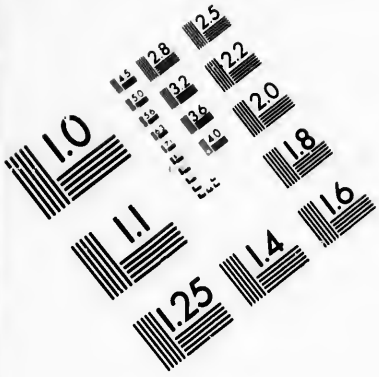

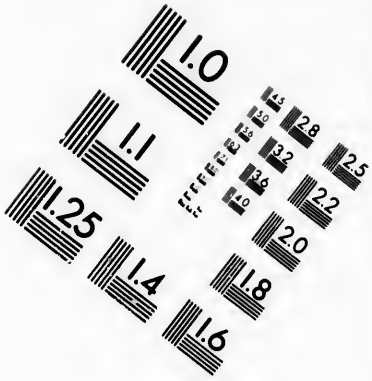

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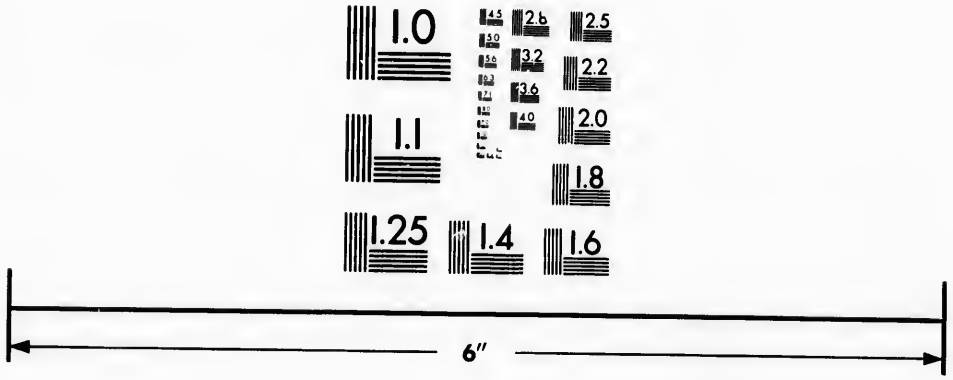

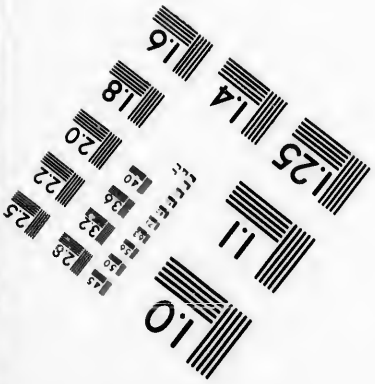

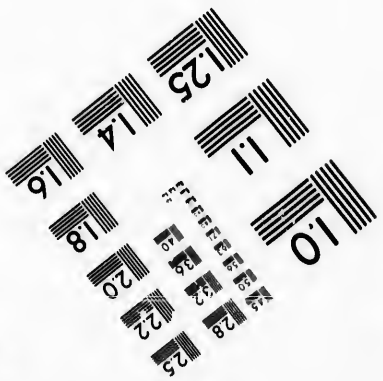

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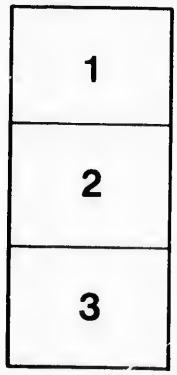

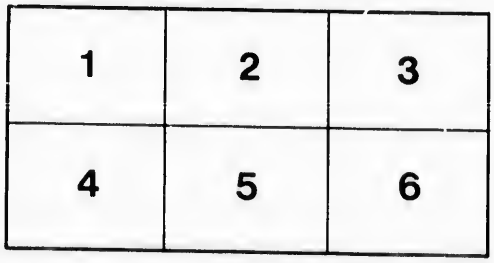

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IN THE SUPREME COURT
OF CANADA.

12

ON APPEAL
From the Supreme Court of Nova Scotia.

MARIA KEARNEY, APPELLANT,

AND

THE HON. SAMUEL CREELMAN & ALEXANDER P. REID, RESPONDENTS.

APPELLANT'S FACTUM.

THOMAS J. WALLACE,
Solicitor or Attorney for the Appellant.

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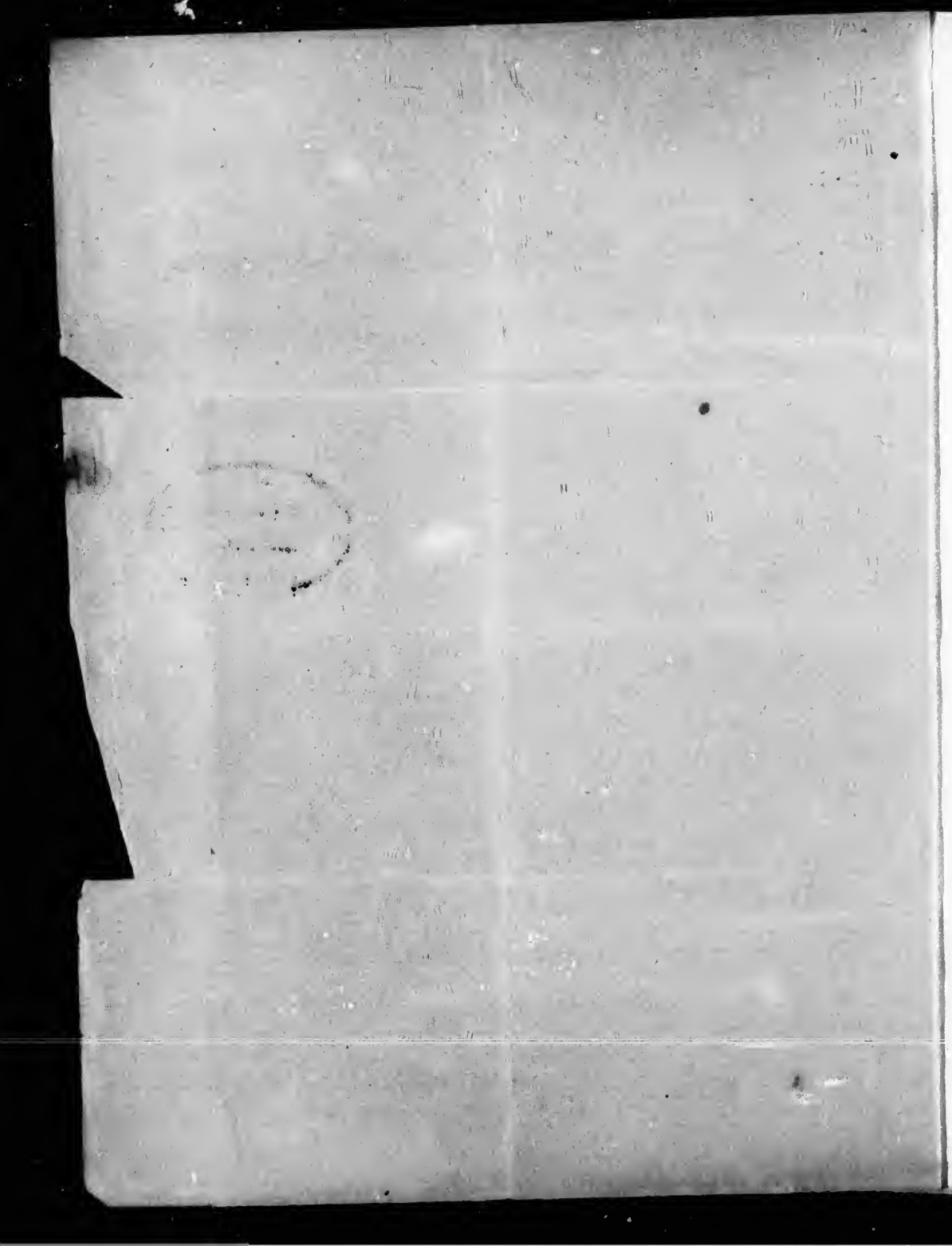

NS. 2. 1990 - 58

In the Supreme Court of Canada.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

BETWEEN { MARIA KEARNEY, *Appellant*,
and
THE HON. SAMUEL CREELMAN and ALEXANDER P REID, *Respondents*.

APPELLANT'S FACTUM.

This cause originated in the Supreme Court of Nova Scotia, was tried before a Judge without a jury, and a verdict or Judgment rendered for defendants without any reasons given to show what view was taken or upon what principle it was decided. A Rule was applied for but refused, and was in due form taken under the statute to set aside the verdict or Judgment and for a new trial. The action was an action of ejectment, in which the plaintiff claimed the property as the only child of the marriage of Andrew and Mary McMinn, a marriage existing at the time Andrew McMinn, the plaintiff's father, made his will in 1835, whereby he devised a lot of 160 acres—of which the lot in dispute is a part—to his widow Mary McMinn, the plaintiff's mother, for life, with remainder to any child or children he might have by his then marriage, and, in the event of there being no child or children, or such child or children dying without issue, then to Ann Byrne, afterwards Ann Kean, the daughter of Mary McMinn by a former husband, her heirs and assigns. See Will, page 160. There was no child when the will was made in 1835, but the plaintiff was born afterwards and before the death of her father in 1838, and was the only child of that marriage. These facts were all proved at the trial, as well as the death of Mary McMinn in 1881, the death of Francis Kearney the husband of the plaintiff in 1883, the possession of the defendants and all other necessary facts, making a clear *prima facie* case for the plaintiff. The plaintiff also tendered evidence to show that the testator left property more than sufficient to discharge all his debts, but this was rejected.

To the case thus made by the plaintiff, the defendants say that there were upon the property so devised at the time of the death of McMinn, two small mortgages—one for one hundred and the other for one hundred and fifty pounds, and that, to foreclose these, proceedings were, after the death of McMinn, taken by Miss Henrietta Phœbe Tremain, and a decree of foreclosure of sale obtained. Also that after such decree a suit

was instituted by Mrs. eMinn in the Chancery Court against the plaintiff, the mortgagee and others, for the application of the real estate to the payment of the testator's debts, in which an order of sale was made, the property sold and bought in by the complainant in that suit, Mrs. McMinn, and that she afterwards made a conveyance of it to parties designated "The Commissioners of the Lunatic Asylum," claimed to be a body corporate. The defendants set up these pretensions and certain Acts of Parliament either to show title in themselves or that the legal title was outstanding in James B. Uniacke or in some person other than the plaintiff. The plaintiff was a mere infant at the time this decree of foreclosure is claimed to have been made against her, and if made, was made without a tittle of proof either as to the execution of the mortgages or as to the existence of a single allegation of the Bill, and although the mortgages purported to be executed by the testator's mark, though he could write, and while there were many other facts showing that it was highly improbable that these mortgages were ever made by the testator. The order or decree of sale in the McMinn suit, if made, was also made when the plaintiff here was an infant, without any proof of the mortgages or of any of the allegations of the Bill. The defendants got in the chief part of the papers in the two suits, the Judge having received them subject to all objections that could or might be taken against them, notwithstanding that the plaintiff resisted their reception,—the mortgages and assignment of them and the decree being a part of these papers. They also got in, subject to all objections, a paper purporting to be a copy of a Chancery deed, and purporting to be made by one James W. Nutting to Mrs. McMinn, without its being properly established or grounds laid for the admission of such copy, the Judge also receiving this subject to all objections. Over forty years elapsed between the time the decree of foreclosure is claimed to have been made and the bringing of this action. No sale is pretended to have been made under the foreclosure proceedings, but a deed is claimed to have been executed by the mortgagee, Henrietta Phœbe Tremain, purporting to assign those mortgages and the decree of foreclosure to James B. Uniacke, who was the Attorney of Mrs. McMinn in the McMinn suit. A deed was in evidence executed by said Uniacke, claimed by the plaintiff to be a release of these mortgages and extinguishment of the title, and by the defendants to be a grant or assignment of the mortgages and title to Mrs. McMinn. The deed is at page 140 of the case. Mrs. McMinn had not, at the time of the making of this deed, obtained any deed in the Chancery Court, as the papers on pages 139, 142 and 143 of the printed case show. Mrs. McMinn, who instituted the McMinn suit, was the administratrix of the estate of McMinn with the will annexed, the tenant for life under the will, and the alleged purchaser under the pretended order or decree in the McMinn suit. Miss Tremain appeared in the McMinn suit and put in an answer without claiming any right under the decree or setting it up as a defence. The will of McMinn did not subject the real estate to the payment of his debts, but only the personal property, the residue of which he bequeathed to his widow, Mrs. McMinn. There seems not to have been any law in Nova Scotia at the time giving the creditors of deceased persons any absolute claim or lien on the real estate of such persons, unless the Act authorizing the administrator to apply to the Governor or Commander-in-Chief and Council for an order to sell for that purpose be so construed. Before the institution of the McMinn suit, such an order was applied for under the Act, but was refused by the Governor-in-Council, as alleged in the Bill in that suit. The plaintiff's name was not in the will, as she was not baptized or born when it was made, but derived her right under the clause of the will giving the property to any child or children the

testator might have by his then marriage. There is no allegation in the Bill showing the plaintiff's right in the property under the will, but her right is wilfully smothered up and concealed. The proceedings in the foreclosure suit were very irregular, if not wholly void, and those in the McMinn suit utterly void, as the plaintiff contends.

When this case came on for argument and the plaintiff's Counsel was proceeding to open it, the Court stopped him and said that they thought the case might turn upon the question as to whether the deed from Uniacke, now at page 140, was a release or an assignment of the mortgages, for if the latter, the legal title would be out of the plaintiff, and that this preliminary point should be first disposed of.

The plaintiff's Counsel said he was ready to go into the whole argument, and hoped he would be permitted to do so; that there were many weighty points for argument and consideration, and among them that of the misreception of evidence, applying, as he thought, as well to these mortgages and the deed from Uniacke as to much or all of the documents and papers got in by the defendants; and if he were correct about this misreception of evidence, the plaintiff would be entitled to a new trial independently of every other question. But the Court insisted on the point raised by them respecting the deed from Uniacke being argued first and alone, but said that in the event of their deciding that it was not an assignment, they would direct an argument of the whole case, to which the plaintiff's Counsel, after exhausting all his efforts to be heard on the whole case, was forced to submit.

The plaintiff's Counsel then urged the objections hereinafter set forth against the view taken by the Court as to the construction of the deed. The plaintiff was not again called upon, but the Court, after taking some days to consider, delivered the Judgment or reasons therefor, commencing at page 168 of the printed case. It is said, at lines 1 and 2 of these reasons, that by Chapter 13 of the local Acts of 1852, as amended by Chapter 24 of the Acts of 1853, a corporation was created called "The Commissioners of the Lunatic Asylum." But there is no such corporation, nor was there ever a corporation of the name given. The enactment is as follows: "The title shall be the Provincial Hospital for the Insane. The management of the Hospital shall be vested in a Board of nine Commissioners to be appointed by the Governor-in-Council, who are hereby created a body corporate, by the name of The Commissioners of the Provincial Hospital for the Insane. The term of office of three of the Commissioners shall expire on the 30th day of June, 1860, and of three others biennially thereafter on the same day. The Commissioners may take and hold in trust for the Hospital any grant, devise, etc., pages 594 and 595 of Vol. 2, R. S. of Nova Scotia." It was scarcely in the power of the Legislature to incorporate a body to be composed of nine individuals when none of them had then been nominated or known. Parliament could not incorporate a shadow. The Act could therefore only have meant that when they were appointed they would be a corporation. It was not proved at the trial that any such appointment ever took place, and it is questionable if the Court should acknowledge the existence at any time of such a corporation, and if the Court did, it would not be the corporation mentioned in the reasons for the Judgment or in the alleged deed from Mrs. McMinn. But if the Court did recognize such a corporation as properly appointed and legally existing under the Act, it has long since expired by effluxion of time as provided by that Act; and as it was not shown at the trial that any conveyance was made by that corporation, the property would revert on their expiring, if they ever had

the title in them. The corporation created or contemplated by the Act could only take property in trust, and the alleged deed from Mrs. McMinn was not made in trust. The plaintiff therefore submits that for these reasons, if ever a deed was made by Mrs. McMinn, it was void even if she had a perfect title, or at all events the property reverted on the expiry of the corporation. From the above reasons it also follows that the chain was broken in the line of claim, and as the present defendants do not claim as parties to either of the suits, or as privy to any of the parties, they could not make use of any of the papers in these suits as evidence against the plaintiff. The Court omitted to mention an Act bearing upon the case, while it has mentioned several of no great or perhaps of any importance. The Act omitted is Chapter 36, 4th Series, Nova Scotia Statutes, Section 47, and reads thus: "The title to the property known as the Nova Scotia Hospital for the Insane, and the lands belonging or attached to the same, is hereby confirmed or vested in the Commissioner of Public Works and Mines for the time being, and his successors in office, in fee simple, for the purposes and uses of such Hospital. There was not any property known as that of the Nova Scotia Hospital for the Insane. It is not of much moment, perhaps, whether the title conveyed, if conveyed, remained in the Commissioners of the Hospital, or was passed over by Act of Parliament to the Commissioner of Works and Mines, who was one of the defendants here, except as regards the application of testimony and its reception as above stated. At line 1, page 169, the Court says, "the two mortgages were put in evidence," but they were only put in as part of the papers in one of the two causes; and when it is considered that these mortgages purport to be executed by the testator's mark, though he could write, as the will shows—that about the same time it is pretended he gave these mortgages to raise the paltry sums of one hundred and one hundred and fifty pounds he had made a present to the daughter of Mrs. McMinn by a former husband, Mrs. Kean, of property of the value of 750 pounds—that his will, made only a short time previously, directed the payment of his debts out of his personal property, the residue of which he bequeathed to his widow, Mrs. McMinn—that he devised all his real estate and executed his will by writing his name in his own hand, grave doubts must arise as to the genuineness of these mortgages; and when it is further considered that the mortgages were never proved in any of the proceedings relied upon, or in this suit, except by being put in as part of two huge bundles of papers—very little of which, if any, being evidence—and that Mrs. McMinn was allowed to put in her answer in the foreclosure suit without oath, still graver doubts arise as to these mortgages having ever been given by McMinn. The plaintiff contends that more than the mere putting in of these papers as part of the papers in such cases was required of the respondents to make them evidence against the plaintiff. The Court says, at line 5 of page 169, and following, that a deed executed by Henrietta Phœbe Tremain was also put in evidence, and the recitals were referred to as evidence against the plaintiff, while such recitals were not, the plaintiff contends, evidence against her. At line 15, same page, and following, the Court says a deed from James W. Nutting was also put in, which recited, among other things, a suit in Chancery brought by Maria McMinn, etc., in which the plaintiff had prayed that certain of the real estate of McMinn should be sold under a decree which had already passed in a suit brought by Henrietta Phœbe Tremain.

But this is incorrect. A copy of a deed of this purport was got in, but it recited what was untrue, for there is not any such prayer in the McMinn suit or the Tremain suit. Mr. Nutting must therefore have sold under some suit not known in these proceedings,

and, as there was no decree or other of the papers put in to warrant the reception of that deed, it was improperly received even on this ground. But there are many other grounds hereinafter shown which should have prevented its reception, as the plaintiff thinks.

The Court, at line 27 of page 169, refers to a deed executed by James B. Uniacke, and at line 30 and following, says "that by said deed he granted to said Mary McMinn in fee the lands and premises described in the said mortgage." That such deed is a grant the Court states as a fact, notwithstanding that the following words are used: "Hath granted, surrendered and released, etc., as well the said indentures of mortgage and the assignment thereof hereinbefore recited, as also all and singular the lands, tenements and premises therein granted or intended so to be, and hereinbefore mentioned and described, with all the estate, right, title, interest, claim, property or demand whatsoever, either in law or in equity, of him the said James Boyle Uniacke, of, in or to the said mortgaged land and premises or any part thereof, under and by virtue of the said in part recited indentures of mortgage and assignment thereof, to the intent that the said mortgage and assignment thereof and the estate thereby granted and created may be forever discharged and extinguished." The Court goes on, and at line 40 and following says: "Mr. Wallace also contended that the deed from Uniacke to Mary McMinn did not convey the fee simple, it being merely a release of the mortgages." "Assuming that such document extinguished the debt, yet it could not extinguish the title to the lands vested in Uniacke, which would either merge in the title which Mary McMinn already had, or still remain in Uniacke." There could be no merger in Mrs. McMinn's title, for she had only a life estate in the property outside of what title, if any, she obtained from Uniacke under that deed. She had obtained no deed in the McMinn suit up to the time of the making of that deed, as the papers at pages 139, 141 and 142 will establish. The Court seemed to think that as the mortgages were not strictly paid at the day they became due, the mortgages became absolute and drew the equitable title to them, but, as the recitals in the deed from Miss Tremain to Uniacke are not evidence against Mrs. Kearney, there is no legal evidence against her to show that the mortgages were not strictly paid at the day, and the presumption is that they were so paid when there is no evidence to the contrary. But, if forfeited, no possession was taken, and Uniacke treated the mortgages not as forfeited or foreclosed, or waived the foreclosure, but as subsisting securities in their original state and character, and released the mortgages by a release which operated not as a transfer to Mrs. McMinn, but as an extinguishment of the title, which had the effect of making Mrs. McMinn the absolute owner of the legal and equitable title, which however became one by that release, for her life, and the plaintiff here the absolute owner in remainder. It was such a release as is spoken of in Sheppard's Touchstone, page 321, where it is said, speaking of releases, "And some of them enure by way of extinguishment, for that he to whom the release is made cannot have the thing released."

It is difficult to comprehend how the Court could have supposed that the title remained in Uniacke after he made and delivered such a deed as this, and it is still more difficult to comprehend how the Court could have supposed that it might be in Henrietta Phœbe Tremain after her deed to Uniacke. At page 321 of Sheppard's Touchstone it is said, "A release is the giving or discharging of the right or action which a man may have, etc., or it is the conveyance of a man's interest or right or thing to another that hath the possession thereof or some estate therein." "It is defined by some to be an instrument

whereby estates, rights, titles, actions and other things be sometimes extinguished, sometimes transferred, sometimes abridged and sometimes enlarged." Of course the intention of the grantor governs as to the manner the deed is to operate, and here the intention is clearly expressed, the words used being, "to the intent that the said mortgages and the assignment thereof, and the estate thereby granted and created, may be forever discharged and extinguished." At page 340 of the same work it is said, "By a release of all a man's right in any goods or tenements, without more words, is released and discharged all manner of rights of action and entry the releasor hath to, in or against the land, etc., so that if the releasee have gotten into the land of the releasor by wrong, by this release the wrong is discharged and the releasee is in the land by good title. Also by this release are discharged and released all titles of dower and titles of entry upon a condition or alienation in *mort main*."

At page 335 of Sheppard's Touchstone, where the effect of the release as among the parties in interest is spoken of, it is said: "A release made to the tenant in tail or for life of the right to the land shall avail and enure to him that hath a reversion or remainder in deed, and so, a *converso*, a release of right made to him that hath a remainder or reversion will avail and enure to the benefit of him that hath the estate tail, the estate for life or for years precedent, as, if a disseisor make a lease for life and the disseisee release to the tenant for life, this release shall enure to the disseisor; so if he or a tenant for life make a lease for life, the remainder for life, the remainder in tail, the remainder in fee (operating by way of wrongful alienation), and the disseisee or first lessor doth release his right to any of them in remainder, this release shall enure unto and benefit all the rest." At page 313 it is said: "A release to a tenant for life would extinguish the right, and enure to the benefit of the reversion."

There are many other similar examples given in Sheppard's Touchstone, under the head of Release, to the same effect, making it clear that even if this release did not contain the last words above set forth showing the intention of the grantor, yet, when made to Mrs. McMinn, the tenant for life, it would enure to the benefit of Mrs. Kearney, relieving her remainder of all claims under the mortgage, and of any outstanding legal title other than the life estate, and would not give Mrs. McMinn anything further than in the same way to perfect her life estate for the term of her life freed and discharged of the mortgages and title thereunder. Because the word "grant" was used, the Court must have concluded that the other two words, "surrendered" and "released," were thereby nullified. But at page 327 of Sheppard's Touchstone it is said: "Words of conveyance, grant or confirmation may operate as a release; and if the lessor do but grant to his lessee for life that he shall be discharged of the rent, this is a good release of the rent. And it is a rule that by what words a debt or duty may be created, by words of a contrary signification it may be released, and therefore if one do acknowledge himself to be satisfied and discharged a debt, this is a good release of the debt." With regard to the deed being a release of the debt merely, the payment is what released that, and after payment there was nothing of the debt for the release to operate upon. The Court says, at page 169, from line 36 to 40: "Mr. Wallace objected, at the argument, that some of the deeds were improperly admitted at the trial. His objection was not, however, very intelligible, especially in view of the agreement in evidence of the 17th of April last made by him and the defendants' attorney, that the papers and documents on each side

shall be admitted without proof when they purport to be original papers and documents." But the agreement differed considerably from what the Court stated it to be and set it forth, for to the words given by the Court were added the following words, which the Court omitted: "provided the originals would be legal evidence, a deed known as the Chancery deed to be proved and not to come under this agreement." The agreement is at page 144, and of course will speak for itself. A copy of this so-called Chancery deed was commented upon as if it were the original to sustain the defence, and, though required to be proved by the agreement, the Court thought it a very unintelligible objection to insist that before a copy was received some account should be given of the original, also some proof of its delivery,—the papers in the cause showing it never was delivered; and also some proof that the cause was heard and a final decree made. The objection, too, to the reception of the papers in these two suits as evidence in this against Mrs. Kearney was also unintelligible to the Court; but surely all the statements in the two Bills in these suits were not evidence against the plaintiff, nor the statements in the several answers, nor the affidavits and papers in the contention between Mrs. McMinn and her solicitor, nor the Reports of the Master made up without examining a witness and behind the back of the plaintiff, nor the many petitions and affidavits made by Mrs. McMinn, Mrs. Kean, Peter H. Lenoir, James B. Uniacke and others, yet they were all received though objected to. It is unquestionable that these were improperly received and many more, and even doubtful that the mortgages and deed from Miss Tremain should have been received. Of course it will be contended that the mortgages and deeds being over thirty years old they were admissible without further proof, but they were suspicious on their face, the mortgages being executed by a mark, though the testator could write, and though they were not proved in either of the suits, nor was it shown that they were ever in the hands of the pretended mortgagee, and certainly did not then come out of her hands. They acquired their age, too, while the plaintiff was a minor and under disability, and concealed from view until the very instant of this trial.

The Court says, at page 170, commencing at the first line: "By the mortgages to Henrietta Phœbe Tremain, the title of Andrew McMinn passed out of him conditionally to become void if the mortgages were paid off within the specified period, and as such payments were not proved to have been made, the title of the mortgagee became absolute in fee, and, as it was not shown that either of the plaintiffs afterwards acquired the title, if it was not in Mary McMinn when she conveyed to the Commissioners, it must still be in Henrietta Phœbe Tremain or those claiming under her." This is already answered by the argument respecting the deed to Uniacke, and to that may be added that payment at the day is presumed unless the contrary is shown, and not the reverse, as the Court concluded; and even if Mrs. McMinn had merely the bare possession without any title, or a bare right without possession, the release would have had the effect contended for, and there is no possible way that Miss Tremain could have the legal title in her after making the deed to Uniacke, unless that, as she was a defendant in the McMinn suit, appearing and answering thereto without claiming any benefit under the foreclosure suit or setting up the decree as a defence, but submitting herself to the Court with all her rights and interests, the deed to Uniacke transferring the mortgages was void, or that the mortgages having merged in the decree, they could not be transferred or assigned, but only the plaintiff here could insist upon this objection, Miss Tremain, Uniacke and Mrs. McMinn being estopped by their deeds and conduct from doing so. It appears Miss

Tremain remained a defendant in that suit to the end of the proceedings. Uniacke never made himself a party, and even if he had, being solicitor for Mrs. McMinn, and having released these mortgages, he would be occupying an anomalous position to be a party, or to be taking exception to his own proceedings; but he went on more consistently making no change, but prosecuting the suit against Miss Tremain, whose name he left upon the record till the very end of the proceedings, aye, even to the present day.

The decree of foreclosure was not transferred to Mrs. McMinn as it had been to Uniacke, but was dropped and abandoned, showing further the intention not to do more by the deed than to release and discharge the mortgages and extinguish the title. But if the title continued in Uniacke or Miss Tremain, as intimated by the Court it might possibly, it would no longer be a subsisting title, more than twenty years having run against it, and in an ejectment would be presumed to have been transferred, and, if the decree ever had any force, it also ceased to have it after a like period of twenty years. The Court admitted that the plaintiff made out a *prima facie* title, and if so, it is not enough for the defendants to throw doubts of a possible title in some one else. They must establish positively a title certain in some certain person, even if the title of the mortgager can be questioned by strangers contrary to the American authorities.

The Court did not, however, confine themselves, as the plaintiff thinks they should have done, either to the mortgages and decree of foreclosure and deeds from Henrietta Phœbe Tremain and from Uniacke, or to the proceedings in the McMinn suit, in making up their judgment deciding that the legal title was not in the plaintiff, but relied somewhat upon the one and somewhat upon the other, though inconsistent and repugnant, the Court referring particularly to the alleged order or decree of sale in the McMinn suit and the deed purporting to be from the Master; but the plaintiff submits that no title can be made or supported to displace the plaintiff's admitted *prima facie* title under these proceedings, if even authentic and regularly in evidence.

1st. Because the Chancery Court had no jurisdiction to entertain the McMinn suit, for, among other reasons, the will did not subject the testator's real estate to the payment of his debts, but the same was devised and the personal property alone directed to be applied to the payment of debts, the residue to go to the widow.

12 Sim. 274, Story's Equity, Jur. 530 to 552, 547, 548, 546.
Toller on Executors, 454.
2 Jacob & Walker, 1; 5 Beav., 398.
Rover on Judicial Sales, 311.
Chapter 5, Sec. 1, Acts of 1760, vol. 1, page 58, Nova Scotia Statutes.
Story's Eq., Pl. 163–172, 176, 180, 205, 206 and 492, 491, and 598-608.
Story's Eq., Jur. 1445 and 1448.
Rover, 21, or page 31; also, Sec. 33, or page 62.
12 Sim. 274.

2nd. Because the Governor and Council having been applied to for permission to sell the land in dispute herein and other lands for the payment of debts, before the institution of the McMinn suit, and the Governor and Council having refused to grant permission to sell,

such decision was a judgment in favor of the plaintiff in this suit, and other devisees, or at all events concluding the matter, and closing the doors of all Courts, if any, of concurrent jurisdictions.

Chapter 5, Sec. 1, of Acts of 1760, Vol. 1, page 58, Nova Scotia Statutes.
Freeman on Judgment, 319.
1 House of Lords Cases, 191.
Law Rep., 2 P. and M., 41.
3 Chancery Div., 27.
Viner's Abridgment, Evidence (a b 58).

3rd. Because under Chapter 5, Sec. 1, Acts of 1760, Vol. 1, page 58 Nova Scotia Statutes, the Governor and Council having the power to grant or refuse orders for the sale of the real estate of deceased persons for the payment of debts, and having refused an order on an application respecting the property in dispute as set forth in the bill in that cause, such decision fixed the title if it required any fixing irrevocably in the devisees, and the jurisdiction assumed over this property by the Chancery Court after such decision by the Governor and Council was unwarranted, and all proceedings therein taken were null and void, especially as regards the plaintiff, then an infant.

1 H. L. Cases, 191.
4 Allan N. B. 484.
3 Ch. Div., 27.

4th. Because the power vested in the Governor and Council under the above-mentioned Act was an exclusive power, and did not extend to the Court of Chancery, and could not be exercised by such Chancery Court either before or after its exercise by the Governor and Council.

5th. Because if the decree of sale was made, it was not sigued by the Chancellor, but only by the Master of the Rolls, who could not make a valid decree in any case except in the absence of the Chancellor from Halifax,—a circumstance nowhere appearing in the order or decree, or in any ot the papers, or proved.

Chapter 52, Sec. 6, Acts 1733.
Vol. 2, page 232, N. S. Statutes.

6th. Because the testator having the power under Act of Parliament to devise his real estate without qualification, and having done so, the title was irrevocable in the devisee.

Chapter 11, Sec. 1, Acts 1758, vol. 1, page 9, Statutes of Nova Scotia.

7th. Because the plaintiff, having no title except as devisee, and that not having been ordered to be sold, such title was not effected by the sale which took place, if any, or by any of the proceedings in the cause instituted by the administratrix.

8th. Because if the power to devise lands was in any manner qualified, which the plaintiff disputes, it was subject only to the qualification of the Governor and Council directing a sale when applied to; and the not directing such sale, but refusing it, the land was discharged from that qualification and passed absolutely to the devisees.

3 Ch. Div., 27.

9th. Because the Master was not the person to convey the property, and it should have been conveyed if the decree was regular by the parties interested, or only by the Master in the event of their refusing when so ordered to convey, or, if sold by force of the statute, should be conveyed by the administratrix, and the Court in ordering him to convey in the first instance and before a refusal by the parties, exceeded its jurisdiction if it had any otherwise in the cause.

Clause 8 and 11 of Chapter 52, Acts 1783, vol. 2, page 232, N. S. Statutes.
8 Beav. 512; 10 Sim. 167; 4 Mad. 376.
Simpson on Infants, 472; 9 Beav., 366.
Dan. Ch. Pr., 1032, 1031, 1042-1264.
21 Story's Eq. Jur., 744; 21 Beav., 559; 17 Beav., 582.

10th. Because it was not proved at the trial that Jas. W. Nutting was a Master of the Chancery Court, nor any evidence tendered respecting his appointment.

11th. Because the original deed, if any, to Mary McMinn, under which defendants claim, was not produced or its non-production accounted for, nor was there any proof of its delivery to her, nor that she went into possession under it, and otherwise lacked proof, and did not come out of her possession, nor was it proved that it ever was in her possession.

12th. Because the Bill did not raise any issue respecting the rights of the plaintiff in her father's will, or seek to sell her interest as devisee, or allege that she was devisee, and there is not any allegation in the Bill showing that Mrs. Kearney, then Maria McMinn, had any interest whatever in the property now in dispute, and the only allegation respecting the interests of parties is in these words; "And your oratrix further sheweth unto Your Excellency that the said Andrew McMinn departed this life a short time after making such his last will and testament without in any manner altering or revoking the same, leaving your oratrix, his said widow, John Andrew McMinn his son, Jane Norris and Mary Norris his grandchildren, and the several children named in the said will him surviving," without Maria McMinn's name being mentioned; and as her name is not in the will, it was not included in the reference or words, "the several children named in the last will."

1 L. Rep., Ch. Ap., 108.
Bigelow on Estoppel, 84, 93, 94, 100, 101 and 102.
3 East. 346; 6 T. R., 607; 2 C. B., N. S., 454.
2 Sch. and Lef., 293 to 306; 1 Sch. and Lef., 396; 2 Exch. 665-681.
Comyn's Dig. (A 1, Estoppel, and E. 4 and c.)
Freeman on Judgments, 257; 4 M. and W., 327.
Rover on Judicial Sales, 66.
Bigelow on Estoppels, 592 to 598.
Dan. Ch. Pr., 659; 2 Ld. Red., 237.
Rorer on Judicial Sales, Sec. 35, or page 66.

13th. Because the complainant in that suit could not institute proceedings for the application of the real estate to the payment of debts, even if the Court had jurisdiction otherwise, but this would be the right only of a creditor or creditors; and if she had such right, the order of sale should have authorized her to sell as the statute directs, and she should have given the security the statute exacted.

14th. Because the order or decree of sale having only directed the sale of lands and tenements of Andrew McMinn, it could not operate, there being then no lands or tenements of Andrew McMinn, they having at his death passed to the devisees under his will, nor could any title be transmitted by a sale under such an order, and the said order or decree was erroneous also in not describing the property to be sold, but leaving it to the Master to discover the property, and consequently giving him a discretionary or judicial power, and also because the decree or order of sale was not signed by the Chancellor, or his absence established, or the decree enrolled.

Chapter 52, Sec. 6, Acts 1733, vol. 2, p. 232, N. S. Statutes.
Chapter 11, Sec. 1, Acts 1758, vol. 1, page 9, N. S. Statutes.
Rorer on Judicial Sales, 109-113 and 128.
Hill on Trustees, 247.

15th. Because if the Court had jurisdiction, it could not order the Master, in the first instance, to sell and convey, and such a conveyance could not vest a title in the purchaser or divest it out of the owner or party otherwise entitled, but should have the signature of the party in interest to have this effect.

Dan. Ch. Pr., 1032, 1031 and 1042.
2 Story's Eq. Jur., 744.
Comyn's Dig., Chancery, Y 3 and 7.

16th. Because the complainant in that suit, Mary McMinn, being administratrix of her deceased husband's estate with the will annexed, could not purchase, particularly at her own sale, but such purchase was wholly illegal and void, or resulted as a trust for the infant, and, after such a lapse of time, the legal title must be presumed conveyed.

Fox vs. Mackboth, White & Tudor's Leading Cases, 115.
Hill on Trustees, 250 note, 838.
Perry on Trusts, 205.

17th. Because if the plaintiff is at all precluded, barred or stopped from asserting a title, it is only a title as heir at law, this being the only title in any manner alluded to in the Bill or proceedings as possessed by her.

18th. Because the Master exceeded the power assigned him by the order of sale, in conveying a more extensive title than the order directed, and the deed was consequently void in toto. See page 152, lines 13, 14, 15, and the last word in line 19.

19th. Because the Master conveyed under a sale alleged in the deed, if any, to have been made on the 17th of December, 1842, which no report or other proceeding in the cause verifies.

20th. Because the sale was never confirmed by the Court, and the deed was therefore worthless.

Sec. 8 of Chapter 52, Acts 1733, vol. 2, page 232, Nova Scotia Statutes.
Rorer on Judicial Sales, 55 and 57, and 128.
Sugden on Vop., 110, 101 and 113.
Dan. Ch. Pr., 1275, 1276 and 1279-1281; 2 Sch. and Lef.; 1 Phil. 364.

21st. Because the deed was not confirmed, and no title was consequently transmitted by such deed to Mrs. McMinn.

Same clause of Chapter 52.

22nd. Because the decree of sale, if made, was not enrolled as required by the sixth section of the above-mentioned Statute.

23rd. Because the proceedings in the McMinn suit received in evidence were not, nor was any of them, evidence in a common law Court, in ejectment as to title, or of any avail against the plaintiff claiming title as devisee, and being an infant defendant in the McMinn suit, and the decree of sale not being enrolled, or any final decree pronounced, or the cause ever heard, or the plaintiff's title as devisee under the will set out in the Bill or other proceedings, or any thing alleged showing that Maria McMinn was even a necessary party to the suit, nor any relief prayed against her, or any sale prayed as to her title or interest, or any issue raised that could affect her, nor was she required to answer the Bill, and there was not any issue in that suit respecting her title as devisee.

Taylor on Evidence, 1410; also 560.
4 Mees & Wells, 325; 8 C. & P., 397-403; 14 M. & W., 303; Taylor, 1413.
Freeman on Judgments, 250, 251-271.
Viner's Evidence, A. B. 17; 2 Sid., 75; 1 Greenlief, 522-536.
Dan. Ch. Pr., 664; 34 Beav. 654; Dan. 660; Dan. Ch. Pr., 170, 839-841.

24th. Because there was no final decree in the McMinn suit.

Freeman on Judgments, 251, 252, 255, 250; Dan. Ch. Pr., 664.
14 Sim., 265; 12 Cl. & Fin., 368; Lord Red., 251; 2 Atk., 630, 632.
Dan., 161; 2 Ves. Sr., 577; 3 Atk., 809.

25th. Because there was no final decree in favor of the complainant in the McMinn suit.

25th. Because the Master conveyed under an alleged foreclosure decree, as well as otherwise, without there being any decree, order or authority from the Chancery Court in the McMinn suit to warrant such a conveyance.

26th. Because Mary McMinn never received any deed from the Master by authority of the Court, or if so, the fact was not proved.

27th. Because creditors had no lien on the real estate for the payment of their debts under the law of Nova Scotia at that time, nor did the will give them any, and the Chancery Court could not therefore order a sale thereof for that purpose, the statute not giving the Court the power.

28th. Because no order or decree was produced to sustain the so-called Chancery deed, or which authorized a sale under a decree of foreclosure and the other decree referred to in said alleged deed.

29th. Because if the decree of sale was made in the absence of the Chancellor from Halifax, it was not afterwards signed by him and enrolled, or either, as the statute required, the statute making such signing and enrolling a condition to its validity.

Clause 6 of the Act entitled "An Act for the amending of the Practice of the Court of Chancery," etc., passed 1733, vol. 2, page 232, N. S. Statutes, part 2.

30th. Because the Master's report of the sale was not confirmed by the Court or shown to have been confirmed.

2 Exch. 108; Sugden on Vender and Purchaser, 101, 102, 58.
6 House of Lords, 572; Dan. 1274, 1281.
2 Sch. & Lef., 566; 9 Ves., 37; 12 Ves., 89; 2 Eq. Rep., 108.

31st. Because the decree of sale was allowed without any proof of any of the allegations of the Bill, though the plaintiff here was then an infant.

Dan. Ch. Pr., 170, 839, 852, 326; 11 Ves. 240.

32nd. Because the McMinn cause was proceeded with after the plaintiff's guardian left the Province, without the appointment of another, and without any copy of the amended Bill being served upon the plaintiff here, then a defendant, or upon her guardian.

33rd. Because the order or decree to sell the property was granted before the hearing of the cause.

Dan. Ch. Pr., 1264, 1343.
9 Ves., 65; 33 Beav., 525; 17 Beav. 582; 21 Beav., 559.

34th. Because the Chancery Court was abolished before any final decree or hearing of the cause, and none of the proceedings were of any force or effect.

35th. Because the Master having acted under an order granted the 28th of December, 1841, directing an inquiry respecting several matters therein mentioned without his instituting any inquiry or taking evidence to inform himself on such matters, but relied and acted upon the *exparte* statements of the complainant, which were untrue, false and fraudulent, and so reported without calling the infant or her guardian before him or such guardian being present; and the proceedings being manifestly unjust in these and many other respects, palpable on the face of the papers, and it appearing on the papers in the foreclosure suit referred to in the McMinn suit that Maria McMinn the said infant and now plaintiff in this suit was a devisee and entitled as the only child of the marriage of McMinn referred to in his will, and was not so described or proceeded against in the McMinn suit; but the fact of her being such devisee concealed all through the proceedings, and for the reason also of the other manifold irregularities, errors and void proceedings in the McMinn suit evident to any one reading the papers, and it being also evident that Mrs. McMinn the purchaser purchased in her own suit where she sued as administratrix with the will annexed, and it being also evident by the papers that no final decree had ever been pronounced, and it being also palpable that the Court had no jurisdiction and that the proceedings were open to all the objections herein taken, the commissioners who purchased from her purchased with their eyes open to all these facts or closed to them from their own negligence, they nor the defendants cannot therefore shield or protect themselves under such a purchase, though none of such proceedings were actually void.

36th. Because the complainant in the suit was allowed to name the guardian for Maria McMinn, then a mere infant of the age of three years, and such person having, as the complainant well knew, an adverse interest, his wife Ann Kean being entitled to

the property in the event of the death of Maria McMinn without issue, a circumstance also concealed from the Court and its officer the Master, and for the purpose of defrauding the Court and the infant, which the said defendant Kean and his wife, and the said Mary McMinn the plaintiff in that suit, colluded to effect.

37th. Because no day was given to the infant in Court by the decree of sale, nor was the cause ever heard or decided though pending for nearly twenty years before the purchase from Mary McMinn, and pending for seven years previous to her pretended purchase without any steps being taken, nor was there any proof of any debt being due or of any fact alleged in the Bill, and the decree of sale on the face thereof shows there was no evidence to bind the infant, and these and the other defects and void proceedings above referred to being so evident and palpable on the face of the papers that they could not have escaped discovery by the exercise of the ordinary care and diligence a purchaser is bound to exercise, and the Commissioners and the said Creelman, as well as the said Mary McMinn, must be charged with notice of such defects, errors and void proceedings, and, having or being chargeable with such notice, cannot protect themselves against the plaintiff's claim herein, then an infant.

The plaintiff therefore humbly submits that the verdict or judgment of the learned Judge who tried this case and the judgment of the Supreme Court of Nova Scotia confirming it, should be set aside, and a new trial granted, for the following and other reasons :—

1st. Because such verdict or judgment and the judgment of the Court confirming it are contrary to law and evidence.

2nd. Because such verdict or judgment should have been for the plaintiff and not for the defendant, and such verdict or judgment should have been set aside and not confirmed by the Court.

3rd. Because the papers in the McMinn and Tremain causes and the deeds and documents or many of them offered by the defendants and received in evidence, were improperly received on their behalf.

4th. Because the Court refused to hear the plaintiff or her Counsel on the rule *nisi* to set aside the verdict or judgment, except on an immaterial point, to which her Counsel was obliged to confine his argument as above set forth.

5th. Because the papers in the Tremain and McMinn suits were received as evidence generally or for all purposes in this cause, though the plaintiff here was an infant defendant in said suits.

6th. Because in the judgment of the Court some of the papers so improperly received, and the recitals of the deed from Miss Tremain to Uniacke, and other recitals, were commented upon by the Court, and such recitals were used against the plaintiff, though she was neither a party or privy to the said deeds or either of them.

7th. Because deeds, papers and documents not evidence against the plaintiff were referred to and used by the Supreme Court to sustain their judgment.

8th. Because the plaintiff established a *prima facie* case, as admitted by the Court, and there was nothing made out by defendants to displace such *prima facie* case.

9th. Because not only were documents and other evidence improperly received on behalf of the defendants, but were also used against the plaintiff in giving judgment and to sustain the same.

10th. Because if the proceedings in the McMinn suit were regular and valid in every respect, yet, Mrs. McMinn being administratrix of the estate of McMinn her husband and plaintiff in the McMinn suit, she could at best, if she could at all, only purchase the property charged with a trust for Mrs. Kearney, and the Commissioners or Corporation purchasing from her would also be chargeable with such trust; and after so great a lapse of time and the dissolution of the Corporation, the legal title, if outstanding at the outset, should have been presumed by the learned Judge who tried the cause conveyed to the plaintiff, or that it did revert or pass to the plaintiff the beneficial owner on the dissolution of the Corporation or previously.

11th. Because papers in the McMinn suit were improperly received in evidence: first, because there never was a final hearing or final decree, or any proof of any fact or allegation of the Bill, though the plaintiff here while defendant in that suit was a mere infant; second, because there was not any allegation in the Bill showing that the plaintiff here had any right in the property as devisee; third, because there was not any valid order confirmed by the Court directing a sale of said property; fourth, because the defendants were not parties to said McMinn suit or privies to any of the parties; fifth, because there was not any enrolment of any decree or order; sixth, because there was not any conveyance from the plaintiff of her interest in the land mentioned in that suit or otherwise; seventh, because there was not any decree or order signed by the Chancellor; eighth, because there was not any decree or order made or disobeyed directing in the McMinn suit a conveyance by the plaintiff here of her interest in the property; ninth, because the order, if any made, was only signed by the Master of the Rolls, who only had authority to sign in the absence of the Chancellor from Halifax, and such absence was not proved, nor was it shewn by said order or otherwise.

12th. Because a paper purporting to be a copy of the alleged deed from the Master was received in evidence on the part of the defendant without there being any proof of any valid decree or order of sale, or any decree or order directing its delivery, or any proof that it had been delivered or that Mrs. McMinn went into possession under it, or that it was a copy, or of the loss or destruction of the original, or that there was any final hearing or final decree in the cause, or that the deed was confirmed, or that a valid order of sale was made and confirmed or enrolled, or that there was any hearing of the cause.

13th. Because two mortgages were also received on behalf of the defendants signed by a mark, though the party alleged to have made such mark could write, without any proof of such mortgages, and though not coming out of the custody of any legal holder, but out of a bundle of papers in a suit in which they had never been proved or established or the suit ever tried or terminated, and though the plaintiff was neither

party or privy to such Deeds, and though there were many other suspicious circumstances as above set forth throwing suspicion upon their genuineness.

14th. Because affidavits, answers, petitions and other papers found in the McMinn suit, and which were used in a dispute wholly between Mrs. McMinn and her Solicitor, were received in evidence in this suit, though the plaintiff here was then an infant, and had nothing to do with such dispute between Mrs. McMinn and her Solicitor.

15th. Because for the various reasons otherwise than in the last 14 grounds set forth in this factum.