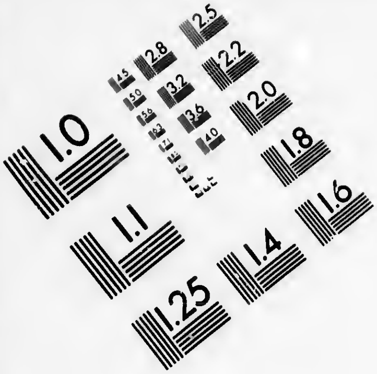

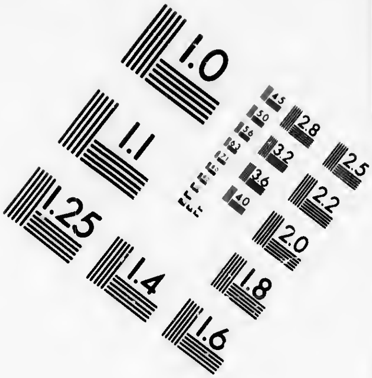

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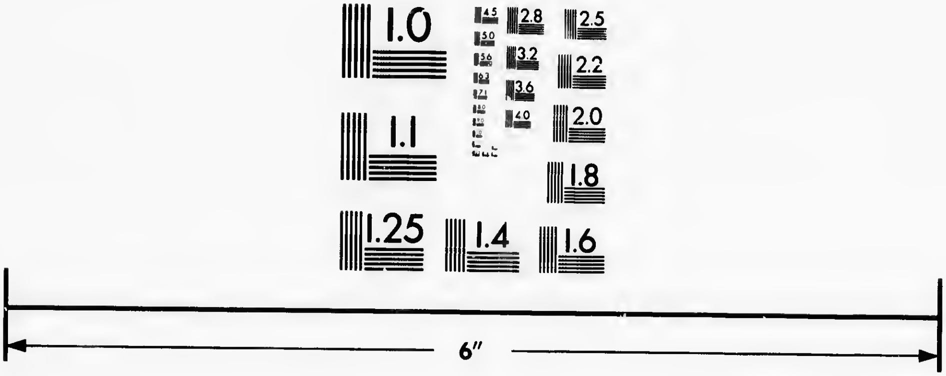

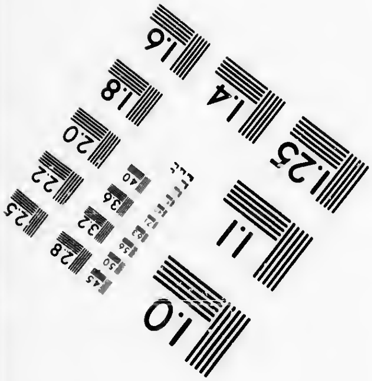

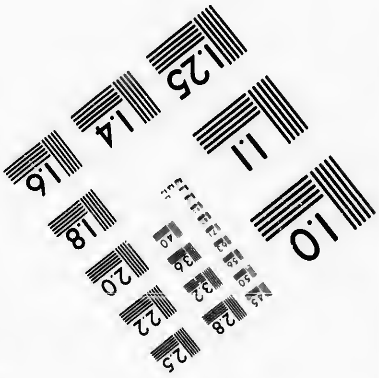

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In the Court of Appeal

For Ontario.

Appeal from the Chancery Division of the High Court of Justice.

BETWEEN

LOUIS AMEDEE DES ROSIERS, ASSIGNEE OF THE
ESTATE AND EFFECTS OF THE DEFENDANT
ROBERT WALLACE,

(APPELLANT) *Plaintiff*,

AND

ROBERT WALLACE AND ARTHUR WALLACE,

(RESPONDENTS) *Defendants*.

APPEAL BOOK.

PARKE & PURDOM,
SOLICITORS FOR APPELLANT.

FRASER & FRASER,
SOLICITORS FOR RESPONDENT.

London, Ont.:
ADVERTISER PRINTING AND PUBLISHING COMPANY.
1891.

In the Court of Appeal

For Ontario.

Appeal from the Chancery Division of the High Court of Justice.

BETWEEN

LOUIS AMEDEE DES ROSIERS, ASSIGNEE OF THE ESTATE AND EFFECTS OF THE DEFENDANT ROBERT WALLACE,

(APPELLANT) *Plaintiff,*

AND

ROBERT WALLACE AND ARTHUR WALLACE,

(RESPONDENTS) *Defendants.*

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In the Court of Appeal for Ontario.

BETWEEN

LOUIS AMEDEE DES ROSIERS, ASSIGNEE OF THE ESTATE
AND EFFECTS OF THE DEFENDANT, ROBERT WALLACE,
(APPELLANT) *Plaintiff*,

AND

ROBERT WALLACE, AND ARTHUR WALLACE,
(RESPONDENTS) *Defendants*.

STATEMENT OF CASE.

This is an action to set aside a deed as fraudulent and void as against creditors.

The action was tried at the Spring Sittings, A.D., 1890, of the Chancery Division of the High Court of Justice, at London, before the Honorable Mr. Justice Ferguson, when judgement was given for the defendants without costs.

The plaintiff thereupon moved the Divisional Court by way of appeal from such judgment on the fourth day of September, A.D., 1890, judgment being reserved and afterwards given, affirming the judgment of the trial judge.

The plaintiff therefore appeals from such judgment to the Court of Appeal.

STATEMENT OF CLAIM.

1. This action is brought under, and by the authority of, an order of His Honor Judge Davis, dated the 9th day of February, 1889, in the name of the plaintiff Louis Amedee Des Rosiers, assignee of the estate and effects of the defendant Robert Wallace, for the exclusive benefit of The Bank of London in Canada, creditors of the said defendant Robert Wallace, at the expense and risk of the said The Bank of London in Canada, and pursuant to the provisions of the revised statutes of Ontario, 1887, Chapter 124, intituled an act respecting assignments and preferences by insolvent persons.

2. The said Bank of London in Canada is a body corporate duly incorporated under the provisions of an Act of the Dominion of Canada, known as "The Bank Act."

3. The said Bank of London in Canada, on the 27th day of January, 1888, recovered a judgment in this Honorable Court against the defendant Robert Wallace, in a certain action against him for the sum of $3,473.31, being the damages, and $19.61 costs taxed, making together the sum of $3,492.92 which judgment is wholly unsatisfied.

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4. By deed bearing date the 9th day of September, A.D., 1876, the defendant Robert Wallace, the owner in fee of the lands hereinafter described for the therein alleged consideration of certain moneys advanced by his father, the defendant Arthur Wallace to, him conveyed a life interest in the said lands to the said defendant Arthur Wallace.

5. By deed bearing date the 17th day of February, 1886, the defendant Robert Wallace, conveyed the fee in the following lands, namely: That certain parcel or tract of land and premises situate, lying and being in the City of London, in the County of Middlesex, being composed of lots numbers 8, 11 and 12, according to a survey of lots numbers 11 and 12, on the south side of east Dundas street, and lots numbers 11 and 12 on the north side of east King street, in the City of London, aforesaid, made for one Robert G. Davidson, by Samuel Peters, P.L.S., said lot 8 having a frontage of 44 feet 9 inches on Colborne street, and said lots 11 and 12 having a frontage of 44 feet on King street, in the said City of London, to the said defendant Arthur Wallace.

6. The said deed in the 5th paragraph hereof was fraudulently executed to the end purpose and intent to delay, hinder and defraud the said The Bank of London in Canada, and all the creditors of the defendant Robert Wallace, and others of their just and lawful debts and demands, and with the intention as between the parties to the same of actually transferring to and for the benefit of the transferee, the fee simple in the said lands, and with full notice or knowledge on the part of the defendant Arthur Wallace.

7. At and prior to the said 17th day of February, 1886, the defendant Robert Wallace was in insolvent circumstances, or unable to pay his debts in full, or knew himself to be on the eve of insolvency, and the said deed referred to in the said 5th paragraph hereof was made by him with intent to defeat, delay or prejudice the said The Bank of London in Canada and his other creditors or give the defendant Arthur Wallace a preference over the said The Bank of London in Canada and his said other creditors, or at all events, the making of the said deed had such effect.

8. The said defendant Arthur Wallace accepted the said deed in the said 5th paragraph mentioned with the intent to defeat, delay or prejudice the said The Bank of London in Canada and the other creditors of the said Robert Wallace and with intent to obtain a preference over them.

The plaintiffs claim:

1. That the said deed of the 17th day of February, A. D. 1886, may be declared fraudulent, null and void as against the said The Bank of London in Canada, and that the same may be set aside or cancelled.

2. That the interest of the defendant Robert Wallace in the said lands may be sold to satisfy the claims of the said The Bank of London in Canada.

3. That the said The Bank of London in Canada may have such further and other relief as the nature of the case requires.

The plaintiffs propose that this action be tried at London.

Delivered this sixteenth day of September, A. D. 1889, by Parke & Purdom, of the City of London, in the County of Middlesex, solicitors for the plaintiffs.

R.W. to A.W. 1st deed life interest

R.W. to A.W. in fee

2nd deed fraudulent

R.W. Jun. innocent

A.W. accepted the fraud

Pts claim
deed void
land sold
further [illegible]

STATEMENT OF DEFENCE.

1. The defendants deny all the allegations contained in the plaintiff's statement of claim except as are hereinafter admitted, and the admissions herein made are made for the purposes of this suit only.

2. The lands in the statement of claim mentioned were purchased for the purpose and with the object and intention of providing a home for the defendant Arthur Wallace and his children during his life, and then to be held and enjoyed as a home for the children of the defendant Arthur Wallace.

3. That besides the defendant Robert Wallace, the defendant Arthur Wallace, has five daughters.

4. That after the purchase of said lands and with the object aforesaid, the defendant Arthur Wallace, expended large sums of money in erecting a house and other-necessary buildings and making other improvements on said lands, and the same ever since has been and now is occupied and used as a homestead for the defendant Arthur Wallace, and his children.

5. The conveyance of said lands was taken in the name of said defendant Robert Wallace, but were held by him on the trusts aforesaid.

6. The subsequent conveyances referred to in the statement of claim were made upon and subject to and in pursuance of the same arrangement and understanding, and the defendant Arthur Wallace now holds the said lands and premises for his own use during his life, and then for the use and benefit of all his said children for the purposes aforesaid.

7. The said The Bank of London in Canada were aware and had notice that the said lands were held on the trusts herein set out when the alleged debt or liability was contracted.

8. The defendants specially deny the allegations contained in the 6th, 7th and 8th paragraphs of the plaintiff's claim.

9. The defendants further say and submit that the children of the defendant Arthur Wallace, other than the defendant Robert Wallace, are necessary parties to this action.

10. The defendant Arthur Wallace, submits that in any event he is entitled to a lien on said premises for the moneys expended by him in erecting buildings and making improvements thereon.

11. The defendants deny all the allegations of fraud or fraudulent intent alleged against them in the plaintiff's statement of claim.

The defendants pray that this action may be dismissed with costs.

Delivered this thirteenth day of September, A. D. 1889, by Fraser & Fraser, of the City of London, in the County of Middlesex, solicitors for the defendants.

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[illegible]

EVIDENCE.

ROBERT WALLACE, sworn, examined by Mr. Purdom.

You are one of the defendants? I am.

When did you first go into business? In 1870.

Were you alone? I was in partnership for a few months with William Green.

How much did you put into the business? I put in about $1,500. Father advanced me $1,200, and I had some few hundreds of my own. My ledger would show about the amount.

How long did Green remain in with you? Only about six months. Then he retired.

What kind of business was it? Clothing business.

It was clothing and gents' furnishings? Yes.

How much did he take out of the business? He took out very little with the exception of what he drew during the time he was there for his living.

Since then you have been carrying on the business yourself? Yes.

His Lordship.—Was Green carrying on the business before you commenced? No, we formed it. We commenced together.

Mr. Purdom.—Did you make anything during the first three or four years? Yes, we did very well, and made money. Green retired and I continued it alone.

You had no one in partnership with you? No.

During the first three or four years you made money? Yes.

How much did you make? We must have made over $30,000.00 the first three or four years.

Do you mean yourself? Yes. The business was very prosperous the first three or four years.

Then it was about that time that you purchased this lot? In 1872 I think it was.

You went into business in 1870, and in 1872 you purchased a lot from whom? From Street and Beecher.

Is that the deed you afterwards got of it? (Exhibit A.) Yes, it was sold by Beecher, Street & Beecher the attorneys for this man.

Is the consideration correctly stated in that? I have no doubt so, yes.

And you yourself personally paid $2,322.37? I paid that amount.

After that you built on the property? The lot was bought for a homestead, and father and myself combined and built on it, father supplying most of the funds for the house.

How much did you supply, and how much did he supply; produce your books and show us? (Books produced.) I put into the building, land, building, furniture, all fittings to make our home complete, the amount of $6,328.10. Of that amount there would be probably over $2,000 for furniture and ornaments and fitting up the place.

You put into the house over $4,000? No, that is the whole thing.

You have no record of what your father put in? No; he gave me money and I paid it out to the contractors, about $4,000.

You and your father had a conversation then what was to be done, as to how the title was to be taken? No, we did not.

No conversation whatever? No, not a word between us as to the title.

Nor whether it was to be to your father for life, and on his death to the rest of his children? No. At the time when the whole thing was paid for I made father a life deed in the thing and

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#[illegible] paid [illegible]

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[illegible]

nothing [illegible]

charged all the money I had put into the estate to my own personal account. We started the thing as a homestead, and it was a gift to them on my part entirely. After everything was paid for I charged everything to my personal account, withdrawing it entirely from my assets.

That is the deed you made at the time? In 1876, yes. We agreed to build the place together as a homestead for the family. Father left the thing entirely to myself in the way of arrangements, and I took all the active work of the thing, my place of business being more convenient then, and he let everything go through my hands. The whole business was done by me, he supplying the money as the contractors would call for it.

HIS LORDSHIP.—You mean your father's family? Yes. I am not married and have no family.

Do you mean to say you gave it out and out, not retaining any interest for yourself? None whatever, only while I should reside with my father and live in it as one of the others.

MR. PURDOM.—The house had been built prior to the time of this deed? I think it was

After the house was built, and in consideration of the advances your father had made, you made a conveyance to him for life? As soon as the place was finished and paid for, I thought it would be right to make some disposition of the things so that the nature of the trust would be shown, and without consulting anybody I called on my solicitor and asked him to make a life interest to my father. I supposed the fact of my having withdrawn the thing entirely from my statements, and giving him an interest in it, and holding the other deed myself, it would show the nature of the trust, that it was a homestead, and intended for that.

When you made that deed you made all that you supposed you had to do for your father? Well, I did not consider anything about that. I knew the place was built for a homestead only, and for no other purpose. There was never any discussion about it.

You were living with your father? Yes. My father advanced me money to start business in, and I was then in a position to assist him to build a home for his family, and I did so.

Was your brother James living with you then? I could not say. He may have been.

Is he living now? Yes, but he is not here.

How many of your sisters were at home at that time? Four of them, I think.

How many at home now? Four daughters and a granddaughter.

And the other is married since? Yes.

Your father never said anything to you about this? Indeed, I did not give it to father for a long time after having made it out. I kept it in my own safe, and thought so little about it that it lay there for a long time.

Did you have any conversation with him? No, sir; not till after I gave him that.

Am I to understand that at the time this deed was made your father did not understand that you had so made it? Oh, yes; I am sure of that.

And you and he had no conversation whatever? No conversation whatever.

You are positive of that? Yes.

You were examined before and said "in 1876, after it was finished and I think all the accounts paid up, I transferred it to him; he insisted and said as the thing was a trust for the family that he should have it in his name"? Yes; as soon as he saw the deed, but he did not see the deed at that time.

"And I transferred it then to him and gave him a life interest in it"? No. Will you read that over again.

"In 1876, after it was finished and I think all the accounts paid up, I transferred it to him; he insisted and said as the thing was a trust for the family that he should have it in his name, and I transferred it then to him and gave him a life title in it"? That, I think, does not read

Hotel was remodeled

House and printing

had been

as the examination occurred. It seems to me the examination does not follow in regular rotation. There is some breaks in that. That is the first examination, and there seems to be some breaks in it. I could not have said that, because we had no consultation about this deed till after I handed it to him.

When was that? Some years after it was made out.

What was the understanding between your father and you? It was that we were to build a homestead for the family which was to be occupied as that while the family held together. That was the only understanding.

After your father's death? It would still remain a homestead for those who stayed at home. That was the way it should have been.

Would your father have a right to make a will? I suppose he would. He has other property as well as this.

Were you to make a deed of gift at that time to your father? At the time the property was built we had no definite understanding. When I made him this life deed he said it was not right, that as head of the family the deed should be in his name. That was after the deed was drawn.

How long after? Two or three years after. I held the deed in my possession for some time without showing it to him. As soon as he saw the deed he objected at once, and said that was not as he would wish it, that as head of the house he wished to have the thing in his own name, and I agreed at once to make it so.

This was about when? The deed was made in 1876; it would be two or three years after.

In 1878 was the first definite promise that passed from you to your father to give him an absolute deed? About that time afterwards. The first conversation that occurred between us I agreed to give him the deed. It made no difference to me. It was a trust between us, and it made no difference to me whether he held the title or whether I did.

He never paid you the money that you put in the building? No. I gave him that money.

After 1876 how did your business prosper? I may say that after making that transfer my estate showed a surplus of between $21,000 and $22,000.

HIS LORDSHIP.—Was it after the transfer in 1886 that you had the surplus? The surplus I speak of was after the amount was charged to myself. After paying for everything I had that surplus, and not considering that amount at all, taking that out entirely.

MR PURDOM.—After that you continued on in the business? I did.

Did you from 1878 till 1888 make any more money than you spent? No sir.

You went behind during those years? I went behind very severely some of the years.

Tell us each year how much you went behind for the whole period of ten years? I lost very heavily in outside investments during that time.

HIS LORDSHIP.—From many causes you went behind? Yes. In January 1886 my estate showed a surplus of $9,754 52.

MR. PURDOM.—You made an assignment for the benefit of your creditors when? In 1887; I think it was August 1887.

Was there any material variation of your business between January 1886 and August 1887? During the last examination I said that I thought probably it was not very much different. I see that in——

Brushed your memory up since? You wish me to speak from memory; I did not have my books here then. In September 1887, before the failure of the Ontario Investment Association my estate showed a surplus of $8,258 62.

Homestead.

made nothing from
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went security be [illegible]

His Lordship.—Was your father a creditor of yours at all? Only on one note on which he collected a small amount.

He endorsed for you? Yes.

Did you owe him money apart from your business? He made no claim.

Did you owe him money? He had advanced me $2,000 at different times in my business.

Did you owe your father money the same as you owed other creditors? I did not consider I owed him the same as the other creditors. He advanced me $1,200 when I started business I think, and then afterwards he advanced me $800.

That was given to you as a son? Yes, he never made any claim on me for it.

Then your father was not a creditor? No.

Mr. Purdom.—Except for the $700 or $800 to the Bank of London? He paid $750 which he endorsed to the bank.

And he would be a creditor of yours for that amount? He ranked on my estate for that.

Mr. Gibbons.—Money he paid since the failure? Yes.

Mr. Purdom.—And he was liable on that note straight along, and has been for some years? That was only a three months' note.

He had endorsed for you? Yes, for a while.

For several years? Yes, I think that year probably.

Prior to your failure? Yes.

His Lordship.—He had not paid anything till after the assignment? It was not due till after the assignment.

What was this amount? $750.

He paid that? Yes.

Mr. Purdom.—After your assignment? He paid that to the Bank of London.

Did you between 1876 and the time of your assignment frequently get extensions from your creditors? No, no more than the ordinary way. In 1876 I did not need extensions; I had a large surplus in my business.

When did you first get notes renewed? I could not tell you that. I was trading with one house to a very large extent, and I would remit them on account, and very often my interest account would be in excess. I was making interest in those days.

Come up a little nearer when you had a few close years? I may have had to renew then.

You did not meet your obligations? No, I would renew occasionally.

Common thing to renew? Not very common.

Did you ever get any extension from your creditors as a whole? No. Any house I was trading a good deal with, they would renew the note if I asked them to do it.

What have you lost since the first of January, 1886? First of January 1886, the years' business of 1886 and 1887, showed a loss of $733.12. Our stock taking was at the end of the year.

That is for one year? Yes.

That was till what date? That was up to the end of January 1887.

What did you lose between January 1887 and your assignment, August 1887? The difference between the balances at September 1887, and the end of January 1887, is about $500. January 1887, and September 1887, the difference between those dates when stock was taken after the assignment.

With those two exceptions, the $700 and $500, your assets would be in the same condition in August 1887 as they were in January 1886? I presume they would

Father a Creditor

He ranked as a Creditor

Renewals

[illegible]
[illegible]

Mr. Gibbons.—Not as to value? No, not as to value. The stock was taken and the books were closed in September.

His Lordship.—From that you know about the time of the assignment you were about $500 worse than in January, 1887? Yes.

Mr. Purdom.—With those two exceptions, the $700 and $500, your assets would be in September, 1887, in about the same condition as in January, 1886? Something about the same.

His Lordship.—The $733 and the $500 added together would show the difference between the value of the estate at the time of the assignment and January, 1886?

Mr. Gibbons.—That is, the book value? Yes.

Mr. Purdom.—The only thing that occurred during that time was the failure of the Ontario Investment? That and the failure of the Bank of London, which drew away the support I had been having from it.

How much stock had you in the Ontario Investment? I had 100 shares, 50 paid up.

That would represent? It cost me over $4,500. I had wiped off an amount of it in order to bring the stock to the market value.

What were you carrying it at in January, 1886? At $3,500.

By the failure of the Ontario Investment you had lost this $3,500? Yes.

His Lordship.—In January, 1886, you were carrying stock of the Ontario Investment Association which you valued at $3,500? Yes.

This resulted in a loss? Yes. The Bank of London had been holding that as collateral for my loans.

Mr. Purdom.—And that was the only security you had beyond your personal security? Beyond father's endorsement for a certain amount.

For the $700? Yes.

When you made your assignment in 1887, what was the statement of your assets and liabilities submitted by you? This is the statement: my liabilities were $25,800.

What was the date of that statement? September. This was after stock taking.

September, 1887? Yes. Merchandize, $19,184.92; open accounts, $3,310.20; real estate, $6,000.

How much were the assets? $28,500, not counting the Ontario Investment.

The Ontario Investment was not counted as an asset at all? No.

Liabilities $25,800 and your assets were $28,500? Yes.

Showing that surplus of $3,000 or $4,000 you made an assignment on account of the loss of $3,500? My creditors in Montreal, as soon as they saw the failure of the Bank and the Association, wrote me to come down with a statement of my affairs. They insisted it would not be possible for me to pull through and meet those amounts, as they no doubt would be demanded, and they insisted on my making an assignment.

And the only difference was between the $2700 and the $3,500? Yes; about that.

What did your estate pay on the dollar when it was wound up? It is not wound up yet. They hold still my real estate and other things.

How much has it paid? It has paid about 45 cents.

How much more can it pay? I have no idea

Do you think there will be five cents more got out of it? I could not say. Of course if they could realize on the property there would be a great deal more. I cannot tell you.

You won't risk an opinion as to whether there would be or not? No.

Up to date, two years, nearly three years after the assignment was made, all they have been able to get out of it is 45 cents on the dollar? I think so.

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What became of your estate? who got the part of it that was sold? My estate was advertised in the usual way very extensively, and it was bought in by chief creditors, and continued on under the name of my brother-in-law since.

What is your brother-in-law's name? Mortimer.

His wife would be entitled to a share in this property? His wife does not live at home.

She would not have any interest in the property at all? Not under present circumstances; no.

You are carrying on business to-day at the old stand in your brother-in-law's name? It is being run in his name.

And you are running it? Yes.

Neither I nor anybody else would know but it was the same old establishment? I wish you could have shown a way to get out of it.

You did not lose anything by the Bank of London? Except the support that I had been receiving from them, which was withdrawn, and my security was withdrawn.

Your security was not good without the support of the Bank of London? Not good without the security they were holding for me.

The Ontario Investment was the cause of your failure? The Ontario Investment and the withdrawal of the support of the Bank of London.

And the class of assets you had at the time of your failure is the same kind as you had for ten years prior? Yes; stock and book debts.

You made this deed in 1886, on the 17th of February? Yes. (Exhibit C.)

You went to the solicitor's office and had it drawn up? Yes; went to the same solicitor that drew the first deed.

Told him the same story? I told him nothing. I told him simply I wanted the property transferred to my father. He objected to it that I wanted it in that way, and I told him to do it.

You told him the same story you have told us to-day; did you tell him it was in trust for the family? I do not remember that I did.

Will you say whether you did or did not? No.

Why did you make that deed? Because I promised my father to do it. It was simply neglect that it had not been done years before.

And notwithstanding the fact that you had made that when it was fresh in your memory, the deed in 1876, you made that when it was fresh in your memory? I made that deed immediately after the place was finished.

Ten years after when you were insolvent? When father wished the thing different I agreed to do it, and it was simply neglect that it had not been done long ago.

Hadn't you just as good a right to it as he had. No. I did not suppose it made any difference in whose name it was when I made the deed, because it was understood it was a trust for the family, and I had no interest in it except as one of the family. I considered it a free gift to my father, and never looked at it in any other way.

To your father? To the family as a homestead.

What interest were you to have in it? I was to have none except as one of the family. I never paid any board.

Take your sister Mrs Mortimer, would she have any interest in it now? No. She don't live at home

Your other married sister? She is living at home now.

She was not living at home then? No

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Would your brother James have any interest? No, not while he was away from home. It was simply to be a place for the family to come to.

There was nothing defined? No.

The real fact of the matter was that that house was built like every other house, intended it to live in? Yes. It was intended to be used for that purpose and none other. There was no other understanding arrived at. Father left the thing entirely to myself, and I looked upon it just the same as if I had paid the money out of my pocket——

I asked you before what caused you to make that conveyance in 1886, because he was not satisfied before, and as head of the family he claimed that he should have a right to it, and he said he thought it should be in his name? He objected to the life deed all the time, he said he should have the thing in his name as head of the family, and I agreed to let him have it in that way, and I agreed to it at once.

And if your estate had been wound up at the time you made that deed it would not have paid 100 cents on the dollar? I am not prepared to say that. If I were allowed to wind it up myself I think I could have got out of it.

As a matter of fact you have had a shortage of $15,000 in paying up 100 cents on the dollar? As soon as it went into the hands of the assignee I had no control on it.

So far the assignees have only paid about 45 cents on the dollar? That is about it.

That would leave $15,000 still unpaid? I think so.

What assets are there to make up $15 000 or the half of it? I do not say the assignee could have done so. If allowed to wind it up myself I have no doubt I could have done so.

What assets are there? The property is untouched yet I understand.

Is it unencumbered? Yes.

His Lordship.—What do you mean by saying if you were allowed to wind it up yourself, do you mean if you were allowed to carry on the business? Yes.

Supposing you stopped the business and took the existing assets for the purpose of releasing the amount to pay debts? Possibly I could not have realised immediately, but in a reasonable time I think I could.

If the assets you had in 1886 had been released by you as best you could in a reasonable time, that is, without carrying on the business, what is your opinion as to their paying the liabilities? To stop the business at that time it would be hard to say. A business running could be realised upon to a greater extent than one stopped. I meant if I were allowed to continue and dispose of the stock, if I had been allowed to continue for the purpose of winding it up.

In 1886 if you had simply made up your mind to wind up your business in a business way, that is, continue it and get rid of your stock for the purpose of winding up only, you are then of what opinion? That I could have paid everybody.

But it would have been different if you had stopped the business? Yes, We could not realise on them to the same extent.

Mr. Purdom.—Any ? a year afterwards your heaviest creditors thought it was impossible to continue? Thought it would be unfair to allow the Bank and Loan Company to get their share out before the other creditors were paid.

Are you now carrying on the business for the creditors or for your brother-in-law? In my brother-in-law's name, and now being wound up. Any money made goes to the present estate.

He is the actual assignee then? Not for the benefit of the old estate, for the benefit of the present estate In regard to this sale I may say that I am endeavoring to make a sale of my

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business, and I base my calculations on the arrangement I am now making, run it down to a certain amount, and I have parties willing to take it at a price——

His Lordship.—At the time of the assignment you assigned all you had to the creditors? Yes.

Mr. Purdom.—Gault Brothers will get the benefit of any money made and on the difference in the value of the stock? I do not understand. If there were any money being made now I would probably get the benefit of it.

How much are you getting for your services? Drawing $900 a year.

Who do you get your goods from? Gault Brothers mostly, but from different houses.

What estate do you mean would get the benefit of it? The present estate.

The Bank of London and other creditors would get a share of it? No. If the business were paying the profit would go to myself, and in that way I would be able to pay my back bebts, but as it is not paying I have to close it up, which I am endeavoring now to do.

How much did you owe Gault Brothers? The money won't go to Gault Brothers more than the share of the new goods.

You are carrying it on for Gault Brothers? Oh no. They bought the stock.

If you sell the business out now at a good price who will get the benefit of any profit on it? It would come to me if there was any profit on it.

Cross Examined—By Mr. Gibbons,—

You say that about $6,000 was put into this property, that about $2,000 of it went into furniture? Yes.

You have lived with your father always? Yes.

Your sisters living there too? Yes.

You are unmarried? Yes.

Have you ever paid any board these 20 years? No.

Who kept the house? Father. And I gave what assistance I wanted to my sisters.

You have lived there without paying any board? Yes.

When you put this money into this property and this furniture, did you ever count it afterwards as an asset of yours? Never, never after 1876.

Was anything that was put into this property included in the balance shown in January, 1876 of $21,000? None of it.

Have you ever counted as an asset since 1876 anything that you put into this property or furniture? Not one cent.

Then the $21,000 which you showed on the first of January, 1876, was entirely clear from this? Yes.

You did not count this as an asset at all? No, nor never have since 1876.

Did you render these statements to your various creditors? At the time of the transfer I explained to my creditors what I had done.

Did Gault Brothers know this money had gone into this? They did.

At the time? Yes.

Have you been giving them statements these 18 years? Yes, not every year but from time to time.

Was anything put in that statement as being an asset comprised of this property? No.

Written off at the time? Yes.

There is an item carried over of real estate of $6,849.76; is that this real estate? No.

Where was that other property? Property owned by Reid.

In November, 1876, you wrote off from your assets this $6,300? Yes.

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Charged it to yourself? Yes, in the next statement.

The real estate had been disposed of in the meantime? Yes.

On the 31st January, 1879, you had no real estate? None.

So that has been continued ever since year after year? Always.

There is no question whatever that since 1876 you have never treated this as your property? No, nor my creditors never expected anything of it. They understood it thoroughly at the time.

Did you give them a statement in writing? Yes.

Mr. Gibbons.—We have given notice to produce this and I will give secondary evidence of it.

Mr. Gibbons, to Witness.—In this statement did you give them a statement of your assets and liabilities? I gave them an approximate statement.

When was it you opened the account with the Bank of London? In 1884, I think.

You gave from your books a statement of your assets and liabilities? Yes.

In those assets was any interest in this real estate included? None whatever.

And never has been in any statement since that time? No.

I believe Mr. Taylor, president of the Bank of London, was also managing director of the Ontario Investment Society? Yes.

The Ontario Investment cost you $4,600? Yes, over $4,500.

You paid how much premium for it? I first went into the Equitable, and then I exchanged some other stock for it.

His Lordship.—The Equitable was merely nebulous? Well, I paid some good money for it.

Mr. Gibbons.—When you took it at $3,500 you wrote it down at the market value of the stock? Yes.

What you owed the Bank of London was really in connection with that stock? That was what induced me to go into the Bank of London. I wished to dispose of the stock, and Mr. Taylor asked me to do it, and on that account I was induced to transfer it.

That is how this indebtedness was produced? Yes. The Bank of Commerce objected to this Investment security, and Mr. Taylor advised me not to dispose of it, and said he would get the loan from the Bank of London.

When the Ontario Investment failed did the Bank of London press you to pay up? The Bank of London failed themselves.

Then your creditors felt it would be impossible to pay off this money? Yes.

Was there ever any intention in making this conveyance of defrauding your creditors? None whatever.

Did ever any such idea enter into your head? It never occurred to me that I had any interest in it. I do not suppose a creditor that was on my books had any idea they had the least claim on that thing.

The statements between 1876 and 1886 did not include this property? No.

Never was counted as your asset? No.

You have always lived together as a family? Yes.

And still live together? Yes.

Your father put into this property about $4,500? I think that was the amount.

Have you any idea of the present value of the property? I could not say. It seems to me if it was sold to-day it would not realize more than $6 000.

The rest of your creditors refused to have anything to do with this action? Yes. I wrote

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telling the inspector of the contemplated action of the Bank of London, and he replied saying they were quite satisfied.

Gault Brothers were creditors for $19,000? Yes.

And they refused to join in any action? Yes, and they understood the position.

Re-Examined By Mr. Purdom.—

Gault Brothers are the same firm that bought in the stock, and still make money out of you as a customer? I would be very glad if they did. They lost money on me.

$6,000 you still thought was the real estate of Nathaniel Reid's? I held real estate Reid's place where the Federal Bank bought afterwards. That was his interest in it.

In charging this money to yourself you were the only person interested in it? Yes.

And you kept the accounts of your business by itself and not of your home; you did not put the money amongst the assets that you had invested in the home? I charged up everything to real estate till it was paid for, and then in one lump I charged it all back to myself. Instead of giving my father the cash I built the place and done the active work, and then charged the amount back to my own account.

In making up your assets and liabilities you did not include that? No.

It formed no part of your business assets? No.

You had no partner? No.

It did not matter whether you charged it to yourself or not? It made a difference to my creditors.

You spoke almost as if you were living with your father on charity? Oh no, I did not.

What have been your expenses a year? My expenses would be in the neighborhood of $1,000 to $1, 00.

Do you keep any account of it? Yes.

Give us the heaviest year you had and the smallest year you had? In 1883 it was a little over $1,000.

Now give us the heaviest one; that is the smallest? No, that is 1883.

Give us the heaviest and the smallest? I will have to go through from the time I started business, 20 years.

Pick me out the largest one? Next is about $1,200. I think you will find they run in that neighborhood all through.

You said they would largely exceed that on some occasions? They probably would exceed that some years. In 1885 it is $1,074.

You kept fast horses? I have never kept fast horses.

Kept a pretty good turn out? Yes, a family horse.

Have you given me the largest year that you have there? No, I do not know that I have.

Give me the largest year that you had? Perhaps I will have to go back 15 or 20 years.

I think you know pretty well where the expensive years would come in?

Mr. Gibbons.—I do not think you need trouble to show that.

Mr. Purdom.—Your account with the bank commenced in 1884? Yes.

And since then you owed them about $5,000 or $6,000? Yes, it would run about that.

Mr. Gibbons.—Always supposed to be secured? It was secured up to a certain amount by this Ontario Investment collateral. I think the amount was $7,500, and all above $6,000 father's endorsement; it might have been $6,500

Practically all secured? Yes.

The losses to the bank is because of the Ontario Investment? Yes, entirely. They considered it a good account at the time.

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ATRHUR WALLACE, Sworn, Examined by Mr. Purdom,—

You are one of the defendants? Yes.

You and your son built a house together? Yes.

On the lot in question; who owned the lot? I did. The lot was purchased for me.

Who paid for it? My son.

And you owned it? Yes.

After he paid for the lot who got the deed of it? I could not tell you anything about the deed for years after.

After the lot was bought who got the deed of it? My son; I left the whole transaction of the business to my son. He was to get the deed out and do everything about it.

You know that he did get it in his own name? I did not know for eight or nine years after.

You had some implicit confidence in him? Yes.

Did you have any conversation with him in the year 1876 or about that time; you have seen that deed to you before, the deed to you for life? I did not see it for eight or nine years after the property was purchased. He brought it to me one evening, and when he told me it was for my life I gave it back to him and told him I would not take it.

Didn't you about the time the deed was made have a conversation with him? I speak to my son most every day that he is home.

When did you first hear of the deed in 1876, the deed of the life interest? I told you before that it was eight or nine years after the property was purchased before I knew anything about it.

Do you mean eight or nine years after 1872 or after 1876? I could not tell you when it was made.

It was made in 1876; when did you first hear of it? It was some time after that my son handed me that deed, and I gave it back to him.

How long after? I could not tell you, because I never kept account of those things.

Some time after 1876? Yes.

Your son said this on one examination, "in 1876 after it was finished and I think all the accounts paid up I transferred it to him——"

HIS LORDSHIP.—You can call to his attention the evidence or the effect of the evidence his son has given now. You can use the examination of the son in cross-examining the son; I do not know that you are at liberty to say to a witness that his son on a certain examination said so-and-so unless the son has now said that is correct.

MR. PURDOM.—Might I not read a statement regarding it and ask him if it is true.

HIS LORDSHIP.—When you are at liberty to lead the witness in his examination you can read a statement to him and ask if it is true. You are not at present authorized to lead. There is a late English case in regard to that; whoever calls a defendant is not at liberty to lead until he gets a ruling that the witness is adverse. It is sometimes assumed that when you call an opponent he is necessarily adverse, but that is not necessarily so. You put the witness in the box as a good witness, and examine him like any other witness If he proves an adverse witness then you get the ruling. At all events the case binds us now. It is beyond all doubt.

MR. PURDOM, to witness.—You say that you never saw for some years after the deed of 1876? I did not.

You cannot tell us what year you saw it in? No, I cannot say.

How much did you put into the house? I put in between $4,000 and $5,000

And the whole thing cost between $8,000 and $9,000? I could not tell you. My son kept account of it

Son bouquet

Now, the intention was that you were going to build a home? Yes.

You and your son were living together? Yes; and we are living together yet.

It was to be a joint home? No; nothing of the kind. It was to be a home for me and my family.

He is one of your family? Yes.

And he would come in for a share of it with the rest of the family? It would all depend on myself who I would will it to.

There was no trust then? There was no trust as far as I was concerned.

It was to be yours absolutely? Yes; I could do what I liked with it.

Your son did not appear to understand it so? I do not know what he understood.

In 1886 were you present when that deed was drawn? I was not. I was not present when any of the deeds were made out.

Were you present when the instructions were given? No.

In any of them? No.

Are you satisfied with the deed now? I am satisfied now.

You are satisfied when you got a deed of the whole thing? Yes; I think my son had a right to give me everything he liked. If I had the means myself I would not ask him for a cent, but I had not the means and he furnished the money together with myself.

And now you say he gives it to you absolutely in 1876? Decidedly.

The deed ought to have been made out in the first place the same as it is now? Yes.

Then your defence talking about it being in trust for the family is not correct (reading clause 6 of defence); is that correct or incorrect? That is not correct, as far as I know.

You do not know anything about that even? No.

Know nothing about the instructions for the defence? No; because I thought my property was my own and I had a perfect right to it.

Then its being to you for life and then to be held in trust for the benefit of the children is not correct? It does not suit me.

You want the whole thing? Decidedly I do.

What interest have your children in the property? No interest, only what I give them.

Then the 9th clause setting up that they are necessary parties to this suit is a mistake? I do not know whether you would call it a mistake or not. They have no interest in that property except what I give them.

Then the story is this: in 1872 your son bought the lot and paid a little over $2,000? The lot was purchased by auction. I went with him to buy the lot. It was knocked down to him, and then he transacted all the business after that. He paid the money himself.

In 1874 he got a deed in fee in his own name? I do not know anything about that.

In 1876, you allowing him to do all the business? I did.

He made a deed by which you became the owner for life, and at your death it was his? I know nothing about that.

In 1886 he makes a deed of the whole thing to you? He takes me that deed for my life and gave it to me one night some years after it was made out, and I handed it back and told him I would not take that, I wanted it made out in my own name without putting any life in it.

Did you give him anything for the money he had put into it? Nothing. I advanced my son money when he started business.

Was it to be for the money you had advanced to him? It was not for anything. I advanced it to him the same as any father to a son when he started business.

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Was the deed to pay you for the money advanced? I know nothing about it. I know nothing about who made the deeds out, and never saw them till recently.

You trusted your son to do everything? Yes, and would trust him to-day.

And you did not ascertain for many years after that it was in your own name? I did not.

And you did not pay your son back the money he put into the house? I did not.

Gave no value for the deed? No; only to put my money into the property the same as you would if you were building a house.

CROSS-EXAMINED by Mr. Fraser:

Your son has lived with you for many years? He has lived with me since he was born.

And still lives with you? Yes.

He is not a married man? No. He makes my house comfortable when he comes into it.

This land was purchased at an auction sale? Yes.

You and your son were both there? Yes.

And you left the transaction of the business to him? Yes.

When did you first hear of a deed being made at all? I never asked him when the deed was made out.

When did you first see a deed? The only deed that I did see till recently was that deed that was made out for my life.

What did you say when you saw that? I gave it back to him; I would not take it because it was not in accordance with the understanding at the time.

And that was the first you knew of it? Yes.

And you would not have it at that time? Decidedly not.

You always supposed you owned that property? Certainly.

Did you do anything with it since you got it? We have been improving it all we could.

How was it assessed? It has been assessed in my name for years, and is assessed to me now.

And always was? Yes.

Did you do anything else with it, signing any paper? Not as I know of.

No occasion to make any wills? I made a will some seven years ago before my wife died. I think I have got it here. I was very angry and I made a will about seven years ago, and I willed it to my wife while she lived. (Witness produces will.)

Who drew the will? William R. Meredith.

On that occasion you undertook to deal with the property? Yes.

Is this particular property specifically mentioned in this will, the King Street property? Yes, it is.

When was it made? 16th of March, 1883.

That will was executed at that time? Yes. I divided the rest of my property, real and personal, between my children.

So that you had it in your mind then that you owned this property at that time? Why decidedly.

And had the right to dispose of it as you thought fit? Yes; I could will it to you if I wanted to.

RE-EXAMINED, by Mr. Purdom:

I suppose the assessment to you would be quite right, as you owned it for life? Yes. I owned it for life, and after my death I suppose some one else would own it.

You did not know anything about the defence put in to this action? I did not know anything about it.

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Your son Robert has done everything? Yes, my son Robert and his attorney did everything. I very seldom be in a court of justice. I guess this is the second time in my life.

Close of plaintiff's case.

Mr. Gibbons.—We have just two witnesses, the book-keeper to prove that this was taken out of the assets, the $6,300, but that seems to be admitted, and Mr. Smart the manager of the Bank, but I do not think I will call him.

Mr. Purdom.—If there was a statement given we cannot find it.

Mr. Gibbons.—The manager of the Bank says there was a statement given.

EXHIBITS.

EXHIBIT "A."

This Indenture, made in duplicate the twenty-first day of February, one thousand eight hundred and seventy-four, in pursuance of the Act respecting short forms of conveyances,

Between Robert Gibson Davisson, of the City of San Francisco, in the State of California, one of the United States of America, merchant, of the first part, and Robert Wallace, of the City of London, in the Province of Ontario and Dominion of Canada, merchant, of the second part:

Witnesseth, that in consideration of twenty-three hundred and twenty-two dollars and thirty-seven cents of lawful money of Canada, now paid by the said party of the second part to the said party of the first part (the receipt whereof is hereby by him acknowledged), he, the said party of the first part doth grant, release and convey unto the said party of the second part his heirs and assigns forever:

All and singular that certain parcel or tract of land and premises situate, lying and being in the said City of London, being composed of lots numbers eight, eleven and twelve, according to a survey of lots numbers eleven and twelve on the south side of East Dundas Street, and lots numbers eleven and twelve on the north side of East King Street, made for the said Robert G. Davisson by Samuel Peters, Esquire, Provincial Land Surveyor, (the said lot eight having a frontage of forty-four feet and nine inches on Colborne Street, and the said lots eleven and twelve having each a frontage of forty-four feet on King Street),

To have and to hold unto the said party of the second part, his heirs and assigns to and for his and their sole and only use forever. Subject, nevertheless, to the reservations, limitations, provisoes and conditions expressed in the original grant thereof from the Crown.

And the said party of the first part covenants with the said party of the second part that he hath done no act to encumber the said lands.

And the said party of the first part releases to the said party of the second part all his claims upon the said lands.

In witness whereof the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered
in the presence of
Sd. CECIL BROWN.

Sd. ROBERT GIBSON DAVISSON. [L. S]

Received on the day of the date of this Indenture from the party of the second part the sum of twenty-three hundred and twenty-two $\frac{37}{100}$ dollars, the full consideration money mentioned.

Witness:
Sd. CECIL BROWN.

Sd ROBERT GIBSON DAVISSON.

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EXHIBIT "B."

This Indenture, made in duplicate the ninth day of September, in the year of our Lord one thousand eight hundred and seventy-six, in pursuance of the Act respecting short forms of conveyances,

Between Robert Wallace, of the City of London, in the County of Middlesex and Province of Ontario, merchant, an unmarried man, of the first part, and Arthur Wallace of the same place, insurance agent, of the second part;

Whereas the party of the first part is the owner in fee of the lands and premises hereinafter described,

And whereas in consideration of certain moneys which the party of the second part advanced to the party of the first part, the party of the first part agreed with the party of the second part to convey the hereinafter mentioned land to the party of the second part to be held and enjoyed by the party of the second part during the period of the natural life of the party of the second part, and it is the design of these presents to carry out such agreement.

Now, therefore, this indenture witnesseth that in pursuance of such agreement and in consideration of the sum of one dollar this day paid by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged; he, the party of the first part, doth grant unto the party of the second part during the period of the natural life of the party of the second part,

All and singular that certain parcel or tract of land and premises situate, lying and being in the said City of London, being composed of lots numbers eight, eleven and twelve, according to a survey of lots numbers eleven and twelve on the south side of East Dundas Street, and lots numbers eleven and twelve on the north side of East King Street, made for the said Robert G. Davisson by Samuel Peters, Esquire, Provincial Land Surveyor, (the said lot eight having a frontage of forty-four feet and nine inches on Colborne Street, and the said lots eleven and twelve having each a frontage of forty-four feet on King Street),

To have and to hold unto the party of the second part to and for his sole and only use during the period of the natural life of the party of the second part;

Subject, nevertheless, to the reservations, limitations, provisoes and conditions expressed in the original grant from the Crown.

And the party of the first part covenants with the party of the second part that he hath done no act to encumber the said lands.

In witness whereof the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered
in presence of
Sd. M. D. FRASER.

Sd. ROBT. WALLACE. [L. S.]

EXHIBIT "C."

This Indenture, made in duplicate the seventeenth day of February, in the year of our Lord one thousand eight hundred and eighty-six, in pursuance of the Act respecting short forms of conveyances,

Between Robert Wallace, of the City of London, in the County of Middlesex and Province of Ontario, merchant, an unmarried man, of the first part, and Arthur Wallace of the same place, insurance agent, of the second part.

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Witnesseth that in consideration of one dollar of lawful money of Canada, now paid by the said party of the second part to the said party of the first part (the receipt whereof is hereby by him acknowledged), he, the said party of the first part, doth grant unto the said party of the second part, his heirs and assigns forever,

All and singular that certain parcel or tract of land and premises situate, lying and being in the City of London, in the County of Middlesex and Province of Ontario, being composed of lots numbers eight, eleven and twelve, according to a survey of lots eleven and twelve, on the south side of East Dundas Street, and lots numbers eleven and twelve on the north side of East King Street, made for one Robert G. Davisson by Samuel Peters, Esquire, P. L. [illegible] the said lot eight having a frontage of forty-four feet and nine inches on Colborne Street, a [illegible] said lots eleven and twelve having each a frontage of forty-four feet on King Street,

To have and to hold unto the said party of the second part, his heirs and assigns to and for his and their sole and only use forever; subject, nevertheless, to the reservations, limitations, provisoes and conditions expressed in the original grant thereof from the Crown,

The said party of the first part covenants with the said party of the second part that he hath the right to convey the said land to the said party of the second part, notwithstanding any act of the said party of the first part.

And that the said party of the second part shall have quiet possession of the said lands free from all incumbrances.

And the said party of the first part covenants with the said party of the second part that he will execute such further assurances of the said lands as may be requisite.

And the said party of the first part covenants with the said party of the second part that he hath done no act to encumber the said lands.

And the said party of the first part release to the said party of the second part all his claims upon the said lands.

In witness whereof the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered
in the presence of
Sd. M. D. FRASER.

Sd. ROBT. WALLACE. [L. S.]

Received on the day of the date of this Indenture from the said party of the second part, one dollar, the consideration mentioned.

Witness:
Sd. M. D. FRASER.

Sd. ROBT. WALLACE.

EXHIBIT "D."

This is the last Will and Testament of me, Arthur Wallace, of the City of London, in the County of Middlesex, Esquire.

1. I give and devise my dwelling house and premises on the north side of East King Street, in the said City of London, being composed of lots numbers eight, eleven and twelve, according to the registered plan of lots numbers eleven and twelve, on the south side of Dundas Street East, and lots numbers eleven and twelve on the north side of East King Street, in the said City of London, to have and to hold the same unto my wife Letitia during her natural life without impeachment of waste and subject to the estate of my said wife therein, I give and devise the same unto my son Robert.

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2. I give and bequeath unto my said wife all my household furniture and household effects.

3. The provision herein made for my said wife is in lieu of dower.

4. All the rest, residue and remainder of all the real and personal estate whereof I am or shall die possessed, I give, devise and bequeath unto my said son Robert, and William Ralph Meredith, of the said City of London, Esquire, their heirs, executors, administrators and assigns upon trust that they or the survivor of them or the executors or administrators of such survivor do and shall sell, realize and convert the same into money with all convenient speed and invest the proceeds thereof in such manner as they or he shall see fit (including in building or loan societies, or companies' stocks, shares or debentures), and to pay the income, proceeds and profits thereof, including the income, proceeds and profits of my said residuary estate before its conversion unto my said wife during her natural life, in trust for the support of herself and the support of my unmarried daughters (while they live with their mother), and upon and immediately after the decease of my said wife, or if she shall not survive me, after my decease to pay and divide the whole of my said residuary estate and the proceeds thereof equally between all my daughters.

5. I authorize and empower my trustees and trustee to postpone the sale and conversion of my said residuary estate or any part thereof as they or he may see fit if they or he shall deem it expedient to do so.

6. I authorize and empower my trustees and trustee with the consent in writing of my said wife to advance any part of the prospective or presumptive share of any of my daughters to her or them if they or he shall deem it expedient to do or to apply the same for her or their benefit as they or he may deem best, and this power may be exercised notwithstanding the minority of the beneficiary.

7. If my trustees or trustee shall deem it necessary for the support of my said wife and unmarried daughters to use a part of the corpus of my said residuary estate or the proceeds thereof for that purpose, they or he may do so.

8 I appoint my said son Robert and the said William Ralph Meredith to be the executors of this my will, and I declare that any executor or trustee who is or may be a practising lawyer, shall be entitled to the like remuneration for services performed by him on account of my estate as if he were not a trustee.

In witness whereof I have hereunto set my hand this sixteenth day of March, one thousand eight hundred and eighty-three.

Signed, published and declared by the testator, Arthur Wallace, as and for his last Will and Testament in our presence, who were present at the same time and did attest and subscribe the said Will as witnesses thereto at his request in his presence and in the presence of each other.

Sd. T. G. MEREDITH,
Of the City of London, Solicitor.
Sd. J. TYTLER.
Of the same place, Law Student.

Sd. ARTHUR WALLACE.

JUDGMENT.

The action is to set aside a conveyance bearing date the 17th of February, 1886. If that were the beginning or inception of the transaction there might be some difficulty in maintaining the conveyance, although there would not even then be a very strong case against it. But when all the circumstances are considered it appears that this land was purchased by Robert Wallace, in the presence of his father at an auction sale, for the purpose of building upon it a homestead for the father's family. Robert, the son, then having been prosperous in business, and having capital at command, which his father had not, and Robert then and always since thereafter residing with his father and amongst his father's family, a building was constructed upon the lot that was bought for the purpose of a homestead and a residence for the family. To this, Robert being then in prosperous circumstances as a merchant, contributed largely, say between $2,000 and $3,000. The father not being so prosperous contributed to the erection of the building still more largely, say $4,000 or $5,000. The conveyance from the vendors was taken to Robert, and Robert paid the purchase money. The purchase was in the year 1872, the conveyance was on the 21st of February, 1874, to Robert. In 1876 Robert, through his solicitor, had a conveyance drawn up whereby he purported to transfer the property to his father for life. As soon as this was made known to the father the father objected and said the conveyance ought to be to him in fee. This was some two or three years after the conveyance had been actually drawn, but unknown to the father. As soon as the father objected Robert at once agreed to make a conveyance to him in fee, saying that he thought it was right that it should be so Robert appears to have been successful in business, and at or about that time had a surplus in his business of over $21,000. The father was not well off. Robert's evidence is clear and distinct that within two or three years after 1876 he promised to make a conveyance in fee of the place to his father, the intention of course being that it should be a homestead, to which a prosperous son had contributed largely, and the father had also contributed largely. The father's evidence is that as soon as he learned of the conveyance to him for life he objected, saying that it ought to be to him in fee. He does not know precisely how long after 1876 this was, but he does not in any way contradict the evidence of his son. Then the evidence of the promise on the part of Robert to make the conveyance is uncontradicted, and as far as the father's evidence goes it circumstantially supports the evidence that the promise was made. There was then the moral obligation on the part of Robert to make the conveyance, but like many matters of the kind it lay over and was not done for many years afterwards. In 1886 this conveyance was made, the one that is now attacked. At that time Robert was not well off, but the evidence does not show that he was insolvent or on the eve of insolvency, although this is argued from subsequent facts.

I think the law is, and it has been decided to be I think by Mr. Justice Strong, when Vice Chancellor here on authority of decided law, that where there is a moral obligation resting upon a party to make a conveyance, and in pursuance of that obligation he does make it, that the quality or character of fraud cannot be attributed to it. Now, I think the conveyance that is attacked is a conveyance standing in this position. I think there was what has been called a moral obligation on the part of Robert to make the conveyance in fee to his father pursuant to his promise so to do, which promise was made when Robert beyond all doubt was in a financial position enabling him to make a gift or any conveyance that he pleased of his property, having as before stated, a large surplus, a surplus of over $20,000. Under these circumstances I think the plaintiff must fail. I think the conveyance is perfectly good. But as the conveyances as they stood seemed to indicate that something was wrong, and to afford some reason

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for litigation and contesting the matter, and as the statement of defence does not clearly disclose the true position according to the evidence, I think the plaintiffs, though they fail, ought not to be called upon to pay costs. Now, I am not sure that the plaintiffs have established such facts as would show that the conveyance is bad, even if it was an act done at the time the conveyance was made without any of those foregoing circumstances, but I feel clear when the whole case is considered the conveyance ought not to be set aside.

On the ground of fraud. It has not been made to appear precisely when, if at all, Arthur Wallace became a creditor through endorsing for Robert Wallace. And I do not see how, nor is it contended, that the effect of the conveyance was a preference of Arthur Wallace within the meaning of the statute.

The result is that the plaintiff's action will be dismissed, but under all circumstances, without costs.

JUDGMENT OF DIVISIONAL COURT.

DIVISIONAL COURT: BOYD C.

This case appears to me even stronger in favor of the defendant than as put by the trial Judge.

The land was bought by the son on the understanding that it was to be improved upon by building a home for family use, and this homestead was to be vested in the father as head of the family.

The price paid for the land was some $2,300, but the father contributed double this amount in order to put up the residence thereon. The son does not appear to have paid anything more towards the property in question. Any further sum paid by him was on account of furniture.

This was an arrangement for a family settlement, induced no doubt by the fact that the father had advanced $1,200 to the son to enable him to commence business some two years before the purchase, and it is in evidence that he made a further advance afterwards of $800 to the son.

The conveyance impeached may well be referred to the proper implimentary of this original agreement on which the land was bought and improved. The Judge has thus viewed the transaction which to my mind is a much more likely view than to assume fraud as against creditors.

The only creditor who complains is the Bank of London, and this one was practically secured for the debt incurred by the son to the Bank at the date of the impeached conveyance. It turned out that $3,500 of this security was worthless, but this was not known till after the execution of the deed to the father.

There is also evidence that a statement of the son's financial standing was given to the Bank at the date of the loan to the son and afterwards which did not include this land.

As between the parties the land has always been treated as the property of the father, and the son has lived for 20 years in this homestead without paying board as a member of the father's family.

Where the evidence supports a praiseworthy rather than a fraudulent view of an impeached transaction it is not usual to over-rule the judgment of first instance when it is in favor of honesty and fair dealing. Such is the evidence and judgment in the present case and the conclusion reached should not be disturbed.

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Exp. Mercer, 17, Q. B. D., 290. Gillam v. Goold, 20 Ch. D., 389.

The costs of this appeal should be given to the defendants, but so far as the debtor is concerned, to be set off against the debt owing to the Bank.

ORDER OF DIVISIONAL COURT.

Upon motion made unto this Court the 4th day of September, 1890, by Mr. Purdom, of counsel for the plaintiff, by way of appeal from the judgment of the Honorable Mr. Justice Ferguson, at the trial of this action dated the 24th day of March, 1890. Upon hearing read the pleadings and proceedings and the evidence taken at the trial; upon hearing what was alleged by counsel for both the plaintiff as aforesaid and the defendants, and judgment having been reserved until this day, this Court doth order that the said motion be and the same is hereby dismissed and the said judgment affirmed.

And this Court doth further order that the plaintiff do pay to the defendants their costs of this motion forthwith after taxation thereof, but the costs of the defendant Robert Wallace, the judgment debtor, are to be set off against the debt due by him to the plaintiff, *pro tanto*.

GEO. S. HOLMSTED,
Registrar.

REASONS FOR APPEAL.

1. The deed made in 1876 by Robert Wallace to Arthur Wallace for life should be taken to be, as recited therein, a settlement between the father and son of their respective interests in the property. Robert Wallace was acting for both parties. He was under no liability to support or contribute to support the father or family.

2. The deed sought to be set aside was made ten years later in 1886, when Robert Wallace was insolvent.

3. If Robert Wallace made any prior promise to convey to his father it was voluntary and could not have been enforced by the father. (Fry on Specific Performance, page 42, Sec. 92; Lewin on Trusts, page 62; May on Fraudulent Conveyances, pages 245, 368, 390, 391 and 397.) 80

4. A defective voluntary agreement will not be executed. (Coleman v. Sorrell, 1 Vesey, 49, 54; Atrobus v. Smith, 12 Vesey, 39; Tatham v. Vernor, 29 Beavan, 604.)

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Edn 1888

In re antis Chedwynd v. Morgan.

Morgan v. Chedwynd, L. R. Chy. Divn, 596. — 31 Chy Divn

5. The deed should not be regarded as a family settlement. All the writings contradict any intention on the part of the grantor to convey away his whole interest, none of the other children had any interest.

6. The evidence of any family settlement is very contradictory. Robert Wallace first makes a deed to his father for life.

7. The pleadings claim that Arthur Wallace now holds the lands for his own use during his life, and then for the use and benefit of all his said children for the purposes aforesaid. (See clause 6.)

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8. At the trial this was changed, and Arthur Wallace claimed to be absolute owner, and a will of Arthur Wallace was produced showing a devise to his wife for life and then to the defendant Robert Wallace, which would have been more in keeping with the deed made by Robert Wallace than the claim set up in the pleadings.

9. If the claim set up in the pleadings is correct, Robert Wallace has an interest in the lands in any event.

REASONS AGAINST APPEAL.

1. The defendants contend that the Judgment of the learned Trial Judge, confirmed as it was by the Divisional Court, should be upheld and the appeal dismissed with costs, for the reasons and on the grounds set forth in said Judgments, on which they rely.

2. The evidence abundantly supports the findings of the Trial Judge on all questions of fact found by him in favor of the defendants.

3. The land in question was purchased as a homestead for the family and should have been vested, at the time of the purchase, in the father Arthur Wallace, and the conveyance impeached was intended to carry into effect, and did carry into effect, the original intention of the parties.

4. The circumstances and evidence show, and the Trial Judge has found, that there was no intention on the part of the defendant Robert Wallace in making said conveyance to defeat his creditors, but on the contrary the evidence supports the praiseworthy and honest rather than the fraudulent view of the transaction impeached, and the conclusion of the Trial Judge should not therefore be interfered with.

Ex parte Kelly, 11 Chy. D., 306. *Ex parte* Stubbin, 17 Chy. D., 58. *Ex parte* Mercer, 17 Q. B. D., 290. Carr v. Carfield, 20 O. R., 218.

5. The Bank of London, the real plaintiffs, had notice before dealing with the defendant Robert Wallace, that the lands in question did not belong to him, and were not liable for his debts, and should be taken to have dealt with him on this understanding.

6. There is no evidence that the defendant Robert Wallace was insolvent or unable to pay his creditors in full when he made the conveyance in question. The Bank, the only complaining creditor, was secured, and the subsequent insolvency of the defendant Robert Wallace was caused by the failure of the Bank of London and the Ontario Investment Association, and, but for these unforseen disasters, the said defendant would have been in a position to pay all his creditors in full.

M. D. FRASER,
Counsel for Defendants.

April 18th, 1891.

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