasions, such as these: that the sons had paid off their father's debts, and had given her all she wanted; that they had been good to her, and she wished to help them along; that they could not pay the debts and keep her, and pay the annuity too. She has never attempted to withdraw the gift in the case of her surviving son; and she made no such attempt with respect to the other son's share until after his death. Now, there are many cases in which the intention of a parent in favor of a child, or of one relation in favor of another, though expressed verbally and not in writing, or though only to be inferred from circumstances, has been enforced by courts of equity (*b*); and having

Judgment.

(*b*) Eden v. Smith, 5 Ves. 341; Gilbert v. Wetherell, 2 S. & S. 254; Melland v. Gray, 2 Y. & C. C. C. 199; Flower v. Martin, 2 M. & C. 459, and cases there cited; Fry on Sp. Perf., 192 *et seq.*; White & Tu. L. C. in Eq. 5 ed. 857 *et seq.*

reference to these cases, I am of opinion that the plaintiff's gift of these arrears, though made by word of mouth only, cannot, after so long an acquiescence, and in the altered circumstances of the parties, be recalled. The amount due the plaintiff on the 28th July last is, therefore, for three years only, less $11 paid, say $64, with interest from the time at which each instalment fell due. The plaintiff is chargeable with the costs of the defendants *Martha* and the infant; these may be set off against the amount coming to the plaintiff; and the balance will be paid to or by the plaintiff, as the case may be. 1869. Long v. Long.

The points in dispute hitherto having thus been adjudicated upon, I hope the parties will provide amicably for the future without further litigation. In that case *George Long* or his assignee should, I presume, pay half the mortgage, with interest; and the annuity of $25 on each fifty acres should then, by agreement, be made a first charge thereon (*a*). Judgment.

TOTTEN v. DOUGLAS.

Fraudulent conveyance—Mortgage—Purchase for value without notice.

Where an insolvent person made a fraudulent mortgage of all his unincumbered property to his son to secure an alleged debt of $400 to the son, and a fictitious debt of $600 to the mortgagor's wife; and the son shortly afterwards transferred the mortgage, for value, to a person who had notice of the insolvency, and of other circumstances fitted to awaken his suspicion as to the *bona fides* of the mortgage, it was *held*, that he could not defend himself as a purchaser without notice of the fraud.

In case of a purchase of a mortgage security recently given on all his real estate by an insolvent father to his son, the purchaser, if he has notice of the insolvency, should, before completing his purchase, satisfy himself by proper inquiries, that the mortgage was *bona fide*, and good against creditors.

The bill in this cause was amended by adding parties

(*a*) See Rhodes v. Buckland, 16 Beav. 212.

1869.

Totten v. Douglas.

and otherwise, pursuant to the leave given after the former hearing (*a*). The defendants, *Cook* and *Nesbitt*, having answered the amended bill, some new depositions were taken, and the case was argued on the old materials and the new.

Mr. *Strong*, Q. C., and Mr. *James McLennan*, for the plaintiff.

Mr. *D. B. Read*, Q. C., and Mr. *Boyd*, for the defendants.

MOWAT, V. C.—In my former judgment I expressed an opinion, that the mortgage was wholly void as between the mortgagee and the creditors of the mortgagor; that the alleged debt of $600, to the mortgagor's wife, being fictitious, and the son, to whom the mortgage was made, being a concurring party in the transaction, the mortgage was void as to the remaining $400, whether a debt of that amount was really due to the son by the mortgagor or not. It was contended on the second argument that the doctrine of *Commercial Bank* v. *Wilson* (*b*), to which case I had referred as an authority, applied to judgments only, and was not applicable to a mortgage; but, on examining again the language of the learned Chief Justice, I find it quite plain that the doctrine of the case is not confined to fraudulent judgments.

Judgment.

I continue of opinion, also, that the purchaser of a legal mortgage on land which is impeached by the mortgagor's creditors as a fraud on them, may defend himself on the ground that he was a purchaser for value without notice of the alleged fraud. A purchaser of a mortgage takes subject to all equities between the mortgagor and mortgagee, whether he had notice of them or not, if he does not buy with the concurrence of

(*a*) 15 Gr. 126. (*b*) 14 Gr. 473.

1869.

Totten. v. Douglas.

the mortgagor. But I am still of opinion that being a purchaser of the land *pro tanto*, he is not affected, any more than the purchaser of any other interest, by equities paramount to both mortgagor and mortgagee, unless he bought with notice of them, or was guilty of such negligence in his purchase as is equivalent to notice. The case of such a purchaser comes within the words and spirit, and I think myself bound to hold that it comes within the true intent and meaning, of the protecting clause of the statute of 13 Elizabeth (*a*). That clause declares that the act "shall not extend to any "estate or interest in lands, etc., which estate or inter- "est is or shall be upon good consideration and *bona* "*fide*, lawfully conveyed or assured to any person, etc., "not having at the time of such conveyance or assur- "ance, etc., any manner of notice or knowledge of "such covin, fraud or collusion, as is aforesaid."

Judgment.

If, therefore, Dr. *Cook*, at or before his purchase of the mortgage in question, had no notice of its true character, I think that the plaintiff must fail. Assuming the mortgage to be bad, the defence of no notice of the facts which make it so, is the only defence left to the defendants. Dr. *Cook's* object in the transaction was thereby to secure $600 of his own *bona fide* debt, which he found was in great jeopardy; and, if he had accomplished that object by any legal means, his doing so might have been subject to no just blame. But, unfortunately, what he did was, to transfer from himself to another his good debt; to take in exchange for it a debt which I must hold to be fictitious, though it had the appearance of being secured; and to put himself in such a position that I cannot uphold the transaction unless satisfied that his bargain had the effect of making the fictitious debt a valid debt, to the prejudice of all other creditors.

(*a*) Ch. V., sec. 5.

1869.

Totten v. Douglas.

As the case stood at the former hearing, I was inclined to think that notice had not been sufficiently made out, though, as I stated, it was not without considerable hesitation that I had come to that conclusion (*a*). *James Douglas* has since been examined *viva voce* for the first time, Dr. *Cook* has had a second examination,—these examinations were before the master at Woodstock,—and some witnesses have been examined before the Chancellor. On a view of all the materials now before me, and with the advantage of the second argument, I am of opinion that notice has been established; that the facts admitted by Dr. *Cook* are sufficient, either to justify the inference that he had express notice of the facts which make the mortgage invalid, or to shew that his want of notice arose from his not making those reasonable and proper inquiries which the circumstances of the case and the rules of equity rendered imperative. He knew at the time of his purchase, that the mortgage had been executed less than five months before; that it was a mortgage to the mortgagor's own son, a workman in his father's business of a tanner; that the sum which the mortgage purported to secure was nearly, if not quite, the full value of the property; that this property was the only unincumbered property which the debtor had at the time (and he acquired none afterwards); that in less than five months after the mortgage was given, the father's chattel property had been seized by the sheriff and sold, his business had been closed, and he had become confessedly and hopelessly insolvent. Being insolvent at this time, Dr. *Cook* had no right to assume, without inquiry, that the father had been solvent four or five months before, when the mortgage was given to the son; and it is not pretended that the father was in fact solvent at that time, or that Dr. *Cook* supposed so when he bought the mortgage. The defendants' own witnesses

Judgment.

(*a*) 15 Gr. p. 131.

1869.

Totten v. Douglas.

show that the father had been insolvent for years, though still struggling to carry on business, and that he was greatly embarrassed at the time of making the mortgage. Now, a conveyance by a solvent man to his son, for alleged value, may, in the absence of circumstances of suspicion, be assumed by a purchaser to have been *bona fide*. But I think that I may safely hold that a recent conveyance, whether by way of mortgage or otherwise, from an *in*solvent person to his son, should always be inquired into by a purchaser. I think that such a conveyance invariably is inquired into where the purchaser is prudent, or is well advised, or does not deliberately prefer to be ignorant; for everybody knows that it is by conveyances to relatives that a fraudulent debtor usually endeavors to defeat his creditors. If the conveyance or mortgage to the son is of all the insolvent father's real estate, the suspiciousness of the transaction is considerably increased.

Judgment.

But Dr. *Cook* knew more. He admits having been informed by the parties, before he bought, that the sum of $1,000, named in the mortgage, was made up in part of an alleged debt of $600, said by them to have been due from the mortgagor to his own wife, to whom he had been married for thirty years or so. Further, I am satisfied, from Dr. *Cook's* examination, that his negotiation for the purchase of the mortgage was with the mortgagor, and that the son merely acquiesced in and carried out what his father had agreed to. The very circumstance that all parties were willing to transfer to Dr. *Cook* this secured debt of $600 for a corresponding amount of the insolvent's promissory notes, on the single condition of Dr. *Cook's* paying to the son the remaining sum of $400, was also calculated to stimulate doubts as to the $600 being really a *bona fide* debt. If a mortgage for a large sum by an insolvent person to his son, is sufficiently suspicious to render inquiry on the part of a purchaser, natural and

1869.

Totten v. Douglas.

necessary, what are we to say of a mortgage which is made to a son to secure an alleged debt to the mortgagor's wife, and with which the parties afterwards deal as I have mentioned? Is it possible to imagine any prudent man, who did not prefer ignorance to knowledge, accepting the statement that there was such a debt, and not even asking when or how it arose? The defendants claim that Dr. *Cook* was dealing for an interest in land, and is therefore, according to the rules of this court, entitled to hold the interest which he acquired, free from all claims of which he had no notice. But equity recognizes the validity of this defence, only when the purchaser used all reasonable diligence and made all proper inquiries to ascertain the facts. The defendants do not pretend that Dr. *Cook* was misled; that the parties misrepresented to him, or withheld from him, any of the facts with which we are now acquainted: if he had inquired how and when this alleged debt of

Judgment.

$600 to the wife arose, he would have learned its imaginary character; and therefore I must now impute to him that knowledge. He had no right to refrain from inquiry. Having refrained, he is in no better situation than if he had made the inquiry and got the information (*a*).

I must declare, that the mortgage and assignments are void against the plaintiffs and the other creditors of the mortgagor. The defendants, *James Douglas*, *Ephraim Cook*, and *John W. Nesbitt*, will pay plaintiff's costs to decree, exclusive of the costs of the first hearing at Woodstock, and including the costs of one only of the examinations of those persons who were examined twice. I presume that no reference will be necessary to ascertain the amount due on plaintiff's execution, and that Mr. *Cockshutt* will make arrangements for paying the

(*a*) See Parker v. Whyte, 1 H. & M. 170; Ogilvie v. Jeafferson, 2 Giff. 378.

amount without the expense of a sale of the property by the court—in which case the property may by the decree be vested in him for the benefit of the general creditors.

Brooke v. The Bank of Upper Canada.

Bill to enforce double liability of shareholders—Pleading—Parties.

A bill will lie in equity, at the suit of a creditor, to enforce the double liability of the shareholders of an insolvent company.

But such a bill must be on behalf of all the creditors.

This was a bill by an execution creditor of the Bank of Upper Canada. The defendants were the Bank and three of the shareholders. The bill alleged that the plaintiff had delivered to the sheriff of the county of York, within which the Bank, while in operation, had its chief place of business, writs of execution against the goods and lands, respectively, of the Bank; that the sheriff had been unable to levy or make anything on either of the executions; that the debt remained wholly unpaid; that the Bank had no assets out of which the plaintiff could obtain payment or satisfaction of any part of his debt; that the assets and property of every kind which the Bank had, had been wholly exhausted; that the stock of the Bank had been paid up; that the defendants, the three shareholders, had not yet paid anything in respect of the double liability imposed by the act, 19 & 20 Victoria, chapter 121, section 36; that the aggregate sums which they were liable to pay in respect thereof was more than sufficient to pay and discharge the plaintiff's executions; that the defendants were directors or managing officers of the Bank; and that the shareholders were too numerous to be all made parties to this suit. The prayer was, for

Statement.

1869.

Brooke v. Bank of U. C.

an account of what was due to the plaintiff: for an account of the number of shares holden by the three defendants, "and of the aggregate amount for which they are respectively liable as sureties as aforesaid for the debts of the said corporation; and that the defendants may be ordered to contribnto in proportion to such liability to the payment of what may be found due to the plaintiff; that if necessary an inquiry may be directed as to other persons who may be shareholders of the said Bank; that they may be ordered to contribute to the payment of the plaintiff's debt; that for the purposes aforesaid all proper directions may be given and accounts taken; and that the plaintiff may have such further and other relief as to this honourable court may seem meet."

Judgment.

The three defendants demurred to the bill for want of equity, and because all the creditors of the Bank were not parties.

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

Mr. *James McLennan*, contra.

Harris v. *The Dry Dock Company* (*a*), *Wood* v. *Dummer* (*b*), *Cullen* v. *Queensbury* (*c*), *Story's* Eq. Pl. sec. 116, were referred to by counsel.

MOWAT, V. C.—The enactment (*d*) which creates the double liability invoked by the bill, is as follows: "In the event of the property and assets of the said Bank becoming insufficient to liquidate the liabilities and engagements or debts thereof, the shareholders of its stock, in their private or natural capacities, shall be liable or responsible for the deficiency, but

(*a*) 7 Gr. 450.
(*b*) 3 Mason, 308.
(*c*) 1 Br. C. C. 101.
(*d*) Sec. 36.

1869.

Brooke v. Bank of U. C.

to no greater extent than to double the amount of their respective shares; that is to say, the liability and responsibility of each shareholder to the creditors of the said Bank shall be limited to a sum of money equal in amount to his stock therein, over and above any instalment or instalments which may be unpaid on such stock, for which he shall also remain liable and shall pay up." The act for the settlement of the affairs of the Bank (*a*) contains a clause providing, that nothing therein contained shall affect or vary the liability of any shareholder to any creditor of the Bank or the rights or remedies of any such creditor against any shareholder. Accordingly, that act was not referred to on the argument of the demurrers.

It was contended, in support of the demurrer, that the liability in question is a legal liability, which the plaintiff can make available at law, and which therefore he cannot come here to enforce. But no authority was cited in support of that contention; and unless the right at law were both clear and adequate, a remedy in equity could not be denied. There are statutes both of the Canadian Parliament and of the Parliament in England which provide a machinery by which creditors of a company can reach at law the individual shareholders. But the acts relating to the Bank of Upper Canada give no such machinery; and I find nothing which enables me to say, that the creditors have in the law courts any remedy whatever against the individual shareholders. On the other hand, in *Halket* v. *The Merchant Traders' Ship Loan and Insurance Association* (*b*) a policy of insurance under the common seal of a joint stock company contained a proviso that the policy should not extend to charge or render liable the respective proprietors of the company to any claim on the policy beyond the amount

Judgment.

(*a*) 31 Vic. ch. 17.

(*b*) 13 Q. B. 960.

1869.

Brooke v. Bank of U. C.

of their individual shares in the capital stock of the company, and that the capital stock and funds of the company should alone be liable to answer all claims and demands by reason of the insurance in question. And the court was of opinion, that those terms "precluded the plaintiff from any remedy at law against the individual shareholders." That case was followed by the court of Exchequer in a suit of another creditor against the same company (*c*). In the American cases which are stated in *Angell* and *Ames* on Corporations (*d*),—and which, although not identical with the present case, yet with reference to the question before me have considerable analogy to it,—it seems to have been held or assumed that the only remedy was in equity. Apart from the technical difficulties that may stand in the way of any legal remedy, the accounts which have to be taken to ascertain the extent of the liability of the shareholders, and the advantage of settling the rights and obligations of all parties in one suit, and in a way to bind everybody, constitute grounds for entertaining the jurisdiction which it seems impossible to resist. I think, therefore, the demurrers for want of equity must be overruled.

Judgment.

The bill is by one creditor only, and is not expressed to be on behalf of all creditors—which, by the rules of this Court, would make it the bill of all and binding on all, if the creditors are too numerous to be all made parties by name. The demurrers object, that the suit is defective for want of parties, because the other creditors are not parties either by name or by this sort of representation; and it seems to me that the objection is well founded. The plaintiff's counsel argued that it does not appear from the bill that the plaintiff was not the only creditor; but if he is the only creditor, he is

(*c*) Hassel v. The Merchant Traders' Ship Loan and Insurance Company, 4 Exch. 525.

(*d*) 596 to 603, 7th ed.

1869.

Brooke v. Bank of U. C.

not entitled to the payment of his whole debt from the three shareholders whom he has made defendants—they are only liable for their share of the deficiency, and, therefore, for their share of the plaintiff's debt. But the bill contains no allegation that the plaintiff's is the only debt, and, in the absence of an express averment to that effect, I cannot assume the facts to be so. If there are other creditors, I see no reason for holding, that one creditor can obtain a preference over other creditors by being the first to sue in equity, or by being the first to obtain a decree. If the plaintiff's proper remedy is in equity, as equity delights in equality he cannot acquire by means of his suit any greater rights than other creditors, though this inability may not be of any practical importance; for I presume that if there is a deficiency of assets of the Bank to pay all creditors, the deficiencey falls far short of the full amount for which the shareholders are liable, and that all the creditors will be paid in full. But if the shareholders may not have to pay to the full extent of the shares which they hold, an account of the unpaid debts and liabilities will be necessary to ascertain the deficiency, and to determine the sum which each shareholder has to contribute to make the amount up. In this amount every creditor whose debt has to be ascertained is interested; and if this court interferes at all, it should be to give complete relief. The accounts should be taken, and the debts ascertained, once for all, in a way to bind everybody, —instead of leaving the shareholders open to separate suits by all the creditors separately, or making it necessary for accounts of common interest to be gone into anew in every suit which may be brought, and with, possibly, varying results. The preventing multiplicity of suits, so far as that forms a ground for maintaining the jurisdiction invoked by the plaintiff, can be fully realized only by making the suit one for the common benefit of all creditors.

Judgment.

1869.

Brooke v. Bank of U. C.

A suit in that form may happen sometimes to be less convenient to an individual creditor, and less prompt in procuring payment of his debt, than a suit on his own behalf alone, and for his individual debt alone, unembarrassed by the rights of other creditors. But this court must regard the rights of all the creditors, and the rights of the unfortunate shareholders also, as well as the interest of the particular creditor who first brings a suit; and, when called upon in a proper case to give effect to the double liability clause which the legislature has introduced into so many acts of incorporation, it will be the duty of the court so to mould its decree, and so to direct the proceedings under it, as to make the remedy as speedy, inexpensive, and effectual, as the nature of the case admits of. For this purpose, new modes of proceeding may, if necessary, be devised and adopted, under the large powers given to the court, so that such a clause as that in question may not, for want of adequate machinery, if the court can provide such machinery, prove a delusion instead of affording the protection to creditors which the legislature contemplated.

Judgment.

One ground of the demurrer being overruled, and the other being allowed, there will be no costs. The plaintiff may have the usual leave to amend.

1869.

DARLING v. WILSON.

Mortgages—Priority—Costs.

The plaintiff was execution creditor of one *S.*, who became a mortgagee of the premises in question. To a suit instituted by a prior mortgagee the plaintiff was not made a party:

Held, that the plaintiff's position as execution creditor of *S.* was that of a derivative mortgagee *in invitum*, and as such he ought to have been made a party to the suit by the prior incumbrancer.

The mortgagor of the lands in question having made an assignment in insolvency, subsequent, however, to the execution of the plaintiff, and it appearing that there was a surplus after payment of all claims proved against the lands in the suit by the prior mortgagee, it was *held* that, in the absence of proof of waiver by the plaintiff of his rights, the plaintiff was entitled to priority as against the creditors of the mortgagor under the assignment in insolvency.

The plaintiff having failed in that part of a suit which rendered a bill necessary, and as the other objects of the suit could have been attained by less expensive proceedings, and it being considered that in case the latter course had been adopted the costs to the insolvent estate would have been about equal to the costs incurred by it in defending the suit, no costs were given to either party.

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

Mr. *Moss*, for defendant *James Stewart*.

Mr. *Toms*, for defendant *McDonagh*.

Mr. *McMurrich*, for defendant *Wilson*.

SPRAGGE, V. C.—At the close of the argument I stated my opinion to be, that while it appeared to be clear that the intention of *John Stewart*, in making the sale to his brother *James*, which is impeached by this bill, was to defeat his creditors, the evidence failed to prove any such intention on the part of *James* in making the purchase. I thought there was an actual sale; that it was not colorable; that there was no secret trust; and that *James* was not cognizant of the intention of Judgment.

1869.

Darling v. Wilson.

John being, what it was, to hinder creditors. I said, however, that when I looked at the case again, with a view to the disposing of the other points presented in argument, I would again consider the point of the sale from *John* to *James*; and if I found reason to alter the opinion I had formed at the close of the case, I would do so: otherwise that the point might be considered as disposed of upon the reasons which I then gave. I have again looked over the pleadings and evidence, and rema[illegible] of the same opinion.

By the sale under the direction of the court, at the suit of the Trust and Loan Company, at which sale the defendant *McDonagh* became the purchaser, *James Stewart* ceased to have any interest in the premises sold to him by *John*. He was made a party, I suppose, in order to charge him with costs. The bill as against him should be dismissed with costs.

Judgment.

The other points in the case arise in this way: The plaintiff recovered two judgments against *John Stewart*. In the first he placed a *fi. fa.* goods in the hands of the sheriff, 2nd July, 1864, which, being returned *nulla bona*, a *fi. fa.* against lands was placed in the hands of the sheriff, on the 30th July, 1864. Upon the second judgment a *fi. fa.* goods was lodged on the 26th March, 1865; and being returned *nulla bona*, a *fi. fa.* lands was lodged on the 15th April, 1865. The writs against lands have been renewed from time to time, and were current at the commencement of this suit.

The next occurrence in the order of time, was an assignment in insolvency, made by *John Stewart* to the defendant *Wilson*, on the 21st November, 1865.

The land sold by *John* to *James Stewart*, was subject to two mortgages: one made by a former owner, *Martin*, to the Trust and Loan Company; the other made by

1869.

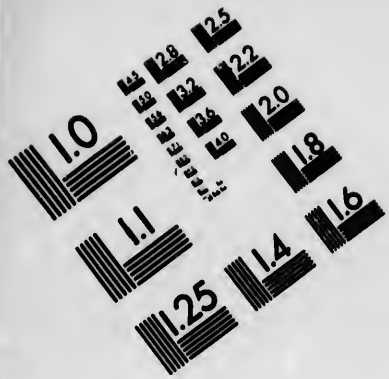
Darling v. Wilson.

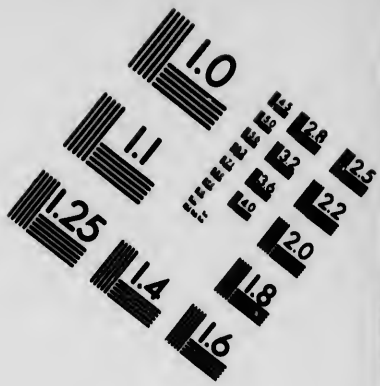
John Stewart to *F. W. Thomas*, as trustee for the Bank of Montreal; and upon the sale to *James Stewart* he gave to *John* a mortgage to secure $4000 of the purchase money: which mortgage was assigned to *Herr* on the 17th of October, 1864, the assignment being registered 10th February, 1865. The assignment to *Herr* was by way of security for a debt. It was made after the lodging of the writs upon the plaintiff's first judgment, and before the lodging of the writs upon the second judgment.

The Trust and Loan Company filed their bill upon their mortgage, and obtained a decree 4th May, 1866: they made parties *Martin*, *James Stewart*, *Wilson* assignee in insolvency, and one *Kells*, whom it is not necessary to notice. The Montreal Bank, and *Thomas* as its trustee, *Herr*, and two execution creditors of *John Stewart* named *Kay*, were made parties in the master's office. The *Kays* proved no debt.

Judgment.

The plaintiff was not made a party to the above suit, and he complains of the omission. If made a party it would have been as judgment and execution creditor of *John Stewart*; and on the ground that his execution against lands attached upon the mortgage by *James* to *John*; that *John* was a mortgagee, and that he as *John's* execution creditor was a derivative mortgagee *in invitum*, his execution creating a charge upon the mortgage to *John*; and I think that such was the plaintiff's legal position. It is suggested that it is a writ against goods, not against lands, that would attach upon a mortgage, it being a security for money: but whatever may be the case if the mortgage itself, as a security for money, were to be taken in execution, it is a *fi fa.* against lands that is the proper process for a judgment creditor to issue in order to place himself in a position to charge the lands of his debtor in this court: so at least I have always understood to be the received doctrine of the court. It





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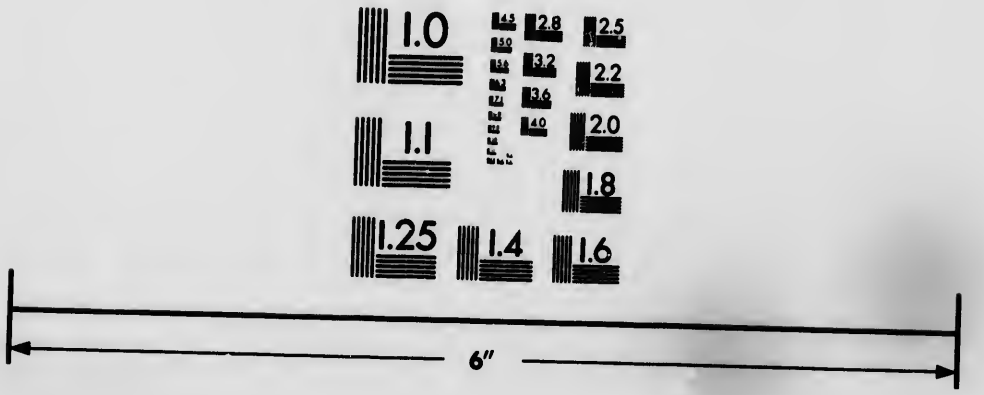

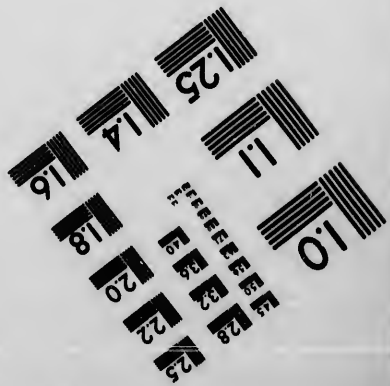

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1869.

Darling v. Wilson.

is true that the plaintiff is one degree removed from the mortgagee, but so is any derivative mortgagee; and so in the suit in question was *Herr*. *Herr* was properly made a party, and this plaintiff ought to have been.

With regard to the provisions of the insolvent acts of 1864 and 1865 (*a*), the latter vesting in the assignee of the insolvent all the assets of the insolvent, although actually under seizure by the sheriff, so long as they are not actually sold; they appear to be out of the question in this case, as writs in the hands of the sheriff at the time of the passing of the latter act are in express terms excepted from its operation, and the plaintiff's writs were in that position. The provision in the act of 1865 is an adoption of an old rule in bankruptcy in England (*b*); but it was not contended before me that, independently of the act, the rule prevails with us in insolvency.

Judgment.

In the suit to which I have referred, brought by the Trust and Loan Company, there is a surplus in court after satisfying the incumbrances of the company, of the Montreal Bank, and of *Herr*, all of whom have been paid. The plaintiff does not make *Herr* a party to this suit, so as to raise any question of priority between the the first of his two judgments and *Herr's* derivative mortgage: therefore, failing to impeach successfully the conveyance from *John* to *James Stewart*, the only question is between the plaintiff and the assignee in insolvency, whether the plaintiff is entitled in priority to, or only *pro rata* with, the general body of creditors.

The plaintiff is, in my opinion, entitled in priority, upon the grounds that I have stated. Something was said in argument as to the effect of the plaintiff having

(*a*) 27-28 Vic. ch. 17, sec. 2, sub-sec. 7; 29 Vic. ch. 18, sec. 12.
(*b*) 1 Coke, 595.

claimed in insolvency. I find from papers put in that he claimed the amount of his judgment debts. The affidavit (made by his agent) adding; "claimant holds execution against said insolvent's lands as a security for said debt, but I believe the same are of little or no value, and I cannot fix any value on such security, but the claimant claims to be paid in full out of the proceeds of said lands as a privileged claim." Whether anything was done upon this does not appear. It was not pressed on behalf of the creditors that this claim so made, prejudiced the creditor's claim to priority if he had any; and I do not see that it did. 1869. Darling v. Wilson.

The only remaining question is as to costs. The plaintiff's bill as against the defendant *James Stewart* and the defendant *McDonagh*, must be dismissed with costs. As between the plaintiff and *Wilson*, the assignee in insolvency, I think substantial justice will be done by giving no costs. The plaintiff succeeds upon the question of title to the fund; but then he might have litigated the question in a less expensive way, *i. e.*, by petition in the cause; I apprehend, indeed, that he proceeded by bill, because he desired to impeach the conveyance made by his debtor, and that but for that he would have proceeded by petition. The costs which the insolvent estate would in that event have had to pay are probably about equivalent to the costs it has been put to in defending this suit: the difference, at all events, cannot, I think, be great; and it will save the costs of two taxations by giving no costs of this suit to either. If however, I am mistaken in this, as possibly I may be, and if the costs to the estate in this suit are materially larger than would be the costs of litigating the question upon petition, the costs may be taxed. Judgment

1869.

SPAIN v. WATT.

Pleading—Demurrer for want of equity.

Where the bill alleged facts which shewed that the lands in question had been sold by the mortgagee under a power of sale in his mortgage for less than one-fifth the value, and alleged that the mortgagee, "intending to acquire title himself to the said lands * * * caused the said lands to be sold for the nominal sum of $109 to one *G.*, who paid no consideration therefor, and on the same day conveyed the same to the defendant *Ann Watt*, the wife of the mortgagee;" that "*Ann Watt* had paid no consideration for the pretended sale and conveyance of the said lands to her, and was well aware that the said sale and conveyance took place for the purpose of depriving the plaintiff of her just rights in the premises:"

Held, this sufficiently alleged the mortgagee's intention to become himself the purchaser.

Demurrer for want of equity.

Mr. *Fitzgerald*, for the demurrer.

Mr. *Cattanach*, contra.

Judgment. SPRAGGE, V. C.—I think the bill states a case which, if true, entitles the plaintiff to relief; and, therefore, that the defendants' demurrer must be overruled.

It may be assumed for the defendant that the mortgage to *Hodgins* contained a power of sale. If it did not, the sale was altogether without authority and simply void, a mere nullity, and there is nothing to stand in the way of the plaintiff's right to redeem. I assume, however, that it contained only such provisions as are ordinarily contained in such powers. If it contains any extraordinary provisions and the defendants rely upon them, they should set them up by answer. It may also be assumed for the defendant that the defendant *Arthur Watt* rightly acquired the assignment of mortgage from *Hodgins*. He may be treated as an ordinary mortgagee,

exercising an ordinary power of sale contained in his mortgage. 1869.

Spain v. Watt.

It is alleged that the mortgage debt did not exceed $455, and that the value of the land mortgaged and sold was at least $2400, consequently that it was sold for a good deal less than one-fifth of its value. This land, together with another parcel of the same quantity in the same concesison of the same township (the one lot being number nine, the other fourteen), was subject to a previous mortgage, the position of which and circumstances connected with it are set out in the seventh paragraph of the bill:

"The said lands, along with the north-half of lot number nine in the second concession Rideau front of the said township of Nepean, was also subject to a mortgage made by the said *Martin Spain* to the Trust and Loan Company of Upper Canada; and the said *Martin Spain*, in his lifetime and after the execution and registration of the mortgage in this paragraph mentioned, conveyed the said north-half of said lot number nine in the second concession Rideau front of Nepean aforesaid, to one *Michael Kelly*, on condition of the said *Kelly* paying the said mortgage in this paragraph mentioned, and indemnifying the said *Martin Spain* against the said mortgage so made by him as aforesaid to the Trust and Loan Company; and in order to secure and save harmless himself and said lands mentioned in the first paragraph of this bill of complaint against the said mortgage to the Trust and Loan Company of Upper Canada, said *Martin Spain* took from said *Kelly* a mortgage on said north-half of said lot number nine, conditioned to pay the said mortgage to the Trust and Loan Company of Upper Canada; and your complainant is informed, and she believes it to be true, that the said *Kelly* has since paid off the said mortgage to the said Trust and Loan Company of Upper

Judgment.

1869.

Spain v. Watt.

Canada, and the defendants well knew said *Kelly* could and would have removed the said lastly mentioned mortgage;" and it is added, "At all events the existence of the prior mortgage was not in any way raised as an objection to paying a larger price for the said lands (in the mortgage in question) and did not in any way influence the price for which the said *Arthur Watt* professed and pretended to sell the said lands," those in question.

The amount of the mortgage to the Trust and Loan Company is not stated; and it is suggested on behalf of the defendants that the amount may have been so large as, with the mortgage to *Hodgins*, to amount to the full value. The facts stated are, however, against this: *Kelly* having purchased the other lot, and agreeing to pay off the mortgage; and it is alleged that the existence of this other mortgage did not prejudice the sale. If it did, and if what is suggested as possibly the case, was in fact the case, the defendants' course was to answer. Upon the demurrer I must take it that the value of the premises mortgaged to *Hodgins* was substantially $2400: consequently that they were sold for less than one-fifth of their value.

Judgment.

One case intended to be made by the bill is that *Arthur Watt* was not only vendor but also purchaser. The defendants object that this is not alleged, at least not sufficiently alleged. The allegation upon this head is that *Arthur Watt*, "intending to acquire title himself to the said lands," procured an assignment of the *Hodgins'* mortgage; and it then proceeds, that he "thereupon caused the said lands to be sold for the nominal sum of $409 to one *Patrick Gilchrist*, who paid no consideration therefor, and on the same day conveyed the same to the defendant *Ann Watt*, the wife of the said *Arthur Watt*;" and in another paragraph it is alleged that "*Ann Watt* has paid no consideration

for the pretended sale and conveyance of the said lands to her, and was well aware that the said sale and conveyance took place for the purpose of depriving the plaintiff of her just rights in the premises."

1869.

Spain v. Watt.

It is not alleged in so many words that the sale to *Gilchrist* was colorable only, not real; but if facts are alleged which shew it to be so, that is sufficient. What is alleged is that *Gilchrist* paid no consideration; that on the day that he purchased he conveyed to the vendor's wife, and that she paid no consideration; and that the price at which he assumed to purchase was a nominal price. The bill, while not in terms alleging that the sale was colorable, still contains nothing affirming it or treating it as a real sale to *Gilchrist*, and it charges that all that was done by *Arthur Watt*, the acquiring of the mortgage and the sale to *Gilchrist*, was done with the intent of acquiring title in himself to the lands comprised in the mortgage.

Judgment.

I accede to the proposition that the bill must state such a case as, if proved, will necessarily entitle the plaintiff to relief. *Arthur Watt* from his position was vendor of the premises comprised in the *Hodgins* mortgage, and it resulted from his position that he was a trustee in the matter of the sale for the mortgagor. It is quite clear that he could not himself purchase, and that if the purchase was really by him, though in the name of *Gilchrist*, the sale cannot stand. The question is whether the bill sufficiently alleges that he, not *Gilchrist*, was the real purchaser. The intent alleged and admitted is not to be discarded. Then, is what is alleged to have been the facts of the case consistent with *Gilchrist* being the real purchaser? I think not. He paid no consideration and he received none, and he conveyed the same day to the vendor's wife. If these facts were in evidence, the conclusion, I think, would be irresistible that he was not the real pur-

1869. Spain v. Watt.

chaser. But that would be only an inference from facts proved; and it is not necessary to say that it would be sufficient: for it is alleged that the price was *nominal*. A real price is essential to a sale. Not only did *Gilchrist* pay no consideration, but he was to pay none. Upon the facts alleged the whole transaction as a sale to *Gilchrist* was necessarily *unreal*. The proper conclusion may be that there was no sale at all. It matters not whether such was the case, or whether there was a sale, and the vendor also the purchaser.

The bill is not framed with that clearness and certainty that are proper, but still the allegations upon the head that I have been considering are, I think, sufficient.

Judgment.

I adhere to what I said, as to the necessity of alleging specific acts of fraud or other misconduct where fraud or misconduct is the ground of relief. The allegations as to the not properly advertising and publishing the intended sale are, however, I think sufficient. They call the attention of the defendants, I think, sufficiently to what the plaintiff complains of in that respect: the defendants are called upon to shew that they did so advertise and publish as to secure, as far as in them lay, a good and fair sale. The other allegations in the same paragraph, other than those as to the auctioneer, are, in my judgment, too vague and uncertain.

I think that the sale cannot stand, upon the ground that I have stated, the purchase by the mortgagee himself. I do not mean, however, to say that the bill discloses no other ground of equity. The great undervalue, especially when taken in connection with the place and manner of conducting the sale, are matters to be considered. But the allegations as to the purchase by *Arthur Watt* being themselves sufficient for the overruling of the demurrer, I have proceeded upon

1869.

Spain v. Watt.

them as the ground of my judgment. I do not think that the Provincial statute makes any difference (*a*). The object of the first and second sections, which alone relate to this point, was plainly to preserve the rights of a mortgagee taking a release of the equity of redemption, or purchasing under a power of sale. There is nothing to enable him to purchase where he could not purchase before. The act, as I read it, does no more than change the effect of a purchase where a purchase may properly be made. At all events, if *Arthur Watt* was purchaser, as I adjudge that he is alleged to be, I am satisfied that he could not hold a purchase made at the price and under the circumstances stated in the bill.

Judgment.

The demurrer will, therefore, be overruled, with costs.

GILBERT v. JARVIS. [IN APPEAL.]*

Judgment creditor—Attachment against equitable choses in action.

A bill was filed by judgment creditors alleging that their debtor was devisee and executrix of her husband; that she was entitled to an annuity under his will, and was a creditor of his estate for advances she had made to pay his debts, and claiming that these debts and claims should be ascertained, the estate administered, and sufficient land of the testator sold to pay what the estate owed, or so much of it as would cover the judgment debt.

Held, that the plaintiff was not entitled to relief.

The Bank of British North America v. *Matthews*, *ante* volume viii., page 486, over-ruled.

The bill in the court below (filed 9th May, 1869,) was by *Elisha B. Gilbert* and *Samuel H. Blake* against

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(*a*) C. S. U. C. ch. 87.

[PRESENT.—Draper, C. J. Q.B., VanKoughnet, C., Richards, C. J. C.P., Spragge, V. C., Morrison, J., A. Wilson, J., J. Wilson, J., and Mowat, V. C.]

1869.

Gilbert v. Jarvis.

Mary Boyles Jarvis and *Samuel Peters Jarvis*, setting forth at length the will of the late *Samuel Peters Jarvis*, dated 7th April, 1853, whereby, amongst other things, provision was made for the annual allowance to the defendant *Mary Boyles Jarvis*, of a sum sufficient with her own rents, &c., to make up £600 a-year in priority to any other bequest or devise made by the will. The bill stated that Mrs. *Jarvis* had not of her own estate more than £200 a-year, and that she was therefore entitled under the will after the payment of the debts and funeral and testamentary expenses of the testator, to an annual payment of £400 a-year; that the personal estate of the testator was not adequate to meet his debts, and as the estate of the defendant *Mary Boyles Jarvis*, could be more easily realized than that of the testator, she mortgaged and sold the whole of her estate in order to raise money to pay the said debts; that a portion of the amounts thus raised by the defendant *Mary Boyles Jarvis*, and expended in the payment of the said debts was afterwards repaid to her by sales of a portion of the estate of the testator, but there still remained due to the defendant *Mary Boyles Jarvis*, from the estate of the testator, a sum exceeding £2000 in respect of such advance; that there was also due to the defendant *Mary Boyles Jarvis*, a sum exceeding £4000 in respect of the annual payment of £400; that the debts and liabilities of the testator had been almost all paid by the defendant, *Mary Boyles Jarvis*, but there were still some liabilities outstanding, far less in amount than the value of the remaining estate; that the defendant *Mary Boyles Jarvis*, had received rents and profits of the estate of the testator, and had applied them to her own use and in making voluntary payments to some of the children of the testator; that the defendant *Mary Boyles Jarvis*, although she had been for many years largely indebted to the plaintiff *Gilbert* and others, and unable to pay such debts, had not taken any steps whatever to raise any sum of money

Statement.

1869.

Gilbert v. Jarvis.

out of the said estate in respect of the provision made for her under the will to obtain payment of the large sum due her by the said estate, but on the contrary, although often applied to for that purpose, she absolutely refused so to do, and she insisted that she had a right, and intended notwithstanding the claims of her creditors, to discharge the said estate from all claims either in respect of the said debt or of the said annual payment, and she insisted that her creditors had no rights in the premises in respect of the said sums of money claimed; that the defendant *Mary Boyles Jarvis* intended to, and asserted that she would, preserve the whole of the said estate of the testator for, or divide it among, her children to the prejudice of her creditors, and in pursuance of such plan, and in the latter part of 1866, she voluntarily and without consideration conveyed a very large portion of the said estate, exceeding the sum of £6000, to one of the children of the testator in the said bill named; that in the year 1858 the defendant *Mary* Statement. *Boyles Jarvis* became indebted to the plaintiff *Gilbert*, on a covenant under seal, and thereafter the said debt and the instrument securing the same were for valuable consideration then paid, assigned to the plaintiff *Blake;* that thereafter, on the 12th day of March, A.D., 1867, *Blake* in the name of *Gilbert*, but for the sole benefit and behoof of him (*Blake*), recovered a judgment in one of the Superior Courts of Common Law in Upper Canada against the defendant *Mary Boyles Jarvis*, in respect of the said debt for the sum of $1345.65; that no sum whatever had been paid on account of such judgment, and there remained justly due thereon for principal money and costs the sum of $1365.65, and interest thereon from the 12th day of March last; that a writ of *fieri facias* against the goods and chattels of the said *Mary Boyles Jarvis* was duly sued out on the judgment, and placed in the hands of the sheriff of the County of York, being the proper sheriff in that behalf, but the same had been returned no goods, and thereupon a writ

1869. Gilbert v. Jarvis.

of *fieri facias* against the lands of the defendant *Mary Boyles Jarvis*, was duly issued and placed, and remained in, the hands of the sheriff for execution; that there were no funds, assets, or estates, of the said defendant *Mary Boyles Jarvis*, out of which the said judgment could be realized save only the interest of the said defendant in the estate of the testator, in respect of which the plaintiffs had no adequate remedy at law; that the defendant *Mary Boyles Jarvis*, threatened and intended to alienate the residue of the estate of the testator, and so to part with and encumber the same, and to charge, anticipate, waste, or so misapply the funds that might be coming to her and applicable to the payment of the said annual payment as to embarrass, delay, or prevent the plaintiffs in the recovery of the said judgment unless restrained.

Statement.

The plaintiff (*Blake*) submitted that he was entitled to have an account taken of the amount due the defendant *Mary Boyles Jarvis*, as executrix, and in respect of the provision made for her by the will, and to have an equitable attachment and garnishment of the said claims, and to have an equitable execution of the said writ in respect thereof, and to have a sufficient portion of the said estates sold to realize the amount so found due to *Mary Boyles Jarvis*, and that the same should be applied in payment of the amount due him; that the defendant *Samuel Peters Jarvis*, one of the sons of the testator was made a party to the suit, as one of, and as representing the beneficiaries under the will of the testator, inasmuch as their pecuniary interest might be opposed to that of the defendant *Mary Boyles Jarvis*, in the premises; and prayed an account of the amount due the defendant *Mary Boyles Jarvis*, as executrix, and in respect of the said provision made for her by said will, and that the said amounts might be attached and garnished, and equitable execution of the said writ had in respect thereof; that a sufficient portion of the

1869.

Gilbert v. Jarvis.

estate of the said testator should be sold to satisfy the amount due *Blake*, not exceeding the amount due *Mary Boyles Jarvis*, and that the proceeds of such sale should be applied in satisfying the amount due to *Blake*, and in payment of the costs of the suit; that if necessary the estate of the testator might be administered under the direction of the court; that for the purposes aforesaid all proper directions should be given, and accounts taken; and for further and other relief.

The bond on which the said judgment was recovered was to the effect following: "Know all men by these presents that I, *Mary Boyles Jarvis*, of the City of Toronto, widow, and devisee under the will of my late husband, *Samuel Peters Jarvis*, in consideration that the said *Elisha B. Gilbert* do, and shall, &c., do hereby undertake, promise and agree to and with the said *Elisha B. Gilbert* that I, the said *Mary Boyles Jarvis*, shall, and will, as soon as the estate of my late husband is settled, according to the provisions thereof, so that the annuity of six hundred pounds per annum is secured to me, as stated therein, forthwith pay the said *Elisha B. Gilbert* the amount of the said judgment and all interest, costs, and expenses thereon, and that the same shall be paid at all events within three years from the date hereof." Statement.

The defendants having answered the bill, the cause came on to be heard by way of motion for decree, before the Chancellor, who, without hearing argument, and following the decision of *The Bank of British North America* v. *Matthews*, pronounced judgment in favor of the plaintiffs, and thereupon a decree for the administration of the estate of the testator was drawn up, referring it to the accountant to make the usual inquiries, and which contained a direction that, "in taking the said account, the said accountant is to inquire and state the amount of annuity to which the said defendant *Mary Boyles*

1869. Gilbert v. Jarvis.

Jarvis, is entitled, having regard to the provisions of the will of the said testator, and the terms on which said annuity is granted, and the amount which she has received on account thereof, and the balance due her on account thereof, and also to inquire, and state the amount (if any) due the said defendant, *Mary Boyles Jarvis*, from the said estate on account thereof as well as executrix, and also to inquire and state the amount due to the plaintiff *Samuel Hume Blake*, on account of his said debt.

And this court doth further order that, the said accountant do inquire and state whether there is or are any other person or persons entitled to a claim or claims upon the said interest of the said *Mary Boyles Jarvis*, as annuitant or executrix as aforesaid, and to find the amount of such claim or claims and to settle the priorities thereof," reserving further directions and costs.

Statement.

Under this decree the parties proceeded to take the accounts before the accountant, who made a report in pursuance thereof, finding a sum of $15,000 and upwards due *Mrs. Jarvis*. On appeal this amount was reduced to $10,083.64. Subsequently the defendants applied in Chambers, before the Chancellor, for liberty to appeal, notwithstanding the time for doing so, as of right, had expired, and thereupon by an order dated 12th June, 1868, permission was granted to the defendant *Samuel Peters Jarvis*, to appeal, he undertaking and consenting that notwithstanding any order of the Court of Error and Appeal, the proceedings in the accountant's office in the cause should stand as if an administration of the estate of the testator had been had under an ordinary administration order; but liberty to *Mary Boyles Jarvis* to appeal was refused with costs.

On the appeal coming on

Mr. *Hector*, Q. C., and Mr. *Moss*, for the appellant,

1869.

Gilbert v. Jarvis.

contended that the plaintiffs had not, by their bill, made such a case as entitled them in a court of equity to any relief from or against the defendants or either of them; that it appeared from the allegations in the bill, that the Court of Chancery had no jurisdiction to make the decree complained of; that no ground is shewn in the said bill to entitle the plaintiffs to come into equity in aid of the execution at law, in the bill mentioned; that the plaintiffs were not entitled, under the circumstances, to a decree for the administration of the estate of the testator; and assuming that a court of equity had jurisdiction over the matters in the bill mentioned, the decree was erroneous, inasmuch as it was in the power of the executrix to abandon or forego any claim against the estate in respect of her annuity or in any other respect; that the interest of the executrix in the estate of the testator, under his will was not chargeable with, and could not be held liable to satisfy the claim of the plaintiffs or any portion thereof; that the decree was in effect a decree for the administration of the estate of a deceased person at the suit of the plaintiffs who had on privity with such estate, and which, therefore, the Court of Chancery had no jurisdiction to make; that the decree directed inquiries to ascertain whether there were any other persons entitled to a claim upon the alleged interest of the defendant *Mary Boyles Jarvis*, in the estate of the said *Samuel Peters Jarvis*, deceased, whereas such persons, if any there were, had no privity with the estate of the said *Samuel Peters Jarvis*, and could only establish their right, if any, by suit; that the decree was in effect, a decree authorizing the levying by execution for the satisfaction of a judgment at law upon an interest which is not by any statute or any rule of law or equity liable to execution, either at law or equity; that the decree declared that the plaintiffs were entitled to have the judgment at law in the pleadings mentioned, satisfied out of the annuity in the pleadings mentioned,

Statement.

1869.

Gilbert v. Jarvis.

alleged to have been devised by the testator *Samuel Peters Jarvis*, to the defendant *Mary Boyles Jarvis*, as if the said *Samuel Peters Jarvis* had absolutely devised the annuity to *Mary Boyles Jarvis*, whereas it appeared by the will of the said *Samuel Peters Jarvis*, set forth in the bill, that such annuity was only devised in a contingency which had not happened, and was not alleged to have happened, and all proper parties to contest the right of the said *Mary Boyles Jarvis* to such annuity were not before the court, and the said *Mary Boyles Jarvis* did not, by the pleadings or any evidence given in the cause, make any claim to such annuity; and further, that the Court of Chancery had no jurisdiction in reference to the matters set forth in the pleadings, to direct any inquiry or account at the suit of the plaintiffs as to whether the estate of the said *Samuel Peters Jarvis*, deceased, was or was not indebted to the said *Mary Boyles Jarvis*.

Statement.

Mr. *Strong*, Q. C., and Mr. *Blake*, Q. C., for the respondents, submitted that the facts shewed that there was a debt due by the estate of the testator to the defendant *Mary Boyles Jarvis*, and if she had not happened to be the executrix of that estate, and so to be a debtor at law, it would have been a legal debt, subject to be reached by legal proceedings upon the respondents' judgment, and being by reason of that accident, an equitable debt was subject to be reached by equitable process upon the judgment; that the impediment in the way of legal process created by the facts ought to be removed by the Court of Chancery, and that there ought to be equitable execution of the writs in the bill mentioned; that the covenant set out in the case in effect charged the interest of the said *Mary Boyles Jarvis* in the said estate, with the respondents' demand; and that the respondents being entitled to recover their demand out of the debt due to *Mary Boyles Jarvis*, from the estate, were entitled to call on

1869.

Gilbert v. Jarvis.

Mary Boyles Jarvis to administer the estate, and to procure such administration through the Court of Chancery; that the said *Mary Boyles Jarvis* could not, when in embarrassed circumstances, lawfully or honestly carry out her proposed intention of making her children presents at the expense of her creditors; that the said appellant had no interest recognizable in a court of law or equity in the question whether the respondents were entitled to enforce a charge on the interest of *Mary Boyles Jarvis*, and had no right to appeal against so much of the decree as established such charge, the said *Mary Boyles Jarvis* alone having such right; and that while the said decree stood against *Mary Boyles Jarvis* in that particular, it could not in that particular be reversed at the instance of the appellant; that for like reasons, and also by reason of the undertaking and order on which the appeal was allowed, the appellant had no right to ask a reversal of so much of the decree as directed an administration of the estate of the testator; and also that the appeal was an attempt to avoid the payment of a just debt by *Mary Boyles Jarvis* out of assets belonging to her and under her control, and under circumstances which made it a fraud upon the creditors.

Judgment.

DRAPER, C. J.—*Samuel Peters Jarvis*, father of the appellant, died in 1857, having duly made and published his last will, bearing date the 7th April, 1853, whereby he directed his executors to pay all his debts and authorized them to sell such parts of his real estate as might be found necessary for that purpose. He gave to his wife (if she survived him) the residue of his real and personal estate, to hold during her natural life, with power to dispose by gift or sale of any part thereof among his children (or the representatives of such of them as might have died) in her discretion. Provided that before any such sale or gift to the children, &c., his executors should sell or lease such portions of his real estate as would yield and produce to his wife, when

1869.

Gilbert v. Jarvis.

added to the rents and profits of her own real and personal estate, (a portion of which he stated was then under lease,) a clear income of £600 per annum, and as soon as that amount was permanently secured to her he empowered her to convey and divide the residue, or any part in her discretion, among his children, and (as before) he also willed and desired that an allowance of £100 sterling per annum should be paid to the appellant, and after other provisions not affecting the present case he appointed his wife and two other persons to be executrix and executors of his will. The widow alone proved the will, the two executors renouncing. The testator left six children, of whom the appellant is the eldest. After the testator's death the widow and executrix became indebted to the plaintiff *Gilbert* on a covenant, which debt and the instrument securing it were for valuable consideration assigned to the other plaintiff, and, in 1867, a judgment was recovered in the name of *Gilbert* in one of the Superior Courts of Common Law, which is yet unsatisfied. Upon this judgment a *fieri facias* issued against goods which was returned *nulla bonâ*, and thereupon a *fieri facias* against the widow's own lands was placed and remains in the sheriff's hands for execution. And thereafter, on the 9th May, 1867, the respondents filed their bill against the executrix, stating, among other things, that the testator was largely indebted to several persons at the time of his death, and that the executrix, instead of selling his lands to pay those debts, paid them out of the proceeds of her own property, which she sold, and that she has never received the annual amount to which under the will she was entitled, to make up to her a clear income of £600 per annum, and that she has consequently a large claim upon the estate; and they pray that accounts should be taken and the amount paid by her out of her own funds to relieve the testator's estate should be ascertained, as well as the sum due to her under the will to make up the annual income of £600, and that

Judgment.

these sums so due to her, or a sufficient part thereof to satisfy the judgment against her should be attached and garnished, and equitable execution "of the said writ" should be granted in respect thereof; and that a sufficient portion of the testator's lands should be sold to satisfy the amount of the judgment against the executrix and the costs of this suit, and that the proceeds of the sale should be paid to the respondent *Blake*, and that if necessary the estate of the testator should be administered under the direction of the court. 1869. Gilbert v. Jarvis.

The appellant was made a party to the suit as one of and representing the beneficiaries under the will.

A decree was made in favor of the respondents. The executrix has not appealed, but the appellant obtained an order permitting him to appeal, and staying proceedings for the sale of the lands pending the appeal, he consenting that notwithstanding any order or decree of the Court of Error and Appeal, the proceedings in the accountant's office in this cause should stand as if an administration of the estate of the testator had been had under an ordinary administration order. Judgment.

It was objected on the argument, that the appellant could not be heard to appeal against the whole decree, because he had no such interest as could have prevented the executrix from doing *sua sponte* that which in effect the decree requires her to do, namely, to sell the testator's lands, to pay his debts, and to raise the necessary sum to produce the specified annual income. That the plaintiffs have a right to charge the interest of Mrs. *Jarvis*, however derived, in the testator's estate, and the appellant cannot interpose against so much of the decree as relates to, or establishes that charge.

The appellant is, I presume, confined to protecting his own rights. But the will only gives a life-estate in

1869.

Gilbert v. Jarvis.

Judgment.

the lands to Mrs. *Jarvis*, with power to dispose of the fee for the payment of the testator's debts, and subject thereto, and to providing for the annual income, to dispose by gift or sale to the children of the testator or the representatives of any who might die, of all or any of the testator's lands. If the executrix never exercises this power, or only exercises it partially, the appellant has an interest in the remainder expectant on the determination of his mother's life estate. This interest would be affected and might be destroyed by a decree which establishes a charge upon the lands beyond the debts owing by the testator at his death. And further, as it appears to me that the will does not authorize sales of land from time to time to supplement the widow's own income up to £600, but that the testator intended that the proceeds of lands sold should be invested and only the interest of the investments, together with the rents of lands leased, should be used to make up the clear income, I am of opinion that the decree goes too far in this respect, and on either or both grounds the appellant has a right to be heard against it. For the effect of the decree is, as I understand it, to treat her as a creditor of her husband's estate for money expended since his death in paying his debts, and for any sums which she had a right to claim to make up her income to £600, and to authorize a sale of the testator's lands to the amount of those claims, or as much less as will satisfy *Gilbert's* judgment and costs, and the costs of this suit.

With regard to the provision for the annual income, I am not free from doubt whether the testator intended that the annual rents and profits of Mrs. *Jarvis's* separate estate, as existing as the time of his death, should be taken in order to ascertain the amount to be supplemented to make up the £600 per annum, or whether the amount to be raised out of his estate was to fluctuate with the increase or diminution of her separate income.

1869.

Gilbert v. Jarvis.

The latter would be most advantageous to her, as in the event of her lessening her own income by any expenditure or by misfortune, the charge on the testator's estate would be *pari passu* increased. But, however this may be, it appears to me that in no event does the will authorize more than the expenditure of income, whether of rents or interest. The money produced by the sale of lands standing in the place of those lands, and the interest thereof in the place of rent. If the widow, being also executrix, has neglected to sell or lease such portion of the testator's real estate as was necessary to yield and produce the sum required to make up the "clear income," that neglect would not authorize the disposal of the *corpus* of the estate in order to pay arrearages arising from her own laches, and it is not suggested that the estate is insufficient to satisfy this charge upon it without exhausting the *corpus* thereof, and if the will does not authorize such a course to be adopted by the executrix, I do not understand upon what ground her creditor can claim to have it carried out for his benefit.

Judgment.

The plaintiffs however, rest their claim on the further ground that Mrs. *Jarvis*, being indebted on the judgment already stated, is a creditor of the estate for moneys advanced and expended by her to satisfy the testator's debts, and they rely on the *dictum* of *Esten*, V. C., in *The Bank of British North America* v. *Mathews* (*a*). During the argument the respondent's counsel admitted that he relied upon an equitable extension of the garnishee clauses of the Common Law Procedure Act, without which he could not argue that a court of equity would take an account of, or administer the testator's estate in order to enable the plaintiffs to obtain satisfaction of the debt incurred by the widow and executrix to *Gilbert*.

(*a*) 8 Gr. 486.

1869.

Gilbert v. Jarvis.

I have at no time been able to concur in this contention as to the power of the court to extend the garnishee clauses, and in fact I had some months ago (for this appeal was heard last August*) written my opinion, entering somewhat at large into a discussion of the question. But the recent decision in *Horsley* v. *Cox* (*a*) renders it unnecessary to argue the matter at length.

If the claims of the widow and executrix on the estate of the testator, and which the respondents desire to enforce to satisfy their judgment, were legal debts, no ground is shewn for coming into the Court of Chancery. But the bill is not framed upon any assumption that such is the character of these claims.

It is solely upon the ground that as the respondents' claim is not enforceable at law, and as the debts they seek to attach, if not strictly speaking equitable debts, are still of that nature, that they can claim the same remedy in equity which they would have at law if the debts they seek to attach were simply legal debts. In *Horsley* v. *Cox*, *Lord Hatherley* says: "There is great plausibility in the argument, but I have come to the conclusion that the doctrine referred to" (that of assisting a judgment creditor by giving him in equity the remedy he would have at law,) "has no application to a case like the present, arising under the Common Law Procedure Act. By that act this particular remedy is given in a very special manner and under very special terms, and there is no ground for saying that this court can interfere so as to alter the position of the parties by simply putting aside the legal obstacle so as to bring the whole matter into this court, and to arrest the money by means of a process analogous to an attachment." And again, "it is clear that the process is only adopted for the simple case of a debt due from a third person to the

Judgment.

* 1868.

(*a*) L. R. 4 Chy. 92.

judgment debtor where the judgment debtor, could at once obtain payment of the debt." 1869.

Gilbert v. Jarvis.

Now the decree that is appealed from abundantly shews that this is not the "simple case" contemplated by the Lord Chancellor, as coming within the proper province of the garnishee clauses of the Common Law Procedure Act. The accounts, inquiries, and directions, ordered and given in the decree go far towards an administration of the testator's estate, and are necessary preludes to the relief which the bill seeks; and this very necessity shews that more is required than the removal of a merely technical difficulty which stands in the plaintiffs' way, and which a court of equity on well established principles will remove.

In my opinion the appeal should be allowed, and it should be declared that the plaintiff is entitled to no relief. There will be no order as to costs. Judgment.

The case *In re Price* (*a*) affords an indirect corroboration of the conclusion, that the remedy by attachment under the garnishee clauses of the Common Law Procedure Act is given only in cases where the whole proceeding is in the common law courts. The head-note appears to me to be incorrect in the report of that case. I think it should be to this effect, "An order of the Court of Chancery for payment of money, though a judgment debt within the 1st and 2nd Vic. ch. 110, does not (under the garnishee clauses of the Common Law Procedure Act) entitle the creditor who has obtained it to attach a debt due to the party ordered to pay." In the May number of the Law Reports the report of this case is corrected.

(*a*) L. R. 4 C. P. 155.

1869.

THE BANK OF UPPER CANADA v. WALLACE. [IN APPEAL.*]

Mortgage—Practice.

Mortgagees, in pursuance of a power of sale contained in their conveyeyance, sold the mortgaged property to *McLeod* for $7,800, and gave him possession. *McLeod* paid a deposit of $600, and gave his promissory note for $600 more, which he duly paid. He also executed a mortgage for $4,000 which was duly registered, but did not pay the residue of the purchase money, $2,600. The mortgagees executed a deed of the property but retained it in their possession. The solicitor for the mortgagees also did some acts as if the sale was complete; but the court, being satisfied that in the contemplation of the parties the transaction was still *in fieri*, *Held*, that the mortgagees were not responsible to a subsequent imcumbrancer for the $2,600, or chargeable with more money than they had actually received.

The bill of a subsequent incumbrancer stated a completed transaction. The mortgagees, through oversight, allowed the bill to be taken *pro confesso*, and a decree was made accordingly. The plaintiff subsequently desiring more extensive relief, filed a petition in the nature of a bill of review in order to obtain the same. The mortgagees, in their answer to the petition, set up the facts which shewed the transaction to be not completed. The court considered the whole case to be re-opened by this petition, and decided that the sale to their vendee did not affect the rights of the mortgagees, and that they were chargeable only with the amount actually received from the purchaser.

This was an appeal by the plaintiffs from a decree of the Court of Chancery, and an order made on rehearing affirming the same.

Statement. The facts as they existed when the original bill in this case was filed, appeared to have stood thus: *Wallace* being seized in fee of a certain lot, No. 4, in the Town of Goderich, on the 19th August, 1854, mortgaged the same to *The Trust and Loan Company* in fee, with a power of sale in case of default in paying

[* PRESENT.—Draper, C. J. Q. B., VanKoughnet, C., Richards, C. J. C. P., Spragge, V. C., Morrison, A. Wilson, and J. Wilson, JJ.]

$4,000 and interest at certain fixed days. The mortgage contained the usual covenants and provisoes, among them one that the *Company* should not be liable for more moneys than they received.

Wallace made default, and on the 27th October, 1859, *The Trust and Loan Company*, by virtue of the power, sold the premises by auction, and *John McLeod* became the purchaser and signed the following agreement: "The property mentioned in the advertisement hereto annexed being that on St. David and Kingston streets in Goderich, mortgaged by *William Wallace* and wife to *The Trust and Loan Company of Upper Canada*, was this day sold by the said *Company* at public auction and purchased by me at the price of $7800, on the terms of payment above mentioned." The terms of sale and payment referred to, were: "Upset price, $5,200: $600 cash and balance in thirty days, secured by an indorsed note. Existing mortgage to stand till the whole transaction is completed. Loan of $4,000 for three or five years."

Statement.

After signing the foregoing agreement, and on the same day, *McLeod* signed the following, written under the agreement, to which *The Trust and Loan Company* agreed, though they did not sign it: "It is hereby agreed that the terms above written are modified so far as the payment of the balance over and above the upset price is concerned, and they are now fixed to be as follows, viz.: Cash $600, indorsed note for $600, and balance in cash or receipts of parties entitled to balance after payment of *The Trust and Loan Comyany*, in thirty days, otherwise resale at the cost of Mr. *McLeod*, who will execute the necessary mortgage and papers to entitle the *Company* to resell."

The Trust and Loan Company executed a deed of the premises to *McLeod*, dated on the 27th October, 1859.

1869.

Bank of U. Canada v. Wallace.

It had never been out of their possession, nor was registered. There was a memorandum indorsed on it in pencil as follows: "To be registered when the purchase is completed and the balance paid."

McLeod paid the two sums of $600 each, which (with the exception of $331) is all the *Company* has received. *McLeod* also executed a mortgage of the premises to the *Company* to secure $4,000. This mortgage was dated 18th November, 1859, and was registered without the direction of the *Company* so far as appears; but it was after registry lodged with them. An agent of *McLeod's* had collected a trifling sum of rent from a tenant of part of the premises.

Statement.

The Bank of Upper Canada, on the 23rd October, 1857, recovered judgment against *Wallace* for $4,015, and registered their judgment in the registry office for the County of Huron (in which the lands lay).

In September, 1860, they filed a bill setting out the mortgage made by *Wallace*—the sale under the power by *The Trust and Loan Company* to *McLeod*—for $7,800, a part payment by him, and his giving a mortgage to secure $4,000 as being the balance of the purchase money payable by him for the lot. And they claimed, that as *Wallace* was, at the time of the registry of their judgment, entitled to the equity of redemption in the mortgaged premises, the judgment became a charge upon that equity. And they further claimed and prayed the court to declare that their judgment was a lien on the mortgage for $4,000 given by *McLeod*, and that *The Trust and Loan Company* should pay the excess between the amount which *McLeod* was to pay as purchase money ($7,800), and the claims which the *Company* had against *Wallace*.

McLeod put in an answer to this bill, but it was taken

1869.

Bank of U. Canada v. Wallace.

pro confesso against *The Trust and Loan Company*, and a decree was made declaring that the judgment of the *Bank* was a lien on the moneys secured by *McLeod's* mortgage, and it was referred to the master to take the account of what was due to the *Bank* on their judgment and to the *Company* on their mortgage, given by *Wallace*.

The master reported on the 28th January, 1863, in substance: The offer for sale at the upset price of £1,300=$5,200, and the terms of payment already stated. That *McLeod* purchased at the price of £1,950=$7,800, and signed a contract which was immediately after modified as above; the payments by *McLeod*, the conveyance to *McLeod*, and the mortgage from him to the *Company* to secure £1,000 (the amount of the loan mentioned in the terms of sale), to be paid on 1st April, 1865, with interest payable in advance, amounting in the whole to the upset price of £1,350, which being deducted from the purchase money to be paid, left a balance of £650=$2,600, which it did not appear *McLeod* had paid either in cash or by the receipts of parties entitled to the same within thirty days after the sale; or that there had been a resale as provided for by the modified terms of sale, and so he found: 1st. That such sum of £650 with interest continued to be a charge in favor of *The Trust and Loan Company* on the premises, through the mortgage of *Wallace* as against *McLeod*, in addition to his mortgage for £1,000. 2nd. That there remained due to *The Trust and Loan Company* in respect of the mortgage made by *Wallace* (though *Wallace's* own liability was satisfied by the sale) for principal £903 2*s*. 1*d*. and for principal and interest, £1,130 10*s*. 3*d*., which sum included the £650 and interest, and so much of the principal sum and interest secured by *McLeod's* mortgage as should, with the £650 and interest, be equal to £1,130 10*s*. 3*d*. 3rd. That at the date of the report there was due on *McLeod's*, principal and interest, £1179 3*s*. 7*d*. 4th. That with interest the £650 above

Statement.

1869.

Bank of U. Canada v. Wallace.

mentioned amounted to £776 18*s.* 8*d.*, and added to the sum due on *McLeod's* mortgage, made £1,956 2*s.* 3*d.*, so that deducting what was due to *The Trust and Loan Company*, there was a sum remaining of £825 12s. toward paying the *Bank* and other creditors of *Wallace*, who had been made parties in the master's office.

On the cause coming on, on further directions it was declared that the *Company* had been paid; that £825 12*s.* remained towards paying the *Bank* and the other creditors of *Wallace*, which money the *Company* were ordered to bring into court, to be applied in payment of the *Bank* and those creditors.

The Trust and Loan Company applied for, and obtained a rehearing, on which the decree on further directions was vacated, because it was not supported by the original decree, and the *Bank* was permitted to present a petition by way of supplemental bill in the nature of a bill of review, and this petition, after a statement of the previous proceedings, charged that *The Trust and Loan Company* must, under the circumstances, be held to have received the whole purchase money, and must account therefor to the *Bank* and the other creditors of *Wallace*, and prays for a decree accordingly.

Statement.

The answer of the *Company* to the petition set up the mortgage from *Wallace*, particularly stating that they were not to be liable for more money than they should actually receive by virtue thereof; the sale to *McLeod* for $7,800, and the contract signed by him and the immediate modification of the terms thereof are also stated, and the payment by him of $1,200, which, with the sum of $331 it was asserted to be all they had received. They admitted that they executed a conveyance to him in the November following the sale (on 27th October), and that he executed a mortgage to them to secure payment of a loan to be made to him of £1,000 for six years,

1869.

Bank of U. Canada. v. Wallace.

but stated that the deed was executed provisionally and in anticipation of his paying the purchase money according to the terms of sale; that the deed neither was, nor was intended to be, delivered to him, and never was out of their possession until produced in the cause, and that the mortgage, though registered by *McLeod* and sent to them, was treated by them as an incomplete security until he paid the balance of the purchase money, and they did not make him any advance on it and gave him no credit for it and he has never paid the purchase money. Since the sale *McLeod* had been found to be insolvent.

On the argument of the petition, the following judgment was delivered by

Judgment.

VAN KOUGHNET, C.—After hearing all the evidence in this matter, I consider the case made by *The Trust and Loan Company*, in answer to the plaintiffs claim, proved. I think there never was any completed sale to *McLeod* binding on the *Company*, or which deprived them of their remedy against the land or their charge upon it. The evidence of Mr. *Paton*, I think, establishes this, and the pencil memorandum on the back of the deed, made, as Mr. *Paton* says, at the time he executed it, confirms it. That memorandum is to the following effect: "To be registered when the purchase completed and the balance paid." This was never done. So far as I can gather from the evidence, ths matter of the purchase under the power of sale remained *in fieri*, although some acts of the solicitors of the *Company* are inconsistent with that view; but, I think, I must in fairness treat those acts as having taken place upon the expectation and faith of the terms of the purchase being carried out, and that this never having been done, they go for nothing.

The difficulty in the way of *The Trust and Loan Com-*

1869.

Bank of U. Canada v. Wallace.

pany is that they, by default, have admitted the statement in the plaintiffs' bill—that there was a completed transaction of sale to, and purchase by, *McLeod*, and had the matter rested on that pleading, and the plaintiffs been content to accept relief in accordance with that case made, admitted and adjudged, *The Trust and Loan Company* would have had difficulty in getting rid of it. But the plaintiffs were not so content, they wanted something more, and have by their petition re-opened the whole case; and I consider myself, therefore, at liberty to deal with it afresh; and this I do, by declaring that the sale to *McLeod* has proved abortive; that the *Company* are in no way bound thereby, except to the amount of the money received by them, and that they retain their original rights subject to these amounts and to the usual accounts, and that for any balance so owing to them, they are entitled to a first charge, which the plaintiffs or others, according to the master's finding in regard to them, will be entitled to pay off or redeem. But I also decree that *The Trust and Loan Company*, accepting this relief, pay all costs up to the hearing on further directions, as by their submitting to the plaintiff's bill, and by their whole conduct in the matter, they justified any one interested in the property in believing and asserting just such a claim as the plaintiffs have put forward, but on the explanations of the defendants have failed to maintain. For the same reasons, I give no costs of this petition, on which the plaintiffs have failed, but by which the defendants have benefitted.

Judgment.

The result is, that *The Trust and Loan Company* retain the lien created by the original mortgage, and by means thereof, are mortgagees, who can only be redeemed in the ordinary way, by one or all the parties interested in the property or having claims upon it.

From this order the plaintiffs appealed.

Mr. *Strong*, Q.C., and Mr. *Roaf*, Q.C., in support of

1869.

Bank of U. Canada. v. Wallace.

the appeal contended that *The Trust and Loan Company*, by their dealing with *McLeod*, put it out of the power of the subsequent incumbrancers and the mortgagor to protect or deal with the property, and that they ought to have been charged as if they had completed the sale according to the terms of the contract; and that if the *Company* are not to be treated as having completed the sale, they ought to be charged with rents and profits as mortgagees in possession, the *Company* having assumed possession of the property.

Mr. *Blake*, Q.C., and Mr. *James McLennan*, for the respondents, *The Trust and Loan Company*.

Mr. *Blain* for the defendant *McLeod*.

DRAPER, C. J.—[After stating the facts as above set forth.]—The evidence appears to me fully sufficient to sustain the allegations of the answer as to the terms of sale to *McLeod*, and his failure to fulfil them by payment of the balance of his purchase money in cash within the thirty days or afterwards. Judgment.

The principal doubt I have felt is, whether the matters of defence set up in the answer to the petition were open to *The Trust and Loan Company* after they had suffered the original bill to be taken against them *pro confesso*. It appears that the decree on further directions was vacated, being, as I understand, not consistent with the relief prayed in the bill or with the facts proved. The plaintiffs present this petition by way of supplemental bill in the nature of a bill of review. On the best opinion I can form it appears to me that these defendants *The Trust and Loan Company*, are not prevented by having suffered the original bill to be taken against them *pro confesso*, from setting up any matter sufficient to answer the case made against them by the petition, though at the same time I do not understand for what reason the original bill was left unanswered by them.

1869.

Bank of U. Canada v. Wallace.

Adopting this view, and considering the evidence, I concur in the judgment given by the learned Chancellor, which is now appealed from. I think the sale never was completed by *The Trust and Loan Company* to *McLeod*, for he failed in the performance of one of the most important stipulations in it, the which, if fulfilled by him, the plaintiffs would have been paid.

And as consequently *Wallace's* equity of redemption has never been extinguished by any act of *The Trust and Loan Company*, who have not executed the power of sale created by *Wallace's* mortgage, the plaintiffs, subject to the satisfaction of the mortgage, have the same rights which they had when their judgment against *Wallace* was registered. The truth appears to be, that *McLeod* became insolvent and that the premises mortgaged are not saleable at the price (nor probably at a price approaching that) at which *McLeod* became the purchaser. The fall of market value according to some of the evidence, took place very soon after the sale. The *Company* could not have realized the $7,800 out of the property, and nothing was to be got from *McLeod*. In my opinion it requires a much stronger case than the facts before us present to make *The Trust and Loan Company* liable as if they had actually received, or with proper diligence might have obtained. In fact they still hold an unsatisfied mortgage against *Wallace's* property. It forms no part of the plaintiffs' case that there was another bidder at the auction, who offered nearly the same price which *McLeod* did, and that by negligence or improper dealing with *McLeod*, on the part of the *Trust and Loan Company*, the *Bank* were deprived of that chance of being paid.

Judgment.

I think the appeal should be dismissed.

SPRAGGE, V.C.—The original bill treated the sale to *McLeod* as completed, and assumed that the difference

1869.

Bank of U. Canada v. Wallace.

between the purchase money and the amount for which the mortgage was given by *McLeod* to the *Trust and Loan Company* had been received by the latter. The bill was taken *pro confesso*, and the decree declared that the plaintiffs' registered judgment was a lien upon the mortgage. Upon the master's report having been obtained the plaintiffs obtained a decree on further directions for payment by *The Trust and Loan Company;* and so a decree more favorable to the plaintiffs than that made on the original hearing. The decree on further directions was reheard; when it was declared that it was not supported by the original decree, and it was vacated. The order made on rehearing has not been appealed from, and the plaintiffs accepted and acted upon leave given, on rehearing, to present a petition by way of supplemental bill in the nature of a bill of review. A petition of the above nature was accordingly presented, and answers were put in by *The Trust and Loan Company* and by *McLeod*, and the question raised by the petition being at issue, the cause was carried down for examination and hearing before the Chancellor at Goderich, when his Lordship made the decretal order which is the subject of this appeal. The conclusion to which he arrived is summed up in the following passage from his judgment: "The difficulty in the way of *The Trust and Loan Company*, is, that they, by default, have admitted the statement in the plaintiffs' bill—that there was a completed transaction of sale to and purchase by *McLeod*, and had the matter rested on that pleading, and the plaintiffs been content to accept relief in accordance with that case made, admitted and adjudged, *The Trust and Loan Company* would have had difficulty in getting rid of it. But the plaintiffs were not so content, they wanted something more; and have, by their petition, re-opened the whole case; and I consider myself, therefore, at liberty to deal with it afresh; and this I do by declaring that the sale to *McLeod* has proved abortive."

Judgment.

1869.

Bank of U. Canada v. Wallace.

I agree perfectly in this as a proper conclusion from the evidence. But counsel for the plaintiffs now take this position, that *The Trust and Loan Company* being trustees in the matter of the sale, for all parties interested in the proceeds of the sale, were bound to do no act which would prejudice the position of other parties so interested, and they complain that they did so act in varying the terms of sale after *McLeod* had become the purchaser.

The exhibits at page seventeen of the Appeal Book shew in what respect the terms of the sale were varied. It is substantially this: That while under the original terms of sale the difference between the down payment and the $4,000 which was to remain on mortgage, was to be secured by an indorsed note at thirty days; under the varied terms of sale $600 only of this difference was to be so secured, and the balance was to be satisfied in cash or the receipts of parties entitled to the balance, after payment of *The Trust and Loan Company* in thirty days, otherwise a resale.

Judgment.

The difficulty is, that this point is not taken upon the pleadings. The sale, and what took place at and after it, are parts of a narrative of facts, from which the petitioners deduce certain conclusions which are thus expressed, "And your petitioners shew that the mortgaged premises in the bill in this cause mentioned were offered for sale and sold, on the terms and conditions, and under the circumstances in the master's said report, and hereinbefore in that behalf mentioned, and that at the said sale thereof, the defendant *John McLeod* became the purchaser of the said premises for the sum of £1950, and your petitioners charge and submit that under the circumstances in the said report and hereinbefore appearing the said defendants *The Trust and Loan Company of Upper Canada* must be held to have received, and are chargeable with the whole of the said purchase money, or sum of £1950, and must account therefor."

1869.

Bank of U. Canada v. Wallace.

The petitioners in all this complain of nothing: they do not say that their position has been prejudiced by the alteration in the terms of sale. They simply state that the effect of what occurred, as they sum it up, was to make *The Trust and Loan Company* chargeable with the whole purchase money; and they point to the fact of an actual sale having taken place, as the ground of the liability of the *Company*. They shew that the mortgaged premises were offered for sale, and sold, on the terms and conditions, and under the circumstances in the master's report, and in the petition mentioned. They find no fault with the terms and conditions, nor with the conduct of the sale, but rest upon the fact of an actual sale. That, and that only, is in my opinion the issue presented by the petition, and upon that issue I agree in the conclusion of the Chancellor.

Judgment.

The plaintiffs contend that in the decretal order made upon their supplemental petition in the nature of a bill of review, there should have been inserted a direction to the Master to charge the defendants *The Trust and Loan Company*, with the rents and profits of the premises comprised in their mortgage, from the date of the delivery of possession to *McLeod*.

Counsel for the plaintiffs, and for *The Trust and Loan Company*, agree that the possession referred to in the judgment of his Lordship the Chancellor was delivered at, or very shortly after the sale, in the presence of *Wallace*, the mortgagor, of the solicitor and agent of *The Trust and Loan Company*, and of the purchaser, *McLeod*; the mortgagor having, as I understand, been in possession up to that time. The delivery of this possession was certainly premature; but it was given, no doubt, upon the faith and in the expectation that the sale would be carried out, the mortgagor *concurring at least*, in the delivery of possession; as the sale was considered to be at a very good price.

1869.

Bank of U. Canada v. Wallace.

I do not see how I can, upon the materials before me, charge *The Trust and Loan Company* with the rents and profits claimed against them. In the first place it is at least doubtful whether it was not the mortgagor who delivered the possession. The agent of the *Company* was present, certainly, but it was not the *Company* that had possession, but the mortgagor; the *Company* could not transfer to *McLeod* that which it had not itself; the mortgagor alone could transfer possession, possession being in him at that moment. The intendment, I think, would be, that the mortgagor delivered possession to *McLeod*, the solicitor and agent of the *Company* being a concurring party; and this is evident, I think, from this, that the act of delivery could have been by the mortgagor in the absence of the *Company's* agent, but could not have been by the *Company's* agent in the absence of the mortgagor. I am of course not speaking of the legal right to possession, but of the fact of possession. It is explained, but is not in evidence, that the mortgaged premises consists of several tenements, one of which was in the occupation of the mortgagor himself, and the others let to tenants; and that part of the delivery of possession consisted in the tenants being directed to attorn and pay their rents to the purchaser. Now these tenants were up to that time the tenants of the mortgagor, and it must have been the mortgagor who gave these directions to the tenants. And as to the premises occupied by the mortgagor himself, the act of delivery of possession *must* have been by himself. So far as the facts appear at present it would seem to go no further than this, that an agent of the *Company* was present and *concurred* in the delivery of the possession.

Judgment.

But supposing the act of this agent to be more than an act of concurrence, the *Company* cannot be affected by it unless it was within the scope of his authority. Possession, it is agreed, was not to be delivered until

1869.

Bank of U. Canada v. Wallace.

all of the purchase money that was to be paid in hand was so paid, and a mortgage given for the balance. There is nothing before me to shew that the agent who was present at the delivery of poosession had any authority to deliver possession, or at all events authority to deliver it before the purchaser was entitled to it according to the terms of the contract.

The plaintiffs claim to charge the rents and profits against *The Trust and Loan Company* upon the bare fact of the delivery of possession upon which I have commented. They do not shew how long or under what circumstances the possession was retained by *McLeod;* or that they have been prejudiced. Two or three dates are material. The *Company's* mortgage is dated 19th August, 1854. The plaintiffs recovered and registered their judgment on the 23rd of October, 1857; and the sale took place on the 27th of October, 1859. For two years before the sale the plaintiffs might, so far as appears, have had a Receiver, and in that way might have got in effect, the rents and profits, applied to the *Company's* prior mortgage. They abstained from doing this, and now ask to be placed in the same position as if they had taken that course at the date of delivery of possession.

Judgment.

All, however, that it is necessary now to decide is, that upon the materials before the court, we cannot hold *The Trust and Loan Company* chargeable. Facts may be disclosed in the master's office, which may make it proper for him to charge these rents and profits against the *Company.* I do not wish to prejudice any question that may arise before the master.

1869.

GILBERT v. JARVIS.

Amendment—Misjoinder of petitioners—Practice.

Where there is a misjoinder of petitioners, the court has jurisdiction at the hearing of the petition to allow the same to be amended by striking out the name of one of the petitioners.

This was a petition by the defendants *Samuel P. Jarvis* and *Mary B. Jarvis*, for a stay of proceedings in consequence of the judgment of the Court of Appeal (*a*).

The order, as drawn up in appeal, stated that, "it appearing that the appellant *Samuel Peters Jarvis* had, as a condition of the leave to appeal given to him, undertaken, in pursuance of the order of the said Court of Chancery, bearing date the 12th day of June, 1868, that, notwithstanding any decree or order of this court, the proceedings in the accountant's office should stand as if an administration of the estate of *Samuel Peters Jarvis* had been had in an ordinary administration suit, this court doth not dismiss the plaintiff's bill, but doth order and decree that the said respondents are not entitled to any relief against the said appellant in this suit. And this court doth not think fit to give either of the said parties any costs."

Statement.

Mr. *Hector*, Q.C., and Mr. *Moss*, for the petitioners.

Mr. *Strong*, Q.C., and Mr. *Blake*, Q.C., contra.

On the argument of the petition before V. C. *Mowat*, he held, that the plaintiffs could not take any further proceedings against *Samuel P. Jarvis*, or any which he had any concern in or was affected by, but that his co-petitioner had no right to stay proceedings. His Honor reserved judgment for the purpose of considering whether he might allow the petition to be amended so as to make it the petition of *Samuel P. Jarvis* only.

(*a*) *Ante* p. 265.

1869.

Gilbert v. Jarvis.

MOWAT, V. C.—The conclusion to which I have come on the point of practice which I reserved, is, that the court has a discretion to allow a petition to be amended by striking out the name of one of the petitioners. In case of a misjoinder of plaintiffs, the court may, at the hearing of a cause, allow the bill to be amended for the purpose of correcting this error; and the misjoinder would not necessarily be a bar to an application for an interlocutory injunction. The Vice Chancellor *Shadwell* refused a motion because persons had joined in the notice who were not entitled to move (*a*.) Whether that case is to be followed at the present day, in case of a motion, it is unnecessary to consider; but I am clear that I should not hold myself bound by it in the case of a petition.

Judgment.

The amendment may be made, and the order will then be drawn up without costs.

BLAKE v. JARVIS.

Judgment creditor—Attachment of debts in equity.

A judgment creditor cannot attach or garnish by means of a suit in equity a debt for which he has not obtained an attaching order at law.

But, *Semble*, after obtaining and serving such an order, if a remedy in equity is needed for the realization of the debt so attached, the creditor is entitled to file a bill for the purpose.

The bill, filed 30th June, 1869, set forth, that on the 7th of April, 1853, *Samuel P. Jarvis* made his will, and thereby appointed his wife, *Mary Boyles Jarvis*, and two other persons, executrix and executors; that the testator died in 1857 without having revoked or altered his will, leaving him surviving the said *Mary Boyles Jarvis*, and six children, of whom the defendant,

(*a*) Folland v. Lamotte, 10 Sim. 486.

1869.

Blake v. Jarvis.

Samuel P. Jarvis, was the eldest; that the widow alone proved the will, and that the two executors renounced probate thereof; that the widow alone assumed and accepted the trusts of the will (which, however, the bill did not specify); that the testator's personal estate was inadequate to meet his debts; and that the widow raised money out of her own means to pay the same. The bill further stated that on or about the 9th of May, 1867, a bill was filed in this court wherein one *Elisha B. Gilbert* and the present plaintiff were plaintiffs, and the said *Mary Boyles Jarvis* and *Samuel P. Jarvis* were defendants, for the administration of the estate of the testator. Nothing was averred as to the capacity in which the plaintiff filed that bill, or as to the interest which at the time of filing it he had in the administration of the estate. But it was assumed on this demurrer that the plaintiff had some interest in the estate of the deceased which entitled him to file the bill. The decree

Statement.

was not set forth, but the bill stated that on the 24th of January, 1868, the accountant of the court made his report in the suit, and thereby found "that there was due and should be paid to the said *Mary Boyles Jarvis* from the said estate, for money advanced by her to pay off the debts and liabilities of the testator, the sum of $15,267 70; and the said defendants having appealed from the said report, the said court, by an order made therein and bearing date the 18th day of February, 1868, declares, all parties consenting thereto, that the said report should be varied by reducing the amount found due to the said *Mary Boyles Jarvis* to $10,083.64, and that the said report, with that variation, should stand confirmed." The bill charged, that the estate of the testator was indebted to the said *Mary Boyles Jarvis* in respect of moneys advanced by her to pay the testator's debts, as ascertained and settled by the said report and order, in the sum of $10,083.64. The bill stated, that this debt had been settled and declared, in the said suit, to have

priority over the remaining unpaid debts of the testator. The bill then set forth certain judgments recovered at law against *Mary Boyles Jarvis*, and which had become vested in the present plaintiff; and the bill stated that writs of *fi. fa.* against the goods and lands of *Mary Boyles Jarvis* were then in the sheriff's hands, but that there were no funds, assets, or estates of the said *Mary Boyles Jarvis*, out of which the said judgments could be realised, save only the said debt of $10,083.64. The plaintiff submitted, that this debt constituted a legal debt, which he could attach at law except that Mrs. *Jarvis* was, in her capacity as executrix, both debtor and creditor, and that, owing to this double position, there was an obstacle to the plaintiff's legal remedy which equity would remove. The bill stated that *Samuel P. Jarvis* was made a party to the suit as one of the beneficiaries under the testator's will, inasmuch as their pecuniary interests might be opposed to the interest of Mrs. *Jarvis* in the premises. The bill set forth certain lands as "the properties of the said estate out of which the said claim of the said *Mary Boyles Jarvis* is payable." These general allusions afforded all the information which the bill contained as to the contents of the will or the rights of parties under it. The prayer was, that the amount so fixed and ascertained to be due to the defendant *Mary Boyles Jarvis* as executrix as aforesaid, might be attached and garnished; that equitable execution of the said writs might be had in respect thereof; that a sufficient portion of the estate of the said testator might be sold to satisfy the amount due to the plaintiff; that the proceeds might be applied for that purpose and in payment of the costs of the suit; and that for these purposes all proper directions might be given and accounts taken; and for general relief.

1869.

Blake v. Jarvis.

Statement.

To this bill the defendants demurred separately.

Mr. *Hector*, Q. C., and Mr. *Moss*, for the demurrer

1869. Blake v. Jarvis. of *S. P. Jarvis*, cited: *Daniel* v. *McCarthy* (*a*), *Bank of Toronto* v. *Burton* (*b*), *Sparks* v. *Younge* (*c*), *Horsley* v. *Cox* (*d*), *Gilbert* v. *Jarvis* (*e*).

Mr. *Fitzgerald*, for demurrer of *Mary B. Jarvis*.

Mr. *Strong*, Q. C., and Mr. *Blake*, Q. C., contra, cited *Henderson* v. *Henderson* (*f*), *Hutchinson* v. *Gillespie* (*g*), *Williams* on Executors, p. 1216.

MOWAT, V. C.—On the argument of the demurrers in this cause the learned counsel for the plaintiff did not attempt to sustain the bill on the ground that the writs in the hands of the sheriff entitled the plaintiff to have the debt in question applied in satisfaction of the executions. The sheriff, under a writ against goods, is authorized to seize money, bank notes, cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money, belonging to the person against whose effects the writ has issued (*h*); and I presume that there can be no doubt that the debt in question does not fall within any of the particulars thus specified.

Judgment.

The argument for the bill was, that the debt could be attached or garnished in equity. The bill has not been so drawn that I can assume that any of the judgment debts of the plaintiff is the same as the judgment debt in virtue of which the bill in *Gilbert* v. *Jarvis* was filed; or that the parties are the same: and it was argued for the plaintiff, that the decision in that case does not apply to such a state of facts as this bill sets up; that the amount of the debt which this bill

(*a*) 7 Ir. C. L. 261.
(*b*) 4 U. C. Prac. 53.
(*c*) 8 Ib. 251.
(*d*) L. R. 4 Ch. 92.
(*e*) *Ante* page 265.
(*f*) 6 Q. B. 288.
(*g*) 11 Exc. 798.
(*h*) Com. Law Pro. Act, Consol. U. C., 22 V., ch. 22, sec. 261.

1869.

Blake v. Jarvis.

seeks to attach, has been judicially ascertained and settled; that nothing is said in the present bill of the widow's annuity; that an administration of the testator's estate is not asked; and that the bill differs in other respects from the bill in *Gilbert* v. *Jarvis*.

But, after reading attentively the judgment of the learned Chief Justice in that case, and the judgments of the Master of the Rolls and the Lord Chancellor in *Horsley* v. *Cox* (*a*), and restricting my knowledge of the facts (as I am bound to do) to what appears by the present bill, I am of opinion that I could not hold, consistently with those cases, and with the law, that the debt in question can be attached or garnished by means of a suit by the plaintiff in this court. It is to be observed that, as the law stood independently of the provisions of the Common Law Procedure Act, the plaintiff could not have laid hold of this debt. Does that act enable him to lay hold of it? It provides (*b*) that upon an *ex parte* application of a judgment creditor, "and upon his affidavit, or that of his attorney, stating that judgment has been recovered, &c., and that some third person is indebted to the judgment debtor, and is within the jurisdiction, a judge of any of the said courts (as the case may be) may order that all debts owing by or accruing from such third person to the judgment debtor, shall be attached to answer the judgment;" and that service on "such third person," or garnishee, "of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee in such manner as the judge directs, shall bind such debts in his hands." That is the only way of attaching or binding the debts which the statute gives; and is not the mode so laid down as essential for the purpose mentioned as the registration of a judgment according to law was essential for the purposes of the Consolidated Statute, chapter 89? Or as the

Judgment.

(*a*) L. R. 4 Ch. 92. (*b*) Sec. 288.

1869. Blake v. Jarvis.

delivery of a writ to the sheriff before filing a bill to reach the debtor's equitable interest in land? So, the English Statute 1 & 2 Victoria, chapter 110, provided that if a judgment debtor had any stocks, &c., it should be lawful for a judge of one of the superior courts, on the application of the judgment creditor, to order that such stocks, &c., should stand charged with the payment of the judgment debt; and it was held, that this order could not be made or dispensed with by the Court of Chancery, even where the object was to charge a sum of money in the funds standing in the name of the accountant general of that court (*a*). It is necessary for the court of law to make the order for the purpose of creating the charge, and then effect may in equity be given to the order as the case may require. The plaintiff does not allege that he has obtained an attaching order in the present case; and the argument assumed that no such order would be granted at law in respect of the debt in

Judgment.

question. Where a judgment creditor obtains an attaching order, and by service of it binds a particular debt, it is quite probable that if he needs an equitable remedy in respect of that debt, in addition to, or in lieu of, the machinery which the statute provides for the realization of the debt, this court may be found to possess the jurisdiction necessary for his relief. But where he neither has obtained nor is entitled to such an order, I think that nothing can be done for him in this court. In *Horsley* v. *Cox* the Lord Chancellor put his judgment on several distinct grounds; but the first was this: By the Common Law Procedure Act, his lordship said, "this particular remedy is granted in a very special manner, and under very special terms, and there is no ground for saying that this court can interfere so as to alter the position of the parties by simply putting aside the legal obstacle, so as to bring the whole matter into this court, and to arrest the money by means of a

(*a*) Miles v. Presland, 2 Beav. 300. See Warburton v. Hill, Kay, 470.

process analogous to an attachment. * * It appears to me that the case is very different from the case of a person having a judgment against his debtor, and finding that at common law his judgment is arrested, when he seeks to enforce it, by an outstanding legal interest. * * * Here is a special remedy, directed to a special case, and very special observances directed by the act,—particularly by the 66th section [the 298th of the existing Canadian act], which enacts that a book shall be kept by the court, in which every attachment is to be registered, and which all persons are to have an opportunity of inspecting—a rule which is inapplicable to this court or its proceedings." There were special reasons, in addition to this general ground, why, in the particular circumstances of the debt there, the judgment creditor was not entitled to prevail; and there were also some special circumstances apparent on the bill in *Gilbert* v. *Jarvis*, some of which do not appear in the present bill; but I think that enough appears in the judgments in both cases to shew, that, independently of such special circumstances, and on the allegations of the present bill, it is impossible for me to sustain the plaintiff's claim to relief.

1809.

Blake v. Jarvis.

Judgment.

The first ground of the demurrers is, that the court has no jurisdiction to give the plaintiff the relief he seeks; and this ground of demurrer seems to me good. The second ground is, that it does not appear from the bill that the accounts in the suit therein referred to were taken in such a way as to bind the beneficiaries under the will of the testator. Only one of the beneficiaries is stated to have been a party to the suit; and there is no allegation which would shew the others to be bound by it (*a*).

I must allow the demurrers generally, with costs.

(*a*) See Consolidated Orders, 61, &c.

1869.

MOSSOP v. MASON.

Sale of good will—Injunction.

The defendant sold to the plaintiffs the good will of the business of an innkeeper, which he had carried on under the name of "Mason's Hotel," or "The Western Hotel;" he afterwards resumed the business under the same name and in the same premises, and represented to his old customers and the public that the business so resumed was the identical business sold:

Held, that, though in the absence of any express covenant the vendor would have been entitled to engage in a business similar to that he had sold, yet he was not at liberty to represent the new business as the same identical business as the old:

Held, also, that a covenant in the agreement that the vendor should pay $4000 in the event of his carrying on business as an innkeeper within ten years, did not affect the purchasers' right to an injunction; nor did the circumstance of their having removed to other premises.

Statement. The defendant kept a Farmers' Inn, in London, Ontario, under the name of "Mason's Hotel," or "The Western Hotel," and was tenant of the premises in which the business was carried on. On or about the 1st January, 1868, he sold out his business to the plaintiffs, and an instrument was executed by all parties stating the terms of the sale. In this writing it was set forth, that the defendant had agreed to sell to the plaintiffs "all his goods, chattels, effects, and goodwill of the business theretofore carried on by him, situate on the corner of Mark Lane and Fullarton Street, in the said City of London, and known as 'Mason's Hotel.'" The instrument contained no direct covenant by the defendant not to resume business, but he agreed to pay to the plaintiffs $4000 "liquidated damages," in the event of his "directly or indirectly, continuing, commencing, or carrying on, the business or calling of an innkeeper within the term of ten years."

The sale was carried out; so much of the money as, according to the bargain, was to be paid down,

1869.

Mossop v. Mason.

was so paid; and the possession of the premises was delivered to the plaintiffs, the defendant remaining with them for a few days to introduce them to his customers. The defendant's expressed intention at this time was to retire permanently from the business of an innkeeper, and to betake himself to the occupation of a farmer. In July or August following, the stabling on the premises was destroyed by fire. The landlord was absent from the country at the time, and as his agent would hold out no hope of the stabling being rebuilt, the plaintiffs were obliged to remove to other premises. They removed accordingly on or about the 1st October, and the landlord of the old premises (who by this time had returned) accepted from them the key. Their boarders and other customers went with them to the new premises. The landlord of the old premises afterwards rebuilt the stables; and the defendant having been advised that the covenant which he had entered into respecting a resumption of business as an innkeeper was void because not restricted as to place, he arranged with the landlord to re-open the old hotel on his own account. He accordingly refurnished the house; and on or about the 18th November he resumed business in it. On the following day the plaintiffs filed their bill, and on the 26th of the same month they gave notice of motion for injunction. The defendant filed affidavits in answer, and to these the plaintiffs filed others in reply. The motion came on before Chancellor VanKoughnet on the 8th of December, and his lordship, after taking time to consider the case, made an order refusing the motion. The motion was re-heard before the two Vice Chancellors on the 27th August, 1869. It was not suggested that the plaintiffs were in any default for not having brought on the appeal at an earlier period.

Statement.

Mr. *McGee*, for the plaintiffs.

Mr. *Blake*, Q.C., and Mr. *Meredith*, contra.

1869.

Mossop v. Mason.

The judgment of the court was delivered by

MOWAT, V. C.—I shall first consider the matter in question on this motion as it would stand in the absence of the express covenant. The defendant sold to the plaintiffs the good-will of the business which he had carried on under the name of "Mason's Hotel," or "The Western Hotel," in the premises he now occupies. He has since resumed the same business, under the same name, and in the same premises, and has done all that he could do otherwise to represent this business to be the identical business which he had sold to the plaintiffs: Had he a legal right to do all that?

Upon the sale of a good-will the seller, in the absence of any express stipulation on the subject, is not considered to part with his right of going into a similar business in the same locality or elsewhere; but, as the present Judgment. Lord Chancellor pointed out in *Churton* v. *Douglas* (*a*), "he must set it up fairly and distinctly as a separate business, and not as the old established business which he has sold;" for the sale of the good-will is the sale of every advantage which "has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business. * * When you are parting with the good-will of a business, you mean to part with all that good disposition which customers entertain towards the house of business, identified by the particular name or firm, and which may induce them to continue giving their custom to it." In that case the defendant's name was *John Douglas;* he had carried on the business of a stuff merchant at Bradford, under the name of *John Douglas & Co.*; and the court restrained him from

(*a*) Johns 188.

1869.

Mossop v. Mason.

resuming or carrying on the business of a stuff merchant at, or in the immediate neighborhood of, Bradford, either alone or in partnership with any other persons under the style or firm of *John Douglas & Co.*, and from in any other manner holding out that he was carrying on the business of a stuff merchant in continuation of, or in succession to, the business carried on by the former firm of *John Douglas & Co.* It is to be observed that the plaintiffs were not using the name of *John Douglas & Co.*, and indeed by the bargain they had no right to use it.

In the present case the defendant has resumed the business of an innkeeper in London; carries it on under the same name as before—the "Western Hotel;" and has represented the business to be a continuation of, or succession to, the old business. The fact of the place being the very premises in which the good-will was acquired, and to which a large part will necessarily attach, makes the case a much stronger one against the defendant, than the case from which I have quoted. All the particulars which I have mentioned appear in the advertisement which the defendant published on resuming business, and which bears date 18th Nov., 1868. That advertisement is headed, "Western Hotel *re-opened*," and begins thus: "The subscriber begs to announce that he has *resumed* the proprietorship of the above hotel, which has been extensively improved and furnished with new furniture," &c., &c. There is other evidence of representations by the defendant, that the business is the same; and the defendant does not dispute having made such representations.

Judgment.

Reference was made in argument to the removal of the plaintiffs from the old stand, as justifying the defendant's conduct. But no authority was cited for the contention. The learned judge who decided the case already quoted from, which was the case of a sale

1869.

Mossop v. Mason.

of a wholesale business, considered it "absurd to say that, where a large wholesale business is conducted, the public are mindful whether it is carried on at one end of the Strand or the other, or in Fleet Street, or any place adjoining, and that they regard that, and do not regard the identity of the house of business, namely, the firm." In *England* v. *Downes* (*a*), the goodwill of a victualler's business was expressly held to be, under the circumstances, incident to the stock and license, and not to the premises on which the business was carried on. The goodwill may not be so valuable to the plaintiffs at their new stand as it was at the old stand; but how can that be a reason for the defendant's depriving them of the diminished advantage which, but for his interference, they would retain at the new stand?

Judgment.

I have mentioned the defendant's covenant to pay $4000 in the event of his carrying on business as an innkeeper within ten years. The instrument is very inartificially drawn. The defendant's attorney suggested before it was signed that the restriction as to carrying on the business for ten years should be limited as to place, but the defendant declared that that was unnecessary as, on account of his family, he meant never to resume the business of innkeeping. It evidently did not then occur to any one concerned, that a restriction as to place was necessary to give validity to the covenant; and, though a restriction to London and its neighbourhood would have answered every purpose of the agreement, no restriction was introduced; and the instrument was executed as drawn. I may assume, for the purpose of disposing of the present motion, that the covenant, by reason of its unrestricted form, is wholly void. The defendant contends that it is wholly void against him, but that it is effectual in his favor to

(*a*) 6 Beav. 269.

destroy the implied covenant which, but for the express stipulation, the sale of the goodwill would carry with it. That we cannot hold. An express covenant controls and modifies an implied covenant in order to give effect to the intention of the parties: to give this covenant the one-sided operation contended for would be defeating, instead of effectuating, the intention of the parties. No authority cited supports the defendant's contention on this point.

1869.

Mossop v. Mason.

It was further contended on the part of the defendant, that, as the instrument contains no express covenant not to resume business, but merely a provision for the payment of liquidated damages in the event of his resuming, he was at liberty to resume if he chose to pay to the plaintiffs the sum named; and that the plaintiffs' remedy (if any) was an action at law for this money, and not a suit in equity for an injunction. But, looking at the whole instrument, we have no doubt that the sole purpose of introducing the stipulation was to protect the plaintiffs against a resumption of the business by the defendant. It has often been held, that, if the court is satisfied as to the real intention in such a case, the form of the covenant is immaterial; and it has also been ruled that there may be an injunction notwithstanding the use of the expression 'liquidated damages,' and though the defendant has entered into no express covenant not to carry on the business (*a*). I apprehend that, in the case of a bond conditioned for the conveyance of a lot of land, and containing no direct agreement for such a conveyance, it has always been understood that the obligee is entitled to have the land specifically. Here the goodwill has been actually transferred; the purchasers have gone into possession; and there is an implied covenant by the defendant not to resume the business

Judgment.

(*a*) Howard v. Woodward, 34 Law J. Ch. 47; Butler v. Powis, 2 Coll. 156.

1869.

Mossop v. Mason.

sold: then follows the stipulation that, in the event of his resuming he will pay $4000 liquidated damages. An implied covenant is as effectual as an express covenant; and I take it to be perfectly settled that, in case of a covenant not to do an act followed by another covenant to pay a specified sum, whether in the name of penalty or in the name of liquidated damages, in case of his doing the act, the other party is entitled to an injunction against such act, and is not obliged to content himself with the money.

It may not be honest in the defendant to take advantage of the form of the express covenant, but if the form adopted renders the covenant invalid the defendant cannot be restrained from resuming the business of an innkeeper in opposition to, and to the injury of, his vendees (subject to the restrictions which I shall mention). We are of opinion that the plaintiffs were entitled, on the motion before the Chancellor, to an injunction to the hearing, like that granted in *Churton* v. *Douglas*, viz., restraining the defendant from resuming or carrying on the business of an innkeeper or hotel-keeper at or in the neighbourhood of London, under the name of "Mason's Hotel" or "Western Hotel;" and from resuming or carrying on the business of an innkeeper or hotel-keeper, under any name or in any manner, in the premises at the corner of Mark Lane and Fullarton Street, now or formerly occupied by him; and from in any manner holding out that he is carrying on business in continuation of, or succession to, the business carried on by him under the said names or either of them. But, considering the time which has now elapsed since the defendant resumed business, we think that if the defendant shall enter into an undertaking to keep an account of the receipts of the business from this time, and of the profits thereof, and to abide by such order as the court may make as to damages, and to discontinue and procure to be discon-

Judgment.

tinued all proceedings for enforcing payment of the remaining instalments of the consideration money until the hearing, no further order shall be made on the motion. Failing such an undertaking within seven days, the injunction will go. In either event the deposit will be returned to the plaintiffs. 1869. Mossop v. Mason.

SPRAGGE, V. C., concurred; and added that he was inclined to think, having regard to the whole instrument, and to the purely local character of the business of an innkeeper, that the covenant might be read as if the restricting words "in London" had been expressed therein.

FERGUSON v. FERGUSON.

Sheriff's sales—Equitable estates—Vendee of Crown.

A debtor being a vendee of land and in default in paying the purchase money, a creditor obtained execution against his lands, and at the sheriff's sale became the purchaser of the debtor's interest for a sum equal to the debt and costs, and took the sheriff's deed accordingly:

Held, that he could not afterwards repudiate the purchase and claim his debt, on the ground that the debtor's interest was not saleable by the sheriff.

The interest of a debtor in land, bought from the Crown, but for which at the time of his death he had not fully paid, and had not obtained the patent, is available in equity for the benefit of his creditors; and their right is not destroyed by a friend of the heirs paying the balance of the purchase money, and procuring the patent to issue in the names of the heirs.

Statement.

The bill was by a creditor of *George Ferguson*, who died on the 17th October, 1863, intestate, and leaving several infant children. *Ferguson* at the time of his death was in possession of a piece of land in the township of Augusta, under a contract from the Crown for the purchase thereof, but he had allowed his instalments to

1869. Ferguson v. Ferguson.

fall into arrear. After his death a relative paid the balance due (about $68); and on the 9th May, 1867, a patent was issued to the children as co-heirs of their father. The person who advanced the money went into receipt of the rents, and in that way repaid himself his advance. Meanwhile the plaintiff had obtained judgment against the administratrix of the debtor, issued a writ against his goods, and then (21st December, 1865,) against his lands. Under the execution against lands, the plaintiff became the purchaser at the sum of $140, being the amount of his debt and costs; and the sheriff on the 4th February, 1867, executed a deed purporting to convey to the plaintiff all the debtor's estate and interest in the land in question. The plaintiff did not pretend any ignorance on his part at the time of the purchase as to the state of the title.

On the cause coming before the late Chancellor *VanKoughnet*, his Lordship dismissed the plaintiff's bill with costs: thereupon the plaintiff set the cause down to be re-heard, and the same came on for argument before the two Vice-Chancellors.

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

Mr. *Moss* for the defendants.

The judgment of the court was delivered by

Judgment.

MOWAT, V. C.—The plaintiff claims that the equitable estate of the debtor was not saleable under execution; that the sheriff's deed conveyed to the plaintiff no interest; and that he is, therefore, entitled, notwithstanding his purchase, to have the property sold by this court, and to have the proceeds applied in satisfaction of the judgment. There are two answers to this claim: first, that he has no writ in the sheriff's hands, without which it has hitherto been held that a judgment creditor has no lien on

his debtor's lands, and is not entitled to file a bill; and, secondly, that, having voluntarily chosen to buy at the sheriff's sale, and to take the sheriff's deed in satisfaction of the debt and costs, he cannot now, without any allegation of fraud, or even of mistake of fact or law, repudiate his purchase, and maintain that the debt is still unsatisfied (*a*). A sheriff's deed has the same effect in that respect as the deed of any other vendor.

1869.

Ferguson v. Ferguson.

We think it clear that an interest of this kind in land can be reached by an execution creditor, through means of this court; and that the heirs, or any one for them, cannot intercept the rights of creditors, by advancing what may be due to the Crown as vendor, any more than in the case of a private vendor. We are, therefore, unable to concur in the view on which the late Chancellor based his decision: differing, as it seems to do, from his Lordship's opinion in the previous case of *Yale* v. *Tollerton* (*b*). But on the other grounds which we have mentioned, we think that the decree should be affirmed, with costs.

Judgment

(*a*) See Watson v. Bernard, 2 Gr. 356; Paul v. Ferguson, 14 Gr. 230.

(*b*) 13 Gr. 302.

1869.

DAVIS v. WHITE.

Mortgage—Purchase of part from mortgagor.

Where a mortgage provided that in cases of sales by the mortgagor of portions of the mortgaged property, the mortgagee, on receipt or tender of a certain proportion of the purchase money, should release the part sold from the mortgage, it was *held*, that the first person who thereafter purchased and paid to the mortgagor his purchase money, but obtained no release from the mortgagee, was not entitled, as he would have been in the absence of this provision, to pay off the whole mortgage, and to demand payment of the whole from a subsequent purchaser redeeming him; but that each purchaser (including the first), was entitled to redeem his own part on payment of the stipulated proportion of money.

Statement.

This was a foreclosure suit, and came on to be heard by way of motion for decree. From the pleadings it appeared that the defendants *White* and *Mitchell* had created a mortgage in favor of the plaintiff *Margaret Davis*, to secure £3,000 and interest, subsequently to which they had the mortgaged premises surveyed and laid off into lots, portions of which were sold to different purchasers, some of whom were named as defendants to the suit, amongst others, *The London and Port Stanley Railway Company*, who were the first purchasers from the mortgagors of any part of the property, the company having paid the mortgagors the full amount of the consideration agreed upon—taking from them a bond of indemnity against the mortgage, although by a provision in the mortgage deed a portion of the purchase money proportioned to the £3,000, as the part sold was to the whole premises, was to be paid to the mortgagee.

The other facts are stated in the judgment.

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

Mr. *S. Blake*, for the defendants, *The Railway Company*.

1869.

Davis v. White.

SPRAGGE, V. C.—The plaintiff is mortgagee of a considerable quantity of land, comprised within the limits of the town of St. Thomas. The mortgage is dated 15th November, 1853, and contains this provision: "that whenever hereafter at any time the said parties of the first part, or their heirs or assigns, shall have disposed of any part or portion of the said within or above described lands, she the said party of the third part her heirs, executors, administrators or assigns, shall, upon the receipt or tender of such proportion of purchase money of the part or parts thereof so sold as shall bear to the sum of three thousand pounds, the consideration therein named, the same proportion that the value of such part or parts so sold or disposed of would bear to the value of the whole of said premises, release the said part or parts of and from these presents; and which said sum so tendered or received shall be indorsed on the note or notes, instalment or instalments, first thereafter due, and shall be considered as part payment of these presents."

Judgment.

This provision was evidently made in order to facilitate the sale of the land by the owners of the equity of redemption, to a number of purchasers. A portion of the land was sold to the defendants *The London and Port Stanley Railway Company*. The company was the first of the purchasers from the mortgagors, and paid to them the whole of their purchase money, £1000, without obtaining from the mortgagee a release of the portion they purchased; taking, however, from the mortgagors a conveyance with absolute covenants against incumbrances, and referring in terms to the plaintiff's mortgage, together with a bond of indemnity. Questions are raised by the company as between themselves and the mortgagee, and as between themselves and subsequent purchasers of the mortgaged premises.

The railway company claims to be entitled to be

1869.

Davis v. White.

entirely exonerated: to stand in the same position as a first purchaser of a portion of the mortgaged premises under an ordinary mortgage; and *Beevor* v. *Luck* (*a*) is cited in support of this position. That case established among other things, that where there were several mortgages in one hand, the first purchaser of mortgaged premises comprised in one of the mortgages being bound upon redemption to pay off the whole of the mortgage debts, was entitled to demand of any subsequent purchaser redeeming him, payment of the whole that he had paid to the holder of the whole of the mortgages, and, unless the special provision in this mortgage to which I have referred makes a difference, *Beevor* v. *Luck* is an authority in their favor.

Judgment.

It becomes material to examine this provision, and what rights it conferred upon purchasers. It is in terms, only an agreement between the mortgagors and the mortgagee, but it qualified the right which the mortgagee would otherwise have had against each individual purchaser; defining certain terms, less than the ordinary right of a mortgagee, upon which he should release portions of the mortgaged premises sold, from the mortgage debt. This provision, I apprehend, and it was not denied in argument, runs with the land; so that each purchaser is entitled to a release of the portion purchased by him, from the mortgage debt, upon the mortgagee being paid the proper proportion of the debt. Payment of the difference between such proportion and the agreed purchase money, to the owners of the equity of redemption, would also be necessary, but that does not affect the present question.

The railway company did not avail themselves of the benefit of this provision, and their contention is, that they stand in the same position as if there were no such

(*a*) L. R. 5 Eq. 537.

provision in the mortgage. It was their privilege to have the benefit of this provision if they chose. Their abstaining from it cannot prejudice the rights of other purchasers, if such purchasers have independent rights under the provision. In the case of an ordinary mortgage and a purchase of a portion of the mortgaged premises, the purchaser becomes liable to pay the whole mortgage debt and he cannot redeem without it; and with this liability goes the right, upon redemption, to have the whole of the mortgaged premises conveyed to him, that is, as between himself and the mortgagee. This was his position and his right upon making his purchase, and his right could not be impaired by any subsequent dealing with the property by the mortgagor; any subsequent purchaser would take subject to his rights whatever they might be.

1869.

Davis v. White.

I have not met with any case in which any question has arisen upon a mortgage containing such a provision as the mortgage in this case contains. This provision does, in my judgment, take this case out of the ordinary rule. There is no liability on the part of the first purchaser, or of any purchaser, to pay the whole mortgage debt upon redemption. The portion he has purchased is chargeable with a certain defined amount and no more; and he has no right to pay any more to the mortgagee. He certainly has no right to pay the whole mortgage debt; and if he did pay it, it would be a merely gratuitous payment, and could not alter the position of other purchasers. The position and the rights of all are governed by this provision. It places all, in my opinion, upon the same footing. If the railway company were right in their contention, the provision could not be carried out. To take the case of a second purchaser who has paid to the mortgagee, directly or indirectly, his proper proportion of purchase money: his right is to have a release. Suppose the railway company had paid the whole debt due on the mortgage, it is impossible

Judgment.

1869.

Davis v. White.

that their doing so could prejudice the right of such purchaser; and so of any other purchaser, the portion purchased was exonerated from the mortgage debt upon payment of the proportion with which it was chargeable. But what makes the point very clear is this. The railway company upon paying off the mortgagee could not acquire rights beyond those possessed by the mortgagee herself; and those rights are defined by the provision.

It is admitted by the plaintiff that releases have been given by the mortgagee to some purchasers, without payment, or at any rate without full payment of the proportion of purchase money payable by them. Where this has been done without the concurrence of the mortgagors; they are entitled to have the sums, payable and not paid, deducted from the mortgage debt, with, of course, a proper rebate of interest.

Judgment.

That is the right of the owners of the equity of redemption, but I do not see that the railway company has anything to do with it, unless they have a right of redemption beyond the land purchased by them. Unless they have such right of redemption they are not prejudiced. It is not pointed out that they have or that they could acquire any rights as to such other lands. If they could not pay the whole mortgage debt, they could not pay the proportion payable by other purchasers: and if they did they could only place themselves in the position of the mortgagee; and she has released. But in fact they have nothing to do with other purchasers, and are not prejudiced by their being released. If they have any equity it could be only of this nature, that the mortgagors ought to have indemnified them as by their covenant and bond they obliged themselves to do, and as the mortgagors get credit for moneys payable by purchasers to whom the mortgagee has granted releases, that credit should enure to their benefit; but I do not see how this can be worked out. It could only be by giving credit

to the railway company instead of to the mortgagors; but I do not see what there is to warrant me in doing this. It is not that money has been paid to the mortgagee which ought to have been so applied, but that, without payment of money the mortgagee has altered the position of the mortgagors, that is, without payment of money, which if paid would have reduced *pro tanto* the mortgage debt; and that wrong is set right by the mortgage debt being *pro tanto* reduced.

1869.
Davis v. White.

It has occurred to me to consider whether the relative position of the mortgagors and the railway company upon the purchase of the latter, and the giving by the former of their covenant and bond, can make any difference. *Quoad* the sum necessary to be paid to the mortgagee to entitle the railway company to a release, the mortgagors are principals as between them and the company; and the company are sureties, and if money were payable by the mortgagee to the mortgagors, it may be that the railway company would have an equity to receive it *pro tanto* rather than the mortgagors; but a credit is a different thing, and the rights of the mortgagee would be affected. They would lose their charge upon the railway company purchase; for which the increased charge upon the unreleased portion of the mortgaged premises might not be an adequate compensation.

Judgment.

Upon the whole my conclusion is that the only right of the railway company is to have a release upon payment to the mortgagee of the proportion payable under the provision to which I have referred. Counsel differ as to the period at which the value spoken of in the provision, should be estimated, whether the value at the date of the sale to the railway company, or the present value. I think it should be the value at the date of the sale. What has to be done now, should have been done at that time, If the payment of the proper proportion of the purchase money had been made then, it

1869.

Davis v. White.

would have been measured by the then value, and should be so measured now.

As to costs, the bill has been taken *pro confesso* against all the defendants except the railway company. The company must pay the costs of the hearing, and a proportion of the costs before the hearing, the proportion being one for the parties representing the mortgagors, and one for each purchaser, so far as the costs of the bill are concerned, the costs of service upon each to be apportioned to each. The railway company to be entitled to redeem the parcel of land purchased by them upon payment of the proper proportion under the provision in the mortgage, and costs as I have indicated, each other purchaser to have the like right, and the representatives of the mortgagors to have also the like right.

Beamish v. Barrett. [In Appeal.*]

Riparian proprietors—Injunction.

In 1844 a mill site was conveyed to the defendant, "with the privilege of keeping the dam thereon at all times, hereafter at its present head or height, but no higher;" and in 1849 the defendant erected a new dam lower down the stream. This new dam was of the same height as the old dam; but the defendant placed on the dam movable stop logs to enable him to make use of the surplus water, which would otherwise flow over the dam. By experiments it was shewn that if these stop logs were not removed when the defendant's mill was not working, but in that case only, the water would be raised on the lands of the plaintiff, to the extent of about 1½ inches: the defendant however always had removed the logs when his mill was not working.

Held, Per Curiam, that under these circumstances the plaintiff was not entitled to an absolute injunction against the use of the stop logs. [Draper, C. J., VanKoughnet, C, and Spragge, V. C., dissenting.]

Statement.

This was an appeal from an order made on re-hearing affirming a decree pronounced by the Chancellor.

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* *Present.*—Draper, C. J., Richards, C. J., VanKoughnet, C., Hagarty, C. J., A. Wilson, J., Mowat, V. C., and Gwynne, J.

1869.

Beamish v. Barrett.

The plaintiff and the defendant *Barrett* respectively owned certain lands, mills, and premises mentioned in the pleadings. A creek, called *Smith's* Creek, flowed through the lands owned by each. The plaintiff's premises were situate higher up the stream than *Barrett's*, and were it not that the plaintiff had mortgaged his property to the defendant *Dickson*, and had leased his mill to the defendant *Peplow* for a term not yet expired, it was conceded that the question raised in this suit might have been tried at law.

The question was as to *Barrett's* right to dam back the water. This right was granted by a deed of the 16th November, 1844, in these words: "with the privilege of keeping the dam thereon at all times hereafter at its present head or height, but no higher."

Statement.

The plaintiff asserted that the dam, existing when the deed was made, did not back the water beyond the limits of the land conveyed to *Barrett*, nor upon the lands (then belonging to *J. D. Smith*, higher up the stream) which the plaintiff had purchased; and he complained that *Barrett*, some years after, erected and built a new dam, which raised the water to a greater height than the first dam, and threw or penned the water back beyond the limits of his property, and interfered with the mill privilege on the plaintiff's lands; and that *Barrett* again in 1859, and since had raised the dam still higher, and had penned the water back on to the plaintiff's lands and mill privilege still more.

Barrett admitted that about 1849, he erected a new dam, lower down stream than the first dam, by means of shifting stop logs, that is, logs which could be moved at pleasure, so as to leave the water unobstructed and said that the new dam had been continued of such height as not to raise the water higher than it was raised by the old dam, and he denied that by the erection

1869.

Beamish v. Barrett.

of this new dam, the water had been raised to a greater height or head than that which existed at the date of the conveyance from *J. D. Smith*, and that the head of water created by the new dam, or by any means of his (*Barrett*), was no higher than was authorized by the conveyance.

By a decree made 27th May, 1864, it was ordered that it should be referred to *Thomas C. Keefer*, civil engineer, to take evidence upon the questions of fact put in issue, and to make his report and to give his opinion in writing upon the evidence; that evidence might be produced before him, the same as before a master, and, for the purpose of the reference, he was authorized to enter upon and examine the premises, and to cause experiments to be made, and to summon and examine witnesses under oath: and that his report should be subject to all the incidents to which the reports of masters are subject,

Statement.

the court reserving a right to send back such report for revision. After the confirmation of the report, either party to be at liberty to set down the cause for hearing, on further directions.

Under this authority Mr. *Keefer* examined the premises and heard witnesses, and then employed Mr. *John Kennedy*, a civil engineer, to make experiments and report to him.

Kennedy's report stated that, the properties of the plaintiff and *Barrett* were divided by an imaginary line running at nearly right angles to the creek, and about 180 feet below plaintiff's mill. About 1849 *Barrett* removed the dam which was standing when he purchased in 1844 and erected the new dam about thirty feet lower down. This new dam was constructed of fixed timber work to a certain height, and above this, of two tiers of movable stop logs; the lower tier, eight, the upper, four inches high. In 1844 there was a wing dam

creating an artificial current which drove a small current wheel, the whole of this being now gone. During that time also there were two or more side channels to the creek crossing the division line above mentioned, which channels no longer exist. 1869. Beamish v. Barrett.

Mr. *Kennedy* stated the points at issue to be: 1. The relative levels and width of water way of the present dam in 1864, and of the dam which stood in 1841. 2. The effect of closing the side channels and altering, by widening and deepening (which *Barrett* asserts was done by the plaintiff) the main channel. 3. The plaintiff's damages.

1. Mr. *Kennedy* observed in effect that the (proper) level of the creek at the boundary line was to be determined, not directly by any specified level (height or depth) of water in defendant's pond, but by a "specified level of his dam." And that as no record had been produced shewing the height of the dam in 1844, either absolutely or with relation to the present (dam), it became necessary to establish its level (height) indirectly from the water level in the pond previous to 1849: that the evidence was very contradictory, but the greater part of the witnesses estimated the difference to which they speak under the difficulties presented by a "complete change in the breadth, depth, and form of the main channel at the boundary line," (changes, it appeared, principally made by the plaintiff), and an absence of all marks by which the former and present water surface can be compared by the eye." He referred to an iron pin planted as a gauge by the plaintiff in 1853, in the rock bottom of the stream about ten feet above the boundary line, but says, it was not planted until four years after the removal of the first dam. Statement.

He stated that one *Archibald Porter* was in possession of *Barrett's* premises from 1844 to 1849, and attached

1869.

Beamish v. Barrett.

weight to his evidence as being valuable, from his familiarity with the every day state of the water, and from his recollection of certain water marks and portions of the old dam still remaining, and capable of being measured and compared with the new, and from it he deduced the conclusion that the top of the old dam was one inch below the level of the old pond, and from other evidence and as "admitted in effect by the defendant himself," the present actual level of the defendant's pond is that of the top of the four-inch log on his dam, and he arrived at the result that the crest of the old dam was four inches below the top of the present four-inch log; therefore level with the top of the eight-inch log.

2. After an examination of the evidence he stated this conclusion, that no damage had been sustained by either party by a stoppage of any channel other than the main channel of the stream, nor by the alteration of the main channel, and that the plaintiff had sustained no injury from the position or existence of the defendant's tannery.

Statement.

3. As to damages, he considered them inappreciable in the working of an ordinary flour mill such as plaintiff's, and he concluded his report by the following summary:

1. That the height of the dam at the time of *Barrett's* purchase was substantially the same as the top of the eight-inch log in the present dam, in August and October, 1844. 2. That any height of *Barrett's* dam, above that in 1844 caused a trespass on the property of the plaintiff, unnecessarily affecting the level of the creek upon his grounds, and subjecting him to inconvenience from such alterations of level. 3. That at certain times *Barrett* had maintained the level of his pond higher than it would be by the dam of 1844, and had therefore, backed water on the grounds of the plaintiff and disturbed the working of his flour mill, but not to

such an extent as to have caused any continuous or substantial damage or loss in the amount of work done by his flour mill, or by the other machinery on his privilege. 4. That the closing of the western side channel, and the alteration of the main channel at the boundary had not caused damage to either party, and no cause was shewn why they should be restored; and also, that defendant's (*Barrett's*) tannery had not caused any obstruction to the flow of the creek, or the passage of the ice, or caused any other damage, and no cause was shewn why it should be removed. 1869. Beamish v. Barrett.

Upon this report and the evidence taken before himself Mr. *Keefer*, made his report from which the following passages are extracted:—

"Plaintiff has by his tail race and its effects so enlarged the capacity of the old stream at or near the boundary, that I did not find any injury arising from the filling up of this" (the western) "channel by both parties, but the contrary. * * * The length of the old dam was not proved in evidence, but, as shewn on the plan filed at Cobourg, appears to have been about double that of the new. If this were the case the effect would be that the narrower new dam at the same top level as the old one would always maintain the pond level, somewhat higher than the old one would have done; so long as the new one is (like the old one was) left to itself to regulate the pond level. But the new dam being made with stop logs, can be worked so as to keep the waters as low, and much lower than the old one would have kept it, that is by raising one or more of the logs. And this, defendant claims that he has done, and he further claims that his mode of working his dam keeps his pond generally lower than the old dam would have done. Doubtless in times of freshets there may be occasions when defendant, for his own protection, would so raise his logs as to keep his pond lower than the old dam Statement.

1869.

Beamish v. Barrett.

would have done, and by so much and for so long diminish the otherwise unavoidable backwater, which would be upon plaintiff's wheels; but if the new dam be so left to itself it will maintain the water higher than the old one did, and if such increased height be a damage to plaintiff, the latter is dependent upon the conscentiousness of the defendant, or upon the vigilance, activity, and scrupulousness of his employees. * * *

"In view of the evidence, levels, measurements, examination, and all the circumstances, I feel no difficulty in coming to the conclusion that the top of the eight-inch log in defendant's new dam was identical with the level of the old *Hawley* dam. * * * I think the defendant has resorted to the four-inch log, not for the purpose of keeping the water higher than the *Hawley* dam kept it, but for the purpose of preventing any of it escaping over the eight-inch log, so that he might use it all to drive his grist mill. There was ordinarily some inches going to waste over the *Hawley* dam as shewn by the evidence, and there was probably some going over the eight-inch log before 1860. When the increase of the machinery by the erection of the grist mill, called for more power, defendant would naturally utilize the whole flow of the stream, and draw it through his wheels, trusting to these to keep it down to the level of the *Hawley* pond, and to his movable dam to maintain it there after his wheels stopped. * * *

Statement.

"In order to ascertain the effect which could be produced by defendant's dam upon plaintiff's wheels, I caused some experiments to be made by Mr. *James Kennedy*, in October, 1864, whose report is hereunto annexed. He found that with plaintiff's ordinary machinery at work there will be necessarily two-and-a-half inches of back-water over the level of his lowest wheel, irrespective of defendant's dam. This depth would be increased or

1869.

Beamish v. Barrett.

diminished by the greater or less volume of water flowing in the stream. Mr. *Kennedy* found that in order to back the water four inches over the bottom of plaintiff's lower wheel (that is to increase the ordinary and unavoidable back-water one-and-a-half inches), defendant's pond must be four-and-a-half inches over the top of the eight-inch log. Mr. *Kennedy* experimented with plaintiff's wheels while defendant's dam was down, and afterwards with his pond full and overflowing, and the result was, that the effect of maintaining defendant's dam at the level of the four-inch log, though perceptible and annoying, was insufficient to cause substantial damage, and barely measurable, if treated as a permanency. Instead of the ten or eleven per cent., as estimated by the witnesses, the trial made by Mr. *Kennedy* did not shew one per cent. of loss in working. If, however, the four-inch log were maintained while defendant's machinery was standing still, I think the effect upon plaintiff's wheels would cause measurable injury."

Statement.

On the 19th of March, 1868, a decree on further directions was made by Chancellor *Van Koughnet*, declaring that the defendant *Barrett* was not entitled to keep or continue the dam existing on his property, at any greater height than the dam which existed thereon, on the 16th of November, 1844, which height was declared to be the same level as the top of the eight-inch stop log, in the pleadings in this cause mentioned, and that the four-inch stop log at the top of the said dam was in excess of the height to which he was so entitled, and that the same ought to be removed; and a perpetual injunction was granted, without costs.

The cause was afterwards re-heard as to further directions by the three judges.

On the 13th June, following, the court informed the parties that there was a difference of opinion amongst the judges, as to whether Mr. *Keefer* meant by his

1869. Beamish v. Barrett.

report, that the water had, as a matter of fact, been raised by the four-inch log; and that they were willing, if either party desired it, to take his evidence as to the following questions, within a limited time. Did Mr. *Keefer* mean to find that, as a matter of fact, the four-inch log as used had penned back the water? Or did he mean to find that it is the necessary effect of using the four-inch log to pen back the water, notwithstanding the working of the grist mill? But neither party having taken any notice of this within the time limited, the judgment was, on the 27th June, affirmed with costs.

From the decree and order thus pronounced, the defendant *Barrett* appealed, alleging as grounds therefor: (1.) That the plaintiff had failed to prove any of the allegations in his bill, on which he sought relief against the defendant *Barrett*. (2.) That the plaintiff, in his bill, alleges that the defendant, *Barrett*, had raised the permanent top of his mill-dam to a height beyond that which the defendant, either by virtue of his proprietorship of the land, or by the grant from *David John Smith*, referred to in the pleadings, was legally entitled to, and higher than the original dam referred to in the said grant from *Smith*; whereas the report to *T. C. Keefer*, C. E., finds the contrary, and in favour of the defendant. (3.) That the defendant does not, in his answer, contend that the top of the four-inch stop log referred to in the report of Mr. *Keefer*, was the height to which he was entitled to permanently maintain his said dam; and in the said report it is not found that the defendant contended for, or alleged, that this was his right; and, even assuming that if this four-inch stop log were occasionally, or temporarily, used by the defendant to increase the height of his said dam, injury from backwater would thereby result to plaintiff, this is not the injury complained of in the bill, in respect of which the interference of the court is sought. The injury that is complained of in the bill of the plaintiff is the erection and use, by the defendant, of a permanent

Statement.

1869.

Beamish v. Barrett.

dam higher than that to which he was entitled by virtue of his proprietorship, or the grant aforesaid. And the Court of Chancery, in making any decree in relation to the said four-inch stop log, has gone outside of the record and pleadings. (4.) Assuming that the plaintiff alleged a case to call for the interposition of the Court of Chancery, with respect to the alleged use by the defendant of this four-inch stop log, he has failed to prove that any injury to him has thereby been caused by the defendant; and Mr. *Keefer* finds in his report that the defendant has not been guilty of any such alleged injury. (5.) That the defendant not having been proved to have used this four-inch stop log, so as to have occasioned legal injury to the plaintiff, or to his premises, the Court of Chancery had no jurisdiction to interfere. (6.) That the plaintiff has failed to establish that the defendant has ever, by any occasional or temporary use of his four-inch stop log, caused him or his premises any injury, and if this should result in the future the plaintiff has an effectual remedy, by an action at law, and this would be a sufficient protection to the plaintiff. (7.) Although the Court of Chancery, under its extended jurisdiction, may determine legal rights, and decree equitable relief in respect thereof without such rights having been previously established at law, yet in this suit the plaintiff has failed to establish such a case against the defendant as would entitle him at law to even nominal damages, and the present decree is in effect one *quia timet*, and not within the principles on which the court assumes jurisdiction in cases like the present. (8.) The decree, even if in other respects warranted, goes too far, in that it prohibits the defendant from the use altogether of the four-inch stop log, when the defendant has the right to use such or any other expedient or contrivance he may please on his own land, so long as he does not thereby cause injury to the plaintiff, and the decree should therefore have limited its use, "so as not to cause injury to the plaintiff," and it was so

Statement.

1869.

Beamish v. Barrett.

contended for in the Court of Chancery. (9.) The injury to the plaintiff, if any, is so small and trifling as not to warrant the interference of the court; and the use of the four-inch stop log by the defendant, not being intended to be permanent, or to be enjoyed without interruption, the plaintiff's bill should have been dismissed. (10.) From the admitted facts, and Mr. *Keefer's* report, it fully appears that benefit instead of injury, has resulted to the plaintiff, by reason of the expedients resorted to in the construction by defendant of his new dam, when, under his grant from *Smith* he would have been entitled to have erected his dam, as a permanent and immovable structure, up to the height of the top of the eight-inch stop log, as found in Mr. *Keefer's* report.

The plaintiff contended that the material allegations of his bill had been proved; that the court had properly granted him the relief decreed him, and that if the decree were varied at all it should be only to the extent of giving the respondent his costs of the court below.

Mr. *J. Hillyard Cameron*, Q. C., for the appellant.

Mr. *Blake*, Q. C., and Mr. *Hector Cameron*, for the respondent.

The cases cited are mentioned in the judgments.

Judgment.

DRAPER, C. J., [after stating the facts as above set forth.]—The reasons of appeal) especially Nos. 2 and 3) almost admit that, the new dam, taking it altogether, *i. e.*, inclusive of the two stop logs, and especially having regard to the four-inch stop log is in excess of the height of the old dam referred to in the conveyance of the 16th of November, 1844. In both these reasons an effort is made, I can hardly say ingenuously, to fasten upon the allegations in the bill a meaning, which, coupling those allegations with the evidence, they do not

properly bear. For it is stated, that the plaintiff is complaining of the raising the permanent top of the mill dam, and the erection and use by the defendant of a permanent dam higher than that to which he was entitled, either as proprietor of the land, or by virtue of the conveyance to him. And the second reason of appeal seems designed to give an interpretation to the answer to the effect that the four-inch stop log being movable, the defendant was not setting up a claim, that the top of the four-inch stop log was the height to which he was entitled permanently to maintain his dam.

1869.

Beamish v. Barrett.

Now, as it appears to me, the plaintiff, first of all, accurately states the right which the appellant has by conveyance, and then complains of the erection of a dam higher than that conveyance warrants. It may be that this dam complained of, can in part or (for it would in my view make no difference) wholly be removed "at the shortest notice." The erection was the appellant's act, he uses it for his own advantages at his own discretion, and if it be when the stop logs are on, higher than it should be of right, it is not the less an excess of right, that the stop logs can be taken off, whenever the appellant directs. The assertion of right to do this at intervals, proved by its exercise from time to time when the appellant pleases, differs only in degree from the assertion of right to do the same thing permanently, and the user of the lesser, might in time afford ground for asserting the greater, especially when the use was at the sole will of the appellant.

Judgment.

I think the weight of evidence, I mean that given by sworn witnesses, preponderates greatly in the plaintiff's favor on the question whether the top of the eight-inch log was or was not at the same level as the top of the old, or *Hawley* dam, and that the whole of the four-inch log was therefore in excess of the height, to which under the conveyance of 1844, the appellant was entitled.

1869.

Beamish v. Barrett.

I think further, that when the four inch-log was used it had a perceptible effect on the level of the water, beyond the boundaries of the appellant's own property; that by its means the appellant was affecting the rights of, and interrupting their enjoyment, to a greater or less degree by, the plaintiff; and I do not consider the question of appreciable injury to be that upon which the plaintiff's right to maintain this suit depends.

I am saved from the necessity of supporting any opinion on this latter point, by an examination of the very numerous decisions which have been made on the subject, for the late case in the House of Lords *Bickett* v. *Morris* (*a*), contains almost all I could desire to say on the subject, and I shall rest upon the following passages from Lord *Westbury's* judgment (pp. 60-61): His Lordship says that this is "the first decision establishing the important principle that an enroachment upon the *alveus* of a running stream, may be complained of by an adjacent or an *ex adverso* proprietor without the nesessity of proving either that damage has been sustained, or that it is likely to be sustained from that cause." In alluding to the *dictum* that proprietors of the bank of a running stream are entitled to the bed of the stream as their property, *usque ad medium filum*, he further observes that this property "must be used in such a manner as not to affect the interests of riparian proprietors in the stream," and finally thus expresses himself: "It is wise, therefore, to lay down the general rule, that even though immediate damage cannot be described; even though the actual loss cannot be predicated yet if an obstruction be made to the current of a stream, that obstruction is one which constitutes an injury, which the courts will take notice of as an encroachment which adjacent proprietors have a right to have removed.". This general rule the House of Lords

Judgment.

(*a*) L. R. 1 Sc. and Div. App. 47.

affirms, and the law of Scotland (for it was a Scotch appeal) is stated to be the same as the law of England in this respect, and is therefore the same as our law. 1869. Beamish v. Barrett.

It has not escaped my notice, that it may be said the language above quoted, as well as the language of the learned lords who took part in the judgment, literally applies to obstructions in or on the bed of the river, and that in this case it is not the whole obstruction created by the dam that is or could be complained of. But conceding fully to the appellant that he has a right to what the deed of 1844 gives, as the privilege of erecting or maintaining a dam, I cannot doubt that the moment he obstructs the current by a dam higher than his deed warrants, he, by such excess as much violates the rule, as if, having no such privilege he had erected the dam *ab imo*.

To this I will add the law as enunciated by Sir *W. Erle*, C. J., in *Sampson* v. *Hoddinot* (*a*). "All persons having land on the margin of a flowing stream have by nature certain rights to use the water of the stream whether they exercise them or not, they may begin to exercise them when they will. If the user of the defendant (in our case the appellant) "has been beyond his natural," (or in our case his limited acquired) right, "it matters not how much the plaintiff has used the water, or whether he has used it at all, in either case his right has been equally invaded, and the action is maintainable." Judgment.

I refer to *Miner* v. *Gilmour* (*b*), to point out, that one of the positions assumed in the judgment at p. 156, in respect of the right of the riparian proprietors to a reasonable use of the water, "without regard to the effect such use may have in case of a deficiency upon

(*a*) 1 C. B. N. S. 590. (*b*) 12 Moo. P. C. 131.

1869.

Beamish v. Barrett.

proprietors lower down the stream" seems to be doubted in Lord *Norbury* v. *Kitchen* (*a*).

Since writing the above, I have seen the case of *Harrop Hurst* (*b*), in which it appeared, that there was a customary right for certain persons at all times to have water from a spout in a highway for domestic purposes. A riparian proprietor on the stream whence the spout was supplied on various occasions prevented such large quantities of water reaching the spout, as to render the quantity which was supplied insufficient for the wants of those entitled. The plaintiffs were so entitled and had not themselves suffered any actual personal damage or inconvenience. *Held*, that an action for diverting the water was maintainable, without proof of actual personal damage, inasmuch as the act of the defendant might, if repeated often enough without interruption, furnish evidence in derogation of the plaintiff's legal rights. In the still later case of *The Attorney General* v. *The Earl of Lonsdale* (*c*), the leading authorites are all referred to, and an injunction was granted against the defendant, though the plaintiff had not established a case of very material injury, as the plaintiff was in strictness entitled to the relief he asked.

Judgment.

I think, therefore, the appeal should be dismissed with costs.

RICHARDS, C. J.—Mr. *Keefer* in his report at page 34, says: "In view of the evidence and all the circumstances I feel no difficulty in coming to the conclusion that the top of the eight-inch log in defendant's new dam was identical with the level of the old *Hawley* dam." * * * Defendant's instructions to his millers with reference to the working of this four-inch log prove that

(*a*) 9 Jur. N. S. 132. (*b*) L. R. 4. Ex. 43.
(*c*) L. R. 7 Eq. 377.

he had no confidence in his right to it as a fixture. The water was not to be allowed to run over it, and it was always to be raised at night—that is, when his mills stopped. If the top of the four-inch log had been on the level of the crest of the *Hawley* dam at least as great a depth of water might flow over the former as used to flow over the latter.

1869.

Beamish v. Barrett.

"I think the defendant has resorted to the four-inch log, not for the purpose of keeping the water higher than the *Hawley* dam kept it, but for the purpose of preventing any of it from escaping over the eight-inch log so that he might use it all to drive his grist mill. There was ordinarily some inches going to waste over the *Hawley* dam as shewn by the evidence, and there was probably some going over the eight-inch log before 1860. When the increase of machinery, by the erection of the grist mill, called for more power, defendant would naturally utilize the whole flow of the stream, and draw it through his wheels, trusting to these to keep it down to the level of the *Hawley* pond, and to his movable dam to maintain it, after his wheels stopped."

Judgment.

At page 36, after referring to the evidence and experiments made when the defendant's pond was full and when empty, he says: "The result was that the effect of maintaining the dam at the level of the four-inch log, though perceptible and annoying, was insufficient to cause substantial damage, and barely measurable if treated as a permanency. Instead of ten or eleven per cent., as estimated by the witnesses, the trial made by Mr. *Kennedy* did not shew one per cent. of loss in working. If, however, the four-inch log were maintained whilst defendant's machinery was standing still, I think the effect upon plaintiff's wheels would cause *measurable* injury.

"In view of the foregoing I see no means of estimating

1869.
Beamish v. Barrett.

the damage, if any, which may have been caused by the defendant's dam."

I am not prepared to say that the Court of Chancery has not power to grant an injunction, unless it can be shewn that express damage has been sustained by the act complained of, where the continuance of an act for twenty years may ripen into a right which would be prejudicial to a plaintiff. I think the later authorities tend in that direction though formerly doubt was expressed whether the court had such a power. But in exercising the power I think the court ought not to go beyond what is absolutely necessary to protect the interest of the party applying. The reluctance with which the Vice Chancellor in Lord *Norbury* v. *Kitchen*, granted the injunction and the narrow limits to which he confined it, shew how unwilling the courts are to go beyond the absolute necessity of the case. In exercising this extraordinary power, very important and valuable rights may be swept away by it, and as observed in one of the cases referred to, the right to use water for manufacturing purposes involving in England the value of millions of pounds, is controlled and may be entirely destroyed by the injudicious exercise of this power.

Judgment.

Now, in the case before us, the injury which it is said will be caused to the plaintiff by the *permanent* placing of the four-inch log on the defendant's dam is *barely measurable*. But if it were maintained when defendant's machinery was standing still it would cause measurable injury.

There can, I apprehend, be very little object in maintaining it, whilst the machinery is standing still. The only benefit that would then arise to defendant would be simply filling the dam, and as soon as that was done the water would overflow. When the machinery com-

1869.

Beamish v. Barrett.

menced to work again, the height would be reduced below the dam. If the four-inch log is removed, and the surplus water which may be retained by it, is allowed to flow away, so much of the available power of the stream on defendant's premises as could be obtained from that surplus water is lost, and no benefit is conferred thereby on any one. If the defendant, however, does not, by using the log, increase the back-flow of the water on the plaintiff's premises, but merely directs that surplus water through his wheels, thereby creating power, which is valuable, he does not thereby injure the plaintiff and vastly benefits himself. And why may he not do this? It is a positive injury to defendant to prevent him doing so, and as a matter of public policy it is injudicious and unwise to lay down principles of action for courts of justice which, when carried out, will have the effect of depriving the country of the benefit of valuable motive-power for many manufacturing purposes, without conferring advantages on any one else.

Judgment.

I understand it is objected if the decree were varied so as to confine the defendant's back-flow of water to the extent which Mr. *Keefer* finds it was penned back by the *Hawley* dam and monuments were directed to be planted defining that point on plaintiff's own land, and defendant were enjoined against causing the water to flow back beyond that point, it would not be satisfactory, or prevent constant litigation.

I do not see how the present decree will necessarily prevent litigation, any more than one framed in the manner I suggest. We cannot, I apprehend, act on the supposition that parties will disobey the order of the court. If a party is determined to disobey such order, I presume it may be done as well in one way as another. Supposing the four-inch log to be removed and some other contrivance were used to pen back the water in opposition to the decree. I suppose that fact

1869.

Beamish v. Barrett.

must be ascertained by some process of inquiry before the party disobeying the command of the court could be punished for it; and if any person by the stop-log or any other contrivance pen back the water beyond certain defined monuments, and that was ascertained, I presume the person doing so would be liable to be punished.

If without any injunction, or without the terror which threats of taking proceedings against him in Chancery, for violating an injunction of that court ought to inspire in the mind of any reasonable man, the four-inch log on defendant's dam for five or six years has been so used as not to cause plaintiff any measurable injury I think we may safely conclude that with the perils of an injunction hanging over him, he will not so use the log as to create even an imaginary, much less a measurable injury. I see no absolute necessity of making the injunction in the form, and to the extent which is directed by this decree, to preserve the plaintiff's rights. I believe it will do very serious injury to the defendant if it is carried out in the way proposed, without corresponding advantage to any one.

Judgment.

The injunction in Lord *Norbury* v. *Kitchen*, although the jury suggested the removal of the pen-stock, and found ¼*d.* damages, yet the Vice Chancellor, feeling constrained to grant an injunction, only granted it to restrain the defendant from damming up or obstructing the natural flow of the stream; he refused an injunction to penning the water, nor did he think the simple use of a water-wheel in a stream an obstruction to the flow within the meaning of *Bickett* v. *Morris*.

The injunction in *Crossley* v. *Lightowler*, (*a*), was to restrain defendants from causing foul water to flow from

(*a*) L. R. 3 Eq. 279.

their dye works into the river above, or within the limits of the land adjoining the river purchased by the plaintiffs *so as to affect the water* opposite the said land to the damage and injury of the plaintiffs as owners of the land. Another branch of the case was by the injunction to restrain defendants from causing or suffering any foul water to flow from their works into the river *so as to affect the water* drawn by the plaintiffs from the river for the use of their dye works, to the damage and injury of the plaintiffs. 1869. Beamish v. Barrett.

If the plaintiff is not desirous of having the monuments referred to by me placed, or there is any difficulty in having them placed there, I will concur in varying the decree in the way suggested by the Chief Justice of the Court of Common Pleas.

VAN KOUGHNET, C., considered the decree appealed from right, and would dismiss the appeal with costs. Judgment.

HAGARTY, C. J., said he had had great difficulty in considering the question involved in this suit, and would liked to have had a verdict of a jury to assist him in coming to a conclusion, but that it would appear could not now be readily obtained. His Lordship suggested, with the sanction of Vice Chancellor *Mowat*, that the decree should be varied to the extent of forbidding the defendant "from keeping and continuing in use at the said dam the said four-inch stop-log, or any similar contrivance whereby the water of the stream in the pleadings mentioned shall be penned back farther than the water is penned back by the eight inch stop-log," and which his Lordship considered would sufficiently declare the rights of both parties.

SPRAGGE, V. C.—Each of these parties acquired his land from the same owner, Mr. *Smith;* the first conveyance having been made to the defendant together with one

1860.

Beamish v. Barrett.

Butterfield; and with it the grant of an easement to keep the dam thereon, at all times thereafter, at its then head or height. The dam upon the land then conveyed, is known as the *Hawley* dam, and the present dam, up to the top of what is called the eight-inch log, raises the water to the same height as it was raised by the *Hawley* dam. The question between the parties arises from the introduction by the defendant, upon his putting up a grist mill some years after his saw mill had been in operation, of an additional log upon the top of his dam called in the evidence the four-inch stop-log, which log, when the defendant's mill-pond is full, and his mills not working, necessarily raises the water at the plaintiff's mill higher than it was raised by the *Hawley* dam.

Judgment.

It is said that independently of the four-inch log, perhaps independently of the defendant's pond altogether, the lower part of one at least of the plaintiff's wheels is in water. When the four-inch log is on the defendant's dam, and the water flowing over it, the water stands still higher at the plaintiff's wheel; the defendant seems to trust to keeping it down, by drawing it through his wheels. When it is not so drawn down the action of the plaintiff's wheel is impeded, not indeed to any great degree, but still to an extent that is capable of computation, and entailing some, though but slight loss upon the plaintiff. This and its consequences are well put by Mr. *Keefer* in his report, "If the dam be so arranged that if left to itself, it will maintain the water higher than the old one did, and if such increased height be a damage to the plaintiff, the latter is dependant upon the conscientiousness of the defendant, or upon the vigilance, activity, and scrupulousness of his employees;" and Mr. *Kennedy* refers to it in these terms, "It is abundantly apparent, from the shallowness of the stream, the smallness of the defendant's pond, its proximity to the plaintiff's wheels, the irregular stopping and starting of the mills from insufficiency of water,

that it must be impossible, even if there were the will, to preserve anything like a uniform level of water between the dams, and therefore that plaintiff must constantly have been subject to petty annoyances and irregularities of speed, which are aggravating in the extreme." I quote the language of Mr. *Kennedy* though his report is not strictly evidence, because it well expresses the inconveniences which must almost necessarily result from the state of things which exists. I may observe of the reports of both these gentlemen that they appear to be free from exaggeration, and are characterized by fairness and candour.

1869.

Beamish v. Barrett.

Mr. *Keefer* acquits the defendant of any intention to injure the plaintiff's mill, or even of backing water more than it would be backed by the *Hawley* dam; he says, "I think that defendant has resorted to the four-inch log not for the purpose of keeping the water higher than the *Hawley* dam kept it, but for the purpose of preventing any of it from escaping over the eight-inch log, so that he might use it all to drive his grist mill."

Judgment.

The position of the defendant as put by Mr. *Crooks*, who argued the case in the court below, is not altogether an unreasonable one. Mr. *Crooks* says that his client claims to use the stop-log, only when its use will not back water more than it was backed upon the plaintiff by the *Hawley* dam: that the plaintiff is not entitled to come into court for an injunction because the defendant has the *power* by the *misuse* of the stop-log to inflict damage, but must shew that he has so used it, as actually to inflict damage: and this Mr. *Crooks* claims is not shewn.

But, on the other hand, it is very clearly the plaintiff's right, to have the stream flow in its natural channel, without any obstruction that may interfere with his strict legal right. His ordinary common law right as a ripa-

1869.

Beamish v. Barrett.

rian proprietor is to a certain extent, interfered with by the easement granted by Mr. *Smith* to the defendant and *Butterfield*. Beyond that, any interference with the natural flow of the stream is an infraction of his ordinary common law right; and this court has, in two cases, *Graham* v. *Burr* (*a*) and *Wright* v. *Turner* (*b*), held a riparian proprietor entitled to have his right protected by injunction.

In each of those cases the plaintiff shewed that he sustained some actual damage, but so small that the late Vice Chancellor *Esten* thought that it was not a proper case for the interference of the court by injunction. These cases have, however, been fully sustained by English decisions, and particularly by the recent case in the House of Lords of *Bickett* v. *Morris* (*c*), before the late Lord Chancellor and Lords *Cranworth* and *Westbury*, each of whom delivered a judgment in favor of the point decided. The point is thus summarized by Lord *Westbury*: "That even though immediate damage 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 notice of as an encroachment, which adjacent proprietors have a right to have removed." In another part of his judgment, Lord *Westbury* speaks of the doctrine thus enunciated as decided then for the first time, as "the first decision establishing the important principle that an encroachment upon the *alveus* of a running stream may be complained of by an adjacent, or an *ex adversa* proprietor, without the necessity of proving either that damage has been sustained, or that it is likely to be sustained from that cause." This judgment was in affirmance of a decision of the Scotch Court, from which the case was appealed.

Judgment.

(*a*) 4 Grant, 1. (*b*) 10 Grant, 67, (*c*) 1 L. R. Scotch Appeals, 47.

1869.

Beamish v. Barrett.

The obstruction complained of in *Bickett* v. *Morris* was the building of a stone wall in the bed of a stream. The obstruction, therefore, was of a permanent character. In the Earl of *Norbury* v. *Kitchen* (*a*), the present Lord Chancellor, then Sir *W. Page Wood*, applied the rule to an obstruction of a more temporary character. It is thus described: "The defendant had dammed up the stream shortly above where it entered the plaintiff's land, by means of a pen-stock or valve, placed in an old stone dam, so as to make a head to feed the water wheel of a water-engine with a forcing-pump." The bill was retained, with liberty to bring an action, which resulted in a verdict for the plaintiff, with nominal damages, the judge refusing to certify for costs. Sir *W. Page Wood* granted an injunction, observing that "he could do nothing inconsistent with the recent decision in *Bickett* v. *Morris*, which decided that a riparian owner had a right, irrespective of any actual damage sustained by him, to complain of an obstruction to a stream," and in *Crossley* v. *Lightowler* (*b*) his lordship referred to the same case with approbation.

Judgment.

It is not necessary to go so far in this case as in these recent English cases; for, in the case before us, the plaintiff is subjected to the annoyances and vexations pointed out by Mr. *Keefer* and Mr. *Kennedy*; and these are no imaginary evils. He may be subjected to actual loss and damage which he is unable to trace distinctly to the extra height of the defendant's dam, and yet, which may be occasioned, or in part occasioned, thereby. But however this may be, we cannot consistently with those cases refuse the plaintiff an injunction.

I think the case may properly be looked at, also, in this view. The conveyance by *Smith* to the defendant

(*a*) 15 L. T. N. S. 501. (*b*) 3 L. R. Eqy. 297.

1869.

Beamish v. Barrett.

and *Butterfield* is the measure of the defendant's rights. It does not give a right to *keep* the water at the height to which it was raised by the *Hawley* dam, or at any particular height; but simply and only to maintain a dam of that height. Whatever the consequences of a dam of that height, the defendant is entitled to, and the plaintiff is subject to; nothing more and nothing less. A consequence of the working of a mill worked by water-power is, in working, to draw down the water. This drawing down the water is to the advantage of a mill situated as the plaintiff's is; as it diminishes the back water at his wheel; and this is an advantage to which he has a right, and upon which it is fair to presume that he reckoned. In placing his mill he would reason thus:—I may fairly reckon upon the water at my wheel being generally so many inches lower than a dead level with the top of the dam of the mill below me, because, generally, that mill will be at work, and the necessary consequence of its being at work is to draw down the water so many inches. It is no answer to this, that the defendant might choose to stop his mill and so keep the water from being drawn down; assuming his strict right to commit such a piece of folly, there would be little danger of his doing so: and when he does work his mill, the existence of such an abstract right can make no difference in the consequences of his working it, either to himself or the neighbouring riparian proprietor. To work his mill, and at the same time, by some extraneous appliances, to counteract the ordinary natural consequence of his working it, is to deprive his neighbour of a benefit which would otherwise necessarily result from his working it. To allow this would be to create a new easement. He has one which is to keep his *dam* at a certain height. It would be quite another to have the right to keep the *water* at a certain height. So far as the latter is a consequence of the former he has a right; beyond that he has, in my judgment, no right whatever. The two things are quite distinct; they are so in their

Judgment.

nature, and they are so in their effect upon the rights and interests of the plaintiff. 1869.

Beamish v. Barrett.

I think the judgment of the court below is right.

MOWAT, V. C.—It was admitted on the argument that the defendant had a right to raise the water by means of his dam to the same height as the *Hawley* dam would have raised it, and I have considered the case on that assumption.

Mr. *Keefer* finds by his report that the main issue between the parties was, whether the defendant had a right to raise the water higher than it is raised by the new dam without the four-inch log, which the defendant has lately added.

The Chancellor held that the defendant had no such right, and that he is not entitled so to use the four-inch log as thereby to increase injuriously the flow of back-water upon the plaintiff's premises and machinery, and that he should be restrained from doing so. Judgment.

In this conclusion I entirely concur. But I presume, from the argument, that the decree as drawn up, forbids the use of the four-inch log altogether; and this was argued to be the right of the plaintiff on the ground that it is impossible to use the four-inch log without raising the water in the pond. On the other hand, the defendant's counsel contended that the water in the pond had never been raised by the four-inch log: that it is only made use of when the defendant's flouring mill is working, and that the water used for it keeps the pond down to the level at which otherwise it would stand without the four-inch log. I see nothing in the report shewing that the water ever has been raised by the four-inch log It has been found by experiment that if the mill is not going, the four-inch log will raise the water at the

1869.

Beamish v. Barrett.

plaintiff's mill an inch-and-a-half, but nothing is shewn as to the water being raised by the log when the mill is at work, and it is not disputed that it is only then the four-inch log is applied.

Reference was then made to Mr. *Keefer's* observation that if the dam be so arranged that if left to itself, it will maintain the water higher than the old one did, and if such increased height be a damage to the plaintiff, the latter is dependent on the conscientiousness of the defendant, or upon the vigilance, activity, and scrupulousness of his employees; and it was argued that the defendant had no right to place an obstruction in the stream which would make the plaintiff so dependent. But no authority for this view was cited, and I know of no authority for it. The rule seems the other way. A riparian proprietor cannot complain of an obstruction by another riparian proprietor unless it has really affected the flow of water to which he was entitled, or unless it must necessarily affect it. That the obstruction will affect him without watchful care on the part of the person who erects it, affords no ground of complaint as long as that watchful care is observed. To lay down a different rule, would, I respectfully think, be introducing a new doctrine into the law on this subject, a doctrine not consistent with the policy of the law on the subject of water courses.

Judgment.

But as the defendant claimed a right to raise the water to the height to which it could be raised by the four-inch log, I think an injunction was proper against his using the four-inch log, so as thereby to increase the flow on the plaintiff's premises.

I think any raising of the water is to be restrained, though no pecuniary damage may have resulted from it to the plaintiff.

1869.

Beamish v. Barrett.

GWYNNE, J.—The plaintiff's bill charges that the defendant by the erection of a dam across a river, running through his own property, has dammed back the waters of the river on to the plaintiff's land higher up the stream, and thereby has interfered with, and damaged, a mill privilege owned by the plaintiff in his lands, which with the mill thereon erected is in possession of a tenant of the plaintiff under a lease for a term of years; and that thereby, and by other enumerated obstructions he has caused the plaintiff very considerable damage, for which he can have no adequate compensation at law; the plaintiff in the 13th paragraph of his bill alleges, that the defendant still continues and intends to continue the obstruction and penning back of the said water and the injury to, and interference with, the full and proper use by the plaintiff of his mills, and mill privilege, and that plaintiff's remedy at law in the premises is inadequate, inasmuch as damages cannot compensate the plaintiff in the premises, and inasmuch as the plaintiff will be obliged to bring constant actions from year to year to recover such damages; and the bill prays an injunction to restrain the defendant from keeping and continuing his dam now existing to any greater height than a dam which existed in November, 1844, and thus from in any way obstructing the waters of the river so as to interfere with, or prevent the full and proper use by the plaintiff of his water mill privilege and an inquiry as to, and compensation for, past damage sustained by the plaintiff from the alleged wrongful acts of the defendant.

Judgment.

The defendant in his answer denies all the grievances complained of by the plaintiff. He denies that he pens back the water upon the plaintiff to any greater height than he is authorized to do by the conveyance under which he claims from the same person as the plaintiff claims; or to any greater head or height than the old dam of 1844, did, and he says that he believes it to

1869.

Beamish v. Barrett.

be true that the plaintiff so defectively and improperly erected his mill, and placed his wheels so low, that to such malconstruction of his mill, the injuries which the plaintiff has sustained are to be attributed, and not to any act of the defendants; and he says that he has offered to leave the whole matter of the plaintiff's complaint in his bill mentioned against the defendant to an arbitrator of plaintiff's own selection, who should settle the height to which defendant should be entitled to maintain his head of water, and who should determine all damages, if any, which the plaintiff has sustained from any act of defendant's. The plaintiff claims the interposition of the court of equity by its extraordinary process of injunction, upon the ground that, as he alleges, he has sustained such substantial injury by acts of the defendant in invasion of the plaintiff's legal rights, as would have entitled him to a verdict at law in an action for damages; and that the injury is so continuous that

Judgment.

the interposition of the court is necessary and proper to restrain a continuance of the grievance, which, if permitted to continue, can only result in incessant actions and an interminable course of litigation at law. The suit has necessarily been an exceedingly expensive one, and much evidence has been taken with the view on the plaintiff's part of establishing his various allegations of the grievances sustained by him, and on defendant's part of establishing that these grievances are not attributable to any act of the defendant. The result of the evidence may be stated to be,—that the defendant has constructed the dam complained of in a manner, namely of shifting logs, so as to make it possible in a moment to remove the logs of which it is composed, and so to prevent the damming or penning back of the water upon the plaintiff's premises injuriously, or to any greater height than defendant is authorized to maintain it by his deed. That the top of a certain eight-inch log, mentioned in the evidence, is identical with the level of an old dam, which level it is admitted the defen-

dant is entitled to maintain *permanently*, however injurious that might be to the plaintiff; that above this eight-inch log, the defendant has placed another shifting four-inch log, but that he has never claimed the right of *maintaining* the water *permanently* higher than the height of the eight-inch log, his instructions as to the four-inch log having always been that it should always be removed when the defendant's mill was not running; that the four-inch log was resorted to, not for the purpose of keeping the water higher than the old dam kept it, but for the purpose of preventing any of it escaping over the eight-inch log, so that he might use the water which would otherwise run to waste to drive his grist mill, his object being to utilize the whole flow of the stream, and to draw all the water retained by the four-inch log through the wheels of his mill; that although the plaintiff has suffered and does suffer from backwater it has not been attempted to trace that backwater in every instance to any act of the defendant; that there are fluctuations of five or six inches in an hour at plaintiff's tail-race caused by the water from above; that in fact no particular or certain portion of the backwater is traceable to defendant's dam; that from the arrangements of plaintiff's wheels and of his wheel-pit plaintiff's wheels could not run without backwater even if defendant's dam were removed altogether; that with the plaintiff's ordinary machinery at work there will necessarily be about $2\frac{1}{2}$ inches of backwater over the level of his lowest wheel, irrespective altogether of defendant's dam, and which would be increased or diminished by the greater or less volume of water flowing in the stream, irrespective of defendant's dam. To increase this unavoidable backwater $1\frac{1}{2}$ inches more, the water must be maintained at the level of half an-inch above the top of the four-inch log; that the effect upon the plaintiff of maintaining defendant's dam as a permanancy to the level of the top of the four-inch log is barely measurable and the most Mr. *Keefer* can venture to say as his conclusion upon

Judgment.

1869.

Beamish v. Barrett.

the whole is, that if the four-inch leg should be maintained up *while defendant's machinery was standing still, he thinks* it would be measurable; and under all the circumstances there are no means of measuring the effect caused to plaintiff by defendant's dam.

I find it further to be established by the evidence, that from the manner in which defendant's dam is constructed, the logs can be moved so as to keep the water lower above than the old dam would have kept it, and that all the defendant claims the right of doing, as to the four-inch log, *is to keep it up while his mill is running. There has been no evidence given that in any single instance the four-inch log has in fact ever been kept up when the defendant's mill is not running. The whole evidence is based not upon acts proved or alleged to have in fact been committed or suffered by defendant, but upon scientific calculations as to what might occur if the four-inch log should be maintained as a permanency, or kept up when the defendant's mill is not running.* As to all the other alleged grievances set out in the plaintiff's bill, the evidence establishes that the plaintiff's allegations are *wholly groundless.* If then the defendant has, as is admitted, a right to pen back the water to the height that the eight-inch log pens it back, and if the effect of the four-inch log as an addition to the dam, is to enable the dam to pen back the water further on the premises of the plaintiff only in the event of, and during the time of its being maintained up while the defendant's mill is not running, as appears to be established by the evidence, and if the evidence fails to establish that this log has ever been so maintained up, then not only has no appreciable damage been inflicted upon the plaintiff, but no right of his has been invaded by any act of the defendant; and the result is, that upon this evidence, if this had been an action at law, the jury not only would, but in my opinion should, render a verdict in favour of the defendant. Upon what principle

Judgment.

1869.

Beamish v. Barrett.

then can the right of the court of equity to interfere under these circumstances, by the exercise of its extraordinary process of injunction be upheld? In 2 *Story's* Equity Jurisprudence, sec. 925, the principle upon which a court of equity interposes, in cases of the nature complained of by the plaintiff here, is thus laid down. "In regard to private nuisances the interference of courts of equity by way of injunction, is undoubtedly founded on the ground of restraining irreparable mischief or of suppressing oppressive and interminable litigation or of preventing multiplicity of suits. It is not every case which will furnish a right of action against a party for a nuisance which will justify the interposition of courts of equity to redress the injury or to remove the annoyance; but there must be such injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented but by injunction.

Judgment.

The case of *Beckett* v. *Morris* does not, as it appears to me, govern this case; there the erection of a pier on his own soil in the alveus of a river, by one riparian proprietor, was declared to be illegal and to be in itself an invasion of the rights of the opposite riparian proprietor, although no present damage was perceptible, because it might by time mature into a prescriptive right from which damage, now imperceptible, might eventually visibly arise. Lord *Westbury* states the principle thus: "You, as a riparian proprietor, see something done which is not at all to your detriment now, but may hereafter be greatly to your detriment, though you cannot precisely point out how or to what extent. If you do not interfere, a right will be acquired against you by which you may hereafter be affected, and you have a right to say things shall remain exactly as they were. Lord *Cranworth* lays down the principle

1869.

Beamish v. Barrett.

thus: "the owners of land on the banks of a river are not bound to obtain or be guided by the opinion of engineers or other scientific persons as to what is likely to be the consequence of any obstruction set up in water in which they all have a common interest. There is in this case, and in all such cases there ever must be, a conflict of evidence as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy, or appreciating the weight of such testimony. They are allowed to say "*We have all common interest in the unrestricted flow of the water, and we forbid any interference with it.*"

In *Sampson* v. *Hoddinott* (*a*) Sir *W. Erle*, C. J., lays down the rule thus: "If the user by the defendant (of the water of a flowing stream) *has been beyond his natural right*, it matters not how much the plaintiff has used the water or whether he has used it at all; in either case his right has been equally invaded, and the action is maintainable." Now, *Miner* v. *Gilmour* (*b*) establishes, as between lower and higher riparian proprietors, that the former, if he owns land on both sides of the stream, may erect a dam across the stream for the purpose of a mill, and may pen back the waters of the stream to any height that the fall of the stream within the limits of the lower proprietor's own land will admit, provided that he does not thereby interfere with the rights of a proprietor higher up, that is, provided that he does not thereby pen back the waters of the stream above their natural level, as they run past the land of the superior proprietor; this right of the riparian proprietor has never been questioned, and cannot be disallowed without the destruction of all the mill privileges in the country. Now, in the present case, the right to pen back the water to the height that the top of the eight-inch log does pen it back, is admitted to be secured

Judgment.

(*a*) 1 C. B. N. S. 590. (*b*) 12 Moo. P. C. 156.

1869.

Beamish v. Barrett.

by the deeds under which both the plaintiff and defendants claim; whatever may be the consequential injury to the plaintiff, it is not the erection of the four-inch upon the eight-inch log simply, but *its maintenance there while the defendant's mill is not running* that causes or can cause any backwater on to the plaintiff's premises, beyond the right of the defendant to pen back the water, or that constitutes any invasion of the plaintiff's right. The defendant asserts no claim to this right. His instructions as to the removal of the four-inch log always when his mill is not running, shew that he has entertained no design of invading the plaintiff's right; *and it does not appear that he has in fact ever even accidentally so maintained the four-inch log when the mill is not running.* Now, the assertion of the right to maintain it when his mill is running, however long that right should be exercised, never can mature into a prescriptive right to maintain it permanently, whether the mill be running or not; for prescription must be from like acts to like acts, not from an uninjurious to an injurious act; consequently the plaintiff is in no danger from anything which the defendant has done or claims the right of doing, of being in a worse position thirty years hence than he is now.

Judgment.

The principle then that governs this case, as it appears to me, is that enunciated by Mr. *Story* as above, and as recognized by the court in *Elmhurst* v. *Spencer* (*a*); *The Attorney General* v. *The Sheffield Gas Consumers Co.* (*b*); and *The Attorney General* v. *Cambridge Consumers Gas Co.* (*c*). In *Elmhurst* v. *Spencer* Lord Chancellor *Cottenham* says: "The plaintiff before he can ask for an injunction must prove that he has sustained such a substantial injury by the acts of the defendant, as would have entitled him to a verdict

(*a*) 2 Mac. & G. 50. (*b*) 3 D. G. M. & G. 311.
(*c*) L. R. 4. Chy. App. 80, 81.

1869.

Beamish v. Barrett.

at law in an action for damages." In *The Attorney General* v. *Cambridge Consumers Gas Co.* Lord Justice Sir W. P. *Wood* says: "Where the court interferes by way of injunction to prevent an injury, in respect of which there is a legal remedy, it does so upon two grounds which are of a totally distinct character, one is that the injury is irreparable as in the case of cutting down trees, the other that the injury is continuous, and so continuous that the court acts upon the same principle as it used in olden times with reference to Bills of Peace, and restrains the repeated acts which could only result in incessant actions, the continuous character of the wrong making it grievous and intolerable."

Judgment.

But it is said that the words in the grant to the defendant namely "with the privilege of keeping the "dam thereon at all times thereafter at its present head "or height, but no higher," operate as a covenant by the grantee with his grantor, that he will never erect his dam higher, whether by so doing he should or not injuriously, affect the lands of the grantor higher up the stream, and that such covenant runs with the lands higher up to the grantee thereof; but a covenant running with the land passes to the plaintiff only in respect of the estate in the lands conveyed to him, and for the benefit and protection of that estate. From the moment that the running waters of the stream have flowed down past the limits of that estate, they belong of common right to the next riparian proprietor,—they are severed from all connection with the plaintiff's estate in his lands. The defendant then as the next riparian proprietor, has the power of utilizing them within the limits of his own lands, uncontrolled by any restriction in so far as the superior riparian proprietor is concerned save only that he shall not again pen them back contrary to the natural flow upon the premises, and lands of the superior proprietor; and unless and until the waters shall be so penned back, the estate of the superior

proprietor in respect of the lands to which the covenant is annexed is unaffected, and so he cannot take any advantage of the covenant although the dam should be raised unless it does pen back water on his premises —his position therefore is the same whether there be the covenant or there be not. 1869. Beamish v. Barrett.

Admitting then that a recovery at law establishing the invasion of a right (however slight and inappreciable the actual damage already inflicted may be) is sufficient to call for the interposition of the court by injunction, I am of opinion that the evidence in this case fails to establish any intention on the part of the defendant designedly to invade the plaintiff's rights; it establishes to my mind the contrary, and in the absence of evidence that the four-inch log has ever been accidentally and contrary to the defendant's express instructions proved, been maintained up at any time in a single instance when the defendant's mill was not running, the plaintiff has failed to establish that any right of his has been invaded or that he is entitled to a verdict even for nominal damages in an action at law. Judgment.

This case must as it appears to me be regarded in the nature of an action brought by a reversioner for injury to the reversion. For occasional tempory acts of trespass accidentally or negligently committed if any have been in fact committed, the tenant has his remedy at law. The permanency of the thing complained of is as it appears to me the material matter to be established at the suit of the reversioner. Isolated occasions, though proved, upon which the log has been maintained up when the defendant's mill is not running, whereby the water has been penned back upon the lands in which the plaintiff has the reversion would be insufficient; and in as much as it appears that the waters are not penned back, if, while the four-inch log is up the defendant's mills are kept running, for this I take to be the result of

1869. Beamish v. Barrett.

the evidence, and this use of the log is all the defendant claims, then no permanent injury nor in fact any injury to the reversion has in my judgment been established.

Under these circumstances the defendant, in my opinion, has been unnecessarily harrassed by this expensive suit, and he was entitled to be indemnified so far as the court could indemnify him, by dismissing the plaintiff's bill with costs. If it had been established that the four-inch log had been maintained up when the defendant's mill is not running, as it appears that this log is so placed as to be removable in an instant, the plaintiff's right could sufficiently be protected without the total removal of the log. If any decree should be made other than one simply dismissing the plaintiff's bill, a decree in the terms following would, I think, attain all that the plaintiff can in justice assert any claim to.

Judgment. Declare that the defendant is not entitled to maintain the four-inch stop upon his dam, when the stream in the pleadings mentioned exceeds the level of the eight-inch stop log in the pleading also mentioned at any time that the mills of the defendant are not running; nor unless he shall draw off through the wheels of his mill, or otherwise, all the water which shall be retained by the said four-inch log above the level of the said eight-inch log so as to prevent any of the waters so retained being penned back upon the mills or premises of the plaintiff, and it appearing that the defendant does not claim any right to maintain the said four-inch log otherwise than aforesaid, and it not appearing that any injury to the plaintiff's reversionary interest in the premises in the pleadings mentioned has been caused by the defendant, dismiss the plaintiff's bill with costs.

Order. "That the said decree and order be varied; and that in lieu of the declarations and directions therein contained the following declarations and directions be made, that is

1869.

Beamish v. Barrett.

to say: This Court doth declare that the said *William Barrett* is not entitled to raise the water of the stream, in the pleadings mentioned, to any greater height than the same is or may be raised by the eight-inch stop log on the dam of the said *William Barrett*, in the pleadings mentioned, to the damage or injury of the said *Francis Beamish*; And it is ordered, that a perpetual injunction do issue to restrain the said *William Barrett*, his servants, workmen, and agents, from raising the water of the said stream to any further or greater height than is hereinbefore declared, to the damage or injury of the said *Francis Beamish*; And it is ordered, that the said *Francis Beamish* do re-pay to the said *William Barrett* the sum of eighty-five dollars and thirty cents, the costs of the said re-hearing, paid by the said *William Barrett* to the said *Francis Beamish*.

Order.

City of Toronto v. Mowat.

Esplanade acts—Cost of construction.

Under the acts relating to the construction of the esplanade in the City of Toronto, water lot owners are not entitled to be paid the cost of constructing so much thereof as the owners shall have constructed.

This was a suit to set aside an award in favor of the defendants on the ground of excess, the arbitrators having awarded to the defendants, as owners of one of the water lots in the City of Toronto, compensation for work done by the owners of the property in filling in portions of the lot, and thus, to a certain extent, constructing the esplanade.

The objections urged by counsel are stated in the judgment.

Mr. *Strong*, Q. C., and Mr. *Cooper*, for the plaintiffs.

1869.

City of Toronto v. Mowat.

Mr. *Blake*, Q. C., and Mr. *James McLennan*, for the defendants.

SPRAGGE, V. C.—By the statute 16 Victoria chapter 219, the city was authorized to construct the esplanade (*a*) unless the water lot owners should construct it within a year, (*b*).

The mode of ascertaining the amount to be paid, if constructed by the city, in the event of the owners failing to do it within the time limited, is as follows:—The city surveyor is by certificate to declare the amount which owners or lessees ought to pay. If the owners are dissatisfied, arbitrators are to decide "the value of the said improvements." The act does not so far fix any data or principle upon which owners or lessees are chargeable.

Judgment.

Section 7, simply enables owners and lessees to construct the esplanade and exempts them from charge. It gives them no claim on the city. The whole cost of construction is to be borne by them. By parity of reasoning the whole cost of construction, if done by the city, would be chargeable upon them.

This act deals only with the 100 feet of esplanade.

The 20 Victoria deals not only with the esplanade but with another space of land described in section 2, as the whole space lying between the northern limit of the esplanade as laid down on the plan and in course of construction, and the shore of the bay of Toronto, and as to such space it provides that the amount to be paid to the city for filling in, grading, and levelling the same shall be ascertained in the same manner as is provided by 16 Victoria in regard to the esplanade.

(*a*) Secs. 2. 3. (*b*) Sec. 7.

1869.

City of Toronto v. Mowat.

Section 4, prescribes what is to be taken into account on each side. If the portion of the defendants' water lots taken for the esplanade had been in a state of nature there would be no difficulty: the provisions of the statute are too explicit to admit of doubt, and they are also in accordance with the provisions of 16 Victoria. In this case, in taking the account between the parties, the arbitrators allowed to the water lot owners compensation for the value of the land taken for the esplanade "and for the expense of making so much thereof as has been made on the land so taken." The question therefore is distinctly raised whether a water lot owner can be allowed for the cost of making the esplanade where it has been made before the taking of the land by the city. At what time the work done by the owners, was done in this case does not appear. The award is dated 8th June, 1868. The notice by the city surveyor is dated 2nd January, 1860, subsequent to the passing of both the acts. In the notice the city surveyor claims for the city $1302, as payable to the city for construction of the esplanade. The work done by the owners was, I understand, before that, but whether before or after the passing of either or both of the acts does not appear very clearly. From the manner, however, in which it is stated in the bill I take it to have been before the passing of the acts. The water lots in question form part of [illegible] is called in the pleadings the *Ewart* estate, and were granted before the year 1837, either to Mr. *Ewart* or to some one from whom he purchased. I take the date 1837 from the bill. The bill states that the defendants or Mr. *Ewart* did a large amount of filling on the lots, and it was assumed in argument that this had been done before the passing of either of the acts. In considering the question, I shall take the work done by the owners of the lots in question to have been done before the passing of either of the esplanade acts.

Judgment.

It is to be observed that the letters patent of February,

1869.

City of Toronto v. Mowat.

1840, and the two esplanade acts all contemplate the filling in of the esplanade being at the expense of those interested in the water lots; and the 4th section of the later act professes to explain the intention of the letters patent in regard to strips of land granted to the city which were to be by them conveyed upon certain terms to water lot owners—where the filling in has been under, and subsequently to, either of the esplanade acts, the construction generally given to the acts has been that it is to be at the owner's expense. In *The City of Toronto* v. *Leak* (*a*), Chief Justice *Hagarty*, then a judge of the Court of Queen's Bench, gave an elaborate judgment upon the point: Mr. Justice *Morrison* expressed himself as clearly of the same opinion, and Chief Justice *Draper*, while deciding upon another point, evidently leaned to the same construction. In *Mowat* v. *The City of Toronto* (*b*), I came to the same conclusion.

Judgment.

In *Brooke* v. *The City of Toronto* (*c*), the award was objected to on two grounds: one, that the arbitrators valued the land taken for the esplanade as it was when granted to the plaintiff; the other, that interest was allowed to the city; and the late Chancellor thought the award bad on both grounds. As to the valuation he observed that the value must be dependent upon the position, situation, and character of the land taken, at the time it is taken, and he went on to say "one lot will or may, in these respects differ much from another. A lot covered with water (other things being equal) cannot be as valuable as a lot filled in and raised above the water; as was the plaintiff's lot here in consequence of the labor and material supplied by him. The arbitrators thought they were bound to estimate the value of the plaintiff's lot as it was when granted to him. In this they were wrong. They should have valued it, as it stood when taken by the city." It does not appear by

(*a*) 23 U. C. Q. B. 223. (*b*) 12 Grant, 267. (*c*) 14 Grant, 258.

the report of the case that the previous cases were cited to his lordship, and they are not noticed in his judgment. I think they could not have been cited, or his lordship would have given his reasons for differing from the opinions expressed in them, if after considering the reasoning by which they were supported he had continued to differ. In the case before the Chancellor he went further than was absolutely necessary. The award was bad in his judgment because the arbitrators took the value of the land at the date of the grant. They should have taken its value at the date of its being taken by the city, and they would have erred in taking it as they did if no labour or material had been expended upon it by the owner. That they should have taken into account the expenditure of such labor and material was therefore not necessary to the decision of the case. I take it, that it unintentionally ran counter to the decisions of other judges, and I cannot regard it as settling the law upon the point, adversely to them.

1869.

City of Toronto v. Mowat.

Judgment.

It does not appear in either of the two cases, at what time labour and material were expended on the land taken for the esplanade; whether before or after the first esplanade act, or whether before or after the grant to the city. The grant contemplated the esplanade being built by the water lot owners; but did not, and could not affect their rights, under their own patents. Under the grant to the city they merely became *cestuis que trust* of the strips granted to the city, upon building the esplanade. Section 4 of the act of 1857 appears, however, to deal with the case of expenditure by water lot owners upon land taken, before the taking of the land, as well as with expenditure by the city after taking it. It recites that the property to be conveyed to them was intended as a compensation for the land taken, "and for the expense of making so much thereof as should be made on the lands taken from them respectively;" and it then enacts "that the owners be respectively charged with their

1860.

City of Toronto. v. Mowat.

respective shares of such expense." The "compensation" is for two things, the value of the land, and the money expended upon it by the owner: it must in this connection mean money expended by the owner, not by the city, as the compensation was to the owner. Then follows the enactment charging the owner with such expense, *i. e.*, he is to be charged with the expense incurred by himself. The section then goes on to shew what matters are to be taken into account between the owner and the city; and places *inter alia* to the credit of the city the expense of constructing the esplanade. There are two ways of reading this provision, one is reading it literally; and so reading it meets the argument of the defendants' counsel, that it is the value of the land taken, and its value at the time of its being taken, that is to be allowed to the water lot owner. It may be taken to be so: but we must at the same time read with it, the enactment that the expense incurred by the owner himself in making the esplanade is to be charged against him, reading the word "charged," not as "allowed," but in its ordinary signification. This is probably as a book-keeper would state the account between the owner and the city. The owner gets the value of the land, improved as it is, and on the other hand the cost of the improvement is charged against him. In this way the language of the statute is satisfied, taking its language in its plain ordinary grammatical meaning: and in this way also, all water lot owners are placed upon the same footing. The owner who has made large improvements, and the owner who has made small ones, or none at all, are placed upon the same footing in this, that all are alike charged with the expense of constructing the esplanade upon their own lots. The owner who has constructed part of it himself has so much the less to pay the city; while he who has done nothing has to pay to the city the whole cost. In this there is equality. If I adopt the construction contended for by the defendants' counsel there would be no

Judgment.

equality; but one principle would be applied to one class and another to another class, according to the accident of money having been, or not having been expended by the owner before the taking of the land. I am satisfied that such was not the intention of the legislature; and it would not, in my judgment, be a sound construction of the statutes. 1869. City of Toronto v. Mowat.

The other way in which this provision might perhaps be read is this, by not taking the word "charged," where it is applied to expense incurred by the owner before the taking of the land by the city, in its literal sense, but as meaning only, not allowed, assuming that such expense could not be an item of charge in favor of the city, as the city had not borne it. To read the clause in this way it would be necessary to read the value of the land to be allowed to the owner to be its unimproved value. I should adopt this construction if necessary rather than a construction that would make the acts incongruous, and inconsistent in principle. But I think the reading of the clause that I have put first is the true one. It is technical and in book-keeper style, but it enables us to read the clause in the ordinary sense of the language employed, and is in accordance with the whole tenor and spirit of the acts. Judgment.

The construction contended for by the defendants' counsel leads to this palpable inconsistency, that the water lot owner would be allowed against the city the value of the work done by him, while the city would be allowed against the owner the value of the work done by it. The principle upon which the legislation, upon this matter has proceeded is, that the construction of the esplanade should be at the expense of the water lot owners, and this principle is preserved by the construction I put upon the act.

As to the question of interest payable by the

1869.

City of Toronto v. Howat.

city upon the sum found payable by it; the arbitrators have in my opinion nothing whatever to do with the question. Their duties are limited to certain points by the statutes under which they act, they are to fix certain values and to ascertain the cost of certain works, and to certify the result in the shape of an award; they have no discretion as to interest or anything else. Section 5 of the statute of 1857 makes an award against the city payable with interest; and section 3 of the act of 1853 makes any sum payable to the city, bear interest from the date of the declaration of the city surveyor, or award of arbitrators, as the case may be.

Judgment.

If the question of interest could come before this court as it arises in specific performance cases, it would be quite a different thing. There might be a good deal to be said in its favor; and the principles enunciated by Lord *St. Leonards* in *Birch* v. *Joy* (*a*) might be found to apply. But this is a bill to set aside an award. The arbitrators have awarded a specific sum for interest. Their doing so is, I think, an excess of authority, but the award would not be bad on that ground, as that part of it is separable from the rest.

It is not necessary to determine whether the award is bad upon the other grounds upon which it is impeached. I am not prepared to say that it is, but I am of opinion that the arbitrators proceeded upon an erroneous principle in awarding to the water lot owners the cost of constructing so much of the esplanade as has been constructed by them, or by those under whom they claim. The award will therefore be set aside and the decree must be with costs.

(*a*) 3 H. L. C. 590-2.

1869.

GORDON v. EAKINS.

Mortgagor and mortgagee—Agreement with widow of mortgagor—Rests.

Wherever, from the necessities of his position, it is necessary that a mortgagee should, for his own protection, take possession, he is not chargeable with rests, and this even though the mortgage was not in arrear.

A tenant of a mortgagor paid the mortgage after the mortgagor's death, and the representatives of the mortgagor having no means of paying the debt, he entered into an agreement with the widow that she and her children should occupy the dwelling house and four acres of the mortgaged property, that he himself should occupy the residue at a rental of $170, should pay $40 a year to the widow, and apply the residue of the rent on the mortgage:

Held, in a suit afterwards brought by a purchaser of the equity of redemption to redeem, that the defendant was not chargeable with the $40 a year he had paid the widow, nor with rests, though the rent for which he was accountable exceeded the interest.

Statement.

This was a suit for redemption. The bill had been filed by *Thomas Gordon*, who was the assignee of the purchaser of the equity of redemption from the sheriff of the county of York, who sold such equity under an execution against the adminstratrix of *Armstrong*, the original mortgagor. The defendant was a tenant of *Armstrong*, in possession of the premises at and prior to the time of *Armstrong's* death, and he continued in possession. It was arranged between the defendant and the administratrix that the defendant should pay the amount of the mortgage to the original mortgagee, and take an assignment of it; that the administratrix, being the widow of *Armstrong*, should occupy the house and four acres of the land; that the defendant should occupy the remainder of the farm, and pay the widow $40 a year for the period of fourteen years, and that the mortgage should then be considered satisfied and be discharged. Pursuant to this arrangement, the defendant paid off the mortgage and took an assignment of it, continued in possession of all but the house and four

1869.

Gordon v. Eakins.

acres, and paid the widow the $40 a year for several years, when the plaintiff, considering that the arrangement between the widow (administratrix) and the defendant did not bind him or the land, filed his bill for redemption of the premises, to which the defendant in his answer submitted, and the only difficulty in the suit was as to the fixing of the occupation rent and the proper manner of taking the accounts for and against the defendant under such circumstances. At the time of the assignment of the mortgage to the defendant there was no interest in arrear. The judgment upon the appeal shews the remainder of the facts material to the case.

Mr. *Fitzgerald*, and Mr. *A. Hoskin*, for the appeal.

Mr. *Ferguson*, contra.

Judgment.

SPRAGGE, V. C.—The first ground of appeal by the defendant, and of cross-appeal by the plaintiff, was disposed of by me at the conclusion of the argument by overruling both, leaving the master's finding upon the point objected to by each party, to stand.

As to the account being taken with rests, the general rule is admitted that if the mortgage be in arrear at the time of possession being taken by the mortgagee, the account is not taken against the mortgagor with rests. The position of *Eakins*, the present holder of the mortgage, is a peculiar one. He was tenant of *Armstrong* the mortgagor, the mortgage being then in other hands, *Armstrong* died, and *Eakins* acquired the mortgage; and he continued in possession, but under a new arrangement which related to the mortgage and to the future occupation of a portion, not the whole, of the mortgaged premises. This arrangement was between *Eakins* and the widow, who was also admininistratrix of *Armstrong*; and was in substance this: that the widow and children

1869.

Gordon v. Eakins.

of *Armstrong* should occupy the dwelling house, and four acres of the mortgaged premises, and that *Eakins* should have the possession and rents and profits of the residue of the land for fourteen years; and should pay to the widow forty dollars a year. Some amount of rental (beyond the forty dollars) was agreed upon, wherewith *Eakins* was to stand charged on his mortgage; the parties differ as to this part of the arrangement, and the decree charges *Eakins* with occupation rent to be fixed by the master. The sum fixed exceeds the interest on the mortgage, and would suffice, after some years occupation, to pay off the arrears of interest. The master has taken the account with rests after this period. It appears that the estate of *Armstrong* was not in a position to pay off the mortgage debt, and that the widow and children had no means of doing so. It was under these circumstances, and this arrangement, that *Eakins* came to have possession after the death of *Armstrong*.

Judgment.

The rule is thus stated by the late Lord Justice *Turner* in *Nelson* v. *Booth* (*a*), "I have always understood it to be the settled course of the court not to direct an account with annual rests against a mortgagee in possession, unless at the time when he took possession there was no arrear of interest due to him. I conceive the principle to be this; a mortgagee is not bound to receive payment of his debt by driblets; but he has the right to do so if he thinks fit. If he enters into possession when no arrear of interest is due, he evidences his intention so to receive payment of the debt, and the account therefore goes with rests; but if the interest is in arrear when he enters into possession, the fact of his taking possesion, affords no evidence of his intention to receive payment by driblets, as he is driven to take the possession by the non-payment of the interest; and the account therefore

(*a*) 3 DeG. & J. 122.

1869.

Gordon v. Eakins.

goes on until the whole debt has been satisfied. I have often had occassion to consider the point, and my impression is, that this is the result of the authorities." The Lord Justice puts it that the non-payment of interest is to be taken as driving the mortgagee to take possession. In this case there was more. There was the hoplessness of obtaining interest or principal, except by taking possession; or making some arrangement whereby the profits of the land or a portion of them should reach his hands.

The cases appear to me to establish this principle that, wherever, from the necessities of his position, it is necessary that the mortgagee should, for his own protection, take possession, he is not chargeable with rests, and this even though the mortgage was not in arrear; and the case of leaseholds, and the security being in danger by non-payment of ground rent or insurance, or through want of repairs, or where the mortgagee has been harrassed by litigation, cases put by Mr. *Fisher* in his work on Mortgages, and for which he cites authorities, are only instances in which this principle has been acted upon. The mortgagee in such cases does not enter into possession of his own free will, choosing to receive payment by driblets, but because circumstances, not his choice, nor his fault, have forced that course upon him.

Judgment.

Mr. *Ferguson* contended that the occupation of *Eakins* being under an agreement was evidence of an intention to take payment by driblets. Mr. *Fisher* cites *Page* v. *Linwood* (*a*) for the position that "rests are not directed where the occupation is under an agreement for tenancy with the mortgagor." The case referred to is a very complicated one, and was decided in a great measure upon its peculiar circumstances, but it negatives at any rate the position taken by Mr. *Ferguson*. In

(*a*) S. 162, 4 G. & F. 399.

one sense a mortgagee taking possession has an intention to take payment by driblets, because it is a necessary consequence of his taking possession; but it is only when he does it of his own free will and not from the necessity of his position, that the account is taken against him with rests.

In taking the accounts the master has allowed to the mortgagee the $40 a year paid by him to the widow for the use of herself and her children; and the plaintiff objects to this as a payment made by the mortgagee in his own wrong. If these payments would be properly allowable if the widow and children were here as plaintiffs to redeem, they are proper to be allowed against this plaintiff, as there is nothing to entitle him to stand in a better position than they. If the arrangement had been with *Armstrong* himself there could be no question. The substance of such an agreement is this, that the mortgagee is to receive the rents and profits of that part of the mortgaged premises of which he is to have possession; and out of them to return to the owner of the premises a certain sum; or, in other words, to receive and retain the rents and profits, less a certain amount. Now suppose the dowress and heirs of the mortgagor to be plaintiffs here, what reason or justice would there be in charging the mortgagee in possession with this $40 a year. It certainly would not be making "just allowances." It might be put in this way, the rents and profits, or the occupation rent are worth $170; of this, $40 is only received, not retained, by the mortgagee; he should be charged therefore with $130 only. As to the $40 he is, as between himself and the owners of the estate, only the hand to receive and pay over. And I think this is the proper way to take the account. I do not know whether the master has allowed interest on the annual payment of $40. I think he should not, but that against the mortgage debt should be set the occupation rent less the amount for which he accounted directly to the owners of the estate.

Judgment.

1369.
Gordon v. Eakins.

There was another item of objection on the part of the plaintiff, the allowance of $100 costs as paid to *Jones Brothers*, solicitors, when, as the plaintiff contends, $48 only should be allowed. The difference appears to be made up of conveyancing and agency costs in carrying out the arrangement for possession, by *Eakins*; and its terms. It was for the benefit of the estate, fourteen years further time being thereby obtained for the payment of the mortgage debt. I suppose the master was satisfied as to the reasonableness of the amount, or he would not have allowed it.

I do not think this is a case in which I should give costs to either party.

LYON v. BLOTT.

Will, construction of—Devise to executrix beneficially.

A testator's will contained the following direction as to the residue of his property: "I give, devise, and dispose thereof as follows, that is to say: my will is, that my wife, S. W., shall have full power and control over all my freehold and personal property; that she, my executrix, her assigns, for ever, may have unlimited power to deed, bargain, alienate, or transfer, for ever, all or any part of my said property; and further, any deed, transfer, or conveyance, made by my said executrix, for my said property, or any part thereof, shall be valid and sufficient to the purchaser or purchasers, his or their heirs and assigns, for ever," and nominated his wife sole executrix of his will.

Held, that the widow took the residue beneficially.

Hearing on further directions.

Mr. *Morphy*, for plaintiff.

Mr. *James McLennan*, and Mr. *Rae*, for other parties.

1869.

Lyon v. Blott.

SPRAGGE, V. C.—The principal point in the case is upon the construction of the will of the testator *George Webster*. It is short and very inartificially expressed; and is as follows: "My will is, that my funeral charges and just debts shall be paid by my executrix, the residue of my real estate and personal which shall not be required for the payment of my just debts, funeral charges, and the expenses attending the execution of this my will, and the administration of my estate I give devise and dispose thereof as follows, that is to say: my will is, that my wife *Sarah Webster* shall have full power and control over all my freehold and personal property—that she, my executrix, her assigns for ever, may have unlimited power to deed, bargain, alienate, or transfer for ever all or any part of my said property; and further, any deed, transfer, or conveyance made by my said executrix for my property or any part thereof, shall be valid and sufficient to the purchaser or purchasers, his or their heirs and assigns for ever. I therefore nominate, constitute, and appoint my wife *Sarah Webster*, sole executrix of this my last will and testament." The testator with tolerable accuracy, and quite sufficiently, describes the qualities of an estate in fee. Mr. *Preston* in his Treatise on Estates (*a*), describes it as "an interest of a nature, extent, and quality, to continue beyond the life of the owner. It will enable him to dispose of the property either for ever, or for any space of time, and in any manner allowed by law. * * * Such is the nature of an estate in fee; and as often as, either from a present or remote view, it appears to be the intention of the testator, that the person who is the object of his bounty, should have the property for an estate, which will confer these powers, and this dominion, an estate in fee will pass." It is manifest from the terms of this devise that the devisee took, under the will, a power to dispose of the

Judgment.

(*a*) Vol. II. p. 70.

1869.

Lyon v. Blott.

property devised, absolutely, not for a period limited to her own life. If so, an estate in fee passed as to the realty, and an absolute property in the personalty; and the only question is whether she took beneficially, or as trustee and executrix.

It is clear from the authorities that if the devisee were not appointed executrix, she would take in fee beneficially. In *Whiskson* and *Cleyton's* case (*a*) the devise was to the godson of the testator after the death of his wife, "and, if he fail," then he willed his share to the discretion of his father. It was held that the father took a fee simple upon the death of the godson, and it was likened to a will that lands devised should be at the disposition of *J. S.*, and "I will my land to *J. S.*, to give and sell at his pleasure," that *J. S.* shall do with the land at his discretion; in all which cases it was assumed that the fee would pass.

Judgment.

In *Jennor* and *Hardies* case (*b*) the devise was in certain events to one *Edith*, to dispose thereof at her pleasure, and it was held that the fee passed. In the subsequent case of *Goodtitle* v. *Pearson* (*c*), the devise was to one and her lawful issue, and if no lawful issue "that she shall have power to dispose thereof at her will and pleasure," and in this case also the fee was held to pass. Other cases to much the same effect are referred to in Vin. Abr. pp. 2, 3, 4, 5, 6.

I do not think that the testator appointing his wife his executrix makes any difference. There is not a word in the will looking to the creation of a trust; and the wife appears upon the face of it to be the sole object of the testator's bounty. There are, moreover, several cases in which the devisee or legatee was appointed

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(*a*) 1 Leonard, 156. (*b*) 1 Leonard, 283.
(*c*) 2 Wils. 6.

executrix, and was held to take beneficially. *Shaw* v. *Bull* (*a*) is an instance of this. Several devises were followed by this clause, "and all the overplus of my estate to be at my wife's disposal, and make her my executrix." The decision was that the words "make her my executrix," shewed an intent to grant to the wife only such estate as she was capable of taking as executrix; no such question could arise in this case as it is clear that both real and personal estate passed. An argument indeed might be drawn from the case, that at all events as to the realty she took absolutely.

1869.

Lyon v. Blott.

Thomas v. *Phelps* (*b*), before Sir *John Leach*, was the case of a gift by will to a son and daughter appointed executor and executrix. The will commences in much the same way as the will in question. Then after bequeathing to the son the lease of a colliery, the will proceeds, "him and my daughter *Elizabeth Phelps*, I do make, constitute and appoint, my joint executor and executrix of this my last will and testament, of all that I possess in any way belonging to me by them freely to be enjoyed or possessed of whatsoever nature or manner it may be, only my household furniture," which he disposes of specifically. No question was made as to the son and daughter taking beneficially, but only as to the quantum of estate they took. It was held that they took the whole estate of the testator. This was before the passing of the Real Property Act.

Judgment.

The case of Doe *Hickman* v. *Hazlewood* (*c*) was fully argued, and was decided after taking time for consideration. The testator, after bequeathing to his wife the residue of his personal estate, added this clause, "and I do likewise make my wife the said *Ann Hazlewood* full and sole executrix of the freehold house situated in

(*a*) 12 Mod. 592, 2 Eq. Ca. Ab. 320. (*b*) 4 Russ. 348.
(*c*) 6 A. & E. 167.

1869. Lyon v. Blott.

Great Queen Street," describing it. The question was whether the wife took a fee simple in the freehold house devised; and it was held that she did. There was, I think, more room in that case than there is in this for contending that the wife took in her representative capacity and not beneficially; for the freehold is not at all mentioned in the will except in connection with her character of executrix. There are some points commented upon by Lord *Denman* which that case possessed in common with this. His Lordship observes that it does not appear that the testator was possessed of any other property. Here the will in explicit terms disposes of all his property. The other point is thus alluded to: "nor can we perceive an allusion to any other object of his bounty except his wife."

Judgment.

In *Doe Pratt* v. *Pratt* (*a*) judgment was given by the same court on the same day. The question was as to certain freehold property of which the testator died seized. After directing the payment of his debts and funeral expenses, and of certain legacies, the will proceeded thus: "I appoint my nephew, *William Pratt*, my whole and sole executor of all my houses and land situate at Flixton in the county of York," and it was held that by these words the houses and land passed to the devisee.

I do not feel any doubt as to the property of the testator passing under his will absolutely and beneficially. Divested of its verbiage his will runs thus: "After payment of my debts and funeral expenses, I give and dispose of all my estate real and personal as follows: I give the absolute control and dominion thereof to my wife; she is to have unlimited power of alienation, and her conveyances shall be effectual and valid to purchasers their heirs and assigns. I therefore appoint her execu-

(*a*) 6 A. & E. 180.

1869.

Lyon v. Blott.

trix of this my will." There is nothing in the word "therefore" that makes against this construction. Having given his estate absolutely to his wife he therefore—for that reason—makes her his sole executrix. The word "therefore" may, well apply to the *sole* execution of the will being given to her who was to be the sole beneficiary.

The authorities bear out this construction, and it appears to me that any other construction would be against reason. A devise of a sufficient estate and of absolute dominion over that estate, *must* carry the fee; and must carry it beneficially, unless the will contains some intention of its being intended to pass by way of trust. It is clear that the appointment of the devisee executor is not an indication of such intention.

BINGHAM v. SMITH.

Partnership decree—Claims of creditors—Costs.

A bill was filed to establish a partnership; and, the partnership being proved, the usual accounts were directed, including an account of the claims of creditors.

Held, that the costs of the suit should not be paid out of the fund to the prejudice of creditors.

Hearing on further directions.

This was a suit to wind up a partnership, which, having been denied, was established in the cause, and the usual decree for winding up the partnership was made, under which the accounts had been taken; and it being doubtful whether the assets were sufficient to pay the debts of the partnership and the costs of the suit, counsel for the plaintiff insisted that the creditors

1860.

Bingham v. Smith.

had been benefited by the suit so far as having the affairs of the partnership wound up, their claims ascertained and ordered to be paid, and that therefore the plaintiff was entitled to have his costs out of the estate, in the first instance, without waiting for payment of the debts.

Mr. *Fitzgerald*, for the plaintiff.

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

SPRAGGE, V. C.—This is a bill filed to establish a partnership. The partnership alleged by the bill is denied by the answer. At the hearing the plaintiff established the partnership; and by the decree the costs up to the hearing were adjudged to be paid by the defendant to the plaintiff. The accounts of the partnership were ordered to be taken and *inter alia* of course the claims of creditors. By the decree on further directions the subsequent costs were dealt with contingently thus, that no costs should be given to the parties in the event of the assets of the partnership being insufficient to pay the creditors in full; but, in the event of there being a surplus after payment of creditors, subsequent costs were in that case reserved. Further assets have since been realized, and it is believed, though, as I understand, it is not definitively ascertained, that the assets will be sufficient to pay creditors in full, and it is agreed that in that event the subsequent costs of both parties should be paid out of the surplus. A question, however, is made whether the costs up to decree (which have not been paid) are payable out of the assets in priority to the claims of creditors. It is claimed that they are, because the creditors have come in, in the suit and proved their claims. But, these costs were in a matter of adverse litigation between partners; and if the subsequent costs were only to be allowed in the event of a surplus, in other words, not made chargeable at all

Judgment.

against the creditors, *a fortiori* costs of the nature of those in question should not be made chargeable against them: but independently of that direction, there is no reason for charging costs of that nature against creditors. If there is a surplus the plaintiff will of course be entitled to those costs against the defendant's share.

1869.

Bingham v. Smith.

PRINCE v. BRADY.

Pleadings—Defence of purchase for value without notice—Leave to supply defects refused.

A bill was filed setting up an equitable right to land, and alleging that the defendant who had obtained the legal title purchased the property with notice of the plaintiff's equity; the defendant, by his answer, said, that at the time of his purchase he had no notion of the plaintiff's claim, and the consideration he had paid was actual and *bona fide;* but he did not negative notice before paying his purchase money or receiving the conveyance; and did not prove payment of any consideration.

Held, that by reason of these defects his defence failed.

The defendant applied at the hearing for leave to put in a further answer setting up the necessary facts, and that the title was a registered title, and to prove consideration. But it appearing that the plaintiff had been long in possession, and had made very considerable improvements before the defendant's purchase, and that the defendant, though he may not have had notice of the plaintiff's claim, had, in this purchase, shewn culpable disregard of the rights of third persons, the application to supply the defective allegations and proof was refused.

Examination of witnesses at Chatham.

Mr. *James McLennan,* for plaintiffs.

Mr. *Kingstone,* for defendants.

1860.

Prince v. Brady.

SPRAGGE, V. C.—The plaintiffs establish their equity if they prove that *Brown*, under whom they claim, purchased the land in question from *McLaughlin*, as they allege that he did, and paid his purchase money. That he did so purchase and pay his purchase money is proved in evidence. There is a clerical error in the bill in using the word "to" instead of "by," making it read that the money was paid to, instead of by, the purchaser. The context shews unmistakeably what was meant, and it should, I think, be so read. At any rate it is a matter upon which an amendment would be allowed without hesitation.

Then how does *Brady* displace the plaintiffs' equity? The bill states that he purchased from one *Cadmus Hosea*, who had the legal title by descent from *Alexander Hosea*, who was a trustee for the conveyance of the land in question to *Brown*; and it alleges that *Brady* purchased with notice. The plaintiffs prove that *Alexander Hosea* was such trustee: they prove also possession and improvements by *Brown*, and by their mother, devisee of *Brown* and her husband; and that at the date of the purchase by *Brady*, a tenant of the mother was in possession of the land: and they also prove some information to *Brady* (not by the tenant) leading towards notice which I will refer to presently. *Brady's* defence is, that he was a purchaser for value, and that he had no notice. He does not however allege all that is necessary to constitute a good defence on this ground. He merely says that he had no notice of plaintffs' claim at the time that he made his purchase of the land from *Cadmus Hosea;* and that the consideration therefor paid to him was actual and *bonâ fide*. He does not negative notice before he paid his purchase money, or before he received his conveyance. And further, he gives no evidence of the payment of any consideration money.

Judgment.

He contends that he is excused from making more

specific allegations upon these points by the frame of the plaintiffs' bill; the bill stating that he purchased from *Cadmus Hosea*, and objecting to his purchase nothing, but that he purchased with notice. This is ingeniously put: but I think *Brady* was not excused from stating his defence fully and proving it. All that is necessary in such a defence is, I think, well understood. It has certainly been affirmed over and over again in this court; and is stated plainly in various text books of authority. I have seen the defence set up by answer somewhat loosely, and with an absence of precision; but never with such an absence of proper allegations as is the case in *Brady's* answer. *Brady* being stated in the bill to have purchased, means no more than that he was not a volunteer. In strict legal phraseology it does not indeed necessarily mean so much as that. It would be stretching its meaning to an unwarrantable extent to take it as an admission of all that is necessary, within the rule of the court, to constitute a purchaser, a purchaser for value without notice. Judgment.

1860.

Prince v. Brady.

As the case stands then upon pleading and evidence, the plaintiffs have established their case; and *Brady* has failed to establish his defence. I intimated this, as the leaning of my opinion, at the argument; and counsel for *Brady* then asked for leave to put in a further answer, setting up the necessary facts to bring him within the rule; and also that his title is a registered title: and to prove payment of consideration. It is out of the question to allow such proof upon affidavit as desired by *Brady's* counsel, and it resolves itself into this, whether it will be in furtherance of justice that *Brady* should now be allowed to put in another answer, and that the cause should be carried down to another hearing.

I think it would not be in furtherance of justice to allow this. It is true that there has been some negli-

1869.

Prince v. Brady.

gence on the part of the devisee of *Brown*. The patent issued to *Alexander Hosea*, as I gather from the evidence of *King*, after the death of *Brown:* and his devisee, Mrs. *Prince*, ought to have procured a conveyance from him, or after his death, from his son *Cadmus*. Her not doing so has enabled *Cadmus* to appear to be the owner of the land, and to sell it to *Brady;* and if *Brady* were wholly blameless in the matter of the purchase I should be disposed to allow him to set up, and prove if he could, that he was a purchaser for value without notice; and to set up also his registered title. But, though there is not sufficient upon the evidence, as is conceded by plaintiffs' counsel, to affect *Brady* with notice, within the rules of this court, and the authorities upon the subject of notice to an intending purchaser, there was yet a carelessness of the rights of others on the part of *Brady* which ought to be considered, as a matter of conduct, in weighing the merits and demerits of each party's case.

Judgment.

The Registrar of the county gives this piece of evidence: "Prior to the deed from *Hosea* to *Ostrander*" (*Ostrander* was the appointee of *Brady* upon his purchase from *Hosea*) "*Brady* came into the registry office, to search in the registry office, as he said, for a bond which a party told him he had for the land from *Hosea*. I told him there was no such bond registered. I told him at the time that a party of the name of *Brown* was, entitled to the lot I thought. I said that Mr. *King* knew something about it." It appears from this that he had been told that a bond had been given by one of the *Hoseas* for the sale of the land or part of the land, for the purchase of which he was in treaty: that the registrar then told him that, as he believed, one *Brown* was entitled to the lot, and that Mr. *King* knew something about it. All this was true, and he was directed to the person who could verify its truth; yet finding that there was no document registered which shewed title in another, he disregarded the information he received as to the

1869.

Prince v. Brady.

rights of others, did not take the trouble to make inquiry though directed to a proper source of information; and made his purchase. Further there had been long possession and very considerable improvements made by the true owner, not by the person from whom he was making his purchase. As to this he professes ignorance, but he was directed to inquiry, and did not make it. He comes now to ask for an indulgence. I have to consider whether, under all the circumstances, I ought to grant it, whether it would be a greater hardship upon the plaintiffs to admit the defendant *Brady* to set up and prove a defence, which, as a matter of strict right, might displace their equitable claim to this land; or of hardship upon *Brady* to deny his application; taking into account also the conduct of the parties on both sides. I think the greater hardship would be upon the plaintiffs; in short that it would not be in furtherance of justice to grant the defendant's application, I therefore refuse it and adjudge upon the case, upon the pleadings and evidence now before me; and upon them, as I have already said, the plaintiff's case is established, and the defence fails.

Judgment.

The plaintiffs are therefore entitled to a decree declaring them entitled to the fifty acres of land in question, and as against *Brady* to a conveyance with costs. It is made a question whether *Cadmus Hosea* was of age at the time of his conveyance to *Ostrander*, appointee of *Brady*. The plaintiffs may, if they desire it, have an inquiry upon that point, and if *Cadmus Hosea* was not then of age he is to convey to the plaintiffs. He may be willing to convey without such inquiry. If not, and it turns out upon inquiry that he was not of age, he should bear the costs of the inquiry. As to the plaintiffs' costs in the cause, I do not see that I can make a decree against *Hosea* for those costs. By his answer he denies notice of the purchase by *Brown*, or that *Brown* or the *Princes* were in possession, and nothing is proved

1869. Prince v. Brady.

against him. It may be that finding among his father's papers, a patent to him for the whole hundred acres, he assumed that his father purchased the whole, and believed, as he swears that he believed, that he was equitably as well as legally entitled. If, in that belief, and being of age, he sold to *Ostrander*, it would be unjust to visit him with costs, and I do not see how I can deny him his costs. If he was under age, he did what was wrong, and enabled *Brady* to do a wrong; and I should refuse him his costs. If he was of age, I will make this order as to costs; that *Brady* pay such costs as would be payable by him if he were sole defendant; and that plaintiffs pay *Hosea* his costs of answer and any other costs, if any, which he has incurred.

ARMOUR V. SMITH.

Quieting Titles Act—Rights of contestants under.

An appeal from a decision of the referee under the Act for quieting titles may be to a single judge.

A contestant who is in possession of the property claimed should be permitted to point out defects in the claimant's *prima facie* title, before being called upon to prove his own title to the property.

This was an appeal by the contestant, *Sandford Smith*, from the ruling of the referee of titles, under the circumstances stated in the head note and judgment.

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

Mr. *S. Blake*, contra.

Judgment.

SPAGGE V. C.—The referee reports that the petitioner having brought in his claim, and the contestant coming in and claiming title to 50 acres of the lot, and

appearing by his solicitor to prove title thereto, his solicitor refused to shew any title thereto, "claiming a right before doing so to review and contest the title of the claimant," whereupon, as the Referee reports, he dismissed his counter claim with costs. I think that in this the referee was wrong. I cannot doubt that it was open to the contestant to point out if he could, that the claimant had not made out such a *primâ facie* case as to entitle him to call upon the contestant to shew his title. Whether the claimant had made out a sufficient case is another thing.

1869.

Armour v. Smith.

Upon this appeal the parties have entered into that question to some extent. The contestant's position is that he is in possession under a *bonâ fide* claim of title of the portion of the lot claimed by him; and that such being his position he is entitled to call upon the claimant to prove his title, and he points out certain defects as he alleges, patent in the title, upon which the petitioner founds his claim.

Judgment.

In regard to the contestant's own position. The claimant in his affidavits states that "*Sandford Smith* (the contestant) is in occupation of part of the said land on which he has erected a frame barn worth about $250, which is the only building erected on the part thereof occupied by him." In the sworn answer put in by the contestant he states that he is the owner in fee simple in possession, and otherwise well entitled to the land claimed by him, and he states that he claims the same, first, by length of possession; secondly, by conveyance from one *William Solomon:* and he also asserts title otherwise. By the abstract of title brought in by the claimant it appears that the person under whom *Solomon* claims, one *Whitaker*, conveyed the whole of the lot in question to one *Russell* in January 1824, the conveyance being registered 6th February in the same year; *Solomon* acquiring title to the same land by con-

1869.

Armour v. Smith.

veyance dated 6th February, 1834, registered 10th October, 1853. The conveyance to the contestant of the 50 acres claimed by him is dated and registered 21st December, 1861. I refer to the chain of title from *Whitaker* to the contestant not as shewing what is sometimes called a paper title, but as evidence of the nature of his possession. As to the fact of possession and of what; in the absence of anything to the contrary, I think it must be taken to be of the 50 acres claimed by him. *When* possession was taken does not appear in proof, though the contestant claims length of possession as one of his grounds of title. The claimant does not state possession of the 50 acres in any one under whom he claims, or in any one other than the contestant. He states possession of the residue of the land in himself in much the same terms as he admits possession of a portion in the contestant.

Judgment.

Upon a trial in ejectment I suppose it would be clear that upon the contestant shewing such possession as is shewn here, the claimant would be put to shew his title. For this the language of Chief Justice *Cockburn* in *Asher* v. *Whitlock* (and which I have quoted elsewhere) is sufficient. "But I take it as clearly established that possession is good against all the world except the person who can shew a good title; and it would be mischievous to change this established doctrine." The defendant claiming title as he does, would not come within the provisions of the Ejectment Act, 4 Wm. IV.(*a*) which takes out of the general rule defendants in ejectment who are "merely intruders." The position of the contestant, being what I have described, I cannot agree that it was competent to the referee to put him without more to prove his title.

It is not absolutely necessary that I should go further, as the matter must go back to the referee, but I may

(*a*) C. S. U. C. p. 304.

1869.

Armour v. Smith.

add a few words in reference to the alleged defects in the claimant's title pointed out by the contestant. One is that in the conveyance from the grantee of the Crown to *Kay & Smith* they are described as merchants trading under the firm of *Kay & Smith*, and that land so conveyed would be personal property which would go to the personal representative—that *Kay & Smith* would not take as joint tenants with benefit of survivorship as in the case of an ordinary conveyance to persons not partners. It might be so or it might not, we have only the memorial of the conveyance and know nothing beyond what the memorial discloses, we do not know with what funds or for what purposes the property was acquired. The conveyance is as old as March, 1805. At law, as the law then stood, it passed to the grantees as joint tenants and as real estate, and at that date the judicial decisions of the Court of Chancery in England were, that in equity it retained the same character. It was more than thirty years after this deed was made before there was a court of equity in this province. *Smith* died in 1815, intestate, and insolvent as stated by his heir-at-law; and he adds his belief that the land conveyed was not partnership property, but that *Kay* was entitled thereto absolutely. *Kay*, it seems to be understood, survived *Smith*. It could only be in equity, if at all, that the land was other than real estate vested in *Kay & Smith* as joint tenants, and I understand that my brother *Mowat* has held that other land conveyed by the same deed is to be held as real estate passing to *Kay & Smith* as joint tenants. As the question may come up more formally, I abstain from expressing any decided opinion upon it.

Judgment.

Another alleged defect is, that there is no evidence of one of the conveyances in the claimant's chain of title other than a memorial signed by the grantee, and registered in the usual manner. Upon going over the referee's book I do not find that this objection has any

1869.

Armour v. Smith.

foundation in fact. If it has, it will come up before the referee. My judgment is, that as the matter now stands before the referee it lies upon the claimant to prove his title.

I have omitted to notice one objection taken to this appeal, namely: that it lies only to the full court, and not to a single judge, and that my brother *Mowat* had so decided. He informs me he has decided otherwise. I will follow his decision. The costs will be costs in the cause.

BOARDMAN v. WROUGHTON.

Injunction, affidavits in support of.

On a motion for injunction to stay the wrongful selling of property by the legal owner, the plaintiff's affidavits alleged that the principal defendant had sold, or pretended to sell, to his son, who was also a defendant, but by mistake no injunction was asked against him. No threat of any further sale was alleged. The defendant filed no affidavit in answer:

Held, that the allegations were sufficient, and an injunction was granted.

Motion, by plaintiff, for injunction and receiver.

Mr. *English*, for the plaintiff.

Mr. *Moss*, contra.

Judgment.

SPRAGGE, V. C.—The plaintiff's case, verified by his own affidavit, is not answered. The question therefore is, whether upon his own shewing, he has made out a case for the interference of the court.

He shews an agreement to enter into a partnership between himself and *Thomas Wroughton*; and something

done on the part of each in pursuance of that agreement, an erection of a building by *Wroughton* and the placing in it of a steam engine by the plaintiff; and he alleges that it was agreed that the land and building, and I assume the engine put into it by himself, should become partnership property, and be used for partnership purposes. The legal title was, and remains in *Wroughton*.

1869.

Boardman v. Wroughton

The plaintiff alleges that *Wroughton* has always refused to carry on the business for which the agreement for partnership was entered into, and has locked up the building and excludes the plaintiff from it. Further, that *Wroughton* has sold or pretended to sell the partnership premises to his son the defendant *Jay Wroughton;* and he swears to his belief that it was only a pretended sale. He asks for an injunction, but only against *Thomas Wroughton:* he asks also for a receiver.

No affidavits are filed on behalf of either of the *Wroughtons*, but their counsel contend that the plaintiff is in this dilemma, that no injunction can issue against *Jay*, as the notice of motion does not ask it; and that none can issue against *Thomas* inasmuch as it is not alleged that he has made any threats to alienate the property. I agree that no injunction can issue against *Jay*. As to *Thomas*, he has done more than make threats, he has actually made a sale, either a real or pretended one, to his son. What he has done once he may do again if in his power; and it does not lie in his mouth to say that he should not be enjoined from doing that which he had not even threatened to do.

Judgment.

It is urged further that an injunction against him would be futile, if, as the plaintiff alleges, he has already sold the property. But the plaintiff does not so allege; but, that he has sold, or pretended to sell. I do not think this is to be taken as an allegation that he had made a real and effectual sale. It is an allegation as to

1869.

Boardman v. Wroughton.

a fact lying within the knowledge of the defendant not of the plaintiff, and is in a shape, to lay a foundation for the statement by the plaintiff in his affidavit of his belief that the sale was a pretended one. This allegation in the bill, and this affidavit being unanswered, it is not for the court to assume that there has been a valid and effectual sale; and, it is not alleged that any conveyance has been made.

A sale by *Thomas Wroughton* would clearly be a wrong to his co-partner; and it is a wrong which from the legal estate being in him, he would be able to perpetrate: his disposition to do the wrong, he has sufficiently manifested, and he ought to be enjoined from doing it, unless it is clear that an injunction would be idle and futile. I do not think that this is clear; he may sell and he may convey to another with the consent perhaps of the son; and so embarrass the plaintiff in the conduct of his suit, if not in his equitable title.

Judgment.

The plaintiff's case of exclusion by *Thomas Wroughton* is not answered. I think an injunction should go in the terms of the notice of motion as to alienation and exclusion.

I do not think, as I intimated at the argument, that it is a case for a receiver; there is in fact nothing to receive.

The not asking for an injunction against *Jay* as well as *Thomas Wroughton* was a strange omission. It is not well that relief should be asked for, piecemeal, and if an injunction should hereafter be asked against *Jay*, the plaintiff ought not in any event to have the costs of both applications.

1869.

McMillan v. Bentley.

Statute of Frauds—Sufficient note in writing.

The owner of land gave parol authority to an agent to sell, the agent accordingly entered into a parol contract for the sale, and communicated the fact and the particulars of the contract to his principal by letter.

Held, a sufficient note or memorandum in writing to satisfy the Statute of Frauds.

Examination of witnesses and hearing at Lindsay.

Mr. *Dennistoun*, and Mr. *Hudspeth*, for the plaintiff.

Mr. *James McLennan*, for defendant *Bentley*.

Mr. *Blake*, Q. C., for defendant *Neads*.

Spragge, V. C.—If there was a contract for the sale of the property in question made by *Russell* to defendant *Neads* sufficient within the Statute of Frauds; and if it was a contract which *Russell* had authority from *Bentley* to make, then there was a contract binding upon the vendor *Bentley*, prior in point of time to the contract which the plaintiff's bill seeks to enforce. Judgment.

The point, that *Russell* had authority from *Bentley* to sell upon the terms upon which he contracted to sell to *Neads* is established by the evidence of both *Bentley* and *Russell*. The authority to sell was by parol. The contract of sale was also by parol. The question is, whether there was a sufficient note or memorandum in writing signed by the vendor, or some one by him authorized to sign the same, so as to satisfy the Statute of Frauds.

What is set up as a note or memorandum in writing, is a letter written and addressed by *Russell* to *Bentley*,

1869.

McMillan v. Bentley.

informing the latter of his having sold to *Neads* the property in question. The description of the property and the terms of sale are sufficiently definite. No question indeed is made upon those points. The only question is whether a letter between such parties is a compliance with the Statute of Frauds. It is to be observed, however, that it was not merely a communication from the agent to his principal; but the letter before being sent was read over to *Neads*, who remarked to *Russell* that he was his agent in the matter, as well as the agent of *Bentley*. If this letter without the answer of *Bentley* was sufficient there is no question as to the priority of contract; for the letter was written on the 11th of January, 1869, the day on which the contract of sale was made, and was mailed to *Bentley* in the presence of *Neads* on the same day, and reached *Bentley* on the 12th or the morning of the 13th; while the telegram and letter of acceptance by the plaintiff (assuming them to be sufficient, which I do not determine) are dated on the 14th of the same month, and were sent the same day.

Judgment.

It is quite clear that the note or memorandum in writing need not, in order to its validity, be between the parties to the contract. Lord *St. Leonards* (*a*) lays it down that a note or letter written by the vendor to any third person containing directions to carry an agreement into execution will be sufficient: and he refers to several cases where specific performance was decreed upon letters written by a vendor to his solicitor, or to a scrivener. It is clear, moreover, that the letter need not be a letter of instructions; nor is there any reason that it should. The old case of *Child* v. *Comber* (*b*) is an instance of this. A person entitled to an interest in a lease, held under the Dean of St. Pauls, agreed to sell it; and in order to facilitate the purchaser's dealing

(*a*) V. & P. 14 ed. 139. (*b*) 3 Swan. 423 n.

1869.

McMillan v. Bentley.

with the Dean, in regard to the property, wrote to the Dean informing him of the agreement; and this was held sufficient to take the case out of the statute. And in the same case, the Dean having made an agreement with the purchaser, wrote to his agent informing him of the fact, and desiring him not to treat with any other person, and this was held sufficient as against the Dean. The case of *Seagood* v. *Meale* and *Leonard* (*a*) is another instance. It was the case of a letter written by the owner of land to his mortgagee, informing him of his sale to a third person. The letter was held to be too indefinite, not specifying the subject of sale, nor the price, and being uncertain otherwise; but it was not contended that if the terms of the letter had been sufficiently definite it would not have been sufficient within the statute. The point was also discussed and considered in the Queen's Bench in *Leroux* v. *Brown* (*b*): and in *Goodwin* v. *Fielding* (*c*) before the Lords Justices. The Lord Justice *Knight Bruce* asked, "Does the statute require the memorandum to be addressed to any person in particular? Does it require more than a memorandum or note in writing?"

Judgment.

In *Barkworth* v. *Young* (*d*) a statement contained in an affidavit was held to be a sufficient note or memorandum within the statute. In that case Sir *Richard Kindersley* well explains the object of the statute. "Its object was to prevent the mischief arising from resorting to oral evidence to prove the existence and the terms of an alleged verbal agreement in certain specified cases, and among the rest an agreement made in consideration of marriage, it having been found that in actions and suits to enforce such agreements, they were (in the language of the preamble) 'commonly endeavoured to be upheld by perjury and subornation of perjury.' It is obvious

(*a*) Prec. in Chy. 560.
(*b*) 12 Q. B. 819, 20, 27.
(*c*) 4 D. M. & G. 90.
(*d*) 4 Drew. 1.

1869.

McMillan v. Bentley.

that there can be no ground to apprehend any such mischief in any case in which you have, under the hand of the party sought to be charged, a written statement of the agreement which he made, and of all its terms; and for this purpose it can signify nothing what is the nature or character of the document containing such written statement, provided it be signed by the party sought to be charged; whether it was a letter written by that party to the person with whom he contracted, or to any other person; or a deed or other legal instrument, or an answer to a bill, or an affidavit in Chancery, or in Bankruptcy, or in Lunacy. Thus where a verbal agreement was made for the sale of land, a letter written by the vendor or purchaser to his own solicitor or agent, stating the terms of the agreement, and not intended for the inspection of the other party, has been held to be a sufficient note or memorandum within the intent of the statute: *Rose* v. *Cunynghame* (*a*), *Welford* v. *Beazeley* (*b*). I would refer also to *Bradford* v. *Roulston* (*c*) in the Irish Court of Exchequer.

Judgment.

I think the case before me falls within the principle of the authorities to which I have referred. A proper test is, putting the treaty with *McMillan* out of the case, and supposing a bill filed by *Neads* against *Bentley*, would the bill lie. I see no reason why it should not. If the statute required the contract to be in writing there would be difficulty; but the statute requires only a note or memorandum of the contract to be in writing; and that, as an essential to a remedy, not as an essential to the contract itself; as was very ably discussed in *Leroux* v. *Brown*; and it matters not, as is apparent from the cases, in what shape it is, so as there is a note or memorandum in writing, signed by the party to be charged or by his agent. Here was a contract made by

(*a*) 11 Ves. 550. (*b*) 3 Atk. 503.
(*c*) 8 Ir. C. L. Rep. 468.

1869.

McMillan v. Bentley.

an authorized agent, or more strictly a contract made by *Bentley* through his agent; and a note or memorandum in writing of that contract made and signed by that agent. Its being in the form of a letter addressed to a third person is no objection to it. Its being addressed by the agent to his principal cannot, I conceive, make any difference. It was objected in one of the old cases against a letter written by the vendor to his agent or solicitor that it had not the character of a note or memorandum in writing; that it was the same as if the writer of the letter had put it in his desk; but the court thought otherwise, and in this case the letter written by *Russell* is scarcely open to that objection; for it was communicated to *Neads* before it passed from the hands of *Russell*. I see no principle upon which I can distinguish this letter from the letters which have been held to be sufficient as a note or memorandum of contract within the statute. It contains all the essential elements; and its custody, or to whom addressed, are unessential points.

Judgment.

Points were raised, as to the insufficiency of the letters which passed between the plaintiff and *Bentley* to constitute a contract of sale. I have not found it necessary to determine these points, because if there was a prior contract with *Neads*, that contract must prevail, even assuming the plaintiff's contention to be right as to a direct contract between himself and *Bentley*.

A doubt occurred to me at the hearing as to the effect of the treaty between *Bentley* and the plaintiff, upon the agency for sale in *Russell*; but the 24th section of the Property and Trusts Act removes all difficulty on that score.

The plaintiff's bill must be dismissed and with costs.

(*a*) 29 Vic. Ch. 28.

1869. McMillan v. Bentley.

I should deprive the defendant *Bentley* of his costs if I found that he had been guilty of any misconduct in the matter, but I find none, and the plaintiff has chosen to enter upon this litigation with his eyes open, as appears by the evidence of *Russell*. He must take the ordinary consequence of failure.

COLE v. GLOVER.

Demurrer—Multifariousness—Want of equity.

A bill filed by an administrator to obtain possession of certain chattels outstanding in the hands of a third party, and for administration of the estate, *held* multifarious both as against such third party and the persons interested in the estate.

Trustees and executors stand in a different position from creditors or *cestuis que trustent* as to the right to have the estate administered in this Court; and cannot, without experiencing some difficulty in carrying out the trusts or administering the estate, file a bill for that purpose.

Statement.

The bill in this cause was filed by *James Cole* as administrator of the estate of *William Snider*, deceased, against *David Glover*, and *Julia Anne*, and *Elias Wallbridge*, and stated that the said *Snider* died on the 3rd December, 1867, intestate, leaving the plaintiff, the defendants *Wallbridge*, and several other persons named in the bill, his heirs-at-law; that letters of administration were granted to the plaintiff on the 11th February, 1868; that the intestate was possessed of a certain mortgage security over certain lands given by the defendant *Glover*, upon which default had been made, but which mortgage the defendant had in his possession; that the defendant *Glover* was in possession of other parts of the intestate's personal effects, and prayed that *Glover* might be ordered to deliver up to the plaintiff the said mortgage deed and other personal property; that the defendants might be restrained

from parting with or dealing with the estate; for administration of the estate, and for costs. 1869. Cole v. Glover.

The bill was filed on the 11th March, 1868.

The defendant *Glover* demurred for multifariousness, and the defendants *Wallbridge* for multifariousness and want of equity.

Both sets of demurrers were heard together.

Mr. *Spencer*, for the defendant *Glover*.

Mr. *Rae*, for the defendants *Wallbridge*.

Mr. *Hodgins*, for the plaintiff.

Mr. *Spencer*, on the ground of multifariousness, argued, that *Glover* having nothing to do with the administration of the estate, had no interest in the accounts or distribution nor in any part of the reference, he is joined as a defendant merely because it is alleged he is in wrongful possession of part of the personal assets of the estate, and the Court is asked to compel him by decree to deliver up such assets to the administrator. Therefore it is clear that *Glover* is able to say, "he is brought as a defendant upon a record with a large portion of which, and of the case made by which, he has no connection whatever": per Lord *Cottenham* in *Campbell* v. *McKay* (*a*). The general doctrine is also stated by Lord *Redesdale* thus: "The Court will not permit a plaintiff to demand by one bill several matters of different natures against several defendants (*b*)." The rule thus stated by Lord *Cottenham* and Lord *Redesdale* is in accordance with both the older and later authorities: *Salvidge* Argument.

(*a*) 1 M. & C. 618. (*b*) Mitford on Pleading, 5th Ed. 208.

1869.
Cole v. Glover.

v. *Hyde* (*a*), *Ward* v. Duke of *Northumberland* (*b*), *Ward* v. *Cook* (*c*), *Shackell* v. *McCaulay* (*d*), *Pearse* v. *Hewit* (*e*), *Doran* v. *Simpson* (*f*), *Dun* v. *Dun* (*g*), *Marcos* v. *Pebrer* (*h*), *Whalley* v. *Dawson* (*i*), *Reynolds* v. *Johnson* (*j*), *Miller* v. *Crawford* (*k*), *Lidbitter* v. *Long* (*l*), *Plumb* v. *Plumb* (*m*), *Mole* v. *Smith* (*n*), *Solomon* v. *Laings* (*o*), *Bignold* v. *Audland* (*p*).

The apparent exceptions to this rule will in general be found to proceed on the ground of the connection of the demurring defendant with some part of an entire case against another defendant, or as is stated by the Court in *The Attorney General* v. *Poole* (*q*), "Where the case against one defendant is so entire as to be incapable of being prosecuted in several suits, yet if another defendant is a necessary party in respect of a portion only of that case, he cannot demur for multifariousness." *Turner* v. *Robinson* (*r*) proceeds on this ground, as appears by the language of Lord *Cottenham* in *Attorney General* v. *Poole*. This relaxation of the rule will not be extended: *Saxon* v. *Davis* (*s*). But here the case made against *Glover* is separate and distinct from the case against the other defendants; while no part of the case against the latter is connected with *Glover*, and these separate matters cannot be litigated in one record.

Argument.

He also referred to *Connor* v. *Bank of U. C.* (*t*), *Loucks* v. *Loucks* (*u*).

(*a*) Jac. 151.
(*b*) 2 Anst. 469.
(*c*) 5 Mad. 122.
(*d*) 2 S. & S. 79.
(*e*) 7 Sim 471.
(*f*) 4 Ves. 651.
(*g*) 2 Sim. 329.
(*h*) 3 Sim. 466.
(*i*) 2 Sch. & Lef. 367.
(*j*) 7 L. J. Ch. 45.
(*k*) 9 L. J. Ch. N. S. 195.
(*l*) 8 L. J. Ch. N. S. 221.
(*m*) 4 Y. & C. Exch. 345.
(*n*) Jac. 494.
(*o*) 12 Beav. 339.
(*p*) 11 Sim. 23.
(*q*) 4 M. & C. 17.
(*r*) 1 S. & S. 313.
(*s*) 18 Ves. 72.
(*t*) 12 Gr. 243.
(*u*) 12 Grant 243.

1869.

Cole v. Glover.

Mr. *Rae*, as to want of equity, argued that the plaintiff asked for inconsistent relief in praying the assistance of the Court to reduce the estate into his possession and at the same time to divest him of it; that the plaintiff claimed in inconsistent characters as administrator and next of kin: *Thomas* v. *Hobbs* (*a*); that as next of kin the bill was filed too soon; as administrator he had shewn no grounds for relief: *Noakes* v. *Fish* (*b*), *Rawlings* v. *Lambert* (*c*), *White* v. *Cummings* (*d*), and our statutory enactments are against administrators applying for administration even in cases of difficulty: 29 Vic. ch. 28, sec. 31.

Mr. *Hodgins*, in support of the bill, argued that by demurring the defendant *Glover* admits the allegations in the bill placing him in the position of a wrongdoer, and that he ought not to be heard to complain that the bill asks for other relief. That it is necessary to get in the estate in order to its administration, and part of it is in the hands of *Glover*, and in this way the case against him is connected with the residue of the bill. That if the suit had been confined to getting the property out of *Glover's* possession the other defendants would have been necessary parties. Argument.

As to the equity of the bill, the administrator has a right to have the estate wound up in Chancery, subject only to this, that if it appears to be an unnecessary suit he will have to pay the costs, and that it is premature to discuss the question of costs until after the accounts are taken.

Mr. *Spencer*, in reply. The question whether *Glover* is a wrongdoer or not is one to be litigated, and *Glover* contends he is entitled to a separate record for the pur-

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(*a*) 8 Jur. N. S. 125.
(*b*) 3 Drew. 744.
(*c*) 1 J. & H. 462.
(*d*) 3 Gr.

1869.

Cole v. Glover.

pose of that litigation. In a suit against *Glover* merely to recover possession of the personal estate, if a bill would lie for that purpose, which is denied, the other defendants would not be necessary or proper parties: *Saville* v. *Tancred* (*a*), *Franco* v. *Franco* (*b*), *Calvert* on Parties, p. 8, *et seq.*

VanKoughnet, C.—There is no precedent for such a bill as this, seeking the administration of the estate, as one of the next of kin and administrator; and also seeking to make a wrongdoer, a stranger, accountable in the same suit for the wrongful detention of personal property of the estate. *Glover* has nothing to do with the general administration of the estate. The plaintiff, as administrator, seeks from him possession of a mortgage besides certain chattels, and it is doubtful whether he is not in this suit seeking also foreclosure of the mortgage though he does not pray for it. If he can properly make this party a defendant in the administration suit, equally might he make defendants, all debtors or parties liable to account to him as administrator. The demurrer of the defendant *Glover* for multifariousness must be allowed with costs. The bill is filed against the other defendants as next of kin of the intestate, and prays for an administration of the estate, and that these defendants may be restrained from intermeddling with it though there is no charge that they have attempted to do so. They could not have had much time so to act, for the intestate died in December, 1867. Letters of administration issued on the 11th February, 1868, and the bill was filed on the 11th March following. Why such haste, or why the necessity for administration through this Court does not appear. The defendants, the next of kin, have demurred for want of equity, and also for multifariousness. This case is the converse of *Rhodes* v. *Warburton* (*c*), in which it was held

Judgment.

(*a*) 1 Ves. 101. (*b*) 3 Ves. 75. (*c*) 6 Sim. 617.

1869.

Cole v. Glover.

that legatees might unite with the executor, as plaintiffs, in a suit to recover property to which they equally with himself as a legatee, were entitled. But it is a different thing to bring legatees unwillingly before the Court for the administration of an estate, and make them parties to a suit for the recovery of assets which the administrator alone should prosecute. They have not specially demurred on this ground, however, and I do not see that in this case they can in any way be damnified by the administrator seeking to recover the property in the hands of *Glover* in order that it may be administered as part of the assets of the estate, and at the same time seeking general administration. The defendants are interested in both matters, and if they should incur additional costs the plaintiff may be ordered to pay them.

As to the demurrer for want of equity, I allow it on this principle, that I do not think that an administrator or an executor has a right to come to this Court for the administration of an estate without shewing some necessity therefor. He assumes the duty of administration which he is not entitled to call on this Court to discharge unless there be some impediment or some difficulty in his way. To permit such a course would be to tell every such person, every trustee, that the moment after he accepts a trust he may relieve himself from its burden by throwing the whole estate into this Court, and subjecting it to the costs of administration here, when he himself has undertaken that duty. Here the bill filed in March alleges the death of the intestate in December, administration in February, and that there are next of kin. This is the whole statement. It is time to put a stop to the practice of rushing into this Court with trust estates, unless for some good reason entitling the trustee to protection here. In *Story's* Equity Jurisprudence, *Spence's* Equity Practice, and *Toller* on Executors, it is said that an

Judgment.

1869.

Cole v. Glover.

executor or administrator may seek the aid of this Court where there is difficulty in distributing the assets, disputes among creditors, legatees, &c.; but it is nowhere said that this Court is to do deputy for him. Our orders make no difference in this respect. An order should not go at the instance of the administrator without some reason being given. The right of a legatee or *cestui que trust* is subject to different considerations.

I allow both sets of demurrers with costs.

Wood v. Irwin.

Fraudulent conveyance.

A sale which is made with intent, on the part of both vendor and vendee, to defeat the creditors of the former is void in equity, whether the sale was or was not intended to take effect as between the parties to it.

In a suit by a creditor to set aside a deed on the ground (amongst other things,) that it was made to the defendant on a secret trust for the grantor and to defeat his creditors, it was *Held* that the grantor's statements after the conveyance that it was a real transaction, were admissible evidence for the defendant, but were not entitled to much weight.

Examination of witnesses and hearing at Lindsay, at the Autumn Sittings, 1869.

Mr. *Blake*, Q.C., and Mr. *McMurrich*, for the plaintiff.

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

Judgment.

Spragge, V.C.—This bill, filed by the assignee in insolvency, of one *George Pogue*, impeaches a conveyance of certain land, a farm held and occupied by *Pogue*

1869.

Wood v. Irwin.

subject to certain mortgages. The conveyance was to the defendant *Robert Irwin*, and was made 12th February, 1862. The consideration expressed is $750. The purchase was subject to the mortgage; and four promissory notes each for $187.50 were given by *Irwin* to *Pogue* as for payment of the consideration. Two of those notes are put in, bearing the same date as the conveyance, and they are made payable, one at five, and the other at six years from date, with interest at six per cent. The bill states that notes were given for various sums extending over the period of eight years: the answer states that four promissory notes were given, but does not state when they were payable, or whether or not, as stated in the bill. Whether the two not produced were payable at three and four, or at seven and eight years, is not very material.

Judgment.

The case made by the bill is, that the conveyance was made by both parties to it in order to defeat the creditors of *Pogue;* that it was a colorable not a real transaction, the conveyance being upon a secret trust for the benefit of *Pogue*, and no consideration money being, or being intended to be, paid. The impression that I had at the hearing was, that the transaction was not merely colorable, but that an actual transfer of property was intended, although the object of both parties was to defeat the creditors of *Pogue*. I was asked for leave to amend in order to the plaintiff's making the latter case. This was resisted, on the ground that under the case of *Smith* v. *Moffatt*, in appeal, such a transaction is not avoided by the statute of Elizabeth; and, that it was a case essentially different from that made by the bill. I reserved the question of amendment as well as the other questions in the case.

Upon examining the evidence, oral and documentary, especially the latter, more minutely than I was able to do at the hearing, I am a good deal shaken as to the

1869. Wood v. Irwin.

correctness of my impression that the dealing between the parties was not merely colorable. That, however, is of the less importance, because I think that the amendment asked for, should be allowed, and that the evidence establishes convincingly, that the intent of both parties was to defeat creditors.

As to the law upon that point, I do not think that *Smith* v. *Moffatt* (*a*) can be considered as settling the law adversely to what had theretofore been the received doctrine in courts of equity. One of the learned judges of the Court of Appeal certainly held the law to be against that doctrine; but others again avowedly affirmed the decision in the court below on the ground that the point, whether the conveyance there in question was made, with the intent to defeat creditors, was in fact left to the jury, and I think the judgment of the learned Chief Justice of Appeal proceeded upon that ground. I do not know, and I do not believe that a majority of the court meant to decide the point adversely to the doctrine of *Bott* v. *Smith* (*b*).

Judgment.

I think it is proper to allow the amendment in this case, because, looking at the defendant's answer and to the evidence given in the case, and looking also at the way in which the case is put by the bill, I think the defendant will not have been put to a disadvantage. The bill sets out the indebtedness of *Pogue* beyond his ability to pay; and that *Pogue* and *Irwin* entered upon a fraudulent plan in order to defeat *Pogue's* creditors; and that with that intent and object the conveyance impeached was executed. Then after alleging that it was colorable and upon a secret trust; it proceeds to say that the conveyance was executed solely upon and for the fraudulent object, intent and purpose of hindering, defeating and delaying the creditors of *Pogue* in

(*a*) 28 U. C. Q. B. 486. (*b*) 21 Beav. 511.

1869.

Wood v. Irwin.

their remedies against him; and to enable him to enjoy the rents and profits of the farm, and to convey and dispose thereof, and to apply the proceeds thereof to his own use as he should see fit. Omitting the allegation as to the conveyance being colorable and made upon a secret trust, the allegations of fraudulent intent are sufficient within *Bott* v. *Smith*. I am not sure indeed that the bill may not be read in this way; as making a case of a fraudulent intent to defeat creditors carried out by the conveyance of his property to a third person; and adding an allegation, not of the essence of the plaintiff's case and not necessary to be proved, that the transaction was colorable only, not real; and upon a secret trust. In this view an amendment would not be necessary, but the plaintiff may take leave to amend if he desires it. The answer meets such a case as would be made by the amendment, whether put as a primary or as an alternative case. It denies the fraudulent plan imputed by the bill, and denies all intent to defeat creditors, denying knowledge of *Pogue's* being indebted as charged; and it insists upon the reality and good faith of the transaction. The evidence covered the whole ground.

Judgment.

Besides impeaching the conveyance of land, the bill impeaches also two judgments recovered by *Irwin* against *Pogue*, by collusion and without consideration, as it is alleged, upon which judgments executions were issued and chattels of *Pogue* were sold, and under one of which, two of the notes given for the alleged purchase money were taken in execution by the sheriff and received by *Irwin* on account of his execution debt. It will be convenient to consider these different transactions together.

Pogue and *Irwin* were connected by marriage; *Pogue's* wife being a sister of *Irwin*. At the time of the transactions impeached *Pogue* was sued by the Bank of Upper Canada, and by one *Lennon*, and he was

1869. Wood v. Irwin.

also, as appears by the evidence, indebted to *Irwin*. Three days after the giving of the conveyance and of the notes for the alleged consideration, *Irwin* sued out a summons for debt against *Pogue*. The particulars of his claim indorsed were for several promissory notes, amounting in the aggregate to $455 besides interest. Of these the largest was for $255.48, payable at three days from 1st February, 1862, and the other notes were, as I gather from the evidence, also in his hands at the time of the execution of the conveyance. The whole claim at that time as indorsed on the summons was £117 11*s*. = $470.20.

This appears to me quite sufficient without going further to establish the fraudulent intent to defeat creditors. I assume that the debts for which the summons was indorsed were really due: that *Pogue* really owed *Irwin* $470. What is done under these circumstances? Judgment. The debtor sells to his creditor his farm, or rather his equity of redemption in it, for $750; only $280 more than the amount of his indebtedness. The natural ordinary course would be to allow the indebtedness on the purchase money. The debt would be wiped out and the purchaser stand debtor for the difference; and if there had not been some secret purpose to answer, this would almost certainly have been the course of dealing. For the debtor to give and the creditor to take several years for the payment of the purchase money, and at the same time (for the difference in time was so short as to make it virtually the same) for a suit to be instituted for the debt, for judgment to be recovered as rapidly as the law would allow, giving priority over other suits, and for the chattels of the debtor to be sold was a transaction so entirely out of the ordinary course of dealing between men, as, unexplained, to be unaccountable. The solution, however, is obvious enough. It has often been observed that it is to be assumed that men intend that which is the natural and necessary conse-

1869.

Wood v. Irwin.

quence of what they do. Other creditors were pressing their claims by suit. The chattels of *Pogue* would be saleable upon their executions, and his land would be also saleable either at common law or (there being several mortgages) in this court. What was done saved the chattels from other executions, and it saved the land also. Is it not a proper intendment that it was done *in order* to save the chattels and the land? Is it not unmistakeably a scheme with that intent. It is unintelligible upon any other hypothesis.

It may be said that it is against that hypothesis that notes were given which might be taken in execution, or the benefit of them obtained by garnishee proceedings; but the conveyance expressed the consideration to be paid, and there was no mortgage; and no evidence, except in the hands of *Pogue*, of there being any notes. The natural inference from what was seen and what was done would be that *Pogue* was indebted to *Irwin* in the whole purchase money, and beyond that in the amount for which he sued him.

Judgment.

This first suit against *Pogue* and the judgment and execution upon it was not all, however. It was followed on the 21st of March by another summons, the particulars indorsed being two promissory notes; one for $300, dated 15th February, 1862, the date of the first summons, and payable three days after date; the other for $128.68, dated 1st March, 1862, payable to one *William Thompson*, or bearer, three days after date. The explanation as to the second suit is, that it was upon promissory notes acquired by *Irwin* after the institution of the first suit. Execution—*fi. fa.* goods, was issued in the first suit 14th March, 1862, and placed in the sheriff's hands on the 17th of the same month. In the second suit *fi. fa.* goods was issued on the 7th of April following, and placed in the sheriff's hands on the same day. The sheriff says that goods were sold under

1869.

Wood v. Irwin.

them as he believes, and a witness, *Samuel Elliot*, speaks of a sheriff's sale, in April, 1862, where, as he says, the chattels were sold. A second *fi. fa.* in the earlier suit was issued on the 27th of March, 1863, was renewed on the 30th of March, 1864, and again on the 27th of March, 1865. The sheriff says that he seized some goods and some promissory notes under this writ; that he made upon the writ $552.62, the notes amounting, with interest, to $459.18, the balance being realized by a sale of the goods; that the goods were sold 4th November, 1865, and that he got the notes a short time before; and he states how he got them: that the solicitor for the plaintiff told him that *Pogue* had the notes, and that *Irwin* had agreed to take them as cash; that he went to the solicitor's office where he found *Pogue*, and then *Pogue* gave him the notes. A witness says that somewhere between 1862 and 1865 he saw two notes given up by *Pogue* to *Irwin*. Two notes, evidently from their dates and amounts, two of the four notes given for purchase money were shewn to him by the defendant, but he was unable, upon being tested, to indentify them as the notes he saw given up. These two notes, produced from the hands of the defendant, are evidently not the notes seized by the sheriff, for one of them is indorsed as paid in full; one by a payment of $168.50 on the 17th April, 1862, and a payment of $20.20 on the 21st of the same month; and upon the other under the latter date, 21st April, is indorsed a payment of $99.34.

Judgment.

In this way *Pogue's* farm and his chattels, and the notes given for the purchase of the farm, found their way into the hands of his brother-in-law *Irwin* There was nothing of any description for the creditors other than *Irwin*. I have looked carefully and minutely into the evidence of the indebtedness of *Pogue* to him. It leads me to the conclusion that the items of particulars indorsed on the first summons, and the item of $128.60

indorsed on the second summons are substantially correct. The note for $300, one of the particulars of the second summons, I think was fictitious. There may have been something beyond the other notes, though I doubt it. The evidence also leads me to believe that the sums indorsed on the two notes given as for purchase money are also fictitious. I have arrived at these conclusions independently of the evidence of *Pogue* himself. I do not discard his evidence altogether, but I receive it with caution and some distrust. He entertained a feeling of resentment against *Irwin*, and upon some points he is contradicted. The evidence of *Irwin* is decidedly against not only the *bonâ fides* but the reality of the whole transaction.

1869. Wood v. Irwin.

Independently, however, of his direct evidence, the circumstances appear to me to lead inevitably to the conclusion that the whole transaction was a scheme to defeat creditors. Further I suspect the reality of the transaction for these reasons. While *Irwin* took upon himself the management of the farm, a course which was expedient for two reasons; one that the transaction might *appear* to be real, the other that *Pogue* had fallen into bad health. Things went on at the farm much as before. *Pogue's* wife continued on the place nominally in a new capacity, *Pogue* also continued there nominally at wages, and his children also continued there. That *Irwin* really managed the place, and with his own means and as owner appears from the evidence. What I suspect is, that he did all this for the sake of his sister and her children; that it was never intended that he should become owner of the farm; and so never intended that he should pay for it. The indorsements of payments on two of the notes, and these being given up to *Irwin*, and the taking in execution of the other two at the suit of *Irwin*, were to my mind new devices to give an appearance of payment of purchase money. The evidence I think fully warrants that conclusion.

Judgment.

1869.

Wood v. Irwin.

As to the chattels, I think there was a sufficient amount of indebtedness established to cover them; and I am not prepared to come to the conclusion that *Irwin's* purchase of the chattels was not real and for himself.

A question was raised as to the admissibility of the evidence of what *Pogue* had said after the conveyance. He had declared upon several occasions that the transaction was real and in good faith, and, that after it, he was the hired servant of *Irwin* at $8 a month; and upon his examination at the instance of creditors before the County Court judge he had reaffirmed the same upon oath. It was objected that these declarations were not against the interest of *Pogue*, that they were in fact part of the scheme to defeat creditors and inadmissible. I received the evidence subject to that objection. My view of the point is, that looking at what strictly and

Judgment.

legally was the interest of *Pogue*, apart from motives that might influence him, the declarations in question were against his interest; that it was his interest that his property should go to pay his debts, thereby diminishing his liability, rather than be kept by one who had paid no consideration, and against whom he would have no redress in law or equity. At the same time the *value* of his evidence would be a fair subject of comment. It might well be urged that the motive which induced the conveyance induced also his declarations in regard to it; that he evidently preferred his property being in even irresponsible hands, to its being applied to pay his debts: all arguments of great weight against the value of his evidence, but still as I think leaving his evidence technically admissible as being against the legal, technical, interest of the witness. In admitting the evidence I have given him the benefit of these declarations of *Pogue*, but I attach no importance to them. I think in making them he was influenced by motives which outweighed in his mind the legal interest which

1869.

Wood v. Irwin.

he had to pay his debts, and his conscientiousness too; that thay were in short part of the scheme to defeat his creditors.

My conclusion then shortly is, that the sale of the farm is void under the statute, the intent of both parties being to defeat creditors, and I incline to think that it was colorable. As to the chattels, *Irwin* obtained priority, and nothing which is against the law appears to have been done in order to his obtaining his priority, his purchasing his debtor's chattels upon his own execution is also not against the law. So far as there was a real debt, and of course only so far, there is nothing against the law in all this. I think it would be unprofitable to direct an inquiry upon this point. I think the evidence establishes indebtedness from *Pogue* to *Irwin* to the extent of the first execution, and to as much of the second as was satisfied by sale of chattels. I think the plaintiff has not established a case for relief as against the chattels.

Judgment.

Irwin is entitled to stand in the place of any mortgagees to whom he has made payments upon their mortgages.

As to the defendants *Dunsford* and *Samuel Irwin* they claim under *Martin*. *Dunsford* who purchased the interest of *Pogue* in the land at sheriff's sale He acquired no interest thereby. The purchase was merely speculative and for a nominal consideration, and, besides according to the judgment of his Lordship the Chancellor, in *Wilson* v. *Shier* (*a*), the interest of *Pogue* was not saleable at common law, the land being subject to several mortgages to different mortgagees.

The decree will be against *Robert Irwin* with costs, without costs as to defendants *Dunsford* and *Samuel Irwin*.

(*a*) 6 Grant, 630.

1869.

PEW v. LEFFERTY.

Will, construction of—Bequest upon condition.

A bequest was made to the son of the testatrix, payable on his attaining twenty-one, provided he continued a steady boy and remained in some respectable family until that time, with a bequest over if he did not do so. Without any reason being assigned therefor, the legatee enlisted and served as a private soldier in the army of the United States during the time hostilities were carried on against the then Confederate States.

Held, that the son by such conduct had not performed the condition upon which alone he was to be paid the legacy given by his mother's will.

The bill in this case was by *John Pew* against *Stanley Lefferty* and *Juliet A. Lefferty*, setting forth that the mother of the defendants had by her will bequeathed certain moneys to the defendant *Stanley* on certain conditions, which, if not fulfilled, the money was to go to his sister, the other defendant. The bill alleged that the defendants each claimed to be entitled to the money, the defendant *Juliet A. Lefferty* insisting that, by reason of her brother having left this country, and having enlisted and served for several years as a private soldier in the army of the United States of America, he had forfeited his right to be paid the legacy.

The case came on to be heard by way of motion for decree.

Mr. *J. P. McCarthy*, for the plaintiff.

Mr. *Sampson*, for the defendant *Stanley Lefferty*.

Mr. *Roaf*, Q.C., for the defendant *Juliet A. Lefferty*.

Judgment. SPRAGGE, V. C.—This is in the nature of an interpleader bill, being a bill by an executor for a direction as to the administration of an estate upon one point. He

says there are no debts, and is willing to incur the responsibility of paying the money in his hands to whichever of the two claimants to it under the will, may in the opinion of the court be entitled to it. He does not ask nor desire an administration of the estate. 1869. Pew v. Lefferty.

The rival claimants to the fund in question appeared before me by counsel, and, at the close of their argument, I stated my opinion to be that *Stanley Lefferty*, one of the claimants, to whom primarily the fund is bequeathed, had not upon his own shewing by his answer fulfilled the conditions, upon the fulfilment of which he was by the terms of the will to become entitled to the legacy, and I gave my reasons for the conclusion at which I arrived.

I have since read the will and the defendant's answer. The condition of the bequest is thus expressed: "I leave to my son *Stanley Lefferty* $800, with the interest accumulating, to be paid to him when he comes of age, provided he continues a steady boy and remains in some respectable family until he is of age: but if he does not do so, if he does not remain steady and in a respectable situation, this money will go to my daughter," &c. I read from the answer of *Stanley Lefferty*, his own account of himself, as follows: "I lived with my mother until I was twelve years of age, when I was forced to hire as a farm servant with Mr. *Andrew Westbrooke*, who then lived near Brantford. I lived with him four years, and could only get to school one winter for about three months, and previously to this I had hardly ever been to school, and I have never had much of even the commonest education. * * My mother died on the 9th June, 1859, when I was about fourteen years of age. I was not living with her at the time, and had not been since I left her when I was twelve years of age. I left Mr. *Westbrooke's* employment in 1860, and went to live with Dr. *Blackwell*, my uncle by my mother's side, and Judgment.

1869.

Pew v. Lefferty.

remained with him until about the 1st of April, 1861, and worked about his place as his servant. I admit that in April, 1861, I enlisted at Niagara Falls, in the State of New York, as a private in the army of the United States. * * * I left the army on the 2nd June, 1865, having obtained an honorable discharge from my lieutenant. I say that I have always been steady, and that my conduct and character have always been good; and I submit and insist that I have never done anything, or been guilty of any conduct which could create a forfeiture of my right to receive the said legacy."

The question is whether *Stanley Lefferty* has performed the condition upon which alone he was to receive the legacy. He puts it, by his answer, that he laboured under disadvantages, that he performed it as nearly as he could, and in fact that he performed it substantially.

Judgment.

Up to April, 1861, there does not appear to have been any breach of the condition. At that date he was, as he says, living with Dr. *Blackwell*, his mother's brother. He says he worked about his uncle's place as his servant, upon what terms he does not state; nor does he say that he was not upon the footing of a near relative in his uncle's family; he was at all events, in the terms of the will, living in a respectable family. So far as appears from his answer, he of his own free will chose to leave his uncle's, and to enlist in the army of the United States. It is a matter of history, that at that date the army of the United States was employed in active hostilities with what were styled the Confederate States. So that he exposed himself voluntarily, as I must infer, not only to the danger but to all the temptations of a soldier's life under such circumstances—chose as a mercenary to engage in a contest with which he had nothing to do. I say as a mercenary, because he assigns no motive for his act, from which I can see that

1869.

Pew v. Lefferty.

he was moved by any other reason than the obtaining of bounty and pay, and perhaps the love of such a life. It is contended on his behalf that the profession of a soldier is honorable, and I am pointed to the latter words of the condition—"in a respectable situation," and it is urged that his being a soldier in the American army was being in a respectable situation. But the whole must be read together: he is to get the legacy provided he remains in some respectable family until of age; but if he does *not do so*—if he does not remain steady and in a respectable situation, the legacy was to go to the daughter of the testatrix: the words "respectable situation" is scarcely a qualification of the words respectable family, especially following the words "if he does not do so;" but reading all together they shew in what sense the testatrix used the words "respectable situation," certainly not in so loose and equivocal a sense as would be necessary to cover the enlistment as a private soldier in a foreign army engaged in putting down a civil war. It is not necessary that I should express any opinion as to the propriety of Canadians enlisting, as many did, in the army of the United States. I am only striving to interpret the mind of the testatrix from the language I find in her will, and seeing whether her son obeyed the condition which she annexed to his receipt of her legacy. I think that what he did was not only not a performance of it, but utterly repugnant to it, and, therefore, that he is not entitled to the legacy.

Judgment.

1869.

Hesp v. Bell.

Will, construction of—Maintenance.

A testator, amongst others, made the following bequest, in favour of his housekeeper, "And further for her the said *H. P.*, to have her own free will to stay on the premises I now at this time enjoy and possess, and for her to have a quiet home and maintenance as long as she may think good to hold to the said privilege."

Held, that *H. P.* had not forfeited her right to the provision by merely ceasing for a time to avail herself of the intended benefit.

Statement.

The bill was by *Hannah Hesp* who sued by her next friend, against *Guy Bell* and *William Hesp*, the husband of the plaintiff, setting forth that one *Joseph Thackeray*, on the 27th March, 1849, duly made his will, whereby, amongst other things, he made the following bequest in favour of the plaintiff, who was then acting as his housekeeper: "And further for her the said *Hannah Pallister* to have her own free will to stay on the premises I now at this time enjoy and possess, and for her to have a quiet home and maintenance as long as she may think good to hold to the same privilege." The fee of the premises he demised to his son *William*, who entered upon and enjoyed the same until in or about the year 1868, when, in a suit brought by one *David Bell* against him the premises were sold to the defendant *Guy Bell*, who entered upon and remained in possession thereof.

The bill further stated that after the death of the testator the plaintiff had married, and had been in the habit of leaving the premises on occasional visits to her friends in neighbouring townships, returning at will, until on or about the 23rd June, 1868, when the defendant *Guy Bell* refused her admittance to the premises, or any support or maintenance therefrom. The prayer was that plaintiff might be declared entitled to her maintenance and support out of and upon the said lands and premises; that defendant (*Bell*) might be ordered

to furnish the plaintiff with a suitable livelihood or means of support upon the lands; or in lieu thereof pay her a sufficient sum of money for that purpose to be fixed by the Master. 1869. Hesp v. Bell.

The defendant *Bell* answered the bill admitting the making of the will, but denying that the plaintiff after having left the premises, shortly after the death of the testator, ever visited the property with a view of residing thereon, or ever visited the property at all, except on one occasion about eleven years before the suit was commenced, when she stopped one night on a visit at *Thackeray's*, when visiting that part of the country; and the defendant submitted that if the plaintiff had any claim it was no other than a right to reside on the premises, and whilst so resident to be supported therefrom; but that she never had any right to reside elsewhere and be supported from the property; and that if she had intended to preserve such right she ought to have continued to reside on the premises, and that after an absence of upwards of twenty years she had abandoned her right to reside on the property.

The evidence adduced established substantially the facts set up by the answer; and the only question discussed was whether the provision in favour of the plaintiff contemplated a continued residence on the premises, or whether in the event which had happened the plaintiff had not forfeited her rights to the intended provision.

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

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

SPRAGGE, V. C.—If the testator had designed so to express himself, in regard to the provision he has made for the maintenance of the plaintiff, as to make his Judgment.

1869.
Heep v. Bell.

meaning as ambiguous as possible, he could scarcely have done it more effectually than he has done. I have read this clause of the will repeatedly, and my construction of it has fluctuated not a little. My first impression certainly was that the testator intended to give to his housekeeper the option of residence and maintenance at his house if she thought fit and for such time after his decease as she might choose to avail herself of it, contemplating at the same time the contingency of her choosing to leave, and affixing to the act of leaving the character of a relinquishment on her part of the provision that he had made for her, and some of the language used favors that construction "to have her own free will to stay on the premises," and the concluding words "as long as she may think good to hold to the same privilege." These words seem to point to the contingency of a termination of the provision, only at the will of the beneficiary certainly, but it supposes the exercise of her will in that way. She may stay if she will, and as long as she will, even all her life time if she shall so will: on the other hand, it may be her will to leave; as long as it may be her will to stay she shall have the privilege; if, on the other hand, it is her will not to stay but to leave, her privilege ceases. That is one way of reading the will, and I think it is the construction which the language used is calculated, as a matter of first impression, to convey to the mind.

Judgment.

I think, however, that it is so in a great measure from the feeling that if a person with a legal mind, or one used to accuracy of expression, desired to give to the beneficiary a general right, of residence and maintenance from time to time, he would have employed different language from that which is used in this clause. The clause is read with a view of ascertaining which of two things is meant: a right to remain as long as *Hannah Pallister* should desire to remain, but a right ceasing upon her leaving: or, on the other hand, a right exercisable

1869.

Hesp v. Bell.

at will from time to time whenever she might think fit to avail herself of the privilege: and it is difficult not to feel that if the latter were meant some such language as that which I have used would have been employed; and if the will had been drawn by a skilled conveyancer, and if any such language as we find in this clause were used, the conclusion would be almost irresistible. The language used certainly would not be used by a skilled conveyancer, or by an educated man, but he might use equivalent words, and if we found equivalent words in a will drawn by such a person, I think the conclusion would be that the privilege was intended to last as long as the woman should choose to remain, and no longer. But the whole will is that of a man *inops consilii;* of a man not skilled in the use of apt words to express his meaning, and in order to get at his meaning, to "spell it out" as it has been termed, one must put oneself as much as possible in the position of the writer, and look at the whole clause as far as may be with his eyes. The word "stay" in the mouth or from the pen of such a man may not mean "remain" but live or abide, and the words "as long as" used by the same person may mean "at such times as" *e. g.* the words "as long as you behave yourself with propriety you are welcome to stay at my house" used by one of the class in life of the testator desiring to serve another might well mean "whenever;" the words that I have put as equivalents, in the mind of such a person as the testator, are not, it must be admitted, the primary meaning of the words used, nor strictly their equivalents, but looking at the whole of the sentence there is much to lead to the conclusion that they were used in the sense that I have indicated. The whole of the language employed manifests the wish of the testator to provide for the future, a home and support for his housekeeper; the words "to have her own free will to stay on the premises, * * * and for her to have a quiet home and maintenance" shew a solicitude to save her from want. It seems to negative the idea of her

Judgment.

1869. Hesp v. Bell.

forfeiting the intended provision by merely ceasing for a while, whether a short while or a long while to avail herself of the intended benefit, and it is hard to conceive a reason that could induce the testator to make this provision determinable, unless there was a continuous residence: he charged land which he devised to his son with a burthen in favor of this woman, her absence for a while would lighten the burthen, and the longer and the more frequent the absence the more would the burthen be lightened. It does not appear that the testator desired the continued residence of the woman for any object personal to his family. The single object of the provision would seem to be to preserve the woman from want.

Judgment.

I desire to act upon the rule, that the words used must be taken in their ordinary grammatical signification, unless it appears from the context or from surrounding circumstances that they were used in some other sense. I have pointed to the language of the context, and to the circumstance of the testator being a layman, and not a master of language, and to the manifest intention pervading the whole of the clause, as indicating that the words relied upon by the defendant were not used in their ordinary meaning, or at all events in their primary meaning, but in the sense which I have indicated.

At the same time, I do not feel very great confidence that my conclusion is the right one, though upon the whole I believe that it is, and I am satisfied that it is the construction which will best effectuate the intention of the testator. The clause, however, is one upon which different minds might very well come to different conclusions, and, as I have said, my own mind has fluctuated upon the point.

I may add that if the testator had contemplated all that has actually occurred, he might very well have

intended all that is in the construction I have put upon his will. I have supposed that he intended a provision, under any circumstances, and in any change of condition that might occur to the person that was the object of his bounty. 1869. Heap v. Bell.

As to costs. It is purely a question between the plaintiff and the devisee of that part of the estate which has been acquired by the defendant *Bell*. There is no one but the defendant, and no fund by, or out of which, I can direct the costs to be paid; they must be paid by the defendant *Bell*.

Burnham v. Galt.

Mortgages—Deficiency.

Where, after the mortgagor had assigned his equity of redemption, the mortgagee, with the concurrence of the assignee, by sale and transfer of the mortgaged premises, put it out of his power to reconvey on redemption by the mortgagor, it was *held* that he could not call upon the mortgagor for payment of any deficiency resulting upon such sale of the estate.

Statement.

The bill in this case set forth that on the 1st of February, 1863, the plaintiff executed a mortgage to the defendant *Cockburn* on lot 8, in the 6th concession of Seymour, for securing the payment of $2000 and interest; subsequently thereto the plaintiff sold and conveyed to defendant *Pentland* the equity of redemption in the said land and premises; and that thereafter, *Cockburn* assigned the mortgaged premises and moneys secured thereon to the defendants *Galt* and *Todd* by way, as it seemed, of sub-mortgage. The bill further stated that *Galt* and *Todd* had, sometimes at the request of *Cockburn*, and sometimes at the request of *Pentland*, and dealing with *Pentland* as the owner of the equity of redemption, released and transferred to divers persons said mortgaged premises.

1869.

Burnham. v. Galt.

The plaintiff submitted that the sale of the equity of redemption to *Pentland* constituted *Pentland* the principal debtor, and the plaintiff a surety merely, and that as such he was entitled to redeem the mortgage premises; and that *Galt* and *Todd* were bound to have so dealt with the property as to have been in a position to reconvey to plaintiff on his paying the amount due; but that they, by the violation of such their obligation, had released plaintiff from his liability as mortgagor to make good the balance of the mortgage money; notwithstanding which *Galt* and *Todd* had commenced an action at law to compel payment of the balance so due. The bill prayed an injunction to restrain such action and other relief in accordance with the above statements.

On the hearing of the cause at Cobourg, it was admitted that all the lands embraced in the mortgage had been sold, and that the assignees of the mortgage and *Cockburn* concurred in deeds confirming the sales. The defendants, under these circumstances, offered to account for all the sales made by them in reduction of the mortgage debt.

Mr. *Blake*, Q. C., and Mr. *J. D. Armour*, for the plaintiff.

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

VanKoughnet, C.—I wrote on detached paper some weeks ago, a judgment in this case, but it has been mislaid. At the close of the case I intimated an opinion that the plaintiff was entitled to be relieved altogether from liability on his covenant to pay the amount secured by the mortgage. I thought it rather a harsh equity to administer, when, as here, the assignees of the mortgage offered to account for the proceeds of the sales of the land, or be charged with its fair value, and I afterwards leaned so far to this as the most equitable course to

Judgment.

take, that I had partially prepared a written judgment to that effect, but further consideration led me to the conclusion that the plaintiff was entitled to the higher measure of relief. I have found no case exactly in point, and all the cases are, in one way or another, distinguishable from this one; but, the underlying principle of all seems to be, that if the mortgagee parts with the estate (otherwise than under a power of sale or the like), so that it cannot be restored to the mortgagor, or be held in security for him or for his benefit, the latter is discharged from personal liability.(a) Here the mortgagee assigned to the defendants *Galt* and *Todd* the mortgage. The mortgagor, the plaintiff, assigned to *Pentland* his equity of redemption in the land subject to the mortgage outstanding. Both sets of assignees joined in making sales of the land without reference to plaintiff, the original mortgagor; they did not require their vendees to redeem or pay off the mortgage given by the plaintiff who had transfered his estate subject to the mortgage.

1869.

Burnham v. Galt.

Judgment.

Decree perpetual injunction and costs.

(a) See principal cases collected, *Fisher* on Mortgages, 354.

1869.

GLASS v. HOPE. [IN APPEAL.]*

Building Society—Forfeiting shares.

In January, 1864, a non-borrowing member of a building society died intestate. No one administered to his estate until June, 1867. In that interval his shares ran into arrear, and in consequence the society in November, 1865, declared the shares forfeited, and carried the amount thereof to the credit of the profit and loss account. After the society had been wound up, or been supposed to have been wound up, and the assets distributed, letters of administration were obtained, and the administrator applied to the society to be admitted as a member thereof, but was refused:

Held (1), that the proceeding of the society to forfeit the shares in the absence of a personal representative was illegal; that they could not do so any more than they could proceed at law to enforce payment of the calls: (2) that the plaintiff (the administrator) was entitled to relief, and that the lapse of time between the attempted forfeiture of the shares and the procuring letters of administration was no answer to the plaintiff's claim. [DRAPER, C. J., HAGARTY, C. J., WILSON, J., and GWYNNE, J., dissenting.]

This was an appeal by the defendants from the decree made in this cause as reported *ante* volume xiv. p. 484.

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

Mr. *Blake*, Q.C., contra.

Judgment. DRAPER, C. J.—*John Horace Gibb* died intestate on the 1st January, 1864. He owed no debts at the time of his death, but he was the owner of five shares in the City of London Building Society, on which, at the time of his death, nothing was due and in arrear by him to the Society for instalments or any other payments or fines.

He died also possessed of the sum of $65 in cash. It does not appear that he had any other personal

* *Present*—DRAPER, C.J., RICHARDS, C.J. Q.B., VANKOUGHNET, C., HAGARTY, C.J. C.P., SPRAGGE, V.C., WILSON, J., MOWAT, V.C., and GWYNNE, J.

effects. The person in whose employment the testator was when he died, paid these $65 to the treasurer of the Society, and the amount was placed to the credit of the shares. 1869. Glass v. Hope.

He left no next of kin in this province him surviving, and no administration to his estate was taken until the 6th June, 1867, when letters of administration were granted to the plaintiff—the respondent.

By the payment of the $65, all instalments, &c., on the five shares were paid up to the 1st June, 1864, and a sum of $5 on account of the instalment which became payable on the first Monday in July. No other payment on these shares was made afterwards. In all, the sum of $1060 was paid to the Society on account of them.

Judgment.

The Consolidated Statute U. C. chapter 53, consolidates the previous statutes, 9 Victoria, chapter 90, and 13 & 14 Victoria, chapter 79. Section 1 of the first of these statutes authorizes the members of these Societies by complying with certain specified preliminary conditions to become a corporation, and to make rules and regulations for the government of the same, and to inflict reasonable fines, penalties, and forfeitures, on the several members who shall offend against such rules, to be paid to such uses for the benefit of the Society as such rules shall direct; and the second section authorizes the Society to receive by way of bonus on his shares any sum, for the privilege of receiving his share in advance prior to the same being realized, together with interest. The third section of the latter of these two statutes enacts that every such Society shall have power either to forfeit and declare forfeited to the Society the share or shares of any member who may be in arrear, or neglect to pay such instalments or monthly subscriptions as may be fixed by any stipulation or by-law, and

1869.

Glass v. Hope.

to expel such member from the Society, and the secretary shall make a minute of such forfeiture and expulsion in the books of the Society, or otherwise recover the same by action of debt.

The 23rd section of the Consolidated Statute embraces this last enactment, but in lieu of the words "otherwise recover the same by action of debt," it has "or instead of such forfeiture and expulsion the Society may recover the arrears by an action of debt." The enactment first above set out is substantially repeated in the first and second sections of the Consolidated Statute.

Neither the bill nor the answer tell us when this Society was organized, nor when they passed their rules or by-laws; but as the 106th monthly instalment became due on the 1st June, 1864, we may infer that this Society acquired its corporate existence not later than

Judgment.

July, 1855, four years and a-half (or nearly) before the Consolidated Statutes were brought into operation, and it is to be presumed their rules were passed as a necessary part of their organization.

By the 21st of these rules, it was provided that every member should, until the objects of the Society were attained, pay ten shillings per share per month, on or before a day to be appointed, and in default of such payment should pay fines, according to a regulated scale increasing every month until the expiration of six months, after which time "if the same remains unpaid the share or shares of such member or his representative shall become forfeited." The 33rd rule provides that in case of the death of any member, his legatee or legal representative should, before becoming entitled to the privileges of an original shareholder, procure his place of abode and the particulars of his title to be registered in the books of the Society, and should at the same time exhibit the will, or probate thereof, or grant of letters of

administration, for the inspection of the directors, and pay a fee for such registry.

On the 13th November, 1865, sixteen monthly payments on the testator's shares being unpaid, it was resolved by the directors, that whereas these shares had long since become forfeited the secretary be instructed to write the same off to the credit of the profit and loss account. This was accordingly done by the secretary.

In February, 1867, the objects of the Society being attained by the realization of profits, the funds were distributed among the shareholders. The only remaining assets, it is stated, are some claims against sundry defaulters legally due to the Society, but all of a more or less doubtful character as to the solvency of the debtors.

Judgment.

The respondent by his bill seeks to be registered as a shareholder of the Society holding five shares as the legal personal representative of *John Horace Gibb*, and to be declared the owner of such shares and entitled to the money paid thereon, and to all interest and profit accrued thereon.

The appellants rely on the forfeiture of the shares *de facto*, urging that from the very constitution of a terminating Building Society, it was indispensable that the instalments on shares should be promptly paid, or on default should be forfeited, and as there was no representative of *Gibb* who could be sued, forfeiture was the only remedy they had.

By the decree it was declared that the shares were valid and subsisting, and that the alleged forfeiture had not taken place, and that the plaintiff, as administrator of *Gibb*, is entitled thereto with the profits accrued thereon; and an account is directed to be taken of the

1869.

Glass v. Hope.

amount of the shares, and of the profits and of the assets and liabilities of the Society, and it is ordered that such assets be realized as far as is necessary to pay such amount and costs to the plaintiff.

But if there be no assets, or assets insufficient for these payments, the shareholders are declared liable to pay *pro rata*, &c.

This decree is appealed against because the forfeiture was absolute in law and equity; because equity will not relieve against such a forfeiture; because the decree makes no provision for the payment or allowance by the plaintiff of the monthly instalments and of the fines—which, according to the rules, should have been paid; and because of the directions affecting the individual shareholders if there are not sufficient assets of the Society to satisfy the plaintiff.

Judgment.

I agree in the conclusion of the learned Chancellor that the attempted forfeiture was nugatory.

These shares are personal property. The contract respecting shares between the Building Society and each of its members is contained in the 21st of the rules, which rules, all persons taking shares in the Society are required to sign (R. 20). After the death of a member a default in payment is not his default but that of the person to whom the share devolves; so long as there is no person existing by whom the obligation of the contract ought to be fulfilled, no person in whom the shares can be said to be vested, it appears to me there can be no forfeiture. The statute gives the Society the alternative power to recover what is due upon shares by action of debt, but after the death of a shareholder, no action could be brought until there was some person who could be made defendant. There is the same difficulty in each case. There must be an

existing person who is legally bound (*sub modo* of course) to fulfil the contract, and whose breach of it constitutes a default, the foundation of an action or of a forfeiture. Here there was no default in the life of the intestate, and therefore the liability to forfeiture, or to an action, could not accrue until there was a legal representative of the estate. 1869. Glass v. Hope.

The part of the decree on which I am in doubt is, the direction to ascertain and state the amount of *Gibb's* shares and the amount of the profits accrued due thereon. I am not sure that I rightly understand the scope and effect of this direction.

The amount of each share is, according to the 3rd of the rules, £100, payable by monthly instalments of ten shillings: is it intended to make this sum the base on which the amount of profits is to be calculated, or is the amount actually paid upon the shares to be the base on which to estimate the profits. It appears to me it would be obviously unfair to the other shareholders that the shares of the intestate upon which only one hundred and six monthly instalments, with half of the one hundred and seventh, had been paid, should be treated as on the same footing as those shares upon which twenty-two and a-half more instalments had been paid. It appears by exhibit A, that one hundred and twenty-nine instalments were received on the other shares before the profit amounted to a sum sufficient to terminate the Society by paying to each shareholder £100 on every share he held, and that on the intestate's shares only one hundred and six and a-half instalments were paid. The shareholders who paid to the end must have paid $258 on each share, while on each of the intestate's shares only $213 have been paid. Nor is this all, for the 21st rule imposes fines in default of payment of the instalments on or before the appointed times, and assuming that there could be no forfeiture, I do not see that the fines Judgment.

1869. would not attach and accumulate by force of the by-law just as the instalments, for the intestate equally contracted to pay them both.

Glass v. Hope.

It was this consideration alone which caused me to hesitate as to the question of forfeiture, as to which the terms of the rule are as explicit as they are in respect to instalments and fines; but the distinction on which I rest, is, that, as I have already set forth, there must be a person *in esse*, whose omission to pay constitutes the default, the penalty of which is forfeiture; while a debt, whether arising from instalments or fines, may keep on accruing from month to month, and may form a charge on the shares themselves, as well as on the person who should become legally entitled to them. When such a person appears, and makes default, forfeiture will follow according to the rule.

Judgment. And the conclusion at which I have arrived does not conflict with the case of *Sparks* v. *The Liverpool Waterworks Company* (*a*), which decides that against such a forfeiture equity will not relieve.

I agree, therefore, in the first and second reasons of the respondent against the appeal.

It then becomes necessary to consider how far the decree is upon other grounds sustainable.

The Society was, from its very constitution, terminable as soon as its funds arising from instalments, fines, repayments, interest and other sources, amounted to sufficient to pay £100 on each unborrowed share. When such an amount was realized, the business of the Society, except as to its distribution, is at an end, unless indeed there be debts still due which require time for

(*a*) 13 Ves. 428.

1869.

Glass v. Hope.

their realization; but the probability of getting in some doubtful claims, which might entitle the shareholders to a future small dividend, is no reason for carrying on the Society's business and making further loans. It would be absurd to hold that the death of a shareholder, pending the legitimate operations of the Society, to whose estate there was no actual legal representative, could change the principles or stipulations on which the Society was organized. The rules have not provided for the particular case, but that omission cannot defeat or delay the *modus operandi*, to which every shareholder had assented.

There are two classes of shareholders, those who pay the required instalments on their shares, obtaining no present return, and those who borrow the sum of their shares at first—less the amount of discount or bonus they pay for the advance, and who also pay the monthly sums required by the by-laws, besides giving security for such payments. The working of such Societies is so clearly explained by the cases of *Mosley* v. *Baker* (*a*), on the original hearing, and again on appeal (*b*), and *Fleming* v. *Self* (*c*), (cases to which I was obligingly referred by my brother *Gwynne*,) that I shall abstain from observing upon the subject beyond citing the pithy and well founded observation of Lord *Cranworth*, in the last case: "In truth the whole scheme is but an elaborate contrivance for enabling persons having sums for which they have no immediate want, to lend to others at a very high rate of interest."

Judgment.

As I have already endeavoured to shew every share must be represented by a holder,—without one, it is as it were in abeyance, at least as to unborrowed shares there must be some person subject to the by-laws and bound to fulfil them, and such a person can alone claim

(*a*) 12 Jur. 551. (*b*) 13 Jur. 817. (*c*) 1 Jur. N. S. 25.

1869. Class v. Hope.

the rights and privileges which result from membership. Such person must be a member of the Society, and this the 32nd and 33rd rules were intended to regulate—where there was to be a substitution for the original shareholder—the last of which rules contemplates the devolution of shares by death.

I do not find any provision made for the sale of such shares, after reasonable delay and notice to those whom it may concern, though the want of some such provision is shewn by this suit, which must be therefore determined by as close an adherence to the principles and terms on which the Society was formed as is practicable.

Now it appears to me, first, that no one who is not *de facto*, a member of the Society can claim to share in the final distribution of its assets; and next, that each member, whether the holder of borrowed or unborrowed shares, must in this respect stand in the same position; that in order to entitle himself to receive his proportion at the termination of the association he must have paid up all accruing instalments, fines, or other contributions. Each instalment is, strictly speaking, a part of the price of the share, and each share must be paid up to the amount necessary, together with fines and profits to enable the Society to pay off the shares in full. The holder of unborrowed shares will receive for each the sum thereof (£100;) and the holder of borrowed shares, having received his money in advance, will be entitled to a release and discharge of the property pledged or mortgaged by way of security to the Society; and as it may be impossible to terminate the Society at the precise moment when the full amount of all the shares is thus realized, there may be a small surplus still to be divided among all the shareholders.

Judgment.

Now, *John Horace Gibb* died in January, 1864. Letters of administration were not issued to the plaintiff until

1869.

Glass v. Hope.

6th June, 1867; and on the 19th July, 1867, the plaintiff applied to be admitted as a shareholder in respect of *Gibb's* five shares, and in his bill he seeks that relief. If administration had been taken out while the Society was still in operation, and the administrator had applied at once, I think it a fair inference from the rules that his application should have been granted upon payment of all calls, fines, &c., accruing due upon the shares under the 21st rule. But no such application was made for five months after the Society was practically at an end, as between it and its several members, nor for about four months after that termination, and near three years and a-half after *Gibb's* death, was any person legally competent to make it. The Society was neither bound to carry on its business after its object had been attained, nor yet to withhold a division of the funds until it should appear whether *Gibb's* estate would ever be administered to. His claim also was, in their estimation, at an end by forfeiture.

Judgment.

No doubt there is an inconsistency between holding that for want of a representative of the shares of a deceased member, while the Society is in actual existence, carrying out the scheme and object of its creation, a forfeiture of the shares of such member cannot lawfully be made, and also upholding a course of procedure on the part of the Society, which in its effect amounts to a forfeiture. The difficulty arises from a defect in the constitution and rules, which have not provided for the case of the death of a member, pending the operation of the Society, when no personal representative appears and fulfils the obligations of the deceased within some limited time.

Here the Society erroneously declared the shares forfeited. They acted, I have no doubt, in good faith, and their subsequent proceeding was right, if the forfeiture had been legal, for they treated the money paid on

1869.
Glass v. Hope.

account of these shares as part of the assets of the Society. After these assets had been distributed, a personal representative makes his appearance; and now —between five and six years after the death of *John Horace Gibb*, between two and three years after the distribution of the assets, after a series of inquiries in the Master's office, necessarily involving no inconsiderable expense—the solvent shareholders are, by the decree, to be compelled to pay not merely what each has received, but the "amount of the shares of the said *John Horace Gibb*, together with the profits accrued thereon and the costs of this suit."

Admitting that the attempted forfeiture was illegal, and that the appropriation of the money paid on account of these shares was consequently improper; and, acquitting the Society of intentional wrong, if restoration could be made without absolute injustice and wrong to others, I should gladly award it. But I do not perceive how, without the hazard of doing serious injury to some of the former shareholders; upon very probable contingencies contemplated by the decree since the distribution of the Society's funds, the money paid upon *Gibb's* shares could be restored without introducing a new clause into the contract between him and the other members of the Society. And, however equitable it would be, that his death, and the delay in taking out administration, should not deprive his next of kin of the relief, or some part of the relief prayed for, I do not see how, under the circumstances, it can be granted without great want of equity to others; and if not, the Court may, I think, in the exercise of a sound discretion, refuse its aid.

Judgment.

What was said by Lord *Cottenham*, in *Graham* v. *The Birkenhead, &c., Railway Company* (*a*), though

(*a*) 2 McN. & G. 146.

under different circumstances, appears to me to furnish a guide to a right conclusion. "The difficulty which I feel in this case is, whether the interference by way of injunction, which is the mode in which the Court exercises its jurisdiction to enforce an equity, is not counteracted by a counter equity on the other side, for in many of these cases the interposition of the Court may produce the greatest possible injustice if the parties have not applied in time, but have permitted things to get into that state which makes the injunction not only a proceeding not enforcing an equity, but calculated to inflict great hardship and injustice."

1869.
Glass v. Hope.

Now here, there was a duty cast upon the directors, in the event that had happened, to wind up the affairs and distribute the funds of the Society. There was no corresponding obligation towards the next of kin of a deceased member, when none of them, nor any one at all, applied to be admitted in his place to succeed to his rights, fulfilling his obligations; and whatever the cause of delay, neither the Society in the aggregate, nor any of its members individually, in any way occasioned it. No relief can now be given but by calling upon every one, who, as a shareholder, received a proportion of the Society's funds, to refund *pro rata* to satisfy the plaintiff's claim. In the interval, some may be dead, some may have left the country, some may have become insolvent, and those only who are solvent must make good the deficiency. If all were solvent and forthcoming, eighty-four persons must be brought into the Master's office subject to the costs of inquiry and the costs of the cause, as well as to contribute.

Judgment.

Following not the very language, but the thoughts suggested by another part of Lord *Cottenham's* judgment, I think that we cannot avoid seeing that the interference prayed for must be injurious, and may be ruinous to those on whom it would fall, and this arises

1869. Glass v. Hope.

from a delay in coming to the Society in accordance with the rules, to procure the admission of a representative of *Gibb's* interest to be a shareholder in his place.

I think we are warranted in withholding the aid of the Court under such circumstances, and that the bill should be dismissed but without costs.

RICHARDS, C. J. Q. B., was of opinion that the plaintiff was entitled to relief; and suggested some variations in the decree as pronounced by the Court below.

VANKOUGHNET, C.—If it be admitted that the Society could not forfeit the shares of *John Horace Gibb*, deceased, in the absence of his personal representative, it seems to me the natural, logical, and legal consequence that those shares,—being as much as any other personalty of that character,—properly belong to the personal representative of *Gibb*. It surely cannot be pretended that when this man died his property in this Society was buried with him; and yet that is the necessary effect of holding that his administrator now cannot have any account of it. If it be conceded, as I understand it to be, that the Society could not have sued for calls without procuring a personal representative of the deceased, how could they adopt the more violent process of wiping out the estate he had held and left in the Society's stock in the absence of such representative? The mistake the Society made was not having procured such personal representative before proceeding to wind up the concern. They would have had no more difficulty in such a case than in a case where their only remedy was by action of debt. In some way, the property left by a dead man must be legally represented before any one has a right to dispose of it. Difficulties, more or less inconvenient, arise constantly in dealing with property left by the

Judgment.

1869.

Glass v. Hope.

dead; but those inconveniences, however great, must be got over in a proper, legal way. The law does not permit any one or every one to lay rough hands upon such property, because it may be convenient in the interest of others to do so, any more than it permits the property of the living to be wrested from him without observance of the forms provided for every man's protection when it is sought to fasten upon him or his property a claim. All this may be very inconvenient, but any other course would convulse and render nugatory the administration of justice. Suppose that the Society illegally declared forfeited the shares of an absent living member, and wound, or attempted then to wind up the affairs of the Society, would such a course be binding upon the absent member? What would be legal in respect of one share of the Society would be legal in respect of three-fourths of the shares. And the same rules and principles must be applied in regard to the one as well as in regard to the many. Judgment. Once admit that there was no forfeiture effected, and you must necessarily admit the plaintiff's right; otherwise you hold this, that though the Society could not by any preliminary act forfeit the shares, yet they may wind up, or cut up and divide the body, first lopping off the property or portion in it left by the deceased. But that in effect would be forfeiture. It may be, on proper accounts being taken, charging the shares with fines, &c., that nothing will be coming to plaintiff; but this we cannot tell till there is an investigation. To say, however, that without the authority of law (and when you deny the right of the Society to effect a forfeiture during its existence, you admit this) any man or body of men, not representing the shares of the deceased in any way—his property in the Society—can dispose of it, wipe it out, or treat it as nothing, seems to me contrary to natural justice, unsanctioned by any principle of law, and without precedent in the administration of justice. It is, in my view, as wrong as

1869.

Glass v. Hope.

to uphold a judgment obtained against a man without previous notice to him. The cardinal mistake is in holding that the Society has been wound up. It could not be wound up without these outstanding shares being legally dealt with. Suppose the shares of a dozen living shareholders had been, by accident or design, overlooked, neglected, or cast out of consideration; would the Society have been wound up, though it declared itself so to be? The inconvenience of working out any particular relief to which a party is entitled is no reason for refusing it, as is said again and again every day by the most learned of England's judges; and a Court of Chancery, in the exercise of its ordinary jurisdiction, has no more right to refuse relief in such a case as the present, than a Court of Law would have to refuse judgment on a promissory note, or to hear any claim of right. We have to deal constantly with cases presenting greater difficulties than the present. If the plaintiff here had a legal remedy, he might have an action against every individual shareholder for the excess which the latter had received;—that would be costly and inconvenient.

Judgment.

HAGARTY, C. J. C. P.—The deceased *Gibb* was a member of a Society, to whose successful operation it was essential that the stock should be paid up in a prescribed manner, and that certain fines should be incurred for non-payment, and forfeiture after a prescribed period of default. As a matter of fact, his stock was in default, and but for his death would have been liable to forfeiture, and would have been duly forfeited. It is said, and I am not disposed to dispute the proposition, that the forfeiture that was attempted was ineffectual in consequence of such death, and the absence of any legal representative. It is also urged that the Society was not without remedy, as it could have had an administrator appointed, and then have proceeded regularly to forfeit.

1869.

Glass v. Hope.

Many cases may occur in which this could hardly be done. Shareholders may leave the country and die abroad, and the Society be wholly ignorant of their being alive or dead. I hardly think it necessary to make them wait till the end of seven years, or compel a costly foreign inquiry to ascertain the existence or non-existence of their defaulters. Such a delay might be destructive of the very purpose of the common adventure. The death of the shareholder was a matter which ought not to inflict an injury on his co-partners, the more or less severe according to the extent of his interest. So far as the regular payment of his stock was concerned, the original contract was to make his payments at specified times, and that a default of six months would make him liable to a forfeiture. I do not see how the occurrence of his death should place his representative in any better position than he occupied.

Judgment.

But even if unable to assent to that view, I entertain a very strong opinion that this is one of those cases, occasionally presented to a Court of Equity, in which an attempt to give relief by the only course open to the Court according to its practice, would produce such an amount of costly litigation so utterly disproportioned to the value of the claim, and so much positive injustice to others in re-opening a large number of accounts long since closed, that the Court would properly, as a balance of evils, decline to interfere. There ought to be such a power in a Court of Equity, and I, for one, will assume that it exists.

If this decree stands, there will be a claim of a little over £250. An inquiry in the Master's office involving the bringing in of eighty-four parties, and the taking an account of each, the possible issue of that number of executions, and the probable return of *nulla bona* to many, in which case, by the decree, insolvency is to be assumed, and the whole burden thrown upon the solvent

1869. Glass v. Hope.

stockholders. I am told that the bringing in of all the shareholders may be avoided by making one or more represent a class, but the interest of each may necessarily be adverse to that of any representative in adjusting each share for contribution.

I cannot see on what principle under the Statute or the By-laws any one shareholder can be thus made to answer for the inability of the others to pay. At the worst, each shareholder should be responsible for the amount which he had received of the money claimed. I am not prepared to treat each shareholder in a Building Society as a general partner, liable for every claim, without reference to his particular interest. In this way, supposing the extreme case of only two solvent shareholders—each originally holding one share—they would have to refund the value of five shares, more than double their original subscription.

Judgment.

Although *Gibb's* stock might not have been duly forfeited, yet the arrears were due on it for the full period. Long afterwards an administrator appears. There is nothing, in substance, inequitable in placing him in the same position in which *Gibbs* would then have stood had he not died. In the latter case, the shares would have been legally forfeited—lost for ever to him.

Now, his administrator asks to have the full benefit of his shares, as if no default had been made. The Society was wound up, and the assets ascertained and distributed on the basis of placing *Gibb's* shares in the same position as other shares left in default for the same length of time.

If a creditor of a bankrupt do not prove his claim within proper time, and a dividend is legally declared and paid, his coming in afterwards to prove is not

allowed to disturb or re-open such dividend, and under our Insolvent Act, even when the claim is known to the assignee, and proper notice given, a final dividend may include the sums previously reserved for such non-proving creditor. It seems to me that when this Society was wound up, all parties would naturally treat the *Gibb* shares, so long in default, as abandoned, and the amount originally paid thereon as properly forming part of the general assets, and divisible as such. 1869. Glass v. Hope.

I think the appeal should be allowed, and the bill dismissed.

It is right to add that it would now seem that in drawing up the decree, certain provisions have been in some way inserted which were not apparently contemplated by the Court below.

Judgment.

SPRAGGE, V. C., thought the decree should be varied in the manner suggested by His Lordship the Chief Justice of the Queen's Bench.

WILSON, J., concurred in the views expressed by the Chief Justice of this Court, and that the bill should be dismissed.

MOWAT, V.C., thought the decree should be affirmed, and appeal dismissed with costs.

GWYNNE, J.—The object of the Society, both by the Act of Parliament and by the rules established in pursuance thereof, is declared to be:—to raise, by monthly or other periodical subscriptions of the several members of the Society, in shares of $400 each, a stock or fund to enable each member to receive out of the funds of the Society the amount or value of his shares therein, which period, of necessity, arrives when the amount of the collective shares is realized.

1869.

Glass v. Hope.

The collective shares so subscribed for, constituted the stock of the Society, and the 3rd by-law declares that the stock of the Society shall consist of shares of £100 currency each, payable by monthly instalments of ten shillings on each share on or before the first Monday in the month.

By the 3rd section of the Act, by the authority of which these by-laws are made, it is provided that "except in the case of the withdrawal of a member according to the rules of the Society then in force, no member shall receive or be entitled to receive from the funds of the Society any interest or dividend by way of annual or other periodical profit upon any share in the Society *until the amount or value of his share has been realized.*"

Judgment.

At the foot of the by-laws is a covenant which must be signed by every person at the time of his becoming an original member of the Society, by which each member, for himself, his executors and administrators, covenants that he, his executors and administrators, shall and will well and truly observe, perform, fulfil, and keep all and singular the foregoing and future by-laws, rules, and regulations of the Society.

This covenant I take to be a covenant to pay the monthly instalments every month, whether there were or not a by-law regulating forfeiture; and non-payment of any monthly instalment would be a breach of this covenant, whether the covenantor should be living or dead at the time of such non-payment occurring, or whether there should then be any personal representative or not of such deceased member, although if there were no such personal representative no action would lie for the breach at the suit of the Society. It must be admitted, then, that non-payment of any monthly instalment, in respect of the shares originally subscribed for by *John*

1869.

Glass v. Hope.

Horace Gibb, although such non-payment occurred after his decease, was a breach of the contract upon which they were subscribed. But, although the contract has been broken, still the plaintiff contends that, by reason of the technical frame of the *rule* relating to forfeiture, there can be no forfeiture, and, as a forfeiture in its strict sense, this, I think, must be admitted.

The rule, No. 21, says that every member, so long as he shall continue to be a member, and until the objects of the Society be attained, shall pay ten shillings per share per month, on or before the day appointed for that purpose, and in default thereof shall pay a fine of three pence per share for the first month, six pence per share for the second month, doubling the fine for each succeeding month till the expiration of the first six months, and after that time, if the same remains unpaid, the share or shares of such member or his representative shall become forfeited.

Judgment.

It is contended that when *John Horace Gibb* died, he ceased to be a member of the Society, and that as he had no personal representative until the plaintiff obtained letters of administration, there was no person at the time of the alleged forfeiture a member of the Society in respect of the shares for which *John Horace Gibb* had originally subscribed, and that therefore there was no one whose right to those shares could be forfeited under the provisions of this rule. The substance of the contract entered into by *Gibb* has not been fulfilled, and it is only by reason of a technical defect in the phraseology of the rule that the forfeiture declared in respect of these shares may be said to be ineffectual; but, granting it to be ineffectual, still we must, I think, hold, upon the authority of the principles involved in *Sparke* v. *The Liverpool Water Works* (*a*),

(*a*) 13 Ves. p. 434.

1869. Glass v. Hope.

Mosely v. *Baker* (*a*), and *Fleming* v. *Self* (*b*), that it is only in virtue of the rules of the Society and the Statute that the plaintiff, as administrator of *John Horace Gibb*, can claim any interest in the shares originally subscribed for by him; and upon the same principle, that the plaintiff can appeal to the rule No. 21 to shew that a forfeiture could not, in strict terms, take place under that rule, the defendants have a right to appeal to other rules and the Statute to shew that the plaintiff has not, in strictness, brought himself within these rules so as to entitle him to a *locus standi* in equity, or to the relief he asks.

Granting the contention of the plaintiff to be correct, that when *John Horace Gibb* died there was no person filling the character of a member of the Society in respect of the shares for which he had subscribed, still those shares constituted part of the capital stock of the Society; and if he had chosen to become a member of a Society which excluded personal representatives from the benefit of membership in respect of these shares, the result, I apprehend, would have been that on his death the shares would have become lapsed into the general stock of the Society for the benefit of the continuing members, without any process of forfeiture. But the rules have provided for a personal representative of a deceased member becoming a member of the Society in respect of the shares which belonged to the deceased member in his lifetime. The question then is, has the plaintiff complied with this rule according to the full purport of its substance, for if he has not, I think it clear he cannot be admitted to the benefit of membership, and except in virtue of membership, he can establish no right to any benefit accrued in respect of the instalments upon the shares paid by *John Horace Gibb* in his lifetime, in equity any more than at law. This appears

Judgment.

(*a*) 12 Jur. 551, and 13 Jur. 817. (*b*) 1 Jur. N. S. 25.

necessarily to follow from the 3rd section of the Statute. The rule upon this subject is the 33rd, which provides "that, in case of the death of any member, the legatee or legal representative of such deceased member shall, *before becoming entitled to the privileges of an original shareholder*, procure his place of abode, and the particulars of his title to be registered *in the books of the Society*, and shall at the same time exhibit the will, or probate thereof, or grant of letters of administration, as the case may be, for the inspection and satisfaction of the directors, and pay for such registry the sum of two shillings and six pence per share."

1869.

Glass v Hope.

Upon this being done the personal representative becomes, and until it is done, no person is a member of the Society in respect of so much of the stock of the Society as was held by the deceased member in his lifetime. Now membership, as it appears to me, has duties as well as privileges annexed to it, and if the condition of things is such that the duties cannot attach, I do not see how the privileges can. These Societies, from their nature, have, by Statute but a terminating existence; they have discharged the whole object of their creation, and have fulfilled all the purposes of their existence, when the realization of the whole amount of the capital is attained. They then become dissolved by operation of law, and the capital becomes distributable among the several members of the Society. In this case it appears that this period arrived, and the distribution incident upon its arrival took place at a time when neither the plaintiff nor the intestate had any interest in that portion of the stock of the Society held by *John Horace Gibb* in his lifetime. Consequently, at the period of distribution, that portion of the stock which in his lifetime he held, being still part of the stock of the Society, and being held by no person entitled to the benefit thereof as a member of the Society, became and was, I think, divisible among the members of the

Judgment.

1869. Class v. Hope.

Society, and being divided among them, cannot now be recovered back. The Society no longer exists, and cannot, in law, be deemed to have any existence for the purpose of attaining the object of the creation of the Society, namely, the realization and distribution of the capital stock among the members. How, then, can the plaintiff be registered upon the books of, or become a member of, a Society which no longer exists? The plaintiff cannot now become liable to discharge the duties of membership in respect of the shares held by *John Horace Gibb* in his lifetime. No object of the Society can now be attained by his paying up any sum by way of arrears in respect of these shares. No Court has, in my judgment, power to revive a dissolved Society of this nature for the purpose of giving it an existence in the sole interest of the plaintiff, and to give him the benefit of shares in respect of which the contract upon which they were subscribed has been wholly violated. The parties cannot by any possibility be placed in *statu quo ante*. It appears to me, therefore, that a legal representative or legatee of a deceased member of the Society, must comply with the provisions of the 33rd rule within the period of the statutory existence of the Society, and before distribution of the realized capital among themselves. If not a member, or at least in a position to claim the benefit of membership when the period of distribution arrives, it appears to me that a plaintiff cannot, after the dissolution of the Society, claim the benefit of membership, or establish any *locus standi* in equity.

Judgment.

But, admitting that the plaintiff has now a *locus standi* in equity, the decree appears to me to go farther than any possible equity he can have.

The benefit which the Society has received from the shares subscribed by *John Horace Gibb*, is the value of those shares at the period of the last payment. It would

1869.

Glass v. Hope.

be impracticable, as it seems to me, to go on working the Society in respect of these five shares alone. The plaintiff is not entitled to any sum by way of interest or dividend, but simply, in the terms of the Statute, to his share when realized. I confess I cannot see how that share can ever now be realized in the terms of the original contract, which is broken by non-payment of the monthly instalments during the existence of the Society, although technical forfeiture in terms of the 21st rule has not been effected. But, at most, I cannot see how the plaintiff could get more than the amount realized at the time of the last payment. Then the decree seems to me to be erroneous in declaring that the return of *nulla bona* to a writ of *fieri facias* shall constitute insolvency. It either does or does not under the provisions of the Insolvent Act. And if it does, it can be attended with no other result than ordinary insolvency; therefore, as it appears to me, the decree is also wrong in declaring that the solvent members shall be liable to make good the proportion found to be payable by the insolvent members. Such a direction might effect the grossest injustice upon the solvent members. For example, assume that it should turn out that all the members should prove to be insolvent with the exception of five persons, holding one share each, equal in the aggregate to the number claimed by the plaintiff. If these five should have to pay the plaintiff in full the amount of his shares, they would get nothing themselves in respect of their own shares, a result which does not appear to me to be reconcilable with any principle of equity. Upon the whole, I am of opinion that inasmuch as, consistently with the terms of the original contract upon which *John Horace Gibb* subscribed for shares, the same cannot now be fulfilled so as to give the other persons who were members of the Society the benefit of that contract in its integrity, and inasmuch as the Society is dissolved, and its assets distributed among the persons who were members at the

Judgment.

1869.

Olas v. Hope.

time of distribution, there is no equity which entitles the plaintiff now to become a member of a dissolved Society in respect of these shares, nor has a Court of Equity power to revive a dissolved Society for that purpose; and the plaintiff's bill ought to be dismissed. He was not such a person as, in the chararter of member, became entitled under the terms of the contract to a share of the assets when the period of distribution arrived, and except as a member, and in right of a fulfilment of the original contract upon which the shares were originally subscribed, he has, I think, no claim to participate in the assets of the Society.

Judgment.

As to the amount paid after the intestate's death, I think that was no legal payment on account of the shares, and the persons who received that sum are liable as tortious dealers with the intestate's estate, to the rightful administrator in an action at law.

Order.

Declare that the shares owned by the said the late *John Horace Gibb*, in his lifetime, in the said City of London Building Society, numbered, &c., are valid and subsisting shares in the said City of London Building Society, notwithstanding the action of the said City of London Building Society in the premises, and that the alleged forfeiture has not taken place. Order and decree the same accordingly. Declare that the plaintiff, as administrator and legal personal representative of the said the late *John Horace Gibb*, is entitled to the said respective shares, with such profits accrued thereon as the Master shall find him entitled to, free and clear of the said forfeiture, and whether the said shares, so numbered as aforesaid, were or were not borrowed by any person or persons, from the said defendants the City of London Building Society, since the alleged forfeiture of the same: Order and decree the same accordingly. Order and decree that it be referred to the Master at London, to ascertain and state the amounts of the said shares of the said *John Horace Gibb*, and the amount of profits accrued due

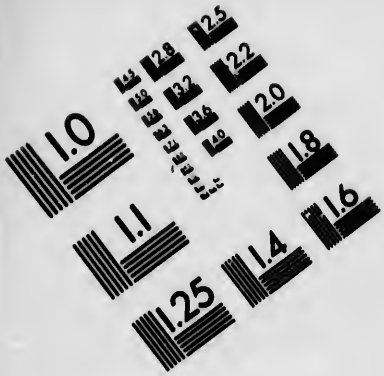
1869.

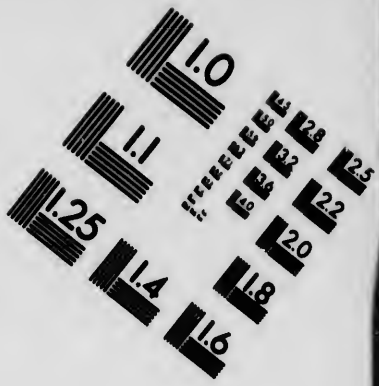
Glass v. Hope.

thereon, to which the said Master shall find the said plaintiff entitled, and also to inquire and state the assets and liabilities of the said City of London Building Society. Order that the assets of the said City of London Building Society be realized so far as may be necessary for the payment of the amount of the said shares of the said *John Horace Gibb*, together with the profits accrued thereon, and the said amount so to be realized is to be paid to the said plaintiff. But in the event of there being no assets of the said City of London Building Society, or in the event of the amount of such assets being insufficient to pay off the amount so to be found due on account of the said shares and profits, declare that the persons who were shareholders of the City of London Building Society at the time of the death of the said *John Horace Gibb*, are liable to pay to the said plaintiff the amount so to be found due on account of the said shares, together with the said profits, or the balance thereof, as the case may be; and to contribute towards payment of the whole amount so to be found due, or the balance thereof, as the case may be, according to their respective shares *pro rata*: Order and decree the same accordingly. And for this purpose the said Master is to inquire and state the names of the persons who were shareholders of the City of London Building Society at the time of the death of the said *John Horace Gibb*, and the amounts of their respective shares, and to fix the amounts payable by the said shareholders under this order.

Order.

Order that the said shareholders be made parties to this suit in the office of the Master, and that they do respectively pay to the said plaintiff, the amounts found payable by each of them under this order.





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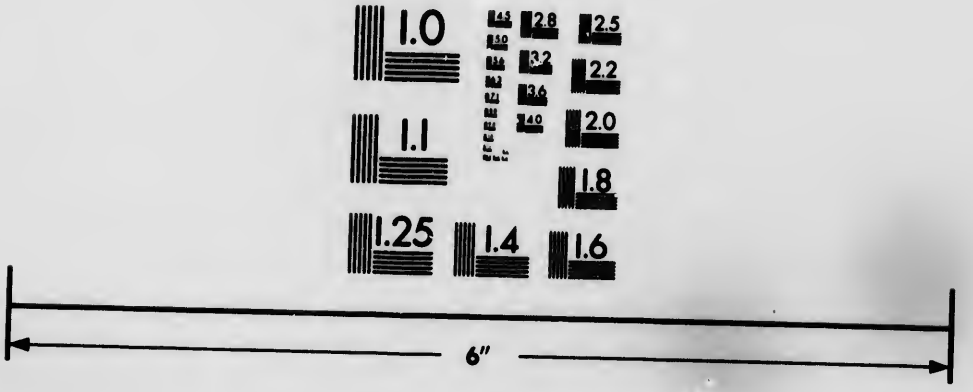

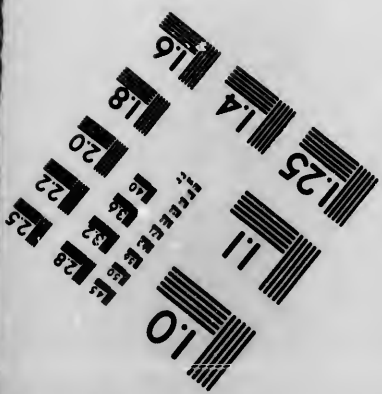

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1869.

THE TRUST AND LOAN COMPANY v. SHAW.

Registration—Notice.

The principle upon which the Registry Act proceeds is, that a party acquiring land ought to see whether there is anything registered against the land he is about to acquire, and that he is assumed to search the registry for that purpose; but this does not apply to one who is not acquiring, but, parting with an interest in land.

This was a suit by the plaintiffs for the realization of a mortgage held by them. There was a prior mortgage which was upon lot No. 23 in the first concession from the bay, in the Township of York, and part of lot 28 in the second concession, and was made by *George Shaw*—who was then of sound mind, as alleged by the bill—to Miss *Huson*, who afterwards became the wife of the defendant *Harman;* the defendants *Gambie* and *Boulton* being the trustees of their marriage settlement.

Statement.

The plaintiffs' mortgage was dated the 12th of May, 1855; and was upon lot 23 only, and was made through the intervention of the defendant *Harman* as committee of the estate of *Shaw*, to the plaintiffs under the authority of the Court. Both instruments were duly registered.

The plaintiffs sought to postpone the first mortgage to theirs, on the ground (amongst others) that the trustees had by release, dated 22nd April, 1858, released lot 28 from the mortgage to Miss *Huson*, and the plaintiffs alleged that that property had since become vested in innocent purchasers for value; and the position taken by the plaintiffs was, that if they were not entitled to postpone the prior mortgage to their own, they were entitled upon redemption to have the value of lot 28, beyond the amount of the prior mortgage deducted from it.

Mr. *Blake*, Q.C., and Mr. *Moss*, for the plaintiffs.

1869.

Trust and Loan Co. v. Shaw.

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

Mr. *Crickmore*, for the estate of *Shaw*.

SPRAGGE, V.C.—With regard to the second ground taken by the plaintiffs, I am not prepared to say, whether they could have maintained their position, or a modification of it, if it had been proved that the trustees when they released lot 28 had notice of the plaintiffs' mortgage. It is a very nice point, and has not so far as I know been presented for adjudication. In *Gibson* v. *Seagrim* (*a*), there were two properties mortgaged to one person, and then one of the two mortgaged to another person, and the first mortgagee satisfied his debt by sale of one of the properties, the sale realizing a surplus beyond the first mortgage, which the mortgagee paid over to the assignees of the mortgagor who had become bankrupt. The Master of the Rolls held the second mortgagee entitled to the surplus, but observed, "I do not say what would have been the effect if the sale and payment over of the surplus had taken place before any suit had been instituted." Judgment.

The very learned judgment of my late brother *Esten*, in *Boucher* v. *Smith* (*b*), proceeded upon this, that the purchaser from a mortgagor of a portion of mortgaged premises comprised in a first mortgage, the purchaser having notice of the first and of a second mortgage, out of which mortgages equities arose in favor of the second mortgagee, as between him and the mortgagor, was affected with those equities; and the learned Vice Chancellor held that registration of those mortgages, was notice to the purchaser of their contents.

I suppose the conclusion was unavoidable, that if equities existed as between a mortgagor and mortgagee,

(*a*) 20 Beav. 614. (*b*) 9 Grant 347.

1869.

Trust and Loan Co. v. Shaw.

one claiming under the mortgagee must be affected with those equities, unless he could protect himself as a purchaser for value without notice. But here the holders of the first mortgage did not claim under *Shaw* in the sense in which a purchaser from a mortgagee claims under him. Great hardship arises, not unfrequently, from the doctrine of imputed notice of facts which constitute an equity. I think the doctrine should be applied cautiously, and should not be pushed beyond its present limits.

In the case before me I desire to express no opinion upon this point. The absence of notice renders it unnecessary. In *Boucher* v. *Smith* the learned Vice Chancellor held registration to be notice, because he thought that the registration of both mortgages affected land which the party to be affected by it was acquiring. I think that the statute proceeds upon this, that a party acquiring land ought to see whether there is anything registered against that which he is about to acquire; and that he is to be assumed to search the registry for that pur- but this does not apply to one who is not acquiring parting with an interest in lands. Besides the statute applies to a state of circumstances, and affixes a penalty inapplicable to such a case as this. There is no evidence of actual notice, and I am of opinion that registration is not notice in such a case.

Judgment.

I ought, perhaps, in justice to Mr. *Harman*, to add, that he derived no benefit whatever from his omission to pay off the prior mortgage out of the money which he received from the plaintiffs. I am perfectly satisfied that he applied all that he received to the purposes of the *Shaw* estate; and that it was a piece of self-denial on his part to forego the advantage of getting in the money due on his wife's mortgage, and that he was influenced in doing what he did by the urgent necessities of the *Shaw* estate.

1869.

QUAY v. SCULTHORPE.

Principal and surety—Subrogation of right.

S. was surety to B. for a debt, for which *A.*, the principal debtor, gave a mortgage to *B.* as a further security. The creditor recovered judgment against the surety and sold his lands under execution. While the *fi. fa.* was in the Sheriff's hands and before the sale, *S.* mortgaged the lands to creditors of his own.

Held, that as the surety would, on paying the debt to *B.*, have been entitled to the benefit of the mortgage which the principal debtor had given to *B.*, so where the lands of *S.* were sold to pay the debt and the mortgagees of *S.* were thereby deprived of them, these mortgagees were entitled to the benefit of the original mortgage as against any subsequent assignment of the mortgage by the mortgagee, and any subsequent mortgage by the mortgagor.

Statement.

The leading facts of this case were that the defendant *James S. Fox* had created a mortgage in favor of the Canada Permanent Building and Savings' Society, for the payment whereof the defendant *James Sculthorpe* executed a mortgage on his lands as surety. *Fox* subsequently created a mortgage in favor of the defendant *Catharine Fox*. The mortgage to the Building Society having gone into default, they instituted proceedings on it against the mortgagor and his surety, in which action they recovered judgment and issued execution against lands, and placed the writ in the hands of the proper Sheriff.

James Sculthorpe created mortgages in favor of the plaintiff and the defendants *Barrett* and *Perry* respectively. Subsequently thereto the Sheriff sold, under the writ which had been so placed in his hands, the lands of *Sculthorpe* which had been mortgaged to the plaintiffs *Barrett* and *Perry*. Afterwards, the defendant *Robert E. Sculthorpe*, recovered a judgment against *James Sculthorpe*, the surety, and obtained a garnishee order garnisheeing the debt due from *Fox*, such debt having accrued from the satisfaction, by sale

1869. Quay v. Sculthorpe.

of *James Sculthorpe's* property, of the debt less $280 due by *Fox* to the Building Society, which *Fox* was ordered to pay to *Robert E. Sculthorpe*, who thereupon issued execution against the lands of *Fox*. *Robert E. Sculthorpe* then paid to the Building Society the balance of $280 left due them on account of *Fox's* debt: and the Society thereupon assigned to him the mortgage created in their favor by *Fox*, the debtor; *Robert E. Sculthorpe* alleging that the proceedings which he had taken at law put him in a position to redeem the Society.

The plaintiff thereupon instituted the present suit, praying to have the lands so mortgaged to the Building Society and assigned by them to *Robert E. Sculthorpe* made liable in the first instance to the claims of himself, *Barret* and *Perry* in preference to the claim of *Robert E. Sculthorpe* and of *Catharine Fox*.

On the cause coming on for hearing before Vice Chancellor *Spragge*, he refused the plaintiff the relief he asked and dismissed the bill with costs.

The plaintiff thereupon set the cause down for rehearing, and the same came on for argument before the Chancellor and Vice Chancellor *Mowat*.

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

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

Mr. *Blake*, Q. C., for the defendant *Robert E. Sculthorpe*.

Mr. *Hector Cameron* for other defendants.

Judgment.

VanKoughnet, C.—This case was argued before my brother *Spragge*, without reference to the doctrine of marshalling; and had I to decide now without any

reference to that doctrine, I do not see that I could have arrived at any other decision than he did. He, however, at the close of the opinion expressed by him, threw out a suggestion that, possibly on the doctrine of marshalling, the plaintiff might have relief, and the plaintiffs have availed themselves of this suggestion by arguing and urging it upon us on a rehearing of the cause.

1869.

Quay v. Soulthorpe.

There is no doubt that ordinarily, and as a rule, the doctrine of marshalling securities is applied to the case of creditors having respectively a double and a single fund, the property of a common debtor; and I find no case in the English Courts in which this doctrine has been extended so far as is sought to apply it here. It seems to me, however, that the plaintiff's conclusion is right on principle. The leading case on the subject is that of *Aldrich* v. *Cooper*, decided by Lord *Eldon*, and reported in 8 Vesey at page 382. In that case, Lord *Eldon*, speaking of the doctrine of marshalling, says: "It does not depend upon assets only, a species of marshalling being applied in other cases, though *technically* we do not apply that term except to assets. So where in bankruptcy the Crown by extent laying hold of all the property, even against creditors the Crown has been confined to such property as would leave the securities of incumbrancers effectual. So in the case of the security *it is not by force of the contract;* bu t equity, upon which it is considered against conscien hat the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the Court, placing the surety exactly in the situation of the creditor." Again he says: "In the consideration of this subject, the word *assets* has been very frequently used. But when you come to look at the case of marshalling, though that term so frequently occurs, the operation is upon the principle that the party has a double fund." And again: "Suppose another

Judgment.

1869.

Quay v. Sculthorpe.

case, *two estates* mortgaged to A. and one of them mortgaged to B. He has no claim under the deed upon the other estate. It may be so constructed that he could not affect that estate after the death of the mortgagor. But it is the ordinary case to say a person having two funds shall not by his election disappoint the party having only one fund." Here, it is true, that the Building Society had not two funds of the common debtor, the surety; but they had one fund of the common debtor and another fund belonging to the principal debtor for whom the common debtor, the surety, had become liable to them, and to the benefit of which the surety was undoubtedly entitled. Now, the plaintiffs here having a lien and charge upon this one fund of the common debtor, the surety, subsequent to that acquired by the Society under their judgment against both the principal and surety, and standing *pro tanto* in the place of the surety as owner of the property affected by the judgment, say to the society, as the surety whom or whose interest in the property *pro tanto* they represent: "Exhaust not another property of the common debtor on which we have no charge, and leave us that on which we have, but exhaust the property of the principal debtor for whom our common debtor is only surety, before you assail that property of the surety on which alone we have a security." Now, does not this really seem a higher order of equity than the ordinary case first put, of two creditors having respectively a double and a single fund of the common debtor on which to rely? What does Lord *Eldon* say of the position of a surety: "That it rests not on contract but on that equity upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety." Is it not equally against conscience that the holder of the security, the society here, should use them to the prejudice of the surety's representative in the property to which alone his charge extends?

Judgment.

1869.

Quey v. Sculthorpe.

The right of the surety himself to insist on this would be, and is, undoubted. Why may not his representative in the property insist upon the like equity? May not the surety, when he executed this mortgage subsequent, and consequently subject to the judgment against himself and the principal debtor, be taken to have conferred upon his mortgagee and so transferred to him the same rights and means to free this property from this judgment as the surety himself possessed? These mortgages are in the ordinary form, with the usual covenants, as I understand. But independently of any such implied contract, it seems to me the equity exists at the suit of these mortgagees, and resting, as I think it does, upon the same principle on which the surety himself could exert it, and I do not think we should refuse to apply it, merely because we find no case in the English Courts exactly in point, either affirming or disaffirming such an application of the doctrine. In the American Courts it has been frequently applied in a similar case, and I cannot do better than quote the language of *Bell*, J., in delivering the judgment of the Supreme Court of Pennsylvania, in the case of *Neff* v *Miller*, as reported in 8 Barr 347. The question was as to the right of judgment creditors of a surety, whose lands had been taken in payment of another judgment against himself and the principal, to substitution on this judgment. The same objection was raised there as here that, although as between creditors of the same debtor, those who had but one fund could not be deprived of their remedy by the election of others who had two, yet that this did not hold good where the fund belonged to different persons. The learned Judge says:—

Judgment.

"Under this state of facts the question is, whether the owners of *Jane Smith's* judgment are entitled to be subrogated as they claim to be. This question is not affected by the fact that they were defendants in the judgment, for it is part of the case that they were merely

1860. sureties, to whom equity accords all the securities and means of payment within the power of the creditor.

Quay v. Sculthorpe.

"It will be perceived that this is not the case of a lien creditor, with power of recourse to two funds belonging to his debtor, in satisfaction of his lien, and another lien creditor of the *same debtor*, having only one of these funds to which he can resort for the payment of his debt. In such a case, a Chancellor will, of course, interfere by compelling the first creditor to look to the fund against which the other has no remedy, or, if the first creditor has already satisfied his debt from the fund to which the second creditor can alone apply, equity will substitute the latter to the place of the former, so as to permit him to avail himself of the unappropriated fund.

Judgment.

"But the peculiarity of the question before us is, that one creditor, having a joint and several incumbrance against the estates of *two distinct* debtors, claimed and received the amount of that incumbrance from the separate estate of one of the debtors, and thus defeated the claim of a lien creditor of the latter. It is then the case of two funds belonging to different debtors, and not an instance of a double fund belonging to a common debtor. Under such circumstances, a Court of equity will not, in general, compel the joint creditor to resort to one of his debtors for payment, so as to leave the estate of the other debtor for the payment of his separate and several debt, for, as between the two debtors, this might be inequitable; and the equity subsisting between them ought not to be sacrificed merely to promote the interest of the separate creditor. Nor will Chancery, for the same reason, substitute the several to the place of the joint creditor, who has compelled payment from the estate of the debtor of the former. But where the joint debt ought to be paid by one of the debtors, a Court of equity will so marshal the securities

1899.

Quay v. Southorpe.

as to compel the joint creditors to have recourse to that debtor, so as to leave the estate of the other open to the claims of his individual creditors; or, if the joint creditor has already appropriated the latter fund, it will permit the several creditors to come in *pro tanto*, by way of subrogation upon the fund which ought to have paid the joint debt: 1 *Story*, Eq. sec. 642-3; Per. Ld. *Eldon*, *ex parte Kendall*, 17 Ves. 520; *Sterling* v. *Brightbill*, 5 W. 229. Thus, if A. have a judgment which is a lien on the lands of B. and C.; and D. own a younger judgment which is a lien on the land of C. only, and the joint judgment be levied on and paid out of the estate of C., to the exclusion of the younger judgment, D. will not be subrogated to the rights of A., to enable him to obtain from the estate of B. payment of his several judgment; for B. was not the debtor of D., and for aught that appears, C. may be indebted to B. to the full amount of A.'s judgment. But if B. and C. were partners, and gave the first judgment on the partnership account; and on a settlement of accounts between them, it appeared that B. was indebted to C. to the amount of the joint judgment, the judgment creditor of C. would be substituted as against the estate of B., *pro tanto*: *Dorr* v. *Shaw*, 4 Johns. C. Rep. 17. It would be the same if the judgment was recovered by A. for B.'s proper debt, C. being merely surety; for in both these cases B. ought to have paid the judgment, and C.'s estate being taken for it, to the exclusion of C.'s judgment creditor, he ought, on equitable principles, to be permitted to receive out of B.'s estate so much as he had lost by the application of C.'s estate to the payment of B.'s proper debt. Nor can the subsequent judgment creditors of B. complain of this. They acquired their securities with a full knowledge of and subordinate to the prior joint judgment, and have no legal or equitable right to demand that a mere surety shall discharge it for their benefit.

Judgment.

1869.

Quay v. Sculthorpe.

"The principles that have been brought to view are of easy application in this instance, and, indeed, the illustration which has been offered exactly embraces the case. Here is a surety, whose money has been applied in payment of the debt of his principal, to the exclusion of his own proper creditors. That he would be entitled to come in, by way of substitution, upon the estate of the principal, is every-day equity; and I think it equally clear that his creditor, who has suffered by the appropriation of a fund which otherwise would have been available for the discharge of his claim, may well ask to stand upon this equity, to the extent of the deprivation to which he has been subjected."

The Court thus carefully guards against any supposed equity existing in favor of the creditors generally of a surety whose property has been swept away for the debt of his principal, as undefined or undefinable, which has nothing to fasten upon, and has no fixed range or limit.

Judgment.

Adopting the law of this case and applying it here, we think the plaintiff entitled to the relief he seeks (*a*).

In the present case there are three mortgagees, two of them defendants, who have let the bill be taken *pro confesso*. The other mortgagee, the plaintiff, has placed all of their mortgages in the same rank as entitled equally to share *pro rata* in the benefit of the security taken by the Society from the principal debtor, and therefore no dispute as to its appropriation between these incumbrancers exists. If it did, the question as to the fund being equitable assets and the appropriation thereof, without regard to priorities, would have to be considered.

(*a*) See also Hales v. Cox, 32 Beav. 118; South v. Bloxam, 2 H. & M. 457.

1869.

Quey v. Sculthorpe.

I of course need not say that where the Court interferes to limit the owner of a charge on two funds to the realization of his debt out of one of them (if the Court ever does so interfere), it substitutes the person having the charge on one fund only in the place of the party who has the two funds. The whole law on this subject is to be found in the notes to *Aldrich* v. *Cooper* (*a*).

As to Mrs. *Catharine Fox*, she took, subject to the mortgage of the Building Society, which the surety or the surety's property has paid off. Her mortgagor did not pay it off, and it remains in the hands of the surety's representative, as it undoubtedly might in the hands of the surety, a charge upon the property as it was originally. She is no better or worse than she was before; and so as to *Robert Elias Sculthorpe*, who, after the Sheriff's sale of *James Sculthorpe's* lands, recovered judgment against the latter, and subsequently purchased from the Building Society and obtained from them an assignment of the security in question on paying them an alleged balance of $280, remaining due on the judgment against the principal and the surety *James Sculthorpe*. He had no lien on the lands of the surety, because they had been sold by the Sheriff before his judgment; and as he does not deny the notice which is charged against him when he purchased from the Building Society, he can stand in no better position than they would, had they retained the mortgage. He must be repaid any balance paid by him to the Building Society.

Judgment.

The garnishee order, we think, could not disturb the prior equities of the parties, and is therefore as against them of no effect (*b*).

As to the costs, we think the defendants must pay the costs of this contention, not the costs of the rehearing;

(*a*) 2 W. & T., Lead. Ca. p. 1. 66.

(*b*) See Webster v. Webster, 31 Beav.

1869. Quay v. Sculthorpe.

and that *R. E. Sculthorpe* should have the ordinary costs of a redemption suit in respect of any sum properly paid by him to the Building Society.

MOWAT, V. C.—I concur in the conclusion to which the Chancellor has come, and in the general reasoning with which he supports it.

"Declare that the plaintiff and the defendants *Perry* and *Barrett* are entitled to a lien in respect of the amounts due on their several mortgage securities in the pleadings mentioned in substitution of and subrogation of and to the extent of the amount realized by the sale of the lands mortgaged to them by *James Sculthorpe* towards satisfaction of the mortgage from the defendant *Fox* to the Canada Permanent Building and Savings' Society upon the lands and premises comprised in the said mortgage; reference to the Master at Cobourg to take the following accounts, &c.

Decree.

1. An inquiry whether any person or persons, and if so, who other than the plaintiffs and the defendants *R. E. Sculthorpe*, *Perry*, and *Barrett*, has or have any lien &c., upon the lands and premises comprised in said mortgage from the defendant *J. S. Fox* to the Canada Permanent Building and Savings' Society subsequent thereto: such persons to be served with process, &c., and an account of what is due to them taken. Also an account of the amount properly paid by the defendant *R. E. Sculthorpe* to the Canada Permanent Building and Savings' Society for the assignment of their mortgage to him as in the pleadings mentioned, and to tax the defendant *R. E. Sculthorpe* his costs of this suit as of an ordinary redemption suit; tax to the plaintiff his costs of this suit, save and except the costs of the rehearing: upon plaintiff and the defendants *Perry* and *Barrett*, or any or either of them paying to the defendant *R. E. Sculthorpe* the amount which the Master shall find to be due, within one calendar month

after the Master's report, *R. E. Sculthorpe* to assign, &c., the mortgaged premises free to plaintiff and defendants *Perry* and *Barrett*, or to such of them as shall make such payment; such conveyance to be settled, &c.: Upon the plaintiff and the defendants *Perry* and *Barrett*, or any or either of them making such payment, the following accounts are to be taken by the said Master:

2. An account of the amount realized by the sheriff's sale, mentioned in the 11th paragraph of the plaintiff's bill of complaint in this cause, and interest thereon to the day to be appointed for payment as hereinafter directed, and to add thereto the amount which shall have been paid by the plaintiff and the defendants *Perry* and *Barrett*, or either of them, to the defendant *R. E. Sculthorpe*, as hereinbefore directed, and interest thereon to the day to be appointed for payment, and the costs of the plaintiff and of the defendants *Perry* and *Barrett* subsequent to this decree.

Decree.

3. An account of the amount due to the plaintiff and the defendants *Perry* and *Barrett* respectively on their mortgages in the bill mentioned, and interest thereon to the day to be appointed for payment as hereinafter mentioned, and of what they shall have paid to the defendant *R. E. Sculthorpe*, as hereinbefore directed, with interest thereon to the same day, and the costs of the said plaintiff and the defendants *Perry* and *Barrett* subsequent to this decree; and in case the total amount of the accounts thirdly mentioned exceeds the total amount of the account secondly mentioned, the Master is to direct payment by the defendant *James Sculthorpe Fox* to the plaintiff and the defendants *Perry* and *Barrett* respectively of their respective costs subsequent to this decree, and of what they or either of them shall have paid as hereinbefore directed to the defendant *R. E. Sculthorpe*, and to deduct the total amount of such last mentioned costs and the total amount which shall have been so paid to the defendant *R. E. Sculthorpe* from the total

1869.

Quay v. Sculthorp e.

amount of the accounts secondly mentioned, and to direct payment of the balance of the amount of the account secondly mentioned, after making such deductions to the plaintiffs and the defendants *Perry* and *Barrett* respectively ratably according to the amounts due on their said several mortgage securities, within three months after report: and in case the total amount of the accounts secondly mentioned exceeds the total amount of the accounts thirdly mentioned, then the Master is to direct payment by the defendant *J. S. Fox* of the amount of the accounts thirdly mentioned to the parties entitled to the several amounts thereof, within three months after subsequent report: and the said Master is to direct payment of the surplus of the amount of the accounts secondly mentioned at the same time and place to any incumbrancer who may establish any claims, &c., against the said *James Sculthorpe* on the said surplus: the said Master to make the necessary inquiries as to such incumbrancers and to settle their priorities and to tax to them their costs, &c.: and if the said Master shall find that there are no such incumbrancers, then he is to direct payment at the time aforesaid of the said surplus to the defendant *James Sculthorpe*, and upon the said defendant *J. S. Fox*, making such payments as aforesaid, order that the said plaintiff and defendants *Perry* and *Barret*, do assign and convey the premises comprised in the mortgage to the Canada Permanent Building and Savings Society to the said *J. S. Fox*, &c.; but, in default of the defendant *J. S. Fox* making such payments as aforesaid, order the premises comprised in the said mortgage to the Canada Permanent Building and Savings' Society to be sold, &c.; the purchase money to be applied in payment of the amounts found due to the said parties as hereinbefore mentioned: and in case such purchase money shall not be sufficient to pay the amounts due to the plaintiff and the defendants *Perry* and *Barrett*, order the defendant *J. S. Fox* to pay the amount of

Decree.

such deficiency, together with subsequent interest and subsequent costs, &c.; Master also to tax to plaintiff his costs of this suit to this date, save and except the costs of the rehearing: order that the defendants *J. Sculthorpe, J. S. Fox, Catharine Fox,* and *R. E. Sculthorpe,* do pay the same immediately after such taxation. 1869. Quay v. Sculthorpe.

In re Eliza Jane Irwin, an Infant.

Infants—Guardianship.

There was a contest in a Surrogate Court between the stepfather and uncle for the guardianship of a child of ten or eleven years old; the child preferred her stepfather, and the Surrogate Court appointed him guardian; but this Court, on appeal, being satisfied from the evidence that it was for the real interest of the child that the uncle should be guardian, reversed the order below.

Appeal from the Judge of the Surrogate Court of the County of Perth.

Mr. *R. Smith*, for the appeal.

Mr. *Osler*, contra.

Williams on Executors, 462; *Coote's* Probate Practice, 109; *McPherson* on Infants, 111, 119; *Chambers* on Infants, 147, 176, 178, were referred to.

Spragge, V.C.—This is an appeal from an appointment by the Surrogate of the County of Perth of a guardian, under the Statute, to the above named infant. The appellant and one *George White*, who opposes this appeal, were contestants before the Surrogate for the guardianship of the infant. The appellant is the only brother of the infant's mother living in Canada. *White* married the infant's mother in January, 1868, and she died in December of the same year. The father of the infant died in December, 1860. The infant is his only child, and is now between ten and eleven years old, Judgment.

1869.

In re Irwin.

having been born in January, 1859. She is entitled to some personal property: the amount is in dispute. *White* has been appointed administrator of his wife's estate. It is admitted that she was entitled to a sum of $1,000 or more. There is a further sum of about $1,500, which is in dispute. It reached the hands of the infant's mother during her intermarriage with *White;* and *White* claims that she gave it to him absolutely, and that he used the greater part of it for the support and benefit of his wife and her child.

Creighton is a merchant residing in Fergus, a village of some 1,500 inhabitants. *White* lives on a farm belonging to his father, in the Township of Blanshard, about nine miles from St. Mary's and three miles from a small village called Granton. *Creighton* is a married man, being married in 1864 and has two children, and is about 33 years old. *White* is still a widower, and is a young man.

Judgment.

Creighton appeals from the appointment of *White* on several grounds. He claims that he is entitled in preference to *White* from his being near of kin to the infant; that *White* has no means of his own, being entirely dependent upon his father. This appears to be the case, with what can scarcely be called an exception, viz., a lot of land, or a right to one, valued at about $20. His father is spoken of as a man of considerable means. That the educational advantages are greatly in favor of Fergus, where *Creighton* lives. This appears to be the case from the evidence. There is what is said to be a good common school not far (two lots off it is said) from the residence of *White*, but still the advantages are in favor of Fergus; and it is urged as another objection that *White*, in respect of the $1,500 to which I have referred, claims adversely to the infant.

Both *Creighton* and *White* are spoken of in the evidence as men of very good character.

1869.

In re Irwin.

The grounds upon which *White* claims that his appointment is right and proper are, that it was the personal wish of the mother of the infant, expressed during her last illness, that her child should continue to live with him; and that it is also the wish of the child herself. It appears by the evidence that the infant's mother and her second husband, *White*, lived together very affectionately during the short period (less than a year) of their married life, and that during that time, and always since, he has treated the child very kindly. It also appears that the expressed wish of the mother was, and that the wish of the child is, that she should continue to live with her step-father. There is another circumstance connected probably with the preference of the child, and perhaps with that of the mother, which is this: the mother and child lived with *Creighton* for four years—two years before he was married and two years after. *Creighton*, two years after his marriage, moved into another house, leaving the widow and child in the house he had formerly occupied, and they remained there until the widow married *White*. The child appears to have retained an unpleasant impression of her residence at her uncle's house after his marriage. She was examined before the Surrogate, and said that she went to live with *White* in January, 1868; that he is good to her; that she likes to live with him; that she lived some time before that with her uncle; that she got on very well with him until he got married; but that his wife was "awful cross;" that she did not get on very well with her; that she likes her uncle very well, but would rather live with *White;* that her mother wanted her to live with *White*, and that when her mother thought she was dying, she told her she wished her to continue to live with *White*. The wish of the mother was probably compounded in part of affection for, and confidence in, her husband, and in part of the recollection of the unpleasant footing upon which her child had been with her brother's wife; the preference of the child

Judgment.

1869.

In re Irwin.

from the latter reason, from the wish of her mother, and from her experience of the personal kindness of her step-father; and these considerations, I have no doubt, influenced the mind of his Honour the County Court Judge in appointing the latter the guardian of the child.

They are considerations which are entitled to some weight; but I cannot help doubting whether more than due weight has not been given to them, when we take into account the future of the child, and the nature of the office of guardian. The guardian has, under the statute, the charge and management of the real and personal estate of the infant, and the care of his or her person and education.

I have looked at the authorities to which I have been referred, and at a number of others. I gather from them—what is indeed the common sense view of the question—that while the Court will have some regard to the personal wish of the infant, when of an age for his or her wishes in such a matter to be listened to, especially upon the question of personal residence, the Court will have yet higher regard to the infant's substantial interests and real good.

Judgment.

But for the considerations to which I have adverted, the child's uncle would be the more proper appointment, especially taking into account his place of residence and the superior means of education afforded there. It is not, however, necessary for me to say now that he should be appointed, but only to say, looking at all the circumstances, whether it was proper that *White* should be appointed. Besides the objections to him to which I have referred, another is urged that he may marry again and have a family, and that the position of the infant may thereby be rendered less desirable. And there are one or two others which strike me as being of no inconsiderable force. The unprotected position of

the child, while her step-father is at work on his farm or in the woods, or absent at market or from other causes; and perhaps also in the child going to and from school, is an evil increasing with her increasing age. Then, besides, the distance from school—no great evil in fine weather—there is the interruption to education or danger to health during the inclement seasons of the year. The want of companionship of children of her own age and sex is another disadvantage, and I am not informed of how the household of *White* is composed. It is not said whether he lives alone with this child, and if not alone, who is living with him. From part of the evidence I suppose his brother is residing with him. One single man or two single men are not the fittest companions for a child of the age of this infant; and in a few years her position in such a household would be emphatically a false position. 1869. In re Irwin.

These are considerations which she is at present too young to appreciate, but which it is necessary to look at, and to weigh well, in order to come to a sound and wise conclusion in a matter which may greatly affect the child's future life. Judgment.

On the other hand, I would not force the child to live in a household where she would be unhappy. It is possible she may have a repugnance to live with her aunt which cannot be overcome; but if it can be overcome, it is certainly the right place for her—so at least I judge from the evidence—and past and present circumstances are so different, that she may find her uncle's house not only the most proper but the most pleasant home for her. Her uncle himself is most anxious that his sister's child should live with him, and his wife will, it is to be hoped, have the good feeling to receive her kindly, and so to treat her as to efface the memory of former unpleasantness. And *White* himself should see that he will best shew his affection for the child of his deceased

1869. wife, by counselling her to a cheerful acceptance of the position in which she may be placed.

In re Irwin.

I will, however, leave the question of the future residence of the child to be disposed of by his Honor the County Court Judge. The residence of a ward is not necessarily with his or her guardian; and if the child cannot live happily in the household of her uncle, it is still desirable that she should be brought up under his eye; and in so large a village as Fergus it is not improbable that an arrangement may be made with some other family. But I repeat, her uncle's house should be her home; and it should only be in the event of her residence there being found incompatible with her comfort and happiness that any other arrangement should be resorted to.

Judgment.

I have considered this matter a good deal, and have hesitated before coming to a conclusion different from that of the learned Surrogate. I should not have disturbed his decision, if I had not felt convinced that the real permanent good of the infant would be best promoted by the course that I have indicated as the proper one. The child of ten may probably think it harsh; a few years hence, and perhaps at a much earlier period, she may take a different view of it.

1869.

REES v. THE ATTORNEY GENERAL.

Repealing patent—Parties.

A bill which shews ground for repealing a patent is not demurrable for not shewing that the plaintiff was entitled to have a patent issued to him.

A bill alleged that the patentees obtained their patent by false representations to the Government, and shewed a case in which the patentees would not be entitled to compensation if the patent were set aside and the land given to another:

Held, that to such a bill the Attorney General was not a necessary party.

Demurrer by the Attorney General.

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

Mr. *Hurd*, contra.

SPRAGGE, V. C.—The parties defendants to the bill are the Attorney General, the City of Toronto, and the Grand Trunk Railway Company of Canada. Judgment.

The demurrer is by the Attorney General, and is to so much of the bill as asks for the revocation of the patent to the Corporation of the City of Toronto, and the granting of a patent or license of occupation to the plaintiff; or in so far as the same seeks any relief against the Crown; and the cause of demurrer is, "that this honorable Court hath no jurisdiction to decree as against the Crown any relief in respect of the matters aforesaid."

The prayer is for a repeal of the patent, though the term "revoke" is used: and if upon the allegations of the bill the plaintiff is entitled to a decree for a repeal of the patent, though he may be entitled to nothing more, the demurrer will not hold good as a demurrer to

1869. Rees v. Attorney General.

the jurisdiction of the Court on the subject matter of the bill, but resolves itself into an objection that the Attorney General is not a proper party, because no decree can be made in the matter as against the Crown.

Upon this point I have more than once expressed my opinion, that where the plaintiff's case, if successful, would establish a claim on the part of the defendants, other than the Attorney General, upon the justice of the Crown for compensation, that in such a case the Attorney General was at any rate a *proper* party.

At the hearing of the demurrer, the Attorney General also demurs *ore tenus* for want of equity. This is objected to, but it is the settled practice that he may so demur.

Judgment.

The plaintiff sets out a great number of facts as constituting an equity, which I am inclined to think form no ground for repealing the patent; or for the interposition of this Court in any way. Their only use in my mind is, that if true, as upon the demurrer I must take them to be, they might properly have had weight with the Executive Government, inducing the Government either to refuse a patent to the City; or to grant it upon terms which would have been of benefit to the plaintiff.

The plaintiff states that after obtaining an assignment of a lease of what may be called, for the sake of brevity, a water lot in the City of Toronto, west of Simcoe Street, produced, he applied to the Government for a sale, or lease, or license of occupation of land of the same character, being westward of that which he had already acquired, in order to make certain improvements thereupon, but that his application was refused, on the ground that it was not the intention of the Government to dispose of water lots in that locality while the top of the bank was occupied by the Parliament buildings; and the bill alleges that

on the plaintiff making such application, the Hon. Commissioner of Crown Lands, the Hon. *Peter Robinson*, assured him that he would be quite safe in going on with his contemplated improvements on the land that he applied for; and that he should always have a preference in case the Government should think of selling or disposing of the land; which assurance and promise the bill states were subsequently confirmed by his successor, Mr. *Sullivan;* and that on the faith of these assurances and promises, the plaintiff did immediately go on with his contemplated improvements.

1869. Rees v. Attorney General.

Up to the fifteenth paragraph of the bill the plaintiff does not, I incline to think, disclose an equitable case for the interposition of this Court.

The fifteenth paragraph reads as follows: [His Lordship here read the paragraph of the bill.]

The pith of the paragraph is, that untrue representations were made to the Government on behalf of the City; that thereupon the Commissioner of Crown Lands reported to the Governor General in Council in favor of the cancellation of the plaintiff's license of occupation in order to the granting of a patent to the City; and that such report was founded upon these representations, which the bill alleges were untrue, so that the Crown was deceived.

Judgment.

But there is this difficulty in the plaintiff's way: The case made by the fifteenth paragraph is, that the Crown was induced to grant the patent to the City by false representations made by or on behalf of the City, and if so, the City cannot have any claim upon the Crown for compensation. The plaintiff's allegations, which I must take to be true as against him, as against the party demurring, exclude any such claim, and consequently the Attorney General cannot properly be made a party

1860.

Rees v. Attorney General.

in order to protect the Crown from such claim; and for any other purpose he is not a necessary party. I must therefore allow the demurrer of the Attorney General.

Upon the argument of the demurrer a question arose as to whether, in the event of the demurrer being overruled, it should be with costs against the Attorney General. The plaintiff claimed costs, and the Counsel for the Attorney General objected that the rule is that the Attorney General does not pay costs, and cited *Gibson* v. *Church* (*a*) in this Court, which so decides.

I did not understand Counsel to claim costs for the Attorney General in the event of the demurrer being allowed. There are some cases certainly in which the Attorney General receives costs. In this case, if unsuccessful, it would not have been according to the practice to give costs against him. It was a fair question whether he should not be made a party, in order to support the action of the Government in the matter complained of; and while I think he is not a proper party, I think, looking also at the fact that he would not have to pay costs, he should not receive them.

Judgment.

I desire to guard myself from being understood to say that the circumstances urged before the Government by the plaintiff constituted any just claim upon the consideration of the Government in favor of the plaintiff. I mean only this, that I cannot say but that the Government would have been induced to withhold the patent, or to grant it upon terms, if the true facts of the case, as alleged in the bill, had been before the Governor in Council.

(*a*) 1 Cham. 69.

1869.

WOOD v. WOOD.

Sheriff's sale—Partition agreement—Decree between co-defendants.

A debtor executed two mortgages, a portion of the land comprised in one of them being comprised in the other, and his interest in all the land was sold under execution:
Held, that the sale was invalid.

In a partition suit, a question of title raised between co-defendants was decided at the hearing and without being referred to the Master.

The adult co-heirs of an estate agreed to a partition, and bound themselves to execute quit claims to carry it out as soon as the minors came of age and united therein: some of the co-heirs went into possession of their portions and made improvements: some released their interest in the property allotted to others; but some of the minors on coming of age declined to adopt the agreement:
Held, on that account, that the agreement was not binding on any of the parties to it; and a decree for partition was made; and the Master was directed to have regard in partitioning to the possession and improvements by the parties.

Examination of witnesses and hearing at Cobourg.

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

Mr. *Armour*, Q. C., for the defendant *Chalmers*.

Mr. *Roaf*, Q. C., for the other defendants, except the husbands of the female plaintiffs, and as against them the bill was *pro confesso*.

SPRAGGE, V.C.—This is a bill for partition. *Richard Rutherford*, the father of the plaintiffs and of the defendants *Rutherford*, died intestate in 1857, seized of several parcels of land in the township of South Monaghan. He left four sons and five daughters, each consequently inherited from him an undivided ninth of the whole. His widow has since died. An agreement was entered into among some of the parties, with a view

Judgment.

1869.
Wood v. Wood.

to the partition of the estate, which bears date 23rd January, 1858, and a number of conveyances have since been made between the parties. But, before entering upon the questions which arise upon those documents, it will be convenient to consider some transactions, in respect of which the defendant *Chalmers* is made a party.

One of the sons of the intestate, the eldest, *Walter*, made a mortgage te secure $602 to the Bank of Upper Canada upon his interest in one of the descended parcels; —lot 17 in the 3rd concession. This mortgage is dated 21st April, 1859; and on the 21st of May, in the same year, he made a mortgage to one *Armstrong*, to secure $800, of his share or interest in the estate of his father; and six parcels of land are enumerated, among them the one comprised in the mortgage to the Bank. Upon a judgment recovered against *Walter*, and execution against lands, all his interest in certain parcels of land described, and which are the same as are comprised in the mortgage to *Armstrong*, were sold by the Sheriff, who by deed, dated 22nd January, 1868, conveyed to the purchaser all the estate, right, title, and interest of *Walter* in those lands. The sale was made by a former Sheriff on the 4th of April, 1863. The defendant *Chalmers* is the assignee of the purchaser at Sheriff's sale.

Judgment.

It was suggested in argument, that the equity of redemption of *Walter* was not saleable under common law process, there being upon a portion of the property sold two mortgages, which were in different hands. In the case of *Donovan* v. *Bacon*,* which was before the

* *Donovan* v. *Bacon* was a bill by the owner of the equity of redemption in certain mortgage lands, seeking to compel the defendant *Bacon*, who had bid off the lands at sheriff's sale, to pay off the mortgage. On the cause coming on for hearing, the following judgment was delivered by—

Chancellor, his Lordship held that the statute for the sale of equities of redemption in lands does not apply where the land sold is subject to mortgages in different hands. The only difference between that case and this is, that in this, a portion only of the land comprised in one of the mortgages is comprised in the other; but that is not a difference in principle, the reasoning upon which the Chancellor bases his decision

1869.

Wood v. Wood.

VanKoughnet, C.—At the time of the sale of the mortgagor's interest by the sheriff, there were outstanding two mortgages in different hands executed by the owner of the estate. Can the sheriff, in such a case, sell the equity of redemption under sections 258 and 259 of chapter 22, Consolidated Statutes of Upper Canada?

The language of the 258th section would be wide enough to cover such a sale; but, read in connection with the 259th section, it seems to me that the Legislature were intending to deal with the simple case of one mortgagor and one mortgagee, and that they did not intend the equity of redemption to be sold where there was more than one mortgagee; for, while they declare in this latter section that any mortgagee may purchase, they provide that he shall give to the mortgagor a release of the mortgage debt; whereas, if any other person becomes the purchaser, he shall pay off the mortgage debt or perhaps the mortgage debts, if the clause had reference to such a purchaser only. But it would be meeting out scant justice to the mortgagor that where a mortgagee, if he become the purchaser, should alone be required to release his own debt—for he of course could not release debts charged on the estate due to others;—yet, that a stranger purchasing must pay off all the incumbrances. Without saying that a mortgagee might not render himself liable to pay off the incumbrances (unless saved by the statute relating to tacking and mesne charges), still, I think that these distinctive provisions of the statute, to which I have just referred, in connection with the language of these sections which operate only in the case of a single mortgage, indicate that the Legislature only intended to deal between mortgagor and the one and the same mortgagee; and this construction of the statute is in accordance with the views taken by the Court on other questions arising under it. I do not mean to say that where the same mortgagee holds two mortgages instead of one, that the statute could not be applied.

Judgment.

As, however, the defendant *Bacon* does not by his answer repudiate the estate and charges fraud, I dismiss the bill against him without costs.

1869.

Wood v. Wood.

is as applicable to such a case as to the one before him. The bill indeed treats the Sheriff's sale as valid and effectual; and the answers of *Walter* and the other sons and of the *Andersons*, husband and wife, object that *Walter* had not a saleable interest, but upon other grounds, with which I do not agree, and which were not suggested in argument. The point therefore is not raised upon the pleadings, and I might pass it by, as a point not material to the plaintiff's case, and a point arising between co-defendants, were it not that a decree for partition is of a nature that makes it necessary to ascertain the title of those among whom the partition is to be made, or at least to put the title in a course of inquiry. As between *Walter* and the other sons and the daughters of the intestate, he and *Chalmers* stand upon the same footing, because if *Chalmers* has acquired anything it is the interest of *Walter*.

Judgment.

The question upon this point is really between *Walter* and *Chalmers*. It would be embarrassing to leave that point undecided, while proceedings for a partition were going on in the Master's office, for it would be uncertain who should be the proper party to represent the interest which is or was the interest of *Walter;* and it might make it difficult for parties to agree, in whole or in part, before the Master upon the terms of a partition or compromise. I think my best course will be, inasmuch as *Walter* has by his answers set up that nothing passed by the Sheriff's sale, though for reasons which I think not tenable, to disregard the reasons; and adjudge upon the substance of the objection that nothing passed, and to follow the decision of the Chancellor (as is the ordinary and proper course) in *Donovan* v. *Bacon*. If counsel for *Chalmers* think the cases distinguishable, I will hear counsel upon that point; and it is desirable that it should be upon an early day, say upon the next Monday or Wednesday that I sit in Court.

1869.

Wood v. Wood.

The agreement of January, 1858, made with a view to a partition, is not referred to in this bill, unless in the paragraph in which the plaintiffs state that they have made ineffectual attempts to effect a partition or sale among the parties interested, which has failed without their fault or negligence. The agreement is set up in the answers of the four brothers and of the *Andersons*, and among other grounds part performance is insisted upon. The parties to the agreement are two of the four brothers, *Walter* and *William*, the *Andersons*, husband and wife, and two of the sisters, *Lilla* and *Mary*. It recites an informal paper as made and signed by the father, allotting his real estate in defined parcels among his sons and his married daughter, Mrs. *Anderson*, and her husband, charging the parcels allotted to his sons with a money payment to his unmarried daughters, and the parcel allotted to the *Andersons* with a money payment to a person named, I suppose his widow. The parties to the agreement agree to the allotments and provisions stated in it, and they bind themselves to execute proper quit claims to each other, in order to carry it out "as soon as all the different parties come to the age of twenty-one years and unite in carrying out the conditions of this agreement." This provision creates the difficulty, or perhaps the nature of the instrument would itself create the difficulty, for it could not be carried out without the assent of all the parties interested in the estate intended to be apportioned. One of the two remaining daughters afterwards indorsed upon the agreement her assent to its provisions. The other daughter and the other two brothers never became parties to it; and it was besides ineffectual as to Mrs. *Anderson*, she being a married woman; and was besides, as to her, an improvident arrangement, as she was to give up her own estate, and in lieu of it a portion was to be allotted in the terms of the agreement to her husband and herself. The four sons and the *Andersons* went into possession of the portions severally allotted to them, and each made improvements thereon.

Judgment.

1869.

Wood v. Wood.

Subsequently, a number of conveyances were executed between several, not all, of the parties entitled. It will suffice to state generally the effect of these conveyances. *Walter* is no party to any of them either as grantor or grantee. There are conveyances from all the sisters, including *Elizabeth* and Mrs. *Anderson* to *William* and *James*, their husbands joining in the conveyance; and from *John* also to *William* and *James*, and from *William* and *James* each to the others. There are conveyances also from *William* and *John*, and from *Mary* and *Jane* and their husbands to Mrs. *Anderson;* from *Elizabeth* and her husband to *Anderson* and wife, and from *James* to *Anderson*. All these conveyances are of the parcels allotted respectively in the agreement of 1858, but without reference to that agreement, and are expressed to be for valuable consideration, and appear in fact to have been so. I do not find among the papers any conveyance to *John*, though I had understood at the hearing that the like conveyances had been made to him. There are conveyances from him to *William* and *James* and to Mrs. *Anderson;* and it is in evidence that he, as well as *James* and *William*, paid to *Elizabeth* £50 in cash. This amount may or may not be correct. The consideration expressed in the conveyances from *Elizabeth* to *James* and *William*, is $300. It is not material. It is suggested that *Walter* was left out of these arrangements, in consequence of the difficulties arising out of the mortgage that he had made, and the judgments recovered against him.

Judgment.

I do not think that anything that has been done amounts to part performance of the agreement of 1858, so as to entitle any one on that ground to call for its entire performance. Beyond what has been actually done by parties having an interest in the descended estate, I do not think that they are bound to go. It was to be binding only in the event of all uniting in

carrying it out. *Elizabeth* never in terms assented to it; *Walter* never did what was contemplated towards carrying it out; and what was done was not necessarily referrible to the agreement, for the same reason that induced the parties to the agreement to make the apportionment and the provisions contained in it, may have induced others, not parties to it, to make the like apportionment and provisions, viz., that it was the expressed wish in writing of their father that such should be the disposition of his property. The case of *Elizabeth* is sufficient. She has a right to say that she was at perfect liberty with her husband, to deal with her sister, Mrs. *Anderson*, and with some of her brothers, as they might agree; the expressed wish of her father might be her inducement, or regard for her sisters and brothers with whom she so dealt; or the perfect fairness as between them of the dealing between them; or even because such an agreement had been entered into, or any other motive. There was nothing in her so dealing that can be properly construed into an adoption of the whole agreement; and indeed her so dealing is quite consistent with a deliberate intention on her part not to carry out the whole agreement, as she might consider that those with whom she dealt had no more than a due share of the estate, while the agreement allotted more than a due share to others with whom she did not choose to deal in the same manner.

1869.

Wood v. Wood.

Judgment.

The parties then are in this position—that which was contemplated by the agreement, the uniting of all parties in carrying it out has not occurred; and the parties expected to concur in carrying it out cannot be compelled to do so. What has been actually done is binding, and nothing more.

It will be convenient to define the rights of the parties so far as they appear from the papers put in. The plaintiffs have each conveyed the same land to *William*,

1869.

Wood v. Wood.

to *James*, and to the *Andersons* respectively, and are entitled to a partition of one-ninth to each of all the descended land which they have not alienated. *Walter* having received no conveyance and having made none, remains entitled to an undivided ninth of the whole, and is entitled to have allotted to him in severalty a portion equal thereto; the portion allotted to him to be subject to the two mortgages which have been referred to, and which are now in the hands of *William*. The rights of *Chalmers*, supposing the Sheriff's sale effectual, will be the same as those of *Walter*. *John* is entitled to a partition of all lands which he has not alienated; he seems to have conveyed specific parcels to all the sons and daughters except to *Walter;* he is entitled in severalty to a portion equal to one-ninth of the residue. *William* and *James* have conveyances of specific parcels from all parties interested except from *Walter*. They are entitled in severalty to a portion equal to one-ninth in the lands which they have not alienated, and excepting the parcels conveyed to themselves. The *Andersons* are in the same position as *William* and *James*. In apportioning the lands in severalty, the Master is to have regard to possession and improvements by the parties, so far as the same may be, without prejudice to the rights of the parties.

Judgment.

The costs to be as usual as between the parties entitled. In case of its being declared that *Chalmers* is not entitled, there should be no costs against him, as the plaintiff has made him a party as entitled to a partition; and on the other hand he cannot have his costs, because not entitled. I except from this any costs that may be incurred between him and *Walter*, in case of an argument to settle the question of right between them. Those costs will have to be adjudged upon the determination of that question.

1869.

THE TRUSTEES OF THE BANK OF UPPER CANADA v. THE CANADIAN NAVIGATION COMPANY.

Mortgage—Purchase with assent of mortgagee.

K. was trustee for sale of certain lands belonging to *M.* Two parcels were subject to a mortgage to the Bank of Upper Canada for more than the value thereof. The trustee agreed for the sale of these parcels to a purchaser; the Bank, before becoming insolvent, assented to the sale, and received the first instalment of the purchase money, The purchaser went into possession, but was in default in paying purchase money: the defendants were his assigns. By the trust deed, which the bank executed on becoming insolvent (which deed was afterwards confirmed by statute), it was made the duty of the Bank trustees to accept in payment and liquidation of any debt due to the estate the notes or bills of the Bank: on a bill by the Bank trustees for payment, it was *held* that as the money was coming to the Bank, the trustees were bound to accept payment in the notes of the Bank at par.

Examination of witnesses and hearing at Kingston.

Mr. *George Kirkpatrick*, for the plaintiffs.

Mr. *Moss*, for the defendant *Kirkpatrick*.

Mr. *Britton* and Mr. *Walkem*, for the other defendants.

Judgment.

SPRAGGE, V. C.—At the date of the sale by Mr. *Kirkpatrick* to *Berry*, the position of the parties was this: Mr. *Kirkpatrick* was trustee for the benefit of creditors of *McPherson* and *Crane* of *inter alia*, a number of parcels of land. Among them there were two parcels sold by him to *Berry*, and which two parcels were at the time of the execution of the trust deed subject to a mortgage to the Bank of Upper Canada for £2,000 ($8,000). The mortgage covered only the land sold to *Berry* (it is erroneously stated otherwise in the answer). The sale was made by *Kirkpatrick*, in pursuance of the trust, and was made, as stated in the bill by amendment, with the assent of the Bank; the Bank agreeing

1869.

Trustees of Bank of U.C. v. Canadian Navigation Co.

with *Berry* to release their mortgage, upon payment to *Kirkpatrick* of the agreed purchase money. *Berry* paid a portion of the purchase money to *Kirkpatrick*, and made default in payment of the balance. In this state of things the estate of the Bank passed into the hands of trustees, and the lands, the subject of the mortgage and sale, have become the property of the defendants. The question is, whether the plaintiffs are entitled to the whole mortgage money, less the amount paid to *Kirkpatrick*, and which he paid over to the Bank, or are bound to accept the balance of the agreed purchase money, and that in notes or bills of the Bank.

The bill claims that by reason of *Berry's* default in payment of the balance of purchase money, they are entitled to consider the agreement at an end and to require payment of the whole mortgage debt. But this view was not much pressed in argument, and I think is not tenable. It is at variance with the spirit of the agreement with *Berry*, which was in effect, that a sale being made to *Berry* for $1,400, the charge of the Bank upon the land should be reduced to that sum. It would be assumed that the sale was for the value of the land. It was a barren security for anything beyond the value; and for that reason the Bank agreed to forego their claim upon the land for anything beyond the purchase money. If upon default the agreement was at an end, the least default even for a day, would work a forfeiture in effect if not in name, for the land would become onerated with an incumbrance of more than five time its value, and the purchase money paid on account would at the same time be lost. My opinion is, that after default, the Bank was still bound to release their mortgage, upon payment of the balance of the purchase money to *Kirkpatrick*.

Judgment.

The peculiarity of the case consists in this: that *Kirkpatrick*, in his character of trustee for the estate of

1869.

Trustees of Bank of U.C. v. Canadian Navigation Co.

McPherson and *Crane*, is entitled, apart from the Bank having been an assenting party to the sale to *Berry*, to require the payment of the balance of purchase money in gold; and unless that assent of the Bank makes a difference, it is his duty as trustee to require payment in gold. On the other hand, there was a direct agreement, as stated by the bill, between the Bank and *Berry*, and it is the Bank (by its representatives) that is the plaintiff here.

It is put in argument that it is the right of *Kirkpatrick*, as trustee, to file a bill for lien for unpaid purchase money, and that upon such a bill the defendants could not acquit the land of the charge upon it by a payment other than in gold; and I apprehend that this would be the case, for I take it that the estate of *McPherson* and *Crane* is entitled to payment according to the contract between its trustee and the purchaser. Then what is the position of the plaintiffs? They are holders of a mortgage for $8,000. It is the owners of the equity of redemption who set up that upon a sale by a former owner of the equity of redemption, to one from whom the present owners derive title, the Bank had agreed to accept less, and this agreement the plaintiffs admit. But those setting up this agreement and claiming a benefit under it must take it in its entirety and subject to all its terms. What those terms were appears in part from the evidence of Mr. *Kirkpatrick*, and in part from the bill. *Kirkpatrick* was, at the time of the transaction, solicitor for the Bank as well as trustee for the *McPherson* and *Crane* estate. As trustee he had power to sell, but as Bank solicitor he had not power to bind the Bank by such an arrangement as was made. He says it was understood that as soon as the purchase money was paid by *Berry*, the mortgage to the Bank would be released. He says he undertook himself to get the mortgage released upon such payment, and thinks he had no conversation with the Bank

Judgment.

1869.

Trustees of Bank of U. C. v. Canadian Navigation Co.

agent in Kingston on the subject. His evidence therefore by itself does not prove enough to bind the Bank, and it is necessary to resort to the bill to establish the fact of the Bank being an assenting party to the arrangement with *Berry*, which the bill states thus: "And the said Bank of Upper Canada consented to said sale and agreed with said *Berry* to release their said mortgage upon payment of said purchase money to the said *Thomas Kirkpatrick*." The purchase money then was to be paid by *Berry* to *Kirkpatrick*, not by *Berry* to the Bank; and *Berry* would have been acquitted of the payment and entitled to a release of the mortgage upon payment to *Kirkpatrick*. And it is here, as I conceive, that any difficulty that exists in the case arises. If the arrangement had been that the payment should have been made to some third person, not to the vendor, there would be room to contend that the Bank had designated an agent to receive certain moneys payable to it; that payment to the agent would be payment to the Bank, and that whatever payment the Bank was bound to receive the agent was bound to receive. But the arrangement as it was, was in terms different. If a third person had been designated, his appointment, so far as the Bank was concerned, would be revocable. But suppose the sale to *Berry* had been by an owner of the land sold, not by a trustee, what would have been the position and rights of the parties? The question may be simplified by taking the case of a sale subject to a mortgage. It is the right of the purchaser to pay off the mortgage. The vendor cannot insist upon himself receiving the amount of the mortgage. It is the right of the purchaser to apply the purchase money *pro tanto* to disencumber the estate purchased. Suppose in such a case the mortagee should decline to receive the mortgage money and desire the purchaser to pay it to the owner of the equity of redemption, it would, I apprehend, be an appointment of the owner as his agent to receive it. Suppose the purchase money and

Judgment

1869.

Trustees of Bank of U. C. v. Canadian Navigation Co.

the mortgage money to be identical in amount, it would be the right of the purchaser to pay nothing to his vendor and to pay the whole purchase money to the mortgagee. Or, suppose the mortgage debt to exceed the purchase money, the right of course would be the same; and suppose the mortgagee to direct the purchaser to pay the vendor instead of himself, it would be constituting the vendor his agent to receive the mortgage money. Suppose, again, upon the treaty for sale, the mortgage debt were found to exceed the value of the land, and the mortgagee were to consent to release his mortgage upon payment of the agreed purchase money, the purchase money to be paid to the vendor, it would still be the same case, and the vendor would be the mortgagee's agent to receive the mortgage money. The mortgagee consenting to forego a portion of his mortgage debt has of course a right to do so upon terms, and may stipulate that payment shall be to the vendor; but as his, the mortgagee's, is the proper hand to receive the mortgage money, an agreement between him and the purchaser that it shall be paid to the vendor or to any other person, must be looked upon as a direction by the mortgagee that it shall be so paid, and an appointment of the vendor or other person as his agent to receive it. And indeed the nature of the dealing in this case would point to Mr. *Kirkpatrick* being appointed as such agent. He was a trustee for sale for the benefit of creditors; the Bank was a creditor, having a charge upon that part of the estate. *Kirkpatrick*, independently of any appointment, would be trustee of this money for the Bank. But, besides this, he was solicitor for the Bank, and so agent for some purposes. It is agreed that he shall receive moneys which the Bank is entitled to receive, the intendment would be that he was thereby constituted agent of the Bank to receive them.

Judgment.

In this view of the case there was a debt due to the Bank, and this bill alleges that *Berry* agreed to pay it,

1869.

Trustees of Bank of U.C. v. Canadian Navigation Co.

These defendants, however, have come under no personal obligation to the Bank to pay this debt. The question is whether as between the plaintiffs and them it is a debt. The plaintiffs claim it as a debt. If the whole face of the mortgage were payable there would be no question; does it make any difference if from any cause they are entitled to less? it is still a debt. The language of the Act is general; there is nothing to limit its operation to cases where there is a direct personal liability to pay. The words are "any debt due to the said estate," and this I have no doubt is a debt within the meaning of the Act.

Judgment.

I have discussed the case in the several aspects in which it was presented to me in argument. The true solution, I think, is to be found in the position and rights of a purchaser of land subject to mortgage; and, interpreting the agreement in relation to the purchase money by the light of the position and rights of a purchaser, my conclusion is that the trustees are bound to accept payment under the Act, and to release their mortgage upon payment of the balance of purchase money and interest.

As to costs, the question really in contest between the parties has been whether the plaintiffs are bound to accept in satisfaction of their mortgage the balance of their purchase money, and that payment in notes of the Bank; and as my opinion is adverse to their contention, I must adjudge the costs against them. It was, however, a fair question to raise, and I have no doubt was raised by the trustees in good faith for the benefit of their *cestuis que* trust. The defendants, the Navigation Company, have the benefit of the arrangement, and must carry it out as *Berry* was bound to do. He gave a note to the Bank for the balance of the purchase money upon which as I suppose the usual bank rate of interest, seven per cent., was payable. They are bound to pay interest at

that rate. The amount is easily computed and may be inserted in the decree. If the Navigation Company make any difficulty on this score and require a reference subsequent costs will be reserved.

1869.

Trustees of Bank of U.C. v. Canadian Navigation Co.

BACON v. SHIER.

Mortgage—Executor in double capacity—Loans to executor—Practice—Hearing.

In a suit for the recovery of mortgage money, the question between the parties was whether the mortgage money had been paid; both parties offered evidence at the hearing, and the Court received the same and adjudged thereon.

A mortgagee appointed the mortgagor one of his executors; and the mortgagor became the acting executor; the mortgagor afterwards entered into an agreement with *B.*, the owner of other property, for an exchange free from incumbrances, and that *B.* should pay $2,000 for the difference in value; the mortgagor had indorsed on the mortgage certain sums as paid by him thereon after the mortgagee's death, reducing thereby the amount appearing to be due on the mortgage to $1,600, no part of which, however, was payable: *B.* satisfied the $1,600, partly in money paid to the mortgagor, partly by a debt owing to *B.* by the mortgagor, and partly by moneys which had theretofore been lent by *B.* for the purposes of the mortgagee's estate, and the mortgagor thereupon indorsed on the mortgage a receipt for 1,600 in full of the mortgage money: the contemporaneous payment of money was with the assent of the other executor. It afterwards appeared that the mortgagor was largely indebted to the mortgagee's estate at the date of all these transactions:

Held, that the contemporaneous payment was a valid payment *pro tanto*, the same having been made with the assent of the co-executor; but that the estate or the co-executor was not bound by the receipts indorsed on the mortgage; and that *B.* was not entitled to credit, as against the estate, for the private debt due to him by the mortgagor, nor for his antecedent loan.

Examination of witnesses and hearing.

Mr. Moss, for the plaintiff.

Mr. Blake, Q. C., and *Mr. Bain*, for the defendant, *J. W. Sheir*

1869.

Bacon v. Shier.

The bill was taken *pro confesso* against the defendant, *John Sheir.*

SPRAGGE, V. C.—This is in form a bill by one of two executors of the estate of a mortgagee against the mortgagor who is his co-executor, and the purchaser of the equity of redemption. In another suit, *McPhaden* against the two executors and the beneficiaries of the estate, the plaintiff in this suit, as well as his co-executor, is declared liable to pay the amount due upon the mortgage in case the amount cannot be "collected," and it was ordered in that suit that proceedings should be taken at the costs, charges, and expenses of this plaintiff to collect and get in the mortgage money, and this suit has been instituted accordingly. It is for the benefit of this plaintiff individually, and it is also for the benefit of the estate. The principal defendant is the owner of the equity of redemption, *Julius W. Shier.* The mortgagor, and plaintiff's co-executor is *John Shier.*

Judgment.

John Shier occupied the anomalous position after the death of the mortgagee *Sterling Pangman*, of being acting executor of the estate and also mortgagor. The mortgage which is dated 5th July, 1856, was for the payment of £900 by nine equal annual instalments, the first of which was made payable on the 1st of March, 1858. The mortgagee died in or about March, 1857. I understand that there is no question about £200 of the mortgage money having been paid to the mortgagee himself. That sum is indorsed as paid "for the payments due 1st March, 1859 and 1860," and the name of the mortgagee subscribed. The receipt is dated 5th Feb., 1857. It seems singular, but the bill admits that £200 of the mortgage debt has been paid.

The principal question is in relation to an alleged payment of a sum of $1400 or something less, made as *Julius Shier* asserts under these circumstances.

1869.

Bacon v. Shier.

Richard Shier the father of *Julius* was the owner of a lot of land in the township of Blanshard, valued at $3000. The lot mortgaged by *John Shier* to *Pangman* which is in Brock, was more valuable; and it was agreed between *Richard Shier* and *John*, that *Richard* should convey to *John* the Blanshard lot, and that *John* should convey to *Julius*, son of *Richard*, the Brock lot and pay the assumed difference in value $2,000. *John* asserted that less than that sum was due upon the mortgage. Certain sums due to *Richard* were to be allowed on account, some private debts due by *John*, and a judgment debt recovered by *Richard* against the executors for moneys lent to them as executors. The balance between these sums and the $2000 was, as stated by a witness to the payment, between $1300 and $1400. It is stated generally at $1400. There are a number of indorsements on the mortgage as of payments made subsequent to that of £200—they are of various amounts—the last sum indorsed is £400 as paid on the 28th June, 1861, and is expressed to be in payment in full of the mortgage. The aggregate of the whole is exactly the mortgage debt £900. It is not made payable with interest. Conveyances were exchanged. The date of the conveyance of the land in Brock is 28th May, 1861, just one month earlier than the date of the last indorsement on the mortgage. The date of the indorsement of discharge by the Registrar is the same as that of the last indorsement. I have not the date of the conveyance of the Blanshard lot. It was signed and sealed a short time previously and delivered at the time of the execution of the deed of the Brock lot. The deed of the Brock lot was executed at the office of *Murdock McPhaden*, the conveyancer by whom it was prepared; the partial execution of the other deed took place at the house of *Richard Shier*, and it was on that occasion, as it is alleged that the payment in question took place. The payment, according to the evidence was made to *John Shier*, he, occupying at the time the double posi-

Judgment.

1869.

Bacon v. Shier.

tion of vendor of real estate subject to a mortgage and also a personal representative of the mortgagee. It was, according to the same evidence, in the latter character, that the money was paid to *John Shier*, as his co-executor was applied to to know whether he was satisfied that the money should be paid to him and he assented that it should be so paid saying to the effect that *John Shier* was the acting executor. It was no doubt intended as an application of part of the purchase money in payment of the mortgage to which the purchased land was subject. There was no strict right in *Richard Shier* or his son *Julius*, his appointee, to make this payment when it was made, for there was then no completed purchase; and further the mortgage money was not then due. On the other hand there was no breach of duty in the personal representative in receiving it, for it was to the advantage of the estate to receive money payable at a future day, and not bearing interest: it would, I apprehend have been a breach of duty to refuse to receive it. The plaintiff therefore cannot say that it was improperly paid so far as the time of payment is concerned; and I do not see that he can say that it was improper that it should be paid to *John Shier*; for besides his assent that it should be so paid, the mortgagee by appointing him executor had empowered him to receive all moneys due to his estate, each executor having that authority, and the party paying had a right to believe that it would be faithfully applied to the purposes of the estate. The fact of payment therefor appears to me to be the only question as to that particular item.

Judgment.

The most circumstantial evidence of the fact is that of *George Shier* a brother of *Julius*, who says that he made up a statement of the amount to be paid, and that he counted out the money that was to be paid, his father handing it to him for that purpose, and that he saw the money paid, and he states that it was at the house of his father, on the occasion of the execution of the deed of

1869.

Bacon v. Shier.

the Blanshard lot. The fact of payment is also sworn to by the father himself. He was at the time he gave his evidence a very old man, but still intelligent and seemed to give his evidence truthfully; he swears that he paid the money in bills and that it was about $1400. He does not fix the place with certainty as *George Shier* does, but says he does not recollect whether it was at his own house or at *McPhaden's*. He is also less precise as to where the money came from, *George* saying that his father took it from a drawer in which he usually kept money, the old man saying that it came out of his "pocket or chest or somewhere" that he kept it by him, not in a bank. A point is made as throwing doubt upon the fact of payment that *Julius Shier* is spoken of by *George* as being present on the occasion when the payment was made, *i. e.*, the execution of the deed of the Blanshard lot, and that upon being examined he said, "I did not see any money paid by my father to *John Shier*." At first this appears very strong against the alleged payment. But it appears that the interview was a long one; *George Shier* says that *John* was there two or three hours as nearly as he can recollect; and *George* only says that *Julius* was present at the execution of the deed, not that he was present at the whole interview. It is quite possible therefore that the money was paid on that occasion although *Julius* did not see it paid; and this is also to be borne in mind that *Julius* was sworn as a party not as a witness, and might not feel at liberty to state his own belief in the matter. I should have allowed him, as I always do allow parties, to state any facts tending to rebut an inference that may be drawn from their direct answers. I suppose that in this instance *Julius* was simply asked whether he saw the money paid, and as he did not, that he answered that he did not.

Judgment.

Further upon this fact of payment is the written admission (in the form of certificate of discharge of

1869.
Bacon
Shier.

mortgage) of the party stated to have received the money, that he did receive it—an admission against his own interest—and that unless collusion were proved, is itself a strong piece of evidence: and what weighs with me a good deal is, that not only is collusion not proved, but the circumstances are against it. The parties are probably relatives, as the name, not a common one, is the same; but *John* is not spoken of as a son of *Richard's;* and it is not suggested that any end of *John's* could be served by admitting that he received a large sum of money in cash, which he did not receive. It was not a contrivance to exonerate his own estate, for that he was parting with; and the deed of the Blanshard lot was retained by *Richard* until *John* executed a conveyance of the Brock lot. Again, the conference with the co-executor the plaintiff looks like a real not a simulated payment of money; and there is the direct evidence of the old man, the party paying the money,

Judgment.

and of *George,* who counted it, and swears that he saw it paid.

It is suggested that if I do not by my decree declare the money not paid, I should at any rate not find affirmatively that it was paid. I would adopt this course, if I thought it likely to serve any good purpose; but the plaintiff does not suggest that he could obtain any evidence—that of *John Shier* himself, for instance—that would throw any further light upon the matter. It was made a question of fact at the hearing, and I think I ought to pronounce upon it, unless there is some good reason why I should not. I think the proper conclusion from the evidence is, that the payment in question was made. The amount should, however, be limited to the smaller sum named, $1,350.

In regard to the sums indorsed upon the mortgage subsequent to the first indorsement of £200, and to the items for which credit was given to *Richard Shier* upon

the settlement, I am of opinion that there is no evidence to warrant their allowance as payments. As to the sums indorsed, *Richard Shier* appears upon the settlement to have given credit to *John Shier*, that he had from time to time made payments on account of the estate. He credited *John Shier's* representations upon this head at his own risk, just as he gave credit to him when he lent him money for the purposes of the estate. He seems to have acted very incautiously. He finds a mortgage, in which *John Shier* was mortgagor, in his possession, having come into his hands as executor, and his co-executor, who appears to have left the general management of the estate to him, does not seem to have made an exception even of the mortgage. Common prudence on the part of the one, and a sense of propriety on the part of the other, should have pointed out that the hands of the debtor was not the proper custody of the evidence of debt; and *Richard Shier* should have seen (as the fact was) that indorsements made by *John* on his own mortgage were only so many assertions that he had made the payments thereby indicated, and no proof as against the estate that any such payments had been made. There is no pretence that these indorsements or any of them represented payments made by him to his co-executor. They may represent payments made for the estate; but, unless he had not moneys of the estate in his hands wherewith to make these payments, such payments were not advances, and he had no right to treat them as payments on his mortgage; they were in fact an application of moneys in hand, not a payment of his debt. They may, as I have said, represent payments, or they may not. The Court can never accept such indorsements as evidence of anything in favor of the person by whom they are made.

1869.

Bacon v. Shier.

Judgment.

Then as to the sums allowed on the settlement. The amount to be paid or satisfied to *John Shier*, by way of

1869.

Bacon v. Shier.

owelty of exchange of land, was $2,000. Of this, it was assumed that $1,600 was due upon the mortgage. The difference between the amount paid in cash and the $21,000 was made up of a private debt due by *John* to *Richard*, and of moneys lent for the purposes of the estate; for one of the latter items a judgment had been recovered against the executors. I understand from the evidence that the amount of private debt was less than the difference between the $1,600 and $2,000; and I take it that the intendment would be that it was intended to be applied towards satisfaction of that difference. As to the sums lent by *Richard* for the purposes of the estate, it is clear that they cannot be allowed against the estate, unless the sums lent for such purpose were actually used and applied for that purpose. I had occasion to consider this point in *Ewart* v. *Steven* (*a*).

Judgment.

From the accounts taken in *McPhaden* v. *Bacon*, it appears that *John Shier* was, during the whole time of his administration of the estate, largely in arrear. The accounts so taken are of course not binding upon the principal defendant in this suit, *Julius Shier;* but, if correct, the state of the accounts as between *John* and the estate disposes of all the sums for which *John* gave himself credit by his indorsements upon the mortgage; and as to the sums allowed upon settlement, it disposes of them also, unless a specific application be shewn of the sums lent. This has not been shewn, and it is not likely that it can be.

As the matter stands now upon the evidence, there remains due upon the mortgage $1,450, there being due at the death of the mortgagee $2,800, and $1,350 having been paid since in cash. Such being the case, I think the proper disposition of the costs will be that

(*a*) *Ante* p. 193, S. C. on Appeal *post* Vol. xviii., p. 35.

neither the plaintiff nor *Julius Shier* have costs against each other. The bill is taken *pro confesso* against *John Shier;* and he, as appears in this case, as well as in *McPhaden* v. *Bacon*, has been the *origo mali*, and he should be ordered to pay the costs of both. 1869. Bacon v. Shier.

In regard to interest upon the mortgage debt, it is claimed on behalf of *Julius* that as he paid in advance of the money falling due, he should be allowed a rebate of interest. But the footing upon which he paid was that he should pay the whole mortgage debt; and, besides, the estate has really suffered detriment instead of deriving advantage from the payment having been made in advance. On the other hand, *Julius* should not, I think, be charged with interest. What would be rebate of interest may fairly be set against the subsequent interest: *i. e.*, if the defendant *Julius* will pay forthwith, or say in one month, the sum I have above indicated as the balance appearing to be due: if he desires the usual six months he must pay interest from the date of the decree. Judgment.

The defendant *Julius* is entitled to shew, if he can, that the state of the accounts is such as to entitle him to be allowed for the payments indorsed on the mortgage, and to shew also the specific application of the moneys advanced by way of loan for the purposes of the estate. If he elects to take such an inquiry, it must be at his peril as to the costs thereby occasioned. And, further, if the matter is at all referred to the Master, I should allow the plaintiff on his part to go into evidence as to the fact of payment of the $1,350, if he can find any further evidence upon the point.

1869.

BREGA v. DICKEY.

Registrar—Defective abstract—Payments by purchaser after notice.

A registrar of deeds gave to an intending purchaser an abstract of title, which by mistake omitted an outstanding mortgage:

Held, that a purchaser who had notice of the omitted mortgage could not make any claim against the registrar in respect of payments made by the purchaser after such notice; and the registrar, who on finding his mistake had bought up the outstanding mortgage, was held entitled to foreclose the same.

Examination of witnesses and hearing.

Mr. *Roaf*, Q. C., and Mr. *John Paterson* for the plaintiff.

Mr. *Blake*, Q.C., for defendants *Dickey*.

Mr. *Taylor*, for the defendant, *Killachy*.

Judgment. SPRAGGE, V. C.—The plaintiff is the assignee of a mortgage, made by one *Tyrrell* to one *Lever*, bearing date 6th October, 1852, and registered 30th December, 1854, the mortgaged premises being the east quarter of lot 23, 3rd concession, Township of Albion, in the County of Peel. The mortgage came to the plaintiff by several *mesne* assignments, the one to himself is dated 22nd November, 1859. The defendants *Dickey*, *Dickey & Niel*, Iron Founders, carrying on business in Toronto, under the name of *Dickey & Co.*, are entitled to the equity of redemption, in nearly the whole of the mortgaged premises, as purchasers from one *Hockley*: and they resist the payment of the mortgage on this ground; that in December, 1857, being then about to purchase from *Hockley*, they by their solicitor applied to the plaintiff, who was then Register of the County of Peel, for an official certificate, as to the registration of conveyances in his office; that the plaintiff sent such certificate, and that the same omitted the mortgage to

1860.

Brega v. Dickey.

Lever and its registration; that they completed their purchase, and paid their purchase money to *Hockley* and his assignees, in ignorance of the existence of the mortgage, since assigned to the plaintiff: and they contend that it is inequitable that he should claim payment of the mortgage money under the circumstances.

The plaintiff seems to have acquired the mortgage, in the first place, in the belief that he was liable to *Dickey & Co.*, and in order to protect himself: the then holder of the mortgage having called upon *Dickey & Co.*, for payment, and they having threatened the plaintiff with an action for damages, sustained by reason of the misrepresentation contained in his official certificate, he now sets up that he has since discovered that *Dickey & Co.*, were not misled by his certificate, inasmuch as they had notice otherwise of the mortgage in question, and the main question now is, whether they had such notice or not.

Judgment.

The chief witness to prove notice, is Mr. *Tyrrell*, the mortgagor to *Lever*. In connection with his evidence the dates of the transactions between *Dickey & Co.* and *Lever*, are material. The date of the contract of purchase by *Dickey & Co.*, is 22nd January, 1857; not December of that year, as stated in their answer. By the contract *Dickey & Co.*, were to furnish certain iron castings and wrought iron, for a mill of *Hockley's*: *Hockley* was to sell them the land for £400: the articles to be furnished were to go on account of the purchase money; and the balance was to be secured by mortgage on the lot, payable in five annual instalments, the "irons" were to be furnished by the 15th of May following; and *Dickey & Co.*, were to have possession at the same date. A conveyance was to be made in three weeks from the date of the contract. No conveyance however was made until the 15th of February, 1858, and on the same day a mortgage was executed to

1869. Brega v. Dickey.

Hockley for £135 16s. 6d., payable by annual instalments of £27 3s. 4d. with interest, the first payment to be made on the 1st of January, 1859; this mortgage was assigned to *Tyrrell* on the 19th of October, 1858, before any of the mortgage money was payable.

Tyrrell speaks quite positively of his having informed one of the *Dickeys*, (he thinks *James Isaac Dickey*, and is probably correct, as he is described by Mr. *Blake*, the solicitor of the firm, as the partner who conducted the law and finance business of the firm,) of the mortgage in question. *Tyrrell's* only doubt is as to which of two occasions, is the one on which he so informed him; whether at about the time of the purchase by the firm, or at a later period, about November, 1858, and which later period he fixes by reference to the time when as he says he purchased *Dickey's* mortgage from *Hockley*, which was in October of that year; he says he should not have doubted that it was on the earlier occasion, but that *Dickey* has told him, that it was on the later, his own belief and opinion he states to be that it was on the earlier occasion.

Judgment.

It is probably not very material upon which of the two occasions this occurred. Taking it to be on the second occasion, and we have *Dickey's* own assertion and admission that he then had notice, *Dickey & Co.* are damnified by the omission in the certificate, only in the event of their having made payments to *Hockley* upon the faith of the certificate. Of course any castings delivered before the receipt of the corrected certificate, for the first was not relied upon, are out of the question: this brings us to a date subsequent to 31st December, 1859, the date of the letter calling for a corrected certificate. It is *possible* that some castings may have been furnished between that date, and the execution of the deed and mortgage, by which time all *must* have been furnished as the balance had then been ascertained.

1869.

Brega v. Dickey.

Before any of the mortgage money was payable, *Dickey* according to his own admission, had the notice, so that the only payments that could have been made upon the faith of the certificate, are payments made between the 31st December, 1857, and 17th February, 1858: unless payments were made between those dates, it is not necessary to ascertain more exactly the earlier dates spoken of; *Tyrrell* says it was before *Dickey* purchased or at least before he got his deed, I suppose he probably means before December, 1857. I should, upon the evidence of *Tyrrell*, fix the earlier occasion, as the date of notice if necessary.

The amount spoken of as due upon the mortgage, was much smaller than the sum really due, but that is of course immaterial. *Dickey* took that upon the faith of *Hockley's* statement, and the certificate would shew nothing in regard to it.

Judgment.

Besides the evidence of *Tyrrell*, is that of *Campbell*, the latter being as to an admission by *Niel*, another member of the firm, that the firm had notice of the mortgage in question. I should hardly have thought it safe to fix *Dickey & Co.* with notice upon the evidence of *Campbell* alone; for what was said, was said hurriedly; and there was room for misapprehension, and besides the witness's memory seemed not very good. It may, however, be received so far as it goes, as corroborative of the fact of notice deposed to by *Tyrrell*.

There may be an inquiry, if *Dickey & Co.* desire it, as to any payments made between the receipt of the corrected certificate, and the date of the mortgage by *Dickey & Co.* to *Hockley*: and if any payments were made between those periods, then an inquiry to fix the date of the earlier occasion, referred to in the evidence of *Tyrrell*. In all probability these inquiries will not be necessary.

1869.

Brega v. Dickey.

It is said that *Hockley* should be made a party in the Master's office, by reason of some estate being in him through a mistake in the description contained in one of the conveyances. It is not pointed out where this mistake is: but if his presence is necessary for the purpose of making a good title in case of redemption, he can be made a party for that purpose in the Master's office.

It is asked that the question of costs be reserved. If in order to confine the plaintiff to County Court costs, I should not reserve them for that purpose, as I think the questions raised, are such as to make it a proper case to file the bill in this Court, even though the amount found due may be within the jurisdiction of the County Court. If costs are occasioned by making *Hockley* a party, he being a necessary party through some default in the plaintiff, or those under whom he claims, costs may be reserved: I think at any rate that the plaintiff is entitled to the general costs of the cause.

Judgment.

As to the defendant *Killachy* his counsel admits that the misrepresentation set up by his answer is not proved: but he contends that the mortgage of which the plaintiff is assignee, became merged in the hands of *Dumont*, assignee of the original mortgagee *Lever*, upon the equity of redemption being conveyed, as he states in his answer by *Hockley* to *Dumont*. I have no evidence of this alleged conveyance of the equity of redemption; and therefore the case is purely hypothetical. From what is in evidence I should doubt very much if there would be a merger supposing the alleged conveyance proved. Apart from this the position of *Killachy* is that of a purchaser of a portion of the mortgaged premises.

It is asked that liberty to apply be reserved. The decree may be so drawn up.

1869.

CARSON V. CRYSLER.

Pleadings—Vagueness—Pro confesso.

A bill set forth the plaintiff's title to land by mesne conveyances from the grantee of the Crown; the bill stated that the plaintiff had gone into possession, not saying when, and not saying that any of the parties through whom he derived title had been in possession: the bill alleged that the defendant pretended to be able to establish title to the land by possession as the assignee of one *E. K.*; and that *E. K.* was for a short period (not saying how long) in possession; the bill charged that the conveyance to the defendant was a cloud on the plaintiff's title, and prayed the usual relief; the bill was taken *pro confesso:* but *held* that its allegations were insufficient to entitle the plaintiff to a decree.

Hearing *pro confesso*.

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

Judgment

SPRAGGE, V. C.—The bill alleges that the defendant has a conveyance to himself, under which he claims title, and which is a cloud upon the plaintiff's title, and prays the usual relief. The bill is taken *pro confesso*.

The plaintiff deduces his title by mesne conveyances from the Grantee of the Crown; and alleges that he went into possession under a conveyance to himself of 5th September, 1865, and has continued in possession ever since. The bill is silent as to possession previous to his own, on the part of any of those under whom he derives title. As to the defendant and the conveyance to him, the bill alleges that on the 18th of March, 1858, one *Ellen Kettle*, executed a conveyance to the defendant of the land in question; and proceeds thus: "The said defendant pretends to be able to establish his title to the said lot of land, by possession, as the assignee of the said *Ellen Kettle*, who was for a short period a squatter upon the said lot," the defendant (the bill being taken *pro confesso*) admits this, *i. e.* that

1869.

Carson v. Crysler.

he does so pretend to establish his title; and, but for the short possession of *Ellen Kettle*, the admission is not against him. Then as to this allegation of her short possession the bill does not negative title in the defendant, it does not allege that the possession of *Ellen Kettle*, together with that of the defendant, were not of sufficient duration to give title to the defendant; nor does it allege that the defendant does not pretend to have title by *Ellen Kettle's* possession, as well as his own, or, together with his own. The bill was filed May 6th, 1868; and the bill is true if the plaintiff took possession a month, or a week, before that date, for while it states the date of the conveyance under which the plaintiff took possession, it does not state *when* he took possession. The defendant then may, consistently with the bill, have been in possession for ten years under his assignment from *Ellen Kettle*, and *Ellen Kettle* herself, was in possession "for a short period." The point then is narrowed to this, does the term short period, applied to the possession of land, exclude a possession for ten years; and that, when, as appears by the bill, title has been claimed on the ground of possession, which could not be claimed, unless she had possession for at least ten years, and where possession for a sufficient period to constitute title is not in terms denied. Ten years may be a short period or not, according to circumstances. For a building lease it would be a short period, and would be so for some other improving leases. For an agricultural lease it would not be a long term; while for the ordinary tenancy of a dwelling house, the words a short period, would probably not apply to a letting for ten years. For possession of land it is difficult to say what it may mean, it is vague; and where it was material to the pleader to limit the duration of the possession by precise allegation; and he has omitted to do so, and has instead used a form of expression, which may mean ten years, or may mean less or more, I do not see how I can, consistently with the

Judgment.

rules for the construction of pleading, say it does mean less. I incline to think that the plaintiff has an equity to maintain this suit, if in fact the defendant has not a title by possession, but upon the allegations of the bill I cannot as it is now framed, make a decree.

1869.

Carson v. Crysler.

Boyle v. Arnold.

Easement—Acquiescence—Mistake.

Divers lands having been devised to three sisters *P*, *A*, and *L*, they in 1840 agreed to a partition, by which, amongst other things, *P* was to have a certain lot 45, with the privilege of overflowing 46; and *A* was to have 46, subject to that privilege; conveyances were signed to carry out the partition, but the matter being transacted without professional advice, *A* and *L*, who were married women, did not execute so as to pass any estate; all entered into possession of the several lands allotted to them, and, in 1841, *P* executed to her son a voluntary conveyance of 45, with the privilege, and *A* and her husband conveyed 46 to their son. Some time afterwards the error in regard to the execution of the partition deed having been discovered, *P*, with *A* and her husband and *L*'s heir (*L* being dead), in 1849, joined in a conveyance of all the lands to a trustee in order to carry into effect the previous partition; but by an oversight, this new deed omitted to mention *P*'s right of overflowing 46. *A*'s son and *P*'s son, were active in getting this new deed executed, but were not parties to it. Immediately after its execution, *A* and her husband executed to their son a new deed of 46; no new deed was executed to *P*'s son, he, thereafter, with the knowledge and acquiescence of *A*'s son, built a mill in 1845, and placed his dam where it necessarily caused the overflowing of 46; he afterwards mortgaged 45, with his supposed privilege of overflowing 46; and the mortgaged property was sold at the mortgagee's suit, the two cousins alleging for the first time that the mortgagor had no right in respect of 46; the right was considered doubtful at the time, but the purchaser completed his purchase.

Held, in a subsequent suit, by the purchaser against the mortgagor and his cousin, who owned 46, that the plaintiff had a right to overflow 46.

Examination of witnesses and hearing.

Statement.

This was a suit by *Daniel Boyle* against *John R. Arnold*, *James Playter*, and *Abner Arnold*, the bill in

1869. Boyle v. Arnold.

which set forth that the late *James Miles*, who died in 1840, by his will dated 21st of September of that year, devised all his real and personal estate (amongst others the lands in question in this cause) to be equally divided between his three sisters, *Hannah Playter*, *Lucy Langstaff* and *Elizabeth Arnold*: that at the time of his decease *Miles* was entitled to lots numbers 45 and 46, in the first concession of Vaughan, (210 acres each), number 21 in the second concession of said township, (200 acres), the east half of lot 20 in the third concession of said township, (100 acres), and lot 45 in the first concession of Markham, (190 acres); that there had always been a mill site on lot 45 in Vaughan but for the purpose of making the same available it was necessary to overflow part of lot 46; that on or about the 12th of November, 1840, the three devisees agreed to partition amongst them the portion of the real estate above described, and executed an instrument (in which the husbands of Mrs. *Langstaff* and Mrs. *Arnold* joined) giving to *Hannah Playter* as her share lot 45 in Vaughan, together with the right to overflow 46 in the manner mentioned, for the purpose of any mill to be erected on 45, and that *Elizabeth Arnold* as her share should have the said lot 46, subject to such right to overflow; also said lot 21 in the second concession, and also the said east half of 20 in the third concession, and the same were thereby duly conveyed to the parties respectively; the remainder of the lands being in like manner conveyed to *Elizabeth Arnold*, and the same parties respectively, and those claiming under them, had ever since continued in possession; but that through oversight Mrs. *Langstaff* and Mrs. *Arnold* had not been examined as required by law, touching their consent to part with their estate in the premises respectively; that by deed, dated 23rd of August, *Hannah Playter* duly conveyed lot 45 to her son, the defendant, *James Playter*, together with all ways, water courses, easements, privileges, &c., together with the right to overflow 46 as

Statement.

1869.

Boyle v. Arnold.

aforesaid; that by an instrument of the 16th of January, 1843, all the parties interested under the will joined in partitioning the remainder of the testator's real estate, but they did not thereby vary, or alter in any way the partition first made between them; that the defendant *James Playter*, by deed of 16th of September, 1847, conveyed by way of mortgage lot 45 to one *Cawthra*, together with the said right of overflowing number 46.

The bill further stated that Mrs. *Langstaff* died, leaving one *Miles Langstaff*, her son and heir-at-law, and the parties interested under the will having subsequently to the execution of the deeds of partition of 12th of November, 1840, and 16th of January, 1843, discovered that the same had as before stated not been duly executed. *Miles Langstaff*, Mrs. *Playter*, Mrs. *Arnold* and her husband agreed for the purpose of confirming the partition so made by the said two conveyances to execute a deed for that purpose; and, accordingly, by deed of 22nd of March, 1849, duly executed by all the said last named parties, conveyed the several properties to one *R. E. Burns* in trust, for the purpose of fully carrying out such partition, and that by such last mentioned instrument the said lot 45, together with the right of overflowing was duly partitioned and allotted to Mrs. *Playter*, and the other parts were in like manner confirmed to the other parties interested.

Statement.

The bill further set forth, that in or about the year 1849, *James Playter*, in pursuance of such right and privilege of overflowing lot 46, commenced to erect a mill on lot 45 and completed the same in 1850; and worked the same, and for that purpose did overflow the said lot 46 from that time until the time plaintiff purchased lot 45 together with such right of overflowing; that the dam used for raising the water for said mill was not placed on lot 45, but by consent of the proper authorities had been placed on the road allowance between

1869.

Boyle v. Arnold.

lots 45 and 46, and the pond caused thereby was partly on such road but chiefly on lot 46 belonging to the defendant *John R. Arnold*, to whom the said lot 46 had been conveyed by his father and mother, and that all the parties interested in lot 46 had always been cognizant of the erection of the mill on 45 and the overflowing of said lot 46 for the purpose of working said mill. That *James Playter* having made default in payment of certain mortgages held by *Cawthra*, a bill was filed to enforce payment thereof by sale of the mortgaged premises, and a sale having been directed an advertisement of sale was issued which contained a description of the mill, &c., and stated that "the head of water is from 16 to 18 feet." The plaintiff attended the sale and purchased lot 45 together with the mill and the right of overflowing lot 46 to work the mill for £3065, which he paid in cash, and that the defendant *John R. Arnold* attended such sale also and was fully aware of the terms of the advertisement and sale and never objected to the same or pretended that the right to overflow lot 46 ought not to be sold; and by an order made in that cause it was declared that the present plaintiff had purchased the right to overflow lot 46 and that he was entitled to have a good title shewn thereto as part of the premises purchased by him.

Statement

By another indenture dated 5th of November, 1864, and made between said *Cawthra*, of the first part; *Thomas Playter* of the second part; the said *R. E. Burns* of the third part; *George Dove* of the fourth part; *William C. Playter* of the fifth part; *George Priest* of the sixth part, and the plaintiff of the seventh part, after reciting the facts above set forth, the parties of the first, second, third, fourth, fifth, and sixth parts, in consideration of the premises of the said sum of £3065, conveyed the said lot 45 together with all and singular the houses, waters, water courses, easements, privileges, profits, hereditaments, and appurtenances whatsoever to the

1869.

Boyle v. Arnold

said parcel or tract of land belonging, or in anywise appertaining, or therewith used and enjoyed or known or taken as a part or parcel thereof, or as belonging thereunto or to any part thereof, and the plaintiff thereupon became entitled to the said lot 45 and all the rights and privileges which the said *Hannah Playter* and *James Playter* had acquired in and to the right to overflow lot 46, and the plaintiff thereupon became entitled to work the said mill or any other mill he might erect or build on the said mill site and to flood and overflow lot 46 for the purpose of working the same. The deed also contained a declaration that it was the intention of the parties thereto "that every right and interest which the said Court could properly order to be conveyed to or vested in the plaintiff shall be deemed to pass by this conveyance and that nothing herein contained shall be construed to be a waiver of any right which may exist with respect to the overflowing of the said lot 46 against any person or persons whomsoever not parties hereto," and that the defendants *John R.* and *Abner Arnold* had never disputed *James Playter's* right to overflow said lot number 46, and the plaintiff submitted that under the circumstances appearing he was entitled to have the defendants *Playter* and *Arnold* and all persons claiming through *Elizabeth Arnold*, restrained from interfering with plaintiff's overflow of said lot 46. The prayer of the bill was in accordance with these statements.

Statement.

The bill further stated that on the 8th of January, 1864, the defendant *John R. Arnold* had commenced proceedings in the Court of Queen's Bench against the plaintiff claiming $1000 damages by reason of the overflow of lot 46.

Abner Arnold was made a defendant in consequence of *John R. Arnold* having executed a voluntary deed to him whereby he authorized *Abner* to recover possession

1869.

Boyle v. Arnold.

of the land overflowed. Nothing turned upon this, however, and it is not necessary further to refer to it.

The defendants *Arnold* answered the bill setting up, amongst other defences, that it was unnecessary for the proper working of the mill on lot 45 to overflow any portion of lot 46; that the easement conceded to *Playter* was personal only; that plaintiff ever since his purchase had been aware that *John R. Arnold* objected to his overflowing lot 46.

The other facts sufficiently appear in the judgment.

Mr. *Blake*, Q.C., Mr. *McMichael* and Mr. *A. Hoskin*, for the plaintiff.

Mr. *Strong*, Q. C., for defendants *Arnold*.

The bill was *pro confesso* against defendant *Playter*.

Judgment.

SPRAGGE, V. C.—It will be convenient, in the first place, to dispose of the objection that the plaintiff has no *locus standi* in Court. The objection is that he supposed and understood that he did not obtain by his purchase the easement which is the subject of this suit. It has been already adjudged by the late Vice Chancellor (*Esten*) as between *Boyle*, the plaintiff, and *Playter*, that the easement, supposing it to exist, was purchased by *Boyle*. I entirely agree in that judgment. The objection in this suit rests almost entirely upon the evidence of *Playter*; Mr. *Playter* himself claiming, as he says in his evidence, to own the mill privilege which *Boyle* claims to have purchased. His evidence amounts to this, that he warned *Boyle* that whatever he offered for the land must be exclusive of the water privilege; and that he thinks that *Boyle* agreed to purchase without it; and that *Boyle* told him that he understood when he bought the land, that he bought it without the

privilege of backing water on lot 46. Mr. *Playter* gave his evidence with an evident leaning against the plaintiff's case, and what he only "thinks" that *Arnold* agreed to do, cannot safely be used to affect *Arnold's* rights. 1869. Boyle v. Arnold.

There appears to have been doubt in the minds of purchasers, even at the second sale, whether or not the easement was offered for sale. But taking into account the situation of the premises, and the language of the advertisement, I confess I hardly see room for doubt. Between lots 45 and 46 was an allowance for road. Lot 46 lies to the north of 45, the stream running through 46 to 45: the dam is built upon the allowance for road, and about seven acres of 46 are actually flooded by the back water. The advertisement described the land, lot 45, and the buildings upon it: as to the mill the words are, "And a saw-mill in good substantial working order, worked by water, of which there is a sufficient supply to run the mill all the year round. In connection with the mill there are two circular saws, one for edging and one for sawing laths. The head of water is from 16 to 18 feet." It is clear that the advertisement was a palpable misdescription, unless the right existed, to back the water upon lot 46, as it had in fact been backed upon that lot ever since the mill had been built. The doubt, I think, must have been, not whether the right was intended to be sold, but whether the vendor had a right to sell it; and it was probably to test that right that *Boyle* made the application to the Court for compensation. Judgment.

Boyle's position I take to be shortly this: He bought the land in uncertainty as to whether he thereby acquired the right to back water upon lot 46; and as that uncertainty existed in other minds also, it probably affected the price. He now claims the right in this suit; and it is objected that even if the right did exist in the vendor

1869.
Boyle v. Arnold.

—for the objection must take that shape—the purchaser shall not be permitted to assert it in this Court. In other words, that it is inequitable in him to assert it in the circumstances under which he purchased. I have no hesitation as to overruling this objection.

Before the sale the question as to this right, if *Arnold* chose to raise it, would have been between him and *Playter*. *Arnold* never did raise it, and *Playter* always assumed to have the right, and exercised the privilege as a right; but now that his land and mill have been sold by his mortgagee, he throws doubts upon his own title: and it is objected by the learned counsel who represent both him and *Arnold*, that even assuming that his mother had the easement, she did not convey it to him; and that even if the conveyance sufficed to carry it, he had no equity to have it, because as between them it was not intended to pass. But his evidence does not bear this out, though that is its evident tendency. Without quoting his words, it is in substance this, that both mother and son thought that the conveyance did not carry the easement. But this *was after the conveyance was made;* for he says she intended he should have it. She was willing to give him another deed. She promised to make him a title to the easement whenever he desired it; but, he says he neglected it, and did not get it It is suggested that the conveyance was voluntary. A valuable consideration is expressed, and there is no evidence whether it was so or not. It may be conceded that if the conveyance was voluntary, and if it did not operate to carry the easement, *Playter*, the son, had no equity to compel his mother to convey it: but that is not the question here, which is simply, whether supposing the instrument effectual, a third person, *Arnold*, can set up a want of equity as between *Playter* and his mother. I do not understand it to be contended that the conveyance from Mrs. *Playter* to her son does not operate to convey the easement in question, if such ease-

Judgment.

1869.

Boyle v. Arnold.

ment existed appurtenant to lot 45. My opinion is, that it does so operate. It contains, *inter alia*, "waters, water courses, easements, privileges," &c., "to the said parcel or tract of land, tenements, hereditaments and premises belonging or in any wise appertaining or therewith used and enjoyed, or known or taken as a part or parcel thereof, or as belonging thereto or to any part thereof." I will consider this point further presently.

The leading question between the parties is whether there is any right to the easement in question as between the *Playters*, mother and son, and the defendant *Arnold*. Three sisters, Mrs. *Langstaff*, Mrs. *Playter*, and Mrs. *Arnold*, were under a devise from their brother *James Miles*, tenants in common in fee of a considerable number of parcels of land, among them of lots 45 and 46, in the township of Vaughan, to the situation of which and of the stream of water running through them, I have already referred. The testator died in 1840, and in November of that year they proceeded to effect a partition of a number of the lots of land devised; among them lots 45 and 46 in Vaughan. A further partition was made (of the residue I understand), in 1843, but that is not material to the question before me. The partition of 1840 was made by referees at a sort of arbitration, and the sisters attended; Mrs. *Arnold* was present with her husband, and her son the defendant; Mrs. *Playter*, with her son *Aaron*; and Mrs. *Langstaff*, with her son *John*. Mrs. *Playter* was a widow: the other two were married women. In the partition, lot 45 in Vaughan was allotted to Mrs. *Playter*, and lot 46 to Mrs. *Arnold*, each with other property. It is proved very distinctly that Mrs. *Playter* was to have the privilege of backing water from lot 45 upon lot 46, in case of there being a mill site upon lot 45: that, upon that and other grounds, Mrs. *Arnold* got more land than she otherwise would have obtained, lot 46 being subject to the easement, being looked upon, as it certainly was, as

Judgment.

1869.

Boyle v. Arnold.

a detriment to the lot; that Mrs. *Langstaff* and Mrs. *Playter* were dissatisfied with Mrs. *Arnold* being allotted more, as they conceived, than a due proportion of the lands divided, when Mrs. *Arnold* explained that lot 46 was injured by being made subject to the backing of water upon it. All this is quite clear upon the oral testimony, and is further evidenced by a document signed and sealed by the three sisters, and by the husbands of the two who were married women. It is in these terms: "Whereas a certain indenture bearing even date herewith, of partition of the part of the estate of the of (*sic*) *James Miles*, made this day, it was a part of the said agreement of all parties thereto, that in the event of it proving that if a mill site exists on lot 45 therein mentioned in Vaughan aforesaid, a right to overflow the water for the purposes of any mill to be erected on said lot, back, over and upon lot 46 in the said township, is hereby granted, conveyed, and confirmed unto the said *Hannah Playter*, her heirs and assigns for ever, without any right whatever by any of the other parties thereto." It is quite clear that it would have been most unconscientious for Mrs. *Arnold* or any claiming under her, to object to the easement in question. She had received the price for it in additional land, and she would be withholding that for which she had been paid.

Judgment.

The same parties, the three sisters and the two husbands, executed a document intended to carry out the partition by conveying to each sister in severalty the land allotted to her; but, unfortunately, choosing to be their own conveyancers, or employing some non-professional person, they did not do this effectually, the married women merely signing and sealing both documents, and not acknowledging before any authorized person, so as to pass their estates.

The parties do not seem to have discovered their

1869.

Boyle v. Arnold.

error for a very considerable time, probably till about the year 1849, when steps were taken to remedy the defect. In the meantime, they acted as if a valid partition had been effected. Mrs. *Playter* made a conveyance to her son, the defendant, on the 23rd of August, 1841, of lot 45; and Mrs. *Arnold* (her husband joining), made a conveyance of lot 46 to their son, the defendant *Arnold*, on the 28th of January, 1841. They appear also to have entered into possession in pursuance of the allotment. The date of this is not given; but it is mentioned incidentally that, in 1849, when the parties were taking steps to confirm and validate the intended partition of 1840 and 1843, *James Playter* and his mother were living upon lot 45, *James Playter* claiming to own it; and the defendant *Arnold* was living upon lot 46, and claimed to own it.

Judgment.

In order to validate the former intended partition, those who were parties thereto, with the substitution of *Miles Langstaff* as heir-at-law to his mother, who had died intestate, executed conveyances by lease and release, the latter dated 22nd of March, 1849, of all the parcels of land which had been the subject of the abortive conveyances of 1840 and 1843 to *Robert Easton Burns*, Esq., in trust as to the lands which had by those conveyances been allotted to each of the three sisters in severalty, to hold the same subject to the appointment of each respectively; and, failing appointment, to the use of each in fee, to be held by each in severalty in lieu of the undivided part or share of each in the whole. The deed of release recites the abortive conveyances of 1840 and 1843, and that the partition thereby intended was not made effectually; and that the two sisters, Mrs. *Playter* and Mrs. *Arnold*, the latter with the consent of her husband, and *Miles Langstaff* as heir-at-law of his mother, had agreed that partition of the said lands should be made, "*according to the division of the*

1869.

Boyle v. Arnold.

same," by the deeds recited as an equal division of the same; and that it had been agreed that such lands should be conveyed to Mr. *Burns*, "in trust to and for the purposes of the said partition, and they are desirous of completing the partition thereof."

I may here observe that this instrument contains the most satisfactory evidence, to my mind, that it was the intention of all the parties to it to make precisely the same partition of lands as was intended to be made by the deeds of 1840 and 1843; and that in the case of the omission of any parcel of land, or its erroneous allotment, the Court could easily see its way to rectify the mistake by a reference to the former deeds.

Subsequently to the trust deed to Mr. *Burns*, Mrs. *Arnold* (her husband joining) made a deed of appoint-

Judgment. ment of lot 46 to their son, the defendant *Arnold*.

The defendant *Arnold* sets up by his answer that no mention whatever is made in the trust deed of any right in the *Playters* to overflow lot 46, and that no such right is thereby given as he is advised and believes. It is true that, in the enumeration of lands assigned to Mrs. *Playter*, no mention is made of this easement; and that the lands are merely enumerated, in some cases by description, without more; and it is also true that in one instance an easement is mentioned being a right of way over some land in Toronto; it occurs in the description of lands conveyed to Mrs. *Arnold*.

It is proved very clearly that the defendant *Arnold* was an active promoter of the deed of trust and confirmation, together with the defendant *Playter*, each, as I feel justified in inferring, for his own purposes, and to confirm his own title. The deed of appointment

1869.

Boyle v. Arnold.

of lot 46 to *Arnold* followed closely upon the deed of trust, being dated, as appears by his answer (it is not among the papers before me), 5th April, 1849; and *Playter* was preparing to erect a saw-mill on lot 45; and it is also clear that the right to back water upon lot 46 was claimed by *Playter* and admitted by *Arnold* in connection with the proposed confirmation.

The evidence is also perfectly clear upon these points that, immediately upon the execution of the trust deed of 1849, *James Playter* proceeded to erect his mill, for which he appears to have been making preparations previously; that he placed it close upon the northern boundary of lot 45, placing the dam, with the consent of the authorities, upon the allowance for road between that lot and lot 46; the necessary effect of which was to back the water of the stream on lot 46. It is also clear that the defendant *Arnold* was perfectly aware of this, and his acquiescence is shewn more clearly and unequivocally by this circumstance, that not long after the mill-dam was erected, it was carried away, and *Playter*, while rebuilding it, cut some trees upon the land that had been flooded, telling *Arnold* that, if he did not cut them, they would be killed by the water, and that he would allow him for them. *Playter* says that *Arnold* did not object to this.

Judgment.

This erection of the mill and dam, and placing them where they were placed, and replacing the dam after it was carried away, were all acts done as in exercise of a right to do them; and this was known to *Arnold*, and assented to by him. The right was admitted by *Arnold* in words, as deposed to by *Miles Langstaff*, and by acts in the manner that I have stated.

Nothing is more clear upon the evidence than that the trust deed was intended to be a confirmation and validation of the previous abortive partitions, and that

1869.

Boyle v. Arnold.

without any variation. I content myself as to this, as well as to other facts, with stating, as clearly proved, what I take by the evidence to be clearly proved, without quoting the passages from the evidence by which the facts are established. I do not think that the facts which I have spoken of as proved, are disputed.

The bill makes no equitable case as between *James Playter* and his mother, but rests merely upon the effect of the conveyances and what was thereby intended to be effected. As between *James Playter* and the *Arnolds*, the mother of the defendant and her husband, and the defendant himself, the bill proceeds not only upon the effect of the conveyances and the intention of the parties in making them, but it also makes a case of acquiescence in the right claimed by *Playter* to back the water upon lot 46; and in the exercise of that right in the erection of the mill, and of standing by while he built the mill in assumed exercise of his right to do so.

Judgment.

Now the position of the parties at the time of the building of the mill was just this. As between Mrs. *Playter* and the *Arnolds*, the son, his mother, and his father, there was a clear equitable right in the owner of lot 45 to back water upon lot 46. It is so clearly proved that, under the partition of 1840, this right was intended to exist, and was assumed to have been created and that the trust deed to Mr. *Burns* of 1849 was intended to be a confirmation of that partition without any variance, without adding to or diminishing the right of any party, that, I repeat, there was a clear equitable right in the owner of lot 45 to have the easement allotted to the owner of that lot in 1840, and to have that easement properly assured. The easement was appurtenant to lot 45, and perfectly useless apart from it. It was a matter of indifference to the *Arnolds* whether Mrs. *Playter* or

her son were the owner of 45. The son claimed to be the owner in virtue of the conveyance made to him eight years before, and as I have no reason to doubt, honestly believed himself to be the owner; and with it claimed the easement. *John R. Arnold* acquiesced in the claim; he was the owner of 46, and he stood by while *Playter* expended a large sum of money in works which he undertook and completed in the belief, or in other words upon the faith of his being entitled to the easement. It may be said that no representation was made by *Arnold*, upon the faith of which *Playter* acted. I think that is not necessary. The assertion of right was made by *Playter*, and *Arnold* admitted it and acquiesced in it; and upon that *Playter* expended money, and so changed his position: *Arnold* standing by and acquiescing in that which was a detriment to his own estate, and a flagrant invasion of his rights, unless *Playter* had the right he claimed Suppose *Arnold* had, after the erection of the mill, brought an action at law against *Playter* for backing water upon lot 46, and *Playter* had filed his bill, making the case that is made by this bill, could *Arnold* set up the *jus tertii* of Mrs. *Playter?* His defence would be, that although true it was he held lot 46, subject to the easement claimed, and had acquiesced and stood by when the mill was built, still there was a flaw in *Playter's* title to lot 45; that the conveyance made to him by his mother, which both believed to be, and acted upon as effectual; upon the faith of which he had entered upon the land and expended large sums of money upon it, was in law not effectual. I can have no doubt a Court of Equity would hold that *Arnold* was estopped by conduct from setting up such defence.

1869.

Boyle v. Arnold.

Judgment.

It would not avail *Arnold* to say that when he conceded to *Playter* the right claimed by him, he really believed that he possessed it. It was held by Lord *Cranworth*, then Vice Chancellor, in *West* v. *Jones* (*a*),

(*a*) 1 Sim. N. S. 205, 7, 8.

1869.
Boyle v. Arnold.

that where one makes a representation by words or conduct, leading another to believe in the existence of a particular fact or state of facts, and the other party has acted on the faith of the representation, the party making the representation shall not afterwards be heard to say that the facts are not as he represented them to be: this is, of course, only the enunciation of an admitted principle. He added that the case would be the same where the conduct of the party making the representation is perfectly honest. He might have believed what he represented, yet if the other party changed his position in consequence of it, he cannot be heard to say afterwards that the fact was otherwise. So in this case the effect is the same, whether at the time *Arnold* did or did not believe that *Playter* was entitled to what he claimed.

Judgment

It is easy to see that *Playter's* course of conduct would be affected by that of *Arnold*. If *Arnold* had denied or even questioned his right, it would have put him upon inquiry, and probably have induced him to perfect his title to the land. His title to the easement would have followed. *Arnold* conceded his title to both. This induced security, and the expenditure and change of position followed.

It is *possible*, that if *Arnold* had questioned *Playter's* title, *Playter* would have built his mill notwithstanding; and so it may be said that it is not certain that *Arnold's* conceding the point made any difference. But this might be said in almost any case; for instance, in *Money* v. *Jorden* (*a*), it is impossible to say that the marriage would not have taken place even if no promise had been made in regard to the bond and warrant of attorney of the intended bridegroom.

The cases of acquiescence and of standing by are

(*a*) 21 L. J. Ch. 531, 895.

1869.

Boyle v. Arnold.

nearly always cases where the party against whom the principle is applied loses something by the application of the principle, an estate or money; or some right is prejudiced. But the Court compels him to suffer this. It is a penalty he pays for his conduct, even though it be not dishonest conduct, and it is sometimes a hardship upon him. But how much less difficult is the application of the principle, where the party suffers and loses nothing.

It is hardly necessary that I should guard myself against being understood to say that *Arnold's* conduct imposes upon him any obligation to *protect Playter*: all that is necessary to say is, that it prevents him from asserting against *Playter* any right inconsistent with the right which he conceded to belong to *Playter*, and upon the faith of which concession, we are authorized to say that *Playter* changed his position. I have already said, in substance, that I think *Boyle* is entitled to stand in the same position as *Playter*.

Judgment

The answer sets up that there was a mill site upon lot 45, without the necessity of backing the water upon lot 46; and some evidence is given that such a mill site may be found upon the lot by placing a dam near the southern boundary, instead of the northern boundary of the lot. But in view of all that has occurred, this contention is utterly inadmissible. Moreover, at the original arbitration the northern boundary of the lot was spoken of as the site for the dam. And besides, the contingency spoken of in the instrument of 1840, which I have quoted, is not that *Playter* should have the right of backing water upon lot 46, if it should be necessary for the purposes of a mill upon lot 45; but the contingency was, there being a mill site upon lot 45, in which event he was to have the easement: the plain meaning of which is, that if there was a mill site upon lot 45, by backing water upon lot 46, the owner of 45

1869.

Boyle v. Arnold.

was to have the privilege of doing so. There is such mill site, hence the easement. Looking at the instrument and all that has occurred, it is out of the question for *Arnold* to raise this contention.

A point was taken that any equity, as between *Playter* and *Arnold*, arising from the conduct of *Arnold*, to which I have adverted, was a personal equity of which *Playter* alone, and not his assignee, is entitled to the benefit. I do not accede to this. The principle is, that it would be a fraud in *Arnold*, after what passed, to set up that *Playter* had not the easement. He can set up nothing inconsistent with what he admitted. His doing so would be a fraud in him, and a detriment to *Playter*: and surely it would be a detriment to *Playter* if he could deprive him of one of the ordinary incidents of the ownership of land, the power of alienation; for the objection must go to that extent if there is any thing in it.

Judgment.

I think the plaintiff entitled to a decree declaring him entitled to the easement, *i.e.*, to back water upon lot 46, for the purposes of a saw mill upon lot 45, and to a perpetual injunction; and the decree must be with costs.

Bradburn v. Hall.

Inception of execution.

A *fi. fa.* against lands was returnable on the 15th September 1868, the advertisement of sale was first published after that date; while the writ was current, the sheriff had told the defendant that he had the execution and that the land would be sold unless he paid; the sheriff was also on the lands more than once before the writ expired, but he did not go to make a seizure:

Held, that there had been no inception of the execution during its currency.

Appeal from the Master's report by defendants.

1869.

Bradburn v. Hall.

Mr. *Downey*, for appeal.

Mr. *Crickmore* and Mr. *J. A. Boyd*, contra.

SPRAGGE, V.C.—I have not the pleadings in this case; but from the papers put in, and having notes of the argument, I take it, that the only point in question is, whether the defendant *McFarlane* purchased at sheriff's sale, subject to the third mortgage, as it is called, held by the plaintiff, as well as subject to the two first mortgages, and this depends upon whether a writ of execution at the suit of *Ferrier et al*, was in force or was spent at the date of that mortgage, 16th of December, 1861.

Ferrier's writ against lands was tested 16th September, 1861, and was renewed for one year on the 15th of September, 1862. I infer from the whole of the evidence of the sheriff, and from the course of the argument, that the advertisement for sale did not appear in the *Canada Gazette* until after the 15th of September, 1863. On the 18th of August, 1863, a writ against lands at the suit of one *Hazlett* was placed in the hands of the sheriff. This writ was renewed on the 16th of August, 1864, and remained in the sheriff's hands, regularly, as it is expressed in the admissions put in. Judgment.

The sheriff treated the *Ferrier* execution as continuing in force. On the 15th of December, 1863, he offered the lands of the execution debtor for sale, and on the 11th of January, 1864, returned to the writ lands on hand for want of buyers. On the day following a writ of *venditioni exponas* was placed in his hands and after advertisement and postponement of sale the land was sold on the 7th of March. The deed to the purchaser the defendant *McFarlane* recites the sale to have been under the execution at the suit of *Ferrier*. The execution at the suit of *Hazlett* was returned no lands.

1869.

Bradburn v. Hall.

Hazlett brought an action against the sheriff for a false return and recovered judgment.

It is admitted that an attorney who acted for the plaintiff and also for *Hazlett* attended at the sheriff's sale and warned those present that the *Ferrier* writ was spent; and that the purchaser would buy subject to the plaintiff's three mortgages; and that *Hazlett* claimed priority over *Ferrier*, and would claim the proceeds of the sale; and that the sheriff said he would sell under the writ in his hands, being those at the suit of *Ferrier* and of *Hazlett* respectively.

The question then is, whether there was any inception of the *Ferrier* execution (there being none by advertisement) before the writ was spent. I will quote such passages of the evidence of the sheriff as bear upon the point. "I did not go to the lands for the purpose of making a seizure, at any time before the advertisement, I got from *Shanahan* (the execution debtor) "the number of the lot before the advertisement; while the writ was current I was on the lands more than once, and informed *Shanahan* that the lands would be sold under *Ferrier & Company's* writ if the amount were not paid. * * * I thought the seizure in the *Gazette* was all right; I did not go to *Shanahan's* with the intention of making a formal seizure of the land. Whether what I did may be construed as a seizure or no I cannot say; I told *Shanahan* that I had an execution against lands and that it would be sold if he did not redeem * * I did not go out to *Shanahan* for the purpose of seizing his lands, and I did not do anything that I did then with the intention of making a seizure."

Judgment.

The question has been before the Court of Queen's Bench of this Province upon several occasions, first I think in the case of *Leeming* v. *Hagerman* (*a*) where it arose

(*a*) 5 U. C. O. S. 38.

upon a question of poundage claimed by the sheriff; then in *Doe Miller* v. *Tiffany* (*a*), and again in *Doe Miller* v. *Tiffany* (*b*). Upon the latter occasion the learned Judges gave elaborate judgments. Upon the trial at Nisi Prius it appeared that the execution debtor lived upon a portion of his lands and possessed other lands in the same district: that the sheriff went to him and asked of him and procured from him, a list of those other lands; which he took to his office and added to it a short description of the land upon which the debtor resided. The list was headed "Lands of *Andrew Miller* at different suits." The jury found this to be an inception of the execution, and the then Chief Justice Sir *John Robinson*, and Sir *James Macaulay* (then a Judge of the same Court), thought the jury warranted in so finding. The Chief Justice thought what was done by the sheriff equivalent to his going upon the lands of the debtor, and saying to him, "I come under the authority of these writs which I hold, to seize your lands, both those on which I see you living and of which I have knowledge and any others which you may possess in this district, of which I have no knowledge; which lands I shall proceed in due course to sell under these writs," and the learned Chief Justice added "It is as formal an act of seizure as we have any reason to suppose takes place in any or all of such cases." Sir *James Macaulay*, in the two previous cases to which I have referred, expressed himself clearly to the effect that there must be some formal entry and seizure under the execution or other overt and notorious act, as perhaps an advertisement under the statute, to constitute an inception of a *fi. fa:* against lands and in the case in 6 U. C. he reiterates this. He says, "If the sheriff takes proceedings under a *fi. fa.* against lands which constitute an overt act towards execution, equivalent to seizure of goods sufficient as

1869.

Bradburn v. Hall.

Judgment.

(*a*) 5 U. C. 79. (*b*) 6 U. C. 426.

1869.

Bradburn v. Hall.

between the creditor and debtor, as by entry with the declared purpose of seizing ; taking possession of the title deeds, or adopting some other symbol as laying hold of the knocker of the door, or the limb of a tree, acts usual in giving livery of seisin in feoffments; which I consider would be a laying on of the execution that he may proceed to advertise and sell afterwards," &c. From other passages of the learned Judge's judgment it is clear that he would not have considered what the sheriff in this case did an inception of the execution. "If he" (the sheriff) "entered not meditating any proceeding against these lands, but merely to inquire of the defendant what lands he had; and took a note of them as returned by him it would not be a seizure; but if he entered knowing the lands to be the defendants and with intent thereby to commence the execution; if he entered on these lands as defendants and also so entered in order to inquire of other lands it would be a seizure. The question is, whether he seized or not; that is to be evinced by, and gathered from overt acts *Bird* v. *Bass*(*a*), if he entered with that *animus* it would be a seizure; if *alio intuitu* it would not," Mr. Justice *Draper* took a different view from the other members of the Court. He held that the sheriff had no power to seize the land, or to enter upon it, and that there was no inception of the execution.

Judgment.

In the subsequent case of *Doe Tiffany* v. *Miller* (*b*) the late Mr. Justice *Burns* entered into the same question at considerable length. His opinion was that the lands of the execution debtor were in *custodia legis* from the time of lodging the writ with the sheriff, but added, "If the sheriff had done nothing whatever towards executing the writ during the twelve months it was lying in his hands, I agree that he could not after that period legally do any thing as of himself, or on the part of those who set him in motion towards executing the writ."

(*a*) 6 M. & G. 143. (*b*) 10 U. C. Q. B. 65.

1869.

Bradburn v. Hall

I think it is proper for me, in a case so purely a legal one, to defer simply to the opinions of the learned Judges of the common law. I should go counter to their opinions if I were to hold that in this case there had been an inception of the execution issued in the suit of *Ferrier & Company*. I suppose this point has in fact been decided, and in the same way in the suit of *Hazlett* v. *Hall*, but I have not been able to refer to the case. If the judgment had been the other way I should not have disposed of this case until I had seen it.

The appeal from the Master's report must be allowed. It will be without costs.

BOSWELL v. GRAVLEY.

Redemption suit—Costs.

In a suit to redeem the plaintiff alleged several grounds for relief which he failed to establish, although he succeeded in shewing a right to redeem, which right the defendant had contested; the Court, under the circumstances, refused costs to either party up to the hearing, and gave the defendant the subsequent costs of a redemption suit where the right to redeem is admitted.

Hearing on further directions.

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

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

Judgment.

SPRAGGE, V.C.—The plaintiff is a mortgagor; the defendant is a purchaser under a power of sale contained in the plaintiff's mortgage to a Building Society. The decree sets aside the sale under the power, and admits the plaintiff to redeem. The bill alleges other grounds for relief besides the ground upon which relief is granted,

1869.

Boswell v. Gravley.

and upon them a good deal of evidence has been given. Upon the first hearing before my brother *Esten* and myself, my learned brother held that the evidence of *A. McDonald*, junior, being rejected, there was no evidence of the arrangement mentioned in the bill; and that the other evidence adduced on behalf of the plaintiff was insufficient to ground a title to relief, but he thought the sale could not be supported. I thought that the sale might be sustained, and I believe I must have come to the conclusion that the whole case made by the plaintiff failed. The Chancellor, upon the case coming before him, agreed with my brother *Esten* that the sale could not be supported, as the power to sell was not followed, and added, "there are other objections which would probably have been fatal to the sale had it been necessary to consider them."

Judgment.

The plaintiff asks for the usual direction as to costs in a redemption suit, where the right to redeem is unsuccessfully resisted, namely, that the defendant shall have the costs of an ordinary redemption suit; and that the plaintiff shall have against the defendant the costs to which he has been put in establishing his right to redeem; and he asks the whole costs of the cause except those to which the defendant is entitled.

I think if he had established all the grounds for relief made by his bill, or had established one sufficient ground upon which relief was granted; and there had been no adjudication upon the other grounds stated in his bill, that he would have been entitled to his costs generally, as the Court will not, after deciding upon one ground, and granting or refusing relief upon it, examine the other grounds with a view only to the question of costs. This point was made before Sir *Richard Kindersley* in *Bond* v. *Bell (a)*. He dismissed the bill upon one ground, without costs; the defend-

(a) 8 Jur. N. S. 1290.

ant's counsel urged that if the Vice Chancellor had gone into the other grounds of defence, the bill must have been dismissed with costs. But he said that his decision was upon the principal point, and he dismissed the bill upon that, and that only; he did not go into the other questions.

But, in this case, if I give the plaintiff his general costs of the cause, I must give him the costs of those parts of his case upon which he has failed. He failed in regard to the arrangement mentioned in his bill; and the other evidence which my brother *Esten* held insufficient to ground relief was, as I understood, evidence in support of another ground of relief, and there is nothing in what is said by the Chancellor to shew that he took a different view of these points.

I might, possibly, by a careful scrutiny of the bill and the evidence, find how much of each was applicable to the ground upon which the plaintiff succeeded, and how much was applicable to the grounds upon which he failed: or, the Master might do this, and so it might be found whether the costs of the one exceeded the costs of the others; for I suppose the defendant is entitled to the costs of so much of the case as is adjudged against him, as the plaintiff is entitled to the costs of what is adjudged in his favor. But the Court does not take this course. Before the reference to the Master, the plaintiff succeeded in part and the defendant in part, each substantially. It is a case in which the Court will not direct counter taxation of costs, but give costs to neither party. There will, therefore, be no costs to either party up to the hearing. The defendant will have the ordinary costs of a redemption suit.

Judgment.

1869.

CAMERON v. HUTCHISON.

Fraud by solicitor.

Where such motives exist in the mind of a solicitor as would be sufficient with ordinary men to induce them to withhold information from the client, the presumption is that it was withheld; and the uncommunicated knowledge of the solicitor is not imputed to the client as notice.

Where mortgagees sold the mortgage to defeat or delay their creditors, but the vendee had no actual notice of the purpose, it was *Held* that the circumstance of his having employed one of the mortgagees as his solicitor in drawing the assignment, &c., did not make the knowledge of the solicitor notice to the vendee.

Motion for injunction.

Statement.

The bill alleged the recovery of a judgment by plaintiff on the 29th of November, 1860, in the Queen's Bench against *Charles Hutchison*, *William Warren Street*, *James C. Macklem*, *David M. Thompson*, *James B. Rivers*, and *Anselm C. Hammond* for £4590 8s. 11d.; that judgment was registered in the County of Huron, 1 December, 1860, and *fi. fa.* issued to defendant *John McDonald*, as sheriff, against the lands of the other defendants; that before judgment, but after debt was incurred, and during pendency of suit defendants *Hutchison*, *Street*, and *Hammond*, without valuable consideration, and with intent to defraud creditors, by an assignment dated 26th of October, 1860, assigned to defendant *James B. Rivers* all their interest in an indenture of mortgage upon certain property in the county of Huron, made by defendants *Charles Widder* and *Thomas Mercer Jones* to the defendants *Hutchison*, *Street*, *Macklem*, *Thompson*, *Rivers*, and *Hammond* for securing £606 13s. 4d., which assignment was duly registered; and that with a further design of defeating plaintiff and other creditors by another indenture of same date assigned to defendant *Foskett B. Beddome*.

1869.

Cameron v. Hutchison.

The bill further stated that said assignment was made *mala fide* without consideration and that the memorial of same does not state consideration and that *Beddome* had notice; that defendants *Hutchison*, *Street*, *Macklem*, *Thompson*, *Rivers*, and *Hammond* had commenced an action in the Common Pleas upon the said mortgage for the benefit, as they allege, of *Foskett B. Beddome* and had recovered judgment and issued *fi. fa.* thereon; and that the sheriff had seized thereunder a large amount of goods of *Widder* and *Jones*.

The bill prayed a declaration that defendants were not entitled to the mortgage money, and that plaintiff was entitled to priority on account of bad registrations; an injunction against further proceeding at law and further relief.

In answer to the motion the defendant *Beddome* filed an affidavit denying all collusion between himself and the other defendants, and alleging that he had paid £500 for the mortgage.

Mr. *G. D'Arcy Boulton*, for the plaintiff.

Mr. *S. Blake*, contra.

Judgment.

SPRAGGE, V. C.—An injunction is sought to restrain the defendants *Hutchison*, *Street*, *Macklem*, *Thompson*, *Rivers*, *Hammond*, and *Beddome*, from receiving certain moneys in the hands of the sheriff of Huron, such moneys being levied under an execution issued upon a judgment recovered in their name, *Beddome* excepted, in an action at law upon a mortgage. The mortgage has been assigned to the defendant *Beddome*, and he as assignee is entitled to receive the money, unless he ought to be restrained from receiving it.

The assignment was made on the 26th of October, 1860. At that date a suit had been commenced and

1869.

Cameron v. Hutchison.

was pending by the plaintiff against the above named defendants other than *Beddome* for the recovery of a debt. On the 29th of November, 1860, the plaintiff recovered judgment in that suit for £4590 3s. 11d. which was registered in the county of Huron on the 1st of December in the same year. The plaintiff makes affidavit that this judgment is unsatisfied to the extent of upwards of £1200.

There were two assignments of the mortgage on the same day, the 26th of October, 1860, one from *Street*, *Hutchison*, and *Hammond*, to *Rivers*, the other from the same three with the addition of *Thompson*, *Rivers*, and *Macklem*, being all the mortgagees, to *Beddome*. The object of the first assignment, as appears by the evidence was, to indemnify *Rivers* from the consequences of the plaintiff's suit at law. Money had been borrowed, by his co-mortgagees, of the plaintiff, of which he had received no portion, and he appears to have been considered the only one of them solvent. The mortgage unless assigned would have been available to the plaintiff towards the satisfaction of his debt. The assignment of it therefore was obviously to delay, hinder, or defeat him as a creditor, and but for the assignment to *Beddome* would I apprehend have been within the Statute of Elizabeth.

Judgment.

I think it clearly proved that *Beddome* was an assignee for value, that he took the assignment with no fraudulent intent, and had no notice himself, personally, of the object of the assignment to *Rivers*. But it is sought to affect him with notice, on the ground that *Hutchison* one of the mortgagees and one of the assignors to *Beddome* was *Beddome's* solicitor, in the matter of the assignment. I think, although it has been questioned in argument, that *Hutchison* was solicitor for *Beddome* in the matter. *Rivers* alone seems to have negotiated the assignment to *Beddome* as assignee and owner of the mortgage, and *Beddome* in his examination says that he told *Rivers* to

take the papers to *Hutchison* to draw out the assignment as his *Beddome's* solicitor; and *Rivers* says "I think I suggested to Mr. *Beddome* his appointing Mr. *Hutchison* to act for him." 1869. Cameron v. Hutchison.

It is quite clear that *Hutchison* was cognizant of the whole transaction; it was he who stated to *Rivers* the reason of the assignment to him, and negotiated it with him; and as *Rivers* says was the only one who acted for all parties throughout the transaction.

The cases on the subject of a purchaser or assignee being affected by notice to, or knowledge in his solicitor have not been uniform. In *Hewitt* v. *Loosemore* (*a*), Sir *George Turner* treated it as constructive notice, but held that he could not act upon the presumption that it had been communicated to the principal in the face of the evidence that had been adduced by the plaintiff. The defendant *Loosemore* a lessee of certain land had borrowed money upon the deposit of the lease; and afterwards borrowed from another person upon an assignment of his term, making an excuse for the absence of the lease; the assignment by way of mortgage was drawn by himself, the mortgagee employing no other solicitor. The Solicitor General and Mr. *Speed* for the mortgagee contended that *Loosemore* was not his solicitor in the business of the mortgage and that if he was, constructive notice would not be imputed, for the existence of the prior mortgage was a fact which he would certainly have concealed; and they referred to *Kennedy* v. *Green* (*b*). Judgment.

Sir *George Turner* held that *Loosemore* must be taken to have been solicitor for the mortgagee, but declined to act upon the presumption that the fact of the deposit of the lease had been communicated; holding, however, that constructive notice is knowledge which the Court

(*a*) 9 Ha. 449. (*b*) 3 M. & K. 699.

1869.

Cameron v. Hutchison.

imputes to a party upon a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated. He thought that *Kennedy* v. *Green* did not apply.

In *Espin* v. *Pemberton* (*a*), on appeal, Lord *Chelmsford* held the same doctrine as to the effect of constructive notice; but classed notice to a solicitor under the head of actual notice to the principal, holding that notice which affects the principal through a solicitor does not depend upon whether it is communicated or not; that the principal is bound by the fact whether it is communicated to or concealed from him. His Lordship differed from Sir *George Turner* as to the doctrine that where a mortgagor, himself a solicitor, prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor is to be considered as solicitor for the mortgagee in the transaction. At the same time he thought that if the mortgagor became the solicitor of the mortgagee it would be hardly possible to stop short of applying all the consequences of the relation, and to refuse to impute the knowledge possessed by the mortgagor to his client the mortgagee: and he added, "You cannot escape from this conclusion unless you apply the principle of the case of *Kennedy* v. *Green*, and exclude this particular knowledge, because the mortgagor was committing a fraud in the transaction which he could not be presumed to communicate. But I have already shewn that imputed knowledge does not depend upon whether it is communicated or not, and therefore the presumption of non-communication does not seem to be the proper principle to apply. I would rather say that the commission of the fraud broke off the relation of principal and agent, or was beyond the scope of the authority, and therefore it prevented the possibility of imputing the knowledge of the agent to his principal."

Judgment.

(*a*) 3 De G. & J. 547.

1869.

Cameron v. Hutchison.

This point, however, was not necessary for the decision of the case, inasmuch as Lord *Chelmsford* held that the relation of solicitor or agent and principal, did not exist, and I confess there are some passages which, as reported, I find it difficult to understand, unless it is meant that the concealment of the prior incumbrance was itself the fraud; for in the case before him, as in *Hewitt* v. *Loosemore*, there was no other fraud, though it was otherwise in *Kennedy* v. *Green*. If that was his Lordship's meaning it would apply, I apprehend, to the most express employment of a solicitor. Indeed he intimates that there must be some consent to constitute the relation. But, assuming the relation duly constituted, and some fact not itself a fraud, within the knowledge of the solicitor, not communicated, the principal, according to this doctrine would not be affected with knowledge of the fact, and the non-communication of it would not, therefore, be a fraud upon him. I think the law can hardly be considered as settled by *Hewitt* v. *Loosemore* or *Espin* v. *Pemberton*.

Judgment.

The latter of these two cases was decided in January, 1859, and in June of the same year a somewhat similar question was raised before Sir *Richard Kindersley*, not however upon presumed communication between solicitor or agent and principal, but between one of several trustees and a person dealing with him. The case was *Browne* v. *Savage* (*a*), and the point was stated by the Vice Chancellor to be, whether if one of several trustees of a fund is also beneficially entitled to a share of that fund in reversion, and makes an assignment to a stranger of such interest, the knowledge which that trustee, of course has, of his own assignment, in the absence of notice to his co-trustees, constitutes good notice, so as to give such assignment priority over subsequent assignments with notice. Notice to one trustee is as a general rule sufficient, and the trustee making the assignment

(*a*) 4 Dry. 635.

1869.

Cameron v. Hutchison.

being necessarily cognizant of it, one trustee has notice and it was contended that notice to the co-trustees was unnecessary. A party about to take an assignment is held bound to inquire of each trustee, and as a trustee giving incorrect information renders himself liable to the person who makes the inquiry, it is presumed that the information given will be true, and as all must be inquired of, notice to one is held sufficient. But the presumption arising from its being the interest of each trustee to give true information is rebutted, where the one having notice of a fact has an interest to withhold the information; and *Sir Richard Kindersley* upon that ground held that the knowledge of the trustee who made the assignment did not constitute notice to the trustees.

Judgment.

Now in the case of a solicitor, the doctrine of notice to the principal proceeds upon the presumption that the knowledge will be communicated, because it is the duty of the solicitor to communicate it; in the case of a trustee it is presumed that he will give true information because it is his interest to do so. In both cases the rule proceeds upon presumption: and it was only in accordance with a general principle, that presumptions may be rebutted, that Sir *Richard Kindersley* decided *Browne* v. *Savage*, and I gather from the language of Sir *George Turner* that he decided *Hewitt* v. *Loosemore* upon the same principle.

I desire not to go beyond the case of knowledge existing in the solicitor or agent; where notice is expressly given to one who is agent to receive that notice the case would probably be different.

The inclination of my opinion certainly is, that where motives exist in the mind of a solicitor or agent, sufficient with ordinary men, to induce them to withhold information, the presumption that it will be communicated, is rebutted. In this case there was, I think, such

a sufficient motive; *Hutchison's* plan to secure *Rivers* would have been defeated if he had informed *Beddome* of the object of the assignment to *Rivers*.

1869.
Cameron v. Hutchison.

But the question still remains, whether I ought to allow the money in question to pass into the hands of *Beddome*. If I am wrong in the opinion I have formed the plaintiff is entitled to the money, and my refusal to interfere may cause it to be irrevocably lost to him.

I think there is sufficient doubt upon the law of the case to make it the proper course to preserve the money in *medio*. The cause can be brought to a hearing at an early day and probably, if security is given that the money shall be forthcoming if the plaintiff is found entitled to it, it may properly be paid over to *Beddome*.

I think the tendency of modern decision is to curtail the doctrine of constructive and of imputed notice. I should be sorry if the tendency of any decision of mine were to extend it.

Judgment.

The Attorney General v. Harmer.

13th Elizabeth.

A conveyance executed by a debtor in satisfaction of or security for a debt, if intended to operate between the parties, is valid, though obtained in order to gain priority to an expected claim of the Crown under a recognizance.

A debtor conveyed land to his father and brother-in-law respectively, which they claimed to be *bona fide*, and for valuable consideration; on a bill by a creditor the Court was not entirely satisfied with the account which was given of the transaction with the father, and had serious doubts in regard to the transaction with the son; but being of opinion that the evidence was insufficient to prove the account of the transactions on the defendants' part to be false, sustained both conveyances.

Examination and hearing.

1869.

Attorney General v. Harmer.

Mr. *Hodgins*, for the informant.

Mr. *Osler*, fer the defendants.

SPRAGGE, V. C.—The information impeaches, as against *Robert Harmer*, the father, the assignment to him of the mortgage made by *Smith*, and the mortgage made by *Day*, and the transaction in relation to the 75 acres, *Henry Harmer's* homestead; and impeaches also the conveyance, to the defendant *Hewitt*, of the 50 acres. They would properly form the subject of separate suits, but no objection has been made on that score; and I do not think it necessary that the Court should object.

Judgment.

These transactions are impeached as void, under 13th Elizabeth; they are sustained on the ground that *Henry Harmer* was at the time indebted to his father and to *Hewitt* respectively; and that he assigned to his father the mortgages, and the four notes given for the purchase money of his homestead, (in lieu of which a mortgage was given), in satisfaction of his debt; and that he conveyed the fifty acres to *Hewitt* in satisfaction of the debt due to him.

These different conveyances were registered. The recognizance, if registered at all, was not registered till afterwards. Evidence has been given in order to affect *Robert* the father of the cognizor, and *Robert* the son of the cognizor, with notice of the recognizance having been entered into. I do not think the evidence brings home notice to either of them: taking the notice required to be such as would affect a purchaser for value, who had registered against a prior purchaser who had not registered. I do not suppose the Crown, having an unregistered recognizance, is in a better position than such prior purchaser.

1869.

Attorney General v. Harmer.

I incline to think, however, that notice would make no difference, and that if the debts set up were actually due, and the conveyances made in satisfaction of them, or in order to secure them; and if such conveyances were not merely colorable, they are not void under the Statute of Elizabeth; although all parties had notice of the recognizance, and although the motive of the cognizor, in making them, was to defeat any remedy upon the recognizance. It is in short, the case of *Wood* v. *Dixie* (*a*), as interpreted in this Court in the case of *McMaster* v. *Clare.* (*b*)

Judgment.

I will consider first the alleged debt from *Henry Harmer* to his father. If the witnesses are to be believed, there can be no doubt of its existence. The amount of it shortly is, that the father immigrated to this country about the year 1855, *Henry* having been settled in the country some nine or ten years before; that the father brought out with him a considerable sum of money; that shortly after his arrival he placed £1500 in the hands of *Henry*, to invest for him, or at any rate to pay him the father six per cent. for the use of it. The father says that the first intention was that a farm should be purchased with it. Further, it is said that *Henry* lent a good deal of this money to various persons, all in his own name, and spent a good deal of it himself; that the father thought that his money was being wasted, and became anxious about it, and asked for security; and that on the 21st of September, 1858, the transactions took place which are impeached.

The evidence was taken before me at Brantford, and both *Henry* and his father were examined, and their evidence is read. The father was an old man, and quite illiterate; at the time of the examination he was feeble and seemed in bad health, his mind seemed confused, probably from illness, and partly perhaps from age.

(*a*) 7 Q. B. 892. (*b*) 7 Grant. 558.

1869.

Attorney General v. Harmer.

Henry, I must describe as a rough, hasty, turbulent style of man; he appeared so to me; and from what is said of him in the evidence, he evidently is so. His evidence was not given in a candid, straightforward manner; he answered hastily, and I think some of the inconsistencies that appear in his evidence may be attributable to that cause: he is not illiterate, and is a man of about ordinary intelligence, and more than ordinary energy and self-will.

The direct proof of the debt rests upon the evidence of these two men. There are some corroborating circumstances beyond the bare allegation of the money being placed by the father in *Henry's* hands. *Henry* did lend considerable sums of money to various persons after his father came to this country, among other sums, £250 to *Day*, whose mortgage is assigned; and he states loans to other persons, whom he names, to a considerable amount: and he led a life of turbulence and litigation, that would almost certainly involve the expenditure of very considerable sums. This rests certainly in a great measure, upon his own evidence; but I do not think his account of loans made by him, and of his other dealing with the money, to be mere fabrications. He gives indeed no satisfactory account of his application of so large a sum as £1500, but I think no satisfactory account was to be expected from such a man; and he gives his account only from memory. I do not reject as a fabrication that a considerable sum of money, probably the sum stated by *Henry* and his father, was brought to the country by the latter; its probability is strengthened by a circumstance stated by a Mr. *Wallis*, a very respectable witness, that the father, accompanied by *Henry* and some other persons, went to his house, and made him an offer of £1000 for his farm, offering to pay the whole sum within a week: the offer was refused. Mr. *Wallis* fixes the date of this at about the spring of 1857. Moreover, the arrangement

Judgment.

1869.

Attorney General v. Harmer.

set up in regard to the money brought to this country by the father, being placed in the hands of the son for the purposes stated, is by no means an improbable one. The relationship of the parties, the superior education of the son, his experience in the country as an earlier settler, and the confidence naturally flowing from these circumstances, render it probable: and it is also probable, from the character and conduct of the son in this country, that at the date of the arrangement impeached, he would stand indebted to his father in the whole amount placed in his hands, with comparatively little in the shape of securities to shew for it.

Judgment.

I have next to consider whether the transaction of September was colorable, and I think it is not shewn to be so. It is pretty evident, I think, that the inducement in the mind of *Henry* was the avoidance of some claims by *Muma*, for repeated assaults upon whom, he was fined, and bound over to keep the peace, and his recognizance afterwards forfeited; and who had recovered a verdict against him for slander; and also probably that his land might not be taken in execution upon any of these matters; but still if he made an actual and not merely a colorable transfer of property in satisfaction of a debt there would be no infringement of the statute. I think his father had become dissatisfied and anxious about his money, and wanted it secured, and certainly not without reason; but that the mode of carrying it out was entirely the work of *Henry*. If the father had sold to his son and kept the notes in his own control I should conclude the transaction to be colorable, but if the notes passed into the hands of a creditor to their amount, who accepted them in satisfaction, or as security for his debt, such notes in his hands would not, I apprehend, be impeachable, under the statute; and if the creditor were to object, as the father did here, to the notes and ask for a mortgage for the purchase money, instead of the notes, it would still more have the character

1869.

Attorney General v. Harmer.

of a *bona fide* transaction; and would not be impeachable, I think, although the act was spontaneous on the part of the debtor.

It is inferred from *Henry's* evidence that there was no change of possession after the sale of the seventy-five acres to the son. In February, 1860, the son conveyed the farm to *Hewitt* for *Robert Harmer* the elder, and it is not improbable that as between *Henry Harmer* and his son it was not intended that the latter should hold the land; but that, as I have observed, could not affect the transference of notes or of a mortgage given for the purchase money. The continuance of *Henry* upon the land before the conveyance to *Hewitt* was evidence of nothing that could affect his father, but it appears that he did remove in the spring after the conveyance to his son. After the conveyance to *Hewitt* he lived again upon the place for nearly a year, the place being occupied by a younger son of his father, his father himself continuing to live as he had done before with his son-in-law *Hewitt*.

Judgment.

As to the assignment of the mortgages there is less difficulty; one of them, *Day's*, was in equity probably the property of the father, having been given for his money, lent by *Henry*: the other appears to have been the property of *Henry*; they amounted together to about £500, and the four notes were of the aggregate amount of £1,000, and the mortgage substituted, and for the same amount, amounted to the alleged debt, $6,000. It is not suggested that the land was really worth more than £1,000.

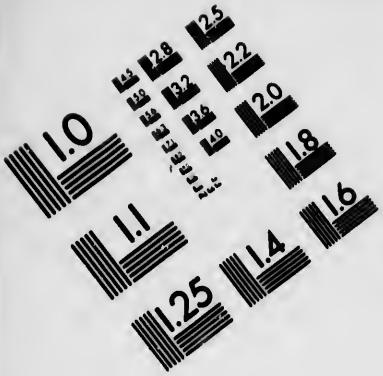
Without saying that the whole of these transactions are accounted for in a manner entirely satisfactory to my mind, I have come to the conclusion, which I think a jury might properly have come to upon the same evidence, that the alleged debt did exist in September, 1858, and that the transactions in relation to its liquidation

at that date, were, as between the creditor and debtor, real and not colorable. 1869.

Attorney General v. Harmer.

The conveyance to *Hewitt* of the fifty acres for the alleged consideration of $2,500 is of the same date as the settlement by *Henry* with his [illegible]er. *Henry* and *Hewitt* were both examined in relation to it. The consideration is thus made up; $1,800 lent in money by *Hewitt* to *Henry* about a year before, and $700 for which *Hewitt* gave his note, and which was paid in sums of $200 and $500 respectively. *Henry's* account of the matter is not clear; he first states that he had borrowed the whole $2,500 from *Hewitt;* at one time $1,800, at another $200, and at another $500. He then varies from this statement, and states that $1,800 was the whole sum borrowed, and that the sums of $200 and $500 were payments on his $700 note. It is possible that his first statement was given over-hastily and was erroneous from that cause; that upon being asked as to the amount he borrowed, his answer may have meant to state the several amounts he received, whether in the way of loan or payment. A great fault in giving his evidence was, that he answered hastily; and at times, apparently without fully appreciating the question. The second statement was a correction of his own, and if either is correct, *it* is the correct one, I think. Upon being recalled, he says the consideration was $2,500 subject to a mortgage to one *Smith* for $300, and that he paid off that mortgage with money given to him for the purpose by *Hewitt.* He says, also, that the loan of $1,800 was made in gold. Upon this last point he is contradicted by *Hewitt*, who states the loan of $1,800 to have been made partly in bank bills, the most of it he thinks, and partly in gold. He says there were some gold pieces, and adds, "I think if *Harmer* swore the whole $1,800 was in gold pieces, it was not true, it was not all in gold pieces." He says it was his wife who gave the money to her brother. *Hewitt* is wholly illiterate; he says he cannot read a letter, or know one deed from another.

Judgment.



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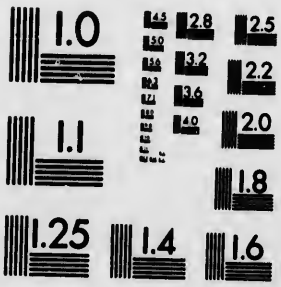

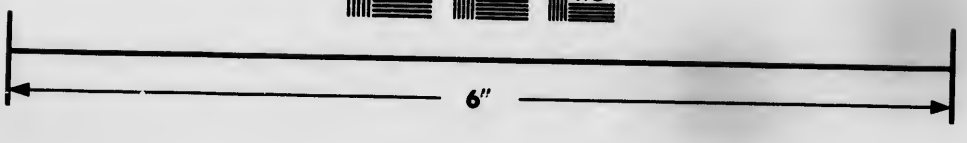

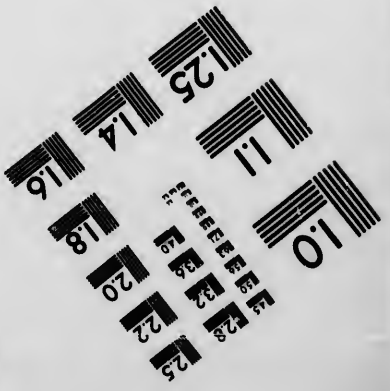

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1869.

Attorney General v. Harmer.

There is no other evidence confirmatory or otherwise, and I feel it to be a task of considerable difficulty to decide the point. Between business men there would be some documents preserved, the notes given and receipts probably, and as *Hewitt* must have signed the note as a marksman, there should have been a witness to it who might have been called; again, upon the alleged loan of $1,800 a security of some kind, or at least an acknowledgment would probably have been given; and there is no explanation why the $300 mortgage money should have been paid by *Henry* with money given to him by *Hewitt* instead of being paid by *Hewitt* himself. I do not attach so much weight to the absence of documentary evidence as I should do if the transaction were between people who would understand its importance. After the execution of the conveyance *Hewitt* would scarcely attach any value to notes or receipts, or any other paper connected with the consideration.

Judgment.

The discrepancy between the two as to the loan of $1,800 being wholly in gold, or partly in gold and partly in notes, is another circumstance; but I think it rather makes in favor of *Hewitt* than against him. If the story of the loan were a sheer fabrication, he would naturally follow the account given of it by *Harmer*; and again, would almost certainly have stated that no other person was present, whereas he states that his wife was present, and gave the money to *Harmer*. If there is no truth in this, *Hewitt* must not only have committed perjury, but have gratuitously made a statement which would exhibit him as a perjurer to his wife.

Against the *bona fides* of the transfer it has not been shewn that possession of the land conveyed, which is a farm, has not followed the conveyance; and this as a badge of fraud should be shewn by the party impeaching it, as was attempted to be done in regard to the seventy-five acres.

1869.

Attorney General v. Harmer.

I ought not to hold this conveyance void under the Statute, unless I can come to the conclusion that the account given of the consideration for it is a mere invention by the parties to it. I cannot help feeling serious doubts in regard to it. The demeanour of neither of the witnesses was such as to inspire one with any great confidence in their truthfulness; but I hesitate to take upon me to pronounce what they have said upon oath a sheer fabrication. It is either that, or *Harmer* was *Hewitt's* debtor for $1,800, and the conveyance was taken in satisfaction for that debt, and in consideration of a further sum to be paid by *Hewitt*. I think, upon the evidence before me, I ought not to hold the conveyance void. I confess, however, that I have come to this conclusion with more hesitation and more doubt than I feel in regard to the transaction with the father.

Judgment.

CONLIN v. ELMER.

Lease—Purchase for value—Voluntary deed—Amendment at the hearing.

A mining lease for 99 years contained provisions enabling the lessor to demand, at his option, a royalty upon the proceeds of the mines, or $4,000 in lieu of such royalty; the lessor had not exercised such option:

Held, that the lessee was a purchaser for value, and that a prior voluntary conveyance was void as against him.

Where the pleadings and evidence were not before the Court in a satisfactory shape, and the Court being obliged to reject evidence on both sides as not material under the pleadings, was not satisfied as to the result being in accordance with the rights of the parties upon the actual facts, leave was given to amend on payment of the costs of the hearing, &c.

Examination of witnesses and hearing.

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

1869.

Conlin v. Elmer.

Mr. *Wallbridge*, Q.C., for defendant *Conlin*.

Mr. *Diamond* and Mr. *J. A. Boyd*, for defendants *Elmer* and *Irwin*.

SPRAGGE, V.C.—The plaintiff is a sister of the defendant *Francis Conlin*; and her case is, that in or about the month of May, 1864, she purchased from him lot number nineteen in the fifth concession of Madoc, for a valuable consideration, which she actually paid; and that her brother at that date executed to her a conveyance of the land. She does not state what the consideration was. She states that the conveyance was left in the office of a Mr. Fitzgerald, who drew the same, in order to its being registered; that the office of Fitzgerald was shortly afterwards consumed by fire, and the deed with it.

Judgment.

The defendants other than the plaintiff's brother are *William Elmer* and *Charles Irwin*. *Elmer* is a lessee of the east half of the lot under a lease made to him by *Francis Conlin* for twenty years, on the 26th of October, 1866, and *Irwin* is a lessee of the same half lot under a lease from *Francis Conlin* for ninety-nine years, made on the 6th of November in the same year; both these leases are registered. I find among the papers a lease from *Francis Conlin* to *Elmer* of the west half of the same lot, but that lease is not mentioned in the pleadings. The plaintiff impeaches the leases of the east half of the lot, on the ground that they are without consideration, and that the lessees respectively had notice of her title.

Elmer's defence is, that the plaintiff had no conveyance; and that if any was made it was without consideration. He claims that his lease was for value, and he denies notice. *Irwin* sets up a like defence as to his lease; and adds that *Elmer* has, as he believes, expended

money and labor upon mining for minerals upon the land; and that but for *Elmer's* prior lease and right to possession, he, *Irwin*, would have expended money thereon.

The facts of the execution of the conveyance to the plaintiff, and of its loss, and of the payment of consideration rest upon the evidence of *Fitzgerald*. I believed in the truthfulness of his evidence; but had some doubt as to the accuracy of his memory. His evidence satisfied me, however, of the fact of the execution of the conveyance, and of its loss by fire. The date of its execution appears to have been about the beginning of May, and of its loss some three weeks later. As to the consideration paid, he said at first that he did not clearly recollect any money being paid; that he believed that notes of which the plaintiff was the holder passed to her brother. Later in his evidence he spoke more positively, saying that the plaintiff handed notes against other parties, against whom he did not know, to her brother; then that there were two notes handed by her to him. This is all the evidence of consideration having been paid; another person was present, one *Dale*, a witness to the deed, *Fitzgerald* stated in his evidence by way, I suppose, of accounting for the absence of *Dale*, that he had seen him lately, and that he was ill. *Francis Conlin* was not called. The evidence of *Fitzgerald* amounts to this, that the plaintiff handed to *Francis Conlin* two notes, or papers purporting to be notes, of persons, he cannot say whom, or for what amount they were given.

Judgment.

If the plaintiff is a purchaser for value, and the defendants, the lessees, had notice of her title, then whether they stand in the position of purchasers for value or not, her title must prevail: or if the plaintiff and the defendants are none of them purchasers for value, the plaintiff's title must prevail, whether the defendants had notice of her title or not. To deal first

1869.

Coulin v. Elmer.

with the case of *Elmer:* there is a provision in the lease to him enabling the lessor, at his option, to demand a royalty upon the proceeds of the mines, which it was in contemplation to open, or to call for payment of a gross sum—$4000—in lieu of such royalty. It does not appear that the lessor has exercised his option; but *Elmer's* liability to pay such sum makes him, I conceive, a purchaser for value; and unless the plaintiff is also a purchaser for value, notice under the then state of the law would be immaterial.

There are several circumstances leading to the conclusion that the plaintiff was not a purchaser for value. Her case is that she paid at the time the whole consideration money: she does not state the amount. She is spoken of in the evidence as a person without means, except that she once owned and sold a horse. The first lease was made nearly two years and a half after the destruction of her deed by fire—a deed she had intended to register; her brother, she says, had been paid in full, and she was of course entitled to another conveyance; and no difficulty is stated in the way of her obtaining it; yet no new conveyance appears to have been asked for. A further circumstance is, that after the leases to *Elmer* and *Irwin* had been made, she made no assertion of her right, nor even used language implying that any rights of hers had been interfered with. She said that her brother had been imposed upon, had been cheated, and the like. If in truth she had purchased and paid the consideration, it was not her brother that had been cheated but herself, and that *by her brother.* Her language is wholly unintelligible upon the hypothesis that she had purchased and paid for the land. Further, she appears to have spoken to two or three people about the land, upon various occasions, without claiming it as her own. I do not think that this, or her speaking of her brother, not herself, as imposed upon in the matter of the leases, is to be accounted for by supposing that she

Judgment.

believed that the destruction of her deed destroyed her title. The purposed destruction of a conveyance, in order to put an end to the title of the grantee, has been supposed by unlearned persons to have that effect; but it is against common sense, that the accidental destruction of a conveyance should do so. It would be so obviously her right to have another deed, that I cannot think that she believed her right destroyed by the burning of the conveyance. There is some evidence of her standing by while her brother was dealing with the property as his own; but the answers do not take that ground. The only use that can be made of her so acting, is by way of evidence that she was not a purchaser for value.

1869.

Conlin v. Elmer.

It is shewn in evidence that a very short time before the execution of the conveyance on the 18th of April, a writ was sued out against *Francis Conlin* in an action for seduction. It does not appear what became of that suit, but the fact of such a suit having been brought may account for the execution of the conveyance, expressing the payment of a valuable consideration. The resting quietly without a new conveyance, and the other conduct of the plaintiff, to which I have adverted, seem to me of great weight. The evidence of payment of consideration is very weak. I doubt if there was any thing more than the form of handing papers called notes, by the plaintiff to her mother; there is no evidence of her being the holder of any notes, a thing not difficult of proof in the case of a young woman in her position. Against this faint evidence of the payment of consideration, is a course of conduct quite consistent with her having taken a conveyance for a purpose, and then allowing it to drop when that purpose had been answered; but not consistent upon any rational view of it, with the case she makes, that she had purchased the land, and paid the consideration for it. Her conduct does, in my mind, quite outweigh the direct

Judgment.

1869.

Conlin v. Elmer.

evidence of payment of consideration; and I think the proper conclusion upon the fact is, that the consideration was not paid. I may add that I doubt whether the evidence of notice to *Elmer* is such that I ought to hold it sufficient to affect him with notice.

As to the other lessee, *Irwin*, the evidence of notice is more satisfactory. The evidence of *Alexander Dickson*, which I have no reason to doubt, proves that *Irwin* admitted in a conversation respecting the land in question, that he knew, before he got his lease, of the conveyance to the plaintiff, but observed that it had not been registered, and had been destroyed, and that they could not prove it. The question then arises, whether he stands in the position of a purchaser for value. The consideration of the lease is expressed to be one dollar, and the reservations, conditions, and covenants to be performed by the lessee. The lease reserves by way of rental or royalty one half of the net proceeds of all ores, metals, and metallic minerals, that should be obtained from the land. The lessee covenants that he will commence "prospecting" within one year, and there is a provision that if work should at any time stop for the term of one year, that the lease should be forfeited. I think that the provisions of this lease constitute *Irwin* a purchaser for value. It was not argued whether the clause respecting "prospecting" and providing for a forfeiture, in the event of work being stopped for a year, makes any difference. I think that they do not. This lease is for ninety-nine years. *Francis Conlin* had, a short time previously, granted a lease for twenty years, to *Elmer*, of the same land, with the exclusive right of using the same for mining purposes. As between *Francis Conlin* and *Irwin*, there could be no breach of covenant and no forfeiture, when it was by *Conlin's* own act that *Irwin* was disabled from doing what he had covenanted to do.

Judgment.

My conclusion therefore upon the pleadings and evidence before me is, that the plaintiff's case fails, both

against *Elmer* and *Irwin*, and in strictness I should dismiss the bill. I could not, however, but feel that neither the pleadings nor evidence were before me in a satisfactory shape. I was obliged to reject evidence on both sides, because not admissible under the pleadings. It may be that the plaintiff is in truth a purchaser *bona fide*, and for a valuable consideration, from her brother, and that she has only failed in proof: if so, it would be hard to conclude her upon the present pleadings and evidence. Instead of dismissing the bill, I am disposed to allow her to take down her case for hearing at the next sittings of the Court at Belleville. This can be done, with diligence on her part, if the defendants throw no difficulties in the way. It is the interest of all parties to have the questions between them disposed of as early as possible, and to facilitate the proceedings. The plaintiff should be allowed to amend, and the defendants to put in further answers, whether she amends or not; and it is an indulgence to the plaintiff which can only be granted upon payment to *Elmer* and *Irwin* of their costs of and incidental to the hearing. The plaintiff must avail herself promptly of the leave hereby given, failing which the bill must be dismissed with costs.

1869.

Conlin v. Elmer.

Judgment.

CLEMMOW v. CONVERSE.

Insolvent debtor—Preference—Pressure.

A preference which a debtor is induced to give by threats of criminal and other proceedings, is not void under the Indigent Debtors' Act of 1859 or the Insolvent Act of 1864.

But to sustain the preference the pressure must have been real, and not a feigned contrivance between the debtor and creditor to wear the appearance of pressure for the mere purpose of giving effect to the debtor's desire and intention to give a preference.

Examination of witnesses and hearing at Ottawa.

1869.

Clemmow v. Converse.

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

Mr. *Blake*, Q.C., for defendant *Walker*.

Judgment.

SPRAGGE, V. C.—It is clear from the evidence, particularly that of *Walker*, that it was apparent to *Converse* and to *J. T. Lamb*, that the effect of the giving of the ante-dated note, and of the legal proceedings to be taken upon it, would be to close the business of *Lamb*—to put him in insolvency, unless he, *Lamb*, could obtain aid from some other quarter. It was the intention of *Converse* to get execution in as short a time as possible, in order to be before other creditors; and the evidence of Mr. *Walker*, the solicitor of *Converse & Co.*, would lead to the inference that *Lamb* facilitated this passively, and was anxious, if he could, to facilitate it actively; but Mr. *Lamb's* letter to *Converse & Co.*, of 4th July, 1865, scarcely supports this. The peculiar course taken by *Walker* was his own idea, in order to conceal the proceedings from other creditors; but *Converse*, though not aware of the mode intended by his attorney to gain priority, was anxious that such steps should be taken as would give his firm priority. His anger at the deception which he alleged, and *Lamb* admitted, had been practised upon his firm, as to the advance of $1000 being obtained by representation as to real security, may have been the reason for the proceedings taken against *Lamb*, or he may have made this alleged deception the occasion for the course he took. He at least suspected, if he did not know, that *Lamb* was in a precarious position, perhaps on the eve of insolvency. and his leading object was to secure the debt of his firm, and that at the expense of other creditors, if necessary.

In order to effect this he brought pressure to bear

upon *J. T. Lamb*, sufficient, under the English cases, to make his act not a voluntary act; unless the proper conclusion is, that although there was pressure, still the giving of the ante-dated note was not really the result of the pressure, but in order to give a fraudulent preference: *Cook* v. *Pritchard* (*a*). The evidence of this is that above adverted to. I think it shews that he gave the note under pressure; and further, that having given it, his desire was that *Converse & Co.* should thereby obtain a preference. Whether he still apprehended the possibility of criminal proceedings being taken, as threatened by *Converse*, or from any other reason, he was anxious that they should obtain execution in priority to other creditors. The principle upon which, in England, pressure is held to be material, is this: *primâ facie*, a payment by one in so hopeless a state of insolvency that his payment is to be looked upon as made in contemplation of bankruptcy; or a delivery of goods or other effects by a debtor in that position, is a fraudulent preference—is presumed to be made in order to defeat the Bankrupt Laws: and the effect of the payment or other act of the insolvent, being under the pressure of the creditor, is to rebut the presumption that would otherwise arise: *Bills* v. *Smith* (*b*). It must of course appear that the pressure is real, not a feigned contrivance between the creditor and debtor, to wear the appearance of pressure, while the real desire and intention is to give a preference.

1869.

Clemmow v. Converse.

Judgment.

The circumstance that in this case the note was ante-dated, and that some of the notes which it was given to cover were not yet due, is some evidence of fraudulent preference; but it is not conclusive: *Strachan* v. *Barton* (*c*), and there are other cases to the same point. It would seem too, from the evidence,

(*a*) 6 Scott, N. R. 34. (*b*) 6 B. & S. 321. (*c*) 11 Ex. 647.

1869.

Clemmow v. Converse.

that it was not a case where preference was given before the expiry of credit, but that the notes still current were renewals of notes given for payment of goods. *Converse* too was in a condition to dictate terms to *Lamb*, and availed himself of his position to insist upon that which enabled him to take immediate proceedings against his debtor. It appears further that *Lamb* did not consider his insolvency inevitable; he still clung to the hope of being able to continue his business: he hoped for "outside aid," and asked and obtained from *Converse* a promise of a further supply of goods, to a small extent, upon security, in order to make up his stock. Under all these circumstances I think it would be held in England that a preference given by a debtor to his creditor, was not a fraudulent preference.

Judgment.

This act of *J. T. Lamb*, if it be void, must be so under the Indigent Debtors' Act, 22 Vic. ch. 96, or under the Insolvency Act, 1864. It was decided in *Young* v. *Christie* (*a*), that allowing judgment to go by default in an action, and defending another, the effect being to enable the one creditor to recover judgment before the other, is not a preference which is avoided by the former act.

Then as to the Insolvency Act of 1864. Sub-section 3, of section 8, is the clause that bears upon this case. It avoids "all contracts or conveyances made, *and acts done* by a debtor fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors or any of them, and so made, done, and intended, with the knowledge of the person contracting or acting with the debtor, and which have the effect of impeding, obstructing or delaying the creditors in their remedies, or of injuring them or any of them."

(*a*) 7 Grant, 312.

1869.

Clemmow v. Converse.

In *Newton* v. *The Ontario Bank* (*a*), I thought that this sub-section does not apply to a preference given by a debtor to one creditor over another. Upon the hearing of that case upon appeal (*b*), my brother *Wilson* expressed the opinion that the sub-section applies to dealings not only by an insolvent with strangers, but to his dealings with a creditor. Assuming, for the sake of argument, that my learned brother is right, and that the giving of the ante-dated note, and leaving the action upon it undefended, while pleas were put in to actions by other creditors, are "acts" within sub-section 3, there still remains the question whether it can be carried higher in favor of creditors disappointed by the act of the debtor, than a fraudulent preference under the English Bankruptcy Law; or rather a preference which would be held fraudulent but for the circumstance that it was obtained from the debtor by pressure exercised upon the debtor. If in England, pressure by the creditor is held to rebut the presumption of fraudulent intent, which would otherwise arise, I do not see how, consistently with English decisions, we can hold that pressure has not the same effect under our Insolvency law.

Judgment.

I think, as I have already intimated, that what was done was the result of pressure. I think that the debtor would have avoided what he did, if he had felt that he could do so: and that he did what was demanded of him in order to escape the consequences threatened by *Converse*, that his motive was to escape those consequences, not with any fraudulent object of preferring *Converse & Co.* I think the presumption of fraud is fairly rebutted.

It may well be doubted whether it should be in the power of a creditor, by the exercise of pressure upon his debtor, to obtain for himself a preference over other

(*a*) 13 Grant, 652. (*b*) 15 Grant, 283.

1869.

Clemmow v. Converse.

creditors; but while a fraudulent intent is made necessary in order to avoid such preference, anything that is sufficient to rebut what would, *primâ facie*, be a fraudulent intent, is necessarily receivable with that view. It is a logical consequence from the state of the law. I regret to have to give effect to it in this case, but in my view of the law I cannot avoid it.

Some question is made as to the *bonâ fides* of the debt for which the judgment was recovered. I agree that if a note was given advisedly and wittingly for a larger sum than was really due, in order to the recovery of judgment for more than the true debt, it would be void under the Statute of Elizabeth; but I do not think that the plaintiff has established such a case.

Judgment.

The plaintiff's bill must be dismissed, and with costs. I may add in justification of the assignee, that it appears to have been a fair case for the institution of a suit for the benefit of the estate. There was insolvency and a preference which, supposing it to be within the act, as my brother *Wilson* takes it to be, would have been sufficient but for the pressure which is shewn by the evidence for the defence.

1869.

BROUSE v. STAYNER.

Act for quieting titles—Old deeds—Conflicting evidence.

In 1866 *J. G. B.* filed a petition for a certificate of title to a wild lot under a conveyance executed to him in 1860 by *P*, the patentee. This claim was contested by S, who claimed, through divers mesne conveyances, under a deed executed in 1835 in *P*'s name by an attorney. The good faith of the various grantees, through whom the contestant claimed, was not disputed; but the question of title turned on the genuineness of the power of attorney, and of a bond which purported to authorize the execution of the deed of 1835. The impeached instrument bore date in 1833, and *P* had done no act in respect of the land from that time until the petitioner induced him in 1860, for a small consideration, to execute the conveyance of that date. The evidence as to the instruments was conflicting, but the Court being satisfied on the whole that the impeached instruments were forgeries by the petitioner's father: *Held* that the petitioner was entitled to his certificate.

The facts giving rise to this proceeding appear sufficiently in the report of the matter, *ante* p. 1. Instead of proceeding to try the questions raised in an action of ejectment, as suggested in the judgment there reported, the parties interested agreed to set the matter down for the examination of witnesses and hearing again, which was accordingly done at the sittings at Cornwall.

Mr. *Blake*, Q.C., and Mr. *Bethune*, for the petitioner.

Mr. *J. H. Cameron*, Q. C.; and Mr. *McLennan*, for the contestants.

Judgment.

SPRAGGE, V.C.—Upon the former inquiry before me, the question was as to the genuineness of the signatures to two documents, a bond and a power of attorney, upon which, or rather upon the latter of which, the title of the contestants is founded; and the question is the same now.

A further investigation was directed by the Court upon some new points suggested by the contestants, in fact on the discovery of new evidence.

1869.

Brouse v. Stayner.

The first point was, that at the former hearing the contestant was under a misapprehension upon a material point, namely, that the signature "*John Parlow*," as one of the witnesses to the bond, was the signature of *John Parlow* the son, when in fact it was the signature of *John Parlow* the father; and that *John Parlow* the son, who was examined as a witness on the former occasion, and who then denied that the signature was his, had since confessed that he knew, or at least believed, that the signature was that of his father.

The other point was, that whereas at the former hearing it was the belief of the contestant that there had been a sale direct from *James Parlow* to *Nicholas Brouse* of the U. E. right of the former, the sale was in truth to *Jacob* not to *Nicholas Brouse;* and that under some contract of assignment, or arrangement of some sort, *Nicholas Brouse* came to be entitled, and that thereupon, and not as original purchaser, his name came to be substituted for that of *Jacob*.

Judgment.

A very large portion of the evidence now taken is, as to whether since the former hearing *John Parlow* has confessed that he knew, or that he believed, that the signature "*John Parlow*" to the bond was that of his father.

The evidence upon this point is conflicting, and that to an unaccountable degree. I have gone over it carefully since the hearing, and while not only what was said, but the manner in which it was said, and the appearance and the demeanor of the witnesses was fresh in my recollection. It is impossible to reconcile it; but many of the discrepancies may be accounted for without imputing wilful falsehood to the witnesses. If it were a cardinal point in the case, it would be necessary for me to come to some conclusion upon it. The only use of it on the part of the contestants is to discredit the evidence

of *John Parlow*, inasmuch as he denies using the language imputed to him. But what is the evidence of *John?* As to fact it is that the name *John Parlow* subscribed to the bond is not his signature. It is not now contended that it is his signature. His opinion evidence as to other signatures may be discarded; so that it would, in my opinion, be unprofitable to analyze or to discuss at any length the relative weight to be attached to this conflicting evidence. I ought, however, to say, in justice to *John Parlow*, that taking all the evidence together, I am by no means convinced that he did use the language imputed to him. 1869. Brouse v. Stayner.

It is obviously of the highest importance to the contestants to prove that the signature is that of the father; for if his, the conclusion would be irresistible that the bond was executed by *James Parlow;* and if the bond, the power of attorney also. He died at the age of 77 in the year 1838, five years after the date of these documents. Judgment.

It does not appear to me to be very material whether the evidence of these papers coming from the proper custody is sufficient. The evidence upon that point, that of Mr. *Thomas Mercer Jones*, is not among the papers put in. But, supposing the evidence sufficient, it establishes only a *prima facie* case, and the evidence given at the former hearing displaces it. That of *James Parlow* alone is sufficient for that purpose; and the genuineness of the papers becomes a question of direct evidence.

If there was in truth an agreement to sell this U. E. right either to *Jacob* or to *Nicholas Brouse*, it would not be without its weight, inasmuch as the execution of documents of this nature would follow almost as a matter of course upon such a sale. If a sale to *Nicholas* were proved this would be almost certain; and if a sale

1869.

Brouse v. Stayner.

to *Jacob*, some arrangement by which it passed to *Nicholas* would not be improbable. The allegation in the petition for a rehearing is, that they have discovered, since the former hearing, that the sale was by *James Parlow* to one *Jacob Brouse*, his brother-in-law, for a valuable consideration; and that *Jacob* afterwards for a valuable consideration transferred the same to *Nicholas Brouse*; and they add that, since the former hearing, *James Parlow* has admitted such to be the fact.

No evidence of such admission by *James Parlow* is given. He was not present at the recent hearing, and I regret it, though not upon this point, for it may safely be assumed that he has not admitted that to be the fact which was not the fact; and that it was not the fact is proved by the evidence of *Jacob Brouse* himself. I place implicit confidence in the evidence of Mr. *Jacob Brouse*. He seemed to be a man of high respectability and intelligence, and though 74 years of age, in perfect possession of his faculties. It appears from his evidence that there was some talk—it did not amount to a treaty—between him and *James Parlow* in relation to the sale by *Parlow* to him of his U. E. right about 1832 or 1833. *Parlow* borrowed from him $12, and it was agreed that in case he purchased the right, the $12 should go on account; no price was named. *Parlow* repaid the money, and *Brouse* got no transfer; and he never transferred the claim, or agreed to transfer it, to *Nicholas Brouse*. An attempt was made to shew that he was mistaken; that he had assented to a statement by his daughter, a Mrs. *Mills*, that *Parlow* was dissatisfied because he had not got $8 more—this, upon the assumption that $20 was the agreed price. Mr. *Brouse*, upon being told that a Mr. *Shaver* was present at such a conversation between himself and Mrs. *Mills*, says that he has no recollection of it, and adds (with an absence of positiveness somewhat unusual in witnesses) "but if *Shaver* says so, I must have said it." He adds further,

Judgment.

however: "But whether he says so or not, no such transaction ever took place." *Shaver* was afterwards called, and deposed to such a conversation having taken place. He probably misunderstood what passed. At any rate, I am satisfied of the fact, that there was no sale or completed agreement of sale from *Parlow* to *Jacob Brouse*, and no transfer or agreement to transfer on the part of the latter to *Nicholas*.

1869.
Brouse v. Stayner.

At the same time, it is highly probable that what passed between *James Parlow* and *Nicholas Brouse*, in contemplation of a possible sale of his U. E. right by the former, was mentioned by him among members of his family, and perhaps to others, and perhaps was mentioned by *Jacob Brouse* also, for *John Parlow* confesses that he had an impression derived, as he thinks, from both of them, that *James* had sold his right to *Jacob Brouse*, and this may help to account also for the impression on the part of some of the witnesses that *James* had stated to them that he had sold his right. But of the fact that there was no sale or completed agreement to sell to *Jacob*, I repeat that I am satisfied.

Judgment.

There are three witnesses who speak of statements by *James Parlow* that he had sold to *Nicholas Brouse*, or that he had sold to a *Brouse*, and had assigned to *Nicholas Brouse*. One of these is *Archibald McInnis*, who puts it in the latter way, and who says that *James* added that he had not got all his pay yet. This conversation, as I understand from his evidence, took place some thirty years ago. It is strange, that in an affidavit made by this witness, at the instance of the contestants for the purpose of this rehearing, he is silent as to this alleged statement, although his affidavit contains passages where it would naturally be introduced. In one he says it was generally understood at the time (he thinks in 1833) that *James Parlow* had assigned his U. E. right. In another he says that about the year 1834 or 1835,

1869. Brouse v. Stayner.

Nicholas Brouse told him that he had bought *James Parlow's* U. E. right. It is difficult to account for the absence in this affidavit of what he now states, if *James Parlow* really did make such a statement. I am willing to believe, and I do believe, that what he now says as to this statement of *James Parlow* is not a mere fabrication, and that he believes what he says; but I do not think his memory is trustworthy, and that it is probably some indistinct recollection of the inchoate bargain between *Parlow* and *Jacob Brouse* that he has put into the shape that we find in his evidence. The reason given by this and some other witnesses for the omission from previous affidavits, or from depositions, of statements now made in evidence, when pressed by cross-examination that for family reasons they told as little as they could, I look upon as an excuse and nothing more.

Judgment.

Another witness was *Sealey*, but his memory was so utterly at fault and there were such inconsistencies in his evidence, when he came to speak of time and circumstances, that I cannot but regard his evidence as altogether unreliable. He made an affidavit and subsequently a deposition in this matter, in neither of which does he mention this alleged statement. In the latter he says, "I have told pretty much all I can think of." His subsequent recollection of this fact which would strike any one as a material fact is singular. I think it is open to the same remarks that I have made in regard to the evidence of *McInnis*. In his deposition he says also that he had a fever and that his memory is not so good as it used to be. Further, he is contradicted upon some points by other evidence. At the same time, while I think that his evidence adds no weight to that given by the others, I do not look upon him as a mere fabricator of evidence. He seemed peculiarly the style of man to understand badly and to recollect inaccurately; and if he ever heard of what passed between *Parlow* and *Jacob Brouse* he would be apt to reproduce it in its present

shape. *William Parlow* also gave evidence of an admission to the like effect, but it was after the sale to the petitioner, and consequently at a time when, as I ruled, and as Mr. *Cameron* afterwards conceded, it could not affect the title of his assignee; and further his evidence upon this point was, at least, shaken upon examination. 1869. Brouse v. Stayner.

I have already spoken of the evidence of *John Parlow*. There remains only the evidence of *West*. It was the first given, but I have reserved my comments upon it to the last. When he commenced I thought well of him, but as his evidence proceeded he impressed me very unfavorably. He seemed more prone to "fence" with questions, to exhibit his expertness at evading them, than to answer them directly and plainly. His bias for the contestants was evident enough. Still, I thought upon the whole his evidence was probably not untruthful, though to be received with great caution and with much allowance for the leaning to one party which he shewed. Whatever weight I might have felt disposed to place in his testimony, if uncontradicted, was entirely dissipated when brought face to face with the testimony of others. I desire to express no stronger opinion in reference to this witness and his evidence, than is necessary in regard to the point which I am considering, and therefore content myself with saying that I regard his testimony to this piece of conversation evidence, occurring many years ago, as altogether unreliable. I attach to it no weight whatever. Judgment.

Against the evidence which I have been considering is that of *James Parlow* himself. I have, since the recent hearing, carefully re-read and considered his evidence. He emphatically denies that he ever sold or agreed to sell to *Nicholas Brouse*, and mentions a circumstance which renders his denial probably the truth, viz., that his father advised him against it, because the U. E. rights were fetching almost nothing; and it appears from

1869. Brouse v. Stayner.

other evidence that he, *James* was a man in easy circumstances. His establishing his claim before the "land board" proves nothing. He did what the rest of his family—entitled like him to U. E. grants—were doing, and the circumstance of *Nicholas Brouse* being named in his petition as the person whom he permitted to locate the land to which he was entitled, and to take out the patent, goes no way to proving that he had contracted to sell to *Nicholas Brouse*. In the petition, which is printed, a blank is left for the name of some one to locate and take out the patent. What more likely than that *Nicholas Brouse* should be named, a connection, a person conversant with that kind of business, and resident in the country, *James* himself being resident in the United States. Whether *James* designed merely to establish his right, and to sell it as a right when he could get a price to suit him, or to locate the land, the name of *Nicholas Brouse* is perfectly intelligible without supposing any contract to sell to him; and his being authorized to take out the patent amounts to nothing. It was part of the printed form and *James* would naturally suppose that it was proper and perhaps necessary; and if he thought anything of it he would feel that the taking out the patent would give no power to deal with the land; for the patent could issue in no other name than that of *James* himself, and he alone could dispose of the land. I say this assuming that *James* was aware of the insertion of the name of *Nicholas Brouse* for these purposes; but it is quite possible, and indeed not improbable that he was not aware of it, and that he put his name to what *Brouse*, a man more experienced than himself, told him was proper.

Judgment.

Upon the whole of the evidence, as to any contract of sale to *Nicholas Brouse*, my conclusion is, not that such contract is not satisfactorily proved, or not that only, but that as a matter of fact such contract was never made; and that any notion that credible witnesses may

1869.

Brouse v. Stayner.

have got upon that subject has arisen out of the inchoate bargain between *James Parlow* and *Jacob Brouse*. I have dealt with the question of sale to *Nicholas*, though the position of the contestants upon this rehearing is that the sale was to *Jacob;* because, if a sale to *Nicholas* had been proved, it would render it probable that some such documents as those in question would be executed; while, on the other hand, if the proper conclusion from the evidence should be that there was no contract of sale with either *Jacob* or *Nicholas*, it would at the least throw the gravest doubt upon the genuineness of the papers in question. If the contestants had been content to rest their case upon the fact simply whether these documents were genuine or spurious, they might have done so; they need not have gone behind them. But when they sought to strengthen their case by proving a previous contract, they ran the risk of failure. If they had failed simply from insufficiency of evidence it would leave the question of genuineness as it was; but when the negative of what they have sought to establish is the proper result of the evidence, as in my judgment it is, then it is evidence, and strong evidence, against the authenticity of the papers in question.

Judgment.

But to take the case simply as a question of proof of handwriting, which is putting the case most favorably for the contestants, the weight of evidence is against them. Apart from the testimony of the witness *West*, to whose opinion evidence in the matter I attach no weight, there is no evidence of the name *John Parlow* being (what it is the contestants' case it is) the handwriting of *John Parlow* the father. The opinion evidence against it is of more weight than that in its favor. We have, besides, the unquestionably genuine signatures of *John Parlow* the father, one in 1820 and two in 1828; the latter are to the e instrument, a conveyance to *John Parlow* the son. In all, the character of the

1869.

Brouse v. Stayner.

handwriting is alike, and is essentially different from that of the same name to the bond. It is true that the date of the latter is five years later, and that he died three years afterwards. This would account for less of firmness in the handwriting, but not, I think, for the marked difference in character which is apparent between them. The signatures of 1820 and 1828 are alike, except that the "P" is formed differently. The name to the bond is very different; so different, indeed, as to resemble the signature of the father less than that of the son, and, if not genuine, but an imitation, I should take it rather to be an imitation of the son's signature than of the father's. Besides the points of difference between the signature and the proved genuine signatures of *John* the father, there are points of resemblance between the signature in question and some of the filling in, in the impeached documents and the papers used before the "land board," such filling in being in the handwriting of *Nicholas Brouse*.

Judgment.

I have observed that, if the signature "*John Parlow*" is genuine, the conclusion would be, that the signature "*James Parlow*" is also genuine. The converse of this will also hold good. If the signature "*James Parlow*" be not genuine, the conclusion will be, that the signature "*John Parlow*" is not genuine. As to the signature of *James*, there is his own denial upon oath; and upon the question of handwriting, the points of difference between his name as appended to the bond and power of attorney, and his proved genuine signature to the petition and affidavits, and the points of resemblance between the two former and the filling up of these documents, pointed out in the evidence of the expert Dr. *Girdwood*. I refer to this only in this view: that the genuineness or spuriousness of the one helps to the conclusion as to the genuineness or spuriousness of the other. Of course, if the genuine signature of *James* be not to the power of attorney and bond, it matters

not whether the signatures of the witnesses be genuine, or not. There is no doubt, I apprehend, that the signature of *Brouse* is genuine; but that proves nothing as to the genuineness of the signatures of the *Parlows*. 1860. Brouse v. Stayner.

It is urged that the probabilities are against the case of the petitioner that the signature "*James Parlow*" and the signature "*John Parlow*" are forgeries; that a person committing a forgery would forge no more signatures than would be necessary to effect his purpose; that if *Nicholas Brouse* were committing the act, he would have contented himself with forging the name of *James Parlow* only, and of putting his own name as a witness to both instruments. It is a fair argument, and not without force. But we often find criminals doing acts which have assisted in their conviction, sometimes gratuitously, sometimes from an over anxiety to escape suspicion, or to give to an instrument an appearance of genuineness, without which it would not serve their purpose. The same thing occurred in a similar paper which was before me about a year ago, and which I was compelled to pronounce a forgery. Judgment.

The smallness of the inducement is another argument, as the market value of that which would be obtained by such a crime was only about £20. The temptation certainly was not large, but, to a man without principle, it might be sufficient. He might escape detection, and, if he were detected, he might expect that an equivalent in money would satisfy the man whom he had defrauded. Rightly viewed, nothing would be a sufficient inducement for the commission of crime, yet the folly, as well as the wickedness of crime is constantly forced upon our attention; and the smallness, the pitifulness of the inducement is often a matter of wonder.

Another point was made in the case which struck me at the time, and to which I have given some considera-

1860.

Brouse v. Stayner.

tion since. It is this. The petitioner *John Gordon Brouse* purchased from *James Parlow* in 1860. Before purchasing he had ascertained that certain land (the lot in question in Plympton) had been located in virtue of *James Parlow's* U. E. right. This he states in his examination. He does not say whether or not he knew by or through whom the land had been located, but he says that *Parlow* informed him that he had never sold his right. His inference, it is contended, must have been that, it having been located under the power contained in the petition presented to what has been called the land board, and by his father, *Nicholas Brouse*, the person named in the power, it had by him been transferred surreptitiously in the name of *Parlow*, but with his authority; in short, by some forged document. He learned, also, that the land was then claimed by the late Mr. *Stayner* under certain conveyances which appeared upon the registry; but not forming a complete chain of title, the conveyance purporting to be from *Parlow* to *Macnab* not being then registered; (it was registered in 1861, after his purchase, and the memorial does not shew that it purported to be executed under power of attorney from *James Parlow*). In 1860, he obtained a conveyance to himself from *James Parlow*, and got it registered, and about the same time saw Mr. *Stayner* and, as he says, spoke to him about it. He does not say whether he knew of the conveyance purporting to be from *Parlow* to *Macnab*, and of its being executed under the power of attorney in question. He says he asked Mr. *Stayner* if he had a deed from *Parlow* for this lot, and that he said he had never seen one. This may be true, as that deed was not registered till afterwards; still it would be very strange, for there would be a patent to *Parlow* and a deed from *Macnab*, and none from *Parlow* to *Macnab*.

Judgment.

The argument is, that *John Gordon Brouse* must have seen that the land was located in the name of

1869.

Brouse v. Stayner.

James Parlow by *Nicholas Brouse*, and seeing the chain of title appearing at the registry office (and of which he says he got an abstract), the inference must have been, that *Parlow* had conveyed to *Macnab*, which he denied, or had sold to *Nicholas*, which he denied (denying that he had sold to any one), or that there was forgery in the case; at all events, that he saw that *Macnab* claimed from *Parlow*. If, in addition to this, he saw or knew how *Macnab* claimed, then it is argued that he lay by until the death of *Nicholas Brouse*, and then asserted title by impugning the genuineness of the power of attorney, the genuineness of which *Nicholas Brouse*, if living, might have proved; and they urge that everything is to be presumed against a person so lying by.

So far as the issue, which is the subject of this inquiry, is concerned, I have nothing to do with the equitable doctrine that the Court will refuse its aid when there has been unreasonable delay, and where evidence has been thereby lost. Whether the doctrine has any application under the Act for Quieting Titles, has not been discussed; and I express no opinion upon it. The only question upon this inquiry is, whether it is to be presumed that the power of attorney is genuine because *John Gordon Brouse* did not contest its validity, in a Court of Law or Equity, in the four years that elapsed between his obtaining his conveyance and the death of *Nicholas Brouse*. I do not think that this is to be presumed. The land was wild; there was no actual possession, and if he believed that the title was in him, there was no particular reason for bringing ejectment; and assuming that a bill would lie for the cancellation of the conveyances, in the hands of Mr. *Stayner*, as a cloud upon his title, the abstaining from a suit of that nature would not afford a presumption in favor of the genuineness of the instruments which he omitted in that way to impeach.

Judgment.

1869.

Brouse v. Stayner.

I should have been glad to be able to arrive at the conclusion that the signatures impeached were genuine, for it is always more pleasing and satisfactory to find innocence in dealings than to find guilt; but, upon the evidence before me, I can come to no other conclusion than that the impeached signatures are not genuine.

With regard to the costs reserved by the orders under which this inquiry proceeds, they must follow the result.

BRAND v. MARTIN.

Specific performance—Redemption—Submitting to decree—Costs.

On a sale of land it was agreed that the purchaser should have the privilege of paying the price by doing certain chopping on other land of the vendor's. No time was fixed for this work. On a bill by the purchaser for specific performance:

Held, that he was not to be treated as in default, so as to lose his right to specific performance, without proof of having neglected to do the work after being requested to do it.

Where the defendant submitted by answer, to be redeemed on payment of costs, and made statements which, if true, would have entitled him to costs:

Held, that the plaintiff was justified in going to a hearing for the purpose of proving facts which entitled him to costs against the defendant.

Hearing at Stratford.

Mr. *E. B. Wood*, for the plaintiff.

Mr. *Evans*, for the defendants *Martin*.

Mr. *Miller*, for the defendant *Robertson*.

Judgment.

SPRAGGE, V.C.—The bill is for the specific performance of a contract of sale by the defendant *John Martin*

1869.

Brand v. Martin.

to the plaintiff of fifty acres of land in the township of Elma, being the north half of the south half of lots 51 and 52 in the first concession. The land was unpatented. The original locatee was one *Tremaine;* and the defendant *Robertson* had purchased the north half of the two lots. A balance of purchase money was due to the Government. The agreed price between the plaintiff and *John Martin* was $400, of which $212 was paid in hand and the balance was payable by three annual instalments, with the understanding, as the agreement expresses it, that the plaintiff should "have the privilege of chopping and clearing land on some part of the south halves of said lots numbered, 51 and 52, at the rate of $10 per acre (being furnished by the said *John Martin* with board and a suitable ox team as required), in liquidation" of the unpaid purchase money. Upon payment of the balance, or upon the plaintiff giving to *Martin* security for any unpaid balance, *Martin* was to assign his interest in the said land. The agreement contains no stipulation in regard to the payment of the balance due to the Government, or of a proportionate part thereof; but all parties agree that it was only the interest of *Martin* that was sold, and that he was not to pay the balance due to the Government. The balance due to the Government on the whole of the two lots was afterwards paid by *Robertson;* and thereupon an arrangement was made between him and the vendor *John Martin;* and *James Martin*, the father of the vendor, that thirty acres of the fifty sold to the plaintiff should be conveyed to *James Martin*, and the remaining twenty retained by *Robertson* in satisfaction of the proportion payable by the *Martins* of the moneys paid by *Robertson* to the Government.

Judgment.

It is set up in the answers that the plaintiff was an assenting party to this arrangement, or at any rate to the arrangement in regard to the twenty acres, but it is not sustained in evidence.

1869.

Brand v. Martin.

At the hearing I held the case clearly made out, as between the original vendor and purchaser. The contract had in no way been put an end to; there was at most, only default in the payment of the balance of purchase money; and, as to that, it was not proved that the vendor had ever required the purchaser to do the work which was to be taken in payment. As to the payment to the Government, if it had been made by *John Martin*, his right could only be to add a due proportion of it to his purchase money. There was nothing, therefore, to disentitle the plaintiff as against him to specific performance. As to the other defendants, they had not set up as a defence that they were purchasers for value without notice, nor, it was evident, would the facts have warranted such a defence.

Judgment.

The case of *Martin* the father must stand upon the same footing as the case of his son, the vendor to the plaintiff; and the case of *Robertson* must also stand upon the same footing, unless he could establish his case that the plaintiff was an assenting party to his retention of the twenty acres. The evidence upon that head goes no further than this: that the plaintiff apprehended that his right to them was lost, and under that apprehension asked and obtained *Robertson's* permission to remove a few young fruit trees which he had planted; and there was some evidence of cordwood being cut by a tenant of *Robertson* for his own use. When *Robertson* obtained a patent for the whole of the two lots, he was a trustee as to the fifty acres, for the plaintiff. If he had conveyed the whole fifty to *John Martin*, there might possibly have been room for him to say that he did so in order to *Martin's* carrying out his agreement with the plaintiff; but his conveying thirty acres, and retaining the twenty, negatives any such intent. In fact, the answers of both negative such intent; and the conduct and dealings of both with the land were a wrong to the plaintiff.

The conduct of the plaintiff induced by this wrong cannot operate to the benefit of the wrong-doers. 1869.

Brand v. Martin.

The answer of *Robertson*, after setting up the agreement that he should retain the twenty acres, and alleging that the plaintiff was an assenting party, and after alleging improvements made by him upon the faith thereof, proceeds thus:—"Nevertheless, I am willing and hereby offer to be redeemed by the plaintiff on being repaid what shall be found due to me for principal money and interest, and my reasonable costs in respect of my payment to the Crown of the proportion of the original purchase money of the said parcels comprised in the said agreement; and in that case, I also pray to be paid out of the balance of purchase money still due and owing by the plaintiff to *John Martin*, the balance due to me from *John Martin* for what I paid for him;" and he adds:—"And I also pray to be allowed my reasonable costs of this suit." It is now claimed on behalf of *Robertson* that, having thus submitted to be redeemed, he ought to have his costs; that is, as I understand, the whole of his costs in the suit. Judgment.

In the first place, it is not alleged that any such submission or offer was made before suit commenced. It was made, so far as appears, for the first time by the answer, and in an answer insisting upon his strict right to retain the twenty acres, a right which he has failed to establish. It is clear, therefore, that he cannot be entitled to the costs of that answer. Then as to subsequent costs, he could only be entitled to them in case his answer made the subsequent prosecution of the suit against him (unless upon bill and answer) unnecessary, and in case also the plaintiff had not a right for any other reason to bring the suit as against him to a hearing.

If the plaintiff had set the cause down as against him upon bill and answer, it would have been an admission

1869.

Brand v. Martin.

of all the allegations in the answer, and such admission would, I apprehend, have entitled this defendant to his full costs of suit, including his answer; whereas not only is this defendant not entitled to the costs of his answer, but the plaintiff is entitled to his costs against him up to his answer at any rate, by reason of the original wrong to which I have adverted, and his denial of the plaintiff's right, which, being denied by the answer, I must assume to have been denied up to the answer. *Robertson*, so far from submitting to pay any costs, does, by his answer, ask for costs. Therefore, assuming that the submission to be redeemed was a proper one, it was still necessary upon the question of costs for the plaintiff to carry his cause to a hearing.

Then as to the plaintiff's right to costs, and against whom. He is clearly entitled to his costs against both *John* and *James Martin*. Against *John* for his conduct, and his dealing with the land as he did with *Robertson*, and his sale of the thirty acres to *James*; and against *James* for his purchase from *John* with knowledge of the plaintiff's rights, for his denial of those rights, and for his attempt to dispossess the plaintiff of the thirty acres by ejectment. And as to *Robertson*, I do not see that I can refuse to the plaintiff his costs against him. His conduct and his dealing with the land have contributed to the placing of the plaintiff's rights in jeopardy. He was a party to the wrong by which *John* got the legal estate, which, under the agreement with the plaintiff, he was not to have had; and which *John* transferred to *James*, and upon which *James* brought the ejectment. *Robertson's* conduct was faulty; though perhaps less faulty than that of the *Martins*, and I think I cannot exempt him from costs. The costs will therefore be against all the defendants, and the costs of the injunction will be included. It is proposed that the purchase money payable by the plaintiff should be paid into Court,

Judgment.

leaving it to the defendants respectively to establish, if they can, their rights in regard to it. The plaintiff's counsel assents to this. This proposal and assent will, of course, not prejudice the right of the plaintiff to set off the cost payable to him against the money payable by him.

1869.

Brand v. Martin.

In re Cobourg and Peterborough Railway Company.

Statute, construction of—Creditors.

A railway company having become insolvent, an Act was passed estimating the claims of creditors for land taken by the company at $30,000, and the value of the whole railway property at $100,000, and directing that $30,000 should be applied on debts for land and the balance of the $100,000 divided *pro rata* among the other creditors; the $30,000 proved more than sufficient to pay the land debts in full, and the company claimed to be entitled to the balance: but

Held, that the other creditors were entitled to it.

Statement.

By the Statute 29 Vic., ch. 79, (1865), after reciting that in pursuance of the 25 Vic., ch. 58, (1862), arbitrators had been appointed for the purposes therein mentioned, namely, the valuing of the properties and franchises of the company, who afterwards made their award declaring the value thereof, which award was set aside by this Court, and that it was desirable that litigation should cease, and that such value should be ascertained by the Act, and that the 25 Vic., ch. 58, should be otherwise amended, it was enacted and declared that the true value of all the franchises and properties of the company was $100,000, and should be in lieu of the award to all intents and purposes, which sum was to be paid into this Court as follows: $50,000, part thereof within two years from the passing of the Act, with interest, and the remainder within four years, with interest, to be distributed by the Court in the propor-

1869.

Re Cobourg and Peterboro' R. Co.

tions and according to the following priorities, namely, $25,000 out of the first, and $45,000 out of the second payment, towards payment of bondholders ratably, and the residue ($30,000) to be paid ratably to parties claiming for unpaid right of way and depot grounds. The $100,000 was accordingly paid into Court by the company itself, and the road became revested in them under the provisions of the Acts referred to. In proceeding to ascertain the amounts of the different claims upon the company, it was ascertained that the claims for right of way, &c., did not amount to more than $25,000; thus leaving $5,000 still in Court. The $70,000 applicable to paying bondholders having been already divided amongst them. An application was thereupon made on behalf of the bondholders for payment out to them of this balance, contending that under the circumstances it belonged to them: this the company opposed, insisting that $70,000 was the amount fixed by the Legislature as the sum payable to the bondholders in full of their claims, and that that sum having been duly paid to them, the residue, if any, belonged to the company.

Mr. *McLennan*, for the application.

Mr. *Roaf*, Q. C., contra.

Judgment.

SPRAGGE, V. C.—The Legislature interposed in virtue of its paramount authority. It took upon itself to deal with an enterprise in which the interests of the public were concerned; and in the Act of 1862 as well as in that of 1865, proceeded upon the assumption, founded upon unquestionable data, that the whole properties and franchises of the Company fell short of its liabilities: and it took the value of the properties and franchises of the Company as the measure of its ability to pay. It settled the priorities of certain creditors. As matters stand now, it is only necessary to notice the owners of rights of way and station grounds, who were

1869.

Re Cobourg and Peterboro' R. Co.

placed first in order of priority; and bondholders who were placed second. Both acts contemplated the payment of owners of rights of way, &c., in full, while the payment of bondholders was to be *pro rata*. It proceeded upon the principle that no injustice would be done to the bondholders if they were paid to the extent to which the assets of the Company would extend to pay them. It is true that the Company was placed in the somewhat anomalous position of buying up its own liabilities at a discount; and obtaining thereby an absolute discharge: but this only placed the body of men, composing the Company, in the same position as any other Company, or any other body of men might, with propriety, have been placed for the like purpose. Legislation in this matter has evidently proceeded upon this. Here is an enterprise of public interest. It can be kept alive in a certain mode without injustice to its creditors; and the mode taken is to place the Company in the position of purchasers of its properties and franchises. I think this position of the Company is very material upon the question raised. The Company are allowed to, become purchasers, just as any other Company, or any other body of men might have been allowed to become purchasers, and this position of the Company does in my mind, irresistibly lead to the conclusion, that they cannot be entitled to any portion of the purchase money. If the purchasers had been some other Company, or some other body of men, they could have no pretence for asking back any of the purchase money they had paid. To whomsoever it belonged, it could not belong to them. They had obtained the whole of the thing purchased: they could not in reason, or upon any legal or equitable principle have both that, and also that or any part of that, which was the consideration for it. And I really can see no difference in principle between the same Company purchasing, and some other Company or individuals purchasing.

Judgment.

1869.

Re Cobourg and Peterboro' R. Co.

Viewing the question in this light, the Company have nothing to do with the appropriation of the purchase money. The statute directs them to pay it into this Court, and provides then for its appropriation. If as to part of this purchase money, it has failed to do so effectually, that can be no reason for its going back into the hands of the purchasers: they have the thing purchased, and cannot have the purchase money too, nor upon the same principle, any part of it.

If indeed it had turned out that the legislature had acted under some great misapprehension as to the debts of the Company, and that they really amounted to less than the sum they were to pay, by way of purchase money, there would be reason in their present demand, for there would then be no other claimant upon the fund. They might in such case have been able to put the matter upon this footing. Our property stood chargeable with a number of debts, which we estimated to exceed its value. The Legislature adopting our estimate of indebtedness, dealt with us as insolvents, when we were not so; and allowed us, for public reasons, to redeem our property upon paying into Court a certain sum, the value of the property, and assumed to be less than our indebtedness; we have paid the whole sum into Court, and it more than pays our indebtedness, the surplus must be ours: and there would, I apprehend, be no denying the equity of the claim.

Judgment.

The Company may urge that they are entitled, whether their estimate of their indebtedness was mistaken or not, to place the dealing of the Legislature with them upon the same footing, a liberty upon public grounds to redeem their property upon paying into Court a fixed sum. Suppose this conceded, what is the position of the Company. The case they have presented to the Legislature is, that they have two classes of preferred creditors, one of which is to be paid in full. They

1869.

Re Cobourg and Peterboro' R. Co.

place the minimum of debt to that class at $30,000, that leaves $70,000, which they truly represent as insufficient to pay the other class, and that class they propose to pay *pro rata* so many cents on the dollar, and Parliament legislates upon the assumption, erroneous as it turns out, that the claims of the first class will absorb $30,000 of the 100,000 to be paid in, and leave only 70,000 to be divided ratably among the second class. The first class in fact, absorbs only $25,000; and the Company claims the difference as its own. If the provisions of these Acts, instead of being what they are, were embodied in a decree of this Court, founded upon a petition of a debtor, setting forth representations of a like character to those I have detailed, I feel safe in saying that if the Court had framed its decree upon the assumption that the debtor's representations were true, and had not by the terms of the decree, disabled itself from dealing with the surplus beyond the sum necessary to satisfy the first class, it would certainly not pay that sum to the debtor. In my judgment the second class would be entitled to it.

Judgment.

It seems to me therefore that whether the Company is to be regarded as a purchaser, which is I think, its true position under the acts; or is entitled to be looked upon as the owner of incumbered property, allowed to redeem it upon certain terms, in either aspect the Company cannot be entitled to this money. I say this, not only as pronouncing that the Company can have no equitable right to it, but upon my understanding of the principles upon which the Legislature proceeded in dealing with the Company, its creditors, and the enterprize. I find nothing in either Act looking in the least towards a return to the Company in any event, of any portion of the moneys to be paid in by them, and I find much, I may say the whole spirit and principle of both Acts, that is in my judgment against it. The most that can be said is that the disposition of the sum in question

1869.

Re Cobourg and Peterboro' R. Co.

is unprovided for, what disposition would have been made of it but for the mistake in assuming $30,000 as the minimum of the amount due for Railway sites and claims of that class I can hardly doubt.

LITTLE v. WRIGHT.

Security for costs.

On an application for security for costs, it appeared that the plaintiff, though a resident of Canada, was in such circumstances as not to be good for the costs of the suit, should it go against him; that other persons were greatly interested in the subject matter thereof; that the plaintiff's success would materially benefit them; and that the defendant had already succeeded in an ejectment suit at law in respect of the same right on one of the grounds relied on by the bill; but there being no evidence that the plaintiff was actually put forward by the other persons interested to try the right, or that the suit was not brought entirely at his own instance: security for costs was refused.

Application for security for costs under the circumstances stated in the head note and judgment.

Mr. *Bell*, Q. C., for the application.

Mr. *Blevins*, contra.

SPRAGGE, V. C.—It is quite clear that the poverty of a plaintiff is of itself no ground for requiring security for costs. In *Ogilvie* v. *Hearn*, (*a*) Lord *Eldon* said that the Court would not require security for costs from any man in England, upon any representation of his circumstances; and the rule is the same at common law. If, indeed, the plaintiff is in such poor circumstances as not to be answerable for the costs, and is put forward by a third person to try a right in which such third person is interested; the Court will require security for costs to be given, and very reasonably, for the real plaintiff is kept back, and the defendant is placed in the unfair

Judgment.

(*a*) 11 Ves. 600.

1869.

Little v. Wright.

position of having to contest a suit really with one able to pay costs if he loses, but yet against whom he cannot recover them, because he uses the name of a third person. But even in such a case I apprehend that the Court must be convinced not only that the third person is interested, but that the plaintiff upon the record is not, or at any rate not substantially interested; and so in *Ball* v. *Ross* (*a*) Chief Justice *Tindal* said: "taking the whole of the affidavits together I cannot help thinking that this is really and substantially the action of the landlord," and in *Hearsey* v. *Pechell* (*b*) the Court refused an application for security for costs, which was asked for on the ground that a Mr. *Wood*, who had taken great interest in the plaintiff's cause, had paid some money towards his costs and had sent him to an attorney, was in fact the instigator of the suit; but it was stated on affidavit in shewing cause that *Wood* had no pecuniary interest in the cause, and had stirred in it upon public grounds only; and the Court not feeling it to be clear that the action would not have been brought by the plaintiff without the instigation of *Wood* refused the application. In this case the evidence does not bring me to the conclusion that the plaintiff does not bring the suit subtantially on his own behalf. It is true that others, and particularly *Ebenezer Wright* are a good deal interested in his success, inasmuch as they are only to receive the amount which the plaintiff is to pay for his interest in the land, in the event of the plaintiff succeeding; but it does not by any means follow that this suit is wholly and substantially theirs, and not the suit of the man in whose name it is brought. It is true that the amount to be paid by him for the right and interests of others is large, as large perhaps as in the judgment of some witnesses is the value of the place, but in the judgment of others the place is worth double that amount, and I am inclined to the opinion that in the event of his succeeding he will

Judgment.

(*a*) 1 M. & G. 445. (*b*) 7 Dow. 487; 5 Bing. N. C. 466.

1869.

Little v. Wright.

not succeed to a barren right, but to that which will be worth considerably more than he will have to pay for the purchase of the interest of others interested. There is no evidence that the plaintiff is put forward by others, or that the suit is not brought entirely at his own instance; and if he is bringing the suit in asserion of his own rights it would be hard to make it a condition to his prosecuting it that security for costs should be given; for the Court when it orders security in the cases to which I have referred supposes that it will or at least ought to be given by the instigator of the suit;—the party really interested in its prosecution.

Judgment.

It is said that the defendants have succeeded in ejectment upon the same grounds upon which this suit is brought, or at least upon one of the grounds. This bill appears to be filed upon two grounds one of which, the construction of the will, is the same that has been the subject of adjudication in one of the Common Law Courts, the other ground impeaches the purchase from the widow *Stockwell* by *John Wright* as obtained under circumstances which should prevent his holding it for more than a purchase of Mrs. *Stockwell's* life-estate; this ground is of course cognizable only in equity. The suit at law was by *Ebenezer Wright*, and the plaintiff in this suit claims under him and two other claimants under the will of *Stockwell*. In his evidence he says that he is to pay him in the event of his succeeding in this suit $2000, the bulk as it would appear of what he is to pay in all, and he made his purchase after being aware of the judgment being against *Ebenezer Wright* at law.

There is some hardship certainly in the defendants having first to answer the suit at law and then this suit, and if my conclusion from the evidence were that the plaintiff was suing for the benefit of *Ebenezer Wright* or any other person, I should think the defendant entitled to security for costs; but as that is not my conclusion from

the evidence I think I cannot consistently with the rules established at law as well as in equity direct security for costs to be given. I have no right to impose that condition to his litigating his rights in this Court. 1869. Little v. Wright.

The application must be refused with costs.

McMahon v. O'Neil.

Practice—Laches—Delay in prosecuting suit.

Quære, whether delay in the prosecution of a suit for specific performance may be a bar to relief at the hearing—VanKoughnet, C., being of opinion that it is no bar—Esten, V.C., holding the opposite, and Spragge, V.C., giving no opinion.

There having been delay in bringing a suit for specific performance, and great delay in prosecuting it, Esten, V. C., at the hearing made a decree directing a reference to the Master to inquire as to the cause of the latter delay: the Master reported that the cause was the plaintiff's poverty. On further directions the bill was dismissed [VanKoughnet, C., dissenting.]

Re-hearing of decree pronounced by the Chancellor on further directions.

Mr. *Proudfoot*, for the plaintiff.

Mr. *Turner* and Mr. *Blevins*, for the defendants.

VanKoughnet, C.—When this case was before my brother *Esten* for hearing, he directed a reference to the Master, to ascertain what was the cause of the delay in prosecuting it; the bill having been filed on the 29th of April, 1853, and the cause being only brought to a hearing on the 28th January, 1862. The Master has reported that the plaintiff's poverty was the cause of the delay in his proceedings. I admit that this is no excuse, either for delay in commencing a suit or in pro- Judgment.

McMahon v. O'Neil.

secuting it; but the question is, whether any excuse for delay in proceeding with the suit is required, or whether such delay can be set up as a bar to final relief. I am of opinion that it cannot. I assume that my brother *Esten* has, by the inquiry he directed, and indeed it seemed to be conceded that he had, determined that there was no such laches, prior to the institution of the suit, as should deprive the plaintiff of a decree. When a party is guilty of delay in proceeding with his case, and comes to the Court for special and interlocutory relief in a matter of disputed and opposing rights, upon which, with ordinary diligence, he might at the time have had a final decision, the Court will very properly refuse him extraordinary aid, and decline to prejudge the case, even *ad interim*, as happened in the case of *Owen* v. *Homan* (*a*); but as both parties, by the practice of the Court, can expedite litigation, the mere fact that neither has done it, and that a suit has therefore been protracted, is no reason for refusing ultimate relief: *Moore* v. *Blake* (*b*). I think the plaintiff should have a decree.

Judgment.

ESTEN, V. C.—This cause was heard on the 28th of January, 1862, when a decree was pronounced referring it to the Master, to inquire as to the cause of the delay between the commencement of the suit and the hearing. The effect of this decree was to establish the plaintiff's right to a specific performance, if he could account for the delay. The Master has made his report, in which he states that the only circumstance to excuse the delay in the prosecution of the suit, was the plaintiff's poverty; and the question is, whether that circumstance was sufficient. I think this is the only question; because I think the decree on further directions must conform to the decree on the hearing, which, if wrong, should have been rectified on rehearing or appeal. I think we ought

(*a*) 4 H. L. 1036. (*b*) 4 Dow. 230; 1 B. & B. 62.

not to notice what the report states about the plaintiff's attaining twenty-one; that was not a matter included in the reference, and the Master went out of his way to mention it. If the fact was, as stated in the report, and it gave the defendants any rights, they no doubt have the proper means provided by the practice for enforcing them, and they should have resorted to them, and not sought to have gained the benefit of them in this indirect and irregular way. I shall therefore assume that the plaintiff did not attain his age until the year 1852.

I see no reason to doubt the correctness of the opinion upon which I acted at the hearing, that gross delay in the prosecution of a suit will debar the plaintiff from relief to which he would be otherwise entitled. I acted upon that opinion in the case of *Crawford v. Birdsall* (*a*), after due deliberation, and after consulting, I believe, all the authorities that were considered material; after, at all events, consulting the case, in the House of Lords, upon which reliance was chiefly placed to support the contrary view.

Judgment.

The question then is, whether the plaintiff has sufficiently accounted for the delay in prosecuting his suit in the present instance. I think he has failed to assign any sufficient reason for it. I am not aware that poverty has ever been held to be a sufficient excuse under such circumstances. Upon the hypothesis, that from the year 1848 until the year 1852, the plaintiff was unable, from poverty, to prosecute a suit for the specific performance of the agreement: of course he must, during all that time, have been unable to pay the purchase money for the land. If *James O'Neil* had given notice in 1848, that the purchase money must be paid within a certain reasonable time, otherwise he should consider the contract at an end, and it had not been paid, as we

(*a*) 9 Gr. 415.

McMahon v. O'Neil.

must suppose it would not have been, the contract would have been at an end. Instead of this, he seeks to put an end to the contract *manu brevi*, by means of an ejectment, without any warning, and the contract is preserved. But suppose no suit had been commenced for thirteen, or computing from 1852, for nine or ten years, the right of the plaintiff would have become extinct. But the case is, I think, still stronger. I cannot imagine why the plaintiff did not prosecute the inquiry directed for his benefit in the other suit. It would have been attended with little or no expense, for it would have proceeded *exparte*, the defendants having no concern with it,—nay, supposing the plaintiff had in 1852 applied to the Master, and told him he was of age, and that he elected to have a specific performance of the agreement, and that he judged for himself, the Master would have reported in his favour; the cause would have been heard on further directions, and a decree made in favour of the plaintiff with costs. And if it be said that these proceedings would have been attended with expense, which the plaintiff could not pay, the answer is that he might have proceeded in *forma pauperis*, in which case he would have got his report, set down his cause, and obtained his decree without expense, and might have effected the necessary services on the defendants, and appeared at the hearing on further directions in person. It cannot be doubted that he would have been advised of his right to proceed in this way. The deeply lamented gentleman who acted for him would, I am sure, not only have advised him of his rights, but have paid the necessary expenses out of his own pocket. Why this course was not pursued it is impossible to divine. I think that no sufficient excuse exists for the delay in the prosecution of the suit, and therefore that at the hearing on further directions the bill should have been dismissed, but under the circumstances without costs, and that the decree should be varied in that way.

Judgment.

I am afraid I differ from the Chancellor and my brother *Spragge* in some aspects. If so, I will readily conclude myself wrong, but as I believe we arrive at the same results, it is of little importance that we reach it by different ways.

McMahon v. O'Neil.

SPRAGGE, V. C.—I think the plaintiff disentitled by laches to specific performance, independently of the delay which has occurred in the prosecution of this suit.

The bill alleges, correctly, that the contract was made in 1832, and that the plaintiff's father went into possession the same year. The following dates are also material: the death of the plaintiff's father in 1844; the eviction of the plaintiff, with his mother and family, in December, 1847, and the entry and subsequent possession by *O'Neil*, and those claiming under him; the bill filed by *O'Neil* in July, 1848, for specific performance or rescission of contract; the death of *O'Neil*, in March, 1852, and the consequent abatement of that suit; and the date of the present plaintiff coming of age.

Judgment.

This bill was filed on the 29th of April, 1853, and states that the plaintiff came of age in the course of the previous year, which I should read as being very early in the previous year, it being the interest of the plaintiff to state his coming of age to be as late as possible. That would itself be, under the circumstances, a very considerable delay. But the evidence shews that the plaintiff states untruly the date of his coming of age. The evidence of *Milne* shews that he must have come of age in 1848 (or at latest in 1849). When *McMahon*, the father, had possession in 1833, he had four children, of whom *John*, the plaintiff, was the eldest, and the youngest was able to walk: *Milne* says *John* must have been more than four or five years old, perhaps seven; and he must be correct in this, considering the

McMahon v. O'Neil.

state of the rest of the family. If *John* was six at that time, he came of age in 1848. It is a very important fact upon the point of laches, and if doubtful, it might be proper to grant an inquiry; but *Milne* speaks from facts which cannot well admit of mistake; and if an inquiry were suggested, we might properly look at the Master's report, based upon the evidence of the plaintiff's mother, who says that he was seventeen when his father died: that took place in 1844, and would make him of age in 1848. I think it sufficiently established by the evidence of *Milne* that he came of age in that year. If so, he allowed some five years to elapse, after he came of age, before filing his bill, and twenty years after the making of the contract. There is also this material fact, that he had been evicted in December, 1847, a circumstance which certainly put it upon him to assert his rights promptly.

Judgment.

This, I should think, is such laches, as should disentitle him to relief, unless the institution of the suit by *O'Neil* ought to make a difference. The bill in that case was filed on the 21st July, 1848. That bill is called, in this suit, a bill for specific performance. It is rather a bill for the cancellation of the bond given by *O'Neil*, which constituted the contract of sale, submitting, however, to receive the purchase money, if paid within a time to be limited by the Court, and thus necessarily treating the contract as still alive. The bill was against *John*, as heir-at-law, and his mother; they put in their answer on the 7th July, 1849, *John* answering, as an infant, by his mother, as his guardian. He alleges in *this* bill that an order was pronounced in that suit, referring it to the Master, among other things, to inquire whether it would be for his benefit, as such infant, to have the specific performance of the contract; and ordering that in case the Master should report it to be for his benefit, it should be so decreed: and the bill proceeds, that afterwards and during his infancy, *O'Neil* neglected to

carry on the inquiry, and that in consequence the Master made no report thereon. The bill does not give the date of this alleged order: I do not find it among the papers, nor any entry of it in the Registrar's books. But I find entries which shew that it must have been made after the 15th November, 1850, for on that day an order was made directing the cause to stand over for the plaintiff to add parties.

McMahon v. O'Neil.

From this it is apparent that the plaintiff carried on in that suit a system of deception, and that he continues it in this suit—for he alleges in this bill his continued infancy—at the commencement of which he must have been about 23 years of age. He must have been of age even when he filed his answer as an infant. It is no excuse for him that the plaintiff proceeded against him as an infant. It was a mistake which he should have corrected and not imposed upon the Court the belief that he required the protection of such an order as he sets out in this bill. He cannot shelter himself under that order, supposing such an order made, for his delay in not performing the contract with *O'Neil*. The question now is, whether the pendency of that suit, and the proceedings had in it, ought to relieve him from the consequences of not seeking specific performance of the contract during its pendency, and we must try him by the well-established rules that a party cannot call for specific performance unless he has shewn himself ready, desirous, prompt, and eager; that specific performance is relief which this court will not give unless in cases where the parties seeking it come as promptly as the nature of the case will permit.

Judgment.

The bill filed by *O'Neil*, instead of being a reason for delay on the part of this plaintiff, is a reason against it. It interposed no obstacle to specific performance, but facilitated it. *McMahon*, if ready and prompt to have specific performance, had only to answer as an adult and

McMahon v. O'Neil.

submit to what the plaintiff prayed, instead of assuming and continuing to wear the false guise of infancy; or he might, though not absolutely necessary, have himself filed a bill for specific performance. I am satisfied that the pendency of the suit by *O'Neil* is no answer to his laches during its pendency. I may add that I doubt whether the false allegation of infancy in the present bill ought not itself to preclude the plaintiff from relief, for it is an allegation that could have been introduced for no other purpose than to mislead the court upon a material point. The course taken by this plaintiff in the former suit is also conduct in relation to the performance of the contract which ought probably to lead to the same conclusion. Taking the view of the case that I do, it is hardly necessary that I should advert to the nature of the contract, as one in which delay in its performance is looked at with more than ordinary strictness. This contract seems to be of that nature. If

Judgment.

McMahon paid the balance of purchase-money in a year, *O'Neil* was bound to convey, but he was not compelled to pay it; and if he did not pay it, *O'Neil* was to return him the purchase-money paid. The contract was therefore unilateral,—it was optional with the purchaser to pay or not, and he was probably not entitled to specific performance unless he complied strictly with the terms of the agreement; but it is not necessary to press the case that length, and it was not so pressed in argument. Apart from any peculiarity in the nature of the contract, I am of opinion that the plaintiff's laches disentitles him to specific performance.

Taking this view of the laches, before the institution of this suit, I have not thought it necessary to consider whether dilatoriness in its prosecution can disentitle the plaintiff to relief. I think the deposit should be returned, and that the bill should be dismissed with costs.

1869.

McLaren v. Coombs.

Fixtures—Distillery.

On the death of the owner of a distillery the still goes to the heir or devisee with the realty.

The widow professed to sell the property but had no authority to do so under the will, except for her own life: the purchaser removed the still, sold it, and put in a new one. Finding after the widow's death that his title was defective, he removed the still, and it was *Held*, that the devisee was not entitled to have the new still restored, but was entitled to the value of the old still.

Mr. *Blake*, Q.C., for the plaintiff, moved on notice, under circumstances set forth in the judgment, for an injunction restraining the defendant *Gemmell* from retaining the still and still worm in any other place than the distillery from which he had removed them.

Mr. *Roaf*, Q.C., contra.

Spragge, V. C.—This application is for a mandatory injunction to compel the defendant *Gemmell* to replace a still which he has removed from the distillery, purchased by him from the widow of the plaintiff's father. The widow was tenant for life; the plaintiff is remainder-man. The widow professed to sell the fee, and *Gemmell*, I have no doubt, thought he was acquiring the fee. This sale has been set aside. Judgment.

I think the still would have been a trade fixture, as between landlord and tenant, though built in with bricks and mortar. It was so built in, as I gather from the affidavits, for the convenience of using, not with any view to its permanency of character; for it appears that stills are taken out and repaired, and again built in for use, as occasion may require. I find that in *McDonald* v. *Weeks* (*a*), a case to which I gave a good deal of con-

(*a*) 8 Grant, 308.

1869.

McLaren v. Coombs.

sideration, I said that "in questions between tenant for life or in tail, and remainder-man or reversioner, the Court looks at the intention, and will hold that to belong to the executor of the tenant of the particular estate, which if put up by the owner of the inheritance would be adjudged to belong to the heir."

If therefore, the still had been put up by the widow of *McLaren*, I should have held her entitled to remove it. The question is, whether I ought to come to a different conclusion in regard to *Gemmell*, because he supposed mistakenly that he had acquired the inheritance, and compel him to replace it. I think I ought not. The intention to be inferred from his idea as to his position, ought not to be used against him in favor of the plaintiff, who has established against him that his idea was a mistaken one. At all events, I think the Court ought not to interfere by injunction, but to leave him to his remedy at law, if he has any. The plaintiff should, however, be placed in as good a position as if *Gemmell* had not removed the still. It is reasonable that he should have the option of retaining the still placed in the distillery by *Gemmell*, instead of the new one he removed; or of receiving from *Gemmell* the value of the old still that he discarded. He appears to have sold it for £26 10*s*., and that is sworn by a machinist to be the outside value of it.

udgment.

As to costs, I think this is a case in which there might be a question whether either party should have them. *Gemmell*, by selling the old still, has prevented the plaintiff from getting what he was strictly entitled to; but the real contest between the parties has been, whether the Court should compel *Gemmell* to replace the new still, and upon that I am against the plaintiff, and I think he should pay *Gemmell* the costs of resisting it. If the plaintiff should elect to have the price of the old still, the costs may be set off against it.

1869.

BROCK v. SAUL.

Fraud on creditors.

H. being indebted to *R.*, and both being in pecuniary difficulties, *H.* made an absolute conveyance of his land to *R.*, which was intended to secure the debt due to *R.*, but was made absolute in form to deceive *H.'s* creditors: various subsequent dealings with the property took place with a view of deceiving the creditors of both parties, and by means thereof the interest of *H.* and *R.*, if any, appeared to be respectively a mere money charge on the property at the time *fi. fas.* against their lands were given to the sheriff: but *held*, that the writs bound their respective interests, and that they should be sold in equity to pay the execution debts.

Examination of witnesses and hearing at London.

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

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

SPRAGGE, V. C.—It will be putting the case as favorably for the defendant, *Amaziah Saul*, as it can be put, to assume that the $300, part of the sum paid to Messrs. *Roaf* and *Davis* was of the proper moneys of *Amaziah*. Judgment.

It was applied in the carrying out of an agreement, the reasons for which are to be found in the circumstances which had existed some time before. *Henry Saul*, a brother of *Amaziah's* father, had been the owner of what may be called the lot in Williams, and was indebted to *Roaf* and *Davis* for a considerable amount of costs incurred in relation to the title of the lot. He was also indebted to *Amaziah's* father, *Richard Saul*, in a sum which may be taken to be $2000, or thereabouts. The debt to *Roaf* and *Davis* was assumed by all parties, (in what manner is not explained) to be a charge upon the land, and *Henry*, in order to secure *Richard* for his debt, gave to him an absolute conveyance of the Williams lot. Some time afterwards *Roaf* and *Davis* pressed for payment of their costs, and in December,

1869. Brock v. Saul.

1862, Mr. *Davis*, who had become wholly entitled to the costs, had a mortgage prepared conditioned to secure payment of the amount, one month after taxation. This mortgage was presented to *Richard*, the legal estate being in him, for execution. *Richard* declined to execute the mortgage, but offered to execute, and did execute, an absolue conveyance to *Roaf* and *Davis* of the Williams lot, and at his instance the consideration was expressed to be $1000, although he had said that *Henry*, the debtor, had a letter from *Roaf* and *Davis* offering to take $700; and the gentleman who was acting on behalf of *Davis* was about to insert that sum when *Richard* desired him to insert $1000. He stated to *Davis's* agent, as the fact was, that he held the land as security; and asked to be informed, in case the land should be offered for sale, in order, as he said, that his son might have an opportunity of purchasing.

Judgment.

I think it is not going too far to assume that he then contemplated the arrangement which was afterwards made. He was himself only a mortgagee, and notified that fact to *Davis's* agent. He chose to give a conveyance without the authority of *Henry*. *Henry's* right to redeem, therefore, was not prejudiced, and in case *Davis* should thereafter refuse to accept his costs there was nothing to prevent *Henry* from insisting upon the same right to redeem against *Davis* which he had had against *Richard*. All this might well present itself to the mind of a man like *Richard*, shrewd and fertile in expedients, as the evidence in this case and his examination before me shewed him to be; and this, I think, furnishes the key to his giving an absolute conveyance when he might have given a mortgage. Both he and his brother *Henry* were deeply in debt. A redeemable interest would be something tangible which creditors might reach, while a purchase by his son, or in his son's name, the son whose name he had found useful in regard to his farm at Strathroy, would shew to the world no

title or interest existing either in himself or his brothers. Whether he speculated upon the idea of the conveyance being open to objection in consequence of the relation of solicitor and client between *Henry* and *Roaf* and *Davis* it is not necessary to inquire. 1869. Brock v. Saul.

I am inclined to think that I do not give *Richard Saul* credit for more management and foresight than he possessed. Things fell out exactly as if they had been planned, and were, in fact, the natural result of such a plan, supposing it to have existed, as I have supposed; it is not too much, I think, to attribute the plan to the person who shaped the course of proceeding that brought about the result.

The next step was, upon the land being offered for sale sometime afterwards by Mr. *Davis*, for *Richard Saul* to suggest to his son to become the purchaser, which was acceded to, I may say, of course; and *Richard*, with his son-in-law, *Armstrong*, who had assisted him in the matter of the Strathroy farm, proceeded to Toronto and there waited upon Mr. *Davis*, and after some little negotiation *Davis* agreed to sell and convey to *Amaziah* for $800 or $900, it is not clear which, but, I think, from the evidence, $800. The purchase money was made up of the $300 to which I have referred, and either $500 or $600, I think $500, borrowed of a building society. Judgment.

The conveyance was made to *Amaziah*, and he was, to all seeming, the absolute owner of the Williams property, subject only to the mortgage to the building society for say $600. All this was brought about by others; he did nothing more than assent to what his father had proposed. Even the $300, which I have assumed to be his, was brought from his father's desk, it being the aggregate of sums handed by the son to the father from time to time as the proceeds of the Strathroy

1869.

Brock v. Saul.

farm. The next thing done was also at the instance of his father, and the result was to place the father and uncle substantially in the same position as both were in before the remarkable act of the father in insisting upon making an absolute conveyance to *Roaf* and *Davis*. The place was worth $4000, probably more; but in favor of the uncle it was agreed to be taken at $3000, and an instrument, drawn by the father, was executed, by which the son agreed to convey to the uncle, upon his paying that sum in four years, with interest at eight per cent. in the meantime. This $3000 was to be thus applied: The mortgage to the building society was to be paid off, and *Amaziah's* $300 was to be paid to him, and the rest was to go to the father in payment of the old debt due to him by *Henry*, the old owner of the land. *Amaziah* says, indeed, that when he bought the land from *Davis* there was no agreement that his uncle might purchase the land back. He says there was such an arrangement made some time afterwards. Two or three months he says at first, then that it might be within a week, and then that it may have been about the same time. He changes, too, from his examination before the Master in saying now that he understood the balance to be paid to his father was to be applied in buying back the Strathroy farm for him. It may have been so, but if so, I take it to be clear from the evidence that it was clogged with the condition that he should support his father and his father's family.

Judgment.

The evidence convinces me that *Amaziah*, who looks little more than a lad, though he is stated to be twenty-four, was in these transactions a mere instrument in the hands of his father, doing his bidding throughout. I think further, looking at the acts of the parties, and the consequences of their acts, in relation to the remedies of creditors, rather than at the form and language in which they clothed them, that the object of all parties was to hinder creditors.

1869.

Brock v. Saul.

But, it is said, there was nothing which creditors could reach. That at the most there was a sum of money which, under the agreement, would go into the hands of the father, in case the uncle should complete the purchase; and that these plaintiffs, being judgment creditors, having lodged with the sheriff a writ against the lands of *Richard* and *Henry*, cannot reach that sum of money. Let us see what was the position of the parties: their nominal, their apparent position was, *Amaziah*, owner of the land and vendor, *Henry*, his uncle, purchaser; his father interested in the purchase money, having a claim in morality and equity at least, as between himself, his son, and his brother to nearly three-fourths of the purchase money, and that claim admitted and acted upon by the very terms of the agreement. The son's only right was to receive $800 or $900—the father says $800. His position was to convey, upon payment of the whole sum, and inasmuch as he was a trustee for his father as to all above say $800 his father might have received, what was coming to him, direct from the purchaser, and upon the purchaser paying to the son the portion coming to him would be entitled to a conveyance. It follows, I think, that if the purchaser failed to pay, the father could, in virtue of his interest, pay to the son the purchase money coming to him; and that he would thereupon be entitled to a conveyance from the son, declaring a trust in favor of the uncle, or, at least, to a declaration of trust by the son of the terms upon which he thereafter held the land. He would at all events, I apprehend, be entitled in some shape, (in what shape is not material) to enforce his right to receive so much of the purchase money, otherwise the other parties to the agreement might, by colluding together, defeat his right to receive it. That right, it seems to me, must be an interest in land, and being an equitable interest, to be reached in this Court by the judgment creditors, having a writ against lands in the hands of the sheriff.

Judgment.

1869.

Brock v. Saul.

The subsequent arrangement cannot, it appears to me, make any difference in the rights of the creditors. It was made in August, 1864, and is thus described by *Amaziah Saul*:—"I then went into possession, arranging with my uncle that I should rent the place, paying him $14 a month out of the proceeds, and pay myself the interest at eight per cent. on the $3000, as he was called to pay it." He adds: "I have not made enough as yet to pay the interest on the $3000 but expect to make it. This is the way the matter now stands." To his own solicitor he answers: "There is no arrangement in reference to the $3000 in force now," and then to the opposite solicitor he says: "What I stated in my examination in chief is what I now repeat as the arrangement now existing." This is not a very clear or satisfactory account, and looks, as the whole transaction does, as if he knew but little about it, and was throughout an instrument in the hands of others. Whether the former agreement was cancelled is not certain,—it is said to have been so. To put it most strongly against the creditors the previous agreement was cancelled, and *Henry* gave up his right to purchase, and *Richard* his right to receive any portion of the purchase money. But they could do neither to the prejudice of their creditors. *Amaziah* describes them as both in difficulties, and unable to pay their debts. On the part of his father it would be giving up an interest in land arising out of his right to certain unpaid purchase money, of considerable value, making, in fact, a gift to his son to the extent of whatever that value might be. It would not, perhaps, be going very far to hold that there is a secret trust that the first agreement should be carried out; but I rather suspect it, than find it proved. But, whether this is so or not, still, looking at the purchase from *Davis* in the name of *Amaziah* in the light of what was done upon it, I think the proper conclusion is, that all parties intended, *Amaziah's* intention being by way of general authority first, and acquiesence afterwards,

Judgment.

1869.

Brock v. Saul.

that the purchaser should reinstate *Henry* and *Richard* in their old position, and that such was the effect of it; and this being so, it was not in their power to alter their position to divest themselves of any of their rights to the prejudice of creditors.

I do not give it as my opinion that the $300 to which I have referred was the proper money of *Amaziah*. I have only assumed it to be so for the purpose of the argument upon which I found my judgment.

The decree will be for the sale of the interest of *Richard* and *Henry Saul* in the land in question, the Williams property, with costs against all defendants. The interest of each may very properly be sold separately, being distinct, and differing from each other in their nature and probable value.

Judgment.

McAlpine v. Eckfrid.

Injunction—Costs—Amount of damages.

The plaintiff filed a bill for the protection of the timber on certain land which he claimed to own: at the hearing the Court retained the bill with liberty to the plaintiff to bring an action: the plaintiff brought the action and recovered a verdict for $20: it appearing that the question in issue was the plaintiff's title to the land he was *held* entitled to a decree with costs, notwithstanding the small amount of damage which had been actually done by the defendant.

Hearing on further directions.

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

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

Spragge, V. C.—The late Vice Chancellor held the plaintiff entitled to the aid of this Court for the protec-

1869.

McAlpine v. Eckfrid.

tion of his timber, and retained the bill, with liberty to bring an action at law touching the matters in question in the cause. The action has been tried, and resulted in a verdict for the plaintiff, with $20 damages, upon which judgment has been entered.

I think the identity of the premises, those in respect of which the suit is brought, and those in respect of which damages have been recovered at law, is sufficiently established. The bill and answer shew what is in question, and it will be intended that a recovery in an action directed to be brought in respect of those lands was, in fact, in respect of them. The bill is filed in respect of the cutting of the trees, as well as the severing a portion of the land from the rest.

I do not think the plaintiff was wrong in filing his bill, which was for preserving his trees by injunction before establishing his legal right at law, and I apprehend that the late Vice Chancellor must have been of that opinion.

Judgment.

The damages recovered are of a small amount; but it does not follow that the question in issue in this suit is trifling, the same being, as appears by the answer, whether the lands upon which the defendant was cutting belonged to the municipality or the plaintiff. I think the plaintiff entitled to his decree with costs.

LUNDY V. TENCH. 1869.

Rector's land—Covenant as to cutting timber and clearing—Construction.

A lease of Rectory land by the Rector contained a covenant not to clear more than a certain portion of the land demised; that the clearing should be for agricultural purposes, in contiguous fields, not exceeding ten acres each, such fields to be enclosed in good lawful fences, "and shall be sufficiently chopped, underbrushed, logged, and burned, according to the due course of farming and good husbandry." It appeared that the lessee's cutting was not meant to be limited to what "might be necessary in working regular clearings on the land," and the lessee, with the lessor's consent, cut and sold the timber off 180 acres: but the lessee having for two years done nothing towards clearing this portion of the demised land, it was *held* that the delay was open to the objection of being contrary to "the due course of farming and good husbandry," and that the lessee was liable to damages in respect thereof.

Appeal from the report of the Master at Hamilton, by the plaintiff.

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

Mr. *Proudfoot*, contra.

SPRAGGE, V. C.—The point mainly argued before me upon this appeal, involves the construction of certain covenants in a lease, made by the plaintiff, as Rector of Grimsby, to defendant, who states himself in his answer, to be the plaintiff's brother-in-law. Judgment.

The lease bears date the 29th of April, 1861, and demises to the defendant lots 11, 12, and 13, in the 6th concession of Grimsby, for a term of twenty-one years. A large portion of the land appears to have been timbered. The lease is a printed form filled up. It contained a printed covenant by the lessee not to top, lop, cut down, or destroy any timber or trees growing on the land, or any part of it, farther than might be necessary in working regular clearings on the land, and for fuel and

1869.

Lundy v. Tench.

fences for the occupier for the time being of the premises, and to be used thereon. This covenant is struck out and marked "erased." The next covenant, which is also by the lessee, provides that he shall not clear more than 180 acres of the land demised; that the clearing shall be for agricultural purposes, in contiguous fields, not exceeding ten acres each, such fields to be inclosed in good lawful fences, "and shall be sufficiently chopped, underbrushed, logged, and burned, according to the due course of farming and good husbandry." There are some written memoranda at the end of the lease which do not affect this question. The first leads me to think that where 180 acres are mentioned in the covenant, 180 acres of each lot is intended; but I do not find this point cleared up, nor do I find it stated what number of acres the lots contain, or what portion or portions were cleared at the date of the lease. I infer from some of the evidence that a portion was cleared.

Judgment.

For the plaintiff it is contended that the defendant was bound to clear the land *as he had cut down the timber*. In fact, to cut down from time to time for the purpose of clearing, and only as portions previously cut down, were cleared and fenced. The defendant contends that the lease makes no provision as to the time that he is to clear. In fact, his contention involves this, that he would be at liberty to cut down and carry away the whole of the timber, and wood, and trees, of which the lease authorizes the cutting, during the first year of the term, and leave the clearing and fencing to the last year.

The lease must be construed with the fact patent upon the face of it, that a covenant to clear in such manner as the plaintiff contends the defendant was bound to clear, was deliberately struck out, and this fact seems to me to exclude such a construction. The contention of

1869.

Lundy v. Tench.

the defendant appears to be in the other extreme; the lease is improvident enough at the best. The lessee knew that the lands demised were but lands in which the lessor's interest was coeval only with the incumbency of the lessor; and the court ought not, I think, to give such a construction to the instrument as would make both parties guilty of a manifest breach of trust, unless such construction is necessarily called for by the terms of the covenant.

The Master says in his judgment,—and he seems warranted by the evidence in saying so,—that the plaintiff assisted the defendant in getting a contract for the supply of 2000 cords of wood at the Grimsby station of the Great Western Railway Company, and he infers, I think correctly, that it was intended to be got off these demised lands, and that at the time when the lease was granted, and that may account for the striking out of the erased covenant. But the covenant retained may still help to protect the estate; all that is to be done under it, is to be done "according to the due course of farming and good husbandry." More appropriate words might probably have been used, but the meaning of husbandry is good management, and I construe the covenant as providing that the chopping, clearing, and fencing shall all be according to the due course of good management. It assumes that there is a due course in the matters of chopping, clearing, and fencing; and it was proper for the Master to inquire what that due course was, just as it would have been proper for him to inquire whether a farm had been cultivated according to the course of good husbandry in the case of a lease with a covenant so to cultivate a farm. To illustrate my meaning,—suppose 10 or 15 years of this lease had expired, and the defendant had cut down and carried away all but the worthless trees, to the extent of the number of acres to which he was limited, but had not cleared up or fenced an acre, and had left the underbrush to grow up (and this

Judgment.

1869.

Lundy v. Tench.

is what he has done to the extent of 160 acres) it would be surely proper for the Master to inquire whether such a dealing with the land was according to the due course of good management in the clearing of land,—not according to the notions of individual witnesses, but what as a matter of fact is the habit and practice of provident owners in dealing with their own land.

In this case, instead of the time that I have supposed having elapsed only about two years had elapsed, but still it may be found that it was not according to the then course of good management that the land should have been dealt with as it was for two years; that a prudent owner, doing justice to his land, would have cleared up ten, or twenty, or forty, or more acres if he had cut down 160 acres, as was done in this case. It may, indeed, have been improvident to cut down so large a quantity, but of that the plaintiff cannot complain, if it appears to have been done with his privity and consent.

Judgment.

I do not pretend to say what may be a proper finding upon such evidence; but I understand from the Master's judgment that he has not so construed the covenant, for if he has so construed it I do not understand his strictures upon the evidence of the witnesses, called by the plaintiff, to prove the amount of damage which has occurred from the omission to clear and fence. Their evidence appears to me perfectly intelligible, and probably perfectly correct, upon the assumption upon which they were examined, and upon which they gave it, viz.: that the defendant was bound to clear up, and to fence into ten acre fields, all the land he cleared from time to time. He had taken the trees off 160 acres, and they assumed he ought to have cleared and fenced all but ten acres. It was worth $12 an acre to clear and fence. To clear and fence 150 acres would be worth $1800, and it would take that sum to compensate the

plaintiff, inasmuch as it would cost that sum to put the land in the condition in which the defendant was bound to put it. I do not see that the defendant was bound to do all this, I do not suppose he is, unless it is made to appear upon evidence that it would be according to the due course of good management so to clear under the circumstances, and qualified by the fact of the striking out of the erased covenant. 1869. Lundy v. Tench.

I should be inclined to attach very much less weight to the evidence of the defendant's witnesses upon this point than the Master seems to have done. They swear to the self-evident fact that cutting down trees upon fresh land is an act towards clearing it, but it does not follow, nor do they venture to state, that the cutting down and carrying away these trees and leaving the land as it was left was *per se* beneficial to the land or its owner. The proper conclusion, even from their evidence, is not that it was so, but very much the contrary. The proper conclusion from the whole evidence, as it stands, probably is, that for every acre that the defendant *ought* to have left cleared and fenced, about $12 would be a fair compensation, (to whom payable I do not now say); but I leave the question as to the quantity of land, and the question of compensation, open to the Master, merely indicating now the principle upon which, in my judgment, he ought to proceed in estimating both. Judgment.

The point raised by Mr. *Proudfoot*, that the proper remedy is at law, does not arise upon this appeal. Looking at the pleadings and the decree it seems clearly intended that the Master's inquiries were not to be confined to the reserves of twenty acres, but to extend to all that was complained of by the bill. The costs must follow the usual course.

1869.

McLaren v. Coombs.

Will, construction of—Power to tenant for life to dispose of corpus.

A testator by his will (as construed by the Court) gave to his widow his real and personal estate for life, with power to dispose of the personal estate at her own discretion during her life; and whatever of it remained at her death not so disposed of, went to a residuary legatee: the testator also authorized his widow and co-executors to lay out such sums as might be deemed necessary for the carrying on his business as a distiller:

Held, that the widow was not bound to convert the personalty into money: that her estate was not liable for debts due the testator, which she had neglected to collect, and was not accountable for the testator's furniture, which was not forthcoming at her death; nor for hay, grain, fuel, cart, and horses, left by the testator and used by the widow in continuing the business.

The widow improved the property: *Held*, that she was entitled to credit for so much only as was expended in completing work commenced by the testator.

Appeal from Master's report (Perth) and hearing on further directions.

Mr. *Blake*, Q. C., and Mr. S. *Blake*, for the plaintiffs.

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

Mr. *Curran*, for other parties.

Judgment. SPRAGGE, V. C.—The parts of the testator's will material to the question before me, are: "I will and bequeath unto my wife, *Janet McLaren*, the full and absolute control of, all and singular, the real estate and landed property of which I may die possessed; together with the full and absolute control of all my personal property, goods, and chattels, of whatsoever nature or kind; and of and over all debts that may be due and owing to me at the time of my death, to have and to hold the said real estate for and during the whole period of her natural life, and

1869.

McLaren v. Coombs.

to use and possess the said personal property according to her discretion. Secondly, I do will and bequeath unto my son *John Alexander McLaren*, at present residing with me, the whole of the real estate of which I may die possessed, and which I have heretofore bequeathed unto my wife, during her lifetime. And I do further will and bequeath unto my said son *John Alexander McLaren*, the residue of all my personal estate which may remain at my said wife's death. * * I do direct that after my decease my said wife and my executors do immediately take an inventory and valuation of all my estate, both real and personal, and that they do invest, in good security, thereafter from time to time, all moneys which I may die possessed of, and which they may recover of and from the debts now due to me, or from the sales of any part of my real estate or personal property, which investment shall be for the benefit of my estate: and I do give full power to my said wife, and to my executors, to lay out such sums as may be deemed necessary for the carrying on of the business in which I am now engaged, or for any purposes which they may think will render my estate best and most productive, reserving always for my said wife therefrom, a sufficient amount of money and means ample for her maintenance in a respectable manner."

Judgment.

The construction put upon the will by the Court, so far as regards personal estate is, that the widow has a life-estate therein, with power of disposing of it at her discretion during her lifetime; and that whatever remained of it at her death, undisposed of, and unappropriated by her during her lifetime, passed under the clauses of the will which disposed of the residue. She was tenant for life of the realty. The business referred to in the will, that of a distillery, was carried on by the widow after the testator's death. She did not prove the will, nor did she make an inventory of the estate, as by the will directed. She declined to do so, though it was

1869.

McLaren v. Coombs.

suggested by *Rudesdale*, a co-executor. She entered into possession of all the estate, real and personal, and assumed the sole management of both. It is contended that she ought to have converted the whole of the personal estate into money. I think there are portions of the will which I have quoted, which exempted her from the necessity of doing this, and shew that such a sale was not contemplated by the testator.

The Master charges the widow's estate with certain debts due to the testator, which the Master does not find that she received; but he makes the charge on the ground of wilful neglect and default, on the part of the widow, in not getting in these debts. The will gave her the full and absolute control of and over all debts due to the testator. It may be, that she did intentionally abstain from calling in these debts. If she had called them in, she might, I suppose, have made a present of the amounts to the debtors, as the will authorizes her to use the personal estate according to her discretion. The testator, in using the words that he has done, must be taken to have intended that she should not be accountable for the debts due to him, unless in the event of her receiving them and not using them, when they were to go into the residue. To hold her accountable, would be limiting the natural meaning and force of the words which he has used. I think the Master was in error in allowing this charge.

Judgment.

I think the Master was also in error in charging the widow's estate with the value of furniture which was not forthcoming at her death. I do not see how she can be chargeable with it, unless it is inquirable before the Master, whether she made a proper disposition of it. She must have made some disposition of it, or it must have worn out, otherwise it would be forthcoming, and she had a right to dispose of it at her discretion.

1869.

McLaren v. Coombs.

With regard to the hay, grain, and fuel, and the cart and horses, which the Master has charged against the estate of the widow, they appear to have been all provided for the purpose of carrying on the distillery business, and in a sense appurtenant to it, in short, part of the stock-in-trade. I do not consider that the distillery business was carried on by the widow, under the authority of the clause in the will which refers to it. The widow, or tenant for life of the real estate, with (in the words of the will) "the full and absolute control" of it, had the power of carrying on the business. The purpose of the clause referred to, was to afford facilities, if necessary, for carrying it on, and seems to assume that it would be carried on after his death; and this was a reasonable expectation, inasmuch as the testator's wife had assisted him in carrying it on in his lifetime. Under these circumstances the widow continues the business after her husband's death, and finding the articles in question on the premises, as part of the stock-in-trade, she uses them as such in the business. She had, I apprehend, a clear right so to use them, and I do not see how she can be made accountable for them. As between herself and the residuary devisee and legatee, she is a beneficiary as well as an executrix, of that which she had a right to take, and use, and consume, in her discretion, and which she did in fact use and consume. I do not see how any liability can arise, to account to one who is entitled only to the residue.

Judgment.

I think the fifth objection should be overruled. The widow took the personal estate as it was. If she were accounting for it, she ought to be allowed any payments she made in respect of it. It is to be assumed that she paid for the cattle in question out of the profits of the business, as the Master finds it to have been profitable.

The parties seem to be agreed as to most of the points which arise upon further directions. The pecuniary

1869. McLaren v. Coombs.

legatee, *Anne Miller McLaren*, now *Coombs*, is entitled to her legacy, and should be allowed interest upon it after one year from the death of the widow.

The plaintiff concedes that the widow is entitled to be remunerated for certain improvements made upon the distillery and the storehouse. I am inclined to confine this to moneys expended in the completion of work commenced by the testator himself; anything beyond that cannot, I think, be charged against the remainderman.

With regard to the costs, all that are disposed of are so much of the costs of the plaintiff as were necessary in order to the relief decreed in respect of the distillery, and Plum Point property: those costs are given against *Gemmell*, and the defendant *Job Spence Coombs*. *Gemmell* must pay his own costs, and *John Shine* so much of his costs as relate to these properties.

Judgment.

The general costs of the cause, including the costs of *Anne Miller Coombs*, should, I think, come out of the testator's estate. They were incurred, in part, by the construction of his will; and the subsequent costs were not occasioned by the misconduct of the defendant. I do not say that her conduct was correct, either in regard to the real estate, or as executrix; but her conduct (consisting rather in omission of duty than in positive wrong) has not, as it seems to me, occasioned this suit.

1869.

ALLAN v. NEWMAN.

Amendment at hearing.

The plaintiff had purchased certain mill premises from C., and afterwards sold the same; the bill alleged that on the sale C. had agreed to accept the sub-purchaser as his debtor for the unpaid purchase money, and so discharge the plaintiff: at the hearing the plaintiff failed to establish this agreement, but there were subsequent transactions by means of which also the plaintiff claimed at the hearing to have been discharged: this ground of relief not having been stated in the bill, the plaintiff had liberty to amend on payment of the costs of the day.

Examination of witnesses and hearing.

Mr. *Brough*, Q.C., and Mr. *Snelling*, for the plaintiff.

Mr. *Drew*, for the defendant.

SPRAGGE, V. C.—There is only one case properly and sufficiently made by the bill, unless I except that founded upon the agreement of 11th November, 1861. The case sufficiently made is, that upon the sale by *Allan* to *Campbell* of the mill premises purchased by *Allan* from *Cowan*, *Cowan* agreed to take *Campbell* as purchaser instead of *Allan*, and to release *Allan* from the payment of further purchase money. At the hearing at Guelph I reviewed and commented upon the evidence given on both sides, upon this point; and said that I thought that the plaintiff had failed to make out his case; that the evidence given by the defendant disclosed circumstances, and shewed conduct on the part of *Allan* and *McDougall*, that seemed to outweigh the evidence given by the plaintiff: I said, however, that I would again carefully go over and consider and weigh the evidence: I have since done so, and still think that the plaintiff's case fails: that in the face of the circumstances, and the conduct to which I have referred, I cannot find as a fact that *Cowan* did agree

Judgment.

1869.

Allan v. Newman.

to release *Allan* from further liability. If this were all, the proper course would be to dismiss the plaintiff's bill. But some evidence was given that upon a subsequent transfer of the mill, that is, from *Campbell* to one *Spencer* which the bill alleges was at the instance of *Cowan*, *Cowan* agreed to substitute *Spencer* as purchaser for *Campbell*, and to release both *Campbell* and *Allan* from the payment of further purchase money. The bill alleges the transfer from *Campbell* to *Spencer* at the instance of *Cowan*, and in the same paragraph states that upon the delivery of the mill by *Cowan* to *Campbell Cowan* stated publicly, as the fact was, that he had taken *Campbell* for everything, and that *Allan* was entirely clear of the purchase, and from all responsibility in connection therewith. One would almost think that *Campbell's* name is here used by mistake for *Spencer's*, following as it does an allegation of transfer to *Spencer* at the instance of *Cowan;* and being a mere repetition of a previous allegation in regard to *Campbell.* The bill, however, contains no allegation of agreement by *Cowan* to discharge *Allan* on the occasion of the transfer to *Spencer.*

Judgment.

As to the agreement of 11th November, 1861. It is an agreement for a lease and sale by the *Newmans to Jane Cowan* (who, it appears, is the widow of *Cowan* the vendor), one *McCaughrin* and one *Scroggie* of certain premises. It recites two instruments, bearing date 30th June, 1857, by one of which it recites that *Cowan* assigned to *Walter P. Newman* the south halves of lots one and two in the ninth concession of Wallace; and that by the other it is recited that *Cowan* had contracted with various persons for the sale to them of portions of the land assigned, and that the purpose of the assignment was for the *Newmans* to receive purchase money to be applied upon a debt due by *Cowan* to them; and that it authorized *Walter P. Newman* in case such debt should not be liquidated in eighteen months thereafter to make sale of the half lots assigned, save and except any por-

tions thereof sold or contracted to be sold by *Cowan*. The agreement then recites that a large sum of money remained due from *Cowan:* and the sale is, of the interest of the *Newmans* in the land assigned, subject to the rights of *Cowan* if any, and to the rights of purchasers of lots; and reserving all such lots or portions of the land assigned as had been, or might be, conveyed, or in respect whereof the purchasers were or should be entitled to deeds.

1869.

Allan v. Newman.

At the date of the recited instruments, *Campbell* was in possession of the mill premises, and working the mill under the transfer from *Allan;* and no purchase money was then in arrear, so that the first question would be, whether the mill premises were comprehended in the assignment; that is, supposing them to be a portion of the west-half of lot one. In the contract of sale, *Cowan* to *Allan*, they are described as a part of lot one, not saying what part. A son of *Cowan* the vendor was examined as a witness, and stated that the mill premises were in the possession of his father's widow and *McCaughrin* as purchasers under the agreement of 11th November, 1861. It does not appear whether the *Newmans* assumed to sell the mill premises; or whether the purchasers assumed that they were included in the purchase. If the *Newmans* assumed to sell they must have done so as possessed of the same right as *Cowan* to put an end to the contract with *Allan*, by reason of the default in payment by his assignees; time being made in terms of the essence of the contract, in the agreement of sale from *Cowan* to *Allan;* or upon the ground that the purchase had been abandoned, and that the premises had fallen back into the hands of *Cowan.*

Judgment.

Upon this state of circumstances the question arises, whether *Allan* has an equity to resist payment of the purchase money, the note sued upon being in its present hands subject to all the equities which would attach to

1869.

Allan v. Newman.

it in the hands of *Cowan*, it being in fact so much purchase money. The principle upon which the case of *Knatchbull* v. *Grueber* (*a*) proceeded would probably be invoked in favor of such an equity.

The question, however, is not sufficiently raised upon the pleadings; nor is the evidence sufficiently definite to enable the Court to dispose of it now; and it is a question that ought to be solemnly argued, if the plaintiff desires to make it a point in his case. A sale by *William P. Newman* is stated in the bill, but the sale of November, 1861, to which I have referred is not accurately stated; and it is stated rather as a part of the plaintiff's narrative of circumstances, than as itself presenting an equity in favor of the plaintiff.

I might dismiss the plaintiff's bill on the ground that the only case properly made has failed in proof. In that Judgment. case I should dismiss the bill without prejudice to his filing another bill upon the grounds suggested; but I think I may properly allow him to amend upon payment of the costs of the day, the amendment to be made and the costs paid within one month.

Fielder v. O'Hara.

Infants—Past maintenance.

A step-father's claim to be paid for past maintenance of a minor out of her capital, was rejected on the ground of his misconduct.

Hearing on further directions.

Mr. *E. B. Wood*, for the plaintiff.

Mr. *Spencer*, for the defendant, *John O'Hara*.

(*a*) 3 Mer. 124.

Mr. *Wilson*, for the administratrix.

1869.

Fielder v. O'Hara.

SPRAGGE, V. C.—The bill in this case has been filed by three female infants, daughters of the administratrix, *Margaret O'Hara*, and against her present husband, for administration, and for other relief.

I cannot avoid noticing some matters which for the sake of some of the parties I would willingly have left unnoticed. The defendant *John O'Hara*, married the widow, the administratrix, about a year and-a-half, as he says, before he put in his answer, which was 12th November, 1866, and he says that he went into possession of the farm about five years before that; that he had a child by Mrs. *O'Hara* in 1861, and two children since; whether either of these was after his marriage he does not say. In November, 1864, moneys of the estate were in the hands of the administratrix, of which moneys she lent $450 to *O'Hara*, payable without interest on the 1st March, 1869. I suppose they were married at this time, as security was given by a mortgage upon some property of *O'Hara's*, made to a third person, and assigned the same day to the administratrix.

Judgment.

John O'Hara is charged by the report with personal estate beyond the $450 to the amount of $77.25, and for saw logs, rails, and wood taken from the land, and used and sold by him for his own benefit, $90.50, which sum was reduced upon appeal to $80.50. He is charged for the use and occupation of the real estate an annual sum of $90. The Master had charged him with interest on the mortgage at ten per cent.: this was reduced upon appeal to six per cent. On the other hand he is allowed $165 for improvements, and $73.47 for statute labour and taxes. The Master reported that he should be allowed $52 a year for six years for the maintenance of one of the infants, *Margaret Jane Fielder*, she being, as the Master reports, under his care and protection

1869.

Fielder v. O'Hara.

for that period. Upon appeal from the report it was ordered that the report as to maintenance should be allowed to stand as if the Master had reported the facts as special circumstances, the defendant *O'Hara* to be at liberty to apply, on further directions, for an allowance in respect of maintenance.

In regard to this maintenance, there is this fact found by the Master, that from the death of *Fielder* to the possession of the place by *O'Hara*, the rents and profits of the real estate were used and absorbed in the support and maintenance of the widow and her children. Since the possession of *O'Hara* he has been charged with the whole of the rents and profits. *O'Hara* was under no natural or legal obligation to support the children of *Fielder* after his marriage with the widow: *Billingsley* v. *Critchet* (*a*); and before his marriage he was of course under no such obligation. And it seems to me reasonable to say that this infant was maintained by *O'Hara* out of what came to his hands. If *O'Hara* instead of being in the position that he was, in the household of the widow and children, had been a brother of the widow, there could be no doubt that he ought, while being charged with rents and profits, and with personal estate come to his hands, to be allowed a reasonable sum for maintenance. If I disallow it to *O'Hara*, it must be because of the improper position that he occupied during a portion of the time. It would be visiting him with what would amount to a pecuniary penalty. I do not know that I ought to do this, but on the other hand, the infant ought not to be in a worse position than she would have been if *O'Hara* had not come into the family. I shall therefore restrict the allowance for maintenance of this child to her share of the annual income of the estate: the sum named by the Master would probably break in upon her share of the *corpus*. This should not

Judgment.

(*a*) 1 B. C. C. 268.

be. The annual income sufficed before *O'Hara's* time, and *O'Hara* should be restricted to it afterwards. As to the amount, it is a matter of easy computation. 1869. Fielder v. O'Hara.

In regard to the costs, I must deal with *O'Hara* more strictly. After entering this family, and having possession of the house, furniture, farm and farming implements and stock, and living in the family a life which made the house in which these children had lived an unfit place for them, especially the elder ones, to live in, he dealt with the property in an improper manner. The mortgage transaction was decidedly an improper one. The cutting and selling for his own benefit of saw logs and other timber; the removal of the furniture from the *Fielder* farm to his own, were all acts of great impropriety. He speaks of his readiness to account, but he admits that he kept no account of anything. I charge him with the impropriety of the mortgage transaction, because whether then married to the administratrix or not his relations with her were such that the proper inference is, that he induced her to lend him moneys of the estate, and which it appears from the evidence he knew to be moneys of the estate, for upwards of four years without interest. These acts of his to which I have referred, made the filing of this bill proper, and not only proper, but necessary, in order to the protection of the estate: and *O'Hara* comes within the rule that where the conduct of a party bound to accout gives occasion to a suit calling him to account, the costs of the suit must be borne by him. The necessity for this bill is further shewn by this, that *O'Hara* in his answer denied the cutting of the saw logs and other timber, and the removal of the furniture, so that his accounting before suit if he had been prepared to account, would, it may be assumed, not have been a full or a true accounting. He must therefore be charged with the plaintiffs' costs. Judgment.

1869.

Fielder v. O'Hara.

There is one point to which my attention was not called, in which there seems to be an error. *O'Hara* is charged with an annual sum by way of occupation rent, for the whole period during which the farm was occupied by him. During a portion of that time he was the husband of the dowress, and would be entitled in virtue of his marital rights to one-third of the rents and profits. That proportion therefore for that period should not be charged against him.

It is suggested that a sum of $45.90, which upon the appeal was deducted from the amount with which *O'Hara* was charged by the Master, as an overcharge, was not in fact an overcharge. As I read the order made on appeal it is a sum found on taking the account of the overcharge of interest ten per cent. instead of six per cent. to be overcharged against *O'Hara*, in other words, that the difference between the two rates of interest is $45.90. If so, it is properly deducted.

Judgment.

Gray v. Reesor.

Specific performance—Exchange—Lapse of time.

The plaintiff contracted to convey to the defendant a lot in Brock, for which the plaintiff was to receive a lot in Sydenham, paying $150, with interest, in four annual instalments, as the difference in value: the plaintiff conveyed the lot in Brock accordingly, but the defendant did not convey the lot in Sydenham, his claim to the lot being under a contract with the Crown, there being default in paying the purchase money, and another person claiming to be entitled to the patent: the defendant ultimately, however, obtained the patent, though there was a delay of several years:

Held, that the plaintiff was not entitled to a decree for the payment in money of the difference in the value of the two lots, but only to a conveyance of the Sydenham lot, the time for his paying the $150 to count from the date of the decree.

Examination and hearing.

Mr. *Moss*, for the plaintiff.

1869.

Gray v. Reesor.

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

SPRAGGE, V. C.—The bill contains charges of undue influence exercised by the defendant upon the plaintiff; of gross fraud practised by the one upon the other, the one being a shrewd crafty man, the other simple minded and weak both in body and mind. All this is reiterated again and again; there is scarcely a paragraph of the bill that does not impute fraud. It is but justice to the defendant to say that not only are these charges not proved, but that the evidence shews that the plaintiff had no reasonable ground for making them.

The ground upon which the bill proceeds is shortly this; that there was an exchange of lands, the plaintiff conveying to the defendant one hundred acres in Brock, upon which there was a mortgage for $1300, and the defendant agreeing to convey to the plaintiff whichever of two lots named, one in Tiny the other in Sydenham, the plaintiff should elect to have; in the event of the plaintiff selecting the latter it was to be assigned to him subject to the payment of $150 with interest at seven per cent. to be paid in four equal annual instalments; the plaintiff to have four mounths to make his choice, and then to give reasonable notice to the defendant for its conveyance, (the agreement is dated 10th of February, 1863), that the plaintiff selected the land in Sydenham, but that the defendant had no title to it whatever, nor to the land in Tiny; that he sold the land in Brock, and the plaintiff asks to be paid the difference between the gross purchase money and the mortgage. It appears by the evidence that no patent had issued for the land in Sydenham; but it appears also that the plaintiff was aware of this; and that purchase money was still due to the Government which would have to be paid before the patent could be obtained. It appears that the land had been sold originally to one *McKay* in March, 1854, and was resumed and advertised for sale in September,

Judgment.

1869.
Gray
v.
Reesor.

1863, but not sold; that it was subsequently sold by the local agent to one *Young*, who abandoned the sale and took back his money, upon a claim being made by one *Carrie* as in occupation of the land. But for *Carrie's* claim the patent would have issued to *Young*, no exception was made to *Carrie's* claim except by the defendant who claimed as holding an assignment thereof from thg original purchaser. The defendant was subsequently allowed as the purchaser. No patent was however issued to him until the day of the hearing of the cause. He claims to have purchased from a Mr. *Kennedy* who purchased from *McKay*, and that his purchase was prior to his agreement with the plaintiff. The assignments filed in the Crown Lands Department will shew the date of his purchase, but I understood it to be admitted that it was before the agreement with the plaintiff. It appears that the Crown could have resumed in February, 1862, but would have allowed the purchaser to complete his pur-

Judgment.

chase on performing settlement duties or compounding for them in money. No written communication was made to the defendant of the intention of the Crown to resume the land.

The defendant narrowly escaped losing the land. But assuming that he had acquired the title of the original purchaser before he agreed to sell to the plaintiff, there was no fraud, nor any wrong, in his agreeing to sell it. He was in default at the time, but trusted no doubt to the habitual leniency of the Crown in dealing with purchasers, to accept the purchase money after default. At the same time it was his duty to the plaintiff to see that the land did uot become forfeited through his default.

The matter then stands thus. There was no fraud or unfair dealing on the part of the defendant; the plaintiff knew perfectly well what he was purchasing, and it would appear from the evidence that the bargain

was perfectly fair, and that the lot in Sydenham was fully equal in value to the lot in Brock, taking the mortgage upon it into account. And it is not shewn that the plaintiff has ever pressed or even asked for a conveyance of the Sydenham lot. It is not shewn at what time he made his election except by the answer which states it to have been "several months" after the agreement; he was to have four months to make his election, and to give reasonable notice of his desire for a conveyance. 1869. Gray v. Reesor.

The defendant, by his answer, says that he was always prepared and was prepared then, to cause the patent to be issued to the plaintiff upon the terms of their agreement, and he submits that the plaintiff should be ordered to carry out his part of the agreement within a limited time and pay the sum payable upon the Sydenham lot; and he submits to convey that lot to the plaintiff and to do what may be further required by this Court. This submission relieves the Court from any difficulty as to granting relief upon this bill, framed as it is, for relief in one shape only. Judgment.

If the defendant had assumed to sell land to which as put by the bill he had no title whatever, or if he had forfeited, and lost his title, so as to be now incapable of making a conveyance it would be for the Court to say whether it would grant relief upon this bill, or put the plaintiff to file another bill free from the gross charges which are contained in this. But I think from the evidence that the defendant had all along a title to the Sydenham lot, subject indeed to be lost, and which was very nearly lost by his default, and he is now in a position to carry out his part of the agreement; and there is no reason, from lapse of time or otherwise, why it should not be carried out. As to the terms, it is only now that the defendant has been in a position to carry it out. He ought to have been in a position to carry it out at any time, and the plaintiff has suffered some

1869.

Gray v. Reesor.

detriment from his not having been so, for his son abandoned work which was to go towards payment of the Sydenham lot upon being informed that the defendant had no title to it, this in all probability arising from the sale to *Young*, or the claim of *Carrie*. I think, therefore, that the time for payment of the $150 should date from the hearing, and that interest should be payable only from the same time. There is this further reason for the payment of interest not commencing earlier, that interest on purchase money to the vendor and perception of rents and profits by the purchaser are correlative, and the latter commences only now.

As to the costs, so lately as November of last year, after this bill had been filed, the defendant was not in a position to carry out his side of the bargain. In an interview with the plaintiff he said that he could get the land then, although a man was in possession; and upon the plaintiff asking him what he would do about the land, he offered land in Tiny. Upon the same occasion there were negotiations for a compromise in money, which however fell through. He had long before this, some three years, sold the land he had received from the plaintiff. I cannot under these circumstances give him his costs. On the other hand I cannot upon such a bill as this is, give the plaintiff his costs. The decree will be without costs.

Judgment

1869.

DENNY v. LITHGOW.

Trust proved by parol.

A lot of land was purchased by the defendant in his own name, and he gave a mortgage for the purchase money. The bill alleged that *D.*, through whom the plaintiffs claimed, was the real purchaser, and that the defendant was his agent and trustee in the matter. Part of the purchase had been paid with *D's* money, and he had possession of the property for many years, and until his death: the trust which was denied was proved by parol; and the Court decreed the plaintiffs entitled to the property, subject to a charge for any sums paid by the defendant on account of the purchase money, or for taxes.

Hearing at Peterborough.

Mr. *Scott*, for the plaintiffs.

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

SPRAGGE, V. C.—Since this case was before me at Peterborough I have gone over all the evidence oral and documentary. The result has been to confirm the impression which I felt and expressed at the conclusion of the argument, that the evidence established the plaintiff's case. The plaintiffs' case is that the purchase from *Hamilton* made by the defendant in his own name was made by him on behalf of *James Denny* the father of the infant plaintiff and the husband of the female plaintiff. The assignment being to *Lithgow* in his own name is a piece of evidence in favor of *Lithgow* being purchaser on his own behalf, but there were reasons for this. *Hamilton* and *Lithgow* had been contestants before the Crown Lands Department, each claiming under one *Binkley;* and *Hamilton* upon payment of a sum of £6 compromised his claim, and assigned to *Lithgow*. Its being a compromise might be a reason for the assignment being to the very person who had contested the right with him, rather than to an assignee, and there is some evidence

Judgment.

1869.

Denny v. Lithgow.

of difficulty being apprehended on the part of *Hamilton* if asked to sell or assign to any but a co-religionist which as I understand *Lithgow* was, and *Denny* was not. There are also these further circumstances that *Denny* was a brother of the then wife of *Lithgow*. *Denny*, too, was new to the country which *Lithgow* was not, and the latter not only had more experience, but was a shrewder man and of more business capacity than *Denny* These circumstances go far to account for the use of *Lithgow's* name in the assignment and in subsequent documents, and help to rebut the inference that might be drawn therefrom that *Lithgow* was purchasing for himself. It is to be observed, too, that the use of *Lithgow's* name was his own act not the act of *Denny*.

Judgment.

The strongest fact in the case, if sufficiently proved, is that the £6 paid by *Lithgow* to *Hamilton* was furnished by *Denny* and that not as a loan, but as a sum which, as the real purchaser, he was the proper party to pay. And that it was not a loan is further evidenced by this, that *Denny* had not the money himself and borrowed it for the purpose from an aunt. This fact rests upon the evidence of *William Hunter*, a principal witness in the case. This witness evidently took a strong interest in the case and exerted himself actively on behalf of the plaintiff; and he avowed that he did so. He was a brother-in-law of *Denny*. He seemed to me to be a hardheaded and probably rather a dogged style of man, with as I judged, more than average intelligence and force of will. Upon one point what he had said upon a certain occasion that he was prepared to swear, he was contradicted by a witness called by the defendant, one *Cassidy*. *Cassidy's* evidence does not convince me that *Hunter's* evidence upon that point was false. At the same time I think that *Hunter's* evidence should be received cautiously and scanned very carefully, though in justice to him I ought to add that his evidence was not given at all evasively, but in a clear and straightforward manner. I incline to

think that his evidence was true as to this £6 payment, and true also in the main, and in no respect intentionally false. He details a number of circumstances with great particularity, consisting in part of conversations, and in part of conduct on the part of *Lithgow* consistent with no other hypothesis than that the land was purchased for *Denny*.

In much of this he is confirmed by the evidence of other witnesses *Menzies*, *Robertson*, *Moffatt*, *McConnell*, *Murdock*, and *Mary Hunter* wife of *William* and sister of *Denny*. Mrs. *Hunter* mentions a circumstance of much the same character as the payment of the £6; that *Lithgow* borrowed of her husband $15 towards making up a sum which he said that he and *Denny* were going to Lindsay to pay on *James's* (*Denny's*) land, and she proves that this sum was repaid to her husband by *Denny*.

Judgment.

Then there is the important fact that ever since the purchase from *Hamilton*, some twenty-five years ago, the possession was in *Denny* till his death in the summer of last year, 1868, and that he made considerable, though not very large, improvements upon the place. For two years of that time, indeed, he rented a farm from one *Robinson*, and *Lithgow* sets this up as an abandonment of a contemplated arrangement between himself and *Denny*; but the evidence does not bear this out. There was no abandonment by *Denny*, but a continuous possession, the difference being that during the time that he had the *Robinson* farm he used the place in question for pasturage only. The improvements were made on the west half of the lot, and *Lithgow* sets up a distinction between that and the east half, but the assignment from *Hamilton* was of his interest in the whole lot and the payments to the Crown Lands Department were upon the whole.

It is true that at one time an attempt, to which both

1869.

Denny v. Lithgow.

Lithgow and *Denny* were parties, was made to represent the land in question as belonging to *Lithgow* not to *Denny;* that *Denny* was *Lithgow's* tenant of the west half, and that he had no interest in the east half. This was upon the occasion of a yoke of oxen belonging to *Denny* being seized or about to be seized by a bailiff upon an execution against the goods of *Denny*. *Lithgow* gave a written notice to the bailiff which was served by the witness *Cassidy*, and *Cassidy* swears that *Lithgow* and *Denny* said the object of the notice was to prevent the bailiff from selling. This circumstance does not at all change my opinion, as to the land having really been purchased for *Denny*. There was language and conduct on the part of *Lithgow* subsequent to this, not consistent with any other hypothesis.

Judgment.

Another point made by *Lithgow* is, that the taxes were paid by him not by *Denny*. The evidence upon this is, that from 1858 to 1866 the taxes were paid by *Lithgow*, and the receipts handed to him; that sometimes the collector told *Denny* the amount, but was always referred by him to *Lithgow*. In 1866, and I believe subsequently they were paid by *Denny*. Several of these receipts are produced: they all express the payment to be from *Denny*: so that *Lithgow* while paying these taxes took receipts in the name of *Denny*. I do not know that the fact is of any great weight either way. Looking at the relations of the parties; that *Denny* was in the habit of doing work for *Lithgow* and for others, and that *Lithgow* managed his money matters for him (both of which facts appear upon evidence) it is not strange that *Lithgow* should pay these taxes, and on the other hand the receipts may have been taken in the name of *Denny* because the land was assessed in *Denny's* name. The payments in and after 1866 having been made by *Denny* are in his favor.

There are some facts, and some conduct on the part

1869.

Denny v. Lithgow.

of *Lithgow* and language used by him on various occasions to which I have not particularly referred. Upon all the evidence I think there is no room for reasonable doubt that the purchase was made as stated in the bill, and that no alteration in the relative position of the parties afterwards took place. The decree will therefore declare that the infant plaintiff is entitled as heir-at-law of *James Denny*, and that the widow is entitled to her dower.

As to the terms upon which relief should be granted, the land should stand charged in favor of *Lithgow* for all sums paid by him in respect of it to the Crown Lands Department, for taxes or otherwise and for any payments of principal or interest that *Lithgow* may hereafter be called upon to make upon the mortgage given by him Beyond that I confess I do not see my way to charging the land.

Judgment.

It may be that the circumstance of the legal estate being in *Lithgow* generally, not by way of security, for any specified time, may make a difference. *Lithgow* is a constructive trustee, and the *cestui que trust* is indebted to him. Is he entitled to hold the legal estate till all the indebtedness of the *cestui que trust* whether charged upon the land or not, is paid to him? I shall be glad to be referred to any authorities upon the point.

The costs up to and inclusive of the hearing are to be paid by *Lithgow*. Further directions and costs are reserved. All parties are to be at liberty to apply.

The decree will of course be in the names of the infant and of the widow as co-plaintiffs. The widow having been made co-plaintiff at the hearing.

1869.

WALLIS v. ANDREWS.

Fraud—Trust—Transactions between mother-in-law and sons-in-law.

A widow of uncommon vigor of mind and strength of character, accustomed for many years to manage all her own affairs, and who owned property to the value of at least £25,000, incurred liabilities to the extent of £8,000; and the time of her indebtedness being one of great commercial depression, she could not raise money to pay, and was in danger of losing all she had by a forced sale: she had two sons-in-law who were persons of wealth and credit; her solicitor, without any communication with them, advised her to offer her property to them on terms which would make it worth their while to devote their time and energy to save a surplus for themselves; she, after some days deliberation, adopted this advice, and proposed to them that they should take all her property, except two farms with which she wished to provide for the only two members of her family, besides the wives of the two sons-in-law who had not already had large sums from her; and the consideration which she proposed to the two sons-in-law, was that they should pay her liabilities and pay to herself an annuity: they with some reluctance accepted her proposal: the same was afterwards duly carried out, and she lived for seven years without making any objection to the transaction, though she was aware that they had made a considerable profit out of it. After her death, some of her heirs having filed a bill impeaching the transaction on the grounds of fraud and trust, the bill was dismissed with costs.

Statement. The bill in this cause was filed to set aside two deeds of conveyance from the late *Margaret Brown* to the defendants *Andrews* and *Meredith*, executed on the 16th and 22nd days of January, respectively: that *Andrews* and *Meredith* might be ordered to account for the rents and profits of the lands received by them, and that the lands might be declared to have passed by descent to the co-heirs of *Margaret Brown*, of whom the plaintiffs were three.

The pleadings and evidence shewed that the late *John Brown*, being possessed of a large amount of real and personal estate, by his will executed on or about the 15th May, 1840, devised the same to his wife the said *Margaret Brown* in fee, and also appointed her his

executrix: that she duly proved the will, entered into possession of the estate, and so continued until the execution of the impeached conveyances; that the plaintiffs were the children of *Eliza Wallis*, deceased, a daughter of *John Brown* and *Margaret Brown*: that at the time of the execution of these conveyances Mrs. *Brown* had become greatly embarrassed in her affairs by reason of having indorsed accommodation paper for a large amount, and several executions were in the hands of the sheriff in respect of such indorsations; that *Andrews* and *Meredith* being her sons-in-law and men of business capacity and experience, she was advised by one *Armour* who was acting as her solicitor, in order to save some portion of her property for her family, to make a transfer of her property to them, and that they should undertake and agree to pay off her liabilities and allow her a sum sufficient to maintain her during her life; that accordingly the conveyances before mentioned were executed by her, embracing a large amount of real estate, and she also transferred in the books of the Company, on the 17th February, 1852, all her shares and interest in the Port Hope Harbour Company, in all 350 shares; that Mrs. *Brown* from the time of the execution of these documents until her death, which occurred in February, 1856, continued to act in conformity with these conveyances and received from the grantees the amount agreed to be paid her, which was increased at her instance £100 a year in consequence of a sudden and unexpected rise in the value of the harbour stock, and *Andrews* and *Meredith* assumed and paid off the debts for which Mrs. *Brown* was answerable, and in all other respects carried out the undertakings into which they had entered on obtaining the conveyances of the lands and transfer of the stock.

1869.

Wallis v. Andrews.

Statement.

Evidence was taken at great length before the late Vice Chancellor *Esten* at the sittings of the Court at

1869. Wallis v. Andrews.

Cobourg, and also in Toronto, the effect of which sufficiently appears in the judgment.

Mr. *Roaf* and Mr. *Hector Cameron*, for the plaintiffs.

Mr. *McDonald*, Mr. *Crooks*, and Mr. *Blake*, for the defendants.

Cook v. *Lamotte* (*a*), *Wall* v. *Cockerell* (*b*), *Nottidge* v. *Prince* (*c*), *Hobday* v. *Peters* (*d*), *Gresley* v. *Mousley* (*e*), *Low* v. *Holmes* (*f*), *Knight* v. *Majoribanks* (*g*) were referred to by the plaintiffs.

Bainbridge v. *Moss* (*h*), *Beanland* v. *Bradley* (*i*), *Holmes* v. *Penney* (*j*), *Thompson* v. *Webster* (*k*), *Wakefield* v. *Gibbon* (*l*), *Penhall* v. *Elwin* (*m*), *Lyddon* v. *Moss* (*n*), *Harrison* v. *Guest* (*o*), *Huguenon* v. *Baseley* (*p*), *Baker* v. *Bradley* (*q*), were referred to by defendants.

Judgment.

ESTEN, V. C.—This suit has been instituted for the purpose of avoiding certain deeds executed by the late Mrs. *Brown*, of Port Hope, in favor of the defendants *Meredith* and *Andrews*. The plaintiffs are two grand children and co-heirs of Mrs. *Brown* and a daughter of hers, another of her co-heirs, and her husband; and the other defendants are the wives of the defendants *Meredith* and *Andrews*, being two other of her co-heirs. The facts of the case are as follows: Mrs. *Brown* owned

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(*a*) 15 Beav. 234.
(*b*) 7 Jur. N. S. 29.
(*c*) 6 Jur. N. S. 1066.
(*d*) 6 Jur. N. S. 794.
(*e*) 1 Giff. 450; S. C. on App. 4 D. & J. 78.
(*f*) 8 Ir. Ch. R. 53.
(*g*) 11 Beav. 322.
(*h*) 3 Jur. N. S. 58.
(*i*) 2 S. & G. 339.
(*j*) 3 K. & J. 90.
(*k*) 5 Jur. 921.
(*l*) 1 Giff. 401.
(*m*) 1 S. & G. 258.
(*n*) 5 Jur. N. S. 637.
(*o*) 2 Jur. N. S. 911.
(*p*) 14 Ves. 273.
(*q*) 1 Jur. N. S. 489.

1869.

Wallis v. Andrews.

a large real and personal estate under her husband's will. She was in very prosperous circumstances until some time before the year 1849, when she began to indorse the paper of her son-in-law Mr. *Burton*, which she did to an amount exceeding £7,000, and in the years 1848 and 1849 she was in this way and otherwise indebted to the amount of about £10,000. Judgments were obtained against her by her creditors to the amount of above £8,000, and writs were issued against her goods and lands; she was much harrassed by her difficulties, and her spirits became depressed: such was her condition in the latter part of the year 1848 and beginning of 1849. A gentleman of the name of *Armour*, a lawyer, had been employed by Mr. *Burton* to defend some of the actions which were brought against her; one of the creditors was the Bank of Upper Canada, to whom she owed about £3,000. A proposal had been made for securing this debt, and it had gone so far towards completion that a mortgage had been prepared to be executed by Mrs. *Brown* to the bank, but they refused to accept it in consequence of a large judgment for £10,000 which had been entered up in favor of *Meredith* and *Andrews* against Mrs. *Brown* prior in point of time to the judgment of the bank, and in the autumn of 1848 the bank sued out a commission of bankruptcy against Mrs. *Brown*. Upon this occasion every exertion was made by *Meredith* and *Andrews* to defeat this proceeding. *Meredith* employed Mr. *Armour* to act for Mrs. *Brown* in resisting it. Mr. *Hillyard Cameron* was retained by Mr. *Armour* as her counsel for the same purpose. *Andrews* was at this time absent in the United States; upon his return he entered actively into her defence. He retained Mr. *VanKoughnet* as counsel for Mrs. *Brown* to oppose the proceedings in bankruptcy, and Mr. *Armour* acted on behalf of *Meredith* and *Andrews*, as creditors of Mrs. *Brown*, both in respect of the judgment of £10,000 and of actual debts of much smaller amount which she owed to them respec-

Judgment.

1869.

Wallis v. Andrews.

tively. In the same proceedings *Andrews* made an affidavit, in which he stated that he had assisted Mrs. *Brown* in the management of her business for two or three years preceding, for the purpose of shewing that she was not a trader within the meaning of the bankruptcy laws, in order that the commission might be superseded, and an application was made for this purpose which was *sub judice* at the time of the occurrence of the transactions which are questioned in this suit, but it was pretty well known what the opinion of the Judge was, and that the commission would be superseded. Some time previous to these occurrences some harbour stock which belonged Mrs. *Brown* had been transferred into the names of *Meredith* and *Andrews*, and they had respectively given powers of attorney to Mrs. *Brown*, enabling her to transfer it into her name whenever she should choose. Her goods had also been previously offered for sale under execution and purchased by

Judgment.

Andrews, but were understood to be held by him at her disposal and for her use. The harbour stock, or part of it, had also been exposed for sale by the sheriff and purchased by *Andrews*, upon which *Meredith*, at Mrs. *Brown's* request, repaid him what he had paid, so that the stock might again become the absolute property of Mrs. *Brown*. The judgment for £10,000, the transfer of the harbour stock with the powers of attorney, and the purchase of the goods were all, it is apprehended, devices for protecting the property of Mrs. *Brown*. She had been in the habit of consulting all her sons-in-law, who were, Mr. *Wallis* the father of two of the plaintiffs; Mr. *Burton* and Messrs. *Meredith* and *Andrews*; but latterly, as Mr. *Burton* had been the cause of her difficulties, he kept aloof, and she received more assistance from *Meredith* and *Andrews*, and principally from *Andrews*; in short it is unquestionable that her sons-in-law, but especially *Meredith* and *Andrews*, afforded her all the assistance in their power both by advice and action amidst her difficulties, and strove in every possible

1869.

Wallis v. Andrews.

way to keep them at a distance. *Meredith* and *Andrews* were also trustees for her to a certain extent in respect of the judgment, the harbour stock and the goods, and she was indebted to them respectively in certain amounts; they had also afforded her the most active aid in the bankruptcy, employed her attorney and counsel, which attorney was connected by marriage with Mr. *Burton* who was the half brother of *Meredith*, and had acted for Messrs. *Meredith* and *Andrews* in the bankruptcy, but with the view of assisting Mrs. *Brown*. Some time previous to these transactions Mrs. *Brown* had conveyed to Mr. *Meredith* a farm, called the Stevenson farm, in satisfaction of, or security for, a debt due from her to him of £600, and it was understood between them that if Mr. *Meredith* should effect a sale of it for more than that amount she should receive credit for the surplus, but Mr. *Meredith* says he does not consider himself under any obligation to proceed to a sale of it unless he should think fit, or desire it. Mrs. *Brown* was a woman of uncommon vigour of mind and strength of character; self-reliant and resolved: she was dispirited by her difficulties, but it does not appear that her mental faculties were in the slightest degree weakened at the age of sixty-four, when the transactions which are questioned in this suit occurred. The latter part of 1848 and the beginning of 1849 formed a period of, almost if not quite, unexampled commercial distress; and in the beginning of January, 1849, it was, I presume, altogether uncertain how long this state of things would continue. Mrs. *Brown's* estate is variously estimated at this time at £40,000 and £25,000; if forced to the hammer I apprehend it is quite certain it would not have realised in all probably £10,000. The two plaintiffs, *Brown Wallis* and Mrs. *Powell*, then Miss *Wallis*, resided with Mrs. *Brown*, who appears to have adopted them, and certainly was very fond of them: she had some years before bestowed upon *Brown Wallis* a valuable mill property, in the vicinity of Port Hope, estimated to be worth, about

Judgment.

1869.

Wallis v. Andrews.

the time of commencing this suit, £3,000, cash value; Mr. *Burton* was considered to have received from her £7,000 and upwards in the shape of accommodation. Some part of the lands, considered to belong to Mrs. *Brown*, were in fact under contracts for sale, and she held mortgages for securing the purchase money of them respectively, which amounted at this time in appearance to £3,000 and upwards; but it is uncertain how much had been paid on them. The harbour stock which has been mentioned had never produced any dividend. Mrs. *Brown* owned such a quantity of it as enabled her to control the operations of the harbour company. The harbour had been demised to both *Meredith* and *Andrews* and was then under lease to *Andrews* at a rent of £700, which had always been expended in improvements upon the harbour, of which the gross receipts amounted to about £1,000. Such was the actual state of things in January, 1849, when the transactions in

Judgment.

question occurred, the bill, however, does not state the case so strongly as I have represented it, the case stated by the bill is merely, that in 1849 Mrs. *Brown* was harrassed by pecuniary difficulties, and exhibited much uneasiness, and under these circumstances applied to *Meredith* and *Andrews* for advice; that they had acquired influence over her, and that when so consulted they advised her to execute the deeds in question, stating that otherwise she would be irretrievably ruined, and that such deeds should be deemed to have been obtained through undue guiding influence exercised by them over her. No evidence is offered to shew that any influence of any sort actually existed, or was exercised over Mrs. *Brown* by these defendants; the evidence all tends to shew the contrary. The affidavit of *Andrews*, however, is produced in evidence to shew that he had assisted in the management of Mrs. *Brown's* business for three years before 1849, the transfer of the stock and the execution of the powers of attorney and declaration of trust of chattels are likewise proved, and the judgment for

£10,500 for the purpose of shewing that the defendants *Meredith* and *Andrews* stood in a relation of confidence towards Mrs. *Brown* in order that the existence of influence, which is not proved, may be inferred from such relation. None of these matters are mentioned in the pleadings, nor the use intended to be made of them, which in fairness should have been the case, the plaintiffs therefore must be confined to the case stated in the bill of Mrs. *Brown's* embarrassment; her mental uneasiness and her application to *Meredith* and *Andrews* for advice in January, 1849, and that they gave her such advice as is mentioned. These last facts are indeed not proved. I have no doubt, however, that when difficulties environed her she did at a previous time apply to all her sons-in-law, and especially *Meredith* and *Andrews*, for advice, and that they assisted her in every possible way, and I have stated the case as strongly as I think the actual facts warrant; because I would, if justice required it, permit the plaintiffs to amend their bill on proper terms, in order that they might be in a situation to insist upon any facts which might be thought to support their case, after affording the defendants every fair opportunity of explanation. The way the deeds in question came to be executed appears to me to have been this: Mr. *Armour* called upon Mrs. *Brown* on Christmas day or New Year's day and told her that in his opinion the only way in which she could save any of her property was to call to her assistance some person, and that it would be better for her to make over to *Meredith* and *Andrews* property enough to render it worth their while to undertake the settlement of her debts. Mr. *Armour* says that he, having acted for Mrs. *Brown* on several occasions, considered it his duty to make this suggestion; that *Meredith* and *Andrews* had nothing to do with it, and were ignorant of his design, and that his opinion was, and is, that if Mrs. *Brown* did not adopt some such plan her property would be dissipated. I have no reason to doubt, and do not doubt, that this was Mr.

1869.

Wallis v. Andrews.

Judgment.

1869.

Wallis v. Andrews.

Armour's real opinion. I am satisfied that he was actuated in making this proposal by a sincere interest in Mrs. *Brown's* welfare, and that the proposal was made without the knowledge of *Meredith* and *Andrews*. Mrs. *Brown* at this time made no answer, and Mr. *Armour* says that knowing her well he did not expect any. I am satisfied that she reflected on the advice he had given, and determined to follow it; and that in coming to this determination she received advice from no one, and certainly not from *Meredith* and *Andrews*. I am satisfied that she did not consult with them at all about this matter, but formed her own plan and determination and made the proposal herself to them, and that they were at first disinclined, and hesitated to accept it. *Armour* had mentioned to *Meredith* and *Andrews* what he had said to Mrs. *Brown* before she made the proposal to them. The next thing he hears is, that the arrangement was made, and he is requested by *Andrews* to prepare the necessary deeds, and to prepare them at his own house on account of its convenience, which he does, *Andrews* assisting him with information as to the particulars of the property. The deeds were then prepared and executed. Nothing appears or is suggested as to the mode of the execution. I am satisfied that Mrs. *Brown* fully understood their effect. She herself proposed the preparation and execution of the agreement providing for the destination of the *Stevenson* and *MacMahon* farms; and it was done as she desired. The deeds are to a certain extent inartificially prepared as regards the provision securing the consideration; they sufficiently, however, shew the intention of the parties, except that many of the debts are not mentioned; and yet I am persuaded that the intention was to pay all the debts, and it has been faithfully performed; and when *Armour* afterwards applied for a release in favor of *Burton*, it was given.

Judgment.

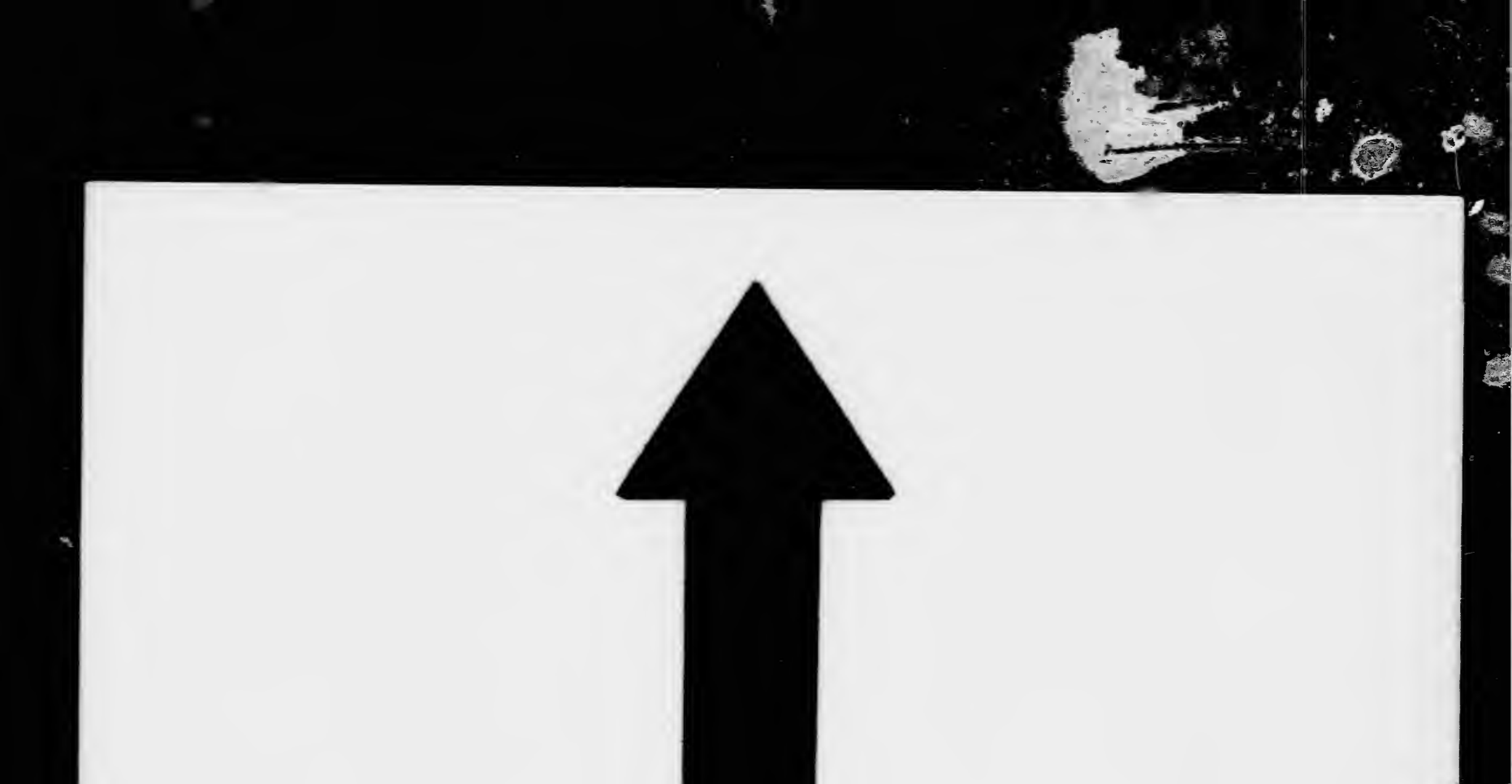
The inartificial and somewhat careless manner of pre-

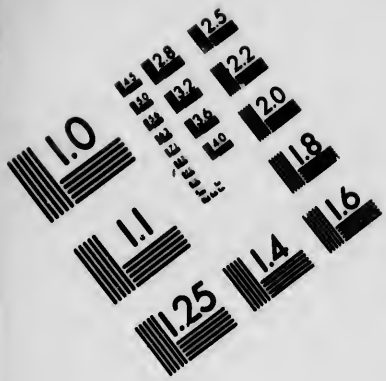
paring the deeds, coupled, however, with the faithful performance of the real consideration, is to my mind a proof of the *bonâ fides* of the transaction. *Meredith* and *Andrews* seem for some time have struggled with difficulties which, however, they gradually surmounted; and the unexpected sale of the harbour stock to the council of Port Hope completed their extrication. I apprehend that the view entertained by both *Armour* and *Burton* was, that the indefatigable efforts of a person of good credit were necessary to preserve any part of the property; that she was disqualified by her sex from undertaking the task, and that although she might reckon upon any help from *Meredith* and *Andrews*, still it would be merely help: whereas it required the devotion of time and credit, and that it should be made their own business to induce any person to undertake such a work. I am satisfied that Mrs. *Brown* regarded the arrangement and the division of the property as under the circumstances not unreasonable. I am sure that she exercised her own unbiassed judgment in the matter. Judgment.

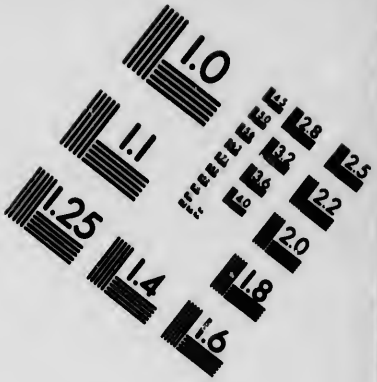
1869.

Wallis v. Andrews.

I have attentively perused the pleadings in this case. I have also referred to the authorities that were cited, excepting a few that were fully read in the course of the argument. According to the view I take of this case, it is unnecessary for me to express any opinion upon the point, whether if these deeds had been called in question within due time after their execution, the Court would or not have afforded any relief against them; but I am bound to say that according to the best opinion I can form, and having reference to all the facts proved in the cause, whether properly in issue, by the pleadings, or not, I think the Court would not in that case have considered it to be its duty to overturn these deeds. Supposing this point, however, not to be clear, I think under the circumstances of this case it is the clear duty of this Court to withhold the relief that is asked. Mrs. *Brown* outlived the transactions in question seven years.







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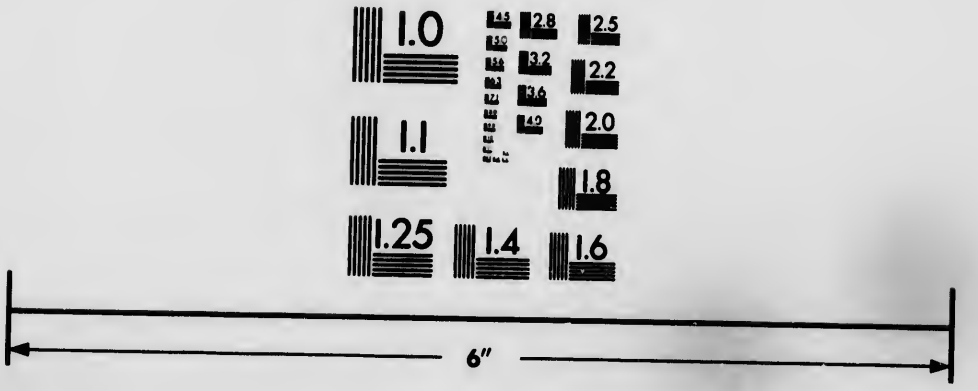

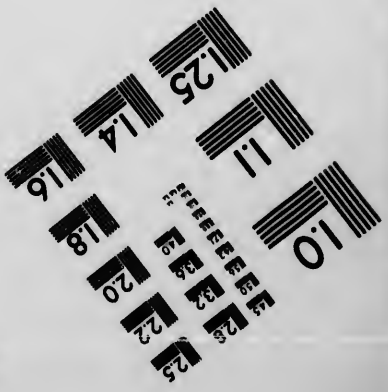

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1869.

Wallis v. Andrews.

During this time she was entirely free from all control, and perfectly uninfluenced. She was in frequent communication and on intimate terms with those members of her family who may be supposed to have felt themselves aggrieved, and who, in fact, did feel themselves aggrieved, by these transactions, one of whom expressed his expectation that they would one day be called in question; and another evinced his disapprobation of them in a manner which sensibly affected Mrs. *Brown's* feelings. She saw the undertaking of the defendants resulting more advantageously than had been anticipated: the valueless harbour stock even producing a large sum, releasing the defendants from their difficulties and finally extinguishing her indebtedness. She must have been strongly led under all these circumstances to consider whether or not it was her duty to question these transactions; she was in full possession of her uncommonly vigorous faculties, and had every opportunity of obtaining the best legal advice, and if she consulted some such legal advisers as those gentlemen who have on the present occasion so ably and zealously advocated the claims of the plaintiffs, I can easily understand that, as a right minded woman, she determined that she ought not to impeach these transactions; and I think that under the circumstances of this case she ought to be deemed to have ratified and confirmed them independently of the many positive acts of confirmation which she performed: when on the sale of the harbour stock she applied to the defendants for and obtained an augmentation of her income; when she willingly attached her signature to the instrument necessary to complete the transfer; when she continually received the rents of the *Stevenson* and *MacMahon* farms, and repeatedly told Mrs. *Powell* that they were to devolve to her after her death.

Judgment.

During the period that Mrs. *Brown* outlived these transactions the defendants continued to deal with the

property the subject of this suit as their own before her eyes: they made a division of it between themselves in 1853; they alienated large portions of it, and in all probability spent the proceeds so that now neither land nor moneys could be at hand to answer the plaintiffs' demands. They were permitted to do all this by Mrs. *Brown* without remonstrance or warning; nay encouraged by her obvious acquiescence. She resided in the same town with the defendants during seven years. She never exhibited the slightest sympton of dissatisfaction. She lived and died without questioning these transactions; and I think, under the circumstances, it would be in the highest degree unjust to permit these plaintiffs, —not half so well acquainted with the facts of the case, nor half so good judges of its merits as Mrs. *Brown* herself,—to do what she never did or would do, when the defendants would have been deprived by her death of the benefit of her testimony, and disabled thereby from adducing clear evidence of the views and feelings under the influence of which this step was taken, deemed probably so wise and prudent at the time, but which after the event it is so easy to represent as improvident and unaccountable.

1869.

Wallis v. Andrews.

Judgment.

I think the bill should be dismissed with costs.

The plaintiffs thereupon set the cause down for rehearing before the full Court.*

Mr. *Mowat*, Q.C., and Mr. *Moss*, for the plaintiffs.

Mr. *A. Crooks*, and Mr. *Blake*, for the defendants.

The judgment of the Court was delivered by

SPRAGGE, V. C.†—The clear synopsis of the case contained in the judgment of my brother *Esten* upon the

* Composed of VANKOUGHNET, C., ESTEN and SPRAGGE, V.CC.

† VANKOUGHNET, C., gave no judgment, having been consulted in the cause while at the bar.

1869.

Wallis v. Andrews.

hearing of the case before him, renders a statement of the facts by me superfluous. I have carefully read the evidence, which I think fully sustains the view which my learned brother has taken, of the character and position of the parties to the arrangement which is impeached.

I have no doubt that Mrs. *Brown* had confidence in the integrity and business capacity of *Andrews* and *Meredith;* she had had good opportunities of observing both, and was herself perfectly competent to form a sound judgment in the matter. *Andrews* had been employed by her in the management of her business, though in what capacity does not appear; but I think it pretty evident that there was no delegation to him of the management of her affairs. The actual management and control, she appears to have retained, and they seem to have occasioned her great trouble and anxiety.

Judgment.

The plaintiffs seek to apply to this case the principles upon which the Court acts in dealing with transactions between guardian and ward; or rather where that relation has recently subsisted; between solicitor and client, and the like. Sir *George Turner*, in *Billage* v. *Southee* (*a*), a case between physician and patient, stated the principle and its application as broadly, I think, as it has been stated in any case. He thought the principle ought to be applied, whatever might be the nature of the confidence reposed, or the relation of the parties, between whom it has subsisted, observing that no part of the jurisdiction of the Court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other. In *Ahearne* v. *Hogan* (*b*), Lord *St. Leonards* states the rule in similar terms. In one

(*a*) 9 Hare, 540. (*b*) Dru. Temp. Sugden, 310.

1869.

Wallis v. Andrews.

passage, indeed, he is reported to have said, "Whenever there is a dealing between two parties, one of whom is subject to the influence of the other," &c., but he was speaking of relations of confidence as the passage immediately preceding shews, and was dealing with a transaction between physician and patient. I do not think it will do to push the application of the principle further; the party acquiring the property must stand in a relation of confidence towards the person from whom it is acquired. The mere *existence* of confidence is not enough: its proved existence indeed would be an ingredient in proving influence; but influence, I apprehend, is not to be *presumed* from the existence of confidence. If it were it would be scarcely safe for a man to deal with one who reposed confidence in him, in regard to transactions in which known integrity and business habits, the usual grounds of confidence, were material for the carrying of the transaction honestly and successfully through. Where a man stands in a relation of confidence, he knows, if well advised, that upon him is thrown the burden of proof, that the transaction is a righteous one, in case it should be impeached. He takes his conveyance, or whatever it may be, with a recognized burthen attached to it; he takes the benefit, if it be one, *cum onere;* but it would be strange and unreasonable to shift the burthen of proof from the party impeaching a conveyance to the party sustaining it, merely upon proof that the party making the conveyance entertained a strong feeling of confidence in the person to whom he made it. It is hardly necessary, as was said by Lord *Cranworth* in *Savrey* v. *King* (*c*), to say that when any person seeks the aid of a Court of Equity, to enable him to get rid of the effect of deeds which he has executed, the burthen of proof is on him to make out a case for such intervention. In *Harrison* v. *Guest* (*d*) his Lordship stated the dis-

Judgment.

(*c*) 5 H. L. C. at 655. (*d*) 6 D. M. & G. at 432, 433.

1869.

Wallis v. Andrews.

tinction, as to the onus of proof, between cases where relations of confidence subsist, and cases outside of that rule. Indeed, throwing the burthen of proof upon a party supporting an instrument, is plainly an exception to the general rule, and I do not find any authority, or any reason, for making the existence of confidence an exception to the rule. I think that no relation of confidence is proved to have existed between *Andrews* and Mrs. *Brown;* there is no pretence of any between *Meredith* and Mrs. *Brown*, unless what is common to both in the following particulars. She had executed to them a *cognovit* for £10,000; she had transferred harbor stock to their names; her furniture, sold at sheriff's sale, had been purchased by *Meredith;* and the *Stevenson* farm had been conveyed to *Meredith.* As to the *cognovit*, it seems to have been made without their intervention; and, as far as appears, their names were used as plaintiffs without their consent. The conveyance of the harbor stock was defeazible upon her request. The furniture is not proved to have been purchased upon any trust; but *Meredith* having purchased it at sheriff's sale, probably in order that his mother-in-law might not be deprived of the use of it, permitted to her the continued use of it. Nor, as to the *Stevenson* farm, is any trust proved; at most, a sort of understanding that in case he should choose to sell it, and in case it should bring more than the amount of the debt, in satisfaction of which it had been conveyed to him, he would account for the excess to Mrs. *Brown.* If the making of the *cognovit*, and the transfer of the harbor stock, placed *Andrews* and *Meredith* in a relation of confidence to Mrs. *Brown*, it was because these things were done in order to defeat Mrs. *Brown's* creditors; and the confidence was, that they would not take advantage of their position. But this is a relation of confidence which the law will not recognize. Mrs. *Brown*, I apprehend, could not come into Court and state such transactions as constituting relations of con-

Judgment.

fidence, and ask, upon the ground of such transactions, to throw the onus of proof, in relation to a wholly different transaction, from herself upon *Andrews* and *Meredith*.

In another point of view, these things should have their proper weight; they might be used by *Andrews* and *Meredith* as instruments of pressure upon Mrs. *Brown*, to induce her to make conveyances or grant other benefits to them; and the position of the furniture and the *Stevenson* farm might be used by *Meredith* for the like purpose to himself. But in this view, the question becomes one of fact, as to the actual existence and use of influence upon Mrs. *Brown*; whether, in fact, the conveyances impeached were obtained from Mrs. *Brown* by undue influence.

Judgment.

I think the transaction one which the Court should look at with some degree of jealousy. A person some 64 years of age, and a woman, reduced from a position of affluence to one of pecuniary embarrassment and distress, makes a conveyance to two of her sons-in-law, of property which turns out to be worth at least £25,000, for a consideration of about £10,000, those to whom she makes the conveyance being at the same time in a position to bring influence to bear upon her, which might induce her to grant them benefits and advantages which but for these circumstances she might not have granted. But, looking at all the evidence, and carefully weighing all the circumstances, I think the transaction will bear to be scrutinized. In the first place, there is no reason to doubt that Mrs. *Brown* fully understood the nature and effect of the instruments which she executed; the contrary, indeed, is not alleged in the bill. It is clear, also, that she was fully capable of comprehending her position in all its bearings; of deliberating with herself as to the fitness of the suggestion made by Mr. *Armour* to accomplish the end proposed; and to decide calmly and wisely in regard to it.

1869.

Wallis v. Andrews.

What was her position? She had possessed a large property, which she naturally desired should go to her daughters and their descendants after her. She saw this property about to slip away from her by sales in execution: her troubles were pressing upon her at a time of such commercial depression, and scarcity of money, that it was doubtful whether anything would be left to her after satisfying the judgments against her. The preservation of as much of her property as could be saved, not for herself, for her dower would have sufficed for that, but for her children, was evidently the chief object she had in view; and she would naturally look at the suggestion made to her, from that point of view.

Judgment.

With the desire that any profit that might be made out of the transaction should accrue to her children, she would deal with her children's husbands rather than with strangers, and with such of them as had the means, and the business capacity to preserve as much as possible from loss.

It was under these circumstances, and, as I judge, with these motives, that Mrs. *Brown* made the arrangement in question. I do not think she acted under the influence of any one. From the previous relative position of her sons-in-law and herself, they expectants, for their families, upon her good will, the influence resulting from position would be with her rather than with them. Then her character for ability, self-reliance, and will, must be taken into account (*a*). The proposal being made, not by them to her, as stated in the bill, but by her to them, after deliberating upon, and, guided by her own judgment, adopting Mr. *Armour's* suggestion. The hesitation on the part of *Andrews*, who, if either of the parties, had been a business agent of Mrs. *Brown*, and the absence of any eagerness on the part of

(*a*) Morse v. Royal, 12 Ves. 355.

Meredith to accept the proposal; all these things go far to negative influence: some of them are considerations which induced Sir *John Romilly* to negative the imputed influence in *Nanney* v. *Williams* (*a*), though he granted relief on another ground. He said: "Mr. *Nanney*, the settlor, was a man not likely to be much influenced by any one; and I see no trace of the possession by Mr. *Williams* of any degree of influence over the testator; he had undoubtedly a high opinion of that gentleman's capacity, but he was not, in my opinion, much disposed to yield to any one;" a description which would apply very well to Mrs. *Brown*, and to the estimation in which she held *Andrews* and *Meredith*. That, too, was the case of a voluntary gift, and to a relation and solicitor of the settlor, upon whom the burthen of proof lay to rebut the presumption of influence.

1869.

Wallis v. Andrews.

It is objected that Mrs. *Brown* had no independent professional advice in the transaction; but that will not invalidate it, if otherwise fair. In *Harrison* v. *Guest*, the Lord Chancellor held the absence of professional advice no objection when the party dealt with did not occupy a fiduciary relation. "In such a case," he says, "if a purchase has been obtained, and the person from whom it has been obtained seeks to set it aside, the burden of proof is upon him to shew that he has been imposed upon; and it is not for him to say, 'I had no professional adviser,' unless he can shew there has been contrivance or management on the part of the person who was dealing with him, and whose transaction of purchase is sought to be set aside, to prevent him having that advice." The judgment in the case was affirmed on appeal by the unanimous opinion of Lords *Campbell*, *Brougham*, and *Wensleydale*, besides the Lord Chancellor, who pronounced it. The older case of *Hunter*

Judgment.

(*a*) 22 Beav. at 457.

1869.

Wallis v. Andrews.

v. *Atkins* (*a*), and the recent case of *Bentley* v. *Mackay* (*b*), are authorities for the same position.

It does not lie upon *Andrews* and *Meredith* to shew that Mrs. *Brown* might not have made a better bargain with some one else, or with themselves; or that they are not great gainers by the transaction; but it lies upon the plaintiffs to shew that *Andrews* and *Meredith* obtained their conveyance by undue influence, or that they made an unrighteous bargain. I think they prove neither; and with regard to the difference between the consideration and the present value, it is to be remembered that there were considerable labor and attention, considerable advances of money, and some risk that, after all, but little profit might be made of it; and the proposal does not seem to have presented itself in a very tempting light, either to *Andrews* or *Meredith*; and as to the profitable results, they were the consequence of

Judgment.

good management, and expenditure of capital, and in part of an unexpected piece of good fortune in the sale of the harbor stock.

But, suppose a large profit had been certain, even to double the amount required to be advanced, the consideration was twofold; in part pecuniary, in part love and affection. We have nothing to do with the result having been (as probably it has been) to give more than an equal proportion to *Andrews* and *Meredith*, beyond the other children and grandchildren of Mrs. *Brown*; we should have nothing to do with it even if such had been the proved intention, and the certain result. Mrs. *Brown* reserved certain advantages to the plaintiffs; she thought that one son-in-law, *Burton*, had drawn the full proportion of the estate that he and his family could look for; she made some provision for the son and daughter of her deceased daughter, Mrs. *Wallis*;

(*a*) 3 M. & K. 113. (*b*) 8 Jur. N. S. 857-9.

1869.

Wallis v. Andrews.

and she designed the residue that could be saved for the families of her other daughters. I say for the families, because Mrs. *Brown* evidently so considered it, from the character and circumstances, doubtless, of the husbands of those daughters. This takes from the transaction any appearance even of its being an unrighteous bargain; and brings it within the reason of the rules which apply to family arrangements, the object being the preservation of family property for members of the family.

Judgment.

That family arrangements, and transactions in the nature of family arrangements, stand upon a different footing from other transactions, is clear from many authorities. I will refer to a few. In *Persse* v. *Persse* (*a*), before the House of Lords, Lord *Cottenham* said: "By what scale of money consideration are these objects to be estimated? The impossibility of estimating them has led to the exemption of family arrangements from the rules which affect others. The consideration in this, and other such cases, is compounded partly of value and partly of love and affection." In *Gordon* v. *Gordon* (*b*), Lord *Eldon* set aside conveyances because there had been concealment of a material fact, observing, however, that the Court will not set aside a family arrangement, "merely because the fact is eventually found different from the supposition on which it is founded." In *Moore* v. *Crofton* (*c*), the transaction was still in *fieri*, and specific performance was decreed, Lord *St. Leonards* observing, "I do not admit that a man may not enter into a contract with a relation, and give him better terms than he would to a mere stranger." I would also refer to the language of Lord *Manners* in *Dawson* v. *Massey* (*d*), and of Sir *John Romilly* in *Hoghton* v. *Hoghton* (*e*).

(*a*) 7 C. & F. at 318.
(*b*) 3 Swan, 400.
(*c*) 3 J. & L. at 443.
(*d*) 1 B. & B. at 235.
(*e*) 15 Beav. at 300.

1869.

Wallis v. Andrews.

The bill refers to the distress in which Mrs. *Brown* was, and which induced her to enter into the arrangement. A passage in Lord *Langdale's* judgment in *Knight* v. *Majoribanks* (*a*) is so apposite to that point in the case, and to the conduct of Mrs. *Brown* during her life, that I cannot do better than quote it: "A man who is in distress may nevertheless contract; and if, being in distress, he procures others to consent to an agreement which he would not himself have requested or consented to if he had not been in distress, and then acquiesces for a length of time in the performance, without any notice of dissatisfaction or complaint, he is not entitled to set aside the transaction on the mere ground of his poverty or distress, in the absence of any deception or fraud, proved to have been practised upon him."

Judgment.

Surprise is another ground upon which this transaction is impeached. I really see no evidence of it. Mrs. *Brown* took several days to think over the matter, as long probably as she found to be necessary to weigh all its advantages and disadvantages, and then, having made up her mind, it was only in accordance with her decision of character, that she had it promptly carried out. Besides, there were reasons for promptitude, to prevent the wasting of the estate. Upon this point I would refer to the case of *Evans* v. *Llewellin* (*b*).

It is said that the instruments executed omitted important parts of the bargain; for instance, that debts other than those specified were to have been paid, and that no time for payment of the debts was specified; that Mrs. *Brown* was not released from the payment of her debts to *Andrews* and *Meredith*; and that *Burton's* debt was not released. This objection is open to several answers: as was said by Lord *Cranworth* in *Harrison*

(*a*) 11 Beav. at 349. (*b*) 1 Cox, 333-9.

1809.

Wallis v. Andrews.

v. *Guest*, there may be a doubt whether the terms of the deed were perfectly well adapted for securing all that was intended; but that is no ground for setting aside the transaction. If necessary, it might be a ground for rectifying the deed. Here it is not denied that the whole bargain on the part of *Andrews* and *Meredith* has been performed; they never made the omission of anything from the deed a ground for not performing it. There never has been a case even for rectifying the deeds, still less for setting them aside.

Anderson v. *Elsworth* (*a*) has been cited as applicable to this case. I think it is not applicable. It was a case of voluntary gift, obtained under circumstances of influence, and it was thrown upon those who supported the gift to shew that everything was explained to the donor. Several points were explained, but it was not explained to her that the effect of the deed would be to deprive her immediately of her property and the means of subsistence, while a will would leave her in possession of both till her death; and the deed was set aside. The case establishes no new doctrine, and differs from this in almost every particular. Besides, there is no allegation that the deeds in question were not fully explained and fully understood.

Judgment.

I cannot but think that it would be most impolitic for the Court to interfere with transactions of this nature. It would deter relations from rendering assistance where assistance would be valuable in preserving family property; and this case would be a good illustration of it: for if it had been the recognized law of this Court that such a transaction could not stand, it is morally certain that *Andrews* and *Meredith* would not have entered into it, and the probable consequence, as I gather from the evidence, would have been the loss of the whole

(*a*) 7 Jur. N. S. 1047.

1869.

Wallis v. Andrews.

property of Mrs. *Brown*, and with it that which has been saved to the plaintiffs themselves. The rule invoked is, that the transaction is against the policy of the law. I think this transaction does not infringe the policy of the law, but that the policy is the other way.

I agree with the judgment at the hearing as to the pleadings, and I think I should have concurred in allowing an amendment upon proper terms. I have therefore considered the case as if the whole case were properly upon the pleadings.

I have considered the case upon its merits, independently of acquiescence and confirmation. The judgment of my brother *Esten* proceeds mainly upon the latter grounds, and I agree with the conclusions at which he has arrived upon them. There has also been acquiescence by the plaintiffs themselves, but even without that, the plaintiffs come to complain of that of which Mrs. *Brown* herself made no complaint; which she not only acquiesced in, but performed acts of confirmation, and received benefits upon the footing of its being a valid and subsisting arrangement. I think that no transaction has been successfully impeached under such circumstances.

Judgment.

With regard to the consideration stated upon the face of the deeds, I am satisfied, from the evidence, that there was no intention to mislead, and that they were stated as they are from no improper motive; and probably Mrs. *Brown* had quite as much to do with their being expressed as they are as *Andrews* and *Meredith* had; and, more than all, the whole true consideration has been paid and discharged by *Andrews* and *Meredith*. I think the decree should be affirmed.

1869.

Ross v. Ross.

Parol evidence of trust—Plaintiff's oath in insolvency.

The plaintiff claimed as belonging to him a mortgage which was in the defendant's name, and had been given for the purchase money of the mortgaged land: the plaintiff had been in the Insolvent Court at one time after the transaction, and had sworn that he had parted with his interest in the property to the defendant in satisfaction of a debt:

Held, that though there was some (not satisfactory) evidence in favor of the plaintiff's present claim it was not sufficient against this sworn statement of his own.

Examination of witnesses and hearing at Woodstock.

Mr. *Strong*, Q. C., and Mr. *Richardson*, for the plaintiff.

Mr. *Moss* and Mr. *Fletcher*, for the defendant.

SPRAGGE, V.C.—The parties are brothers. The business of the plaintiff was, and perhaps still is, that of a carriage or waggon maker; the business of the defendant, that of a plasterer. The question between them is, whether an assignment made by the plaintiff to the defendant in January, 1862, was intended to be absolute in discharge and satisfaction of the indebtedness of the assignor, or by way of security only. Judgment.

The position of the plaintiff at the above date was that of purchaser from the Crown, with all the instalments, except the last, paid. The defendant paid the last on the day of the date of the assignment, and obtained the Crown patent in July following. On the 27th of November following, the land was sold for $1200 to one *Kauffman*, who paid to the defendant $500, and gave a mortgage for the balance. The plaintiff and defendant differ widely now as to the amount due the defendant—the plaintiff stating it at

1869. Ross v. Ross.

about $500 and some interest, the defendant alleging that the plaintiff admitted it to be as much as $1000, while he claimed a much larger sum. The consideration expressed in the assignment is $800, that sum being inserted by Mr. *Carroll*, who drew the assignment, by the instructions of the plaintiff, the defendant not being present. The amount of indebtedness is only material in this view. If it were clear that the value of the land very greatly exceeded it, it might be a circumstance tending to shew that the assignment was by way of security only.

The assignment is absolute in its terms. That would be entitled to more weight were it not that it was intended for use in the Crown Lands Department, in order to the issue of the patent; and Mr. *Carroll* says that his practice was always to draw such assignments absolute in form. He was not instructed so to draw it. There is no separate defeasance, nor is there anything in support of the plaintiff's case except parol evidence, and that not of a very satisfactory nature. There is the evidence of the plaintiff's son, who gave his testimony with so evident a bias for his father as to detract from its weight. The matter of his evidence, as well as the manner of it, was also against him. In his evidence-in-chief, he stated, as matters within his own knowledge, circumstances of which, as appeared upon his cross-examination, he knew nothing except by information from his father. His evidence, too, was of conversations only; the gist of it being that he informed the defendant that his father was about to sell to *Kauffman;* and that the defendant said it was a good idea, and the best thing to do: in repeating it, he says the defendant said, "it was a good idea, and the best thing he could do (*i.e.*, that the plaintiff could do), or words to that effect." The witness was then between 17 and 18 years old; and assuming his memory to be accurate, and his account of what passed not colored by bias, neither of which can

Judgment.

1869.

Ross v. Ross.

be safely said of his evidence, what does it amount to? As a fact, *Kauffman* had gone first to the plaintiff, supposing him to be, as he had been, at any rate, the owner of the land; the two went the same day to the store kept by two brothers of these parties, *Robert* and *John*, and there, as I understand, met the defendant, and the bargain was, as *Kauffman* believes, closed the same day. The conversation deposed to by the witness may have been before or after this—it matters little which. The point of the defendant's answer was, that a sale would be a good thing: it was not necessary to tell his nephew, little more than a lad, what had been done between himself and his father. It was an answer that might have been given if there had been a sale as well as if there had been an assignment by way of security. Besides, for the reasons that I have given, I believe, assuming some such conversation as the witness speaks to, to have taken place, that the witness has put it in the strongest light for the plaintiff, his father.

Judgment.

Besides the evidence of the son is that of *Kauffman*. He begins by saying, "I bought this land from *Hugh Ross*" (the plaintiff); and he goes on to say, "I went first to plaintiff, I talked to him about the land; I then went up to the store; he talked to his brothers. I don't remember if it was defendant I saw at the store. I think we closed the bargain the first day. Some man, I think *Waggoner*, was with me." He then states that he went a second time, one *Steinman* being with him, and a third time, accompanied by one *James Trow;* and he adds that the conversation was in English, and that he did not understand English well then (he is a German). "It is also," he adds, "a long while ago, and I can't recollect well what passed." This is very weak evidence, even if there were nothing against it, upon which to hold an assignment absolute in terms, and with no writing, and no circumstances to shew that it was not intended to be what it purports to be, to be a

1869.

Ross v. Ross.

mere security. But there is evidence against it. It might perhaps be inferred from the evidence of the plaintiff's son and of *Kauffman*, that the defendant was passive in the sale to *Kauffman*, tending to the conclusion that the plaintiff was the real vendor. Upon this point the evidence of Mr. *Fletcher*, the solicitor, is material. He says: "I was in partnership with Mr. *Carroll* in 1863. I remember the deed, defendant to *Kauffman;* I was present when it was signed. *Steinman*, *Kauffman*, defendant, and, I think, plaintiff, were present; if not plaintiff, it was some other brother. I remember some discussion between the parties. We had discovered there were some back taxes; there was a dispute between *Alexander Ross* and *Steinman*, who acted in the interest of *Kauffman*, as to who should pay them. The other brother, whoever he was, took no part in the discussion. *Steinman* said to *Alexander Ross*, 'Did you not sell the land free from all incumbrances?' *Alexander* said, 'Yes; but I want to make that much out of it,' viz., $1200. It was finally settled by each paying a part of the taxes." This was the language and conduct of a man selling his own land, not of one who was the mere channel of conveyance at the instance of a third person, who was really the owner of the land. And here I cannot help remarking upon neither *Steinman*, nor *Waggoner*, nor *Trow* being produced as witnesses. The plaintiff has preferred to call, or has contented himself with calling, his own son, a very unsatisfactory witness, and a man so imperfectly acquainted at the time with the language in which the business was carried on, that he took agents with him. He was, as I judge, perfectly honest in his evidence, and at the time he gave his evidence evidently understood English well; but his little knowledge of the language at the time of the transaction, and his consequent liability to mistake and misapprehension, render his evidence less satisfactory than would probably have been that of *Steinman*, and *Waggoner*, and *Trow*.

Judgment.

1869.

Ross v. Ross.

There is a circumstance which, upon the evidence as it stands, is of little weight either way. A sum of $171 was, shortly after the sale to *Kauffman*, placed in the hands of *Robert Ross*, a brother of the parties, by the defendant, to be handed to the plaintiff. The parties differ as to how this came about, and each now presents it in his own light—the defendant as a piece of liberality on his part, as giving his brother all that the land realized beyond $1,000; the plaintiff as his right, and less than his right in amount. The plaintiff received the amount from *Robert*. If living, *Robert* might throw light upon this matter, but unfortunately he is dead, and, his evidence being lost, it would be unfair to the defendant to give any weight against him to the payment of this money.

Judgment

The delay of the plaintiff has been very great, and the defendant complains of it, and with reason. This cause is brought to a hearing in June, 1869, more than six years and a-half after the sale to *Kauffman*. The two brothers of the parties, *John* and *Robert*, are dead. The sale to *Kauffman* took place in their store. *John*, indeed, died not very long after, and the loss of his evidence is not chargable to the plaintiff's delay. Not so, however, as to the evidence of *Robert*; he lived till October, 1868, and would probably have been a material witness, for he was a subscribing witness to the assignment from plaintiff to defendant, which was executed in his store, as well as being the medium of the payment of the $171. One cannot say in whose favour his evidence would have been; but the presumption is against the party by whose delay it has been lost, length of time operating, as Lord *Eldon* said in *Morse* v. *Royal* (*a*) "upon the infirmity attending all human testimony;" his Lordship adding, "Where witnesses are suffered to die before the claim is made, much is to

(*a*) 12 Ves. at 377.

1869. Ross v. Ross.

be presumed against it." Moreover, it is not the land that is sought in this case. The plaintiff was an assenting party to the sale to *Kauffman*, and, as he says, more than an assenting party; so that the plaintiff's claim is in fact a stale pecuniary demand; and he seeks now to put the defendant to prove at this day the indebtedness of the plaintiff to him nearly eight years ago. He might be put upon terms of not setting up the Statute of Limitations, but the difficulty of proof might be very great, and the defendant a great loser by loss of proof.

Judgment.

If the case rested here, I should at least hesitate before holding the plaintiff entitled to the relief sought by his bill; but there is, besides, weighty evidence against the plaintiff's contention. In April, 1865, he had failed in business, and had made an assignment in insolvency; and, in that month, he was asked at a meeting of his creditors what had become of the land in question. His answer, as stated by Mr. *Fletcher*, who was his solicitor in the insolvency proceedings, was, "You know very well what I did with the land. I gave it to *Sandy* (the defendant's name is *Alexander*) for what I owed him. I had been owing him, for years, more than that came to." And Mr. *Fletcher* says, that he was then asked if he would swear to it; that he said he would; that he was then sworn, and repeated his statement in similar words. This is corroborated with more or less distinctness by four others who were present at the meeting of creditors. It is a strange circumstance, certainly, that the assignee, by whom the question was put, and who was called as a witness, while admitting that he put the question, denies that any answer was given to it. He stated this very positively, overpositively, I thought. I could not account for his evidence, except upon the hypothesis that he had unaccountably forgotten what five other witnesses remembered; that they had imagined or fabricated the story,

I considered out of the question; and I hold the fact established. 1869.

ROSS v. ROSS.

Against this statement, upon oath by the party himself, nothing but evidence of the most clear, satisfactory, and convincing character, could be allowed to prevail. We have no such evidence in support of this plaintiff's case. His bill must be dismissed with costs.

LATCH v. BRIGHT.

Registry law—Lease for years renewal.

A lease of land for four years, with covenant for renewing for four years more, was *held* not to require registration, actual possession having gone along with the lease; and such a lease though not registered was *held* valid as respects the covenanted renewal as between the lessee and subsequent mortgagees of the lessor.

Demurrer for want of equity by the defendants *The Edinburgh Life Assurance Company.*

Mr. *Leith*, for the demurrer.—The only question really raised by this demurrer is, whether the lease to plaintiff required registration in order to constitute it a binding instrument against *Bright* and those claiming under him. If it did, then the claim of the mortgagees overrides it, they having registered their mortgage without notice of the plaintiff's rights. The right to a future renewal of the term granted is not itself a term but a right superadded. In fact it may be said to be a lease *in futuro*, which clearly is not within the act, as in that case possession cannot go with it: a grant of a right of way for four years would require registration. Here the lessee has a right to remove the buildings put up by him: this, it is submitted, makes registration necessary. Argument.

1869.

Leich v. Bright.

He referred to *Doe* v. *Rainsford* (*a*), *Ferguson* v. *Hill* (*b*), *Clarke* v. ——— (*c*).

Mr. *Roaf*, Q. C., contra.—In equity this is really a lease for eight years at the option of the lessee, Equity considering that as done which is required to be done. The only thing that could have ousted plaintiff of his right to a renewal was a sale being effected by the lessor. Now, a mortgage is not such a sale as was contemplated by the parties, and is not such an act as will prevent the plaintiff insisting on the renewal of his term.

SPRAGGE, V. C.—The defendant *Bright*, on the 6th of June, 1861, made a lease of the premises in question to the plaintiff for a term of four years, and the same was made renewable in these words: "And it is further covenanted that lessor will renew this lease for four years further at the same rent, if the premises are not sold." Then follows a provision as to what was to be done in the event of the premises being sold. The plaintiff went into possession. The lessor subsequently mortgaged to the defendants *The Edinburgh Life Assurance Company*, who registered their mortgage, and now raise the question whether the plaintiff is entitled, as against them, to his further term of four years: he not having registered.

Judgment.

By the lease a legal term was created for four years, and an equitable term for four years further. I do not think the further term can be regarded as a lease to commence *in futuro*, but rather as an extension of the first term. In the eye of a Court of Equity a term was created for eight years,—absolute for the first four, but defeazible upon a contingency at its expiration. If the

(*a*) 10 U. C. Q. B. 236. (*b*) 11 U. C. Q. B. 530.
(*c*) 10 Ir. Ch. 268.

instrument had created a legal term for eight years so defeazible, or an equitable term for the same period so defeazible, it would, I apprehend, in either case be within the exception of the Registry Law. 1869. Latch v. Bright.

The instruments that may be registered are, so far as they affect this question, "Deeds, conveyances, and assurances of, or in any wise affecting in law or equity any lands in Upper Canada, executed after such lands have been granted by letters patent." The exception is of "any lease for a term not exceeding twenty-one years, where the actual possession goeth along with the lease." Any deed, therefore, whereby an equitable term of more than twenty-one years is created requires registration, just the same as if a legal term were created; and if the term were for less than twenty-one years, I apprehend it would come within the exception, as it would if it were a legal term for less than twenty-one years,—the actual possession in each case of course going along with the lease; and this construction will certainly carry out the intention of the Legislature. In prescribing the instruments to be registered it places those affecting lands in equity, and those affecting them in law, upon the same footing: it would be incongruous to make a distinction in the exception. What the statute evidently meant to except was a term not exceeding twenty-one years accompanied with possession; whether a legal or an equitable term could make no difference, either as affecting the purchaser, or as to the extent or value of the interest. If an equitable term is not within the exception, this anomaly will follow—that an equitable term for four years requires registration, while a legal term for twenty-one years does not. I see nothing in the act to exclude an equitable term from the exception, but much to lead to the conclusion that all interests, as well equitable as legal, were intended to be placed upon the same footing. Judgment.

In the lease before me it is provided, in the event of

1869.

Latch v. Bright.

the premises being sold, as follows: "A six months' notice in writing to determine lease at any time, and one year's rent to be allowed lessee for compensation for such determination of lease,—lessee to have option of removing any buildings he may erect." I think these provisions do not make it necessary to register the lease. There has been no sale; and if there had, I think it would make no difference. Suppose a legal term for eight years created, and it were made determinable upon a sale being made by the lessor, I do not see how the mere fact of its being determinable upon a contingency could make it necessary to register it. If extendible beyond twenty-one years it might be different.

I confess I have felt a good deal embarrassed by the case of *Doe dem Kingston Building Society* v. *Rainsford* (*a*) in our Court of Queen's Bench. In that case there was a lease for fourteen years, and the lessor covenanted that at the end of the term he would pay for the buildings that the lessees might put up, and that in case he should not be willing, or should neglect to pay for the buildings, he would "grant and execute a new and fresh lease" of the same premises, at the same rent, for a further term of fourteen years; and the like provision was made in regard to a third term of fourteen years. The Court held that the lease came within the exception, and did not require registration.

Judgment.

The late Mr. Justice *Burns*, by whom the judgment of the court was pronounced, placed it upon this ground: "It is quite clear that no present term was created beyond fourteen years by the lease, and that, if a second term of fourteen years was to exist it must be by a new instrument to be executed between the parties; and if *Mason* did neglect to pay for the buildings at the expiration of the first term of fourteen years, the lessees could

(*a*) 10 U. C. Q. B. 236.

1869.

Latch v. Bright.

not, after the expiration of the first fourteen years, have held the premises under the existing deed—for the provisions respecting the second term amount only to a covenant, and not to a subsisting lease. *Evans* v. *Thomas* (*a*). Without a new lease for the second term of fourteen years, the parties claiming the estate under the present instrument would have no legal title; and without such new lease, the premises would not be affected in law in anywise. Whether it be possible to construe this instrument so as to hold that the land is affected in equity by reason of the covenants *presently* in the instrument contained upon the execution of it, or whether the land is to be considered as affected only by a contingent event independent of the deed, it is of no importance now to consider."

Judgment.

It happened that in that case the lease was determinable at the end of fourteen years, at the option of the lessor; and, in fact, the legal term then expired by efflux- ion of time; but the reasoning of the judgment would equally apply if the option to continue the term,—for a renewal is substantially a continuance of the term,—had been with the lessees, and the effect would be that the rights of the lessees legal and equitable would cover a period of forty-two years' time the period contemplated by the statute. And, if good for so long, would be good for a third or fourth or more renewals, if such renewals were provided for by the lease. But the question arose, during the currency of the first fourteen years, and while consequently a legal term was subsisting; and all that it was felt necessary to hold was that no present term was created beyond the then current term of fourteen years, and that if a further term were created it was to be by a new lease creating a new legal term. The language of the judgment certainly goes beyond this,—it excludes an equitable term, for ever so short a period from the

(*a*) Cro. Jac. 172.

1869. Latch v. Bright.

exception of the statute,—in other words, makes it necessary to register the instrument creating it.

In this I do not agree; and, for the reasons that I have given, such an instrument is, in my judgment, within the exception of the statute, and I therefore overrule the demurrer.

Ball v. Sherlock.

Injunction—Motion to commit for breach.

An injunction was issued restraining the defendant from removing logs from a certain specified lot of land; before this he had removed logs from the lot to the adjoining road allowance, and after being served with the injunction, he took these away to his mill. The Court refused a motion to commit him for breach of the injunction.

Mr. *Cattanach*, for the plaintiff, moved to commit the defendants for contempt of Court, under the circumstances stated in the head-note and judgment; referring to *Brown* v. *Sage* (*a*), and cases there cited.

Mr. *E. C. Jones*, and Mr. *John Paterson*, contra.

Judgment.

Spragge, V. C.—None of the cases go the length of warranting me in committing *Hamilton* for his acts, so far as they are proved, in regard to the saw logs.

By the first injunction he was enjoined from removing them from the lot; that injunction was served on the 9th, and he does not appear to have removed any from the lot after that day. Before that date he had removed logs from the lot to the road allowance; and he was then enjoined from removing them from the road allowance; that injunction was served on the 19th, and it is not

(*a*) 12 Gr. 25.

brought home to him that he had knowledge of it before that day. I cannot say whether he removed any after the 19th, as he declined, upon advice of counsel, to answer whether he did or not. I think he was bound to answer, and I only abstain from committing him for not answering because it was upon the advice of counsel that he acted, in declining to answer.

In the interval between the 9th and 19th he appears to have removed logs from the road allowance to his mill, and I am asked to commit him for so doing, as for a contempt of Court. I think none of the cases go that length. I have examined those to which I was referred, and some others. It is no doubt a contempt of Court to aid a party enjoined in committing a breach of an injunction, if the party aiding has knowledge of the injunction; and a party may be guilty of a contempt without disobeying the *literal* terms of the injunction, what he does being a palpable evasion of it. But I cannot say that *Hamilton*, who had logs on the road allowance, knew when he was enjoined from removing them from the lot that the Court would, upon finding that they had been removed from the lot to the road allowance, prevent his removing them from the latter; or that the Court would hold logs which had been removed from off the lot of which the plaintiff was mortgagee, subject to the equitable rights of the plaintiff, just as if they had remained upon the lot. He apprehended it, I have no doubt, and I think it was at least partly under that apprehension that he removed them from the road allowance. I have no doubt, too, from the evidence, that he removed the logs from the lot to the road allowance in part, at least, because he apprehended that he might be prevented by injunction. He says as much upon his examination. It is not pretended that I can commit him for that; and yet it would be hard to draw any sound distinction. If it be said that in the one the Court had actually interposed by injunction, the answer

Judgment.

1869.

Ball v. Sherlock.

is, that I cannot say that *Hamilton's* inference might not be that the Court having only enjoined him from removing from the lot would only interfere as to logs still upon the lot. He would be wrong in such inference inasmuch as the Court did interfere further; but I cannot commit him unless I can see with reasonable certainty that he knew that removing the timber from the road allowance was a mere colourable evasion of an injunction enjoining its removal from the lot; and as to that I confess I am not satisfied.

If in fact *Hamilton* did not remove logs from the road allowance after the 19th, and tho plaintiff is cognizant of the fact, I suppose the plaintiff will let the matter rest where it is, and in that case I should not give *Hamilton* his costs of resisting the application. If, however, the plaintiff knows or believes that *Hamilton* did remove logs from the road allowance after the 19th, the plaintiff will probably proceed further, and it is his right to have an answer to his question as to that fact, and *Hamilton* must attend at his own expense to answer it.

Judgment.

As to *Cockburn*, his own examination makes a *prima facie* case against himself; there is quite sufficient to call upon him to shew cause.

As to *Sherlock*, I think sufficient is not made out for his commitment, but I think he lent himself to the removal of the timber, and sanctioned a variation of the contract with *Shaw* in order to facilitate it. I shall therefore refuse him his costs.

1869.

GRAHAM v. MENEILLY.

Married woman—Fraud—Quieting title—Doubtful evidence.

A married woman, owner of real estate, representing herself as a spinster, and selling the property as a spinster, is not entitled in equity to set up that the sale was void because of a conveyance not having been executed in conformity with the statutes as to the conveyance of land by married women.

On a petition to quiet the title to land, the genuineness of the documents on which the petitioner claimed title having been impeached, and the evidence being doubtful, the Court refused a certificate without pronouncing absolutely upon the genuineness or spuriousness of the documents in question.

Proceeding under the Act for Quieting Titles.

Mr. *Crooks*, Q. C., and Mr. *Cattanach*, for the claimant *Graham*.

Mr. *S. Blake*, for the contestant, contra.

SPRAGGE, V. C.—This is a proceeding under the Act for Quieting Titles, and a principal question is, whether two documents under which the petitioners claim are genuine or not. One purports to be a bond executed by *Nancy Brouse* to *Allan Napier MacNab* for the conveyance of 200 acres of land "to be drawn from government by the obligor as the daughter of a U. E. Loyalist"; the other is a power of attorney to two persons named in it, for the conveyance of the land so to be drawn, to *MacNab*. They purport to be executed by the mark, thus ✕ of *Nancy Brouse*, and to be witnessed by "*Henry Jones*" and "*N. Brouse*." They are dated 20th October, 1833, and are produced from the proper custody. The petitioners, who claim through *McNab*, call no witnesses. Judgment.

It is in evidence that *Nancy Brouse* was married in December, 1822, to *Henry Jones*. It appears, however,

1869.

Graham v. Meneilly.

that in February, 1833, she in her maiden name went before the Quarter Sessions at Brockville in order to claim a grant of 200 acres of land as the daughter of *Joseph Brouse*, a U. E. Loyalist. Her petition with her own affidavit and that of one *John Adams* as to her identity, and the usual certificate of the Clerk of the Peace are produced. Her affidavit is signed in full, "*Nancy Brouse*," not with a mark, and her husband, *Henry Jones*, who is called as a witness by the contestant, verifies it as her signature.

As she used her maiden name in her application before the Quarter Sessions, there is, I think, nothing against the authenticity of the papers in favor of *McNab*, being in her maiden, not her married name.

Judgment.

It is suggested on the part of the contestant that the signatures to the papers in favor of *MacNab*, were all those of one *Nicholas Brouse* a relative of *Nancy*, and a man who was in the habit of purchasing U. E. rights. It is suggested also that he was her agent in the application before the Quarter Sessions, and that what was done there was through his procurement; and the evidence of *Henry Jones* goes far to prove that this was the case. It appears from his evidence that there were negotiations between his wife and *Nicholas Brouse* in regard to the purchase by the latter of her U. E. right. How far these went does not appear, but she expected to have to execute a deed or other instrument after the patent should be issued, and said she expected a silk dress when she did so: this was not, however, spoken of as the *consideration*, but as a customary thing upon married women executing conveyances. Still *Jones* speaks as if the consideration to be paid by *Nicholas Brouse* was not paid, or at least not in full. *Nicholas Brouse* has been some years dead. *Jones* says that he used to call himself *Harry Jones*, and upon being desired to write his name in Court he signed his name repeatedly and each

time "*Harry Jones.*" He says also that the signature *Nancy Brouse* to the affidavit before the Quarter Sessions is that of his wife, that she wrote well, better than he did, and did not sign her name by mark. The signature to the affidavit is distinctly and fairly written. *Jones* appeared to be a man of but little education, and not more than average intelligence. His evidence appeared to be fairly and honestly given. 1869. Graham v. Menelly.

Against the genuineness of the documents in question we have the evidence of *Jones*, and the fact of the signature to the affidavit before the Quarter Sessions being not by mark but in full, while that to the documents is by mark. *Jones* was asked whether about that time his wife had a sore hand or finger, he said he never saw that she had.

Mr. *Crooks*, for the petitioners, suggests that if there was any forgery it must have been by *Nicholas Brouse*, and that it is very improbable that he or any one else committed a forgery. And he says, with some reason, that a forger would not do that which would help to convict himself; that the attestation of one witness to the document in question was sufficient, and if he were forging the name of an executing party he would have put his own name only, and not have added a second, and least of all the name of the husband of the person whose name he was forging. Further, that he would have imitated the signature of *Nancy Brouse*, and not have signed by mark the name of a person who was in the habit of signing her own name. That all the circumstances proved agree with the probability of her actually executing such documents, and he points to the absence of any sufficient motive for the commission of forgery, and to the circumstance of the woman herself not following up her claim established at Quarter Sessions, but after a number of years conveying to her son. The absence, too, of surprise when told by *Nicholas* Judgment.

1869.
Graham v. Menelly.

Brouse that he could manage without any document being executed by her after the issue of the patent, and refusing her demand of a silk gown. This is conduct that looks like a consciousness on the woman's part that she had done something towards parting with her interest. It may, however, have been that she attributed more than its proper effect to what passed at Quarter Sessions. The petition, affidavit, and certificate, appear to have passed into the hands of *Nicholas Brouse*. This appears by the indorsements: and she may have thought that the patent could be issued upon those papers.

I confess I feel not a little embarrassed by these considerations. Some of the circumstances make it improbable that there was a forgery in this case; and Mrs. *Jones* herself who could have given most important testimony was not called as a witness. It is not explained why. There is, however, the express evidence of *Henry Jones*, that the name "*Harry Jones*" as a witness to the documents in question is not his signature. I have no doubt that it was meant to represent his. If so, it is a forgery, and there is the mark instead of the full signature of the wife.

Judgment.

Upon the whole I think that the genuineness of these documents is so far impeached that I ought not to give the petitioners a certificate under the Act for Quieting Titles. I say this without pronouncing absolutely upon the genuineness or spuriousness of the documents in question.

If I had been prepared to decide this case upon the legal point raised, I should have preferred to do so. I think such a document as this insufficient to pass the estate of a married woman without such official examination and certificate as is necessary to enable married women to convey real estate, and besides the husband is no party. But these documents if genuine

1869.

Graham v. Menelly.

are a representation by a married woman that she was a *feme sole*, not to *Nicholas Brouse* only, who knew the fact to be otherwise, but to *MacNab*. In the bond, *Nancy Brouse* to *McNab*, she is described in terms as a spinister, and there is nothing to set this right in the power of attorney which accompanied it. This was a fraud, within the cases of *Vaughan* v. *Vanderstegen* (*a*), and *Hobday* v. *Peters* (*b*), and would, I apprehend, bind the married woman and those claiming under her.

The petitioners are the actors in this case, and must pay the costs of this inquiry.

McDonald v. McLean.

Practice—Abatement—Delaying creditors.

After a bill had been filed by a judgment creditor, impeaching certain dealings between his debtor and a vendee of the debtor, the plaintiff allowed the writ against lands to run out for some time, but subsequently renewed it before the hearing:

Held, not necessary to amend stating this fact, and that its existence was no objection to the plaintiff obtaining relief at the hearing.

J. A. S. contracted to purchase from *M.* on credit a wood lot, No. 32, and to secure the price (£400) the purchaser's father gave a mortgage on his farm: this mortgage not being paid was foreclosed. Shortly afterwards, *M.* being still willing to receive his money, *J.A.S.* sold No. 32 for £300, this sum went to *M.*, part of the remaining £100 was satisfied by delivering to *M.* a pair of horses raised on the farm, valued at £62 10*s.*; and *W. S.*, another son of the owner, agreeing to pay the balance £37 10*s.* The farm, by arrangement between all the parties, was conveyed to *W. S.*, who was not more than twenty-one years old, if so much.

Held, that these transactions were, as respects the father and sons, a mere roundabout way of securing the farm from the creditors of the father, and the farm was ordered to be sold to pay the plaintiff, an execution creditor of the father.

Examination and hearing at Cornwall.

(*a*) 2 Drew. 363. (*b*) 28 Beav. 354.

1869.

McDonald v. McLean.

Mr. *D. Maclennan*, for the plaintiff.

Mr. *J. Bethune*, for the defendants.

SPRAGGE, V. C.—It is made a point whether the plaintiff has a *locus standi* in Court. At the date of filing his bill he was a judgment creditor, and had a writ of *fi. fa.* against lands in the hands of the sheriff. At the hearing he was in the like position, but there was a time between bill filed and the hearing when there was no writ current. The objection is taken at the hearing. It amounts to no more than this: that there was a time during the pendency of the suit when it had become defective, or it may have abated. The mere fact of a suit having become abated is no objection. Upon that being done, which is necessary to reconstitute it correctly, it is proceeded with and the rights of the plaintiff at the hearing stand unaffected by the circumstance of their having been a period when they were in abeyance, and that, I think, furnishes an analogy which is an answer to the objection. It is true there is no order for reconstituting the suit either in the cause or a general order, but neither is an order universally necesssary upon abatement. Where there is a change of interest, and in the style of the cause, the authority of the Court is generally necessary; but here there is the bare fact of the temporary suspension of the right of the plaintiff as against the land, which it was in the power of the plaintiff by his own act to remove, and which he has removed, and he has placed himself now *rectus in curia*. I think there would be no reason in the Court denying him his rights for the bare reason that for a period during the pendency of the suit they were in suspense.

Judgment.

With regard to the merits of the case. It is a case of very great suspicion, so far as the *Sheas*, father and sons, are concerned. The arrangement made with Mr. *McLean* was exceedingly well adapted to secure the

1869.

McDonald v. McLean.

property of the father, lot 11, from his creditors, but I think the evidence does not warrant the conclusion that *McLean* himself colluded with them for that purpose. He had land to sell, and he asked a high price for that which the younger *Shea* applied to him to purchase, lot 32. From the evidence, I should say it was an extreme price. The younger Shea purchased it at the price asked, after a faint attempt to reduce it, paid nothing upon it, and for the purchase money (£400) security is given, not upon the land purchased, but upon the land of the father, which but for the mortgage given to secure this purchase money, would have been liable to execution to satisfy the plaintiff's claim. The reason given for this is, that *McLean* would not allow timber to be cut off the lot he sold, without security being given upon some other land. I cannot say that this was unreasonable, when no part of the purchase money was paid down. The bill was filed to impeach this transaction, charging *McLean* with fraudulently colluding with the *Sheas* to hinder and delay the creditors of the elder *Shea*. *McLean* had filed a bill to foreclose the mortgage, and the plaintiff proved, in the Master's Office, as a subsequent incumbrancer; and upon this cause coming on for hearing, I held that the plaintiff had thereby precluded himself from impeaching the mortgage. Upon a rehearing this view was sustained, but the plaintiff was allowed, as an indulgence, and upon payment of costs, to alter his position and to proceed in this suit.

Judgment.

Between the hearing and the rehearing, *i. e.*, in March, 1867, a new arrangement was entered into between the *Sheas* and *McLean*, one *McPherson* being substituted as the purchaser of lot 32, for £100 less than the consideration that was to be paid by the younger *Shea*. Part of this difference was satisfied by the delivery of a pair of horses, raised on lot 11, the father's lot; and about £37 10*s.* remains due to *McLean*. *McLean* at

1869.

McDonald v. McLean.

this time had obtained a final order of foreclosure, and upon this arrangement being made, he delivered to *Shea*, the father, the mortgage upon lot 11; and what is now set up by *Shea*, the father, is that *William Shea*, a younger son, is now the owner of lot 11, having, as the father says he is informed, bought it. He puts it, as I understand, that after the final order for foreclosure, *McLean* was the owner of the land, and sold it to *William Shea*, and gave up the mortgage to the father. the mortgagor. *William*, was hardly of age, if of age at all, at the time of this transaction. The father continues on the place, but says *William* is the master there. The result would be, if this arrangement could be successfully carried out, that the oldest son, *John Albert Shea*, would be rid of his purchase of lot 32; and lot 11, the father's lot, would be preserved to the family, if not to him, at an expense of a pair of horses, and $150. The scheme of March, 1867, is too transparently a mere device to defeat creditors to stand a moment's examination. Upon *McLean* consenting to receive his mortgage money, the foreclosure was opened, and when he was satisfied, as he must be taken to have been when he gave up his mortgage to the mortgagor, he was a trustee to reconvey to him; and if he conveyed to *William*, it was to him as the mere appointee of the father. To put *William* forward now as buying from *McLean*, is a mere artifice, and a very shallow one, to defeat the creditors of the true owner, the father. *William*, if he has a conveyance, has only acquired an equitable estate *pendente lite;* the legal estate is in *Hodge*, the first mortgagee, and I feel no difficulty in directing a sale of lot 11, to satisfy the execution creditors.

Judgment.

If I judge of the character of the first transaction by what, I have no doubt, is the true character of the second, I should say that it also was a device to defeat creditors, and there is much to lead to this conclusion. The son appeared as a purchaser of lot 32, but paid no

purchase money and incurred no responsibility; the father, the man in danger from creditors, pledged, for the purchase money, the land otherwise liable to the execution of creditors; and after a while the son gets rid of the purchase by a sale, how effected does not appear, at a loss of £100, that loss however not falling upon him, but upon the father, for the horses were, as I have no doubt from the evidence, in truth, the property of the father. The account given of the first transaction, by the son, appeared to me very unsatisfactory, and I noted him as an unwilling, unsatisfactory, and unreliable witness. I think, looking at the whole case, and at the first transaction by the light thrown upon it by the second, that it was a device to defeat the plaintiff's debt, and that the decree must be against the *Sheas*, with costs.

1869.

McDonald v. McLean.

If I thought it made out that *McLean* had lent himself to aid this device, I must have given costs against him also. But I think this is not made out. I regret to say, however, that I cannot acquit *McLean* from all blame. By the second transaction he ceased to have any interest in lot 11. Of the £400, for which he held security upon that lot, he took *McPherson*, and lot 32, for £300, and was satisfied to within £37 10*s*. of the whole debt. Lot 11 therefore ought, so far as he was concerned, to have been left free to the creditors of *Shea*, the father. It would have been no more than right to have notified the plaintiff of this; at least, when notice of rehearing was served upon him, he should have said that he had no interest in sustaining the decree exeept for his costs. The real question between him and the plaintiff was gone, yet he not only left the plaintiff in ignorance that it was so, when a proper occasion presented itself for informing him of the fact; but he appeared at the rehearing and opposed any change in the decree, and left the Court as well as the plaintiff under a misapprehension, namely, that his interest in sustaining it continued the same: and in that way, so far as in him lay, aided *Shea* to defeat

Judgment.

1869.

McDonald v. McLean.

the rights of his creditor. The plaintiff obtained relief only upon payment of costs, and *McLean* in that way obtained the costs of the rehearing as well as of the former hearing, and also the costs of such portions of his answer, as set up by way of defence the proceedings in the foreclosure suit of *McLean* v. *Shea*. If the costs of the rehearing had been reserved, I should now adjudge them to be paid by *McLean* instead of to him. As it is, I shall direct that *McLean* pay the costs of the present hearing before me; and that he, as well as the *Sheas*, be liable for those costs. It is the only way in which I can set the plaintiff right in the matter of costs, and that only partially.

Judgment.

HEWITT v. BROWN.

Specific performance—Personal services.

The plaintiff *H.* being in possession of land belonging to the defendant and being entitled to retain such possession for another year, the defendant, in order to obtain immediate possession, agreed that in consideration thereof he would give another piece of land to the plaintiffs, husband and wife, for the life of the wife, the husband, further agreeing that he would look after and take care of the former property whenever the defendant was absent, and would, during winter, see to the defendant's cattle and stock. In pursuance of this agreement possession was delivered of the respective parcels, and the husband rendered some services, being all that were required of him, the defendant having afterwards brought an ejectment against the plaintiffs, the Court *held*, the agreement enforcible, notwithstanding the stipulation as to personal services to be rendered, and granted an injunction.

Examination of witnesses and hearing at Whitby.

Mr. *Donovan*, for the plaintiffs.

Mr. *Blake*, and Mr. *R. J. Wilson*, for the defendant.

1869.

Hewitt v. Brown

SPRAGGE, V. C.—It is alleged by the bill, and admitted by the answer, that in 1854 defendant became the purchaser of the west half of 7, in the 1st concession of Reach for the price or sum of $1200, which consideration has been paid. The bill alleges that the sale was by the plaintiffs, husband and wife. The brief of answer says by the plaintiff in the singular number. The fee was not in the plaintiffs or either of them; but the husband had in 1850 purchased from one *Agnew* his interest under a contract of purchase with Mr. *Street*, and in 1854 that interest was assigned to the defendant, by what instrument or in whose name is not stated. The bill states that in addition to the money consideration it was stipulated on the part of the purchaser, the defendant, that he should allow *Hewitt* and his wife to continue in possession for four years, for their own use and benefit. This is denied by the defendant, who puts it that he allowed the plaintiffs as a mere matter of bounty to continue upon the land, and that they did continue upon it for upwards of four years. I think the allegation of the bill upon this point is sustained in evidence. The evidence is indeed chiefly of admissions to that effect made upon various occasions and to different persons, but not entirely so, for Mr. *Agnew*, a witness called by the defendant to prove the original agreement, does prove it to have been part of the agreement of sale, though a point, as he puts it, yielded by the defendant at the instance of the witness, out of regard to Mrs. *Hewitt* who was his cousin. But however that may be, it was a point agreed upon before the conclusion of the bargain, and I cannot say that without it *Hewitt* would have agreed to sell to the defendant, at least at the price that he did. It is in evidence that he was offered a larger money consideration by others than was paid by *Brown*. I must take the stipulation for four years enjoyment of the premises by the plaintiffs to have been part of the consideration for the sale. According to the evidence of Mr. *Agnew* it was to *Hewitt* that he sold,

Judgment.

1869. Hewitt v. Brown.

and it was *Hewitt* who sold to *Brown*. I think upon the evidence that he was the contracting party in the stipulation for the four years enjoyment of the premises; and in the agreement to which I will now refer, and upon which the bill is based.

It is stated in substance thus, that at about the expiration of the third of the four years for which the plaintiffs were to have the enjoyment of the place, *Brown* became desirous of going upon it and working it himself; in effect, of taking it out of the hands of the plaintiffs for the last of the four years, and for that period abridging their enjoyment of it; and that he proposed if they would give it up to him that he would allow the occupation of a small piece of land, not a part of that sold, but another portion of the same lot, for the life of Mrs. *Hewitt*. The bill states that part of the stipulation proposed by *Brown*, in addition to the plaintiffs giving up the place was, that they should render certain personal services which are thus stated, that after leaving the land the plaintiff should "look after, and take care of the said land, during such time or times as the defendant might be absent therefrom; and also, during the winter months, would see to the feeding of the defendant's cattle and stock."

Judgment.

The principal witness in regard to the arrangement for the giving up of the farm to *Brown* for the last of the four years, and for the plaintiffs having the small piece of land, is *George Brown*, a cousin of the defendant. He says that he heard the arrangement stated by both parties, and that it was, that upon the *Hewitts* giving up the farm when they did, they were to have a small piece of land which he described as a three-cornered piece beyond the mill pond containing some seven or eight acres for Mrs. *Hewitt's* life. I thought this witness gave his evidence with some bias for the plaintiffs, but the evidence of others, though less explicit, is con-

firmatory of what he says, particularly that of *Foster*, though mistaken upon one point, that is as to the time and occasion when this arrangement was made; and that of *Richard Graham*, who was told by *Brown* that he offered to Mrs. *Hewitt* a lease for life of this piece of land, but that she had not taken it as she feared that her husband might sell it or get rid of it: he is spoken of as occasionally intemperate. There is no evidence of the rendering of personal services by the plaintiffs, forming any part of the arrangement; but as it is so alleged by the plaintiffs themselves I must take it that it did form part of the arrangement.

1860.

Hewitt v. Brown.

The evidence is somewhat conflicting as to the state of this small piece of land when the *Hewitts* went into possession of it, and as to the value of the improvements made upon it afterwards. Taking into account the nature of the place, I think it proved that *Hewitt* improved the place very considerably, though I am not prepared to say that the improvements were not such as might have been made by a person who relied for possession only upon the kindly feeling of a relative, and who knew himself to be only a tenant upon sufferance. Some little assistance was rendered by *Brown* in the putting up of buildings in the first place.

Judgment.

The evidence of this agreement is certainly not of the most satisfactory character; but upon the whole I feel warranted in coming to the conclusion that such an agreement was made. And the plaintiffs are not volunteers; they gave up a portion of that which was part of the consideration for the sale of the land. And two acts of part performance are proved; one, the giving up possession of the purchased land by the *Hewitts;* the other, the putting them into possession by *Brown* of the small piece of land in question. Upon the merits of the case, therefore, I am with the plaintiffs. Some objections of a technical nature remain to be noticed. The bill

1869.

Hewitt v. Brown.

states the agreement for the sale of the land to *Brown* to have been by *Hewitt* and his wife, and that she was a party to the agreement made three years after that sale. I think these allegations have been made under a misapprehension of both law and fact. It may be, and probably was, the case that good will to her may have had something to do with the conduct of *Brown*; that the agreement that the *Hewitts* should have the small piece of land in question for the life of Mrs. *Hewitt*, was a liberal arrangement on the part of *Brown*; and that what was obtained by the *Hewitts* was of more value than what they gave up; and that *Brown's* liberality was induced by regard to his relative; and she very probably took part in the negotiations and the arrangement, but in the eye of the law the agreement was with the husband, and I think I may properly allow an amendment stating it to have been so: the defendant has not been misled or surprised, or in any way placed at a disadvantage by the bill having put the case as it has, in that respect: and I think it will be in furtherance of justice to allow it to be amended.

Judgment.

With regard to the allegation that personal services were to be rendered by the plaintiffs, it amounts to this, that these personal services were part of the consideration for the lease for life agreed to be granted by the defendant. It was put in argument for the plaintiffs that they were to be rendered by the plaintiffs during the four years' contemplated absence of the defendant. If that were so, it would be an easy solution of the difficulty, but it is not so; for the services were to be rendered after they gave up the land, and the only limitation to their duration that I see is, the expiry of the term, *i.e.*, the death of Mrs. *Hewitt*; or the defendant parting with his property; or such changes in regard to it as would be incompatible with the continued rendering of such services. The objection is that the Court cannot enforce that part of the agreement, a part to be

performed by the plaintiffs, and therefore will not enforce any part of the agreement in their favor.

I should have regretted very much if this difficulty had been insuperable, as it would have been an obstacle in many cases to the Court preventing the commission of very great injustice; for the Court could not prevent the displacing of a party, by ejectment, who had personal duties to discharge as part of the consideration for his possession, although he might have discharged all those duties, and even although those duties might have been but a small part of the consideration, and he had fully paid all the rest; and in addition have punctually discharged all the personal duties which he was to discharge. It would be a technical rule in the way of this Court preventing a great wrong, and I am glad to find that such a rule does not prevail. The case is thus put by Mr. *Fry*, in his work on Specific Performance, sec. 558: "In cases where the agreement, on which an injunction is sought, contains stipulations some of which the Court can, and others which it cannot enforce, and the latter are wholly on the plaintiff's part, no difficulty arises; because though the Court may be unable to enforce them directly, it does so indirectly, inasmuch as the moment the plaintiff fails in performing his part of the agreement the injunction would be dissolved;" for this *Stocker* v. *Widdersham* (*a*) before Sir *William Page Wood* is cited. See also *Dietrichsen* v. *Cabburn* and cases there cited (*b*). I think upon the whole they lead to the same conclusion; and see the language of Lord *Cottenham*, at page 57.

Judgment.

In the case before me there is evidence of some services of the nature stipulated for having been rendered; and there is no evidence of any demand on the part of the defendant for the rendering of such services.

(*a*) 3 K. & J. 398. (*b*) 2 Ph. 52.

1869.

Hewitt v. Brown.

From their not having been stated to the witness *Brown*, or mentioned by the defendant to others, it is probable they were not considered of much account, and were rather matters of mere conversation than of express agreement forming part of the consideration for the grant for life to the plaintiff; but it is put otherwise by the bill, and I must give effect to it.

I think the proper relief will be a perpetual injunction, subject, however, to be dissolved upon any default on the part of the plaintiffs to perform the personal services stipulated for; costs to be paid by the defendant.

Robertson v. Beamish.

Equity of redemption, compromise of—Costs.

A suit for redemption having been compromised by payment into Court of a sum of money for the benefit of those entitled to the equity of redemption, a decree was made in a suit subsequently brought by an execution creditor of the mortgagor, directing an inquiry as to other incumbrancers, and payment to them according to priority, and the defendants having made no improper defence were *held* entitled to receive their costs out of the fund.

Statement.

The late *John Sweetman Beamish* had created a mortgage in favor of one *William Pomeroy*, to redeem which a bill had been filed by *Beamish* which was revived after his decease by the defendants in the present suit. While that suit was pending a compromise was agreed to between the parties thereto for the payment by *Pomeroy* of £290 into Court for the benefit of the parties entitled to the equity of redemption. The proposed compromise upon being brought before the Court was approved of; and the money was, in pursuance thereof, paid into Court. The present suit was instituted by the plaintiff, who was a creditor of *John Sweetman*

Beamish having an unsatisfied writ of execution in the hands of the sheriff, and came on to be heard by way of motion for decree. Hewitt v. Brown.

Mr. *Moss*, for the plaintiff.

Mr. *Burns*, for the defendants.

SPRAGGE, V. C.—The money in Court represents certain mortgage premises, the equity of redemption in which was in *John Sweetman Beamish;* and after his death in the defendants, his widow and heiresses-at-law, and it represents the value of the equity of redemption, which equity of redemption was saleable; and but for the decree of this Court would still be saleable at law, under the judgment and writ of execution upon which this suit is brought. This bill seeks in effect an equitable execution; the object of which is correctly defined by Mr. *Adams* (*a*), to be to impose on the equitable interest the liability which would attach at law on a corresponding legal interest. I think the equity of redemption is gone. The decree directed that, upon payment of certain moneys, (which are the moneys in Court), the parties who are the defendants in this suit should *without further order* be absolutely barred and foreclosed of their equity of redemption. Judgment.

I do not see any necessity, as a preliminary to this money finding its way into the hands of those who would be entitled at law, to direct a general administration of the estate of *Beamish;* but an inquiry must be directed as to whether the plaintiff, or other execution creditors, have priority. It is scarcely necessary that the cause should come on again, on further directions. The decree may provide for payment of the money to the plaintiff or other execution creditors according to their priority.

(*a*) On Equity, 129.

Hewitt v. Brown.

These execution creditors, if any, should be made parties to the inquiry in the Master's office; and liberty to apply should be given by the decree. The defendants should have their costs. They were necessary parties to a suit to give the plaintiff relief; they derive no benefit from the suit; and have made no improper defence to it.

Rachel McDonald v. Archibald McDonald.

Vendor's lien.

On the sale of land notes were taken by the vendor for a portion of the purchase money.

Held, that the vendor retained his lien for the amount unpaid, although, in fact, the vendor did not intend to retain any lien; and one witness in the cause swore that "the notes were taken in payment of the land"—it appearing that there was no agreement or arrangement that there should be no lien.

Hearing at Cornwall.

The circumstances giving rise to this suit are fully stated in the report of the case *ante* Volume XIV. page 133.

Mr. *J. S. McDonald*, A. G., and Mr. *D. Maclennan*, for the plaintiff.

Mr. *J. Bethune*, for the defendant.

Judgment. Spragge, V. C.—This bill is to establish a lien for unpaid purchase money, and for the usual relief. The plaintiff claims under the will of the vendor, and it is not denied that if the vendor was entitled the plaintiff is. The defendant is a purchaser from the grantee of the vendor, having purchased first one portion, and then the residue of the land conveyed by the vendor; and it is clear that when he purchased he had notice that the

1869.

McDonald v. McDonald.

purchase money was unpaid, with the exception of certain payments made on account, since the purchase. The original purchase money was £350, and notes were given by the purchaser spreading the payment over several years. The original vendor was *Neil McDonald;* the original purchaser, his son *Norman*. The defendant is a cousin of *Norman;* the plaintiff, a daughter of *Neil*.

The plaintiff's case is *prima facie* clear. The defendant's first position is, that there was no lien originally. In the year before the conveyance to *Norman*, it was agreed between him and his father, that the payment of the purchase money should be secured by a bond, with a surety or sureties. *Norman* was unable to procure a surety, and the giving of promissory notes was substituted for it: this is clear from the evidence and from the character of the transaction. So that if what had been first contemplated had been inconsistent with the retention of lien by the vendor, it was, at any rate, not carried out. The giving of notes is clearly consistent with the retention of lien, and the fact (supposing it to be a fact, as it probably was) that there was no intention on the part of the vendor to retain a lien, makes no difference. There is a short passage in the evidence of *Norman*, taken before my brother *Mowat*, which however, in my mind, amounts to nothing; it is, "the notes were taken as payment of the land." He does not say that it was agreed that they should be so taken; and I have no doubt he used the words in their popular sense, and did not mean to say that they were taken as payment, as distinguished from their being taken as security for payment. I think there is nothing in this head of objection.

Judgment.

It is next contended that if any lien existed originally, it was subsequently waived by conduct on the part of *Neil*, at least as to one of the parcels of land. That

1869.

McDonald v. McDonald.

Neil would have insisted upon his lien, upon more than one occasion, if he had been aware of his rights, is highly probable; but I find no occasion upon which he waived them, or acquiesced in the balance of purchase money being paid by the defendant to *Norman* instead of to himself. A little knowledge of law, or consultation with a lawyer, would have saved a good deal of trouble. *Neil* was anxious to get the defendant to pay the unpaid purchase money to him, and said to one *Lauchlin McDonald* that if the defendant would pay him, he would give him the notes he held against *Norman*; and *Lauchlin* repeated this to the defendant. The defendant, on his part, was willing to pay *Neil*, provided he were indemnified; and after that, as I understand, *Neil* made the offer of the notes. The defendant knew all the facts which constituted the plaintiff's equity to a lien, but did not know the legal consequence of the facts, and under these circumstances paid the balance of purchase money to *Norman*. He paid one not entitled, instead of the one who was entitled.

Judgment.

The defendant having a registered title, relies next upon the Act of 1865. That Act has, however, been held by my brother *Mowat*, in this case—(reported in 14 *Grant*, 133)—to be not retrospective. To hold it to apply to this case, I must hold it to be retrospective, instead of following the decision, upon the point, of another member of the Court; and must also hold that the Act applies, notwithstanding express notice, for it is clear, in this case, that the defendant had notice before he purchased.

My conclusion, therefore, is that the plaintiff has established her case. As to the amount due for unpaid purchase money, I suppose there must be a reference. The plaintiff admits that £150 of the purchase money has been paid. The defendant may claim that more is paid. It appears from the evidence that some of the

payments made by the defendant since his purchase reached the hands of *Neil* the vendor, or were applied in payment of his debts, or otherwise, for his benefit. The defendant is entitled to be allowed for such payments. 1869. McDonald v. McDonald.

The decree will be for costs to the plaintiff up to the hearing.

The Quebec Bank v. Snure.

Trustee for creditors.

Where a debtor assigned his estate to trustees on trust to sell for the benefit of creditors; and the trustees were guilty of delay in selling and of other misconduct it was *held* that the Court had jurisdiction at the suit of a creditor to execute the trusts of the deed.

Examination of witnesses and hearing.

Mr. *Strong*, Q. C., and Mr. *Leith*, for the plaintiffs.

Mr. *Spencer* and Mr. *Bull*, for the defendants.

Sprague, V. C.—The plaintiffs sue on behalf of themselves and all other creditors of *Jacob Snure*, entitled to the benefit of a trust deed made for the benefit of creditors on the 26th of April, 1864. The defendants are the trustees *James Barton Snure*, a son of the assignor, *James B. Hall*, a son-in-law of the assignor, and the assignor himself. *James Barton Snure* has been the acting trustee. The assignment is of all the estate real and personal of the debtor. The lands enumerated are two parcels of farm land of 100 acres each, in the Township of Chinguacousy, a lot of 200 acres in the Township of Chatham, and two village lots. There was also a mill, the debtor being a miller and lumber merchant as well as a farmer, and the stock in trade, Judgment.

1869.

Quebec Bank v. Snure.

lumber, and all other effects about the mill were assigned; also all the debtor's personal estate, which included several horses, cows, and other stock and implements, lumber and household furniture. There is no dispute that everything the debtor had paassed by the assignment.

The trusts are, "First, with all convenient speed to receive, collect, and get in all credits and sums of money due and owing to the said party of the first part, and also to sell and convert into money the said real estate, property and effects, with absolute discretion as to the conditions and mode of such sale or sales to be made in this behalf, and either together or in parcels, and either by public auction or private contract, and on such terms and in such manner as they shall think best." Then follow provisions usual in such assignments which it is not necessary to notice; and the final trust is, "to pay and divide the clear residue of the said estate unto and among all the creditors of the said party of the first part ratably and proportionably, and without preference or priority, and to pay over the surplus (if any) to the said party of the the first part, his heirs, executors, administrators and assigns." The creditors are made parties to this trust deed in these terms: "The several creditors of the said party of the first part, of the third part." No list of creditors is appended to the instrument; nor is it provided that they shall execute it. It is, however, executed, though not very formally, by the plaintiffs.

Judgment.

The defendants deny that the plaintiffs are creditors, *i. e.*, they set up that they have been paid, but they fail to prove it. The plaintiffs, therefore, have a *locus standi* in this Court, and the trustees are accounting parties.

The trustees set up, that under the circumstances a reasonable time has not elapsed for the winding up of

the trust, and say that the suit is unnecessary and vexatious. 1869.

Quebec Bank v. Snure.

With regard to the facts, the trustees have been guilty of great delay in executing the trusts; and comparatively little has been done until recently. They have carried on the business of the mill, and retained in hand a considerable portion of the personal effects for that purpose, instead of converting the whole into money. The creditors must of course take subject to the whole of the trusts, and it is not open to them to complain of the wide discretion given to the trustees in regard to the disposal of the trust estate. But they have still much to complain of. Assuming in favour of the trustees that the words, "with all convenient speed," apply only to the getting in of debts, and that it does not extend to the converting of the real and personal estate into money, they were still bound to do the latter within a reasonable time, and to take all the usual modes for effectuating it. There was nothing to warrant their carrying on the business of milling and farming, unless as subsidiary to a sale in order to have the mill a "going concern," and the farm in the best state for sale. They were trustees for creditors, and their duty to them was to sell, or at least to use their best endeavours to sell; and this they certainly have not done. In regard to the real estate, the acting trustee has made a few inquiries among neighbors, has issued no advertisements, has employed no land agent, has worked the mill and farm for the benefit, as far as appears, of his father and himself, has allowed a brother to occupy a portion of the trust estate without rent, and another person to occupy another part, and has himself occupied and used a very large proportion. He has in short almost entirely ignored his duty to the creditors. The books also have been irregularly kept; and moneys of the estate come to his hands have been, as he says, kept upon his person, and that to a large amount; and when paid into a bank, paid into his private account.

Judgment.

1869.

Quebec Bank v. Snure.

His account of the the personal estate is equally bad. Some articles used; others consumed by him, others lent, and dealt with as if his own property. There is no good reason shewn why all of them should not have been converted into money within a year at furthest after the execution of the trust deed.

The plaintiffs ask for the administration of the estate by this Court. I think the creditors are entitled to this. A receiver is also asked for, and should be appointed, especially as the acting trustee is a man of no real estate, and of personal estate, small in value and very easily disposed of. He must pay into Court the money in his hands, and should not be allowed to retain any by way of compensation for his services. As to the administration of the estate by this Court, I see nothing to prevent it. The discretion vested in the trustees may properly be exercised by this Court. The trust is for a sale at any rate; the terms and mode only are matters of discretion. The money in hand must be paid in immediately.

Judgment.

There will be the usual decree for account with costs, and further directions reserved. There may be special circumstances to report, among others as to the land sold under power of sale in the mortgage, and whether there was any breach of duty on the part of the trustees in suffering this sale to take place.

1869.

RAPSON v. HERSEE.

Absolute sale—Mortgage or conditional sale.

The distinction between a mortgage and an absolute sale, with a contemporaneous agreement for repurchase explained; and an absolute conveyance held to be of the latter character rather than the former, on the weight of evidence, which was conflicting.

Hearing at Woodstock.

Mr. *Spencer* and Mr. *Finkle*, for the plaintiff.

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

SPRAGGE, V. C.—The question in this case is, whether a dealing between the plaintiff and the defendant *Hersee*, was a loan of money by *Hersee* to *Rapson*, the plaintiff, or a sale by *Rapson* to *Hersee* of his interest in certain land, with a right of repurchase.

Judgment.

Rapson, in 1864, was lessee, with right of purchase, from the Canada Company, of 100 acres of land in the township of Blenheim. He was in arrear for rent, and the purchase money was about falling due, amounting, together, to about $1073; and was also, as the bill expresses it, in distress for want of money to pay what he calls some small pressing claims against him. He applied to *Hersee* for assistance. His request in the first instance was for a loan of $200. *Hersee* did lend, or pay, to him $200, and *Rapson* assigned to him absolutely the Canada Company lease. *Hersee* paid to the Company the arrears of rent and the purchase money, who thereupon made him a conveyance of the land, which bears date 21st July, 1864.

There is no difficulty as to the law of the case. It is thus stated by Lord *Cottenham* in *Williams* v. *Owen*: (*a*)

(*a*) 5 M. & C. at 306.

1869.

Rapson v. Hersee.

"That this Court will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, is no doubt true; but it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will not of itself entitle the vendor to redeem."

In favor of the plaintiff's contention is the fact, that what he applied for was a loan; that at a subsequent period, a lease was made to him by *Hersee* for one year, the rent reserved being the odd sum of $135.50, that sum being interest at 9 per cent. upon the $200 lent, the sum paid to the Canada Company, and one or two other small items. The plaintiff also relies upon some language attributed by one of the witnesses to *Hersee*, amounting, it is contended, to an admission that the transaction was a mortgage; and he relies also upon what he alleges to be the inadequacy of the sums paid, as the price of the land.

Judgment.

Hersee was examined by the plaintiff before the local Master at Woodstock, and his examination was read by the plaintiff at the hearing. His examination certainly does not assist the plaintiff's case. He admits, indeed, that the plaintiff's first application was for a loan of $200; he states that he told him that he had no money to lend at that time; that *Rapson* then said he wanted to sell his place to him, and that his answer was, that he did not want to buy any land; conversation then ensued about the land, and how *Rapson* held it, and *Rapson* pressed *Hersee* to let him have the $200: that he said he could not pay the rent up; that the lease would soon run out, and that he had no prospect of getting the money for obtaining the deed; and that he had better sell his right for what he could get than run the chance of losing it. That he offered no security for the $200; that after *Hersee* refused to lend him the money, he did not again ask him to lend money.

1869.

Rapson v. Hersee.

While the usury laws were in force all this might have been a mere cloak to cover a usurious transaction; the unwillingness to lend money, and the willingness at the same time to purchase land, giving to the applicant for a loan a right of repurchase, being mere forms of words, well understood between the parties. But in 1864 there was no reason for cloaking the real nature of the dealing between the parties; no reason for putting that into the shape of a sale of land, with right of repurchase, which was in truth a security for a loan of money. *Hersee*, in his examination, emphatically and repeatedly denies that it was a loan of money. He was not re-examined before me, so I infer that counsel for the plaintiff did not think that there was anything in his demeanor that would tend to throw doubt upon his testimony.

Judgment.

The sum reserved as rent being a percentage upon moneys paid, struck me, at first sight, as a good deal in favor of the plaintiff's contention. But, upon reflection, I do not think it of any great weight. It is quite consistent with a sale and right of repurchase; and quite natural under the circumstances. The repurchase was to be at a price which was the aggregate of the moneys paid; these moneys might therefore come back into the hands of *Hersee*. *Rapson* was to have the place and its profits, and as *Hersee* was to be compensated in money for not having the place, it would naturally occur to the parties to base the amount to be paid for rent upon a percentage upon the money which had been paid, and which, in the shape of repurchase money, might be repaid; and this would probably occur the more readily to these parties from the practice of the Canada Company upon their leases with right of purchase—to make the rent the interest upon the purchase money: a practice that would most likely be present to their minds from the circumstance of this land being a purchase from the Company. The fact of its being in this case an exact percentage rather indicates to my mind a consciousness that there was nothing to disguise.

1869.

Rapson v. Hersee.

That *Hersee* spoke of this transaction as a mortgage rests upon the evidence of one *Bryant Mills*, a man who had, as he says, worked for *Hersee* off and on for the last twelve years. *Rapson* was in arrear with his rent, and *Hersee* asked *Mills* how *Rapson* was getting on, and in that way the dealing between them came to be talked of. *Mills* says that *Hersee* said he was going to foreclose the mortgage; another time that he had sent a man to eject him off the place, as he had closed the mortgage, "or words to that effect," as the witness says, adding that *Hersee* said further that after he had closed the mortgage he had given *Rapson* time to sell the place and pay him his money, and keep the balance himself; and the witness adds that he is positive the word "mortgage" was used in two conversations. The witness was a labouring man, and certainly of not more than average intelligence; and though I think he meant to give his evidence fairly, I cannot help having some doubts of his understanding *Hersee* correctly, or remembering and repeating accurately. He says, speaking of one of the conversations with *Hersee*, "I can't recollect the words he used." In another place he says, "I had a conversation with *Hersee* yesterday; I can't say if I said to him that he did not use the word 'mortgage.'" In another, that *Hersee* said "he had taken up the deed for *Rapson*, and had given *Rapson* a bond to hold in the same way as a mortgage." Now in fact no bond was ever given, nor was there any foreclosure, so that *Hersee* must have told the witness things that had no existence, or else the witness's understanding or memory is at fault. I think the latter more probable. The witness says that *Hersee* spoke of the rent due to him by *Rapson;* that *Hersee* called it rent, and the witness said, "the interest of your money," and *Hersee* replied "yes." The probability is that *Hersee* was not careful to express himself very accurately before the witness. They were not business conversations, nor was he conversing with a business man. This witness had conver-

Judgment.

sation, as he says, with *Rapson* as well as *Hersee*. *Rapson* told him, he says, that *Hersee* owned the place according to the deed, but that he could get it back by paying the money. 1869. Rapson v. Hersee.

In regard to the value of the land, the evidence is extremely conflicting, the witnesses varying in their estimates from $3,000 to less than half that sum; one of the witnesses, a Mr. *Landon*, gives some very intelligible reasons for not placing a higher value upon the land. He describes it as situated in about the centre of the south-east quarter of Blenheim, that portion of the township being a low tract of land, much of it being covered with water; that it is badly situated as to roads and schools, and unhealthy; that the tract is covered at intervals with swamps, small lakes, and stagnant water, and is not a part of the township where industrious and thriving people will be likely to settle. All these are serious drawbacks, and greatly impair the value of the land. Good land in such a locality would not be of much value, but he describes the land in question as having a good deal of swamp, and the fences and buildings as poor. He estimates the quantity of swamp upon this land as much larger than do the plaintiff's witnesses, and gives altogether a much worse account of it, but he gives such good reasons for its being an undesirable place, that I think it very greatly over-estimated by the plaintiff's witnesses. Mr. *Landon* does not stand alone in his estimate of value; and, upon the whole, I think that the real value, as compared with the sums paid by *Hersee*, is not such as to be any evidence that the transaction was not, as *Hersee* contends, a sale with right of repurchase. I put it in this way because that is all that is necessary. I am not sure that its market value was at all more than the sums paid; and I may add that there appears to have been on the part of *Hersee* no hasty taking advantage of default, as appears by the evidence (fairly given, I thought) of his father; Judgment.

1869. and it does not appear that in parting with it to the defendant *Burns* he made much, if anything, beyond what the place cost him.

Rapson v. Hersee.

Upon the evidence of the plaintiff himself, he makes but a weak case, but there are, besides, circumstances against his case. There is, in the first place, the form of the instrument, or rather the absence of any document shewing that the conveyance was to be defeasible. I am far from saying that this is conclusive, or indeed a very strong circumstance, for I know, from cases that have come before the Court, that business is often done loosely by unprofessional men; and that assignments intended to be by way of security only are often absolute in terms, and without any separate defeasance. There is no reason, however, to suppose that there was any omission in this case, for we have the evidence of Mr. *Cowan*, who drew the assignment. The instructions were given by *Rapson* himself, and Mr. *Cowan* says that, though he is unable to give *Rapson's* words, he understood from him that he was to assign the land absolutely to *Hersee* for $200; that *Rapson* told him that he had *sold* to *Hersee* his right to the place for $200; further, that if he paid back the money to *Hersee* before the Canada Company lease expired, *Hersee* had agreed to re-assign the lease to him. This agrees with *Hersee's* own version of the agreement as given upon his examination. Mr. *Cowan* adds his own impression, from the instructions of *Rapson*, that it was a sale, and not a mortgage.

Judgment.

Then there was no covenant on the part of *Rapson* to repay the $200 paid to him, nor any engagement, or even understanding, that he was to do so; or, in the event of Hersee completing the purchase from the Canada Company, that *Rapson* should repay him what he should so pay. The absence of a covenant to pay is always looked upon as a strong circumstance against

1869.

Rapson v. Hersee.

the transaction being by way of security. In *Williams* v. *Owen*, Lord *Cottenham* quotes the language of Lord *Manners* in *Goodman* v. *Grierson* (*a*): "The fair criterion by which the Court is to decide whether this deed be a mortgage or not, I apprehend to be this, are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to?" And Lord *Cottenham* adds his own observation in applying Lord *Manners's* language to the case before himself: "Tried by this test, there would be no doubt that in this case the transaction was not a mortgage."

The first lease (which was for a year) bears date 18th April, 1866, the assignment of the Canada Company lease having been made on the 23rd of April, 1864: a second lease was made shortly before the expiration of the first—7th March, 1867. One of them was drawn by Mr. *Landon;* I think the first. *Landon* says he thinks nothing was said specially as to whether the transaction was a loan of money or a sale, and adds: "I never, at that time, heard from either of them that it was a loan of money." At the execution of the second lease, which was read over to *Rapson*, he made no objection.

Judgment.

There were thus three occasions upon which papers were drawn and executed, and at neither of them was anything done or said to indicate that the dealing between the parties was other than what upon the face of the papers it appeared to be.

There is only one other piece of evidence to which I will refer. It is that of *Thomas Cowan*, who says that *Rapson* told him that he had given *Hersee* a deed of the place. This, without more, would imply that he had sold and conveyed to him. It is by itself not very

(*a*) 2 B. & B. 274.

1869.

Rapson v. Hersee.

important; but taken in connection with other occasions on which *Rapson* had spoken of the dealing as a sale, or been silent when he might be expected to speak of it as a mortgage, if it were a mortgage, it is of some weight; these occasions do, in my mind, outweigh what is attributed to *Hersee* by the witness *Mills*.

Upon the whole, my opinion is, that the evidence is not such as to enable me to say that the transaction was other than what it purported to be, and that the proper conclusion is, that it was a sale with right of repurchase, and not by way of security for a loan of money. The plaintiff's bill is, therefore, dismissed with costs.*

Judgment.

* On a rehearing before the full Court, composed of SPRAGGE, C., MOWAT and STRONG, V.CC., this decree was affirmed.

INDEX

TO THE

PRINCIPAL MATTERS.

3. Trustees and executors stand in a different position from creditors or *cestuis que trustent* as to the right to have the estate administered in this Court; and cannot, without experiencing some difficulty in carrying out the trusts or administering the estate, file a bill for that purpose,

Cole v. Glover, 392.

ADVANCES TO EXECUTORS.

A widow and children were entitled under a will to support out of the testator's property, and goods were supplied for this purpose to the executors:

Held, that the creditor who advanced the goods had no charge against the estate, but must proceed against the executors personally.

Campbell v. Bell, 115.

See also "Agent and Executor."

AFFIDAVITS IN SUPPORT OF MOTION FOR INJUNCTION.

See "Injunction," 3.

AGENT AND EXECUTOR.

A sum of money was advanced to an agent, who was also executor, avowedly to pay taxes, for which the lands of the testator were liable, and it was shewn that a part only of the sum advanced was so applied:

Held, that the lender was entitled to claim against the estate to the extent to which the money was shewn to have been expended thereon, and that, too, without reference to the state of account as between the executor and agent and the estate.

Ewart v. Steven, 193.

[Reversed on appeal. See *post* Vol. XVIII. p. 35].

ALLEGATION (IN BILL) AS TO NOTICE.

See "Pleading," 4.

AMENDMENT.

See "Practice," 8, 11, 14.

APPOINTMENT UNDER POWER.

The donee of a power of appointment made a will, not referring to the power, disposing of "the money now or at my death invested in mortgages or otherwise." The settled estate was invested in mortgages, and the donee had no other mortgages:

Held, that the intention of the testatrix to appoint the settled estate sufficiently appeared.

Deedes v. Graham, 167.

ATTACHMENT OF DEBTS IN EQUITY.

See "Judgment Creditor."

BEQUEST UPON CONDITION.

See "Will, construction of," 3.

BUILDING SOCIETY.

In January, 1864, a non-borrowing member of a building society died intestate. No one administered to his estate until June, 1867. In that interval his shares ran into arrear, and in consequence the society, in November, 1865, declared the shares forfeited, and carried the amount thereof to the credit of the profit and loss account. After the society had been wound up, or been supposed to have been wound up, and the assets distributed, letters of administration were obtained, and the administrator applied to the society to be admitted as a member thereof, but was refused:

Held (1), that the proceeding of the society to forfeit the shares in the absence of a personal representative was illegal; that they could not do so any more than they could proceed at law to enforce payment of the calls: (2), that the plaintiff (the administrator) was entitled to relief, and that the lapse of time between the attempted forfeiture of the shares and the procuring letters of administration was no answer to the plaintiff's claim.—[DRAPER, C. J., HAGARTY, C, J., WILSON, J., and GWYNNE, J., dissenting.]

Glass v. Hope, 420.

CAPITAL.

[PAYMENTS OUT OF.]

See "Infants," 1.

CONTESTANTS, RIGHTS OF.

[UNDER ACT FOR QUIETING TITLES.]

See "Quieting Titles Act," 4.

CONTRIBUTION TO PAY COSTS OF SUIT TO STAY WASTE.

See "Tenant in Common."

CORPUS, POWER TO TENANT FOR LIFE TO DISPOSE OF.

See "Will, Construction of," 5.

COSTS.

The plaintiff failed in that part of his suit which rendered a bill necessary, and the other objects of the suit could have been attained by less expensive proceedings. It being considered that in case the latter course had been adopted the costs to the insolvent estate would have been about equal to the costs incurred by it in defending the suit, no costs were given to either party.

Darling v. Wilson, 255.

See also "Administration Suit."
"Damages," 2.
"Equity of Redemption, compromise of."
"Mortgage," 1.
"Partnership Decree."
"Redemption Suit."
"Submitting to Decree."

COVENANT IN RESTRAINT OF TRADE.

The plaintiff purchased the defendant's business as an exchange broker at Kingston, and the latter agreed not to go into the business there again. The plaintiff afterwards sold out to one *C*, and entered into a like agreement with him:

Held, that the plaintiff after this sale had not such an interest in the contract with the defendant as entitled him to an injunction, and that his remedy, if any, was at law.

Jones v. Wooley, 106.

CREDITORS, CLAIMS OF.

See "Partnership Decree."

[FRAUD ON.]

See "Fraud," 2, 3.

[RIGHTS OF.]

See "Married Woman's Act."

CUTTING TIMBER AND CLEARING.

[CONSTRUCTION OF COVENANT AS TO.]

See "Rector's Lands."

DAMAGES.

1. A debtor, whose business was the manufacture of reaping machines, conveyed his personal property to trustees; and having afterwards compounded with them and his other creditors, the trustees entered into a covenant to re-assign to him the property on certain terms and conditions. The debtor filed a bill, alleging amongst other things a breach of the covenant, and claiming damages:

Held, that he might be entitled to damages for the detention of the machinery necessary for the carrying on his business; and it was referred to the Master to inquire into the nature of the personal property withheld, and if it was machinery or chattels of a like nature to inquire and report as to damages.

Scott v. Wilson, 182.

2. The plaintiff filed a bill for the protection of the timber on certain land which he claimed to own; at the hearing the Court retained the bill with liberty to the plaintiff to bring an action; the plaintiff brought the action and recovered a verdict for $20. It appearing that the question in issue was the plaintiff's title to the land, he was *held* entitled to a decree with costs, notwithstanding the small amount of damage which had been actually done by the defendant.

McAlpine v. Eckfrid, 595.

See also "Sequestration."

DEDICATION.

In a new country like Canada, user of a road by the public, is not to be too readily treated as evidence of an "intention" on the part of the owner to dedicate it.

Dunlop v. The County of York, 216.

DEFECTIVE ABSTRACT.

See "Registrar."

DEFECTS,

[LEAVE TO SUPPLY—REFUSED.]

See "Pleading," 8.

DEFICIENCY.

See "Mortgage," &c., 8.

DELAY IN PROSECUTING SUIT.

See "Practice," 12, 13.

DELAYING CREDITORS.

J. A. S. contracted to purchase from *M.* on credit a wood lot, No. 32, and to secure the price (£400) the purchaser's father gave a mortgage on his farm: this mortgage not being paid was foreclosed. Shortly afterwards *M.* being still willing to receive his money, *J. A. S.* sold No. 32 for £300; this sum went to *M.*, part of the remaining £100 was satisfied by delivering to *M.* a pair of horses raised on the farm, valued at £62 10*s.*; and *W. S.*, another son of the owner, agreeing to pay the balance £37 10*s.* The farm, by arrangement between all the parties, was conveyed to *W. S.*, who was not more than twenty-one years old, if so much:

Held, that these transactions were, as respects the father and sons, a mere roundabout way of securing the farm from the creditors of the father, and the farm was ordered to be sold to pay the plaintiff, an execution creditor of the father.

McDonald v. McLean, 665.

DEMURRER.

See "Pleading," 2, 3, 4.
"Multifariousness."

DETENTION OF PERSONAL PROPERTY.

See "Damages."

DEVISE TO EXECUTRIX BENEFICIALLY.

See "Will," 2.

DISTILLERY.

See "Fixtures."

DISTRESS UNDER MORTGAGE.

See "Injunction," 1.

DISTRIBUTION.

[PERIOD OF.]

See "Will, Construction of," 1.

DOUBLE LIABILITY OF SHAREHOLDERS.

[BILL TO ENFORCE.]

See "Pleading," 5.

DOUBTFUL EVIDENCE.

See "Quieting Title."

DOWER.

1. A testator devised to his daughter for life a house and four acres of land; and the will shewed that he contemplated that the devisee should reside on the property so devised:

Held, that, according to the authorities, the testator had thereby sufficiently indicated his intention to devise free from his widow's dower; and that, therefore, the widow could not have dower in either this land or the other lands devised, without foregoing the provisions in her favor which the will contained.

Hutchinson v. Sargent, 78.

2. A testator by his will made certain gifts to his widow, not saying they were in lieu of dower. It was suggested that the estate was not sufficient to answer these gifts in addition to the dower:

Held, per Spragge, V.C., that the other devisees were entitled to an inquiry as to this, and the weight to be attached to the circumstance would be considered after the result of the inquiry was ascertained.

Lapp v. Lapp, 159.

EASEMENT.

Divers lands having been devised to three sisters, *P*, *A*, and *L*, they in 1840 agreed to a partition, by which, amongst other things, *P* was to have a certain lot 45, with the privilege of overflowing 46; and *A* was to have 46, subject to that privilege; conveyances were signed to carry out the partition, but the matter being transacted without professional advice, *A* and *L*, who were married women, did not execute so as to pass any estate; all entered into possession of the several lands allotted to them, and, in 1841, *P* executed to her son a voluntary conveyance of 45, with the privilege, and *A* and her husband conveyed 46 to their son. Some time afterwards the error in regard to the execution of the partition deed having been discovered, *P*, with *A* and her husband and *L*'s heir (*L* being dead), in 1849, joined in a conveyance of all the lands to a trustee, in order to carry into effect the previous partition but, by an oversight, this new deed omitted to mention *P*'s right of overflowing 46. *A*'s son and *P*'s son were active in getting this new deed executed, but were not parties to it; immediately after its execution, *A* and her husband executed to their son a new deed of 46; no new deed was executed to *P*'s son. He, thereafter, with the knowledge and acquiescence of *A*'s son, built a mill in 1845, and placed his dam where it necessarily caused the overflowing of 46; he afterwards mortgaged 45, with his supposed privilege of overflowing 46; and the mortgaged property was sold at the mortgagee's suit, the two cousins alleging for the first time that the mortgagor had no right in respect of 46; the right was considered doubtful at the time, but the purchaser completed his purchase:

Held, in a subsequent suit, by the purchaser against the mortgagor and his cousin, who owned 46, that the plaintiff had a right to overflow 46.

Boyle v. Arnold, 501.

ELECTION.

See "Dower."

EQUITABLE CHOSES IN ACTION.

See "Judgment Creditor."

EQUITABLE ESTATES.

The interest of a debtor in land, bought from the Crown, but for which at the time of his death he had not fully paid,

and had not obtained the patent, is available in equity for the benefit of his creditors; and their right is not destroyed by a friend of the heirs paying the balance of the purchase money, and procuring the patent to issue in the names of the heirs.

Ferguson v. Ferguson, 309.

EQUITABLE PLEA.

Where a party had a clear right in regard to certain equities to set them up by way of equitable defence to an action at law, or to come to this Court; and by mistake pleaded them at law as a *leyal* defence only, upon which he *neeessarily* failed:

Held, [reversing the dectee of V. C. MOWAT], that this did not form any bar to relief, on the same grounds, in this Court.

Arnold v. Allinor, 213.

QUITY OF REDEMPTION, COMPROMISE OF.

A suit for redemption having been compromised by payment into Court of a sum of money for the benefit of those entitled to the equity of redemption, a decree was made in a suit subsequently brought by an execution creditor of the mortgagor, directing an inquiry as to other incumbrancers, and payment to them according to priority, and the defendants having made no improper defence were *held* entitled to receive their costs out of the fund.

Robertson v. Beamish, 676.

EQUITY—WANT OF.

See "Administration Suit," 3.

ESPLANADE ACTS.

Under the acts relating to the construction of the esplanade in the City of Toronto, water lot owners are not entitled to be paid the cost of constructing so much thereof as the owners shall have constructed.

The City of Toronto v. Mowat, 355.

ESTOPPEL.

See "Rector."

EVIDENCE—NEWLY DISCOVERED.

See "Fraud," 1.
"Practice," 1.
"Quieting Titles Act," 1.

EXCHANGE.

See "Specific Performance," 4.

EXECUTORS.

See "Administration Suit," 3.
"Advances to Executors."
"Agent and Executors," 1.
"Mortgage," &c., 9.
"Will," 2.

[LOANS TO.]

See "Absolute Bequest."
"Mortgage," &c., 10.

EXTRINSIC EVIDENCE.

See "Dower," 2.

FI. FA., RETURN OF, PENDING SUIT.

[TO SET ASIDE DEEDS.]

See "Setting aside Deeds," 3.

FIRE INSURANCE.

A fire policy, in favor of a mortgagor, contained a clause providing that in the event of loss under the policy, the amount, the assured might be entitled to receive, should be paid to *A. L.*, mortgagee:

Held, by the Court of Appeal, that this clause did not make *A. L.* the assured; and that a subsequent breach by the mortgagor of the conditions of the policy made it void as respected *A. L.* as well as himself. [SPRAGGE, V. C., dissenting.]

Livingstone v. The Western Insurance Co., 9.

See also "Insurance."
"Principal and Agent."

FIXTURES.

FLUCTUATION IN VALUE OF LAND.

See "Time Essence of Contract," 1.

FORFEITING SHARES.

[IN BUILDING SOCIETY.]

See "Building Society."

FRAUD.

made absolute in form to deceive *H's* creditors: various subsequent dealings with the property took place with a view of deceiving the creditors of both parties; and by means thereof the interest of *H* and *R*, if any, appeared to be respectively a mere money charge on the property at the time *fi. fas.* against their lands were given to the sheriff: but *held*, that the writs bound their respective interests, and that they should be sold in equity to pay the execution debts.

Brock v. Saul, 589.

4. A married woman, owner of real estate, representing herself as a spinster, is not entitled in equity to set up that the sale was void because of a conveyance not having been executed in conformity with the statutes as to the conveyances of land by married women.

Graham v. Meneilly, 661.

See also "Trust."

FRAUD BY SOLICITOR.

Where such motives exist in the mind of a solicitor as would be sufficient with ordinary men to induce them to withhold information from the client, the presumption is, that it was withheld; and the uncommunicated knowledge of the solicitor is not imputed to the client as notice.

Cameron v. Hutchison, 526.

Where mortgagees sold the mortgage to defeat or delay their creditors, but the vendee had no actual notice of the purpose, it was *held* that the circumstance of his having employed one of the mortgagees as his solicitor in drawing the assignment, &c., did not make the knowledge of the solicitor notice to the vendee.—*Ib.*

FRAUDULENT CONVEYANCE.

1. Where an insolvent person made a fraudulent mortgage of all his unincumbered property to his son to secure an alleged debt of $400 to the son, and a fictitious debt of $600 to the mortgagor's wife; and the son shortly afterwards transferred the mortgage, for value, to a person who nad notice of the insolvency, and of other circumstances fitted to awaken his suspicion as to the *bona fides* of the mortgage, it was *held*, that he could not defend himself as a purchaser without notice of the fraud.

Totten v. Douglas, 243.

[Reversed on Appeal. See *post* volume xviii., page 341.]

2. A sale which is made with intent, on the part of both vendor and vendee, to defeat the creditors of the former is void in equity, whether the sale was or was not intended to take effect as between the parties to it.

Wood v. Irwin, 398.

3. In a suit by a creditor to set aside a deed on the ground (amongst other things) that it was made to the defendant on a secret trust for the grantor and to defeat his creditors, it was *held* that the grantor's statements after the conveyance that it was a real transaction, were admissible evidence for the defendant, but were not entitled to much weight.—*Ib.*

4. A conveyance executed by a debtor in safisfaction of or security for a debt, if intended to operate between the parties, is valid, though obtained in order to gain priority to an expected claim of the Crown under a recognizance.

The Attorney General v. Harmer, 533.

5. A debtor conveyed land to his father and brother-in-law respectively, which they claimed to be *bona fide*, and for valuable consideration; on a bill by a creditor the Court was not entirely satisfied with the account which was given of the transaction with the father, and had serious doubts in regard to the transaction with the son; but being of opinion that the evidence was insufficient to prove the account of the transactions on the defendants' part to be false, sustained both conveyances.—*Ib.*

GIFT.

[BY PAROL.]

A parent was not permitted to recall a gift, which, in view of the marriage of one of her two sons, she had made verbally to the two, of certain arrears of an annuity which had accrued due from them while she lived with them; the attempt to recall the gift not having been made until after the marriage and death of the son.

Long v. Long, 239.

GOOD-WILL, SALE OF.

The defendant sold to the plaintiffs the good-will of the business of an innkeeper, which he had carried on under the name of "Mason's Hotel," or "The Western Hotel;" he afterwards resumed the business under the same name and in the same premises, and represented to his old customers and

the public that the business so resumed was the identical business sold:

Held, that, though in the absence of any express covenant the vendor would have been entitled to engage in a business similar to that he had sold, yet he was not at liberty to represent the new business as the same identical business as the old:

Held, also, that a covenant in the agreement that the vendor should pay $4000 in the event of his carrying on business as an innkeeper within ten years, did not affect the purchaser's right to an injunction; nor did the circumstance of their having removed to other premises.

Mossop v. Mason, 302.

[Affirmed as to the first holding and varied as to the second, on Appeal. See *post* volume xviii., page 453.]

GUARDIANSHIP.

See "Infants," 2.

HEARING.

See "Practice," 10.

[AMENDMENT AT.]

See "Practice," 14.

HIGHWAY, COMPENSATION TO MORTGAGEE FOR LAND TAKEN FOR.

See "Municipal Corporation."

INPROVEMENTS—COVENANT TO PAY FOR.

See "Rector."

INCEPTION OF EXECUTION.

A fi. fa. against lands was returnable on the 15th September, 1863, the advertisement for sale was first published after that date; while the writ was current, the sheriff had told the defendant that he had the execution and that the land would be sold unless he paid; the sheriff was also on the lands more than once before the writ expired, but he did not go to make a seizure:

Held, that there had been no inception of the execution during its currency.

Bradburn v. Hall, 518.

INDEMNITY.

See "Principal and Agent," 1.

INFANTS.

1. In a proper case trustees may be allowed payments made by them, for the maintenance and education of children out of their capital.

Stewart v. Fletcher, 235.

2. There was a contest in a Surrogate Court between the stepfather and uncle for the guardianship of a child of ten or eleven years old; the child preferred her stepfather, and the Surrogate Court appointed him guardian; but this Court, on appeal, being satisfied from the evidence that it was for the real interest of the child that the uncle should be guardian, reversed the order below.

In re Irwin, 461.

3. A stepfather's claim to be paid for past maintenance of a minor out of her capital, was rejected on the ground of his misconduct.

Fielder v. O'Hara, 610.

See also "Advances to Executors."

INJUNCTION.

1. Two persons were in joint possession of property of the one, and carried on business therein as partners when the owner of the property mortgaged it, giving a power of distress in case of default, and the mortgagee afterwards distrained on the partnership property. On a bill by the assignee of the other partner, it not appearing that the latter assented to, or had notice of, the mortgage, the court granted an injunction to the hearing of the cause.

Mason v. Parker, 81.

2. Such proof of prosession as is sufficient to maintain a suit at law against a wrong-doer, is sufficient *primâ facie* proof of title to enable a party to obtain a decree for an injunction to restrain waste.

Walker v. Friel, 105.

3. On a motion for injunction to stay the wrongful selling of property by the legal owner, the plaintiff's affidavits alleged that the principal defendant had sold, or pretended to sell, to

his son, who was also a defendant. but by mistake no injunction was asked against him. No threat of any further sale was alleged. The defendant filed no affidavit in answer:

Held, that tho allegations were sufficient, and an injunction was granted.

Boardman v. Wroughton, 384.

See also "Damages"
"Equitable Plea."
"Good will, Sale of."
"Riparian Proprietor."

INSOLVENCY, PLAINTIFF'S OATH IN.

See "Trust proved by Parol," 2.

INSOLVENT DEBTOR.

1 A preference which a debtor is induced to give by threats of criminal and other proceedings, is not void under the Indigent Debtors' Act of 1859, or the Insolvent Act of 1864.

Clemmow v. Converse, 547.

2. But to sustain the preference the pressure must have been real, and not a feigned contrivance between the debtor and creditor to wear the appearance of pressure for the mere purpose of giving effect to the debtor's desire and intention to give a preference.—*Ib.*

INSURANCE.

1. The travelling agent of an insurance company obtained from the plaintiff his application for an insurance, and in filling up the answers to the questions, the question as to the existence of incumbrances was answered in the negative, when in fact a mortgage was in existence on the land on which one of the houses insured stood.

Held, that this circumstance vitiated the policy, not only as to a house situate on the land covered by the mortgage; but also as to another building standing on land not comprised therein, although separate sums were named in respect of each building.

Bleakley v. Niagara District Mutual Ins. Co., 198.

2. At the foot of the paper containing the answers to the several queries propounded by an insurance company, a memorandum was inserted stating that their agents were the agents of the applicants, so far as related to the making of applications, &c. And that the company would not be bound by any statement made to the agent not contained in the application:

Held, that the applicant was bound by a false statement contained in the application, even if the agent had, as was alleged, filled in the answer to the question without putting the question to the applicant.

Bleakley v. Niagara District Mutual Ins. Co., 198.

INTERPLEADER.

Where a person in good faith, but from wrong information, replevied property which did not belong to him; and after a verdict against him, a new claimant insisted that the property was his, and threatened an action:

Held, that the case was not one for an interpleader in this court.

Fuller v. Patterson, 91.

JUDGMENT CREDITOR.

A bill was filed by judgment creditors alleging that their debtor was devisee and executrix of her husband: that she was entitled to an annuity under his will, and was a creditor of his estate for advances she had made to pay his debts, and claiming that these debts and claims should be ascertained, the estate administered, and sufficient land of the testator sold to pay what the estate owed, or so much of it as would cover the judgment debt.

Held, that the plaintiff was not entitled to relief.

Gilbert v. Jarvis, 265.

2. A judgment creditor cannot attach or garnish by means of a suit in equity a debt for which he has not obtained an attaching order at law.

Blake v. Jarvis, 295.

3. But, *Semble*, after obtaining and serving such an order, if a remedy in equity is needed for the realization of the debt so attached, the creditor is entitled to file a bill for the purpose.—*Ib.*

LACHES.

See "Practice," 12, 13.

LAPSE OF TIME.

See "Specific Performance," 4.

LEASE FOR YEARS, RENEWABLE.

A lease of land for four years, with covenant for renewing for four years more, was *held* not to require registration, actual possession having gone along with the lease; and such a lease though not registered was *held* valid as respects the covenanted renewal as between the lessee and subsequent mortgagees of the lessor.

Latch v. Bright, 653.

LIEN FOR UNPAID PURCHASE MONEY.

A vendor who has conveyed without receiving the purchase money, is entitled against the vendee to a decree for a sale of the property and payment of any deficiency.

Sanderson v. Burdett, 119.

LUNACY.

See "Vendor and Purchaser, 1."

MAGISTRATES INTERESTED.

See "Married Woman's Deeds."

MAINTENANCE.

See "Will, construction of," 4.

MAINTENANCE, PAST.

See "Infants," 3.

MARRIED WOMAN.

A married woman, living apart from her husband, accepted some property for her wages:

Held, that the transaction was binding on the grantor, and all claiming under him.

Moore v. Davis, 224.

See also "Fraud," 4.

MARRIED WOMAN'S ACT.

The Married Woman's Act does not exempt personal property of a wife who was married on or before the 4th May, 1859, from liability for debts contracted by the husband before that date.

Fraser v. Hilliard, 101.

Where a wife who was married before the 4th May, 1859, purchased after that date property in her own name, and paid for it (as was alleged) with money theretofore given to her by her son, it was *Held*, as between her and a creditor of her husband, whose debt was contracted before the 4th May, 1859, that money so given to the wife became instantly her husband's money, and that the land bought with it was liable to the creditor.—*Ib.*

MARRIED WOMAN'S DEEDS.

Magistrates interested in the transaction, are not competent to take the examination of a married woman for the conveyance of her land. The solicitor of the husband is not, as such, disqualified.

Romanes v. Fraser, 97.

Where, after the decease of one of the Justices of the Peace, by whom an examination was taken, the other, an old man of seventy-three, gave evidence that he did not recollect and did not believe that the wife was examined as the certificate stated, the Court gave credit to the certificate notwithstanding the evidence.—*Ib.*

MISJOINDER OF PETITIONERS.

See "Practice," 8.

MISTAKE.

See "Easement."

MORTGAGE, MORTGAGEE, MORTGAGOR.

1. *L* and *S* were joint owners of certain lands, and *L* had created a mortgage on a part of his undivided interest, in favor of *R*. With the view of effecting a partition, *L* conveyed his interest to his co-tenant *S* who thereupon re-conveyed to *L* a certain defined portion; and in order to protect *S* against the

mortgage outstanding in *R*'s hands, *L* executed back to *S* an indemnity mortgage: *L* did not pay off *R*'s mortgage; and *R* having obtained a final decree of foreclosure, sold his interest in the property to *S*. *L* after the petition, had sold a portion of the estate to the plaintiffs who in respect of their interest had been made parties to the foreclosure suit by *R*. Subsequently in an action of ejectment *S* set up title under the indemnity mortgage from *L*.:

Held, that he had thus let in the plaintiffs to redeem who were entitled to do so upon paying what *S* had paid or was liable to pay to *R*, and all expenses reasonably incurred, together with costs as of an ordinary redemption suit—beyond those *S* was ordered to pay the costs.

Read v. Smith (In Appeal), 52.

2. *A* lent *B* $2,000 and took two mortgages from the borrower each for $1,000 on separate property. The mortgagee foreclosed one of the mortgages and then parted with the property:

Held, no bar to a foreclosure of the other mortgage.

Bald v. Thompson, 177.

3. The owner of property mortgaged it, and then died, having devised one-half the property to one son, and the other half to another, charging each half with an annuity to the testator's widow. One of the sons afterwards died intestate, and his widow paid off the mortgage, and took an assignment to herself:

Held, that the one annuity not being in arrear, and the assignee of the mortgage being willing to pay the arrears of the other annuity, the testator's widow could not insist on redeeming the mortgage.

Long v. Long, 239.

4. Mortgagees, in pursuance of a power of sale contained in their conveyance, sold the mortgaged property to *McLeod* for $7,800, and gave him possession. *McLeod* paid a deposit of $600, and gave his promissory note for $600 more, which he duly paid. He also executed a mortgage for $4,000, which was duly registered, but did not pay the residue of the purchase money, $2,600. The mortgagees executed a deed of the property but retained it in their possession. The solicitor for the mortgagees also did some acts as if the sale was complete, but the Court, being satisfied that in the contemplation of the parties the transaction was still *in fieri*.

Held, that the mortgagees were not responsible to a subsequent incumbrancer for the $2,000, or chargeable with more money than they had actually received.

The Bank of Upper Canada v. Wallace [In Appeal], 280.

5. Where a mortgage provided that in case of sales by the mortgagor of portions of the mortgaged property, the mortgagee, on receipt or tender of a certain proportion of the purchase money, should release the part sold from the mortgage it was *held*, that the first person who thereafter purchased and paid to the mortgagor his purchase money, but obtained no release from the mortgagee, was not entitled, as he would have been in the absence of this provision, to pay off the whole mortgage, and to demand payment of the whole from a subsequent purchaser redeeming him; but that each purchaser (including the first) was entitled to redeem his own part on payment of the stipulated proportion of money.

Davis v. White, 312.

6. Wherever, from the necessities of his position, it is necessary that a mortgagee should, for his own protection, take possession, he is not chargeable with rests, and this even though the mortgage was not in arrear.

Gordon v Eakins, 363.

7. A tenant of a mortgagor paid the mortgage after the mortgagor's death, and the representatives of the mortgagor having no means of paying the debt, he entered into an agreement with the widow that she and her children should occupy the dwelling house and four acres of the mortgaged property, that he himself should occupy the residue at a rental of $170, should pay $40 a year to the widow, and apply the residue of the rent on the mortgage:

Held, in a suit afterwards brought by a purchaser of the equity of redemption to redeem, that the defendant was not chargeable with the $40 a year he had paid to the widow, nor with rests, though the rent for which he was accountable exceeded the interest.—*Ib.*

8. Where, after the mortgagor had assigned his equity of redemption, the mortgagee, with the concurrence of the assignee, by sale and transfer of the mortgaged premises, put it out of his power to reconvey on redemption by the mortgagor, it was *held* that he could not call upon the mortgagor for payment of any deficiency resulting upon such sale of the estate.

Burnham v. Galt, 417.

9. *K* was trustee for sale of certain lands belonging to *M.* Two parcels were subject to a mortgage to the Bank of Upper Canada for more than the value thereof. The trustee agreed for the sale of these parcels to a purchaser; the Bank, before becoming insolvent, assented to the sale, and received the first instalment of the purchase money. The purchaser went into possession, but was in default in paying purchase money: the defendants were his assigns. By the trust deed, which the bank executed on becoming insolvent (which deed was afterwards confirmed by statute), it was made the duty of the Bank trustees to accept in payment and liquidation of any debt due to the estate the notes or bills of the Bank: on a bill by the Bank trustees for payment, it was *held* that as the money was coming to the Bank, the trustees were bound to accept payment in the notes of the Bank at par,

The Trustees of the Bank of Upper Canada v. The Canadian Navigation Co., 479.

10. A mortgagee appointed the mortgagor one of his executors; and the mortgagor became the acting executor; the mortgagor afterwards entered into an agreement with *B*, the owner of other property, for an exchange free from incumbrances, and that *B* should pay $2,000 for the difference in value; the mortgagor had indorsed on the mortgage certain sums as paid by him thereon after the mortgagees's death, reducing thereby the amount appearing to be due on the mortgage to $1,600, no part of which, however, was payable: *B* satisfied the $1,600, partly in money paid to the mortgagor, partly by a debt owing to *B* by the mortgagor, and partly by moneys which had theretofore been lent by *B* for the purposes of the mortgagee's estate, and the mortgagor thereupon indorsed on the mortgage a receipt for $1,600 in full of the mortgage money: the contemporaneous payment of money was with the assent of the other executor. It afterwards appeared that the mortgagor was largely indebted to the mortgagee's estate at the date of all these transactions:

Held, that the contemporaneous payment was a valid payment *pro tanto*, the same having been made with the assent of the co-executor; but that the estate or the co-executor was not bound by the receipts indorsed on the mortgage; and that *B* was not entitled to credit, as against the estate, for the private debt due to him by the mortgagor, nor for his antecedent loan.

Bacon v. Shier, 485.

See also "Fire Insurance."
"Fraudulent Conveyance."
"Partner."
"Practice," 7.
"Priority."
"Purchaser for Value," &c., 3.

MORTGAGE OR CONDITIONAL SALE.

See "Absolute Deed."

MOTHER-IN-LAW AND SONS-IN-LAW, TRANSACTIONS BETWEEN.

See "Trust."

MULTIFARIOUSNESS.

A bill filed by an administrator to obtain possession of certain chattels outstanding in the hands of a third party, and for administration of the estate, *held* multifarious both as against such third party and the persons interested in the estate.

Cole v. Clover, 392.

MUNICIPAL CORPORATION.

Land which had been mortgaged by the owner, was taken by a township council for a road, and the compensation having been ascertained by award, the corporation paid the amount to a creditor of the mortgagor, by whom it had been attached:

Held, that the mortgagee had the prior right; that his mortgage being a registered mortgage, the corporation must be taken to have acquired the land with notice of it; and that the mortgagee was entitled to recover the amount from the corporation with costs.

Dunlop v. The County of York, 216.

NEWLY DISCOVERED EVIDENCE.

See "Practice," 1.

NOTICE.

See "Registration."

[OF MOTION.]

See "Practice," 4.
"Vendor and Purchaser." 1.

OLD DEEDS.

See "Quieting Titles Act," 5.

OPENING FORECLOSURE.

See "Mortgage," &c., 1.

PAROL EVIDENCE.

See "Specific Performance," 1, 2.

PAROL.

[GIFT BY.]

See "Gift by Parol."

PAROL PROOF OF TRUST.

See "Trust proved by Parol."

PARTIES.

1. To a suit by a second incumbrancer, to redeem the prior incumbrancer, the owners of the equity of redemption are necessary parties.

Long v. Long, 239.

2. The plaintiff was execution creditor of one *S*, who became a mortgagee of the premises in question. To a suit instituted by a prior mortgagee the plaintiff was not made a party:

Held, that the plaintiff's position as execution creditor of *S* was that of a derivative mortgagee *in invitum*, and as such he ought to have been made a party to the suit by the prior incumbrancer.

Darling v. Wilson, 255.

See also "Patent, Repealing," 2.
"Pleading," 5.

PARTITION AGREEMENT.

The adult co-heirs of an estate agreed to a partition, and bound themselves to execute quit claims to carry it out as soon as the minors came of age and united therein: some of the

co-heirs went into possession of their portions and made improvements: some released their interest in the property allotted to others; but some of the minors on coming of age declined to adopt the agreement;

Held, on that account, that the agreement was not binding on any of the parties to it; and a decree for partition was made; and the Master was directed to have regard in partitioning to the possession and improvements by the parties.

Wood v. Wood, 471.

PARTNER, MORTGAGE BY ONE.

A mortgage with distress clause, by the legal owner of property of which, at the time, he is in possession, and to all appearance in sole possession, is valid at law and in equity against an unknown partner, whose only claim to the possession, when the mortgage was executed, was as tenant at will.

Mason v. Parker, 230.

PARTNERSHIP DECREE.

A bill was filed to establish a partnership; and, the partnership being proved, the usual accounts were directed, including an account of the claims of creditors:

Held, that the costs of the suit should not be paid out of the fund to the prejudice of creditors.

Bingham v. Smith, 373.

PAST MAINTENANCE.

See "Infants," 3.

PATENT.

[REPEALING.]

1. A bill which shews ground for repealing a patent is not demurrable for not shewing that the plaintiff was entitled to have a patent issued to him.

Rees v. The Attorney General, 467.

2. A bill alleged that the patentees obtained their patent by false representations to the Government, and shewed a case in which the patentees would not be entitled to compensation if the patent were set aside and the land given to another:

Held, that to such a bill the Attorney General was not a necessary party.—*Ib.*

PAYMENTS BY PURCHASER AFTER NOTICE.

See "Registrar."

PERSONAL PROPERTY.

[DETENTION OF.]

See "Damages," 1.

PERSONAL SERVICES.

See "Specific Performance, 5.

PLEADING.

1. Where the locatee of the Crown assigned his interest absolutely, and the purchaser gave his bond for the purchase money, payable if the title should prove good, it was *held*, that a bill was wrong in treating the transaction as a contract and praying specific performance; and that the bill must be amended and a lien prayed, in order to entitle the vendor to relief.

Sanderson v. Burdett, 119.

2. A bill against an Insurance Company on a policy, alleged that the policy was made by the Company, but did not state that it was under seal:

Held, sufficient.

Workman v. The Royal Insurance Co., 185.

3. The policy was stated to be to pay such loss or damage as should happen to the property by fire, "subject to the conditions thereon indorsed":

Held, that the language did not imply that the conditions were conditions precedent, and therefore that it was not necessary to shew due performance.—*Ib.*

4. A bill, setting forth that one of the defendants procured a conveyance from the plaintiff by fraud, and afterwards mortgaged the property to another defendant, is not demurrable for want of a charge that the latter had notice of the fraud at or before he received his mortgage. It is for the defendant, in such a case, to set up the defence of no notice.

Kitchen v. Kitchen, 232.

5. A bill will lie in equity, at the suit of a creditor, to enforce the double liability of the shareholders of an insolvent company.

But such a bill must be on behalf of the creditors.

Brooke v. The Bank of Upper Canada, 249.

6. Where the bill alleged facts which shewed that the lands in question had been sold by the mortgagee under a power of sale in his mortgage for less than one-fifth the value, and alleged that the mortgagee, "intending to acquire title himself to the said lands * * * caused the said lands to be sold for the nominal sum of $400 to one *G.*, who paid no consideration therefor, and on the same day conveyed the same to the defendant *Ann Watt*, the wife of the mortgagee;" that "*Ann Watt* had paid no consideration for the pretended sale and conveyance of the said lands to her, and was well aware that the said sale and conveyance took place for the purpose of depriving the plaintiff of her just rights in the premises:"

Held, this sufficiently alleged the mortgagee's intention to become himself the purchaser.

Spain v. Watt, 260.

7. A bill was filed setting up an equitable right to land, and alleging that the defendant who had obtained the legal title purchased the property with notice of the plaintiff's equity; the defendant, by his answer, said that at the time of his purchase he had no notice of the plaintiff's claim, and the consideration he had paid was actual and *bonâ fide;* but he did not negative notice before paying his purchase money or receiving the conveyance; and did not prove payment of any consideration.

Held, that by reason of these defects his defence failed.

Prince v. Brady, 375.

8. The defendant applied at the hearing for leave to put in a further answer setting up the necessary facts, and that the title was a registered title, and to prove consideration. But it appearing that the plaintiff had been long in possession, and had made very considerable improvements before the defendant's purchase, and that the defendant, though he may not have had notice of the plaintiff's claim, had, in this purchase, shewn culpable disregard of the rights of third persons, the application to supply the defective allegations and proof was refused.—*Ib.*

9. A bill set forth the plaintiff's title to land by mesne conveyances from the grantee of the Crown; the bill stated

that the plaintiff had gone into possession, not saying when, and not saying that any of the parties through whom he derived title had been in possession: the bill alleged that the defendant pretended to be able to establish title to the land by possession as the assignee of one *E K;* and that *E K* was for a short period (not saying how long) in possession; the bill charged that the conveyance to the defendant was a cloud on the plaintiff's title, and prayed the usual relief; the bill was taken *pro confesso:* but *held*, that its allegations were insufficient to entitle the plaintiff to a decree,

Carson v. Crysler, 499.

See also "Patent, repealing."
"Specific Performance," 1.

PRACTICE.

1. There is no rule that a petition of review, on the ground of the discovery of new evidence, will not lie when the new evidence is of conversations and admissions.

Brouse v. Stayner, 1.

2. Where, after a defendant's lands were seized under a writ of sequestration, the defendant died intestate, it was *held* that his widow was not a proper party to the order to revive.

Harris v. Meyers, 117.

3. A motion to discharge an order to revive cannot, without leave of the Court, be made after fourteen days from the service of the order; and mere service of notice within the fourteen days is not a sufficient compliance with the General Order 329.—*Ib.*

4. The notice of motion in such a case need not set forth the previous proceedings.—*Ib.*

5. In a suit against an Insurance Company on a policy, the bill alleged that the policy had been destroyed:
Held, that an affidavit of the fact must be annexed to the bill.

Workman v. The Royal Insurance Co., 185.

6. Under a general administration decree, the Master may, without any special direction, take evidence as to payments by executors for the maintenance and education of infants, out of their shares of capital, and report the facts.

Stewart v. Fletcher, 235.

7. The bill of a subsequent incumbrancer stated a completed transaction. The mortgagees, through oversight, allowed the bill to be taken *pro confesso*, and a decree was made accordingly. The plaintiff subsequently desiring more extensive relief, filed a petition in the nature of a bill of review in order to obtain the same. The mortgagees, in their answer to the petition, set up the facts which shewed the transaction to be not completed. The Court considered the whole case to be re-opened by this petition, and decided that the sale to their vendee did not affect the rights of the mortgagees, and that they were chargeable only with the amount actually received from the purchaser.

The Bank of Upper Canada v. Wallace [In Appeal] 280.

8. Where there is a misjoinder of petitioners, the Court has jurisdiction at the hearing of the petition to allow the same to be amended by striking out the name of one of the petitioners.

Gilbert v. Jarvis, 294.

9. In a partition suit, a question of title raised between co-defendants was decided at the hearing and without being referred to the Master.

Wood v. Wood, 471.

10. In a suit for the recovery of mortgage money, the question between the parties was, whether the mortgage money had been paid; both parties offered evidence at the hearing, and the Court received the same and adjudged thereon.

Bacon v. Shier, 485.

11. Where the pleadings and evidence were not before the Court in a satisfactory shape, and the Court being obliged to reject evidence on both sides as not material under the pleadings, was not satisfied as to the result being in accordance with the rights of the parties upon the actual facts, leave was given to amend on payment of the costs of the hearing, &c.

Conlin v. Elmer, 541.

12. *Quære*, whether delay in the prosecution of a suit for specific performance may be a bar to relief at the hearing—VanKoughnet, C., being of opinion that it is no bar—Esten, V. C., holding the opposite, and Spragge, V. C., giving no opinion.

McMahon v. O'Neil, 579.

13. There having been delay in bringing a suit for specific performance, and great delay in prosecuting it, ESTEN, V. C., at the hearing, made a decree directing a reference to the Master to inquire as to the cause of the latter delay: the Master reported that the cause was the plaintiff's poverty. On further directions the bill was dismissed [VANKOUGHNET, C., dissenting.]

McMahon v. O'Neil, 579.

14. The plaintiff had purchased certain mill premises from *C*, and afterwards sold the same; the bill alleged that on the sale *C* had agreed to accept the sub-purchaser as his debtor for the unpaid purchase money, and to discharge the plaintiff: at the hearing the plaintiff failed to establish this agreement, but there were subsequent transactions by means of which also the plaintiff claimed at the hearing to have been discharged: this ground of relief not having been stated in the bill, the plaintiff had liberty to amend on payment of the costs of the day.

Allan v. Newman, 607.

15. After a bill had been filed by a judgment creditor, impeaching certain dealings between his debtor and a vendee of the dedtor, the plaintiff allowed the writ against lands to run out for some time, but subsequently renewed it before the hearing: *Held*, not necessary to amend stating this fact, and that its existence was no objection to the plaintiff obtaining relief at the hearing.

McDonald v. McDonald, 665.

See also "Equitable Plea."
"Injunction," 3.
"Pleading," 8.
"Quieting Titles Act," 2.
"Security for Costs."

PREFERENCE.

See "Insolvent Debtor," 1, 2.

PRESSURE.

See "Insolvent Debtor," 1, 2.

PRINCIPAL AND AGENT.

A school trustee, by desire of the board, attended an auction, and bought for the board a piece of property for a school-site,

and he signed the contract with his own name only. The board afterwards, by several resolutions, during three years, unanimously recognized the purchase as their own, and paid three instalments of the purchase money. In an estimate under the corporate seal, the board applied to the town council for money to pay "for school premises for a central school, contracted for and agreed to be paid, $1,570; for building a central school-house on said purchased premises, $7,870." It was shewn that there was no other property or contract to which this language could refer than the property or contract mentioned. The town council did not comply with the requisition, and ultimately trustees were elected, a majority of whom determined to repudiate the purchase:

Held,—in a suit against the board, by the person in whose name the purchase had been made, for indemnification in respect of the remainder of the purchase money,—that the plaintiff was entitled to relief.

Smith v. The School Trustees of Belleville, 130.

See also "Insurance," 2.
"Vendor and Purchaser," 2.

PRINCIPAL AND SURETY.

S was surety to *B* for a debt, for which *A*, the principal debtor, gave a mortgage to *B* as a further security. The creditor recovered judgment against the surety and sold his lands under execution. While the *fi. fa.* was in the Sheriff's hands and before the sale, *S* mortgaged the lands to creditors of his own:

Held, that as the surety would, on paying the debt to *B*, have been entitled to the benefit of the mortgage which the principal debtor had given to *B*, so where the lands of *S* were sold to pay the debt and the mortgagees of *S* were thereby deprived of them, these mortgagees were entitled to the benefit of the original mortgage as against any subsequent assignment of the mortgage by the mortgagee, and any subsequent mortgage by the mortgagor.

Quay v. Sculthorpe, 449.

PRIORITY.

The mortgagor of the lands in question having made an assignment in insolvency, subsequent, however, to the execution of the plaintiff, and it appearing that there was a surplus after payment of all claims proved against the lands in the suit by the prior mortgagee, it was *held* that, in the absence of

proof of waiver by the plaintiff of his rights, the plaintiff was entitled to priority as against the creditors of the mortgagor under the assignment in insolvency.

Darling v. Wilson, 255.

PRO CONFESSO.

See "Pleading," 9.

PURCHASE BY TWO IN NAME OF ONE.

Where a purchase is made by one in his own name, but on the joint behalf of himself and another, the decree for payment of the purchase money may be against both.

Sanderson v. Burdett, 119.

PURCHASE WITH ASSENT OF MORTGAGEE.

See "Mortgage," &c., 9.

PURCHASE FOR VALUE WITHOUT NOTICE.

1. Land was sold for $400, and the purchasers bound themselves that, in case of gold being found on the land in paying quantities, a joint stock company should be formed and incorporated for working the same; and that the grantor should in that case, in addition to the $400, have $600 in paid-up shares of the capital of the company. No company was formed; and it was *held*, that this contingent agreement did not prevent the grantees from defending themselves, to the extent of their interest, as purchasers for value without notice.

Sanderson v. Burdett, 119.

2. Where a purchase was completed, conveyance executed, and purchase money paid without notice of an outstanding equity, but a bill claiming it was afterwards filed and *lis pendens* registered, before registration of the purchasers' deed:

Held, that they did not thereby lose their defence as purchasers for value without notice.—*Ib.*

3. In case of a purchase of a mortgage security recently given on all his real estate by an insolvent father to his son, the purchaser, if he has notice of the insolvency, should,

before completing his purchase, satisfy himself by proper inquiries, that the mortgage was *bona fide*, and good against creditors.

Totten v. Douglas, 243.

[But see case on Appeal, *post* volume xviii., page 341.]

4. A mining lease for 99 years contained provisions enabling the lessor to demand, at his option, a royalty upon the proceeds of the mines, or $4,000 in lieu of such royalty; the lessor had not exercised such option:

Held, that the lessee was a purchaser for value, and that a prior voluntary conveyance was void as against him.

Colvin v. Elmer, 541.

See also "Fraudulent Conveyance," 1.
"Pleading," 7.

PURCHASE OF PART FROM MORTGAGOR.

See "Mortgage," &c., 5.

QUIETING TITLES ACT.

1. In a case of considerable suspicion as to the title of a petitioner under the Act for Quieting Titles, the Court stayed the certificate on the ground of the discovery of new evidence, though witnesses had been twice examined *viva voce*, and nearly a year had elapsed since the second examination; the applicants satisfactorily accounting for their not having adduced the new evidence at an earlier date.

Brouse v. Stayner, 1.

2. Where the question involved, on an application for a Certificate of Title, was the legal title to the property, and the proper determination of the question depended on the credibility of witnesses against, or in favor of, certain old documents which were impeached as forgeries, the Court directed an action of ejectment to be brought, in order that the question might be tried by a jury of the county where the principal witnesses resided.—*ib.*

3. An appeal from a decision of the referee under the Act for Quieting Titles may be to a single Judge.

Amour v. Smith, 380.

4. A contestant who is in possession of the property claimed should be permitted to point out defects in the claimant's *prima facie* title, before being called upon to prove his own title to the property.

Amour v. Smith, 380.

5. In 1866 *J G B* filed a petition for a certificate of title to a wild lot under a conveyance executed to him in 1860 by *P*, the patentee. This claim was contested by *S*, who claimed, through divers mesne conveyances, under a deed executed in 1835 in *P*'s name by an attorney. The good faith of the various grantees, through whom the contestant claimed, was not disputed; but the question of title turned on the genuineness of the power of attorney, and of a bond which purported to authorize the execution of the deed of 1835. The impeached instrument bore date in 1833, and *P* had done no act in respect of the land from that time until the petitioner induced him in 1860, for a small consideration, to execute the conveyance of that date. The evidence as to the instruments was conflicting, but the Court being satisfied on the whole that the impeached instruments were forgeries by the petitioner's father: *Held*, that the petitioner was entitled to his certificate.

Brouse v. Stayner, 553.

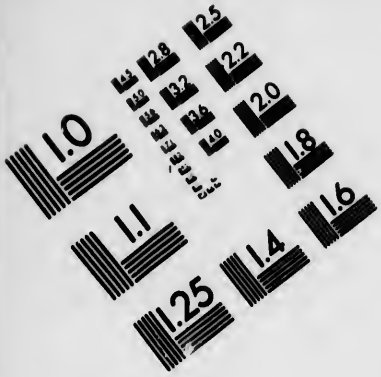
QUIETING TITLE.

On a petition to quiet the title to land, the genuineness of the documents on which the petitioner claimed title having been impeached, and the evidnce being doubtful, the Court refused a certificate, without pronouncing absolutely upon the genuineness or spuriousness of the documents in question.

Graham v. Meneilly, 661.

RECTOR, LEASE BY.

By letters patent, dated in January, 1824, certain lands were granted to three parties, upon the trust, amongst others, to convey the same to the incumbent, whenever the Government should erect a parsonage or rectory in Kingston and duly appoint an incumbent thereto, such conveyance to be upon trusts similar to those thereinbefore expressed. In January, 1836, a rectory was created in Kingston. In May, 1837, the trusts for which the patent of 1824 had been issued, having been carried out, and one of the trustees named therein appointed rector, the other two joined in a conveyance to him as such rector, to hold to him and his successors, subject



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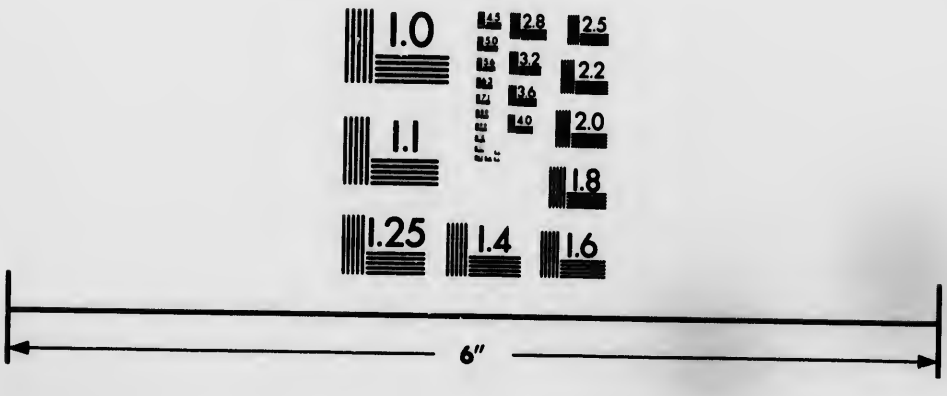

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to the uses and trusts set forth in the grant to them. In 1842 this incumbent created a lease for twenty-one years (under which the plaintiffs claimed), whereby he covenanted for himself and his successors to pay for certain improvements made by the lessee of the premises, or that he or they would execute a renewal lease on terms to be agreed upon, and that until such payment for improvements or renewal of lease, the lessee should retain possession of the premises.

Held, that the incumbent, either as a trustee or rector, had no power to bind his successors to pay for improvements, or to enter into any agreement which *a priori* would extend the lease beyond the twenty-one years.

Kirkpatrick v. Lyster, 17.

RECTOR'S LANDS.

A lease of rectory land by the rector contained a covenant not to clear more than a certain portion of the land demised; that the clearing should be for agricultural purposes, in contiguous fields, not exceeding ten acres each, such fields to be enclosed in good lawful fences, "and shall be sufficiently chopped, underbrushed, logged, and burned, according to the due course of farming and good husbandry." It appeared that the lessee's cutting was not meant to be limited to what "might be necessary in working regular clearings on the land," and the lessee, with the lessor's consent, cut and sold the timber off 180 acres; but the lessee having for two years done nothing towards clearing this portion of the demised land, it was *held* that the delay was open to the objection of being contrary to "the due course of farming and good husbandry," and that the lessee was liable to damages in respect thereof.

Lundy v. Tench, 597.

REDEMPTION.

See "Mortgage," 3.
"Submitting to Decree."

REDEMPTION SUIT.

In a suit to redeem the plaintiff alleged several grounds for relief which he failed to establish, although he succeeded in shewing a right to redeem, which right the defendant had

contested; the Court, under the circumstances, refused costs to either party up to the hearing, and gave the defendant the subsequent costs of a redemption suit where the right to redeem is admitted.

Boswell v. Gravley, 523.

See also "Submitting to Decree."

REGISTRAR.

A registrar of deeds gave to an intending purchaser an abstract of title, which by mistake omitted an outstanding mortgage:

Held, that a purchaser who had notice of the omitted mortgage could not make any claim against the registrar in respect of payments made by the purchaser after such notice; and the registrar, who on finding his mistake had bought up the outstanding mortgage, was held entitled to foreclose the same.

Brega v. Dickey, 494.

REGISTRATION.

The principle upon which the Registry Act proceeds is, that a party acquiring land ought to see whether there is anything registered against the land he is about to acquire, and that he is assumed to search the registry for that purpose; but this does not apply to one who is not acquiring, but parting with an interest in land.

The Trust & Loan Co. v. Shaw, 446.

RENEWAL.

See "Rector."

RESCISSION.

See "Vendor and Purchaser," 2.

RESTS.

See "Mortgage," &c., 7.

REVIEW, PETITION OF.

See "Practice," 1.

REVIVOR, MOTION TO DISCHARGE ORDER FOR.

See "Practice," 3, 4.

RIGHTS OF CREDITORS.

See "Married Woman's Act."

RIPARIAN PROPRIETORS.

In 1844 a mill site was conveyed to the defendant, "with the privilege of keeping the dam thereon at all times hereafter at its present head or height, but no higher;" and in 1849 the defendant erected a new dam lower down the stream. This new dam was of the same height as the old dam; but the defendant placed on the dam movable stop logs to enable him to make use of the surplus water, which would otherwise flow over the dam. By experiments it was shewn that if these stop logs were not removed when the defendant's mill was not working, but in that case only, the water would be raised on the lands of the plaintiff to the extent of about ¼ inches; the defendant, however, always had removed the logs when his mill was not working.

Held per Curiam, that under these circumstances the plaintiff was not entitled to an absolute injunction against the use of the stop logs.—[DRAPER, C. J., VANKOUGHNET, C., and SPRAGGE, V. C., dissenting.]

Beamish v. Barrett [In Appeal] 318

SCHOOL TRUSTEES.

See "Principal and Agent." 1.

SECURITY FOR COSTS.

On an application for security for costs, it appeared that the plaintiff, though a resident of Canada, was in such circumstances as not to be good for the costs of the suit, should it go against him; that other persons were greatly interested in the subject matter thereof; that the plaintiff's success would materially benefit them; and that the defendant had already

succeeded in an ejectment suit at law in respect of the same right on one of the grounds relied on by the bill; but there being no evidence that the plaintiff was actually put forward by the other persons interested to try the right, or that the suit was not brought entirely at his own instance: security for costs was refused.

Little v. Wright, 576.

SEQUESTRATION.

The claim of a debtor to compensation for misrepresentation of parties in obtaining a patent of land, is not liable to be seized, attached, or sequestered before the amount is determined by decree or otherwise.

Roberts v. The Corporation of the City of Toronto, 236.

SETTING ASIDE DEEDS.

[FOR WANT OF CONSIDERATION.]

1. An old man, greatly addicted to drinking, executed deeds of all his property, real and personal, to the tavern-keeper with whom he boarded, and he accepted in consideration thereof the bond of the latter for his support for life, which was an inadequate consideration. Within five months afterwards the grantor died; and, one of his heirs having filed a bill to set aside the deeds, the Court made a decree for the plaintiff with costs.

Hume v. Cook, 84.

2. Where a debtor died owing more than he had the means of paying, and a month afterwards his mother, who wished to pay all his debts, was induced to give her promissory note to one of the creditors for an amount which was less than one-eighth the value of her property, it was *held* that, in the absence of fraud, the note, though given without professional or other advice, could not be impeached in equity.

Campbell v. Belfour, 108.

3. A *fi. fa.* lands was placed in the hands of the sheriff, and, before the return day, the plaintiffs filed their bill in respect of property of the debtor fraudulently conveyed away. During the pendency of this suit the sheriff returned the writ "no

lands," and the plaintiffs thereupon issued an *alias* writ and delivered it to the sheriff:

Held, that the plaintiffs had not thereby lost their right to proceed with the suit in equity.

Stevenson v. Franklin, 139.

4. A person being embarrassed made a deed of land to his son in alleged pursuance of a prior agreement, but he remained in possession of the property, and kept the deed in his own hands and unregistered, for fifteen months; and there were other circumstances against the good faith of the transaction:

Held, that the deed was void as against subsequent creditors, the prior creditors having been paid.—*Ib.*

SHARES, FORFEITURE OF.

[IN BUILDING SOCIETY.]

See "Building Society."

SHERIFF'S SALES.

1. A debtor being a vendee of land and in default in paying the purchase money, a creditor obtained execution against his lands, and at the sheriff's sale became the purchaser of the debtor's interest for a sum equal to the debt and costs, and took the sheriff's deed accordingly:

Held, that he could not afterwards repudiate the purchase and claim his debt, on the ground that the debtor's interest was not saleable by the sheriff.

Ferguson v. Ferguson, 309.

2. A debtor executed two mortgages, a portion of the land comprised in one of them being comprised in the other, and his interest in all the land was sold under execution.

Held, that the sale was invalid.

Wood v. Wood, 471.

SPECIFIC PERFORMANCE.

1. Where a defendant denies an alleged agreement of which a plaintiff seeks specific performance, the defendant should claim the benefit of the Statute of Frauds in order to exclude parol evidence of the contract.

Butler v. Church, 205.

2. Continued possession by a tenant, coupled with acts inconsistent with a tenancy, is sufficient part performance to let in parol evidence of a contract of sale.

Butler v. Church, 205.

3. On a sale of land it was agreed that the purchaser should have the privilege of paying the price by doing certain chopping on other lands of the vendor's. No time was fixed for this work. On a bill by the purchaser for specific performance:

Held, that he was not to be treated as in default, so as to lose his right to specific performance, without proof of having neglected to do the work after being requested to do it.

Brand v. Martin, 566.

4. The plaintiff contracted to convey to the defendant a lot in Brock, for which the plaintiff was to receive a lot in Sydenham, paying $150, with interest, in four annual instalments, as the difference in value; the plaintiff conveyed the lot in Brock accordingly, but the defendant did not convey the lot in Sydenham, his claim to the lot being under a contract with the Crown, there being default in paying the purchase money, and another person claiming to be entitled to the patent; the defendant ultimately, however, obtained the patent, though there was a delay of several years:

Held, that the plaintiff was not entitled to a decree for the payment in money of the difference in the value of the two lots, but only to a conveyance of the Synenham lot, the time for his paying the $150 to count from the date of the decree.

Gray v. Reesor, 614.

5. The plaintiff *H.* being in possession of land belonging to the defendant and being entitled to retain such possession for another year, the defendant, in order to obtain immediate possession, agreed that in consederatic ereof he would give another piece of land to the plaintiff sband and wife, for the life of the wife, the husband further agreeing that he would look after and take care of the former property whenever the defendant was absent, and would, during winter, see to the defendant's cattle and stock. In pursuance of this agreement possession was delivered of the respective parcels, and the husband rendered some services, being all that were required of him. The defendant having afterwards brought an ejectment suit against the plaintiffs, the Court *held*, the agreement enforcible, notwithstanding the stipulation as to personal services to be rendered, and granted an injunction.

Hewitt v. Brown, 670.

STATUTE, CONSTRUCTION OF

A railway company having become insolvent, an Act was passed estimating the claims of creditors for land taken by the company at $30,000, and the value of the whole railway property at $100,000, and directing that $30,000 should be applied on debts for land and the balance of the $100,000 divided *pro rata* among the other creditors: the $30,000 proved more than sufficient to pay the land debts in full, and the company claimed to be entitled to the balance; but

Held that the other creditors were entitled to it.

In re Cobourg and Peterborough Railway Co., 571.

STATUTE OF FRAUDS.

The owner of land gave parol authority to an agent to sell, the agent accordingly entered into a parol contract for the sale, and communicated the fact and the particulars of the contract to his principal by letter.

Held, a sufficient note or memorandum in writing to satisfy the Statute of Frauds.

McMillan v. Bentley, 387.

See also "Specific Performance," 1.

SUBMITTING TO DECREE.

Where the defendant submitted by answer, to be redeemed on payment of costs, and made statements which, if true, would have entitled him to costs:

Held, that the plaintiff was justified in going to a hearing for the purpose of proving facts which entitled him to costs against the defendant.

Brand v. Martin, 566.

SUBROGATION OF RIGHTS.

See "Principal and Surety."

TENANT IN COMMON—CONTRIBUTION BY, TO PAY COSTS OF SUIT TO STAY WASTE.

Where costs were incurred by a tenant in common, suing on behalf of himself and his co-tenants, in restraining the committing of waste on the joint property by a stranger, it was

Held that, on its being shewn that the suit was necessary and proper, and that it resulted in benefit to the co-owners, they should share the expense, in proportion to the advantage they had derived from the suit.

Gage v. Mulholland, 145.

TIME OF ESSENCE OF CONTRACT.

Where lands which have a fluctuating value are the subject of a contract, time is, from the nature of the case, of the essence of the contract.

Sanderson v. Burdett, 119

TITLE, PROOF OF PLAINTIFF'S.

See "Injunction, 2."

TRADE, COVENANT IN RESTRAINT OF.

See "Covenant in Restraint," &c.

TRUST.

A widow of uncommon vigor of mind and strength of character, accustomed for many years to manage all her own affairs, and who owned property to the value of at least £25,000, incurred liabilities to the extent of £8,000; and the time of her indebtedness being one of great commercial depression, she could not raise money to pay, and was in danger of losing all she had by a forced sale; she had two sons-in-law who were persons of wealth and credit; her solicitor, without any communication with them, advised her to offer her property to them on terms which would make it worth their while to devote their time and energy to save a surplus for themselves; she, after some days deliberation, adopted this advice, and proposed to them that they should take all her property, except two farms with which she wished to provide for the only two members of her family, besides the wives of the two sons-in-law who had not already had large sums from her,; and the consideration which she proposed to the two sons-in-law, was that they should pay her liabilities and pay to herself an annuity: they with some reluctance accepted her proposal: the same was afterwards duly carried out, and she lived for seven years without making any objection to the transaction, though she was aware that they had made a considerable profit

TRUST PROVED BY PAROL.

TRUSTEES AND EXECUTORS.

TRUSTEE FOR CREDITORS.

USER.

See "Dedication."

VAGUENESS.

See "Pleading," 9.

VENDEE OF THE CROWN.

See "Equitable Estates."

VENDOR AND PURCHASER.

1. A vendor was insane, but not on all subjects: and apart from his delusions a stranger might not perceive his insanity; in the course of the negociation for a sale of land, he said to the purchaser that he was bewitched, which, it was shewn, was one of his delusions:

Held, that this statement was not sufficient indication of insanity to affect the vendee with notice of the vendor's condition.

McDonald v. McDonald [In Appeal] 37.

2. A person agreed with the two owners of oil lands for the purchase of certain lots at stipulated prices, and he was to have a certain time to accept. To facilitate this the real prices were to be concealed; one of the vendors was to write a letter purporting to offer the whole at an advanced price which he named, the intention of the other was not to appear, and he was to write a letter recommending the transaction. The project was successful; the property was bought, conveyed, and paid for. The lands having afterwards fallen in value, and the shareholders becoming acquainted with the private arrangement, the company filed a bill against the three parties for a rescission of the contract: and it was *Held* that the company were entitled to this relief, and to an order for all the defendants jointly to repay the purchase money.

Lindsay Petroleum Oil Co. v. Hurd, 147.

[But see this case in Appeal, *post* volume xvii., page 115.]

VENDOR'S LIEN.

On the sale of land notes were taken by the vendor for a portion of the purchase money:

Held, that the vendor retained his lien for the amount unpaid, although, in fact, the vendor did not intend to retain any lien; and one witness in the cause swore that "the notes were taken in payment of the land"—it appearing that there was no agreement or arrangement that there should be no lien.

Rachel McDonald v. Archibald McDonald, 678.

VESTED INTERESTS.

See "Will, Construction of," 1.

VOLUNTARY CONVEYANCES.

See "Purchase for Value," &c.

WASTE, INJUNCTION TO STAY.

See "Injunction," 2.

WILL, CONSTRUCTION OF.

1. A testator devised all his real estate to his two daughters and a grand-daughter "during their lives or the lives of any one of them for their support; and in the case of the marriage of any one of them, to those above-named remaining unmarried;" and after their decease the property was to be sold for the benefit of all his grandchildren. At the time of his death all were living and unmarried; subsequently one of the daughters married, but became a widow; then the other daughter died unmarried and intestate, and afterwards the grand-daughter married.

Held—[SPRAGGE, V. C., dissenting,] that on the marriage of the grand-daughter the property was to be sold and divided among the grandchildren.

Wight v. Church, 192.

2. A testator's will contained the following direction as to the residue of his properiy: "I give, devise, and dispose thereof as follows, that is to say: my will is, that my wife, *S W.* shall have full power and control over all my freehold and personal property; that she, my executrix, her assigns, for ever, may have unlimited power to deed, bargain, alienate, or transfer, for ever, all or any part of my said property; and further, any deed, transfer, or conveyance, made by my said executrix, for my said property, or any part thereof, shall be valid and sufficient to the purchaser and purchasers, his or

their heirs and assigns, for ever," and nominated his wife sole executrix of his will.

Held, that the widow took the residue beneficially.

Lyon v. Blott, 368.

3. A bequest was made to the son of the testatrix, payable on his attaining twenty-one, provided he continued a steady boy and remained in some respectable family until that time, with a bequest over if he did not do so. Without any reason being assigned therefor, the legatee enlisted and served as a private soldier in the army of the United States during the time hostilities were carried on against the then Confederate States:

Held, that the son by such conduct had not performed the condition upon which alone he was to be paid the legacy given by his mother's will.

Pew v. Lefferty, 408.

4. A testator, amongst others, made the following bequest, in favour of his housekeeper, "And further for her the said *H P*, to have her own free will to stay on the premises I now at this time enjoy and possess, and for her to have a quiet home and maintenance as long as she may think good to hold to the said privilege."

Held, that *H P* had not forfeited her right to the provision by merely ceasing for a time to avail herself of the intended benefit.

Hesp v. Bell, 412.

5. A testator by his will (as construed by the Court) gave to his widow his real and personal estate for life, with power to dispose of the personal estate at her own discretion during her life; and whatever of it remained at her death not so disposed of, went to a residuary legatee; the testator also authorized his widow and co-executors to lay out such sums as might be deemed necessary for the carrying on his business as a distiller:

Held, that the widow was not bound to convert the personalty into money; that her estate was not liable for debts due the testator, which she had neglected to collect, and was not accountable for the testator's furniture, which was not forthcoming at her death; nor for hay, grain, fuel, cart, and horses, left by the testator and used by the widow in continuing the business.

McLaren v. Coombs, 602.

The widow improved the property; *Held* that she was entitled to credit for so much only as was expended in completing work commenced by the testator.—*Ib.*

WILL, MORTGAGE AFTER.

Where a testator devised property and afterwards mortgaged it, and the personal estate was insufficient to pay the debts and legacies, it was *held per Spragge*, V. C., that the devisee of the mortgaged property was entitled as against the legacies to have the property exonerated from the mortgage at the expense of the personal estate.

Lapp v. Lapp, 159.

See also "Appointment under Power."
"Dower," 1.

WRITING, SUFFICIENT NOTE IN.

See "Statute of Frauds."

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