REPORTS

OF

CASES DETERMINED

BY THE

SUPREME COURT IN EQUITY

OF

NEW BRUNSWICK,

AND BY THE SUPREME COURT OF JUDICATURE OF NEW BRUNSWICK, CHANCERY DIVISION,

WITH

A TABLE OF THE NAMES OF CASES DECIDED, A TABLE OF THE NAMES OF CASES CITED, AND A DIGEST OF THE PRINCIPAL MATTERS.

REPORTER:
HOMER D. FORBES, B.C.L.,
Barrister-at-Law.

VOLUME IV.

35962

TORONTO:
THE CARSWELL COMPANY, LIMITED.
1912.

JUDGES

OF THE

SUPREME COURT OF NEW BRUNSWICK

DURING THESE REPORTS.

THE HONORABLE WILLIAM HENRY TUCK, C.J (1).
" " FREDERIC E. BARKER, C.J. (2).
" " DANIEL L. HANINGTON, (3).
" " PIRERE A. LANDRY.
" " EZEKIEL McLEOD.
" " GEORGE F. GREGORY. (4).
" " ALBERT S. WHITE. (5).
" " JEREMIAH H. BARRY. (6).
" " HARRISON A. McKEOWN. (7).

Judge of the Supreme Court in Equity, (8).

THE HONORABLE FREDERIC E. BARKER, C. J.

Judges of the Chancery Division. (9).

THE HONORABLE FREDERIC E. BARKER, C.J.
" " EZEKIEL McLEOD.

Attorneys-General:

THE HONORABLE CLIFFORD W. ROBINSON. (10).
" " HARRISON A. McKEOWN. (11).
" " JOHN DOUGLAS HAZEN. (12).
" " W. C. HAZEN GRIMMER. (13).

Solictors-General:

THE HONORABLE WENDELL P. JONES. (14).
" " HARRY F. McLEOD. (15).

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(1) Resigned January 8, 1908.
(2) Appointed Chief Justice, January 29, 1908.
(3) Died.
(4) Resigned.
(5) Appointed January 29, 1908.
(6) Appointed June 5, 1909.
(7) Appointed June 5, 1909.
(8) Supreme Court in Equity abolished May 1, 1910.
(9) The Chancery Division was established May 1, 1910.
(10) Appointed May 31, 1907. Resigned October 28, 1907.
(11) Appointed October 28, 1907; resigned March 17, 1908.
(12) Appointed March 24, 1908. Resigned October 16, 1911.
(13) Appointed October 16, 1911.
(14) Resigned March 17, 1908
(15) Appointed March 24, 1908. Resigned October 16, 1911.

ERRATA.

Page 29.— For "Higgins v. Pitt" read "Higgons v. Pitt."
Page 29.— For "Mara v. Sanford" read "Mare v. Sandford."
Page 73, Foot-note.— For "2 Y. & C. C. R. 30" read "2 Y. & C. C. R. 31."
Page 73, Foot-note.— For "1 Han. N. B. R. 168" read "1 Han. N. B. R. 167."
Page 73, Foot-note.— For "1 Eq. N. B. R. 588" read "1 Eq. N. B. R. 568."
Page 74, Foot-note.— For "4 Hare 128" read "4 Hare 129."
Page 83, Foot-note.— For "3 Y. & C. Chan. R. 598" read "2 Y. & C. Chan. R. 598."
Page 85.— For "Roberts v. Jefferys" read "Robarts v. Jefferys."
Page 94, Foot-note.— For "48 L. R. 510" read "48 L. T. 510."
Page 105, Foot-note.— For "7 C. B. 905" read "7 C. B. 906."
Page 116.— For "13 Ves. Jr. 438" read "13 Ves. Jr. 439."
Page 193, Foot-note.— For "(1) L. R. 7 H. L. 243" read "(1) L. R. 5 H. L. 418."
Page 193, Foot-note.— For "(2) L. R. 5 H. L. 418" read "(2) L. R. 7 H. L. 243."
Page 199, Foot-note.— For "3 Atk. 484" read "3 Atk. 517."
Page 213, Foot-note.— For "10 Hare 78" read "10 Hare 81."
Page 218, Foot-note.— For "7 Hare 472" read "7 Hare 473."
Page 230, Foot-note.— For "Burr. 1686" read "3 Burr. 1684."
Page 235, Foot-note.— For "3 D. & War. 8" read "3 D. & War. 1."
Page 239, Foot-note.— For "7 Taunton. 234" read "7 Taunton 224."
Page 282.— For "Prouty v. Mears" read "Prouty v. Ruggles."
Page 283.— For "Prouty v. Mears" read "Prouty v. Ruggles."
Page 319.— For "Power v. Attorney-General" read "Attorney-General v. Power."
Page 336.— For "Raneskill v. Edwards" read "Ramskill v. Edwards."
Page 336.— For "Ex Parte Kelley" read "Ex Parte Pelly."
Page 336.— For "Patrick v. Stanley" read "Padwick v. Stanley."
Page 336, Foot-note.— For "16 Ont. A. C. 307" read 16 Ont. A. C. 357.
Page 337.— For "Gordon v. City of Toronto" read Godson v: City of Toronto.
Page 366, Foot-note.— For "(1) (1891) A. C. 228" read "(2) (1891) A. C. 228."

TABLE OF CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED

IN THIS VOLUME.

A

B.

C.

D.

E.

F.

M.

Mc.

Q.

R.

S.

CASES DETERMINED

BY THE

SUPREME COURT IN EQUITY

OF

NEW BRUNSWICK.

EDGECOMBE v. McLELLAN.

1907.

October 24.

Specific Performance—Conduct of Parties—Costs.

Plaintiff purchased leasehold property from defendant for $340.50, and has paid $300 on account.

Plaintiff alleged that property was sold free of all unpaid rent and taxes, and refused to pay balance of purchase money unless defendant contributed towards unpaid rent which was due at the time of the sale.

Defendant alleged that no such agreement as to unpaid rent and taxes was made, and was willing to execute conveyance on payment of the true balance, but refused to entertain any proposition for settlement unless certain other dealings between the parties were adjusted at the same time.

Held, that the plaintiff was entitled to a decree for specific performance.

Held, also, that as the evidence failed to establish the plaintiff's contention as to the agreement for sale and the unpaid balance; and that as the defendant had acted wrongfully in attempting to make the settlement of this matter contingent upon the settlement of other dealings between the parties which are distinctly foreign, there should be no order as to costs.

Bill for specific performance.

The facts fully appear in the judgment of the Court.

J. H. Barry, K. C., for the plaintiff.

Albert J. Gregory, for the defendant.

1907.

EDGECOMBE v. MCLELLAN. BARKER, J.

1907. October 24. BARKER, J.:—

This case in form is a suit for the specific performance of a contract; in substance it is a dispute over a few dollars and ought never to have come here at all. The defendant's mother held a mortgage from one McCaffrey on a leasehold property in Fredericton, to secure the sum of $300 and interest. The lease to McCaffrey is from the University of New Brunswick. It is dated February 6th, 1896, and the annual rent reserved is $28.28, payable in two equal instalments of $14.14 each, on the 27th days of March and September. McCaffrey being in default the mortgagee sold the premises under a power for that purpose on the 6th March, 1900. The premises were bought in by Hughes, who is a law clerk in the defendant's office, for the sum of $50, admittedly for the mortgagee, for whom the defendant was acting. The bill alleges that on the 6th March—that is the day the sale under the mortgage took place—the defendant sold and the plaintiff purchased these leasehold premises for the sum of $340.50, and that the terms of the sale are embodied in a receipt given by the defendant for $100, the first payment on account of the purchase money. That receipt is as follows:

"Fredericton, N. B.; March 7th, 1900.

"$100.

"Received of Sophia P. Edgecombe a check for one hundred dollars, being part of the purchase money of the Francis McCaffrey property situate on King street in the City of Fredericton, and I hereby agree to sell to the said Sophia P. Edgecombe the said property for the sum of $340.50.

R. W. MCLELLAN."

On the 4th July, 1900, the plaintiff made another payment of $100 on account of the purchase money, and on the 5th January, 1901, a third payment of $100, leaving a balance of $40.50 due at that time, exclusive of interest. So far there is practically no dispute between the parties. The plaintiff, however, alleges in her bill that at the time of the sale it was distinctly understood and agreed that she was to

have an unencumbered title to the premises, subject only to the ground rent, but freed and discharged from all past due rent and taxes. She further alleges that at the date of the sale there were eighteen months ground rent accrued due, amounting to $42.42, and that a further sum of $14.14 became due in September, 1900; that she insisted that the defendant was bound to pay these sums, and that he at first refused, but finally agreed to pay one-half of these sums, that is, one-half of $56.56, and that for this sum the defendant, on the 28th May, 1901, became party to a note for $31 in settlement of this one-half, and a further sum of $5.50, which the plaintiff says the defendant owed her. It is over this that this suit has arisen. The defendant denies this liability altogether, and on payment of the true balance is willing to make the conveyance. The plaintiff, on the other hand, refuses to pay the balance without being credited with the amount, or allowed for it in other accounts between them. Immediately after the sale, which the defendant says took place on the 7th March instead of the 6th, the plaintiff was put in possession and has since been in possession. She has also expended some hundreds of dollars in improvements. There seems to be no doubt that the premises at the time of the sale were worth more than double what the plaintiff was to pay for them. They were valued by the assessors at $700, and that seems a low valuation. I shall treat this case just as the Counsel treated it, as involving the question I have mentioned, and no other. After hearing the evidence given, and after perusing it and comparing it since, I have come to the conclusion that it altogether fails in establishing the plaintiff's contention, both as to the original agreement and as to the giving of the note for $31. The amount due on the mortgage was $300 for principal, $10.50 for interest and $30 for the costs of advertising and selling, in all amounting to $340.50, which the plaintiff was to pay. The defendant says that on the 6th March, just after the sale under the mortgage had taken place, and Hughes had come into the office and reported to him the result of it, the plaintiff's

1907.

EDGECOMBE v. McLELLAN.

BARKER, J.

husband, William Edgecombe, came into the office on another matter altogether, and after that was disposed of, that he spoke to Edgecombe and said: "Mr. Edgecombe, we have just sold that McCaffrey property directly across from you there" (that is opposite from where Edgecombe then lived and had lived for some time), "would you like to buy it?"

He made inquiries as to the price, and I simply told him that I would sell the property to him for the sum of $340.50, and he asked me if that was the best I could do. I said, "Yes, it certainly is;" because I told him that the $340.50 would simply let me out of the transaction clean and clear. I wasn't taking anything on it except the actual amount of mortgage and interest and charges against it (that is, the charges for the sale under the notice). He also says that he showed him how the amount was made up, and that they did not want to hold the property, only to get their own money out of it. The defendant positively denies that he made any agreement either as to taxes or ground rents, and that he had no knowledge whether these were all paid or not. He says that Edgecombe said he would take the matter into consideration and let him know; that he came back in the afternoon and agreed to take the property at the $340.50; that he then said he must have some cash payment; and he came in the next morning and paid the $100, as I have already mentioned. Edgecombe was asked to state what took place between him and the defendant when the sale was made. He talked about several other matters which led up to this, and he said: "I was speaking of the property that is here. He told me about it. So we talked considerable about it. Parties came into his office and we didn't have much of a conversation about it, but he gave me to understand that he had foreclosed a mortgage the day before, and that he would get it for us at the same price as what it cost him;" and this he said he understood to be the $340.50, which he agreed to give. He also, on his cross-examination, said that at the time the transaction was made there was nothing said specifically about ground rents. It is true that he said that the defend-

ant was to sell to him free of rent and taxes, but that is positively denied and is inconsistent I think with the admitted facts and other circumstances. The defendant as mortgagee would not necessarily know anything about either the taxes or ground rent, they were liabilities of the lessor, and Edgecombe had the same means of ascertaining whether there were any arrears as the defendant had. As I interpret the defendant's offer, and as I think Edgecombe understood it, it was simply this—we have had to buy in this property at the mortgagee's sale—we do not want to keep it so as to be troubled with tenants—it is worth twice the sum we have against it, our claim is $340.50 made up of principal, interest and costs—if you will pay that for it you can have it. All we want is to get our money out of it. It seems to me no one would take that to be an offer to sell subject to arrears of ground rent, neither do I think Edgecombe did, it was altogether an afterthought. He knew perfectly well that he was simply taking Mrs. McLellan's place, not as mortgagee, but as purchaser under her for just the amount of her claim against the property. Let us see what took place later as to the note. This note is dated May 28th, 1901, made by Wm. Edgecombe in favour of his wife, endorsed by her and the defendant, for $31.00, payable at the Royal Bank in two months. *Prima facie* this is Edgecombe's own liability, and the onus is upon him to show that it was the liability of some one else. He says it was made for the accommodation of the defendant, who was then so short of money that he could not pay this $31.00. Let us see how he says the amount was arrived at. Edgecombe says the first intimation he had that there was any rent in arrear was from a letter written by the defendant to him dated December 12th, 1900. This letter is in evidence, and in it the defendant states that Mr. Bliss, who was then Registrar of the University, had telephoned him that there was $56.56 ground rent due on this McCaffrey property, and that it must be arranged at once. This was over nine months after he had purchased the property and been in the occupation of it. He adds to this $56.56 a sum of

1907.

EDGECOMBE v. MCLELLAN.

BARKER, J.

$5.50, which I shall explain later on, making $62.06, the half of which he calls $31.00 and the note is made accordingly, with the specific agreement, so the plaintiff says, that the defendant was to pay it at maturity. The plaintiff says this was a compromise or settlement arrived at between them —that the sale was to be clear of all arrearages of ground rent, but as they disagreed over that, the defendant finally consented to pay one-half of it, and in this way the amount of the note was arrived at. On the 15th May, 1901, only thirteen days before this note transaction took place, Edgecombe had a letter from Mr. Bliss calling upon him for payment of the arrears of rent before the 22nd inst., amounting to $70.70, and threatening proceedings if the amount was not paid. The amount is divided thus,—arrearages $56.56, half year's rent due 24th March, $14.14,—that is March 24th, 1901. Edgecombe knew perfectly well not only by this letter but by the letter of the previous December, that on the 7th March when this sale took place there was only one year's rent overdue, $28.28. There was of course a half year's rent coming due in a fortnight later, but if you add that it only makes $42.42, the half of which is certainly not $31.00 If Edgecome did not discover this he ought not to expect that the defendant was equally dense. He certainly could scarcely expect to be in receipt of the rents of the property, and make the defendant pay the ground rent. There is another extraordinary thing about this note. The $5.50 included in it is a sum which Edgecombe says the defendant received from a Mrs. Johnson for 57 days' interest on $500 which he took out of the Bank to loan Mrs. Johnson on mortgage, but which was not completed. According to the defendant, and I have no reason to think he is not correct, no such transaction took place; he never charged the amount and never received it. Apart, however, from that, according to Edgecombe himself, there never was any dispute as to that—there was nothing to compromise or to settle as to that, and yet he divides that in half as well as the $56.56. Besides this, even if the defendant had agreed to pay this $31, there was, as Mr. Gregory

suggested, a very simple way of settling it. Edgecombe had only paid $300 on account of the purchase money. There was a balance of $40 and interest coming to the defendant, and all he had to do was to credit the $31, for Edgecombe to pay the balance, about which there could be no question whatever, and close the transaction up. This is certainly the only reasonable solution of the whole matter if Edgecombe's story is correct. In addition to all the other extraordinary features in this transaction, the note in question was immediately used in the bank; Edgecombe himself paid it at maturity without asking the defendant to do it or speaking to him about it at all until long afterwards. I asked him why he did not go to the defendant to pay it as he agreed, and his answer was that he did and he was away. It was clearly proved by reference to the defendant's book that he was not away but at his office as usual on the day before and after. Now what is the defendant's version of the transaction? He says when this demand was made upon Edgecombe for the rent he came to him for assistance. Edgecombe paid Bliss $40 on account of the rent on the 25th May, 1901, leaving $30.70 due. This sum he wished to raise in order to avoid the proceedings which Bliss was threatening, and he wanted the defendant to assist him. The defendant then drew out this note on which he would have the liability of Edgecombe and the plaintiff, it was signed, given to Edgecombe who took it to the bank, and out of the proceeds he paid the balance of the rent, 30.70. I think the plaintiff's claim as to this rent is not sustained by the evidence, Edgecombe's account of this note a most improbable one. If this case ended here it would be easily disposed of. It seems that the defendant has a claim against the plaintiff, and another against Edgecombe, her husband, the two altogether amounting to between $300 and $400 for professional services, which I think unwisely he has attempted to tack on to this purchase, and make the settlement of the one dependent upon the settlement of the other. The two have in reality nothing whatever to do with one

1907.

EDGECOMBE v. McLELLAN.

Barker, J.

another. The sale of the property was a matter of Mrs. Edgecombe, a client of the defendant, and his claims against Edgecombe and his wife are altogether separate and distinct, and his own private matters. There have been negotiations with a view to the settlement of this matter so as to avoid the expense of litigation. The defendant offered to rescind the whole contract and return the plaintiff this money and the cost of his repairs with interest, but that was refused. Offers to pay the balance have been made, but they were based on the defendant contributing to the arrears of rent, which he refused to do. Mr. Barry made up an account on this basis, showing a balance of $25.28 up to the end of January, 1906, but this was refused. In a letter written to Mr. Barry by the defendant dated April 20th, 1906, he says, "I would of course be willing to wait a reasonable time so that you could have time to communicate with him, but I have definately made up my mind not to close up the transaction in connection with the King street property until other matters are settled and adjusted. Taking all our accounts together I am willing to be more than generous with these people rather than be put to any inconvenience in the matter, but I certainly intend to insist that not only one but all matters between us shall be closed up." On the 14th June, 1906, Mr. Barry again called upon the defendant, and then offered to pay him $64.65 and all accrued interest from January 5th, 1906, out of which $39.30 was to be credited on the defendant's private account against the plaintiff, in with what Mr. Barry understood the defendant had consented to at a previous meeting. The defendant, on the 20th June, 1906, replied to this offer, refusing it on the terms proposed. He says that in order to get the whole matter cleared up he would only be too glad to cut down his account against the Edgecombes considerably. He adds, "In case, however, that they are not willing to have all matters adjusted at the same time, I may positively state that I cannot consent to closing up one end of the transaction and leaving the other open." The $64.65 is admittedly the correct balance due, irrespective

1907.

EDGECOMBE v. McLELLAN.

BARKER, J.

of the $31 note. I think both parties have been wrong. The plaintiff was wrong in his position to the arrears of rent, and the defendant's attitude as to making the settlement of this suit dependent upon a settlement of the accounts was wrong, and of course closed the door to further negotiations.

I shall follow *Lawes* v. *Gibson* (1), where in a somewhat similar case Stuart, V. C., made a decree for specific performance without costs to either party.

(1) 11 Jur. N. S., 873.

1907. December 17.

CARTER v. LOWERISON AND OTHERS.

Descent—Partition of Real Estate—Next of Kin—Statute of Distributions, Con. Stat. (1903), Chap. 161.

L. died intestate, leaving him surviving heirs, consisting of an uncle and the representatives of two deceased uncles and three deceased aunts on his father's side; and of the representatives of a deceased uncle and aunt on his mother's side.

Held, that the heirs on the maternal side rank equally with the heirs on the paternal side, when they stand in the same degree of relationship, and that the partition of the real estate must be made on this basis.

The case of *Doe Dem. Wood* v. *DeForrest* (1) followed as to distribution of real estate.

This suit was brought for the partition of the real estate.

Albert W. Bennett for the plaintiff.

William B. Chandler, K.C., and *Daniel Jordan*, K.C., for the defendants.

1907. December 17. BARKER, J.:—

This suit is brought for the partition of the real estate of one Robert A. Lowerison, who died intestate at Sackville on January 11th, 1907. He did not leave him surviving any brothers or sisters or representatives of a brother or sister. His parents and grandparents predeceased him. His heirs consist of one surviving uncle and the representatives of two deceased uncles and three deceased aunts on his father's side, and the representatives of a deceased uncle and aunt on his mother's side. The only question involved is whether the estate is to be divided among both the paternal and maternal heirs, or confined to those of the paternal side. In the one case the land would be partitioned on the basis of six shares, in the other on the basis of eight.

(1) 23. N. B. R. 209.

1907.

CARTER v. LOWERISON. BARKER, J.

I think that the rule of construction governing the distribution of real estate in a case such as this, is really settled by *Doe dem. Woods* v. *DeForrest* (1), though the point there involved was not the same as the one arising here. I understand that rule to be, that the "next of kindred" to whom real estate in cases of intestacy descends under our Statute of Distributions (Chap. 161, Sec. 1, C. S. of 1903), are to be ascertained by the method of computation which is adopted in reference to the English Statute of Distributions—that is, by counting up from the one party to the common ancestor and down to the other, reckoning a degree for each person. Uncles and nephews would therefore stand in the third degree, whether the common ancestor was male or female. *Williams*, in speaking of this method of computation, says: "Relations by the father's side and the mother's side are in equal degree of kindred; and therefore, equally entitled to administration: for, in this respect, dignity of blood gives no preference. Hence it may happen that relations are distant from the intestate by an equal number of degrees and equally entitled to administration of his effects, who are no relations at all to each other." *Williams on Executors* (2). The author is here discussing the right of administration, but that right depends upon the right of property. At page 355 of the same work he says:—"It may be observed that it is an established principle of the Ecclesiastical Court, that the right to the administration of the effects of an intestate follows the right to the property in them."

I think therefore that the heirs on the maternal side are entitled equally with those on the paternal side, and the partition must be made on that basis.

As the property cannot be beneficially partitioned there will be an order for its sale, and the proceeds, after payment of costs, will be distributed among the parties to this suit in the proportions set out in the bill.

(1) 23 N. B. R. 209. (2) 9th Ed., p. 258; 8th Ed., p. 428.

1908.

February 25.

McGAFFIGAN ET AL v. FERGUSON ET AL.

Mortgage—Deed—Confidential Relationship—Undue Influence—Pressure—Misrepresentation—Improvident Contract—Voluntary Gift—Insanity of Grantor.

William Davidson died in 1890, leaving real estate consisting of his Homestead and lot "A," all of which he left absolutely to his wife Helen Davidson, and appointed her and the Defendant William Ferguson executors.

In 1898 James Davidson, son of William and Helen Davidson, being indebted to the Defendants William Ferguson and Philip Arsenault, became insolvent and assigned to Philip Arsenault. Nearly all the creditors, including William Ferguson and Philip Arsenault, agreed to compromise at ten cents on the dollar, but James Davidson made a secret agreement with William Ferguson and Philip Arsenault that they should be paid in full.

By arrangement between James Davidson, William Ferguson and Philip Arsenault, William Ferguson for James Davidson purchased the assets from Philip Arsenault as assignee for $1000.00, and for the securing William Ferguson the balance advanced and balance of his old debt against James Davidson, Helen Davidson in 1899, being then about seventy six years of age, without any independent advice, executed to William Ferguson a mortgage of lot "A" for $822.90. William Ferguson gave James Davidson a Power of Attorney to deal with these assets, who in the name of William Ferguson sold and converted them into money to an amount greater than the mortgage.

In December, 1899, James Davidson arranged that his mother should sell to Philip Arsenault the said lot "A" for $600, $200 of it to go on Philip Arsenault's old account against James Davidson, and $400 by notes made by Philip Arsenault in favour of William Ferguson, and which the latter took on his account against James Davidson. Both the mortgage and deed were written by James Davidson, and Helen Davidson had no independent advice and had become of feeble intellect.

In March, 1900, Helen Davidson made a will leaving all her property to her son James and his family. William Ferguson drew this will, is named in it an executor, and had full knowledge of its contents.

In December, 1902, James Davidson being indebted to William Ferguson to the amount of $1,250.97, Helen Davidson, at the request of William Ferguson and James Davidson, gave a mortgage of the homestead to William Ferguson for $1.250.97 to secure that amount, which was shown by the evidence to be the total sum due from James Davidson to William Ferguson at that time.

1908.

MCGAFFIGAN v. FERGUSON.

Helen Davidson lived practically all the time with James Davidson, and he had great influence over her, which fact was well known to both William Ferguson and Philip Arsenault.

Held, that the first mortgage to Ferguson, made in March, 1899, was discharged and must be set aside, as the amount which it had been given to secure had been paid in full.

Held, that the conveyance to Arsenault, made in December, 1899, must be set aside, as obtaind through undue influence and pressure on the part of James Davidson, and solely for his benefit; and on the ground of the mental weakness of the grantor, and that she had no independent advice; that Arsenault, as he knew the relation which James Davidson occupied with regard to the grantor, and all the circumstances in connection with the transaction, stood in no better position than James Davidson would stand, and was bound by, and responsible for, any acts committed by Davidson, or omitted to be done by him.

Held, that the second mortgage to Ferguson, made in December, 1902, must be set aside, as obtained through undue influence and pressure on the part of James Davidson and William Ferguson, and solely for their own benefit; that Ferguson had the same knowledge of all the facts as Arsenault, and was bound in the same way by the acts and omissions of James Davidson; that the grantor had no independent advice, and was so deranged mentally as to be incapable of transacting business.

Bill to set aside two mortgages from Helen Davidson to William Ferguson, and a deed from Helen Davidson to Philip Arsenault, and for an accounting.

The facts fully appear in the judgment of the Court.

M. G. Teed, K.C., for the plaintiffs.

N. A Landry, K.C., and *L. A. Currey*, K.C., for the defendants.

1908. February 25. BARKER, C. J.:—

This suit was commenced in the name of Helen Davidson, a person of unsound mind, not so found, by William G. Bowie as her next friend. Helen Davidson was the widow of William Davidson. She died April 7th, 1905, at the age of eighty-two years, leaving a will dated March 6th, 1900, by which she appointed the Rev. Joseph A. Babineau and the defendant William Ferguson executors. They both renounced, and the present plaintiff, Elizabeth McGaffigan, who is a daughter of Helen Davidson, applied for and

1908.

McGAFFIGAN v. FERGUSON.

BARKER, C. J.

obtained letters testamentary *cum testamento annexo*, and the suit is now being prosecuted in her name coupled with others in like interest. It appears from the evidence that Wm. Davidson, for many years previous to his death, carried on a considerable business at Tracadie. He died in 1890, leaving him surviving his widow and two children, the present plaintiff Elizabeth McGaffigan, and a son James, one of the defendants. He left a will dated December 26th, 1889, by which he appointed his wife executrix, and the defendant Wm. Ferguson executor, to whom letters testamentary were granted. By this will all the testator's property, with the exception of a legacy of $50 given for religious purposes, and another of $500 given to his daughter, was given absolutely to his wife. The estate consisted of two lots of land at Tracadie—one known as the homestead lot on which Davidson lived and which contained some twenty-five acres, the other known as the Arsenault lot which contained two or three acres. The appraisers valued these lots, with the buildings on them, at $2,260. There was also personal property, consisting of farm stock and house furniture valued at $940, cash in the Savings Bank $1,000, and $3,000 in Provincial debentures deposited at the agency of the Bank of Montreal at Chatham. So that the whole estate at a moderate valuation was worth $7,000, for there were substantially no debts. Wm. Ferguson himself estimated that the income derivable from the estate was sufficient for the support and maintenance of the widow, Helen Davidson, in view of her habits and condition in life. By her will she disposed of her property as follows,—she gave $70 for masses, and the residue to her son James for his life, then to James' wife for life or until her marriage, and then to James' children living at the time of his death for their lives, and on their death to the Superioress of the Corporation of the Hotel Dieu St. Joseph, of Tracadie, forever. This will, which is dated March 6th, 1900, and of which Wm. Ferguson is named an executor, is witnessed by him and it was drawn by him, so that he had personal knowledge of its contents. James

1908.

McGAFFIGAN v. FERGUSON.

BARKER, C. J.

Davidson was a man of exceedingly intemperate habits, and though not without business capacity, he was reckless in the management of his affairs, and squandered what he had without thought for the future. In 1898 he became insolvent, and made an assignment for the benefit of his creditors. His liabilities amounted to about $8,000, in which was included an amount of $477.80 said to be due Wm. Ferguson.

On the 22nd March, 1899, Helen Davidson executed a mortgage to the defendant Wm. Ferguson, to secure the sum of $822.90 with interest at the rate of 7%, payable in four years, on the Arsenault lot. This mortgage was not registered until March 15th, 1901.

On the 28th December, 1899, Helen Davidson for an expressed consideration of $600 conveyed the Arsenault lot to Philip Arsenault, under which he went into possession, and remained in possession until his death, which took place after this suit was commenced. Philip Arsenault was a son-in-law of Wm. Ferguson, and when James Davidson made his assignment in 1898, Arsenault claimed as a creditor for some $355.11. This conveyance was registered January 6th, 1900, about fourteen months before the registry of Ferguson's mortgage on the same property. According to Ferguson's evidence $600 was the full value of the lot and other witnesses confirm this opinion.

On the 29th December, 1902, James Davidson and Helen Davidson executed a mortgage to the defendant Wm. Ferguson to secure the sum of $1,250.97, payable in five years, with interest at 5% on the homestead lot. This mortgage shows on its face that the consideration was money due by James Davidson and in no way by his mother, who was sole owner of the property. It was registered January 6th, 1903. Default having been made under this last mortgage, the defendant Wm. Ferguson, as mortgagee, proceeded to realize the amount, and for that purpose he gave a notice of sale in October, 1904, to take place at Tracadie on the 17th January, 1905. This bill was then filed, the sale was restrained and the object of this suit is to set aside these three

1908.

McGAFFIGAN v. FERGUSON.

BARKER, C. J.

conveyances, on the ground that they were all procured from Helen Davidson by undue influence, when she was enfeebled by old age, without independent advice and unable from mental weakness to understand their nature or effect, and in disregard of a duty which both James Davidson and Wm. Ferguson, for whose benefit they were made, owed to Helen Davidson, arising out of a fiduciary relation in which, it is said, both of them stood to her. When the notice of sale was given in October, 1904, Helen Davidson was eighty-two years of age and weakened in body and mind. She was without any means of support of her own. Her money and personal property had all disappeared. A part of her real property had been sold Arsenault, and the remainder of it had been mortgaged to its full value to Wm. Ferguson. James Davidson and his family were without means of support. Of all the money belonging to Helen Davidson which had passed through Wm. Ferguson's hands, there only remained $20 which he had kept to pay her funeral expenses. In this condition of things the present plaintiff, Mrs. McGaffigan, came to the rescue. She arranged with the Convent authorities to take her mother to board, for which she was to pay $20 a month besides cost of clothing. The old lady, with a young girl as attendant, was accordingly transferred to the Hotel Dieu in October, 1904, where she remained until she died in the following April. Mrs. McGaffigan paid some $150 under her arrangement, and Wm. Ferguson appropriated the $20 in defraying the cost of the funeral.

There are distinctions between these three transactions which make it necessary to discuss them separately. As to the first mortgage, Wm. Ferguson in his answer claims that there is due him the full amount of principal and interest secured by both mortgages. The evidence, however, clearly shows, and his own books show that the $1,250.97 secured by the last mortgage was the total sum due by James Davidson at that time on all accounts. It is unnecessary to go through the books to prove this, because Ferguson's counsel very properly admitted that from the evidence this was a fact.

They, however, allege that whereas the last mortgage was given for an existing debt from James Davidson, the first was given to secure an advance made to Helen Davidson, and though it was made for James Davidson's benefit, the debt was Helen Davidson's. And the agreement was, that if any balance remained unpaid on the first mortgage which formed a part of the $1,250.97, to that extent at all events the second mortgage secured a loan to Helen Davidson herself. I do not think the evidence sustains the defendants' contention on this point. What took place was this—when James Davidson failed in 1898 he owed some $8,000. Of this sum something over $2,000 was due his mother—$335.11 was due to Philip Arsenault and $477.80 to Wm. Ferguson. His assignment was made on 10th Nov., 1898, but before it was made a consultation took place between James Davidson and William Ferguson, at which it was arranged that a cash compromise of 10% was to be offered the creditors, that in the event of its acceptance, Ferguson was to supply the money on being secured by Helen Davidson, and Ferguson and Arsenault, his son-in-law—one of whom became the assignee and the other an inspector of the estate—were to be paid their claims in full. The meeting of creditors was held, the offer of compromise was accepted by nearly all the creditors, and the arrangement made with Ferguson and Arsenault was not made known to the other creditors. In order to carry out this compromise, Ferguson sent in a tender for the purchase of the insolvent's estate for $1000. That was the sum which Ferguson estimated would be required to pay the 10% and other charges. His tender was accepted, he took possession of the estate, property and assets, and the business went on as before, not in James Davidson's name, for some of the dissenting creditors had obtained judgments, but for his benefit. In the following March James Davidson and Wm. Ferguson settled upon the amount for which the mortgage was to be given at $822.90. This sum included not only the compromise actually paid, but Ferguson's claim in full, as it was then settled at $241.70, his

1908.

McGAFFIGAN v. FERGUSON

BARKER, C. J.

fees as inspector of the estate and other accounts, for which, according to his own version of the transaction, Mrs. Davidson never agreed to become security in any way. In addition to this, on the 14th day of March, eight days before the mortgage was executed, Ferguson gave a power of attorney to James Davidson, authorizing him, in the name of Ferguson and for his sole benefit to continue, operate, manage and transact the general mercantile and fish business, lately operated and transacted by the said James Davidson, at Tracadie, with power to Davidson, in Ferguson's name and as his agent and attorney, to sell on credit or otherwise whatever goods, chattels, wares and merchandise then there, or that might at any and all times be put there by Ferguson or by Davidson for him. Included in this property were fishing boats, tackle and fishing gear valued at hundreds of dollars, with which James Davidson continued the business, and of which he alone received the benefit. Besides this, the $822.90 Ferguson did not charge to Mrs. Davidson, but to James or his estate; and in Ferguson's own books it, with the subsequent dealings which took place between the two, down to the time when the second mortgage was given, are carried along as one account, and they finally ended in the balance of $1,250.97 for which that security was taken. And we have in this second mortgage a specific declaration by both James Davidson and his mother, who is a party to it, as follows,—"Witnesseth that in consideration of the sum of $1,250.97 of lawful money of Canada by the said Wm. Ferguson to the said James Davidson in hand well and truly paid, &c." It is therefore clear that not only was the total indebtedness of James Davidson to Ferguson included in the amount secured by the last mortgage, but that the debt was the debt of James and not that of his mother. It is clear from Ferguson's own evidence that the arrangement, such as it was, between him and Mrs. Davidson, was that the advance was not to exceed $1,000, and it was for the money advanced as necessary to pay the compromise, that the

mortgage was to be given. His evidence on that point is as follows:—

"Q. You were to have a mortgage from her to secure your cash you might advance to settle with James' creditors? A. For a thousand dollars.

"Q. It was for cash you were to advance—you were to get a mortgage for whatever you were to advance, not to exceed $1000. A. Yes."

He also says expressly that it was not the agreement that the mortgage was to include the old debt.

The evidence is equally clear, that if the first mortgage had only been for the money advanced by Ferguson as he had agreed, the whole amount would have been paid off. Ferguson's own books show this, and he himself admitted that it was so. His evidence on this point is as follows:

"Q. However you are satisfied now, are you not, that $222.05 is the balance that appears due on the first mortgage? A. Yes, that would be it.

"Q. And if you deduct from the mortgage the old debt of $250 and your inspection fees of $20 and some other items you have charged in there, that mortgage will be wiped out absolutely? That is the first mortgage. Ar'n't you satisfied of that? That would be correct wouldn't it? A. Yes."

Ferguson was there speaking from his own books. James Davidson positively proved the correctness of the account, and there is no other evidence on the subject. It is therefore clear that Ferguson has actually been paid all that, according to the undisputed evidence, he could have ever recovered on this first mortgage, and all that it was really intended to secure. This is altogether apart from the illegality which would have attached to the mortgage, if it had in fact been given to secure the payment in full of Ferguson's debt, in pursuance of the secret agreement, made in fraud of the other creditors of James Davidson. Mrs. Davidson's part in this, as well as the subsequent transactions, was little more than the mechanical act of signing

1908.

McGAFFIGAN v. FERGUSON

BARKER, C. J.

her name, as directed or requested by James. He had apparently acquired complete control over her—what she had in the way of money or property she seemed ready to give him. Though not so debilitated at this time as she was when she gave the second mortgage, she was feeble and old and weak in mind. The mortgage was prepared by James. It was not read over to the old lady—it was not explained to her. She had no independent advice. She does not seem to have been consulted as to what was done or what was agreed to be done—how the amount of the mortgage was arrived at, or as to its terms, or as to what became of James' property. Beyond the fact that she was willing to assist her son as he suggested to her, she does not seem to have known anything more about the transaction than an entire stranger to it. She received no benefit from it—James and Ferguson shared that between them. Nor can there, I think, be any doubt from all the evidence that Ferguson knew perfectly well in what relation James stood to his mother, as to this or similar transactions. In such a case this Court will interfere, and set aside the security as illegal, upon such terms as may be equitable, and there must be a decree to that effect as to this mortgage.

The facts in reference to the sale to Philip Arsenault are as follows: The conveyance was made December 28th, 1899, and at that time James Davidson still owed Arsenault $280 of the old debt upon which he had claimed when James assigned. He also owed Ferguson a large sum. Arsenault was anxious to purchase this lot, and had spoken to James several times about it. They finally agreed on a sale on these terms. The price was to be $600, and it was to be paid in this way—$200 was to go on account of James' debt of $280, and the remaining $400 was to be paid by 3 notes made by Arsenault in favor of Wm. Ferguson as follows,—one for $133.33 payable in a year—one for the same amount payable in two years, and a third for $133.34 payable in three years; all of them bearing interest at the rate of 7%. These notes were to be given to Ferguson, who

was to credit James Davidson with the amount. James Davidson wrote the conveyance as he had previously written the mortgage. It was executed before Savoir, the Justice who had taken Mrs. Davidson's acknowledgment to the first mortgage. It was delivered to Arsenault, the notes were written by James, signed by Arsenault, and handed over to Ferguson, who credited the $400 to him on account, and Arsenault credited James with the $200 on account of the old debt. Arsenault registered his conveyance and went into possession. It is contended that the sale should be set aside, or, failing that, that Arsenault and Ferguson should account to the plaintiff for the purchase money, for nothing has been paid on the notes. It is not contended that Arsenault stood in any fiduciary relation to Mrs. Davidson, and so far as the evidence goes, he had no direct communication with her on the subject of the purchase. So far as she was consulted in reference to it, or acted in reference to it, it was through James Davidson and him alone. Arsenault knew that she had already given a mortgage on the same property for more than its value to Ferguson. That was spoken of at the outset of the negotiations between them. The only evidence there is on this point is that of James Davidson himself. It is as follows:

"Q. Did you or not have any conversation or negotiations with her about the Arsenault lot? A. About buying the piece of property? Yes.

"Q. Just tell us what took place. A. Well Philip Arsenault on several occasions asked me about buying that piece of property on the opposite side of the road from his home. Well of course I told him that Wm. Ferguson had already a mortgage for that.

"Q. From your mother? A. From my mother. Oh well! says Philip, we can easily arrange that with the old man, alluding to Wm. Ferguson I suppose. Says he, that mortgage is not put on record. Well it was found after that a little time maybe and he was asking me again, and I said, well I will tell you Mr. Arsenault what I will do. I

1908.

McGAFFIGAN v. FERGUSON

BARKER, C. J.

will go down and see Mr. Ferguson, and if Mr. Ferguson is willing or agrees that I should sell you this piece of ground, it will be all right, on condition that he will take you for the amount of $400.

"Q. What was he offering you for the property? A. $600."

The witness then explained that at that time he owed Arsenault something over $200 including the old debt, and his examination then proceeds.

"Q. Getting back to where we were. In your negotiations with him about the sale of the land, you say he offered you $600. How did he propose to pay that for this land of your mother's A. He proposed I would leave to my credit on his account $200 and that he would give me notes in three years, payable one, two and three, in favour of Wm. Ferguson for the $400.

"Q. Well then you said you wouldn't do anything until you went and saw Mr. Ferguson? A. I told him Wm. Ferguson had a mortgage on the property, and he said the mortgage was not on record, and the old man (he named him this time) would fix that all right.

"Q. What did you say to that? A. I said I would go and see Mr. Ferguson myself, and I didn't know whether Mr. Ferguson would accept these notes till I would see Mr. Ferguson.

"Q. You went and saw him before anything was done? A. Saw him shortly.

"Q. What did you say to Wm. Ferguson? A. I went in and mentioned the matter to Mr. Ferguson.

"Q. Tell us what you told him, as near as you can? A. I told him I came to see him about a piece of property that Philip was very anxious to get, and I was aware he had a mortgage of the same piece, and Mr. Ferguson told me the mortgage was not on record, that I could please myself.

"Q. What did he say about the notes? A. He said this, of course he would accept the notes, but he didn't know

exactly what time he would be paid, as Philip owed him then a considerable amount.

"Q. Did he agree to credit you with them? A. Yes."

The witness then says that he himself wrote the deed and got it signed, and his examination proceeds.

"Q. You wrote out the deed yourself, and what did you do about getting it executed? A. I went and spoke to my mother first about it, and she said it was all right. I didn't explain anything about the first mortgage on the same property or not, and I don't remember she asked me about anything particular.

"Q. Did you explain to her? A. That I was going to get a deed of what we call the Arsenault property; that is the way we had of distinguishing it by the name, and she said it was all right. So I sent up for the magistrate, Justinian Savoir, and he came down."

Later on in his examination the witness was asked as follows:

"Q. Did you say you explained anything to your mother about the notes, about how this was to be paid for, or anything of that sort, or what did you tell her about that?

"Q. (By the Court) Did she know how much you were to get for the land? A. Yes, I mentioned that to her.

"Q. Did you tell her how you were to get the money, in the shape of notes, and what was to be done with it? A. Yes, I think I told her.

"Q. Told her that before the deed was executed? A. Yes."

This evidence is uncontradicted except in one particular. Ferguson swears that he knew nothing whatever about the transaction until Davidson actually brought him the notes. I do not know that it is important, so far as this case is concerned, which version is correct. In either case, Ferguson knew when he took the notes that they had been given in payment of this old lady's property, and that she was not deriving a particle of benefit from the sale. He also knew her mental and physical condition was such as to make her an

1908.

McGAFFIGAN v. FERGUSON

BARKER, C. J

easy prey to any one disposed to impose upon her, and he also knew how entirely and unreservedly she yielded to the wishes of James Davidson, and how for his benefit her property had been and was being dissipated, as a result of James' control over his mother. And he knew, that notwithstanding his advice to her, to save her property for her support, she was squandering it all at James' instance, and that he was himself gathering in the fragments in satisfaction of James' debt to him. Apart from this, it seems an almost necessary inference from the evidence that Ferguson's memory has failed him in this as in other particulars; for it seems unreasonable to suppose that James Davidson and Arsenault would go to the trouble of having the notes given and the conveyance drawn and executed without saying a word to Ferguson, when a part of the arrangement was that the notes were to be made payable to him, and accepted in satisfaction *pro tanto* of James' debt, and also that he should waive his lien on the property, created by the first mortgage, when his refusal to accede to either of these terms would have defeated the whole arrangement.

Where a gift is made to a parent by a child, not entirely emancipated from parental control, the law, on grounds of public utility, assumes as incident to the relation between the parties and arising out of it, that the gift is the result of undue influence, where the child has had no independent advice. The converse of this proposition is, however, not true. There is nothing illegal or suspicious or unnatural in a gift from a parent to a child. In *Beanland* v. *Bradley* (1) the Vice Chancellor says—"It is said that the lessor, being the grandfather of one of the lessees and father-in-law of the other, there existed such a confidential relation between him and those he intended to benefit as to throw upon them the onus of proving the absence of undue influence. It is a new doctrine that a parent cannot by a deed, only a few days before his death, benefit a child or grandchild * * * There is, however, no rule of this Court which prohibits a man by a

(1) 2 Sm. & G. 339.

voluntary deed from bestowing a benefit upon his son or his grandson or son-in-law, even although only a few days before his death. To provide for his children or grandchildren is, or may be, a necessary duty; and where a father discharges that duty, this Court will not presume a fraud. If, therefore, fraud is alleged, it must be proved in the ordinary way."

The evidence shows that when James Davidson married in October, 1887, he went to live in the Arsenault house, and that he remained there until 1890. He then went to live at the homestead with his mother, and continued there until 1897, when he moved to his new house, which is only a few yards distant. His mother lived with him two or three months during the winter of 1898; she returned to her own house in the spring of 1899 and remained the summer. She went back to James in the fall of 1899 before Xmas, and remained until she went to the hospital in October, 1904. So that for many years previous to her death James was constantly with his mother—in fact they practically lived together. That he had acquired and actually possessed great influence over her cannot be denied. He swears to it, his wife proves it, the transactions themselves show it; Ferguson knew it, and no one, as it seems to me, can read the evidence, in the light of all the surrounding circumstances, without being impressed with the belief that both Arsenault and Ferguson carried on their dealings with James Davidson, feeling assured that whatever Mrs. Davidson had in the way of property, James could at any time secure for himself for the asking. Between $2000 and $3000 of the cash had gone in that way, and now that the personal property had been exhausted, an onslaught was being made on the real estate, and all this without a particle of benefit to Mrs. Davidson herself. She was then 76 years old, showing at that time marked evidence of mental weakness. James was some 54 years of age and a man of business capacity, notwithstanding his intemperate habits. He prepared the first mortgage and the conveyance to Arsenault, and secured their

1908.

McGAFFIGAN v. FERGUSON.

BARKER, C. J.

execution. Neither of them was read over to the old lady, and it is not by any means clear that the latter was even explained to her. She certainly did not seem to remember when she executed the deed to Arsenault, that she had only a few months before mortgaged the same property to Ferguson for more than its value. Nor was she reminded of this fact. James Davidson concealed both transactions from his wife, who never heard of them until, as she says, the trouble came in October, 1904, five years later, when the old lady went penniless to the hospital. Arsenault also concealed the fact of the purchase from his wife, though she seems to have learned of it from some other source. Now have we not here precisely the elements found in cases where this Court has repeatedly interfered? There is the improvident contract, in this case not merely improvident, but absolutely without any advantage to the donor. There is the old age and the enfeebled mind easily imposed upon and dominated; the absence of all advice except that of the man she trusted—the man who was getting the benefit of the transaction, and whose duty and self-interest were in direct conflict. There is the absence of any real explanation of the nature and effect of the transaction itself, or the effect of it upon herself, and there is the intention to make the conveyance, brought about by the ascendancy of one mind over another, sufficiently great to compel submission. In *Harvey* v. *Mount* (1), the Master of the Rolls, speaking of this description of influence, says: "Now, that species of influence may be used for good or for evil, and as the advice of one so circumstanced is received by the other as a command, submission may be easily effected." In *Cooke* v. *Lamotte* (2), the M. R. says: "It is very difficult to lay down with precision what is meant by the expression—relation in which dominion may be exercised by one person over another. That relation exists in the case of parent, of guardian, of solicitor, of spiritual adviser, and of medical attendant, and may be said to apply to every case in which two persons are so situated,

(1) 8 Bea. 439. (2) 15 Bea. 234.

that one may obtain considerable influence over the other. The rule of Court, however, is not confined to such cases. Lord Cottenham considered that it extended to every case in which a person obtained, by donation, a benefit from another to the prejudice of that other person, and to his own advantage; and that it is essential, in every such case, if the transaction should be afterwards questioned, that he should prove that the donee voluntarily and deliberately performed the act, knowing its nature and effect. It is not possible to draw the rule tighter, or to make it more stringent, and I believe it extends to every such case. The fact of such a relation existing between the parties is only a circumstance in the case, which may, according to its bearing on the other facts, be favourable or unfavourable to the person seeking to sustain the gift; but the existence of such a relation is not necessary to enable this Court to apply the rule before referred to; and that rule may, I believe, be thus expressed; that in every transaction in which a person obtains, by voluntary donation, a benefit from another, it is necessary that he should be able to establish that the person giving him that benefit did so voluntarily and deliberately, knowing what he was doing; and if this be not done the transaction cannot stand." See also *Sharp* v. *Leach* (1); *Mason* v. *Seney* (2); *Donaldson* v. *Donaldson* (3); *Anderson* v. *Elsworth* (4).

If this were a question simply between Mrs. Davidson and her son James the conveyance in my opinion should be set aside. It is, however, more than that. *Huguenin* v. *Basely* (5) has been cited as an authority for the proposition that if the subject matter of the gift can be traced into the possession of third persons, it will be effected by the fraud or undue influence which attached to the original transaction, and therefore Arsenault would stand in no better position than James Davidson would. *Morley* v. *Loughnan*, (6) may be referred to as a recent case in which the above rule was applied. The present transaction, I think, comes within a

(1) 31 Bea. 491.
(2) 11 Grant 447.
(3) 12 Grant 431.
(4) 7 Jur. N. S. 1047; 3 Giff. 154.
(5) 14 Vesey 273
(6) [1893] 1 Ch. D., 736.

1908.

McGAFFIGAN v. FERGUSON

BARKER, C. J.

different class of cases. In *Cobbett* v. *Brock* (1), it appeared that the defendant was considerably indebted to the plaintiffs, and that they were pressing him for payment. He then told them that he was about to be married to a lady of fortune and that she would give the plaintiffs security for their debt. She did so by a mortgage, and in the action for foreclosure of that mortgage it was set up as a defence by the defendant, who had in the meantime married the lady who gave the security, that it had been obtained by misrepresentation and undue influence. The M. R. says: "In cases where a deed is obtained by fraud or undue influence, though it may be avoided as between the parties, yet it cannot be set aside as against a person claiming for valuable consideration under it, and without notice of the fraud. The real question is this: Assume that a fraud was committed by the husband, did the plaintiffs know of that fraud." In the same case the M. R. says: "I fully adhere to what I expressed in the cases of *Cooke* v. *Lamotte* and *Hoghton* v. *Hoghton*, and if this were a case between Brock (the defendant) and his wife, I should require him to prove all the requisites I pointed out in those cases as necessary to give validity to the transaction; but when the security gets into the hands of a purchaser for valuable consideration, the case is very different, unless the person obtaining the benefit of it has been guilty of or privy to the fraud." Again the M. R. says: "I look at the case in the same light as if certain benefits had been voluntarily conveyed to Mr. Brock by Miss Colyer, and he had afterwards sold them to the plaintiffs. The fact of this being one transaction does not affect the question, unless the plaintiffs were privy to the fraud." In the case from which I have just quoted there was nothing to suggest that the creditor was party or privy to any fraud. Notwithstanding that, it was held to be the duty of the creditor (who was aware of the relation between the parties) to the lady to see that she had proper independent professional advice.

Now what is the position of the several parties to this

(1) 20 Bea. 524.

transaction? Mrs. Davidson's position is easily defined. She has simply given away $600 worth of property without having derived any benefit whatever in return. What was the position of Arsenault? He was the person who proposed this purchase, and was anxious that it should be carried out. He was the person who proposed the terms of payment, and he was the only person who derived any substantial benefit from the transaction. It is true that on James Davidson's old indebtedness to him of $280 he credited $200 of the purchase money. But that was on a debt which he had agreed to compromise for 10%, and which he was now claiming in full, under a secret arrangement made in fraud of creditors, and illegal on that ground. [*Mara* v. *Sanford* (1), *Higgins* v. *Pitt* (2), *In re McHenry*, *McDermott* v. *Boyd* (3).] It is also true that he was to give his notes to his father-in-law for $400 on James Davidson's account, and it is equally true, that although eight years have passed since then, he has never paid one cent on account of that liability. As to his actual knowledge of Mrs. Davidson's condition there is no direct evidence, but that he was well acquainted with it is clearly to be inferred from admitted facts. His wife, who is a daughter of Ferguson, knew the old lady well —they were friends and neighbors. She was in the habit of repeatedly visiting the old lady, and gave evidence herself of her failing memory. When he wished to purchase, Arsenault did not go to Mrs. Davidson but to James, because he knew that he was the person to manage the business. He knew that he was dealing with an infirm old lady, who had only a few months before come to her son's assistance in the matter of the compromise. He knew that he was asking this old lady to give away $600 worth of property, and he was asking her to do that when she had already given a mortgage on the same property for more than its value, which Arsenault himself knew was not on record. Put in plain language, his proposal to James Davidson was this: "If you will procure for me a conveyance from your mother to me of this property

(1) 1 Giff. 288. (2) 4 Ex. 312. (3) [1894] 2 Ch. 428.

1908. I will credit you with $200 on this old debt to me, and I will assume $400 of your debt to William Ferguson by giving him my notes for that amount, which I will arrange for him to accept." To regard this as in any sense an ordinary business transaction of bargain and sale, is to my mind impossible. It could only be accomplished by a direct fraud perpetrated on this old lady by reason of her absolute incompetency to make such a contract, or else by means of some pressure or undue influence brought to bear upon her by her son. That Arsenault knew this I have not a shadow of doubt. He may not have appreciated the risk he was running in taking a conveyance under such circumstances, any more than he appreciated the unrighteousness of such a transaction, even though he was not an active party in carrying it out, but that he was quite willing that the conveyance should be secured by such means for his benefit, and that he knew that in the absence of any independent advice, it could not be secured by any other means, I have not a shadow of doubt. James Davidson, on his examination, was asked as follows:

McGAFFIGAN v. FERGUSON. BARKER, C. J.

"Q. About Mr. Arsenault, when you were negotiating with him to get this deed to him, was anything said then about your being able to persuade your mother to sign the deed? A. Well, yes, he just mentioned, I don't suppose there would be any trouble about getting your mother to sign it, and I said, no, I don't think there would be the least trouble.

"Q. Did he say you could convince your mother to sign the deed or sign anything? A. Well, yes, I think he did say that."

It is clear that Arsenault, with this knowledge and with these expectations as to James Davidson's influence and control over his mother, left everything to James, and must take the consequences of such pressure or undue influence he may have used in order to obtain the conveyance, or of such omissions as he may have made in affording his mother such explanations as to the nature and effect of the transactions, as she was entitled to have. See *Turnbull & Co.* v. *Duval* (1),

(1) [1902] A. C. 429 at p. 434.

Bischoff's Trustee v. *Frank* (1), *Chaplin & Co.* v. *Brammall* (2).

As to Ferguson, it is true that he had no part in the negotiations, and according to his own account, knew nothing of the conveyance until the three notes were brought to him, but he still retains the notes and claims the amount of them. When he took them he acquired a full knowledge of the transaction, and no one knew, as I have already pointed out, better than he did how altogether unlikely it was that such a transaction could have possibly been carried out, except by resort to some of the methods I have already suggested. His refusal to take the notes would have defeated the whole arrangement. So far from doing that he adopted it, so far as it could benefit him or his son-in-law; they divided the so-called purchase money between them, and in my opinion, are alike affected by what James Davidson did or omitted to do, and they must both take the consequences. *Kempson* v. *Ashbee* (3), *Dawson* v. *Dawson* (4), *Berdoe* v. *Dawson* (5), *Baker* v. *Bradley* (6), *Cox* v. *Adams* (7).

I have not thought it necessary, in discussing these two transactions, to make more than a general reference to Mrs. Davidson's mental condition. Three months after the conveyance to Arsenault was made she executed a will. It is dated March 6th, 1900. There does not seem to have been any question raised as to her competency to make it. In fact her entire property had been dissipated during her life, and there was nothing left to the devisees but this lawsuit. The last mortgage was given on the 22nd December, 1902, three years subsequent to the conveyance to Arsenault, and two years and nine months subsequent to the will. And it is contended that during these years she had become so weak mentally that when she executed the mortgage she was in fact incapable of understanding the nature or effect of the instrument. It is also contended that there were such fiduciary or confidential relations existing between Ferguson and

(1) 89 L. T. 188.
(2) [1908] 1 K. B. 233.
(3) 10 Ch. Ap. 15.
(4) 12 Grant 278.
(5) 34 Bea. 603.
(6) 7 DeG. M. & G. 597.
(7) 35 S.C.R. 393.

1908.

McGAFFIGAN v. FERGUSON.

BARKER, C. J.

Mrs. Davidson, when this mortgage was made, that this Court would set it aside, Mrs. Davidson having had no independent advice. Not only is this contention made, but it is also charged that the mortgage is the result of direct pressure brought to bear by Ferguson upon Mrs. Davidson. There is no doubt that Ferguson had been an intimate friend of the Davidson family all his life. In his younger days he was in their service and employ for a long time, and later on, when he was doing business for himself, he dealt with William Davidson, and I think continued to do so up to the time of his death. He made him executor of his will, and after William Davidson's death Ferguson constantly visited Mrs. Davidson. He drew her last will and several others for her, and in all I understand she named him as executor. It is true that some of her money was in his hands, but it was subject to her order, and was paid out on her order or on that of some person recognized as acting by her authority. I do not find an instance where she consulted him as to her affairs, or where she sought his advice as to their management. I do not see that there was any relation existing between these parties which of itself created any legal duty from one to the other, or which created any dominion or control by the one over the other, from which one ought to assume the existence of undue influence or coercion of any kind in the case of a voluntary gift. At most, I think it may be said that there was a moral obligation upon one situated as Ferguson was to make some substantial effort to protect a feeble old lady from squandering her property, impoverishing herself, upon a reckless and spendthrift son, doing him no permanent good and herself a permanent injury, especially where he was himself deriving a benefit out of the transactions. And it may be added that in reference to this second mortgage that it disposed of the last vestige of the property which the old lady had, and which Ferguson knew that by the will she had made she intended should be left at her death for the benefit of James Davidson and his invalid wife and family. Apart from this there is, I think, ample evidence to show that this mortgage should

1908.

McGAFFIGAN v. FERGUSON.

BARKER, C. J.

not be permitted to stand. In the first place as to the pressure. I have already pointed out that the $1,250.97 for which the mortgage was given, was the total indebtedness at that time of James Davidson to Ferguson. In his answer Ferguson divided this sum into two—one for $822.90 as an indebtedness of Mrs. Davidson, and the other of $428.07 as as an indebtedness of James Davidson. In section 17 of his answer Ferguson states as follows: "The said mortgage was made and given for the purpose of securing the indebtedness of the said Helen Davidson for the said sum of $822.90 to me, and also the said indebtedness of $428.07 from the defendant James Davidson to me, and said two indebtednesses and liabilities of the said Helen Davidson and James Davidson were then existing and due and owing to me from them as aforesaid. I have no knowledge, information or belief as to who suggested or advised the making and executing by the said Helen Davidson of the said mortgage, but I allege and say that I informed the defendant James Davidson and the said Helen Davidson that I would not furnish and supply the said defendant James Davidson with any more goods and supplies from my store, unless I got security on the said house and buildings of the said James Davidson, and on the said lands and premises of the said Helen Davidson, for his then existing indebtedness to me of the said sum of $428.07—that thereupon, and in order to secure further advances of goods and supplies from me, to and for the said James Davidson, the said Helen Davidson and James Davidson voluntarily and of their own free will and accord, made and executed in my favor the said second mortgage bearing date the 29th day of December, A. D. 1902, as aforesaid."

It is necessary to explain that when Ferguson here speaks of house and buildings belonging to James Davidson, he refers to a house which James built on the homestead lot, to which he removed in 1897, and which Ferguson then supposed belonged to James. Ferguson's evidence is substantially in support of the extract from his answer that I have just given, that is that James' indebtedness to him at

1908.

McGAFFIGAN v. FERGUSON

BARKER, C. J

that time was $428.07, and he then told both James and his mother, not that he would not trust her any further without security, but that he would not give James any more goods without security; and he also stipulated the security which he required—that is a mortgage both on what he supposed was James' house, and on what he knew was the last remnant of everything in the way of property which the old lady then owned. In view of all the circumstances and the position in which James Davidson then was, this demand for security could not have been made except with a view of coercing the old lady again to come to the rescue, and a pressure upon James to use his control over her to force her to do so. It was precisely the kind of pressure likely to be successful as it proved to be. The mortgage was prepared by Ferguson's solicitor under his instructions, and without consultation with Mrs. Davidson as to its terms or conditions. Instead of being given in order to get further advances, as the section of Ferguson's answer which I have quoted would lead you to suppose, there was in fact no agreement to make any further advances, and there were in fact no further advances ever made. Instead of being a mortgage to secure James' indebtedness of $428.07, as the answer implies it was to be, it is a mortgage to secure the whole $1,250.97. The effect of the transaction was to impoverish this old lady and enrich Ferguson by $1,250.97. Ferguson gave the mortgage to Doucette his clerk and son-in-law, with instructions to take it to Raymond, who is a notary public and also a son-in-law of Ferguson, to go to Mrs. Davidson and get it executed. When it was executed there were present Mrs. Davidson, James Davidson, Raymond and Doucette. It was not read over to Mrs. Davidson, but Raymond after reading it over himself says that he explained it to her; he told her that it was a mortgage on the homestead for $1,200, told her the terms and conditions, all of which she said she understood and which he says she seemed to him to understand. This took place in the forenoon, and when Mr. Raymond went home an interview took place between him and his wife which

led him to return to Mrs. Davidson in the afternoon alone. Mr. Raymond's evidence on this point is as follows:— 1908. McGAFFIGAN v. FERGUSON. BARKER, C. J.

"Q. When you went home didn't your wife tell you when you told her where you had been and what you had done, that it was a shame to go and have a mortgage from that old lady, and that everyone said she was crazy? A. She may have said words to that effect but not that.

"Q. But in consequence of what she said and what took place between you, you came back? A. Yes.

"Q. And went up again to see the old lady? A. Yes; alone this time.

"Q. What took place then? A. I went up stairs and asked if Mrs. Davidson was upstairs. Mrs. Davidson was alone. She said, go up or something like that, and I said to her, 'Pardon me, I would like to ask you a question,' and I said, 'do you remember signing a certain document before me today,' and she said, 'yes,' and I said, 'would you mind telling me just what the document was,' and she said then in her own words, told me what it was.

"Q. Didn't she tell you she signed a paper to help James? A. She told me the paper was a mortgage. She said, 'I remember signing a mortgage on the place to Mr. Ferguson for $1,200 to help James to pay his debts.' That is the recollection I have of it, or to get him out of his trouble."

James Davidson's evidence on this point. What he says in reply to a question as to what took place about the second mortgage:—

"A. Well Mr. Ferguson said he wished to get mortgage on the whole place for the whole amount.

"Q. A mortgage for this $1,250? A. Yes.

"Q. A mortgage from whom? A. Well my mother, and I would have to sign it too, that the property was still (willed?) practically all to me, that is the way I understood it.

"Q. By whom? A. By my mother.

"Q. Did he say anything about your creditors? A.

1908.

McGAFFIGAN v. FERGUSON.

BARKER, C. J.

Oh there was a party in Quebec had a judgment against me. He mentioned that to me, and as soon as I would fall into the property that they would likely come down on me, and by getting the mortgage he would be secure and it would protect me at the same time.

"Q. Did he want you to see your mother, or what did he say about it? A. I spoke to mother about it, and I don't know whether Mr. Ferguson said yes or no to her about it.

"Q. You never heard that he spoke to her? A. No, for it didn't make much difference at that time, she wasn't in a state to transact any business at that time."

Mrs. Davidson's mental condition at this time may afford a satisfactory explanation why in this last transaction she seems to have been consulted or considered even less than in reference to the other two, and why she could be ignored beyond getting her signature as she was requested by her son. The evidence on this point is too voluminous to quote at length. I shall give but a brief summary of it as relating to the period form 1898 to 1902. Commencing with 1898 it appears that the old lady was becoming childish and forgetful—she would cry to be taken home when she was actually at home. She often imagined the boys were on the roof of the house tearing down the chimneys and wanted some of the family to go down and stop them. They often took her to the house to convince her there were no boys there, but she imagined they had run away, and when she returned she would complain of the same thing over again. She had visited the lazaretto, and when she returned she said the Sisters there had very little to do, as they were tearing down the chimneys every day and putting them up again. She continued speaking of this, and wondered why her husband (who had been dead some years) did not come back. She complained of a "hissing" in her head, and consulted Father Morrisey, who had some reputation in that locality as an expert in the treatment of such trouble. He gave her a liquid with which to syringe her nose and ears, and a salve to be applied to the ear. When any attempt was made to use the syringe, she

laughed and behaved in such a childish way that they could not use it all. She used the ear salve for rheumatism in her knee. She used the potatoes and turnips prepared for the table as a poultice, which she also applied to her knee. At another time she painted it with boot polish. In 1899, though at times apparently rational, she became more helpless and more childish, and required greater care and more constant attendance. She would still cry to go home when in fact she was at home—constantly insisted that the weather was foggy when it was fine, and was constantly speaking of the tides. To use Mrs. James Davidson's words, "she never went out doors but it was high tide, or she was wondering if it high tide for her husband to come home." Her weakness and childishness continued to increase in 1900 and afterwards. She would wash the table dishes with milk and the table with yeast. On one occasion—one Sunday in 1900—she came down stairs in her nightdress with her crepe bonnet on, filled the kettle with parafine oil, and put it on the stove. She constantly removed the pillowshams and counterpanes soon after the beds had been made up in the morning, put them away in drawers and turned down the bedclothes, imagining it was night and time to go to bed. She often talked and sang to herself, and spoke of her husband as though he were still living. She would eat the food prepared for the hens, and shut them all up in the daytime. She would cut up soap to be eaten as food. For a long time she did not recognize her own grand-daughter, an inmate of her own family, calling her "Mary," apparently under the impression she was a servant in the house, of that name. At one time she asserted she had been married again. In the summer of 1902 she continually cried for her mother; so violently on one occasion that they were obliged to put her in a chair and haul her from room to room in order to quiet and soothe her. From having been cleanly in her habits and particular as to her dress and personal appearance, she became quite the reverse. In fact her mind became so weak, and her physical functions so impaired, that she lost all con-

1908.

McGAFFIGAN v. FERGUSON.

BARKER, C. J.

trol over herself, and had to be washed and cared for as a child, sometimes two or three times during the day. This was in 1900 and 1901. This seemed to annoy her, and she would often show her body to strangers so that they could see that she was clean and there was nothing wrong with her. Though naturally modest she at this time exhibited her rheumatic knee to strangers, regardless of sex, apparently under the impression that each was a doctor or could benefit her in some way.

I have extracted the above facts from the evidence of Mrs. James Davidson and her daughter, and there is nothing to suggest that it is an exaggerated account. In many of its details it is corroborated by the independent testimony of Brideau Sonier and McGraw. Mrs. Hill, another witness, states that she occupied the old lady's house as a tenant in 1901 and 1902. She paid her the rent in 1901, but she would often come back for it again. She would go into the house, close all the doors and speak of her husband as if he were alive. In 1902 she was worse. Mrs. Hill that year paid the rent to Mrs. James Davidson. In addition to other unusual things the old lady did that year, she came to Mrs. Hill's house one day dressed in most ragged clothing when she had plenty of good clothing at home; and sometimes she would come with two or three caps on her head and a dish towel tied around them. This evidence clearly shows that in the years 1901, 1902 and later this old lady was not only under insane delusions, but that her mind and memory had become so entirely weakened and impaired that no business transaction with her, much less a voluntary gift, regardless altogether of any question of undue influence, would be permitted to stand, without the clearest proof of her understanding its nature and object and its effect upon herself, and without having the protection afforded by a competent and independent adviser.

In *Hoghton* v. *Hoghton* (1), at page 298 the M. R. says: —"I am of opinion, as I lately held in a case of *Cook* v.

(1) 15 Bea. 278.

1908.

MCGAFFIGAN v. FERGUSON.

BARKER, C. J.

Lamotte (1), that whenever one person obtains by voluntary donation a large pecuniary benefit from another, the burthen of proving that the transaction is righteous, to use the expression of Lord Eldon in *Gibson* v. *Jeyes* (2), falls on the person taking the benefit. But this proof is given, if it be shewn that the donor knew and understood what it was that he was doing. If, however, besides the obtaining the benefit of this voluntary gift from the donor, the donor and donee were so situated towards each other that undue influence might have been exercised by the donee over the donor, then a new consideration is added, and the question is not, to use the words of Lord Eldon in *Huguenin* v. *Baseley* (3)—whether the donor knew what he was doing, but how the intention was produced—and though the donor was well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction would be set aside. In many cases the Court, from the relations existing between the parties to the transaction, infers the probability of such undue influence having been exerted. There are the cases of guardian and ward, solicitor and client, spiritual instructor and pupil, medical man and patient and the like, and in such cases the Court watches the whole transaction with great jealously, not merely for the purpose of ascertaining that the person likely to be so influenced, fully understood the act he was performing, but also for the purpose of ascertaining that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit. Not that the influence itself flowing from such relations is either blamed or discountenanced by the Court; on the contrary the due exercise of it is considered useful and advantageous to society; but this Court holds as an inseparable condition that this influence should be exerted for the benefit of the person subject to it, and not for the advantage of the person possessing it."

In *Huguenin* v. *Baseley* (4), at page 299 Lord Eldon says: "Take it that she intended to give it to him it is by no

(1) 15 Bea. 234.
(2) 6 Vesy 266.
(3) 14 Vesy 273.
(4) 14 Vesy 273.

1908.

McGAFFIGAN v. FERGUSON.

BARKER, C. J.

means out of the reach of the principle. The question is, not whether she knew what she was doing, had done or proposed to do, but how the intention was produced, whether all that care and providence was placed around her, as against those who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf. Her situation, with reference to pecuniary circumstances during the whole period, must also be attended to: her husband a few weeks before having been relieved from distress by a sum of money advanced by Baseley."

I think this last transaction must be set aside also.

There is one other matter in reference to which relief is sought. In William Ferguson's account as executor of the William Davidson estate, he has charged under date of January 9th, 1899, the amount of two promissory notes, one for $255.83 and the other for $153.50 as having been paid by him out of estate funds. We have only Mr. Ferguson's account of the transaction, and according to it this money was used in paying these two notes, which were made by Ferguson for the accommodation of James Davidson at the request of Mrs. Davidson. It seems that the old lady wished to assist James who was wanting money, and she wanted Ferguson to help him. He suggested giving him his own notes which James could get discounted. This was done and at maturity Ferguson was obliged to pay them. There is nothing to show that James had anything to do with the arrangement or used any influence with his mother in reference to the matter. It is a simple case of legal liability on the part of Mrs. Davidson, at whose request the notes were given, and I think she would be liable. In *Brittain* v. *Lloyd* (1), Pollock, C. B., says:—"If one ask another, instead of paying money for him, to lend him his acceptance for his accomodation and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower, by request-

(1) 14 M. & W. 762.

1908.

McGAFFIGAN v. FERGUSON.

BARKER, C. J.

ing the acceptor to assume that character which ultimately obliges him to pay, impliedly requests him to pay, and is as much liable to repay, as he would be in a direct request to pay money for him with a promise to repay it." It may be that strictly speaking the charge should not be in Ferguson's account as executor, inasmuch as it was a liability incurred at the instance of Mrs. Davidson, with which her husband's estate had nothing to do. But that would only make him have so much more money in his hands belonging to Mrs. Davidson under her husband's will, which she would owe him. While I express my opinion that the plaintiffs have no claim as to this money, I think the matter is one for the Probate Court, as the plaintiffs have not asked for a decree for the administration of the Davidson estate.

I think there must be a decree setting aside the first mortgage and a declaration that all the money which Ferguson intended should be secured by it has been paid. The conveyance to Arsenault must also be set aside, except as to that part of the lot sold and conveyed by him to Loggie, and there will be a reference as to the value of that lot, the value of present improvements, etc. The second mortgage will also be set aside, and the defendant Ferguson will be ordered to deliver up to the executors of Arsenault the three promissory notes on request to be cancelled.

Reserve the question of costs until the Referee's report.

1908.

April 21.

GOLDEN AND WIFE v. McGIVERY AND OTHERS,

COMMITTEE OF JAMES McGIVERY, A LUNATIC.

Foot-note to Interrogatories—Practice—Exceptions to Answer—Irrelevancy.

The plaintiffs omitted to add any foot-note to their interrogatories as provided by Sec. 44 of the Supreme Court in Equity Act, Con. Stat. (1903), Chap. 112.

On a motion to set aside an order setting exceptions to the answer down for hearing:

Held, that by a proper construction of the section, such an omission was equivalent to a requirement that all the defendants should answer all the interrogatories.

Where defendants, in answering interrogatories filed as part of the bill, neglect to state their belief, or, when required to set out a document at length, neglect to do so without assigning a sufficient reason, the answer is insufficient, and exceptions on that ground will be allowed. If, however, the interrogatories relate to matters which are altogether irrelevant, the exceptions will be overruled.

This is a suit to compel the specific performance of a contract. The answer was excepted to for insufficiency, and an order was made setting the exceptions down for hearing. The defendants gave notice of a motion to set aside this order, on the ground that the interrogatories had no foot-note, as required by Sec. 44 of Chap. 112, C. S., 1903. This motion and the exceptions came on for argument together.

W. Watson Allen, K. C., for the plaintiffs.

W. B. Wallace, K.C., and *E. S. Ritchie*, for the defendants.

1908. April 21. BARKER, C. J.:—

Exceptions to the answer of the committee of the lunatic James McGivery.

The bill is filed for the specific performance of a contract said to have been made by the lunatic James McGivery with the plaintiff James Golden, who is a nephew of McGivery, and his wife, by which it is alleged he agreed to convey to the

1908.

GOLDEN AND WIFE v. MCGIVERY.

BARKER, C. J.

plaintiff, Margaret Golden, a certain leasehold property on Brussels Street in St. John, in payment of services before that performed by the plaintiffs for him. This was in 1905, and at this time Margaret Golden, as is alleged in the bill, was under treatment in the General Hospital, and McGivery proposed that she should then be removed to one of the tenements on the property in question, but that in order to put the property in proper repair McGivery was to collect the rents for a year, put the premises in repair, and in the following April (1906) he was to execute the conveyance. The proposal was accepted. Margaret Golden, as is alleged, was removed to the premises and put in possession under the agreement, and the proposed repairs were commenced by McGivery in May, 1905. In August, 1905, he was taken ill and was sent to the Provincial Hospital for nervous diseases, where he has been ever since under restraint as a lunatic. Proceedings were taken which resulted in an order being made by this Court on the 20th Feb., 1906, appointing the defendants James A. McGivery, Reverdy Steeves and Andrew McNicholl a Committee of the person and estate of James McGivery. This Committee subsequently made an application to this Court for authority to borrow money on mortgage of the lunatic's property, which was required for the payment of his debts. This authority was given and in pursuance of it the Committee borrowed from the defendant Catherine Dolan $1,500, and as a security for the money executed to her a mortgage for that sum and interest, on the premises in question with other property of the lunatic. This mortgage is dated August 22nd, 1906, and was registered about the same time. The bill also alleges that the plaintiff completed at his own expense the repair in progress when McGivery went to the Provincial Hospital, and that the Committee have not only collected the rents from the tenants of the premises in question, but also are seeking to collect rent from him and his wife for the tenement occupied by them.

When the exceptions came on for argument the Com-

1908.

GOLDEN AND WIFE v. MCGIVERY.

BARKER, C. J.

mittee made a motion, of which they had given notice, to set aside the order setting the exceptions down, and I may as well dispose of that here. It seems that the plaintiff's Solicitor omitted to specify in a note at the foot of the interrogatories which of them each defendant was to answer. It was contended that in such a case the defendants were not bound to answer the interrogatories at all, and that the answer put in was simply an answer to the bill, as if no interrogatories had been filed, and it was therefore not open to exceptions. I do not agree to this construction of the Act. Sec. 44 provides for the foot-note in question, but it is evident to my mind it was intended to avoid the necessity, and therefore the expense of serving the interrogatories on defendants, who knew nothing or but little about the matter in dispute, and whose answer therefore would serve no useful purpose. No such note would seem of any use where there was only one defendant, and I see no use for it where there are several defendants and they are all required to answer. I think the fair construction of the section is that, if the plaintiff chooses not to restrict his interrogatories, when he should do so, but puts the defendants or some of them to the expense of answer or portions of answer which are useless, he must run the risk of being made liable to pay the costs in any event under section 45. If, when there are several defendants, the plaintiff omits the foot-note it is equivalent to a requirement that all shall answer, and the taxing officer can deal with the question of costs if the interrogatories have been unnecessary. There was also some question of waiver by reason of an arrangement to take some evidence, but there is nothing in that.

The first exception relates to an interrogatory founded on an allegation in the bill in reference to the services alleged to have been performed by the plaintiff, James Golden, to James McGivery, which are put forward as the consideration for the agreement to convey. The answer is, I think, insufficient for not stating the defendant's belief, and I think the exception must be allowed.

1908.

GOLDEN AND WIFE v. MCGIVERY.

BARKER, C. J.

The second and third exceptions must, I think, be allowed on the same ground.

The fourth exception is that the defendants have not set forth in full the mortgage to Dolan and the order of Court under which it was made, as by the interrogatory they were called upon to do. They have set forth in full its date, its registry and all the particulars relating to it. It is difficult to see what purpose is to be served by encumbering the records with copies of documents which are not attacked in any way, and where there is no allegation or suggestion that beyond the fact that they exist, which is admitted, nothing turns upon them one way or the other. The public records and the mortgage itself are both as accessible to the plaintiff as they are to the Committee, and while the mortgage is their own conveyance, and they must therefore know its general terms as they have stated, there is nothing either in the nature of duty or usage which would require them to keep a copy of it. If they had said that they had no copies of the mortgage and order, I should have been disposed to overrule this exception, but they have not done so and I shall therefore allow it.

I think the remaining nine exceptions must be overruled. They are all alike in their character and relate, as I think, to matters altogether irrelevant to the subject matter of the bill. By section 13 of the bill the plaintiff alleges that the lunatic was possessed of considerable property beside that which he agreed to convey to them, and that the Committee had plenty of property in their hands when they obtained from the Court the authority to borrow, and when they borrowed, to pay off the debts, and in fact there was no necessity for borrowing at all. The bill also alleges that the Committee have collected the rents of the property. Based upon these allegations a series of interrogatories have been framed by which the defendants were required to state the particulars of this property, the amounts due to them, the amount of rent collected by them, the appropriations by them of the moneys received by them, and in fact to give a full account of their dealings

1908.

GOLDEN AND WIFE v. MCGIVERY.

BARKER, C. J.

with the estate. This whole enquiry, as it seems to me, is wholly irrelevant to any issue involved in this suit, and therefore vexatious. That would certainly be the case if the plaintiffs fail in establishing their contract. But assuming that they do establish it, what has the value of the property in the Committee's hands to do with the relief to which they may be entitled? The plaintiff's right to relief does not depend upon the defendant's ability to carry out the decree of this Court granting it. The only relief to which the plaintiffs can be entitled is a conveyance of the property, or a compensation in lieu of it. But the right to the compensation does not depend upon the ability of the Committee to pay it. If there is anything in the nature or extent of the property of the lunatic which this Court should think it desirable to know for its guidance in directing the Committee as to their disposal of the estate, in case the plaintiff's right to compensation should be established, it can by its officers get the requisite information. In *Francis* v. *Wigzell* (1), the bill was for the same purpose as this, but brought against a man and his wife. There was an interrogatory addressed to the wife whether she had not separate moneys and property of her own to a considerably larger amount than the purchase money, or to some and what amount. The demurrer to this alleging as a ground that the bill made no case entitling the plaintiff to such discovery. The Vice Chancellor says—"It is admitted that if a similar interrogatory had been addressed to the husband as to his property, or any other party against whom a specific performance was sought, such an inquisition into the circumstances of the defendant would not have been permitted. Is it then a proper question with regard to the Feme Covert?" Here the defendants admit they have property enough to pay the mortgage. See also *Wood* v. *Hitchings* (2); *Kennedy* v. *Dodson* (3).

It would, I think, be a monstrous proposition to put forward, that if this defendant had not been afflicted as he is, but had remained sane, and this bill had been filed against

(1) 1 Maddock, 258. (2) 3 Beavan, 504. (3) [1895] 1 Ch. 334.

him, he should be subjected to all this inquiry as to his private affairs and their management. Why should this Committee be obliged to account for their stewardship to these plaintiffs simply because they claim to be entitled to a conveyance of a piece of the property in payment of a debt?

The defendant's motion to set aside the order setting down the exceptions for argument will be dismissed.

The first four exceptions will be allowed and the others overruled.

The defendants to have twenty days after service of the order herein as to the exceptions in which to file amended answer.

As each party has succeeded in part, there will be no order as to costs, as to the defendant's motion or the exceptions.

1908.

April 21.

BOYNE v. BOYNE.

Life Insurance—Will—Life Insurance Act, 5 Ed. VII. (1905), Chap. 4—Re-apportionment—Election—Bequest in nature of Specific Legacy.

B. died in 1907, having made a will in 1905, by which he left, among other legacies, one for $1100 to his wife, the defendant in this suit. B. had insured his life some years previous to 1905 for $1500, the policy being made payable to his wife. In his will B. created a fund for the payment of the several legacies, and included as part of this fund the policy for $1500 above mentioned.

Held, that this provision in the will did not operate as a reapportionment of the insurance money as regards this policy for $1500, under the New Brunswick Life Insurance Act, 5 Ed. VII, Chap. 4, Sec. 13; and that the proceeds of the same are payable to the defendant as sole beneficiary thereunder.

Held, that the widow was not bound to make an election, and that she was entitled to be paid the legacy for $1100.

Held, that in case the fund created by the will is insufficient, then the specific legatees are entitled to rank for any unpaid balance upon the general estate.

This is a special case stated for the opinion of the Court on the following four questions:—

1. Has the said will made any disposition of the said Policy No. 1399311 in the mutual Life Insurance Company, or varied or altered the apportionment of the same, or is the same payable to Agnes E. Boyne?

2. If the said will has made a disposition of the same, are the proceeds to be apportioned between the said defendant and the son and daughter of the said deceased, or to be applied generally to the payment of the legacies?

3. If the will has made no disposition of said policy, is the defendant put to an election, or is she entitled to the legacy also?

4. In case the fund designated is not sufficient to pay

the specified legacies, are the same entitled to rank for any unpaid balance upon the remainder of the estate?

H. A. McKeown, K.C., for the plaintiffs.

W. Watson Allen, K.C., for the defendant.

1908. April 21. BARKER, C. J.

Special case stated for the opinion of the Court.

The plaintiffs are the executors of one Gordon Boyne, who died on the 15th December, 1907, having made a will dated February 17th, 1905. He left him surviving his wife the above named defendant, and one son and one daughter. Some years previous to the date of his will Boyne had insured his life in the Mutual Life Insurance Co. of New York, by Policy No. 1399811 for the sum of $1500, which by the terms of the policy was made payable to the defendant his wife. At the time of Boyne's death there was due on this policy $1316, after deducting a small sum which had been borrowed on the policy from the Company. This sum has been paid to the executors, who hold it subject to the direction of this Court. The testator had another insurance on his life for $1000 with the Equitable of New York, and at the time the will was made he had some $1300 on deposit at interest in the Bank of New Brunswick in the name of himself and wife. At the date of his death, however, the sum had been reduced to $58.40. The testator by his will gave a legacy of $1100 to his wife, $500 to his son, $500 to his daughter and $500 to an adopted son. The legacies altogether, including those I have just mentioned, and a number of small amounts given to strangers and charities, amounted to $3275, and the testator made the following provision as to their payment:—"All of the aforegoing bequests to be paid out of the following insurance on my life and cash on deposit in bank.

"Policy No. 204755 in the Equitable Life Assurance Society of New York for One Thousand Dollars, $1000.00.

1908.

BOYNE v. BOYNE.

BARKER, C. J.

"Policy No. 1399311 in the Mutual Life Insurance Company of New York for One Thousand Five Hundred Dollars, $1500.00.

"Cash on deposit Bank of New Brunswick at 3% say, $1300.00."

The remainder of the estate consists of another policy in the Mutual Life for $1000 and a legacy of about $1440 coming from Boyne's father's estate, and payable on the death of his mother.

The principal point involved is what effect if any, the will has had as to the disposal of the money payable on the $1500 policy in the Mutual Life of New York. The plaintiffs' contention is that by the terms of the will the widow has lost all benefit under the policy as the sole beneficiary mentioned in it, except what she may derive as a legatee, in common with the other legatees, from the fund created by the moneys derived from this policy and the other moneys making up the fund of $3800 mentioned in the will. Failing this the plaintiffs contend that the will operated as a re-apportionment of the policy moneys between the wife and children of the testator under the provisions of the Act of Assembly, 5 Edward VII. Chap. 4 (1905) known as the Life Insurance Act. As a third contention the plaintiffs say that if the defendant is entitled to the sole benefit of the policy, she is put to her election whether she will take the benefit of the legacy or the benefit of the policy.

It is not disputed that, except for the will, the policy moneys in question by law belonged to the defendant who is the sole beneficiary mentioned in the policy, and the only person for whose benefit the policy was originally effected. Section 12 of the Insurance Act distinctly provides that in such a case (there having been no re-apportionment of the money during the assured's life) the money payable under the contract shall not be subject to the control of the assured, or of his creditors or form part of his estate when the insurance money becomes payable. This money therefore belonged absolutely to the wife, under the contract of insurance, by oper-

1908.

BOYNE v. BOYNE.

BARKER C. J.

ation of law, and not in any way under the will. Section 13 of this Act gives to the assured a power, subject to certain limitations, by a written instrument during his life or by his last will and testament, to re-adjust and change the disposition of such insurance moneys. In order to secure that object, so as to accomplish what the Legislature had in view in these sections of the Act, that is to secure such insurance moneys for the benefit of wives and children, possible beneficiaries are by the Act divided into two classes known as "Preferred beneficiaries" and "Ordinary beneficiaries." The first includes husband, wife, children, grandchildren and mother of the assured. All others are included in the other class, and we find that by s. s. 2 of sec. 13 the assured in this case, while by his will he might have included his children with his wife (they being of the same class) in a re-apportionment, he could not have diverted all the moneys to a person of a different class or to the assured himself or to his estate. So that it was never competent for the assured, either by his will or by an instrument executed and operative during his life, to have, without the consent of the beneficiary, diverted the benefit of the insurance to himself or to his estate, so as to deprive the beneficiary of all benefits under the policy. The assured was therefore precluded from including in any re-apportionment any of these seventeen legatees except his children. None of the others were "Preferred beneficiaries." It seems to me impossible to suppose that by the direction in the will which I have quoted, the testator had any idea or intention of making any re-adjustment of this policy money. The fact that he would thereby be attempting to make a policy for $1500 pay the beneficiaries $2100 seems an answer to any such suggestion. He did have in his mind the creation of a fund from the proceeds of these two policies and the cash in the Bank of New Brunswick, out of which primarily these legacies were to be paid by the executors, and which, as the fund then stood, would have left a surplus of $525 in the hands of the executors as estate assets. He made no gift or disposal of this particular insurance money; the legacies

1908.

BOYNE v. BOYNE.

BARKER, C. J.

were as much payable out of the cash in the Bank of New Brunswick as by the insurance moneys, and there seems no more reason for holding that the mere direction to pay these legacies out of the fund derived from these three sources, operated as a re-adjustment of this insurance money, than there is for holding that it created a trust in favour of the wife and children as to the insurance moneys arising from the Equitable policy for $1000. There was really no intention of doing either. In my opinion the defendent as sole beneficiary under the Mutual Life policy is entitled to be paid the $1316 due thereon.

The plaintiffs contend that in that event the defendant must be put to her election as to the policy and the legacy of $1100. Though the doctrine of election is somewhat refined and not always easy of application, I do not think that this is a case within the principle. In such cases there is always a disposition by the testator of property which belongs to some one else, and which would of course be defeated unless confirmed by the real owner. It has therefore been held that in such a case, if the real owner himself took a benefit under the will he must accept the will in its entirety, and he was put to his election whether he would retain his own property and defeat the attempted disposal of it by the testator, or accept the benefit given him by the will and carry out the testator's intentions. See *Cooper* v. *Cooper* (1).

In all these cases, as Lord Romilly says in *Box* v. *Barrett*, (2) there must be some disposition of property the testator has no right to dispose of. As I have already pointed out this policy nor the money secured by it, is in any way disposed of or attempted to be disposed of by this will. It is true that the testator seems to have erroneously considered that at his death these moneys would form part of his estate available for the payment of the legacies mentioned in his will, including the one to his wife, but that does not make a case of election. There is no attempted disposal of these policy moneys to be ratified, because none has been made. There

(1) L. R. 7 H. of L. 53. (2) L. R. 3 Eq. 244.

1908.

BOYNE v. BOYNE.

BARKER, C. J.

is no donee of the policy to be disappointed, and there is no one claiming it under the will. This I think is not a case for election.

The only other question raised is whether these legatees having exhausted the fund out of which the will directs them to be paid, can claim on the general personal estate for the deficiency. I think they can. This fund is not given to the legatees or any of them. It goes into the hands of the executors, subject to the payment of debts, as a fund in course of administering the estate, to be primarily appropriated to the payment of these pecuniary legacies. In *Williams on Executors* it is thus laid down—"But where a legacy is bequeathed out of a debt, it will not, generally speaking, be a regular specific legacy but a bequest, in the nature of a specific legacy, according to the distinction already stated, with regard to legacies out of a particular stock. Such legacies, therefore, are in one sense only specific, viz. that against all other general legatees they have a precedency of payment out of the debt or security, but in another sense they are general, since if the debt be not in existence at the testator's death, or if it be insufficient to pay the legacies, the legatee will be entitled to satisfaction out of the general estate of the testator." *Fowler* v. *Willoughby* (1). *Pagit* v. *Hurst* (2).

The questions stated for the opinion of the Court are as follows:—

1. Has the said will made any disposition of the said Policy No. 1399311 in the Mutual Life Insurance Company or varied or altered the apportionment of the same, or is the same payable to Agnes E. Boyne?

Answer. It is payable to Agnes E. Boyne.

Any answer to the second question is unnecessary by reason of the answer to the first.

3. If the will has made no disposition of said policy, is the Defendant put to an election, or is she entitled to the legacy also?

(1) 2 S. & S. 354. (2) 9 Jur. N. S. 906.

1908.

BOYNE v. BOYNE.

BARKER, C. J.

Answer. She is not put to election and is entitled to the legacy.

4. In case the fund designated is not sufficient to pay the specified legacies, are the same entitled to rank for any unpaid balance upon the remainder of the estate?

Answer. Yes.

There will be a declaration accordingly.

CUMMINGS v. GIBSON ET AL.

1908.
May 19.

Demurrer—Multifariousness—Convenience of Parties.

G. died in 1902 leaving a will by which his property was bequeathed to his eight children, with a small annuity to his wife.

This suit is brought to compel the cancellation of a mortgage given by the Plaintiff to G., and the reconveyance to the Plaintiff of a certain life insurance policy and other property, which were held by G. to secure certain monies advanced by G. to the Plaintiff; and also to compel the conveyance of two lots of land which the Plaintiff claims he purchased from G. under an agreement that G. was to give him the deed for them whenever he demanded it.

Held, overruling the demurrer, that it was by no means certain that the Defendants were not all necessary or proper parties, in regard to all the causes of action set out in the bill, or that they did not all have a common interest in them; but if that were not so, there are no special circumstances in this case which render it either difficult or impossible to deal fully and properly with all the causes of action, without causing inconvenience to anyone, and therefore any discretion which this Court has, should be exercised in favour of continuing the suit in its present form.

The facts fully appear in the judgment of the Court.

Peter Hughes for the plaintiff.

D. McLeod Vince for the defendants.

1908. May 19. BARKER, C. J.

This is a demurrer to the bill for multifariousness.

It appears by the bill that in October, 1887, the plaintiff borrowed some $5000 or $6000 from one Wm. Gibson for which he gave a chattel mortgage as a security, and also a mortgage on two lots of land. Some three or four years later the plaintiff borrowed from Gibson a further sum of $259.98, and to secure its repayment the plaintiff and his wife conveyed what is known as the Moore and Dickenson lots to Gibson. Though this conveyance is an absolute one, the bill

1908.

CUMMINGS v. GIBSON ET AL.

BARKER, C. J.

alleges that it was in fact made only by way of security for the loan. At the same time, and as an additional security the plaintiff assigned a paid up life policy of insurance for $213. The bill goes on to allege that in addition to various payments in cash and by the delivery of goods and produce on account of these loans, Gibson received some $1100 for the Moore lot and one of the other lots which he sold, and that in this way he has been more than paid what is due him on the loans, and that he is therefore entitled to have the mortgage cancelled, and the life policy and the other property remaining undisposed of, reconveyed to him. Gibson died in February, 1902, leaving a will by which, with the exception of a small annual allowance secured to his widow, he gave all his property of every kind to his eight children, who together with the executors of the estate have been made defendants in this suit. This is what I may call the first cause of action.

The bill then goes on to allege that in Nov. 1886 the plaintiff purchased from Gibson two lots of land known as the Griffiths lots for $600, and that at the time he paid $300 on account of the price and on the 21st May, 1888, he paid the balance, but that at his request the conveyance was not made at the time but that it was to be made whenever he requested it. Gibson however refused to make any conveyance, and this bill is filed to compel a conveyance of these lots. This is the second cause of action, and the ground of demurrer is that these defendants cannot, or at least ought not, to be joined in one suit as they are not interested in the result as to both causes of action. I am by no means sure that the executors are not necessary parties in both cases. They are the persons who now represent the payments, to whom any balance of the loans which may be found due will be payable, and they have an interest in the contract as to the Griffiths lots for it is their testator's contract which it is sought to enforce. Apart however from all this, there is but one plaintiff here and it is a question of discretion in the Court, to be determined upon considerations of convenience in reference to the circumstances of this particular case, whether or

not the matters in controversy can be properly disposed and dealt with in the one suit.

Campbell v. *Mackay* (1); *Coates* v. *Legard* (2).

In the latter case Sir Geo. Jessell, M. R. says that the question is, according to *Pointon* v. *Pointon* (3) whether the various subjects as to which relief is sought are such as, if fit for discussion, can be properly dealt with in one suit. I am altogether unable to see any reason why this cannot be done here. No one can be inconvenienced by such a course, and to compel these parties to carry on two suits where one answers every purpose would be to cause unnecessary expense without doing any person any benefit.

The demurrer must be overruled with costs.

(1) 1 M. & C. 603. (2) L. R. 19 Eq. 56.
(3) L. R. 12 Eq. 547.

1908.

May 19.

HARRIS ET AL v. SUMNER ET AL.

Exhibition Association—Incorporation—Objects—Property—Original Capital Stock—Sale of Stock—Discretion of Directors—Confirmation by Company—Form of Bill.

At a meeting of the Directors of an Exhibition Association, a large number of shares of the original capital stock of the Company were alloted to the Secretary of the Company at par, he having subscribed for them; and immediately afterwards he disposed of a number of these shares at par to the Directors themselves individually, in varying amounts.

It was established in evidence that the transaction was for the purpose of retaining control of the Company, in order that it might be carried on for the purposes for which it was organized. It was also established that the plaintiff had previously purchased a large number of shares, for many of which he had paid a premium.

Held, that this allotment of shares by the Directors was not illegal, as the transaction was *bona fide*, and not *ultra vires* of the Corporation itself; that the Directors were acting within their powers when they exercised their discretion, and in the interest of the whole body of shareholders sold shares at par which might have brought a premium.

Held, that as no fraud had been shown, and relief was sought only for the Company, the bill should have been filed in the name of the Company itself.

Bill to set aside a certain transfer of stock of the Moncton Exhibition Association Company to David I. Welch, one of the defendants, or for a declaration that the holders of this stock hold it in trust for the Company.

J. D. Hazen, A. G., and *F. R. Taylor*, for the plaintiffs.

M. G. Teed, K. C., and *David I. Welch* for the defendants.

The Moncton Exhibition Association Company was organized in 1903, for the purpose of establishing a permanent exhibition at that place. The amount of capital stock of the company was fixed at $10,000, divided into 1,000 shares, and some six hundred shares were subscribed for, of which

1908.

HARRIS ET AL. v. SUMNER ET AL.

the present plaintiff took two. Real estate was acquired by the company for exhibition purposes. In 1907, owing to various circumstances, that real estate became greatly increased in value, and the plaintiff immediately set about to acquire stock, and at the time the bill was filed had become the owner of one hundred and eighty-eight shares, most of them bought at a premium. The apparent object of the plaintiff was to secure control of the company, with a view to the sale of the real estate for the benefit of the shareholders. In May, 1907, the secretary of the company, one of the defendants, subscribed for and took at par the four hundred and seven shares of the capital stock which had never been disposed of, and immediately after the ratification of this sale by the directors, he sold the most of these shares to them in varying amounts. The plaintiff claims that the disposal of the stock in this way was illegal and *ultra vires;* that this stock must be regarded as new stock, and not as original capital stock; that the secretary of the company acted with the knowledge and on behalf of the directors; and that the directors hold this stock in trust for the benefit of the company.

Argument was heard March 31, 1908.

F. R. Taylor for the plaintiffs:—The defendant Company is not a public corporation, but purely a commercial one. The directors are trustees for the shareholders, and stand in a fiduciary capacity. Directors must act *bona fide,* and not for personal gain. There must be no fraud. Plaintiff's object in buying shares cannot enter into this case in any way. The stock purchased by David I. Welch, and subsequently transferred to the directors, is new stock and must be treated as such in its allotment, and the plaintiff had a right, as one of the original shareholders, to his proportion of this stock divided *pro rata. Martin* v. *Gibson* (1); *Punt* v. *Simonds* (2); *Percival* v. *Wright* (3); *York & North*

(1) 10 Ont. W. R., 66. (2) (1903) 2 Chan. 506.
(3) (1902) 2 Chan. 421.

1908.

HARRIS ET AL v. SUMNER ET AL.

Midland Railway Company v. *Hudson* (1); *Parker* v. *McKenna* (2); *Panhard* v. *Panhard* (3); *Imperial Mercantile Credit Association* v. *Coleman* (4).

M. G. Teed, K. C., for the defendants:—The defendant Company is a public one, organized in the interests of the general public, and not with the hope of gain. The Company could only buy and sell real estate for the purposes for which it was organized. Directors have discretion to allot stock as they will, if acting *bona fide*. Directors are trustees for the Company, not for individual shareholders. No rights are taken away from the plaintiff, and he stands in as good a position as he did before this transfer. The Company is the proper plaintiff in a suit of this nature, and the bill should show why the plaintiff brought suit in his own name, and not in the name of the Company. Fraud is alleged, and if the plaintiff's bill is dismissed, the defendants are entitled to costs. *Ex parte Penney* (5); *Hilder* v. *Dexter* (6); *Re London & Colonial Finance Corporation, Ltd.* (7); *Punt* v. *Simonds* (8); *Martin* v. *Gibson* (9); *Percival* v. *Wright* (10); *Foss* v. *Harbottle* (11); *Mosley v. Alston* (12); *Hamilton* v. *Desjardin* (13); *Holland* v. *Baker* (14); *North West Transportation Company, Ltd.* v. *Beatty* (15).

J. D. Hazen, A. G., for the plaintiffs, in reply:—The suit is properly brought by the plaintiff. The Company is not a public one, or of an eleemosynary character. Minority of shareholders have rights which majority cannot override. Stock in question must be regarded as new stock, and entirely separate from the original capital stock. Directors acted in

(1) 16 Beav. 485.
(2) L. R. 10 Ch. App. 96.
(3) (1901) 2 Ch. D. 513.
(4) 6 E. & I. App. 189.
(5) 8 Chan. 446.
(6) (1902) App. C. 474.
(7) 77 L. T. 146.
(8) 1903, 2 Chan. 506.
(9) 10 Ont. W. R. 66.
(10) (1902) 2 Chan. 421.
(11) 2 Hare 461.
(12) 1 Philips, 790.
(13) 1 Grant's Ch. R. 1.
(14) 3 Hare, 68.
(15) 12 App. C. 589.

their own interests, and not in the interests of the Company. *Menier* v. *Hooper's Telegraph Works* (1); *Hilder* v. *Dexter* (2).

1908.
HARRIS ET AL. v. SUMNER ET AL.
BARKER, C. J.

1908. May 19. BARKER, C. J.

"The Moncton Exhibition Association Company, Limited," one of the defendants, was incorporated by an Act of the Provincial Legislature in 1903, (3 Ed. VII. Chap. 87) with a capital of $10,000, divided into 1,000 shares of $10 each. Its objects are specifically set forth in Sec. 3 of the Act; but speaking generally, it was incorporated at the instance of a large number of the wealthiest and most influential residents of Moncton, for the purpose of establishing a permanent exhibition at that place. In order to accomplish that object, the Company was authorized to acquire property, erect buildings, hold exhibitions, award prizes and do such things as are usual in the management of matters of this kind. Nine provisional directors were named in the Act for the purpose of organizing the Company, but the permanent board was to consist of five members (a majority of whom were required to be residents of Moncton) elected from the members of the Company, and a further number not exceeding fifteen, to be chosen from the members by the five members of the board first elected. It was provided by the Act that the selection of these fifteen members was to be made, so that, as far as possible, the principal branches of trade, commerce and agriculture, should be represented at the board. At present the board consists of fifteen members, all of whom have been joined with the Company as defendants in this suit. After the Company had been organized the directors proceeded to the selection of a suitable property for their purpose. Several sites were examined, but the directors finally settled upon the present one as being in all respects the most desirable. It comprises about thirty-one acres within a mile of the central part of Moncton; it is well drained; it is in the immediate vicinity of the Inter-

(1) 9 Ch. App. 350. (2) (1902) App. C. 474.

1908.

HARRIS ET AL v. SUMNER ET AL.

BARKER, C. J.

colonial Railway, whose tracks can at a moderate cost be laid to the exhibition grounds, so that live stock intended for exhibition can be conveyed direct to the buildings. The Company purchased the property for $4,990, and by their financial statement for the year ending with March, 1907, there had been expended on the race track, erection of stables and other expenses in improving the ground and fencing it, the sum of $7,466.41. No buildings for exhibition purposes have as yet been erected, though I understand plans have been made for the purpose. The property is subject to a mortgage for $6,000, for money borrowed to pay the purchase money, and for improvements.

This Association was actively promoted by the defendant, Mr. D. I. Welch, a prominent member of the Moncton bar, who has resided in that city for many years and taken an active interest in its advancement. There are probably differences of opinion in reference to the advantages to be derived from exhibitions to be held annually or at stated intervals. They are certainly most common throughout the Dominion, and both Governments and Municipalities are continually recognizing their utility and their public character by substantial money grants made in their aid. What the plaintiff's view on this subject is I do not know, but Mr. Welch and the directors co-operating with him entertain very decided opinions that such an Association, properly supported, while it might not and probably would not bring any direct return to the shareholders in the way of dividends, would be of immense advantage to the city generally. Acting on this view they prepared a stock list, solicited subscriptions, selected the site, secured the property and gave their time and labour gratuitously to the work, so far as it has progressed. Some five hundred and ninety-three shares were subscribed for by upwards of one hundred persons, in various amounts from one share up to fifty. Of these the plaintiff took two shares, and according to the list of shareholders submitted to the annual meeting in May, 1907, the defendants then held in all one hundred and ninety-five

shares. From 1904 up to June, 1907, there was no material change in the holdings, new shareholders did not come forward. The plaintiff seems to have acquired seven shares during that period. Such was the condition of matters in the early part of 1907, when the Dominion Government acquired a tract of some two or three hundred acres of land adjoining this exhibition tract, for the purpose of erecting the new Intercolonial car works, and the result was that land in the vicinity rapidly advanced in price. According to the plaintiff's evidence the exhibition property which had been purchased some three years before for $4,990, and the improvements on which were unimportant in value except for the special purpose for which they were intended, had become worth some sixty or seventy thousand dollars. This is probably an over estimate, but there does seem to have been a substantial advance. The defendants estimate the value at from $20,000 to $25,000. The plaintiff seems to have set about immediately to purchase shares, and by the 15th July, 1907, he had acquired in all one hundred and eighty-eight shares, nearly all of them at a premium, and some of them for $25 a share. At this time four hundred and seven shares of the original capital stock of the Company had never been subscribed for. In May, 1907, Mr. Welch, who was then and always has been, secretary of the Company, subscribed the original subscription list for these four hundred and seven shares, and deposited with himself, as representing Mr. Clark the treasurer of the Company, his own cheque for $4,070, being the par value of the stock. In doing this Mr. Welch acted without the knowledge of the directors in any way. He did not consult, but acted, or at all events professed to act, under a resolution or bye-law of the Company passed in 1906, authorizing the sale of the unissued stock. The minute book of the Company had been destroyed by a fire which took place in Mr. Welch's office. At all events it with other books had never been seen since the fire. But the fact that such a resolution had been in fact passed was sworn to positively by Mr. Welch. The subscription for these un-

1908.

HARRIS ET AL. v. SUMNER ET AL.

BARKER, C. J.

issued shares soon became known to the plaintiff. He immediately protested against their being so disposed of, and claimed a right as a shareholder to participate in any disposal of these shares. His claim as now put forward, and as put forward before the director's meeting on the 15th. of July is, that as a holder of one hundred and eighty-eight shares he was absolutely entitled to a *pro rata* number of these four hundred and seven shares, or if they were not alloted among the existing shareholders, that they should be sold at auction for the benefit of the Company. Mr. Welch, in consequence of the plaintiff's action, consented to submit the matter to the Board. His cheque was not presented for payment, and the matter came before the directors at a meeting held on the 15th July, 1907, at which, according to the minutes, the following directors were present, that is the defendants Bell, Kinnear, Thompson, Harris, Humphrey, Jones, Clark, McCuag, McSweeney, Masters, Higgins and Sumner. When the question of Welch's subscription for these shares came up for discussion, Senator McSweeney read two letters which the plaintiff had given him for the purpose. Only one of these is important. It is dated July 15th. 1907, addressed to the directors of the Company, and is as follows:

Gentlemen,—On behalf of myself and other stockholders of the above named Company, I do hereby protest against the sale of the treasury stock of this Company in any other manner than by first offering it to the present stockholders of the Company *pro rata*, and in default of their accepting their respective allotment the placing of it to public competition by public sale. Any other method of the disposition of such treasury stock would be unjust, unconstitutional and contrary to the spirit and provisions of the N. B. Joint Stock Companies Act, being Chap. 85 of the Consolidated Statutes.

Yours respectfully,

GEO. L. HARRIS.

On behalf of myself and other stockholders of the Maritime Exhibition Company.

1908.

HARRIS ET AL. v. SUMNER ET AL.

BARKER, C. J.

The minute of the meeting recording the board's action as to this letter and the subscription for the shares by Welch is as follows:—"Senator McSweeny presented two letters from Mr. George L. Harris, which were read to the meeting and on motion ordered to be filed." "The secretary reported that he had personally subscribed four hundred and seven shares of the unsold capital stock believing it to be in the interests of the Company to do so. It was moved by Capt. Masters and seconded by W. F. Humphrey that the sale of the four hundred and seven shares of the capital stock of the Company to Mr. Welch be ratified and confirmed, and the officers of the Company authorized and directed to issue a stock certificate for the same to him, on payment for the stock." It is therefore plain that in taking this action the directors acted with full knowledge of the plaintiff's claim and the ground upon which he based it. A certificate for the four hundred and seven shares was then issued to Welch, and at the same meeting, or at all events immediately afterwards, the defendants purchased from Welch shares as follows:—Sumner 50, Senator McSweeny 25, Kinnear 10, Clark 10, Bell 10, Marr 20, Humphrey 20, John H. Harris 10, Cole 10, Masters 5, Jones 10, Higgins 20 and McCuag 10. For these they paid par or at the rate of $10 a share. Mr. Welch states, and in this he is confirmed by all the directors, that it was understood between them, as a condition of Welch's sale to them, that they should all stand together and hold the property for exhibition purposes and not permit it to be sold. This suit was commenced a few days later.

The plaintiff has sued on behalf of himself and all other shareholders of the Company, and in his bill he alleges that the sale of the stock to Welch was not made *bona fide*, and that he was acting merely as agent for the directors in the transaction, and that it was part of a plan by which they procured the stock at par, which was far below its value. Sec. 18 is as follows, "That the defendants have fraudulently

1908.

HARRIS ET AL v. SUMNER ET AL.

BARKER, C. J.

conspired among themselves, knowing the value of said treasury stock to be far more than par, to take it up themselves at a price or sum far less than its real worth, and thereby depriving the Company of the profits they could have obtained by the sale of the said stock in the open market, or depriving the other shareholders of the benefits they would obtain by a *pro rata* distribution of the said stock among themselves at the price of par." Sec. 20 alleges that the issue of stock was *ultra vires* of the directors and made without any lawful authority from the Company or otherwise, and that it was fraudulent and a breach of trust on the part of the directors. The bill prays a declaration that the issue of the stock to Welch was fraudulent and in excess of the powers of the directors, and that the transfers should be set aside, or that the holders hold them in trust for the Company. It will be seen therefore that the plaintiff seeks no relief for himself. The only relief asked for is for the Company.

There is no doubt in my mind that the plaintiff's sole object in buying up these shares was to obtain control of the Company, with a view to forcing a sale of the property for the pecuniary benefit of himself as a shareholder, quite regardless whether or not the result would be to destroy the association, and entirely defeat the purpose and object for which it was incorporated. So long as it gave no prospect of any direct pecuniary return the value of two shares represented his interest in it, and he was willing to leave its management to those who were gratuitously giving their time and their labour for the purpose. But when by a combination of circumstances, in no way brought about by him, the property, according to his estimate, ran up in value from about $166 an acre to $2,000, matters assumed an entirely different aspect. It is due to the plaintiff to say that he has not disguised his object, and that in coming here he is not asking for favours but demanding rights. It is, however, due to the general body of shareholders to say that, so far as the evidence shows, not one has come forward in support of this action or of the policy and purpose which are at the back of it.

1908.

HARRIS ET AL. v. SUMNER ET AL.

BARKER, C. J.

The plaintiff rests his claim on two grounds. In the first place he contends as a shareholder, having at the time one hundred and eighty-eight shares, he was entitled as of right to a *pro rata* share of this unissued stock, and that the directors had no legal right to withhold them. And in the second place he charges the directors with fraud in securing the shares for themselves, and with doing an illegal act in disposing of them at par, when they were worth a premium in the open market. The plaintiff has not always put forward his claim in the same terms. In the first place he claimed a right to one hundred and eighty-eight shares because the directors, or a majority of them, had been allowed to double their holdings. So strong was he in that view, that on going to Boston a day or two after the meeting held on the 15th July, he left a certified cheque for $1880 with Welch to pay for these one hundred and eighty-eight extra shares at par; and so strongly did he feel on this point that he sent a telegram from Boston to the defendant, John H. Harris, threatening some very dreadful things if his demand was not acceded to. The plaintiff is a lawyer, and I presume conversant with matters of this kind, and it does strike me as unusual that with his knowledge of this alleged illegality, and his opinion as to the fraud alleged to be wrapped up in this transaction, he should have evinced such a determination to be a participator in it. Dealing with the case as it is now presented, I understand that, as a matter of law, it is contended that under no circumstances, unless by some special authority by statute, can directors sell the original shares of a Company except at the market rate where they are at a premium. And I also understand it to be argued, that as regards these four hundred and seven shares in question, the directors were obliged to offer to allot them among the existing shareholders at a fixed price, and as to those shares not accepted they must be sold at public auction. I do not agree with either of these propositions. I think there is a distinction which has escaped the

1908.

HARRIS ET AL v. SUMNER ET AL.

BARKER, C. J.

plaintiff's attention between the original shares of a Company and an added or new issue of stock. It is true that without special authority original shares cannot be parted with at a discount, because if that were so in the case of compromise with limited liability the shares would not realize what they are bound to pay, that is the face value in full. That is the price the holder pays for the immunity from further liability. This would not be done if they were sold at a discount, and the Company would never realize from its shares the capital authorized for its operation. *North-West Electric Co.* v. *Walsh* (1); *Ooregum Gold Mining Co.* v. *Roper* (2).

But there is no rule that I am aware of which absolutely prevents directors, who represent the Company and have the most of its powers, from selling shares where they are at a premium, except at that premium. In *Hilder* v. *Dexter*, (3) at page 480, Lord Davey says, "I am not aware of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do so, and it is a question for the directors to decide." The same opinion is expressed by the Lords Justices in *In re London & Colonial Finance Corporation* (4). It seems to me a mistake to say that these shares had any marketable value in the proper sense of that term. What was it? No one was buying or wishing to buy except plaintiff. For his purposes he was willing to pay all the way from par to $25 a share. What premium between these two limits represents the market price? This case seems to me to be one in which the discretion of the directors may well be exercised; and when once the sale is made at par, it is not competent for a private shareholder to question the exercise of discretion by the directors. That is a matter between them and the Company. What possible difference there can be as to the right of selling these four hundred and seven shares and the remainder of the one thousand

(1) 29 S. C. R. 33.
(2) (1892) A. C. 125.
(3) (1902) A. C. 474.
(4) 77 L. T. Rep. 146.

shares previously sold I cannot see. The Attorney General alluded to the time that had elapsed between 1904 and 1907, during which no stock was issued, but that can have nothing to do with the point. I admit, that as to the issue of new stock that is not the original capital stock, there is a different rule. In my opinion the directors had a perfectly good right in the exercise of their discretion to dispose of the shares to Welch, always supposing the transaction was *bona fide*. As to that the direct evidence is all one way, and unless I am to disregard it altogether, my finding must be in their favour. It was put forward as a strong argument in support of the plaintiff's allegation in the bill as to the want of good faith on the defendants' part, that the Company as a business venture had not been a success; that up to the present time the net proceeds had not been large, and that it would be entirely disregarding all the rules by which facts are inferred, to find, first, that Welch, a man of moderate means, should as a mere philanthropic act borrow $4,000 in order to purchase these shares; and second, that all these directors should, with the same unselfish motive, contribute their money and double their holdings in this Company with no expectation of gain to themselves, beyond what might come to them in common with the citizens of Moncton generally. It was said that these defendants were shrewd business men, and that it would be most unreasonable, after all that had taken place, to infer that they had really any other object in view than the money which they would make by reason of the enhanced value of the Company's property. I recognize the force of this argument, but it is not conclusive. Of the fifteen defendants, all save three gave evidence. In the most unreserved way they all swear that they knew nothing of Welch taking the shares until after he had subscribed for them, that he was in no way acting for them, and that they had nothing whatever to do with it until after the sale had been ratified by the directors at their meeting on the 15th of July; and that when they purchased from Welch, it was with the distinct understand-

1908.

HARRIS ET AL v. SUMNER ET AL.

BARKER, C. J.

ing that the object of the Company, that is the exhibition project, should not be sacrificed by a sale of its property. It was also said that if the plaintiff had been allotted the shares which he claimed, he would not have a controlling interest. That is true, but he would have been so much nearer the accomplishment of his purpose. It is also said that another site was available for exhibition purposes and therefore the sale of the Company's present property did not necessarily involve a destruction of the Company itself. The evidence shows that there is one other available site, which though not nearly so suitable or convenient for exhibition purposes as the present, might answer the purpose. It is, however, common knowledge that the difficulties which stand in the way of organizing and establishing on a working basis associations of this nature are so great, as to render it impossible that a second attempt would be made, or if made, that it would be successful. From supposing that in taking these shares these defendants acted *bona fide* for the purpose of preserving the Company, and in order to carry out the objects for which it was incorporated and defeat the plaintiff's efforts in an entirely opposite direction, does the transaction necessarily become fraudulent or illegal, because it may turn out that at some future time the property may be sold, and the defendants derive some benefit from its advanced value, as holders of these shares? I think not. The directors, in what they did, have done nothing which the Company itself could not have done; and if they have been guilty of negligence or improper conduct in the management of the Company's affairs, or the disposal of its property, or have done an act which, as between them and the Company, may be voidable, the Company itself can ratify and confirm what the directors have thus done, and in such cases the minority of the shareholders must yield to the majority. *Patrick* v. *The Empire Coal Co.* (1) and cases there cited.

I take it as settled by numerous authorities that in any case like the present, where there is an absence of fraud, and

(1) 3 N. B. Eq. 571.

where the act complained of is not *ultra vires* the corporation itself, the majority of the shareholders are the only persons who can complain, provided they are not themselves the wrongdoers, and that any proceeding calling the act in question must be in the name of the Company itself, unless the Company refuses to act. *Foss* v. *Harbottle* (1); *Mozley* v. *Alston* (2); *McDougall* v. *Gardiner* (3). Precisely the same rule given in the United States. *Hawes* v. *Oakland* (4).

In *Gray* v. *Lewis* (5), at page 1050, James, L. J., says—"It is very important in order to avoid oppressive litigation to adhere to the rule laid down in *Mozley* v. *Alston* and *Foss* v. *Harbottle*, which cases have always been considered as settling the law of this Court, that where there is a corporate body capable of filing a bill for itself, to recover property either from its directors or officers, or from any other person, that corporate body is the proper plaintiff, and the only proper plaintiff. One object of incorporating bodies of this kind was, in my opinion, to avoid the multiplicity of suits which might have arisen, where one shareholder was allowed to file a bill on behalf of himself and a great number of other shareholders." Now the sole object of this bill is that these shares should be returned to the Company as part of its assets, illegally in the hands of the directors. But the Company must have the right to say, even if the transaction could be regarded as a voidable one, we will confirm it, for it was a beneficial act done in the interest of the whole body of the shareholders. That right cannot be taken away from the shareholders at the will of an individual shareholder by filing a bill and carrying on litigation of his own, in reference to the Company's affairs, simply because for reasons personal to himself he happens to differ from everyone else interested. *Burland* v. *Earle*, (6).

The Bill must be dismissed with costs.

(1) 2 Hare, 461.
(2) 1 Ph. 790.
(3) 1 Chan. D. 13.
(4) 104 U. S. 450.
(5) 8 Ch. Ap. 1035.
(6) (1902) A. C. 83.

1908.

May 19.

McKENZIE v. McLEOD ET AL.

Mortgage—Redemption—Rate of interest—Tender—Condition attached to tender—Disclaimer—Costs.

In a mortgage of real estate, the proviso for payment was that the principal should be paid in five equal annual instalments, with interest semi-annually at eight per cent.; and five promissory notes with interest at that rate were given.

Held, that in a suit for redemption, when there was no special agreement for interest on overdue payments, the mortgagor adopting a certain rate higher than the statutory one and making payments under it, was bound by that rate so far as payments actually made were concerned, but was not bound as to unmade or future payments, and only the statutory rate could be enforced.

Held, that a demand for a discharge of the mortgage and release of the debt, accompanying a tender by the mortgagor, made the tender a conditional one.

Held, that when the mortgagee hampered and oppressed the mortgagor, and obstructed his suit in every possible way, the mortgagee, while entitled to the general costs of suit, would lose the costs of his own unnecessary pleadings, and would be compelled to pay the costs of any such pleadings by the mortgagor as were occasioned by his procedure.

If there had been a sufficient and unconditional tender by the mortgagor before suit, the mortgagee would have been liable for the costs of the suit.

Held, that a defendant who answered, and later on filed a disclaimer, would lose his costs, even if successful in having the bill dismissed as against him.

Bill filed for redemption. This was a motion to confirm the referee's report, which had been excepted to by the defendants. The facts fully appear in the judgment of the Court.

M. N. Cockburn, K. C., and *J. W. Richardson*, for the plaintiff.

M. MacMonagle, K. C., for the defendants.

Argument was heard April 21, 1908.

M. MacMonagle, K. C., in support of the exceptions, for the defendants:—Referee should have allowed interest at

eight per cent. instead of at six on the overdue payments, and also all the defendants' expenses, amounting to $48.55. *Jackson* v. *Richardson* (1); *King* v. *Keith* (2). There was no good tender, for a tender to be good must be unconditional, and in this case there was a condition attached. Here there was no legal tender, only an offer: 9 *Bacon's* Abridgement (3); *Coote* on Mortgages (4). Hugh A. McLeod has disclaimed, and bill should be dismissed as against him, allowing him his costs: *Teed* v. *Carruthers* (5); *Wilson* v. *Hornbrook* (6). There has been no misconduct on the part of the defendants, and as mortgagees they are entitled to their costs: *Thomas* v. *Girvan* (7).

M. N. Cockburn, K. C., in support of the motion, for the plaintiff:—Referee was right in calculating interest at six per cent., as when there is no special agreement only the statutory rate can be charged on overdue payments: *The People's Loan and Deposit Co.* v. *Grant* (8); *Daniell* v. *Sinclair* (9); *Murchie* v. *Theriault* (10); *Coote* on Mortgages (11). The defendant Hugh A. McLeod answered, and afterwards disclaimed, and if bill is dismissed against him it should be without costs: *Roberts* v. *Howe* (12); *Lame* v. *Guerette* (13); *Horn* v. *Kennedy* (14); *Coote* on Mortgages (15); Dan. Chan. Plead. and Pract. (16). There was a good tender; money was offered, and offer was met with a square refusal. Tender was unconditional. The plaintiff has been forced into Court to obtain her rights, and it would be a great injustice if she is compelled to pay the defendants' costs, as they have acted wrongfully: *Gregg* v. *Slater* (17); *Detillin*

(1) 1 Eq. N. B. R. 325.
(2) 1 Eq. N. B. R. 538.
(3) Pp. 314, 315 and 316.
(4) 4th Ed. p. 885.
(5) 2 Y. & C. Ch. R. 30.
(6) 1 Han. N. B. R. 168.
(7) 1 Eq. N. B R. 314.
(8) 18 Can. S. C. R. 262.
(9) 6 App. Cases 181.
(10) 1 Eq. N. B. R. 588.
(11) 4th Ed. 868.
(12) 1 Eq. N. B. R. 139.
(13) 1 Eq. N. B. R. 199.
(14) True. N. B. Eq Cases 311.
(15) 4th Ed. 732.
(16) 4th Ed. 709.
(17) 22 Beav. 314.

1908.

McKENZIE v. McLEOD ET AL.

BARKER, C. J.

v. *Gale* (1); *Bryson* v. *Huntington* (2); *Roberts* v. *Williams* (3); *Ashworth* v. *Lord* (4); *Livingstone* v. *Bank of New Brunswick* (5).

MacMonagle, K. C., in reply.

1908. May 19. BARKER, C. J.

Redemption Bill.

The mortgage in question was made by one Alexander S. McKenzie, the husband of the present plaintiff, to one Howard B. McAllister on the 12th November, 1896, to secure the sum of $500 and interest. It was assigned on the 6th March, 1897, to one Hattie F. Clark, wife of Augustus T. Clark. The Clarks assigned it to the defendant, Mary Ann McLeod, on the 25th February, 1907, and by various conveyances the equity of redemption became vested in the present plaintiff. Her husband died intestate on the 11th October, 1901, leaving three children, who by their separate conveyances transferred their interest in the equity of redemption to the plaintiff. These conveyances are dated respectively as follows:—October 13th, 1906, March 29th, 1907, and April 5th, 1907. On the 14th March, 1907, a little over a month after the mortgage had been assigned to the defendant, she and her husband gave a notice of sale, under the power contained in the mortgage, to take place on the 24th April. On the 4th of April, the plaintiff made a tender of what she alleged to be due on the mortgage and expenses, $414 in all. This was not accepted. The plaintiff then filed this bill, and on her application I granted an injunction staying the sale, and ordering the $414 to be paid into Court, where it still remains, subject to the order of this Court. That order was made April 15th, 1907, and the money was paid in on the 20th of that month. When the cause came down for hearing

(1) 7 Vesy 583; 18 E.R.C. 502.
(2) 25 Grant's Ch. R. Up. Can. 265.
(3) 4 Hare 128.
(4) 36 L. R. Ch. D. 545.
(5) 6 Allen N. B. R. 252.

1908.

MCKENZIE v. MCLEOD ET AL.

BARKER, C. J

I referred it to a Referee to report the amount then due on the mortgage, as well as the amount due on the 4th April, 1907, when the alleged tender was made. The Referee has reported that on the 4th April, 1907, the sum of $355.53, and on the 4th February, 1908, the sum of $372.67 was due, including in both cases a sum of $7 to cover the expenses of drawing and publishing the notice of sale. In computing the amount due, the Referee allowed interest at the rate of 8% as stipulated for in the mortgage until the due date of the several instalments, and on overdue principal at the rate of 6%. Exceptions were filed, and this matter now comes before me on a motion to confirm the Referee's report. The Referee does not seem to have had any evidence before him, except the commission issued for the examination of Clark to shew the payments made while he had the mortgage. The defendants filed an account before the Referee by which they claimed, for principal and interest due February 4th, 1908, $591.10 as against $365.67 as reported by the Referee, a difference of $225.43. The first exception relates to the admissability of some evidence before the Referee, taken under the commission, I disposed of that on the argument adversely to the defendants. The second exception is as follows:—"Referee improperly disallowed simple interest at the rate of eight per cent. per annum after each instalment became due, although evidence is that each payment (except one) was for interest at 8% per annum, by agreement after interest was due from time to time." The proviso for payment in the mortgage is as follows:—"Provided always that if the said Alexander S. McKenzie, his heirs, etc., shall and do pay unto the said Howard B. McAllister, his heirs, etc., the full sum of $500 in five equal annual instalments of $100 each, with interest semi-annually thereon at 8% as by five promissory notes of even date herewith given." These notes are made payable "with interest semi-annually at 8%." It was not denied that interest under a proviso such as this could only be allowed at the rate of 6% on payments overdue as settled by *St. John* v. *Rykert*

1908.

McKENZIE v. McLEOD ET AL.

BARKER, C. J.

(1); and *The People's Loan Co.* v. *Grant* (2); and followed in this Court (prior to the date of this mortgage) in *Hanford* v. *Howard* (3); unless there was some binding agreement to the contrary. There certainly is no such agreement in the mortgage itself, but assuming for the sake of argument that a subsequent agreement between the parties could be made in consideration of forbearance or some other good consideration, charging the property with interest by way of damages after default, at a rate exceeding the statutory rate, has that been done here? The defendants set up in their answer that such an agreement was made, and the onus of establishing it is on them. I think I may assume that there never was any such agreement made, either orally or in writing. If there had been, the fact could easily have been proved. Am I to infer it, and if so upon what facts? The Referee has simply made a calculation of the interest on the basis that six per cent. was to be the rate after the due date, and he has credited payments amounting in all to $506. The defendants dispute not only the correctness of the principle upon which this calculation is made, inasmuch as 8% instead of 6% should have been allowed, but they also dispute the correctness of the amount of the credits, and allege that the $506 is too much by $148. I have no doubt, whatever, that the $506 is the correct amount. The receipts, endorsements on the notes, and the positive evidence of Clark all shew it, and it was on that basis the defendants themselves arrived at $405 as the amount due when they purchased the mortgage, and which they paid for it. The other point is not so easily disposed of, but after giving the matter careful consideration, I have come to the conclusion, under the peculiar circumstances of this case, that the plaintiff has no just ground of complaint if she is held liable for the interest at the higher rate. The plaintiff has produced receipts for the eighteen payments which together make up the $506 credited. The first two are for

(1) 10 Can. S. C. R. 278. (2) 18 Can. S. C. R. 262.
(3) 1 N. B. Eq. 241.

the interest due in May and November, 1897, before default, and are unimportant. The third one is dated June 13th, 1898, and is "*in full of interest on mortgage to May 12th, 1898.*" All of the other receipts down to that of November 12th, 1901, nine of them, I think, are all for interest in full to a certain date, or, on account of interest due at a certain date. The receipt dated Nov. 12th, 1901, which is the last in that particular form is as follows:—"Rec'd of J. D. McKenzie thirty dollars interest on mortgage to date." These receipts all given by Clark to whom all the payments were made. This last $30 made $200 in all, paid up to that time specifically for interest, and there had accrued due up to that time $200, if the 8% were allowed, as it of course was. One of the notes had been overdue then for four years, one for three, one for two and one for one, and the remaining note fell due on the 12th November, 1901. Now I find it difficult to see upon what principle such a payment can be recalled. If A voluntarily pays B $100 in full for interest on a certain mortgage to a certain date, and both parties know that the interest is calculated at the rate of 8%, how can it be said that A has not agreed to pay it? He has not only agreed to do so, but he has actually done so, and in the absence of any mistake of fact or of law—and there is no suggestion here of either, there is certainly no evidence of either—I think such a payment ought not to be disturbed. That, however, does not necessarily give rise to an inference as to future transactions of a similar character, where the precise object of the payment is not stated. On the 8th February, 1904, there was a payment made of $50. Of this $40, according to the terms of the receipt, was for interest and $10 on account of principal. On the 16th February, 1903, $20 was paid on *account of interest*, and a similar sum on the 5th July, 1903. These two with $40 paid on the 8th February, 1904, made up the $80 or two year's interest from November 12th, 1901, to November 12th, 1903. The last three payments, amounting in all to $216, are represented first by a receipt for $66, dated December

1908.

McKENZIE v. McLEOD ET AL.

BARKER, C. J.

7th, 1904, which is said to be on account of interest; one is for $850, dated December 7th, 1905, and the last for $100 on account. By these receipts it may be said the plaintiff has neither made nor assented to any specific appropriation of the money, and she is therefore free to insist upon her legal rights as to the statutory rate of interest after November 12, 1903. To a certain extent this is so. When, however, in the case of a series of transactions like these, between mortgagor and mortgagee in reference to the same security, and extending over a period of ten years, for more than half of which the mortgagor was in default, you find them uniformly adopting a certain rate for the calculation of their interest, and payments are made on that basis, and there is no suggestion of mistake, the inference is not unnatural, that as to later payments of interest on the same mortgage, the same rate has been agreed to, though the evidence of the fact may not be so clear. It is not a necessary inference, but, in the absence of evidence to the contrary, it is not, I think, an unreasonable one. Before this suit was commenced the plaintiff proceeded to make a tender of the amount due, and in doing so her solicitor, on her behalf, in addition to offering the $414 tendered, served the defendants with a formal notice signed by the plaintiff, in which is shown how the $414 is arrived at. After stating her desire to redeem the property and pay all the moneys due on the mortgage, it states thus: "I herewith and at the same time of the service of this notice upon you, tender you the said Hugh A. McLeod and you the said Mary Ann McLeod, with the said money so due thereon (that is on the mortgage) as follows:—

The amount due on the said mortgage at the date of assignment to you, and which amount you paid for the said assignment	$405 60
Interest on $405.00 from February 25th, 1907, to April 5th, 1907, at 8%	3 46
Costs of publishing notice of mortgage sale	4 00
	$412 46

1908.

MCKENZIE v. MCLEOD ET AL.

BARKER, C. J.

There is a very material difference between the amount due if interest is allowed at 8% and the amount if it is allowed at 6%. The plaintiff, in serving this notice, was not seeking to effect a compromise of some disputed claim. She had never had any dealings with the defendants in reference to this mortgage at all. She had all the receipts in her possession, she knew exactly what she had paid. She knew that the $405 paid by the defendants, and which she calls "the amount due on the said mortgage at the date of assignment to you," was made up by allowing interest at the rate of 8%, and in order to compute the amount due at the time of the offer, she adds the subsequent interest, computed also at 8%. Having the payments, it was a very simple calculation to arrive at the amount due for principal and interest. If it is made up on a 6% basis, the balance will be some $80 less than what this tender makes it. It is unreasonable to suppose the plaintiff or her solicitor was willing, without being even asked to do so, to throw away this sum for no purpose whatever. I regard it as a deliberate adoption of that amount as due, and as strong evidence that the plaintiff recognized a liability to pay interest at the rate of 8% and was willing to act upon it. There is another circumstance pointing to the same conclusion. In section 4 of her bill in this suit, the plaintiff sets out the assignment of the mortgage by Clark to the defendant as having been made for the sum of $405, "being the amount then due for principal and interest under and upon the said mortgage." These are not words of recital taken from the assignment, for they are not there; they are the allegations of a fact by the plaintiff in her bill. In section 12 the notice of the tender is set out, and there follows an allegation "that there was tendered and offered to the defendants the sum of $414 of lawful money of Canada, as the amount then due from the plaintiff to the defendants under and upon the said mortgage, in part recited and referred to in the second paragraph of this bill, and as the consideration for which the

1908.

McKENZIE v. McLEOD ET AL.

BARKER, C. J.

plaintiff was entitled to have the mortgage cancelled." And in the interrogatories the defendants are asked this question in section 4, "Was not the sum of $405 the amount then due upon said mortgage, and if not, what amount was then due thereon?" In an affidavit made by the plaintiff's solicitor verifying the bill for the purpose of applying for the injunction, he states the particulars of the tender which he made. He says: "I then told her" (that is, the defendant, Mary A. McLeod) "that I had as solicitor for Martha D. McKenzie, the amount of $412.46 to offer her the said Mary Ann McLeod, and the said Hugh McLeod to pay the amount as far as I could ascertain *what was due for principal, interest and costs of advertising sale of property*, and that I would, etc." I do not wish to be considered as holding that a mere tender of a specific sum of money by a mortgagor to a mortgagee as the amount due on the mortgage is necessarily evidence against the mortgagor of the amount due. The circumstances here are, however, unusual. The only question I am now dealing with is whether the plaintiff has herself fixed or assented to the appropriation of the last three payments to the payment of interest computed at the rate of 8%, as she had done in reference to previous payments. In order to demonstrate to the defendants that her tender is sufficient, she undertook to show how she makes up the amount then due on the mortgage, and she takes as a starting point the $405 paid by them on the 25th February, 1907, as the amount due at that date, and she adds the subsequent interest made up at 8%. In the notice of tender she says: "The amount due on this mortgage at the date of the assignment to you, and which amount you paid for the assignment was $405." If you eliminate the question of mistake, this statement can only be true on the theory that the payments in question were made like the previous ones in pursuance of an agreement to pay the 8% interest, which must be inferred from the circumstances. This, however, has no reference to future transactions, and I am disposed to think, notwithstanding that the

plaintiff charges herself in the notice of tender with 8% after the 25th February, 1907, in making up the amount to be tendered, she is not bound to pay over 6%. The amount due for principal and interest I state as follows:—

Principal	$500	00
Interest at 8% from Nov. 12th, 1896, to February 25th, 1907, 10 years and 105 days,	411	51
Interest from Feb. 25th, 1907, to 4th April, 1907, 38 days, at 6%	3	12
	$914	63
Deduct payments	506	00
Amount due April 4th, 1907	$408	63

The amount due on the 4th February, 1908, will be $433.78, made up as follows:—

Principal	$500	00
Interest at 8% from Nov. 12, 1896, to Feb. 25, 1907, 10 years and 105 days	411	51
Interest from Feb. 25, 1907, to Feb. 4, 1908, 344 days, at 6%	28	27
	$939	78
Deduct payments	506	00
Amount due on Feb. 4th, 1908	$433	78

As to the charges claimed by the defendants amounting in all to $48.55, the referee allowed two—$3 charged for preparing the notice of sale for publication, and $4 paid for publishing it. These are the amounts charged by the defendants' solicitor for these services, and there is no evidence that any other services were performed. I think the referee was right in rejecting the others. Adding this $7 to the above balances, there was due on all accounts on the 4th of April, 1907, when the tender was made, $415.63, and on the 4th February, 1908, $440.78.

1908.

McKENZIE v. McLEOD ET AL.

BARKER, C. J.

I come now to the question of costs, and first as to the alleged tender. That the plaintiffs' solicitor, in his interview of the 4th April with the defendants, had a *bona fide* intention of paying them all to which they were entitled under this mortgage, there can be no doubt. He had the money with him for the purpose; he made no objection to the defendants' own method of making up the account. It is equally clear to my mind that they placed every obstacle in the way which they could, and that before the suit was commenced, as well as afterwards, there seems to me to have been one principal object in view—to make this suit as expensive and oppressive as possible. It is not necessary to inquire whether or not, in view of the defendants' absolute refusal to give any information as to their expenses, the tender might not be considered sufficient as to amount, because I think it did not amount to a legal tender by reason of the condition attached to it. There is no doubt from the evidence, as well as from the terms of the notice to which I have already referred, that the offer to pay was accompanied with the condition that the release should be given. Mr. Richardson, who made the tender, was asked the following question: "Did you not say it was on condition of having that signed" (that is, the discharge), "that you would pay the money?" His answer was: "I said upon condition of the mortgage being discharged I would pay the money." This placed the defendants in a position where they were obliged to refuse the money, because if they accepted it and executed the release, the whole matter would be closed whether the amount was correct or not. The case must therefore be treated as though no tender had been made. The general doctrine as to costs in cases of this kind is laid down in *Cotterell* v. *Stratton* (1). Lord Selbourne there says: "The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established, and does not rest upon the exercise of that discretion of the Court, which, in

(1) L. R. 8 Ch. Ap. 295.

1908.

MCKENZIE v. MCLEOD ET AL.

BARKER, C. J.

litigious causes, is generally not subject to review. The contract between mortgagor and mortgagee, as it is understood in this Court, makes the mortgage a security not only for principal and interest and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. * * * These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract. * * * A decree therefore in a redemption suit which disallows the costs of the mortgagee, is of right appealable, and if appealed against can only be supported by proof of special circumstances sufficient to justify such a departure from the ordinary course of the Court. That there may be such circumstances is undeniable, the question is whether they exist in this case." In *Cliff* v. *Wadsworth* (1), the Vice-Chancellor says: "A mortgagor is entitled, like every other man, to be protected against litigious and unreasonable conduct." I shall as briefly as I can, give the facts and circumstances which have led me to make the order as to costs which I am about to pronounce. It appears from the evidence and what took place, that the defendant, Mrs. McLeod, was very anxious to obtain control of this property, and that it was to enable her to accomplish this object that she purchased this mortgage. She actually borrowed the money for the purpose, and according to her evidence, she paid for expense in getting the assignments the sum of $25. The purchase was certainly not made as an investment. The assignment was executed in Colorado on the 25th February, 1907, and it was registered on the 15th March, 1907. The plaintiff was in arrear in her payments; the last one, made shortly before the assignment was made, only reduced the original loan by about $100. Without notifying the plaintiff of the assignment, or making any application to her for payment, or communicating to her

(1) 3 Y. & C. Chan. R. 598.

1908.

McKENZIE v. McLEOD ET AL.

BARKER, C. J.

in any way, the defendants caused a notice of sale to be published in the *St. Croix Courier* of the 21st of February, to take place on the 24th April, one month being the shortest time for a notice of sale required by the mortgage. So soon as the plaintiff learned of this she consulted with her solicitor, and she immediately set to work to ascertain the amount which the defendants claimed, so that it might be paid. Both the defendants and their solicitor, after some delay, absolutely refused to give any information as to the amount of their claim, not only as to the amount unpaid for principal and interest, but also the amount claimed for expenses. The answer put in raises defences, which no one attempted to support, in addition to the one as to the rate of interest. Its unnecesssay length, filled as it is by repetitions, long quotations and irrelevant matter, I hope the taxing master will not lose sight of in taxation. The defendants then filed long interrogatories for the plaintiff's examination. Her answer was not even read or used in any way. In order to avoid the expense of issuing a commission to Colorado to prove by Clark the payments which had been made to him, and about which there was really no dispute, and the evidence of which the defendant had seen and knew all about and had acted upon, the plaintiff gave notice to admit facts. The defendants refused to admit, and the commission was issued. Then shortly before the hearing the defendant who had already answered filed a disclaimer and he now asks for his costs. There was in reality nothing to dispute about except the amount due, and this involved so little room for differences when once the rate of 8% was conceded, that five minutes conference should, and, with reasonable men, would have settled it. The defendants' actions throughout look like a deliberate attempt by accumulating costs, so to increase the burthen upon this plaintiff as to place the redemption of her property beyond her reach. If there had been a sufficient and unconditional tender, the defendants would have been saddled with the costs of this litigation, and the money

which has been paid into Court would have stopped the interest. *Roberts* v. *Jefferys* (1),

This bill will be dismissed against the defendant, Hugh A. McLeod, without costs. The defendant must pay the costs of the three overruled exceptions and get the costs of the other. The defendant must also pay the costs of the plaintiff's answer to the defendants' interrogatories and lose the costs of this hearing. The cost of the commission will be disposed of by the Clerk. Otherwise she must have her general costs of suit. When taxed they will be added to the mortgage balance, and the money in Court, so far as it will go, will be used in payment, and the balance as ascertained by the Clerk, will bear interest at the rate of 6% from 20th April, 1907, when the money was paid into Court for the defendants' protection, and which she might have had at any time on application.

There will be the usual order as to redemption by payment of the balance.

(1) 8 L. J. Chan. 137.

1908. EARLE, TRUSTEE, ETC., OF LAWTON v. LAWTON ET AL.

July 14.

Will—Construction—Fund for Heirs—Time for Distribution—Determination of Class—Discretion of Trustees.

L. died in 1899, having made a will in 1898, by which he left all his property to two trustees, to hold in trust for the benefit of the infant children of two nephews. The trustees were to use the income, according to their discretion, for the support, maintenance and education of these children, until each reached the age of twenty-one years.

The words in the will are,—"and on each child attaining the age of twenty-five years, to pay to such child what they consider would be his or her share in my estate, dividing the same equally between such children living, and the children of any deceased child when such payment shall be made, such payment to be *per stirpes*, and not *per capita*, etc."

In 1904, one of the children died without issue, and in 1906 another child was born to one of the nephews. The oldest child has now reached the age of twenty-five years.

Held, that the child who had reached the age of twenty-five years was entitled to be paid her share of the *corpus* of the estate, which share was to be ascertained by dividing the *corpus* equally among the children then *in esse*, they being the only ones entitled to rank, as the class was then determined.

Held, that the child born after the death of the testator, but before the time for payment to the oldest child, was entitled to rank equally with the other children as the class was not determined until then.

Held, that as the testator had given the trustees full discretion, to use the income as they might see fit, for the purposes mentioned in the will, the Court would not, in the absence of fraud or wrong-doing, interfere or direct them in this respect.

Charles Lawton died at St. John, on the 11th February, 1899, leaving a will dated February 28th, 1898, by which he appointed the present plaintiff and the late L. J. Almon executors and trustees of the estate. He disposed of his property as follows:—"I give, devise and bequeath unto my executors, hereinafter named, their heirs, executors and administrators, all my real and personal estate, whatsoever and wheresoever situate, upon trust, to pay all my just debts and funeral and testamentary expenses, to pay from time to time, so much of the income of my said estate, as they, in their discretion, shall see fit, towards the support, maintenance

and education of the children of my nephews James Clark Lawton and Charles Abbott Lawton, until they shall respectively arrive at the age of twenty-one years, and on each child attaining the age of twenty-five years, to pay to such child, what they consider would be his or her share in my said estate dividing the same equally between such children living, and the children of any deceased child when such payment shall be made, such payment to be *per stirpes*, and not *per capita*, and the children of any deceased child being entitled to the share of their father or mother, as the case may be, and their respective share or shares being transferred to their respective guardians." At the time of Charles Lawton's death his nephew James Clark Lawton had three children living—Eliza Edna, Benjamin and Richard Woofendale. His nephew Charles Abbott Lawton at the same time had four children living—Alice, William Parker, Charles Ralph and Herbert Clarence. All of these seven children were then under age, and there were no children of a deceased child in either family. Charles Ralph Lawton died March 23rd, 1904, without ever having been married. On the 19th February, 1906, some seven years after the testator's death, another child—the defendant VanDyke Lawton—was born to James Clark Lawton. Alice Lawton attained the age of twenty-five years on the 29th January, 1908, and has therefore become entitled to be paid what the trustees consider her share in the terms of the will. In determining that, two questions have arisen and are now stated for the opinion of this Court. First,—is the property to be divided into two equal parts and one half to be distributed among the children of the one nephew, and the other among the children of the other nephew; or is the whole property to be divided equally among the children of both? And second,—is VanDyke Lawton entitled to a share, he having been born after the testator's death but before Alice Lawton attained the age of twenty-five years, she having been the first of the children to reach that age?

1908.

EARLE, TRUSTEE, ETC. OF LAWTON v. LAWTON ET AL.

W. A. Ewing, for the plaintiff.

A. W. Macrae, K.C., *J. Roy Campbell* and *K. J. Macrae*, for defendants.

Argument was heard May 29, 1908.

A. W. Macrae, K.C., for defendants:—Estate is divisable *per capita* among all the children of the two nephews, living at the time for distribution. *Weld* v. *Bradbury* (1); *Devisme* v. *Mello* (2). A bequest to a particular description of persons at a particular time, vests in persons answering that description at that time exclusiveiy. *Godfrey* v. *Davis* (3); *Hughes* v. *Hughes* (4); *Whitbread* v. *St. John* (5); *In re Wenmoths Estate* (6). Under the will the estate became vested in all the children when the oldest child reached the age of twenty-five years, and distribution should be between the children then *in esse*. The word "equally" when used, has been held to show an intention that the estate was to be divided *per capita*. *Houghton* v. *Bell* (7); *Gourley* v. *Gilbert* (8); *Bartlett* v. *Hollister* (9).

J. Roy Campbell, for defendants:—Estate is divisible *per stirpes* and not *per capita*, but if the latter construction is held, then the division should be made among all the children living at the time of the testator's death. Theobald on Wills (10); *Davis* v. *Bennett* (11); *Archer* v. *Legg* (12). Child born after testator's death will not be entitled to a share in the estate. *Scott* v. *Harwood* (13); *Heathe* v. *Heathe* (14). Estate vested from the moment of the testator's death. *Maddison* v. *Chapman* (15). Estate vesting at testator's death, the representatives of the deceased child would be entitled to his share. *Stapleton* v. *Cheele* (16).

(1) 2 Ver. 705.
(2) 1 Bro. C. C. 537.
(3) 6 Vesy 43.
(4) 3 Bro. C. C. 434.
(5) 10 Vesy 152.
(6) 37 Ch. D. 266.
(7) 23 Can. S. C. R. 498.
(8) 1 Han. N. B. R. 80.
(9) Ambl. 334.
(10) 2nd. Ed. 252.
(11) 4 DeG. F. & J. 327.
(12) 31 Beav. 187.
(13) 5 Maddock 332.
(14) 2 Atkyns 121.
(15) 4 K. & J. 709.
(16) 2 Vern. 673.

1908.

EARLE, TRUSTEE, ETC. OF LAWTON v. LAWTON ET AL.

BARKER, C. J.

K. J. Macrae, for defendants:—Estate vests immediately on the death of the testator, and should be divided into two equal shares, one of which is divisable among the children of one nephew share and share alike, and the other is divisable among the children of the other nephew share and share alike. Child born after the testator's death has no share in the estate. *Coleman* v. *Seymour* (1); *Horsley* v. *Chaloner* (2); *Hill* v. *Chapman* (3); *Arrow* v. *Mellish* (4); *Hawkins* v. *Hamerton* (5).

1908. July 14. BARKER, C. J.:—

(His Honor recited the facts of the case as stated above, and proceeded as follows.)

I think the intention of the testator, as clearly indicated by the will, was to benefit all the children of his two nephews alike—first, by giving them all during their minority an equal right to such amount as the trustees might in their discretion think proper for their support, maintenance and education; and in the second place, by making an equal division of the *corpus* among the children of both families. There is nothing in the will, that I can see, to suggest or to warrant any different construction. Although the other children are not entitled to be paid their shares, a present basis of distribution must be determined in order to enable the trustees to fix the amount coming to Alice Lawton, and for that reason it is necessary to ascertain whether VanDyke Lawton is a beneficiary and entitled to a share equally with his brothers and sisters living at the time the testator died. The general rule, as laid down in Hawkins on Wills (6), and other books of authority is, that in the absence of a contrary intention appearing on the face of the will itself, the time for ascertaining the class, is the period when the first of the class, by attaining the specified age becomes entitled to receive his

(1) 1 Ves. Sr. 209.
(2) 2 Ves. Sr. 83.
(3) 3 Bro. Ch. C. 391.
(4) 1 DeG. & Sm. 555.
(5) 16 Sim. 410.
(6) P. 75.

1908.

EARLE, TRUSTEE, ETC. OF LAWTON v. LAWTON ET AL.

BARKER, C. J.

share, and those who come into *esse* after that time are excluded. *Andrews* v. *Partington* (1); *In re Emmetts Estate* (2). This is said to be a rule of convenience, in reference to which Jessel, M. R., in the case just cited, says:—"There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is, that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied when it is not necessary, there being also a rule that you let in all who are born up to the time when a share becomes payable." *Berkeley* v. *Swinburne* (3); *In re Wenmoth's Estate* (4).

The words in the will itself are certainly not happily selected, and their meaning is not free from doubt, but I should read them as fixing the time of payment of the first share as the time for determining those entitled to shares, and that such persons were the children then living and the children of a deceased child who were to take *per stirpes* and not *per capita*. I cannot give any other reasonable meaning to the words, "when such payment shall be made."

I shall therefore hold that VanDyke Lawton is entitled to share as one of the nephew's children, and there will be a declaration accordingly.

The only point mentioned at the argument was as to an increased allowance for the support and education of some of the infant children. If the fund is to remain in the hands of the trustees the testator has placed the amount of the income to be used for the support and education of the infants entirely in their discretion, and it is not usual for this Court to inter-

(1) 3 Brown Ch. C. 401.
(2) L. R. 13 Ch. D. 484.
(3) 16 Sim. 275.
(4) L. R. 37 Ch. D. 266.

1908.

EARLE, TRUSTEE, ETC. OF LAWTON v. LAWTON ET AL.

BARKER, C. J.

fere with such discretion in the absence of bad faith. *Gisborne* v. *Gisborne* (1). There is a large sum to the credit of income in the hands of the trustee available for such purposes. I have no evidence before me bearing on the question, and therefore nothing on which to proceed if it were a matter with which this Court would at present interfere.

Declaration as to VanDyke Lawton, with leave reserved to apply for further directions.

(1) L. R. 2 A. C. 300.

1908.

August 18.

EARLE, TRUSTEE, ETC., OF LAWTON v. LAWTON, ET AL.

—No. 2. See *ante* p. 86.

Will—Construction—Gift to Class—Time for Distribution—Income—Provision for Maintenance—Costs.

Held, that the oldest child, having reached the age of twenty-five years, was entitled to be paid her share of the *corpus* of the estate, and took an absolute vested interest.

Held, that the remainder of the capital was not to be set apart now, but held in trust until another child reached the age of twenty-five years, when another division must be made.

Held, that the oldest child was not now entitled to any share of the accumulated income. That can only be divided when all possible claims upon it have ceased.

It was ordered that the costs in this matter as between solicitor and client, be paid out of the *corpus* of the estate.

This is an application by the trustee for directions, in the matter of the construction of the will of the late Charles Lawton; and the opinion of the Court is asked on the following five questions:—

1. Is Alice Lawton entitled to a share of the accumulated income on hand when she attained the age of twenty-five years, as well as of the capital, and if so, to what proportion?

2. Is Alice Lawton's share of the estate, or any and what part of it, payable to her now, or when is it payable? If not how is it to be held?

3. Should the shares of the other parties interested under the will be set apart now, or should any and which part of such shares be set apart?

4. If so, how should such shares be ascertained as regards capital and the accumulated income respectively?

5. If such shares should be set apart now, should any and which of them be held in trust until the parties respect-

ively attain the age of twenty-five years, or should such shares, or any and which of them, be paid to the guardians, or to whom and when are such shares to be paid?

See *ante* p. 86 for statement of facts in the report of the previous hearing, in addition to which the following may be stated. The four children of James Clark Lawton who are living are, Eliza, who was born August 8th, 1886; Benjamin, who was born December 16th, 1887; Richard Woofendale, who was born January 10th, 1891, and VanDyke, who was born February 19th, 1906; and the three children of Charles Abbott Lawton now living are, Alice, who was born January 29th, 1883; William Parker, who was born March 9th, 1886, and Herbert Clarence, who was born April 17th, 1891, the other son Charles Ralph having died March 23rd, 1904, at the age of seventeen, without having been married. The trustees' accounts were passed and allowed up to August 22nd, 1907, at which time the capital fund was $52,687.04, and the accumulated income $6,532.10, making in all $59,219.14, all of which, with the exception of $319.14, is invested in mortgage securities. The total amount paid up to that time for maintenance was $6,575. Of the seven children entitled to participate in this fund, at present Alice has attained the age of twenty-five years, Eliza and William Parker are between twenty-one and twenty-five, and the others are infants.

W. A. Ewing, for the plaintiff.

A. W. Macrae, K.C., *J. Roy Campbell* and *K. J. Macrae* for defendants.

Argument was heard July 31, 1908.

A. W. Macrae, K.C., for defendants:—Estate is divisable at the time the oldest child attains the age of twenty-five years, and the shares should then be ascertained and paid over to the children, or if infants to their guardians. Alice Lawton is now twenty-five years old, and is entitled to be paid

1908.

EARLE, TRUSTEE, ETC. OF LAWTON v. LAWTON ET AL.

BARKER, C. J.

not only her share of the *corpus* of the estate, but also her share of the accumulated income: *Davies* v. *Fisher* (1); *In re Breed's Will* (2); Hawkins on Wills (3); *Hagger* v. *Payne* (4); *In re Emmett's Estate* (5); *Whitbread* v. *Lord St. John* (6); *Re Hiscoe* (7).

J. Roy Campbell for defendants:—Shares should be ascertained and distributed at the time the oldest child attains the age of twenty-five years. All the children are entitled to their shares at that time, and their interests become vested. The oldest child is entitled to her share of the accumulated income. Accounts should be made up and passed to January 29th, 1908, at which time the oldest child attained the age of twenty-five years: *Booth* v. *Booth* (8); *Jones* v. *Mackilwain* (9); Jarman on Wills (10); *Green* v. *Ekins* (11).

A. W. Macrae:—Costs should be allowed out of the estate to all parties as between solicitor and client: Seaton on Decrees (12).

1908. August 18. BARKER, C. J.:—

(His Honor recited the facts of the case as stated above, and proceeded as follows.)

It is, I think, clear by the terms of the will that Alice is now entitled to be paid what the trustee may consider to be her share in the estate, on the basis of an equal division between the seven children now living. That amount can never decrease, because when once paid it cannot be got back. *Gilman* v. *Daunt* (13). It is, however, subject to increase by reason of the share of any child falling in, should he die without issue before attaining the age of twenty-five. It is clear, I think, that the testator intended that as each child

(1) 5 Beav. 201.
(2) 1 Ch. D. 226.
(3) pp. 74 and 75.
(4) 23 Beav. 474.
(5) 13 Ch. D, 484.
(6) 10 Ves. 152.
(7) 48 L. R. 510.
(8) 4 Ves. 399.
(9) 1 Russ. 220.
(10) 5th Ed. 614.
(11) 2 Atk. 473.
(12) 5th Ed., Vol. 2, 1413.
(13) 3 K. & J. 48.

1908.

EARLE, TRUSTEE, ETC. OF LAWTON v. LAWTON ET AL.

BARKER, C. J.

reached the age of twenty-five, he should then be entitled to be paid his share of the estate, to be determined as directed by the will, he then taking an absolute interest in his share entitling him to its use, possession and enjoyment. What interest in the estate have these children previous to attaining the age of twenty-five? Is it more than a contingent interest becoming absolute only on their attaining that age?

The intention of this testator, in some respects at all events, is clear, whatever difficulties there may arise in carrying it out. It seems evident that he intended that his two nephews' children should be maintained and educated during their minority, and he placed the income of his estate at the disposal of his trustees, to be used in their discretion for that purpose. It seems equally clear that he intended his estate to be divided equally among such of these children as should attain the age of twenty-five years, subject to this, that if any one died before reaching that age leaving children, these children should take the parent's share, just as the parent would have taken it had he lived; not as his next of kin, but under the will by way of substitution. It is a direct gift by the testator for their benefit in such a case. The provision for maintenance is confined to the nephews' children only. By the will, all the testator's property is given to his trustees in trust to carry out these two objects, after payment of debts and testamentary expenses. The first trust, in point of order, is a trust "to pay from time to time so much of the income of my said estate as they (the trustees) in their discretion shall see fit, towards the support, maintenance and education of the children of my nephews James Clark Lawton and Charles Abbott Lawton, until they shall respectively arrive at the age of twenty-one years." There is no gift of this income to these children. It is subject to the control of the trustees for the benefit of the whole class, and it was known that as a necessary result of the disparity in the children's ages, that some would require allowances for a longer period then others, and therefore the appropriation of the income need not necessarily be on the basis of equality. In *In re*

1908.

EARLE, TRUSTEE, ETC. OF LAWTON v. LAWTON ET AL.

BARKER, C. J.

Parker (1), the will contained the following provision. The residuary estate was given to trustees "in trust for sale and conversion, and to invest the proceeds upon the stocks, funds and securities therein mentioned, and to stand possessed of the stocks, funds and securities upon trust, to pay the dividends, interest and income thereof, or such part thereof as my said trustees for the time being shall from time to time deem expedient, in and towards the maintenance and education of my children, until my said children shall attain their respective ages of twenty-one years; and from and immediately after attaining their respective ages of twenty-one years, then upon trust to pay, assign and transfer the said stocks, funds and securities to my said children in equal shares, etc." One of the children died an infant, and it was held that he took no share. Jessel, M. R., says:—"In my opinion, when a legacy is payable at a certain age, but is in terms contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees (shall pay the whole or such part of the interest as they shall see fit.) But I am not aware of any case where the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held to create a vested interest in a member of the class who does not attain that age."

In *In re Grimshaws Trusts* (2), the same principle was acted upon. Hall, V. C., says:—"It appears to me that in this will there is no gift of any of the capital fund to any child who did not attain the age of twenty-one years. It may perhaps be considered to be a somewhat critical mode of construing wills like this one, to notice whether the gift of the capital fund comes first or whether the direction for maintenance does. In this will" (as in the present one) "the direction for maintenance comes first and that circumstance is one which, in the present state of the authorities cannot be disre-

(1) 16 Ch. D. 44. (2) 11 Ch. D. 406.

garded." The trust there was to apply "the income, or so much thereof, as the trustees shall think proper in the maintenance of the children." Hall, V. C., held that this was a trust not in respect of the income of the whole fund, but only of the income of the whole fund, or of so much as the trustees should think proper. The trust there was, that upon the attainment by the children of the age of twenty-one years, the trustees were to pay and divide the same principle and the accumulations. Hall, V. C., held that this trust was only for the benefit of those who attained the specified age, and that they were not to take unless they fulfilled that description. The children, therefore, who died in infancy were excluded.

In *In re Coleman* (1), the trust was to apply the income of the testator's estate, "in and towards the maintenance, education and advancement of my children, in such manner as they shall deem most expedient, until the youngest of my said children attains the age of twenty-one years" and in the happening of that event he directed them to divide his estate equally among all his children then living. Cotton, L. J., says:—"The contention of the appellant was that each of the four children took a vested interest in one-fourth of the income till the youngest child attained twenty-one. I am of the opinion that no child has a right to any share of the income. The trustees have a discretion to apply the income for the maintenance of the children in such manner as they think fit. This excludes the notion of the children being entitled to aliquot shares. I will assume, though I do not decide, that the trustees have no power to exclude a child, but I am clearly of opinion that under this power they could make unequal allowances for the benefit of the children, and might allow only half a crown to one of them."

In *Leake* v. *Robinson* (2), the testator gave to trustees certain real estate and certain ground rents upon trust, to apply the said ground rents and the rents and profits of his

(1) 39 Ch. D. 443. (2) 2 Mer. 363.

1908.

EARLE, TRUSTEE, ETC. OF LAWTON v. LAWTON ET AL.

BARKER, C. J.

said estate, and interest of the said mortgage moneys, or such part as they should judge proper, to the maintenance, education and advancement of his grandson until twenty-five, and after his attaining that age, to pay to or permit him to have and receive the same during his life, etc., and to pay, assign and transfer the said property to such child or children at twenty-five, if sons, etc. The Master of the Rolls, after pointing out that there was no direct gift to any of the classes and that it was only through the medium of directions given to the trustees that the benefits intended for them could be ascertained, says:—"As to the capital, there being as I have already said, no direct gift to the grandchildren, we are to see in what event it is that the trustees are to make it over to them. There is with regard to this some difference of expression in the different parts of the will. In some instances the testator directs the payment to be to such child or children as shall attain twenty-five. In others the payment is to be made upon attainment of the age of twenty-five." (In this case the words are "and on each child attaining the age of twenty-five years, etc.") "In the residuary clause it is from and immediately after such child or children shall attain the age of twenty-five that the trustees are to transfer the property. But I think the testator in each instance means precisely the same thing, and that none were to take vested interests before the specified period. The attainment of twenty-five is necessary to entitle any child to claim a transfer. It is not the enjoyment that is postponed; for there is no antecedent gift, as there was in the case of *May* v. *Wood* (1), of which the enjoyment could be postponed. The direction to pay is the gift, and that gift is only to attach to children that shall attain twenty-five. The case of *Batsford* v. *Kebbell* (2), was much more favourable for the legatee, for the interest of the fund was given to him absolutely until he should attain the age of thirty-two, at which time the testatrix directed her executors to transfer to him the principal for his own use. He died under thirty-two. Lord Rosslyn, said, 'There is no

(1) 3 Bro. Ch. C. 471. (2) 3 Ves., Jr. 363.

gift but in the direction for payment, and the direction for payment attaches only upon a person of the age of thirty-two. Therefore he does not fall within the description.'" *Selby* v. *Whittaker* (1); *Jobson* v. *Richardson* (2); *Hunter's Trusts* (3).

From these and numerous other authorities to the same effect, it seems clear that under a maintenance clause such as the one in this will, no one child can claim a vested interest in any share of the income. The trust as to the distribution of the estate, by which I understand the capital and unexpended income, is as follows:—"And on each child attaining the age of twenty-five years, to pay to such child, what they (the trustees) consider would be his or her share in my said estate, dividing the same equally between such children living, and the children of any deceased child, when such payment shall be made, etc." There is no clause in this will giving this estate to these children, except the direction to the trustees to pay to each child, on his attaining twenty-five, what they consider to be his share. The giving of the property consists in the direction to transfer the share, which is only on the child being twenty-five, and until he has attained that age he has no right to call for payment.

It would, I think, be disregarding the clear language of the will, to hold that there was not to be a division made by the trustees, on each child attaining twenty-five, for the purpose of ascertaining what at that time is to be paid over to him as his share. A final division cannot be made until all have fulfilled the conditions subject to which they are entitled to be paid. I think Alice is entitled to have paid to her, what the trustee considers to have been one-seventh of the principal of the estate on the 29th January, 1908. The balance of the whole fund will remain in the trustee's hands until another child shall attain the age of twenty-five, when the trustee will make a division as before. If in the meantime any child, other than Alice, shall have died without leaving children, that share shall fall in as part of the estate divisible among the survivors of the class. If such child

(1) 6 Ch. D. 239. (2) 44 Ch. D. 154. (3) 1 Eq. 295.

1908.

EARLE, TRUSTEE, ETC. OF LAWTON v. LAWTON ET AL.

BARKER, C. J.

shall have children, they would take their parent's share, and when entitled to have it transferred to them, if they are then infants, the shares would be transferable to their guardian. As to the accumulated income, I do not think the children are entitled to any division of it, until all the children shall have attained their majority, or for that or any other reason, all possible claims upon the fund shall have ceased.

There will be the following declaration:—

1. That VanDyke Lawton is entitled to a distributive share of the estate, as one of the nephews' children.

2. That Alice Lawton, on her attaining the age of twenty-five years on the 29th January, 1908, took an absolute vested interest in one-seventh of the estate, and was then entitled to be paid what the trustee considered to be one-seventh of the capital fund for her own use.

3. That Alice Lawton is not now entitled to any share of the accumulated income. That is to remain in the trustee's hands, to be used at his discretion in the support, maintenance and education of the infant children of James Clark Lawton and Charles Abbott Lawton until they attain the age of twenty-one years.

4. That the remainder of the capital fund is not to be set apart, but held by the trustee until another child reaches the age of twenty-five years, when another division of the capital fund will be made.

The costs of all parties will be taxed as between solicitor and client, and paid by the plaintiff out of the *corpus* of the estate.

FENETY ET AL v. JOHNSTON.

1909.
January 5.

Practice—Insufficiency of Answer—Exceptions.

A defendant who has acted entirely through his solicitor in any matter, and has himself no personal knowledge, must state in his answer, when required to do so, the knowledge that he has of the matters he is interrogated upon, basing his answer upon the information given him by his solicitor.

Where there are a number of different and distinct questions included in one section of the interrogatories, and the answer to that section is sufficient as to one or more of these questions an exception to that whole answer must be overruled. The exception is too wide.

The case of *Burpee et al* v. *The American Bobbin Company* (1), followed.

Judgment on exceptions filed to the defendant's answer.

J. J. Fraser Winslow for the plaintiffs.

J. D. Phinney, K. C., for the defendant.

1909. January 5. BARKER, C. J.:—

Exceptions to defendant's answer. I think all these exceptions, except the seventh, must be allowed. The rules by which the sufficiency of answers is governed are so fully discussed and so clearly laid down in *Hendricks* v. *Hallett* (2), that there is really not much excuse for practitioners going astray unintentionally. This suit is brought to enforce the performance of an alleged agreement between the parties for the purchase by the defendant of a property in Fredericton described in the bill as "Linden Hall." Some difficulty seems to have arisen as to the completion of the purchase, and during the negotiations which took place with a view of settling the matters upon which the parties differed, Mr. Barry acted for the defendant as his solicitor. As to what took place the defendant does not seem to have had any per-

(1) N. B. Eq. Cases 484. (2) 1 Hannay 185.

1909.

FENETY v. JOHNSTON.

BARKER, C. J.

sonal knowledge. What he did know he learned from Mr. Barry, and the plaintiffs were desirous of procuring admissions, by way of his belief, of certain facts based on the information given him by his solicitor. The answers excepted to are, with one exception, all faulty in this respect, and some of them in others as well.

The seventh exception has reference to the thirteenth section of the answer. By way of meeting the objection I was referred to the rule acted upon by Palmer, J. in *Burpee* v. *The American Bobbin Co.* (1), and the cases there cited. It was there held that when an exception is filed to an answer to several separate questions included in one section of the interrogatories, and the answer is sufficient as to one or more of the questions, the whole exception must be overruled. The exception is too wide. Section thirteen of the interrogatories contains some ten or more separate and distinct questions. The exception seems to be to the answers to eight of these. Among these questions was this—whether or not Mr. Barry was not informed by the plaintiff, W. T. H. Fenety, that one of the heirs at law was in the Yukon, and that it might be difficult to locate him, and whether or not the said Fenety did not offer to have all the other heirs at law join in the proposed conveyance, and suggest that the defendant might accept a deed similar, as to the parties executing it, to a deed from the estate to Mr. Justice Gregory of another portion of land purchased from said estate. The answer states: "I am informed by the said J. H. Barry and admit it to be true that he was informed, etc." following the question *verbatim*. This was, I think, a sufficient answer under the circumstances.

I must make some reference to the many objections there are to the practice of crowding into one interrogatory a great number of what are really separate and distinct questions, and stringing them together as though they formed but one. Section fourteen of these interrogatories contains some fifteen distinct questions. Where this practice can be avoided it

(1) N. B. Eq. Cases 484.

1909.

FENETY v. JOHNSTON.

BARKER, C. J.

should be. It leads to misapprehension of the scope and meaning of the inquiry, the questions are liable to lead to unintentional omission and inaccuracies in answering, resulting in exceptions, that might well have been avoided; and they may, as in this case, result in a slip by the pleader who framed them. Besides this, it throws upon the Court which has to deal with them, an unnecessary amount of work.

The first, second, third, fourth, fifth, sixth, eighth, ninth and tenth exceptions will be allowed with costs. The seventh will be overruled with costs. The costs of each party will be taxed and the one deducted from the other. The defendant to have leave to file amended answer within thirty days from the date of settling this order, and on paying the plaintiffs the balance of costs payable by him hereunder, as certified by the Clerk.

NEVERS v. LILLEY ET AL.

1909.

January 5.

Injunction—Lease—Quia Timet Action—Supporting Affidavits—Probability of Damage—Legitimate Business.

The defendant L. holds certain premises under a lease granted by the plaintiff N. to one W. and assigned by W. to L. The lease contains express covenants, but nothing in reference to its assignment, or to the use of the premises, with the exception of the word "office" used in the description, which is as follows: "All that certain office situate on the ground floor of her brick building on the East side of Main Street in the said Town of Woodstock, and the office in the said building fronting on the South side of Regent Street in the said Town, also the lower part of the shed in the rear of the said office, etc." W. is an attorney and occupied the premises as an office. L. is a retail meat and fish dealer, and proposes to carry on this business in the premises.

Held, that there was no implied covenant in the lease, restricting the lessee to the use of the premises as an office, as it was not necessary to carry out any obvious intention of the parties; and that the word "office" in the lease was used merely as a means of identifying the premises included in the demise.

Held, that as no actual damage had been shown, the action was in the nature of a *quia timet* action; and that as the defendant was carrying on a legitimate business, and there was no probability of any immediate or irreparable damage to the plaintiff arising, the application for an injunction must be dismissed.

This is an application, made on notice, for an injunction to restrain the defendants from using the premises as proposed, or as the prayer of the bill reads, "from keeping, storing or selling meats and fish, or either or any of them" on the premises.

W. P. Jones and *Thane M. Jones* for the plaintiff.

J. C. Hartley for the defendants.

The plaintiff Elizabeth Nevers, owns a three storey brick building, situated on the corner of Main and Regent Streets, in the Town of Woodstock, N. B. She occupies the corner store in the lower flat as a cake shop, and resides with her family in the two upper flats. On October 22nd, 1907, she gave a lease of two rooms and a shed on the ground floor of

1909.

NEVERS v. LILLEY, ET AL.

this building, to one J. Norman W. Winslow, an attorney residing in Woodstock. The lease is for five years and six months at a yearly rental of $200.00, and contains a number of covenants. One to pay the rent, one to deliver up at the expiration of the term in as good condition, and others in reference to repairs and improvements to be made by Winslow. Winslow occupied the premises for about a year, removing from them in December, 1908, and then assigned the lease to the above defendant Mary J. Lilley. It appears that the defendant carrys on a retail meat and fish business in Woodstock, and it is her intention to use the premises in question as a retail meat and fish store, and she has already stored fish in them.

Argument was heard December 16, 1908.

W. P. Jones for the plaintiff:—The defendants have created a nuisance to the injury of the plaintiff, with respect to her property adjoining and being a part of the same building; and also, under the bill, the plaintiff has a right to an injunction as against a private nuisance, irrespective of the relationship of landlord and tenant: *Reinhardt* v. *Mentasti* (1); *Walter* v. *Selfe* (2); *Ball* v. *Ray* (3). The injunction should be granted, because if it is not, waste will ensue, viz.: the occupation will diminish the value of the inheritance. The covenant to surrender in as good condition in the lease, does not prevent an injunction being granted: *Queens College, Oxford* v. *Hallett* (4); *Mayor of London* v. *Hedger* (5); *West Ham Central Charity Board* v. *East London Waterworks Co.* (6). Under the lease the lessee could not use the premises for anything but an office. A covenant should be implied to this effect, based upon the general construction of the lease: *Kehoe* v. *Marquess of Lansdowne* (7); *Wood* v. *Copper Miner's Co.* (8); *Lancey* v. *Johnston* (9); Am. & Eng. Ency. of Law (10).

(1) L. R. 42 Ch. D. 685.
(2) 4 DeG. & Sm. 315.
(3) 8 Ch. App. 467.
(4) 14 East. 489.
(5) 18 Ves. 355.
(6) [1900] 1 Ch. D. 624.
(7) [1893] App. C. 451.
(8) 7 C. B. 905.
(9) 29 Gr. Ch. R. (Ont.) 67.
(10) 2nd Ed., Vol. 18, p. 634, par. 13.

1909.

NEVERS v. LILLEY, ET AL.

J. C. Hartley for the defendants:—The bill and affidavits do not support the allegation that there is a private nuisance; no private nuisance has been shown. The lease gives the lessee the right to use the premises for any reasonable purpose for which they were constructed, in the absence of restrictive covenants. The plaintiff could have protected herself by covenants in the lease, but she did not choose to do so. With regard to the question of waste, the covenant in the lease to surrender in as good condition, prevents any injunction being granted on the ground of the waste alone. Where a written contract is entered into, the negotiations leading up to the contract and conversations beforehand are not binding, as the contract is supposed to embody the final agreement. See *In re Railway and Electric Appliances Co.* (1); *Hamlyn* v. *Wood* (2); *Doe dem. Wetherell* v. *Bird* (3); *Bonnett* v. *Sadler* (4.)

1909. January 5. BARKER, C. J.:—

Whatever may be the fate of this suit at the hearing I think this present motion for an injunction must be dismissed. It appears that the plaintiff, Elizabeth Nevers, owns a lot of land on the corner of Main and Regent streets in the Town of Woodstock, fronting on Main street. On this lot she erected a three storey brick building in the year 1907, and she occupies the two upper storeys as a dwelling for herself and family. The corner store in the lower flat the plaintiff occupies as a bread and cake shop; the remaining part of the flat is the so called office, in reference to which this suit has arisen. On the 22nd day of October, 1907, the plaintiff leased this office to Mr. Winslow, an attorney practising at Woodstock, for a term of five and a half years at an annual rental of $200. This lease, so far as it bears upon the question in dispute, is as follows: "This indenture made this 22nd day of October A. D., 1907, between Elizabeth Nevers, of the Town of Woodstock in the County of Carleton, married

(1) 38 Ch. D. 597.
(2) [1891] 2 Q. B. D. 488.
(3) 2 Ad. & Ellis 161.
(4) 14 Ves. 526.

woman, and J. Norman W. Winslow of the same place, attorney-at-law, witnesseth, that the said Elizabeth Nevers doth hereby demise and release unto the said J. Norman W. Winslow, his executors, administrators and assigns, all that certain office, situate on the ground floor of her brick building on the east side of Main street in the said Town of Woodstock, and the office in the said building fronting on the south side of Regent street in the said town, also the lower part of the shed in the rear of the said office, excepting that the said Elizabeth Nevers is to have the right to the use of the stairway in said shed leading to her dwelling above, to hold to the said Winslow and his aforesaids for the term of five years and six months from the first day of November next, yielding and paying therefor during the said term the yearly rent of two hundred dollars, the same to be payable quarterly, first payment of $50 to be made on the first day of February, A. D., 1908." The lease contains a covenant by Winslow to pay the rent, "and to deliver up said premises to the said Elizabeth Nevers or her attorney, peaceably and quietly at the end of the said term, in as good condition as the same now are, or may be put into by the said Winslow or his aforesaids, reasonable wear and tear thereof and fire excepted." There was also a covenant on the part of Winslow that he would put up a partition in the Main street office and a lavatory and closet in that office wherever he thought best at his own expense. He was also to pay the water and sewer taxes and he had the right if he wished to build a vault in the shed in the rear of the Main street office. This vault was removable by the tenant at the end of the term, but the partition, lavatory and closet were to be the property of the lessor. Winslow went into possession of these rooms under the lease and continued to occupy them as his office up to the second day of December, 1908, a little over a year. It seems that in April last (1908) a fire took place in a building owned by Winslow in another part of Main street, and in repairing and enlarging that building he fitted up rooms for his offices and that he removed there, as I have

1909.

NEVERS v. LILLEY, ET AL.

BARKER, C. J.

stated, on the first of December. In the meantime Winslow had put up the partition and put in the lavatory and closet according to his covenant, at a cost as he alleges of $150. There were some negotiations between the plaintiff and Winslow with a view to an agreement for a surrender of the lease, but these did not result in any settlement. On the 24th day of November, 1908, Winslow assigned the lease and premises with all the improvements for the unexpired term, to the defendant Mary J. Lilley for the consideration of $150. The bill alleges that the defendant Mary J. Lilley was then and for some eleven months before that had been carrying on the business of selling meats and fish by retail in premises on Main street nearly opposite the plaintiff's office, and that for some time before that her husband, Wm. Lilley, had carried on the same business at the same place. In December, 1907, Lilley, the husband, failed in business and made an assignment for the benefit of creditors, and that after that the business has been carried on in the name of the defendant, Mary, by William Lilley, Junior, who I suppose is a son of hers, though the bill does not so state. In section eight of the bill the plaintiff alleges that on the 2nd day of December last (1908) the defendant Wm. Lilley, Junior, having a key to the office, went into it and left a quantity of vegetables there, whereupon the plaintiff's husband, acting for her, asked Lilley what he was going to do in the office and he replied that he was going to keep meat and fish there. Section nine of the bill sets out the plaintiff's cause of complaint as follows: "The said offices of the plaintiff are finished very nicely in hard wood flooring, and with walls and ceiling of steel sheeting, and it would be impossible for the business of dealing in meats and fish in said office to be carried on without permanent injury to the said offices and other parts of the said building of the plaintiff, because of the odours and stench from the said meats and fish permeating and clinging to the floors, walls and ceilings of the same, and the juices of the said meats soaking through and in the floors, and the carrying on of such business would

create a very offensive odour from day to day through the said buildings: And also that the carrying on of the said business of the defendants' would, through such odours and stenches place the said office in such a state as that it would be impossible to deliver it up at the end of the said term mentioned in said lease thereof, in as good condition as the same now is." Section ten of the bill alleges that in carrying on a meat and fish business in these rooms, the defendants are not using the premises in that reasonable manner contemplated by the lease. Section eleven alleges that the use of these premises as alleged would, on account of the odours and stench occasioned by the continuous presence of meats and fish, be very injurious to the health and comfort of the plaintiff and her family living in the upper part of the house, and would make it impossible for the plaintiff to lease the dwelling to a desirable tenant at a proper rent. Section twelve alleges that the defendant, Mary J. Lilley, has already commenced to move her retail meat and fish business into these offices, and that she had on that day (December 3rd, 1908) moved and placed therein a quantity of beef, and she was about to open these offices for the sale of this beef by retail, and "to constitute said main office and shed in rear thereof a retail meat and fish shop."

This is an application, made on notice, for an injunction to restrain the defendants from using the premises as proposed, or as the prayer of the bill reads, "from keeping, storing or selling meats and fish or either or any of them" on the premises, and several grounds are put forward on which the motion is based. In the first place, it is said there is a covenant to be implied from the terms of the lease, by which the lessee is restricted in his use of the premises to their use as offices, and that the use to which the defendants are now putting them is a violation of that covenant. While it may be quite true that when Mr. Winslow rented these premises he intended to occupy them for an office, there is nothing to suggest that either he or the plaintiff had any intention of restricting the use of them in any way. The

1909.

NEVERS v. LILLEY, ET AL.

BARKER, C. J.

lease is not a loosely drawn instrument—it contains express covenants in reference to many matters, but no restriction over either as to the use of the premises, or the assignment of the lease. In such cases covenants are never implied, because they are not necessary to carry out any obvious intention of the parties. *In re Railway & Electric Appliances Co.* (1); *Hamlyn* v. *Wood* (2) per Lord Esher.

The word "offices" in the lease is used simply to distinguish or identify the premises which are the subject matter of the demise, it has no relation whatever to its use. If A. demised to B. for five years a barn situated on a certain piece of land, no one, as it seems to me, would think of saying that B. could not use the building except as a barn; or that if he stored meat and fish in it, he would be violating some implied covenant arising out of the terms of the lease. The "habendum" is to Winslow for five and a half years without restrictions, except those mentioned in the lease itself. *Martyr* v. *Lawrence* (3).

The plaintiff claims an injunction on two other grounds; first, on the ground of nuisance, and second, on the ground of waste. I can dispose of these two points together, as the evidence, slight as it is, may be said to bear on both. So far as these two points are concerned, the bill is in fact a *quia timet* bill, and must be so dealt with. For the purposes of this motion it is supported by two affidavits, which with the bill, were served on December 7th. I shall later on refer to the contents of these affidavits, but as one of them was sworn on the 3rd day of December and the other on the 7th of December it is obvious, that for the purposes of establishing a nuisance, which could not have possibly commenced before the 3rd of December, they cannot be very useful, especially where the nuisance complained of, is the unpleasant odours emanating from meats and fish in the month of December, when meats and fish are usually in a frozen condition.

In the *Attorney General* v. *Corporation of Manchester* (4), the principles applicable to *quia timet* bills are dis-

(1) 38 Ch. D. 597.
(2) (1891) 2 Q. B. 488.
(3) 2 DeG. J. & S. 261.
(4) (1893) 2 Ch. 87.

1909.

NEVERS v. LILLEY, ET AL.

BARKER, C. J.

cussed, and two propositions are there laid down. In the first place the principle is alike applicable to cases of public and private nuisance. And in the second place, in order to sustain such a bill, the plaintiff must shew a strong case of probability that the apprehended mischief will in fact arise. Wood, V. C., in *The Attorney-General* v. *Mayor of Kingston* (1) said, there must be "evidence of the extreme probability of a nuisance if that which was being done was allowed to continue." And Fry, J., in the *Darenth Hospital Camp Case* (2) adopted Chief Justice Cockburn's statement of the law that there must be proof of "a well founded and reasonable apprehension of danger." In *Fletcher* v. *Bealey* (3), Pearson, J., after referring to many of the authorities, says: "I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended danger will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *quia timet* action." The evidence in the present case falls far short of bringing it within the least stringent of all the rules laid down by these and numerous other authorities. Of the two affidavits read in support of the bill, one was made by the plaintiff, and the other by her husband. His affidavit I regard as altogether useless. He says he is a trader, residing at Woodstock, that he is the plaintiff's husband, and then he says that he has heard the bill read and that all the sections in the bill are true and correct, except the sixth which he has been informed and believes is

(1) 34 L. J. Ch. 481. (2) 2 Times L. R. 361.
(3) (1885) 28 Ch. D. at p. 698.

1909.

NEVERS v. LILLEY, ET AL.

BARKER, C. J.

true. That section refers to the negotiations for a surrender of the lease. He does not state in what way or by what means he is competent to judge as to the injurious effects upon a house of the odours from a meat and fish store kept in it. His affidavit for the purposes of this case is of no value whatever. The other affidavit is made by the plaintiff herself. After swearing to the truth of several sections in the bill, and her belief as to the truth of the remaining sections, she says that the offices in question are finished with hardwood flooring and with walls and ceilings of steel sheeting. She proceeds as follows: "In the construction of the said walls and ceiling, boards were nailed into the studding and the steel sheeting was then placed directly upon the said boards. The said walls and ceiling were not lathed or plastered. The odours from meat and fish, if kept in the said offices, would pass through the cracks where the sheets of the said sheeting are joined together, and would then pass all through the said building and would thence pass through the walls and floors of the two upper storeys of the said building where I reside with my family, and would become and be very offensive to myself and my family, and would, I believe, be a source of danger to the health of myself and my said family." In order to demonstrate how these noxious odours could, and, of course, would reach that part of the premises occupied by herself and family, the plaintiff seems to have thought it necessary to describe with some particularity what seems, at all events to me, an exceptional manner in which these offices were finished. And if this case is intended to rest upon the exceptional conditions to which this evidence is directed, the plaintiff would, I think, not have much cause for complaint, for the annoyance, if it existed at all, would be the result of her own act, and the odours would have reached her apartments by a channel created by herself in the unusual method of finishing the tenant's premises, of which, so far as there is any evidence before me, the defendants had neither knowledge nor notice. Apart from this, it must be borne in mind that the defendants are engaged in a

1909.

NEVERS v. LILLEY, ET AL.

BARKER, C. J.

legitimate business, not in any way necessarily causing discomfort to any one. The business is not in itself a nuisance, and even if it were possible to carry it on so as to be a nuisance, there is no evidence that such is the case, nor is there anything to suggest that it must necessarily or is at all likely to become so. The defendants are not carrying on the trade of butchers, but simply a retail trade in meats and fish, such as one sees in all parts of well regulated cities, and such as has been carried on by them in the immediate neighborhood of these premises for years.

The bill in this case seems to be directed to a permanent injury to the plaintiff's property by reason of the floors and walls absorbing these fishy odours, and thus becoming so offensive as not to be tenantable at all, or only capable of being rented at a reduced rent. It is not pretended that any such injury has taken place; in so short a time that would be impossible, but danger of that result occuring is put forward as a ground for this Court interfering. There is absolutely no evidence on the subject; either that such a thing ever did happen or if it were possible that it is to be expected in the present case. The bill is also directed to the personal discomfort to the plaintiff and her family. There is a distinction between these two grounds of relief which is pointed out in *The St. Helen's Smelting Co.* v. *Tipping* (1). The Lord Chancellor there says: "My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denom-

(1) 11 H. of L. 642.

1909.

NEVERS v. LILLEY, ET AL.

BARKER, C. J.

inated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circumstances the immediate result of which is sensible injury to the value of the property." I must assume that the defendants will carry on their business in a legitimate way; that the meat and fish which they sell are fit for sale and fit for use. If not I imagine the public health regulations will be found adequate for putting an end to the practice. It then comes down to this, that this Court is asked to restrain this defendant from selling fish and carrying on her business because the plaintiff does not like the smell of fish, and she has smelt them in her room on one occasion and her daughter on another.

What aspect this case may assume after the evidence shall be given at the hearing I cannot say. As to this present motion I think it must fail. The motion will be dismissed with costs.

PHILLIPS v. PHILLIPS ET AL.

1909.

February 16.

Dower—Bar—Adultery—13 Edw. I., c. 34.

A wife voluntarily separated from her husband after having lived with him for three years. Nine years later she married again, knowing that her first husband had married, and believing that he had obtained a divorce from her and that she was at liberty to marry. Subsequently she learned that her second marriage was illegal, and she immediately left her second husband.

Held, that under the Statute 13 Edw. I., c. 34, the dower right of the wife in the estate of her first husband was not barred by her subsequent cohabitation with another, as she acted *bona fide*, believing, on reasonable grounds, that she was legally entitled to marry again.

This is an application for admeasurement of dower.

T. J. Carter for the plaintiff.

J. C. Hartley for the defendants.

The plaintiff, Esther Caroline Phillips, was married to James E. Phillips, at Andover, N. B., on November 12th, 1859, when she was fifteen years of age. They lived together three years, and then voluntarily separated. At the time there was one child living, a son only a few weeks old, who was taken by his father. After the separation the plaintiff went to Lewiston, Maine, and later to Lowell. She never had any communication of any kind with Phillips, and supported herself. Nine years after she had left Phillips she went through the ceremony of marriage with one William Barnes, at Lowell. At this time the plaintiff knew that Phillips had married again. She and Barnes lived together as man and wife for about nine years. When she learned that Phillips had never procured a divorce from her, and that her marriage to Barnes was illegal, she immediately left Barnes, and since that time has had no communication with him of any kind, and has supported herself.

Argument was heard January 20, 1909.

1909.

PHILLIPS v. PHILLIPS ET AL.

T. J. Carter for the plaintiff:—There must be a knowing and wilful living in adultery to bar dower. If there is an abandonment by the husband, a subsequent living in adultery by the wife does not bar her dower. There must be a guilty knowledge. The plaintiff did not voluntarily live in adultery, and her dower right is not barred. See *Graham* v. *Law* (1); *Woolsey* v. *Finch* (2.); *Neff* v. *Thompson* (3).

J. C. Hartley for the defendants:—The plaintiff's dower right is barred under the Statute 13 Edw. I., c. 34. She should have made sure that she was entitled to marry again before she did so. She did not exercise that care which would reasonably be necessary, in order to find out if she was at liberty to marry again, and her ignorance is no excuse. She never made any proper inquiries herself before her second marriage. She was never served with any divorce papers, and consequently could not have believed there was a divorce. It is a matter of evidence as to whether she was in ignorance or not, and whether she neglected to take the necessary precautionary steps to find out the true state of affairs, viz. if she was at liberty to marry again. See *Hethrington* v. *Graham* (4); *Woodward* v. *Dowse* (5); *Bostock* v. *Smith* (6); *Seagrave* v. *Seagrave* (7); *Frampton* v. *Stephens* (8); Am. & Eng. Ency. of Law (9); Digest of Eng. Case Law (Mews) (10).

1909. February 16. BARKER, C. J.:—

This is an application by Esther Caroline Phillips, widow of the late James E. Phillips who died on the 9th August, 1907, seized of certain real estate in the County of Victoria, for the admeasurement of her dower. Notice of the application was duly given and the matter came before me in July last, when Counsel appeared for all the parties interested. As the circumstances as disclosed by the affidavits seemed so

(1) 6 U. C., C. P. 310.
(2) 20 U. C., C. P. 132.
(3) 20 U. C., C. P. 211.
(4) 6 Bing. 135.
(5) 10 C. B., N. S. 722.
(6) 34 Beav. 57.
(7) 13 Ves. Jr. 438.
(8) 21 Ch. D. 164.
(9) 2nd. Ed. Vol. 10, 200.
(10) Vol. 7, 1245.

unusual in their character and the right was disputed, I concluded to hear the matter on *viva voce* testimony, and at a later date the applicant and other witnesses were examined before me. It appears that the petitioner and Phillips were married at Andover on the 12th day of November, 1859, she being at that time only fifteen years old. They lived together for about three years and then voluntarily separated. She then had but one child living, a son only a few weeks old, and the father took him and brought him up until he was about sixteen years old. On the separation, or soon after, she went to Lewiston in Maine where she remained a year and a half and then went to Lowell, and supported herself by weaving in some of the mills there. She has been living there until recently, and since the separation, which took place some forty-four years ago, Phillips never contributed anything to her support, and they had no communication of any kind. About four or five years after she went to Lowell and about nine years after the separation, she married, or went through the ceremony of marriage, with one William Barnes, at Lowell. They lived together at Lowell as man and wife for about nine years when they separated and have never lived together since, nor has Barnes contributed anything to her support.

On the 15th August, 1868, Phillips married, or at all events went through the ceremony of marriage, with Martha Amanda Dyer, and they lived together as husband and wife up to the time of Phillip's death, a period of thirty-nine years. They had three children. She says she supposed Phillip's first wife was dead when she married and that she did not learn to the contrary until Herbert—that is the son of Phillip's by the first wife—returned from Lowell, where he went when about sixteen years of age, and that he was then about twenty-one years old, which would make it about 1882.

The answer set up to this application is that the petitioner has forfeited her right of dower by reason of her adultery in cohabiting with Barnes, at Lowell, for the nine years I have mentioned; and the Statute 13 Edward I., ch.

1909.

PHILLIPS v. PHILLIPS ET AL.

BARKER, C. J.

34, is relied on for the contention. There was evidence to show that Phillips treated the petitioner cruelly, assaulted her at times and subjected her to all kinds of indignities. It is, however, admitted by the petitioner that the separation was a voluntary one; she was to go her way and get along as best she could and he was to do the same. While his conduct may have been such as would sustain a suit for a divorce *a mensa et thoro*, it would not justify her living in adultery, and that is the substantial ground upon which the forfeiture created by the Statute rests. *Woodward* v. *Dowse* (1); *Woolsey* v. *Finch* (2); *Bostock* v. *Smith* (3). At common law adultery was no bar to the widow's dower, and it is said that as this Statute is in derogation of her common law rights, it is necessary in order to make the Statute applicable to prove a guilty knowledge in the petitioner. The question then arises is the petitioner's right of dower barred provided the evidence shows that at the time of her so called marriage with Barnes and while she continued to live with him as his wife, she *bona fide* believed, and had reasonable grounds for believing that she was free to marry and that the subsequent cohabitation was that of husband and wife legally married.

In *Reg.* v. *Tolson* (4), it was held on a case reserved for the consideration of all the Judges that a woman who had gone through the ceremony of marriage within seven years after she had been deserted by her husband, could not be convicted of bigamy, if at the time she had a *bona fide* belief on reasonable grounds that her husband was then dead. In such a case the *mens rea* was held to be an essential requisite and that without it there could be no conviction. I can see no distinction as to principle between a case of bigamy and a case of adultery, and if this were a trial for that offence on an indictment, as it might be in this Province, it would, in my opinion, be a good answer to the charge that the so called adulterous intercourse was with a man with whom the petitioner had gone through a ceremony of marriage in the

(1) 10 C. B., N. S. 722.
(2) 20 U. C., C. P. 132.
(3) 34 Beav. 57.
(4) L. R. 23 Q. B. D. 168.

1909.

PHILLIPS v. PHILLIPS ET AT.

BARKER, C. J.

bona fide belief on reasonable grounds that she was free to marry. In other words can a woman be convicted of adultery when the intercourse is with one whom she honestly believes on reasonable grounds is her own husband? I think not. The rule at common law was that an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a person is indicted an innocent act, is a good defence. If in such a case the woman cannot be convicted of adultery, how can she be said to be living in adultery, that is without all regard to her duty as a married woman to remain chaste though separated from her husband. Besides this, it is to be remembered that this Statute was passed in a country where adultery is not a crime, where it is only an offence against the ecclesiastical law, and where it is not a criminal act but an immoral one. An act, however, which a wife in the discharge of her duty to her husband must avoid as the price to be paid for her dower interest in his estate. Common justice points to a guilty knowledge as the basis of the immorality which the Statute says shall bar the dower.

There is no suggestion in the evidence that the petitioner has not lived an honest and moral life. So soon as she learned that her marriage to Barnes was illegal she left him and has had nothing to do with him since. The evidence shows that when Barnes made proposals of marriage to her, which was two years before the marriage took place, she told him that she was a married woman and told him the circumstances. Barnes said he would see a lawyer about it, and he afterwards told her that the lawyer told him that it would be all right for her to get married as she had been away (from her husband I suppose she meant) for seven years. Not being altogether satisfied with what the lawyer had said Barnes told her that he would take measures to find out if Phillips had procured a divorce. She proceeds in her evidence thus:—"So he (Barnes) came and told me Mr. Phillips had got a divorce, was married and all this, and so being there alone and friendless and homeless I made up my mind after a while I would

1909.

PHILLIPS v. PHILLIPS ET AL.

BARKER, C. J.

marry him for the sake of a home and friend; but after I married him and Herbert (that is her son) came out there I questioned Herbert about his father having a divorce and Herbert said he didn't know whether he did or not, he didn't think he did, he didn't hear anything about it. So Herbert went to a lawyer to see what the lawyer would say to him and the lawyer told him a different story, * * *."

"Q. (By the Court) You left your second husband? A. I did after I found out Mr. Phillips——.

"Q. You did leave him? A. Yes.

"Q. When? A. Twenty-eight or twenty-nine years ago.

"Q. And you have never lived with him since? A. Never have seen him.

"Q. What was the information you got that led you to leave him? Was it in consequence of information you got that your first husband was still living or married or what? A. That he had no divorce.

"Q. Had you heard of his second marriage? A. Yes.

"Q. When did you hear of his second marriage? A. I heard of it before I was married, that is how I came to be married because they told me I was clear on account of him being married and having children.

"Q. And you got information some years afterwards that he hadn't a divorce at all. Whom did you get that information from? A. From Herbert, my son.

"Q. That is to say, he told you he didn't think his father had a divorce? A. Yes.

"Q. And since that time you have accepted nothing from Mr. Barnes in the way of support? A. Not anything.

"Q. And you have not lived with him or cohabited with him since you learned or were told no divorce had been secured? A. I haven't seen him."

Herbert Phillips gave evidence on the same point. He says that after he went to Lowell his mother asked him if he knew whether his father was divorced or not and he told her he couldn't say for certain whether he was or not, but that he

wrote to a friend of his and ascertained later on that there had not been a divorce. He then consulted a lawyer and the result was that he was convinced, or to use his own expression "they knew it wasn't a legal affair and they got out."

It is contended that the information which the petitioner procured was altogether too meagre, too vague and too unreliable for any reasonable person to act upon in so important a matter, and there is much force in the observation. We must, however, look at all the circumstances in judging as to her *bona fides*. To one situated as this petitioner was when Barnes made proposals of marriage to her, the prospect of a home and a happy married life must have been a very alluring one, and yet with all its temptations she not only did not accept the offer but frankly told him why. It was not an unnatural thing that he should undertake to procure the information and find out what her legal position as to a re-marriage was. He does not seem to have brought her very correct advice as to the law or very correct information as to the divorce. But she believed him as to the divorce, having heard that Phillips had married again and naturally reasoning that he must on that account have procured a divorce from her. In this she was mistaken but her reasoning was precisely what most women under the same circumstances would have followed. Besides this when she, years afterwards, found out her mistake, she promptly did what she could to correct it. She left Barnes and the apparently comfortable home which he had given her, and went off again to provide for herself.

The evidence is, I think, quite as strong as it was in the following cases where a similar question arose: *Ousey* v. *Ousey* (1), *Freegard* v. *Freegard* (2); *Joseph* v. *Joseph* (3); *Potter* v. *Potter* (4).

I think the petitioner is entitled to dower and there will be an order for the admeasurement.

(1) L. R. 3 Prob & Div. 223.
(2) L. R. 8 Prob. D. 186.
(3) 34 L. J. Mat. 96.
(4) 67 L. T. 721.

1909.

February 16.

PUGSLEY v. FOWLER AND POPE, ET AL.

Verbal Agreement—Time the Essence of the Contract—Laches.

In November, 1902, the plaintiff and the defendant F. with a number of others formed a syndicate for the purpose of acquiring options and purchasing land with a view to sale.

The transaction was a large one, involving the purchase of some 200,000 acres of land in the Northwest Territories, and before the land was finally disposed of the syndicate was compelled to pay to the owners the sum of $60,000.

The agreement between the plaintiff and F. was verbal, and at the time it was made the plaintiff paid the sum of $200.

On the 30th of March, 1903, the defendant F. wrote to the plaintiff to hold himself in readiness to raise $2,000, "to hold your corner of the deal," and that if they had to call upon him it would be at short notice. The plaintiff took no notice of this letter and made no preparation for securing the money. On the 14th of April, 1903, F. telegraphed the plaintiff as follows:—"Three thousand dollars absolutely necessary to hold your interest in the land deal. Will I draw? Wire." To this the plaintiff sent no reply.

In 1903 the plaintiff learned that the speculation had been successful and that large profits had been made, but it was not until 1907 that this suit was brought.

Held, that in view of the special nature of the transaction, the plaintiff's refusal to contribute his share of the money required to complete the purchase, and his refusal to answer or take any notice of both letter and telegram, justified the defendants in acting on the assumption and belief, that he had entirely abandoned the contract and his interest in the purchase, and that he did not intend being any longer bound by it.

Held, also, that the plaintiff's delay in commencing a suit until long after he knew that a large profit had been made by a re-sale of the land, was, in the absence of any satisfactory explanation, evidence that his failure to pay the money, and his refusal to answer either the letter or telegram, were in fact intended at the time as an abandonment of all interest in the transaction.

Bill filed for an accounting. The facts fully appear in the judgment of the Court.

Argument was heard December 23, 1908.

A. W. Macrae, K. C., for the plaintiff:—

1909.

PUGSLEY v. FOWLER AND POPE ET AL.

A partnership was formed between the plaintiff and defendants and others. Once there was a partnership it could not be dissolved without plaintiff's consent. Onus of showing that partnership was dissolved falls on the defendants in this case, and they have failed to do so. Plaintiff contributed towards the expenses of the venture, and became interested in it to the extent of one-thirtieth, and he is entitled to receive one-thirtieth of the profits. See Lindley on Partnerships (1); *Clarke* v. *Hart* (2); *Hesketh* v. *Blanchard* (3).

M. G. Teed, K. C., for the defendants:—

Plaintiff has not made out a case within his bill. If any agreement has been made out, it is void under the Statute of Frauds, as transaction was in reference to land, and there was no note or memorandum in writing. Plaintiff by his acts abandoned any interest that he had, and if any agreement, defendants were legally justified in considering it rescinded by the actions of the plaintiff: *Withers* v. *Reynolds* (4); *Mersey Steel Co.* v. *Naylor* (5); *Freeth* v. *Burr* (6); Fry on Specific Performance (7). In cases of options or unilateral contracts time is of the essence of the contract, and the plaintiff has failed to recognize this: Fry on Specific Performance (8); *Roberts* v. *Berry* (9).

A. A. Wilson, K. C. for the plaintiff, in reply:—

Once a partnership existed it could not be dissolved without an accounting or mutual agreement. No such proceedings were taken in this case. If there was a partnership, Statute of Frauds would not apply. Transaction dealt with an option only, and Statute was not applicable. If Statute was applicable, draft accepted and paid by the plain-

(1) 6th Ed. pp. 550, 579.
(2) 6 H. of L. C. 633.
(3) 4 East. 144.
(4) 2 Barn. & Adol. 882.
(5) 9 App. C. 434.
(6) L. R. 9 C. P. 208,
(7) 3rd Ed., pp. 484, 485.
(8) 3rd Ed., p. 497.
(9) 3 DeG. McN. & G. 284.

1909.

PUGSLEY v. FOWLER AND POPE ET AL.

BARKER, C. J.

tiff would be sufficient. There was no agreement as to time, and it cannot be said to be of the essence of the contract. If there was any negligence on the part of the plaintiff, it was not sufficient to justify the defendants in regarding it as an abandonment, or to take away the plaintiff's right to a share in the profits.

1909. February 16. BARKER, C. J.:—

At the time the transactions which have caused this litigation took place, the plaintiff was the proprietor of an hotel at Sussex, the defendant, Fowler, was a member of the House of Commons, residing at Sussex, and the defendant, Pope, was a resident of Cookshire in the Province of Quebec. By this suit, which was commenced in June, 1907, the plaintiff seeks to obtain an account of the profits made by the defendants from the sale of some 200,000 acres of land in the Northwest Territories, purchased by them from the Canadian Pacific Railway Company, and soon afterwards sold to the Great West Land Company at an advance of some $143,000, in which profit the plaintiff by his bill claims a one-thirtieth interest. He bases his claim on a verbal agreement made by him with the defendant Fowler, in November, 1902, in a conversation which, he says, took place at the station of the Intercolonial Railway at St. John, and which, from his own account given in evidence, was as follows:—"I had gone down to catch the train going to Penobsquis, due to leave at seven o'clock, I think. Mr. Fowler was in the depot and spoke to me, and said he was waiting for his train going out—the C. P. R. west—and, after a few preliminaries, he went on to say he was interested in a land deal in the Northwest—he and Rufus H. Pope—and had got an option on 217,000 acres of land from the Canadian Pacific Railway Company, lying along the proposed road of the Canadian Northern Railway, and would like to have me interested in this deal; that it was a good thing, as immigration had set in to the west, and that town sites would naturally spring up along this proposed road of the Canadian Northern, and

while this consisted of 217,000, the 17,000 was a private transaction between himself and Mr. Pope—200,000 for the syndicate. The land was to cost—they were to pay for the land—$3.50 an acre, and they were to divide this land matter up in this way—first into thirds, and the thirds into tenths, making it fairly equal shares, saying, I have one share left and I would like you to have it. I have taken a few of my friends in, and he mentioned Mr. George Parker and Mr. S. A. McLeod of Sussex, and Mr. W. H. Parlee of Sussex. He said, Mr. Pope and myself are the promoters, and, as promoters, we expect a reasonable amount for promotion; apart from that you shall get your share of the profits. I said, how much do you want for the share? And he said $200. I said, what are the chances, the prospects of making a little? He said, you may make $3,000, you may make $5,000, you are sure to make something. I said, I will take it. He said, Mr. Pope will make the draft. Mr. Rufus H. Pope, and you can accept it when it comes. A few days later the draft came down."

"Q. (By the Court.) Was that all the conversation that took place down at the train? Did you say anything further to him? A. I said, is it necessary to have a certificate? He said, no, the draft will be sufficient.

"Q. Do you recollect anything else that was said? A. I think that was about all.

"Q. Did you part at the station? A. We parted at the station, his train going west, his train went first."

On his cross-examination the plaintiff adhered to his statement as to what took place at St. John, except that he admitted that Fowler might have said something as to the lands being sold, and the money to pay for them realized in that way. And he also admitted that he expected that if more money should be required to pay for the land it would come from the syndicate of which he was a member, although he says that nothing was said about that. Stated shortly, the plaintiff's case is this, that he bought from Fowler for $200 a one-thir-

1909.

PUGSLEY v. FOWLER AND POPE ET AL.

BARKER, C. J.

tieth interest in a tract of land comprising 217,000 acres, which the defendants had an option to purchase from the Canadian Pacific Railway at $3.50 per acre, or $759,500, and which on a re-sale it was expected would realize to him a profit of $3,000 to $5,000. In view of the magnitude of this transaction; in view of the fact that the plaintiff was committing himself to a possible liability of over $25,000, and in view of the place and the occasion at which this casual conversation took place, it seems difficult to conclude that the plaintiff's account has been a complete, or in all respects an exact account of all that took place. He is, however, the only witness for himself, and the defendant Fowler is the only witness for the defence, and it will, perhaps, serve a good purpose if on disputed points, we compare their accounts as we go along. On the 7th November, 1902, a draft for $200 was drawn by Fowler in favor of Pope on the plaintiff at forty days. It was accepted, and on its maturity it was renewed by a draft at ten days, which the plaintiff afterwards paid. It appears that at the time this interview took place between the plaintiff and Fowler, negotiations for the land sale had not proceeded far, and nothing very definite had been decided on. Mr. Fowler says—and on this point his evidence is uncontradicted—that as a result of a visit to the west and inquiries into the prospects of railway and colonization development in that part of Canada, he and Pope on their return made a formal application to the Canadian Pacific Railway Company for the purchase of 200,000 acres of the land stretching from the elbow of the Saskatchewan westward, following along the projected line of the Canadian Northern Railway, at $3.50 an acre, to which application they had received no reply. This is all that had been done. Bearing this in mind, let us see what Fowler's version of the interview between him and the plaintiff is. After stating that he does not recollect of any interview of the kind at the railway station, and that his impression is that it took place at Sussex, he says:—"I did see him (plaintiff) sometime the latter part of the month of October or the first part of the month

of November, 1902, and I suggested to him the coming into a syndicate of ten that Mr Pope and I were getting together for the purpose of purchasing a tract of land in the Northwest, and I cannot recall all the conversation in regard to it, the information I may have given him about the lands out there, because I had recently returned from the Northwest, and was very much impressed with the prospects in that country, and I may have talked at some length about the profits to be derived from land values in the Northwest, but I suggested he should become one of a syndicate of ten, and informed him it was necessary for each member of the syndicate to put up $200 for preliminary expenses, to cover the necessary charges in connection with the location of the land, and that each one of the syndicate would have one share, and there would be ten shares altogether. I never told Mr. Pugsley that there was going to be thirds and those thirds divided into tenths, because there was nothing like that contemplated, and it would have been an absolute falsehood and unnecessary."

"Q. Never a word about thirtieths? A. No.

"Q. Never a word about thirtieths in it from beginning to end? A. Never, from beginning to end. I told him that in my opinion we would be able, we hoped at least to be able to sell before we would have to put up any money.

"Q. To sell the land you expected to purchase? A. To sell the land that we expected to purchase before we would have to put up any money on the purchase price.

"Q. In other words, make the sales pay the purchase? A. Yes. I said we hoped to do that, but I said you must be prepared in case we cannot, to carry your corner of the deal, as I expected every other man to carry his corner.

"Q. Was there anything said by you on the subject of giving reasonable notice if money was required? A. Yes. I said if it was required he would have notice so there would be plenty of time for him to get the money together.

"Q. Did you tell him at that time you had an option on 217,000 acres of land? A. No.

1909.

PUGSLEY v. FOWLER AND POPE ET AL.

BARKER, C. J.

"Q. What, if anything, did you tell him as to your having or expecting to have, or expecting to purchase lands in the Northwest, just relating to the acquisition of them? A. I told him that we expected, we were organizing this syndicate of ten, and we expected to buy 200,000 acres of land in the Northwest.

"Q. Was anything said then about 17,000 acres? A. No.

"Q. Was there any purchase of 17,000 acres in contemplation? A. No, because it was impossible for that to have been mentioned, because it was not until nearly the first of May that the thing resolved itself into the 17,000 acres, and if you like I can explain it.

"Q. We will come to it later. At that time when you had the conversation with Mr. Pugsley, the latter part of October or early in November, 1902, had you or not any option from the Canadian Pacific Railway Company, or any definite arrangement whatever? A. None whatever."

I have no hesitation in concluding that in view of all the circumstances Fowler's version of the interview is much the more probable one of the two, and I adopt it.

Fowler states that he went to Montreal and there found that Pope had received an answer from Mr. Griffin, the Canadian Pacific Railway Company's land commissioner, in which on behalf of the company he declined to sell the land at $3.50 an acre and wanted $5.00. This led to a further interview with the railway officials in reference to the price, and they advised the defendants to go and look over the lands and make a selection of the tract out of which they wished to take the 200,000 acres. This they concluded to do, and the draft for $200 was drawn on the plaintiff as his one-tenth of the expense. The defendants then went out to examine and locate the lands, and spent some weeks there and at the land office in procuring such information in regard to the lands as they required in order to make a selection, and they finally selected the land out of a tract of 300,000 acres. Other

interviews took place with the Canadian Pacific Railway officials, the result of which was that the price was settled at $3.25 an acre, and a proposal by the defendants to extend the payments to ten years instead of the usual term of six was refused. This seems to have been in December, and nothing more was done until the latter part of February. Up to this time no written agreement of purchase had been made, and though the price and terms of payment had been agreed upon, no money had been paid.

Returning to the plaintiff's evidence he says, that he heard nothing from Fowler (except the draft) and had no communication of any kind with him from the date of the interview at the Intercolonial Railway station until March 31st, 1903, a period of about five months. On that day he received the following letter from Fowler, dated March 30th at Ottawa.

"Dear Pugsley,—Hold yourself in readiness to raise $2,000 to hold up your corner in the land deal. If we have to call upon you it will be at short notice. The deal is all right financially and a good thing, but we may have to put up the stuff as the sale has not gone through. We are now fighting for our life as Griffin, the land commissioner, is trying to turn us down, but we hope to beat him out, though he may have influence enough to make us put up the cash at once. Yours, etc.,

GEORGE W. FOWLER."

To this letter the plaintiff made no reply. He ignored it altogether and took no steps to have the $2,000 or any part of it available should it be required. On the 14th April, a fortnight later, he received the following telegram from Fowler, dated at Cookshire, April 14th, 1903.

"Three thousand dollars absolutely necessary to hold your interest in the land deal. Will I draw? Wire."

This telegram the plaintiff treated precisely as he had treated the letter. He did not reply to it, but ignored it altogether.

1909.

PUGSLEY v. FOWLER AND POPE ET AL.

BARKER, C. J.

The circumstances which led up to the sending of this letter and telegram are thus detailed by Mr. Fowler:—

"Q. What, if anything, occurred that led up to your writing Mr. Pugsley the letter of the 30th of March? A. It might have been in the latter part of February, or it might not have been until March, but sometime during the winter, either in February or March, I got word. I think when I got to the House I found Mr. Griffin saying they wanted $20,000 paid on account of the purchase price, and that that must be paid at once or the agreement would be voided; that is, they would not reserve the lands for us. It was not a real option, but they would not reserve the lands. So I think he then notified me that they had taken the lands out of the reservation afterwards. I think I had a notice to that effect.

"Q. What, if anything, did you do, so far as the plaintiff at all events is concerned, when you found this becoming imminent, and what steps did you take to get rid of paying the $20,000 in cash? A. Well, we saw Mr. McNicoll, first vice-president of the Canadian Pacific Railway. Sir Thomas Shaughnessy was in Europe. We saw Mr. McNicoll and got him to stand the thing over until Sir Thomas would return, and notified Mr. Griffin to that effect, and after Sir Thomas Shaughnessy returned, we met him. And I may say there was another person had come east by the name of Brown for the purpose of purchasing these very lands."

Fowler says that before he interviewed Sir Thomas Shaughnessy he wrote the plaintiff the letter of March 30th, and that when he saw Sir Thomas, he said we would have to pay $20,000 down, and it might be $30,000 and we had better be prepared to pay our money, because this man Brown was prepared to take up the reserved lands and pay the money. The telegram of April 14th, 1903, was then sent to the plaintiff. The defendants were obliged to pay up the $20,000 and subsequently $40,000 more, making $60,000 in three payments of $20,000 each. The defendants then sold their interest in the purchase to the Great West Land Com-

pany at a profit of some $143,000. The 17,000 acres spoken of was simply the surplus of the 300,000 acre tract, after taking out the 200,000, the Canadian Pacific Railway, School and other reserves, and making the usual allowance for water areas. This was not ascertained and could not be until the matter was finally settled up. It had nothing to do with the original purchase, and the defendants bought it themselves at $3.50 per acre. It therefore seems quite impossible that anything could have been said about this 17,000 acres at the conversation at the station as the plaintiff says.

Except for the purposes of an accounting it is perhaps unimportant whether the plaintiff's interest was to be a thirtieth, as he says, or a tenth as Fowler says. The substantial defence set up here is, that whatever that interest was the plaintiff abandoned it altogether, or so conducted himself as to warrant these defendants in believing that he had done so, and acting on that belief. It is with a view to this defence that I wish to call attention to the plaintiff's conduct in reference to this transaction. He says that in the latter part of the summer or the early part of the autumn of 1903 he knew that the "deal had gone through," to use his own expression. This suit was not commenced until June, 1907, nearly four years later. The plaintiff says that the first time he saw Fowler after the interview at the Intercolonial Railway station was on the 13th of April, 1903, the day before the telegram was sent and a fortnight after he had received the letter of March 30th. Fowler was then at the railway station at Sussex waiting to take the train for Montreal. He says he saw Fowler and he walked over to see him and said, "Good morning Mr. Fowler, are you going away? I said, I received a letter. He said, yes, I thought it wise to write you in case we needed the money. Just after that he took the train and went away." Mr. Fowler had been in Sussex for some days at that time, and yet the plaintiff had not sought him out, as one interested in a transaction of that kind naturally would, to get some information as to its progress and the reasons for making so large an assessment. He puts forward now as an

1909.

PUGSLEY v. FOWLER AND POPE ET AL.

BARKER, C. J.

excuse for non-payment, that he expected a statement of some kind. But at that time he said nothing about statements, neither did he express any surprise at being called upon to contribute. The next day when he received the telegram he consulted his solicitor, and he says both the solicitor and himself came to the conclusion that the whole thing was a fraud. He took no notice of the telegram, although it called for an immediate answer. Common business civility would have suggested a reply, especially as Fowler was acting in the plaintiff's interest in the very business from which he is now seeking to benefit. It seems impossible to suppose that in the course he took he was not acting deliberately with a well defined intention. Was it to remain in the syndicate and assume his share of the responsibilities, that he might earn his share of the profits? Everything, as it seems to me, points to a different conclusion. Was it that he should, with the smallest loss, get out of a transaction which he and his solicitor had concluded was a fraud? Was he adopting that non-committal course of action which people more cunning than candid sometimes adopt, and which can be cited as proof of their being in the speculation if it should turn out a success or equally well as proof of their being out of it, if it should turn out a failure? There is some positive evidence on the point. Fowler says that he had a conversation with the plaintiff a few weeks after the telegram had been sent which he relates as follows:—"I asked him why he didn't allow me to make a draft on him for the money, and he said that he couldn't pay it, couldn't handle it. I said, do you want to drop out of the thing? And he said he would have to, it was too big for him to handle, he had no idea when he went into it he would have to put up money, except the $200 for preliminary expenses, and he said he couldn't carry it further." And Fowler says, that in consequence of that, they made no further calls upon him. This conversation is denied by the plaintiff. If it is to be accepted, notwithstanding the plaintiff's denial, it would, I think, establish the defence. It is not necessary that I should express an opinion as to the

1909.

PUGSLEY v. FOWLER AND POPE ET AL.

BARKER, C. J.

relative credit to be given these two witnesses. I can, however, say that the statements attributed to the plaintiff seem so natural under the circumstances, and so entirely in accord with his own actions that I can readily understand the conversation may well have taken place precisely as Fowler has told it.

The plaintiff says that in the latter part of the summer, or the early part of the autumn of 1903, he had a conversation with Fowler. This was the first time he had seen him after the telegram was sent, and it was after the plaintiff had ascertained that the sale had been completed. He was asked to tell what occurred, and his answer is as follows:—"I had heard that this deal had gone through, and went down to his house to see him one evening. After we had chatted over matters I said, the land deal has gone through. And he said, yes. I said, where do I stand in the matter? He says, you didn't answer my letter or telegram. I said, no, I was taken sick that day and confined to my bed for several days, and I thought you asked me for a very large amount of money. He said, you wont lose anything. That is all." Nothing more took place until the early part of 1904, some four or five months later. Fowler was then in Sussex and another interview took place which the plaintiff describes as follows:—"I saw him coming towards the hotel one day and I went out to the door and spoke to him and said, Mr. Fowler, I would like to have you make up my bill and contra account as well. He said, yes, I will; I would like also to have yours, and started to walk away. I said, what about the land matter? He said, you didn't flash up. I said, what about what I did flash up? He said, I will see you about that later. I am going away to-day, and I am in a hurry to-day, I will see you later. That is all the conversation then." These accounts asked for had nothing to do with this transaction. They related to professional services of Fowler on the one side, and some contra account on the other. These last two conversations, which I have just quoted from the plaintiff's evidence, are relied on by the plaintiff as amounting to admissions by Fowler of an interest

1909.

PUGSLEY v. FOWLER AND POPE ET AL.

BARKER, C. J.

in the land sale and profits, and I shall deal with them together, for they impress me in an entirely different way. We must not forget that at this time the lands had been sold at a profit of $143,000 odd, of which the plaintiff on his basis of owning a one-thirtieth interest would be entitled, subject to charges, to over $4,700. Fowler was the only person who had dealt with him in the whole matter; he, if any one, was the accounting party liable to him for this substantial sum of money. And yet, he did not ask for an account or how the matter stood. On the contrary, the conversations, short as they were, related principally to matters of comparatively trifling importance. Fowler's version of these conversations is, that the allusion in them to the land sale had sole reference to the $200 actually paid by the plaintiff. It is clear that the second conversation does only refer to that. The plaintiff says nothing more took place until December, 1904, some eleven months later, when he again applied to Fowler about the accounts between them, but there was not a word as to the land sale. Another year passed and nothing was done until sometime during the winter of 1905-6, when the plaintiff says he wrote Fowler "asking him for his contra account and also his statement in other matters between us." To this letter there was no reply. The next interview took place several months later, in the fall of 1906. The plaintiff gives the following account of what took place:—"I would say this was in the autumn of 1906, it may have been in the early autumn. I called Mr. Fowler up at his office on the 'phone and again asked him for my bill, and he said he would come in and see me on his way down."

"Q. What did you say to him on the telephone? A. I said I wanted my bill, and I think that is all I said on the 'phone, and I think I mentioned about a statement, and he said he would call and see me on his way down. He came down in the afternoon, came in the house in company with Mr. S. A. McLeod and some other gentleman I didn't know; he was a stranger. He didn't speak to me about the matter and went out again. In the evening, I think the same even-

1909.

PUGSLEY v. FOWLER AND POPE ET AL.

BARKER, C. J.

ing of that afternoon, he came in again apparently to see somebody, and I called him into the cloakroom in the hall and said, Mr. Fowler I am anxious to get your bill and these matters between us settled, they have been standing for a long time, and I referred to the land matter.

"Q. (By the Court.) Tell me what you said? A. I am anxious to get the land matter settled, and he said he was in trouble and in law and the case in Court, and if it went against him it would ruin him. I said, I think you asked me for too much money. You asked me for $2,000 in a letter and in the telegram for $3,000. He said, the telegram $2,000. I said, no, $3,000. He said, look it up. I said, I have looked it up and it is there. He said, you offered $500. I said, no, I never made any offer. That is what he told me. He said, I will see you again. That is all he said to my recollection."

The plaintiff says he waited for some time, and as nothing was done, he brought this action. He also says that at this time he had learned from the published reports of an investigation which took place at Ottawa, how the sale had turned out, though he knew long before that it had taken place. Taking the plaintiff's own account I am unable to reconcile his want of interest in the results of this speculation, his anxiety as to the $200 and his apathy as to the profits, his constant and almost persistent efforts to procure his professional account and his casual allusion to the land sale, and then with special reference to the $200 only, with the ordinary conduct of a man who claimed to have an interest in the transaction. I think the evidence of Fowler as to the plaintiff's express abandonment is corroborated by the admitted facts and his own conduct. But apart from that, I think there is abundant evidence to show that the plaintiff, when he found he was to be called on for a somewhat larger payment, concluded that he had better not risk any more money in a speculation of such magnitude, however attractive it might look. In short, that his first loss would be the smallest, and that he would therefore, withdraw. If he

1909.

PUGSLEY v. FOWLER AND POPE ET AL.

BARKER, C. J.

could get his $200 back, well and good, but if not, that he would not perform his contract by paying what his assessment was in order to hold his interest. I think also the defendants were quite justified in believing that to be his intention and acting on it.

The plaintiff knew that this was a speculation—a deal as he calls it—involving a large sum of money, and involving many risks. He also knew, or should have known, that promptness in making payments is one of the essential factors in such transactions. And he must have recognized the fact that the money which he refused to pay must necessarily be paid by some one or the whole arrangement would fall through and result in loss. It is no answer to this to say that in the accounting the amount paid for the defaulter can be re-paid with interest. But such a position cannot be forced upon him, and if there was a loss in the speculation, those who paid would be without remedy, because they did not pay at the defaulter's request in any way.

On the hearing the plaintiff amended his bill by alleging a partnership to have been created, so as to entitle him to an account on that basis, and that the moneys which the plaintiff should have paid would be chargeable with interest against his share of the profits. I do not agree in this view. Had the Canadian Pacific Railway been paid in full the conveyance would have vested the property in the ten members as tenants in common, or in trust for them as such. At most these ten were interested in the profits in the proportion of one-tenth each, and whether you call them partners or tenants in common, it is equally open to any one to abandon his interest.

In *Freeth* v. *Burr* (1), Lord Coleridge says :—"I mention that because it is important to express my view that, in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do

(1) L. R. 9 C. P. 208.

not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free."

In *Mersey Steel and Iron Co.* v. *Naylor* (1), Lord Selbourne states the rule as laid down in *Freeth* v. *Burr*, thus:—"You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here."

And in *Clarke* v. *Hart* (2), the same rule is laid down. That case was relied on by the plaintiff in regard to the question of forfeiture, but it has no application to a case like the present. It was a case of a mine, and by the rules of the proprietors the share of a member was liable, on certain forms being observed, to forfeiture for non-payment of calls. There is, however, one passage which bears upon this case. The Lord Chancellor, after alluding to the doctrine of estoppel as enunciated in *Pickard* v. *Sears* (3), and *Freeman* v. *Cooke* (4), goes on to speak of the general law as applicable to

(1) 9 A. C. 434.
(2) 6 H. of L. C. 633.
(3) 6 A. & E. 469.
(4) 2 Exch. 654.

1909.

PUGSLEY v. FOWLER AND POPE ET AL.

BARKER, C. J.

special descriptions of property such as mines. He says:—"The case of mines has always been considered by a Court of Equity as a peculiar one. The property is of a very precarious description, fluctuating continually, sudden emergencies arising which require an instant supply of capital, and in which the faithful performance of engagements is absolutely necessary for the prosperity and even the existence of the concern. And, therefore, where parties under these circumstances stand by and watch the progress of the adventure to see whether it is prosperous or the contrary, determining that they will intervene only in case the affairs of the mine should turn out prosperous, but determining to hold off if a different state of things should exist, Courts of Equity have said that those are parties who are to receive no encouragement; that if they come to the Court for relief, its doors shall be closed against them; that their conduct being inequitable, they have no right to equitable relief."

In this case no question arises as to the amount asked from the plaintiff being required at the time. And when he was first notified that it would probably be required, so that he might prepare to meet the payment, and afterwards informed by the telegram that the $3,000 was necessary—absolutely necessary are the words—to hold his interest, and he is asked to wire if he (Fowler) may draw for the amount, and he makes no reply to either the letter or the telegram, it is a refusal in itself and an acceptance of the result which the telegram says will follow on the non-payment. There is nothing in the evidence, from beginning to end, to show that the plaintiff ever had any intention of paying the money or any part of it. His excuse that he wanted a statement, or that he could not answer the telegram because he was taken sick, is too trifling to merit any consideration.

This bill must be dismissed with costs.

SMITH, ET AL., TRUSTEES, ETC. OF ROBERTSON v. ROBERTSON, ET AL.

1909.

February 25.

Will—Construction—Administration of Trusts—Legatee's Power of Appointment—Time for Distribution—Implied Power to Sell Real Estate—Interest in Residuary Estate.

R. died in 1876, leaving practically all his property upon trust for the benefit of his widow and children. In his will, in order to make an equal distribution of a large portion of his estate among his five daughters, he grouped together certain properties, in part real estate and in part personal, in five separate schedules. The property in schedule (A) was devised to the testator's daughter M. A. A. who died in 1902, leaving a will by which, in exercise of the power of appointment in her father's will, she devised one-third of her estate to her husband who survived her.

The clause in the will relating to the final distribution of the scheduled property was as follows:—"And upon trust on the death of either of my said daughters to convey one-third of the said lands, tenements, hereditaments and premises apportioned to her in such schedule, to such person or persons upon the trusts and for the ends, intents and purposes or in such manner as my said daughter may by any writing under her hand, attested by two or more witnesses, or by her last will and testament direct and appoint, and as to the remaining two-thirds, to hold the same for the child or children, or such of them of my said daughter so dying, upon the trusts and in the proportion, and for the intents and purposes my said daughter may by her last will and testament direct and appoint and in default of such direction and appointment then and in such case the said two-thirds and one-third shall be held by said executors and trustees in trust for such child or children and be divided equally between them and their heirs, share and share alike, on the youngest child living attaining the age of twenty-one years and in the meantime and until such child shall attain such age, the rents, issues and profits thereof shall be applied by my said executors toward the support, maintenance and education of such child or children, and in the event of my daughter dying, leaving no issue her surviving, then and in such case I will and direct that the said two-thirds and one-third before mentioned (if no disposition of the same shall be made by my said daughter) shall be equally divided by my said executors and trustees between her sisters and brother and their respective heirs in equal proportions *per stirpes* and not *per capita*."

Held, that the trustees, in order to make a distribution, had power to sell and dispose of the scheduled property apportioned to the deceased daughter, such power being implied in the will in order to carry out the trusts, though no express power was given.

1909.

SMITH ET AL. v. ROBERTSON ET AL.

Held also, that, the deceased daughter having died without issue, the unappointed two-thirds of her scheduled property should be equally divided now between the surviving daughters and the heirs of the deceased son.

The residuary clause in the will was:—"The rest, residue and remainder of my said estate, both real and personal and whatsoever and wheresoever situate, I give, devise and bequeath the same to my said executors and trustees, upon the trusts and for the intents and purposes following, that is to say: Upon trust after paying my brother Duncan Robertson or his heirs, to whom I give and bequeath the same, the legacy or sum of four thousand dollars, Dominion currency, to sell and dispose of the same as and when they shall in their discretion see fit and consider to be most for the benefit and advantage of my said estate, and shall apportion the same or the proceeds of such parts or portions as shall be sold from time to time, equally to and among my said children, share and share alike, and shall hold the same for my said children and their heirs, share and share alike, subject to any advances or sums made or to be made by me, as aforesaid upon the same trusts, with regard to my said daughters as are hereinbefore declared with respect to the said estate in the said schedules mentioned."

Held, that the deceased daughter had a disposing power over one-third of her share of the residuary estate; and that the remaining two-thirds was divisible as was directed in regard to the scheduled property.

This is an application by the trustee for directions, in the matter of the construction of the will of the late Hon. John Robertson. The opinion of the Court is asked on the following three questions:—

1. In what manner should the payment be made to the executors of Lewis J. Almon of the one-third of schedule (A), appointed to said L. J. Almon under the will of his wife Mary Allan Almon, *i. e.*, have the plaintiffs the power to sell and dispose of the lands and premises comprising part of said schedule (A)?

2. What disposition should be made by the plaintiffs of the remaining unappointed two-thirds share of said Mary Allan Almon in said schedule (A), *i. e.*, should same be equally divided now between the surviving children of the testator, and the heirs of David D. Robertson deceased; or should the same be held in trust until the death of the last surviving daughter of the testator, and then apportioned between the children of any deceased child *per stripes?*

1909.

SMITH ET AL. v. ROBERTSON ET AL.

3. Had said Mary Allan Almon a disposing power over one-third of her interest in the residuary estate? If so, what disposition should be made by the plaintiffs of the unappointed two-thirds? If not, what disposition should be made of her whole interest in the residue?

This bill has been filed by the executors and trustees under the will of the late Hon. John Robertson for directions as to the administration of the trusts declared in the will in reference to certain portions of the estate. This will, after making provision for the testator's widow during her life and for a legacy of $4,000 to Duncan Robertson, deals exclusively with provisions made for the benefit of the testator's children, and the distribution of the estate among them or for their benefit. He left him surviving beside his widow, five daughters and one son. Of these children David, the son, was married and had issue living at the time of the testator's death. One of the daughters, Mrs. Almon, was then married, but had no issue, and another, Mrs. Giles, was married since the testator's death, and she has a son and daughter living. The remaining daughters of the testator are unmarried. David D. Robertson, the son, died on the 3rd March, 1896, intestate, leaving a widow and five daughters, all of whom are living. The testator's widow died on the 27th March, 1894. Mrs. Almon died on the 25th January, 1902, leaving her surviving her husband Lewis J. Almon, but no issue. She left a will, dated August 22nd, 1877, to which I shall refer later on. The testator died August 3rd, 1876. L. J. Almon died August 23rd, 1907, having made a will by which he gave all his real and personal property to his executors and trustees upon certain trusts which are unimportant for the purposes of this case.

Argument was heard December 21, 1908.

A. O. Earle, K. C., for Eliza Robertson, Sophia Robertson and Agnes Lucas Robertson, the three unmarried daughters of the testator, defendants:—

1909.

SMITH ET AL v. ROBERTSON ET AL.

So far as scheduled property is concerned, distribution should be made immediately upon the death of any of the schedule legatees. There is nothing in the will to warrant a postponement. The unappointed two-thirds of schedule (A) should be equally divided now among the surviving children of the testator. By the words of reference, all the trusts referred to in the schedule shares have to be read into the trust of the residuary share, and therefore it would be divisible at the same time and in the same manner as the schedule property.

W. A. Ewing, K. C., for the executors of Lewis J. Almon, the husband of the testator's deceased daughter, defendants:—

The direction in the will to divide the property does not mean to convey an undivided third; the trustees must set apart a separate third: *Cornick* v. *Pearce* (1); *Henry* v. *Simpson* (2). The trustees have an implied power to sell: *Mower* v. *Orr* (3). See also Jarman on Wills (4). The trustees unquestionably have power to sell and convert the personalty: , *Ferguson* v. *Stewart* (5). There was a power of appointment by the testator's daughter over one-third of her interest in the residuary estate: *Cooper* v. *MacDonald* (6).

M. G. Teed, K. C., for T. Laura Campbell Giles, a daughter of the testator, and the representatives of David D. Robertson the deceased son, and all other defendants:—

The word "convey" in the will clearly cannot mean sell and divide; it is a specific and definite word. The word "then" where used in this will is clearly a word of reference and not of time: *Campbell* v. *Harding* (7); *Beauclerk* v. *Dormer* (8); Jarman on Wills (9). The will must be taken as a whole, and general intention of testator considered.

(1) 7 Hare 477.
(2) 19 Gr. Ch. R. 522.
(3) 7 Hare 472.
(4) 5th Ed. pp. 552, 553.
(5) 22 Gr. Ch. R. 364.
(6) L. R. 16Eq. 258.
(7) 2 R. & My. 390 at p. 411.
(8) 2 Atk. 308.
(9) 5th Ed. Vol. II, 1335.

Intention was for estate to be divided equally. If the unappointed two-thirds of the property devised to the deceased daughter of the testator in schedule (A) be divided now, and so on as each daughter dies, the intention of the testator will be defeated, as the surviving daughter will receive by far the largest amount. There was no disposing power in any of the daughters of the testator, over any part of the residuary estate. The trust as to the schedule property and the residuary trust are irreconcilable and irrepressibly in conflict. The specific words of the residuary clause must be given effect, in preference to general words before used. Residuary trust was by way of reference, and in such a case the intention of the testator will prevail: *Surtees* v. *Hopkinson* (1).

A. O. Earle, K. C., in reply.

Bowyer S. Smith, for the plaintiffs, took no part, except to state the points upon which the direction of the Court was sought by the trustees.

1909. February 23. BARKER, C. J.:—

(His Honor recited the facts of the case as stated above, and proceeded as follows.)

Eliminating all parts of the will relating to the share given to the son David D. Robertson, in reference to which special provisions and directions are made which have no reference to the questions now under discussion, the testator for the purposes of his will and in order to make an equal distribution of a large portion of the estate among his five daughters, grouped together certain properties, in part real estate and in part personal, in five separate schedules designated for the purpose of reference by the letters A, B, C, D and E. These schedules form a part of the will and the property described in each, the testator when he made his will valued at $50,000. The property described in schedule

(1) L. R. 4 Eq. 98.

1909.

SMITH ET AL v. ROBERTSON ET AL.

BARKER, C. J.

(A) was devised for Mrs. Almon's benefit—that in (B) for the benefit of her sister Eliza, and so on. Eliminating for the present also all the provisions in the will relating to the income of the estate, the trusts in reference to it and the various directions given for the purposes of its management, previous to the death of the testator's widow, the will provides that after the widow's death, the net annual income from the property described in the several schedules shall be paid to the daughters to whom such property has been apportioned; that is, Mrs. Almon was, during her life, to receive the net income of the property described in schedule (A), and so on with the others. The will then proceeds thus:—

"And upon trust on the death of either of my said daughters to convey one-third of the said lands, tenements, hereditaments and premises apportioned to her in such schedule, to such person or persons upon the trusts and for the ends, intents and purposes or in such manner as my said daughter may by any writing under her hand, attested by two or more witnesses, or by her last will and testament direct and appoint, and as to the remaining two-thirds, to hold the same for the child or children, or such of them of my said daughter so dying, upon the trusts and in the proportion, and for the intents and purposes my said daughter may by her said last will and testament direct and appoint, and in default of such direction and appointment then and in such case the said two-thirds and one-third shall be held by my said executors and trustees in trust for such child or children and be divided equally between them and their heirs, share and share alike, on the youngest child living attaining the age of twenty-one years, and in the meantime and until such child shall attain such age, the rents, issues and profits thereof shall be applied by my said executors toward the support, maintenance and education of such child or children, and in the event of my daughter dying, leaving no issue her surviving, then and in such case I will and direct that the said two-thirds and one-third before mentioned (if no disposition of the same shall be made by my said daughter)

1909.

SMITH ET AL. v. ROBERTSON ET AL.

BARKER, C. J.

shall be equally divided by my said executors and trustees between her sisters and brother and their respective heirs in equal proportions *per stirpes* and not *per capita*."

This is the only clause in the will relating to the final distribution of the scheduled property. Two of the three questions submitted for directions relate to these properties, and it will be convenient to dispose of them here. They are as follows:—

1. In what manner should the payment be made to the executors of Lewis J. Almon of the one-third share of schedule (A), appointed to the said L. J. Almon under the will of his wife Mary A. Almon, *i. e.*, have the plaintiffs the power to sell and dispose of the lands and premises comprising part of schedule (A)?

2. What disposition should be made by the plaintiffs of the remaining unappointed two-thirds share of said Mary Allan Almon in said schedule (A), *i. e.*, should the same be equally divided now between the surviving children of the testator, and the heirs of David D. Robertson deceased, or should the same be held in trust until the death of the last surviving daughter of the testator, and then apportioned between the children of any deceased children *per stirpes?*

Mrs. Almon by her will executed her power of appointment as to her scheduled property in favor of her husband. It consists partly of personal property and partly of real estate. The trust is to convey to the appointee one-third of the lands, tenements, hereditaments and premises, etc. upon such trusts as the daughter may direct. This does not mean an undivided one-third interest in all the lands and property, but either one-third of the property set apart and equal in value to one-third of the value of the whole or part in property and part in money. It would be a most unusual provision by which trustees in making a final distribution of a mixed fund, are required to convey a one-third undivided interest to one person upon certain trusts and the remaining two-thirds among nine other persons with different interests and for

1909.

SMITH ET AL. v. ROBERTSON ET AL.

BARKER, C. J.

purposes altogether different. That is not the true construction. The appointee is entitled to have transferred to him either in specific property or in money or in both what is equivalent to one-third of the value of the whole, and the other two-thirds are to be divided equally as the will directs. And if, in order to make this division or to determine the value for that purpose, it is necessary to make a sale, there is in my opinion an implied power in the trustees for that purpose as incident to the complete execution of the trust. *Mower* v. *Orr* (1).

As to the point specifically mentioned in the second question I have already indicated my view. I think that the scheduled properties are to be treated and dealt with as entirely separate funds, and that by the clear language of the will, it was the testator's intention that as each daughter died the property apportioned to her was to be distributed according to the directions in the will, which seem to me to be explicit and to have been prepared with a view of providing for the various cases which might arise by reason of marriage, failure to appoint or otherwise. There is no provision in the will for the payment to any one (except in the case of children) of the interest or income arising from these scheduled properties after the death of the daughter to whom they are respectively apportioned. Was it to accumulate in the hands of the trustees for the benefit of some person after the sisters had all died? I think not. No such provision was made because the *corpus* of the fund was then going out of the trust into the possession and for the use of the sisters and others entitled to it. How can it be said that when the testator directed that two-thirds of Mrs. Almon's scheduled property should, in the event of her death without issue, be equally divided by the trustees between her sisters and brother and their respective heirs in equal proportions *per stirpes*, he intended that so far from this being done it should not be divided at all until all the sisters had died, then to go among those who would be included within the term "heirs."

(1) 7 Hare 473.

1909.

SMITH ET AL. v. ROBERTSON ET AL.

BARKER, C. J.

The principal, I may say the only argument for a different construction was this—that the result of a distribution of each of these funds on the death of the daughter to whom it had been apportioned would result in an unequal division of the estate among the testator's children, and thus defeat his will and desire as expressly declared in the will itself. That is to say the last surviving daughter will come into the use and possession of her share in the different two-thirds interests of the portions of the others and in that way derive a greater benefit from the estate than her sisters who had predeceased her. That will be so, and I imagine there is no person more likely to have forseen that result than the testator himself. He, however, made a different provision for daughters with children than for those who had none, for in the former case the mother had practically a power of disposal over her whole fund for the benefit of her children, and in no case did the two-thirds share of it go to the sisters. Speculations like these are of no value in determining a testator's intention where on the face of the will itself he has declared his particular intention in clear and precise language. He himself scheduled and apportioned these properties; he made special provision by which the trustees were authorized to restore the equality in value in case it had by losses or otherwise been disturbed after the date of the will; and so far as his daughters are concerned, he made precisely the same provisions in reference to each where the conditions were the same. He has not only expressed in his will a desire to divide his estate equally among his children, but in the control, enjoyment and final disposal of these scheduled funds, created by himself, separate and distinct from the remainder of his estate which he has expressly provided for in his will he has given a practical illustration of what he himself meant by an equal distribution of his estate among his children.

The third question is as follows:—

3. Had said Mary Allan Almon a disposing power over one-third of her interest in the residuary estate? If so,

1909.

SMITH ET AL v. ROBERTSON ET AL.

BARKER, C. J.

what disposition should be made by the plaintiffs of the unappointed two-thirds? If not, what disposition should be made of her whole interest in the residue?

The residuary clause in the will is as follows:—

"The rest, residue and remainder of my said estate, both real and personal, and whatsoever and wheresoever situate, I give, devise and bequeath the same to my said executors and trustees, upon the trusts and for the intents and purposes following, that is to say: Upon trust after paying my brother Duncan Robertson, or his heirs, to whom I give and bequeath the same, the legacy or sum of four thousand dollars, Dominion currency, to sell and dispose of the same as and when they shall in their discretion see fit and consider to be most for the benefit and advantage of my said estate, and shall apportion the same, or the proceeds of such parts or portions as shall be sold from time to time equally to and among my said children, share and share alike, and shall hold the same for my said children and their heirs, share and share alike, subject to any advances or sums made or to be made by me, as aforesaid, upon the same trusts, with regard to my said daughters, as are hereinbefore declared with respect to the said estate in the said schedule mentioned."

In addition to the contention that by a present distribution an inequality would arise as between the sisters in the division of the estate, and which I have discussed in dealing with the second question, it has been argued as to the third question that the trusts declared as to the scheduled funds were so inconsistent with those declared as to the residuary estate that they could not be incorporated together, and the last provisions of the will must prevail. By the clause the trustees are given a power of sale, and out of the property or the proceeds of the sale the trustees are to do with the residuary estate precisely what the testator had himself done with the other part of the estate, that is, apportion it to and among the children equally. They were then to hold the same, that is these apportioned shares, for the children and

their heirs, share and share alike, as aforesaid, upon the same trusts with regard to the daughters as had by the previous part of the will been declared with respect to the scheduled property. If the testator's intention and desire was to make an equal division of his estate among his children, as no doubt it was, for he has expressly said so in the will itself, and if the provisions of the will in reference to the enjoyment, control and final disposition of the scheduled properties, represented the testator's views as to carrying his intention into effect, as it certainly did, was it not the most natural way for him, when dealing with the residuary estate, to entrust the apportionment of it among his children to his trustees, and then direct that they should hold it for his children and their heirs in just the same way and upon the same trusts as they held the scheduled properties. I am at a loss to see what better way there was by which he could accomplish his object. There is no inconsistency in the clauses that I can discover. The words "for my said children and heirs" are but a copy of a phrase in the previous part of the will, and the trustees were to hold it in trust for the daughters upon the same trusts as had been declared in reference to the scheduled property. I think that the effect of the will is that the portion of the residuary estate set apart for Mrs. Almon as representing her share must be dealt with as being held by the trustees on precisely the same trusts as they hold the property described in schedule (A). It necessarily follows that she had an appointing power as to one-third of it, which she has exercised in favor of the husband, and the remaining two-thirds will be divisible as before.

As to the first question; I say that in order to make the payment to the executors of L. J. Almon of the one-third share of schedule (A) appointed to him, the trustees have power to sell and dispose of the property in that schedule or so much of it as they may deem necessary.

In answer to the second question. The unappointed two-thirds share of Mrs. Almon in the property of schedule

1909.

SMITH ET AL v. ROBERTSON ET AL.

BARKER, C. J.

(A) should be equally divided now between the surviving children of the testator and the heirs of David D. Robertson.

In answer to the third question. Mrs. Almon had a disposing power over one-third of her share of the residuary estate. The unappointed two-thirds should be distributed now as declared in reference to the last question.

PICK v. EDWARDS ET AL.

1908.
October 6.

Exceptions to Answer.

Answers to interrogatories must be made substantially and fully, and not with a view to avoid giving information, but they need not be in strict or technical language.

The rule in *Reade* v. *Woodrooffe* (1) followed.

This matter came up for hearing on exceptions filed to the defendants' answer.

Argument was heard September 15, 1908.

William B. Chandler, K. C., for the plaintiff.

Peter Hughes, for the defendants.

1908. October 6. BARKER, C. J.:—

Exceptions to Answer.

The first exception arises out of an answer to the sixth interrogatory, in which the defendants were asked as to whether or not, on or about the 16th of October, 1906, or on some other or what date, and immediately before the hearing in a certain suit between the same parties, a conveyance was made by one Isabella L. Murray and the defendant Alice Edwards. The defendants state their belief that a conveyance of that date was made, but they do not state whether or not this was immediately before the hearing in this other suit. It is objected that the answer is insufficient, inasmuch as whether such a conveyance was made or not is a fact within the personal knowledge of at least one of the defendants, the plaintiff is entitled to distinct admissions of the fact, and that a statement of mere belief in such a case is insufficient. It is unnecessary for the decision of this case to

(1) 24 Bea. 421.

1908.

PICK v. EDWARDS ET AL.

BARKER, C. J.

express any opinion on that point. The real question involved in exceptions to answers is whether the defendants have substantially and fully answered the interrogatory. I think these defendants have done so. In the first place we have their belief that the conveyance in question was made, and it is at all events the general rule that the defendants' belief will be as against them accepted by the Court as its belief. But in addition to this, in another part of the answer, the conveyance is set out at length. And as to the question whether or not it was made immediately before the hearing in the other suit, it is stated in the answer this hearing was adjourned from October 2nd, 1906, until the 30th of the same month. The rule as laid down in *Reade* v. *Woodroffe* (1), is, that where the substantial information is given, though not strictly and technically, it is sufficient when there is nothing to suggest that the defendant is seeking to avoid giving the information. I think this exception must be over-ruled. I think the other five exceptions must be allowed. The answers to which they are directed are altogether insufficient.

The first exception will be over-ruled with costs and the others allowed with costs. The Clerk will tax the costs of both parties and deduct the one sum from the other and certify the balance due, which balance is ordered to be paid as certified. The defendants will have thirty days after settling minutes of this order to put in amended answer.

(1) 24 Bea. 421.

NIXON v. CURREY, ET AL.

1908.

October 6.

Conveyance to Secure Advances—Mortgage—Payments—Appropriation by Creditor—Accounting—Redemption—Sale.

One W. Q. conveyed certain real estate to the defendant C. in 1891. This conveyance was absolute on its face, but was really by way of mortgage to secure a certain sum of money in which W. Q. was indebted to C. for goods supplied from C.'s store.

W. Q. was also indebted to the plaintiff N., and the latter obtained judgment against him for the sum of $239.50, a memorial of which was filed December 3rd, 1896.

After the conveyance from W. Q. to C. had been made, the latter continued to supply goods to W. Q., and W. Q. worked for him and made cash payments to him, which amounts were credited by C. against his account.

W. Q. died in 1902 intestate, leaving a widow and several children.

In 1903 C. conveyed the premises to W. Q's. son, A. Q., who, at the same time, gave C. a mortgage on them. In 1905 C. sold the premises under a power of sale contained in the mortgage to one A. S., who immediately reconveyed them to C.

This suit was originally to set aside the conveyance from W. Q. to C. on the ground of fraud, but the bill was amended, and it was by agreement treated as a redemption suit, the sole question of fact being what was the amount necessary to be paid C. in order to redeem the property.

Held, that where a mortgagor is seeking to discharge himself from liability by payment, the *onus* of proof is upon him.

Held, that where a conveyance, absolute on its face, but subject to certain verbal agreements as to reconveyance, is taken by a creditor to secure advances, instead of the ordinary form of mortgage in which the terms of agreement would have been set out, the *onus* of proof, in case any dispute arises, is on the creditor to show the exact sum for which the conveyance is to stand as security.

Held, that where there were several debts, in the absence of any appropriation by the debtor at the time of payment, the creditor had the right to appropriate the payment to any of the debts he chose, and this right could be exercised at any time, and need not be shown by any specific act or declaration, but might be inferred from facts and circumstances.

Held, that the parties wishing a sale, there will be an order for sale in case the plaintiff fails to redeem instead of the bill standing dismissed with costs, as is usual.

Bill filed to set aside a conveyance from William Quint to the defendant Currey. By agreement the suit was changed

1908.

NIXON v. CURREY ET AL.

BARKER, C. J.

to one of redemption, and came up for hearing on the taking of accounts. The facts fully appear in the judgment of the Court.

Titus J. Carter, for the plaintiff.

Aaron Lawson, for the defendants.

1908. October 6. BARKER, C. J.:—

In its original form the bill in this suit was framed with a view of setting aside a certain conveyance made by one William Quint to the defendant Currey, dated February 14th, 1891, as having been made without adequate consideration and as being fraudulent under the Statute of Elizabeth. Though this conveyance is absolute on its face it was really given to secure an indebtedness existing from Quint to Currey and a further advance to be made to Quint. For convenience sake I shall speak of it as a mortgage. The expressed consideration is $200, and the property conveyed is valued by the plaintiff at about $400 and by Currey at between $200 and $300. Currey kept a country shop in Carleton County, at which Quint was in the habit of purchasing supplies for his family from time to time, for which he paid partly in cash and partly by work. It seems that Quint also became indebted to the plaintiff Nixon who obtained a judgment against him on the 30th March, 1896, for $239.50, a memorial of which was filed on the 3rd of the following December. The amount of this judgment is unpaid, and it is by virtue of the lien created by the memorial that the plaintiff claims the relief asked for. William Quint died May 25th, 1902, intestate, leaving a widow and several children—one of them a son named Alonzo. On the 2nd March, 1903, Currey for an expressed consideration of $200 conveyed the premises to Alonzo Quint, who at the same time gave Currey a mortgage for $200 and interest. The conveyance to Alonzo Quint has never been registered—in fact the evidence goes to prove that Quint himself destroyed it.

The mortgage from Alonzo Quint was registered on the 20th January, 1904. On the 12th June, 1905, the defendant sold or professed to sell under the power in this mortgage. One Alexander Straton became the purchaser. A conveyance was made to him on the 12th June, 1905, and he at the same time conveyed back to Currey. Admittedly this sale was abortive as Straton was acting throughout for Currey and as his agent. Alonzo Quint died on the 28th August, 1906, so the only evidence we have as to the conveyance to him is that of Currey. It is clear from that, that the transaction was merely a means to substitute Alonzo Quint in the place of his father in reference to the property. Currey's evidence on the point is as follows:—"Some years afterwards his son came and bargained with me for the place—for the old homestead. I said, 'Alonzo, I will tell you what I will do. I will do just as I agreed with your father; if you give me the $200 he owed me you can have the place.'" This is a clear notice to Alonzo that although the conveyance from his father to Currey was in its terms an absolute conveyance, it was in fact subject to an agreement that on payment of the indebtedness which he spoke of as being $200, the property was to be reconveyed to Quint. At this time William Quint's equity of redemption was subject to the plaintiff's lien under his judgment, so that if the conveyance from Currey to Alonzo Quint had been recorded, the transaction would not have altered the rights of the plaintiff as a second incumbrancer. The representatives of Alonzo Quint, who are all parties to this suit, do not set up any special interest in the premises—in fact they seem to be willing that all the conveyances should be set aside. When the defendant Currey put in his answer he not only denied all fraud, but he set up as a defence that he held the property simply as a security for an indebtedness which then existed, and for further advances to be made and which had in fact been made. It soon became evident from the evidence that the bill in its original form could not be maintained, and that the sole question of fact which was to be determined was as to the amount neces-

1908.

NIXON v. CURREY ET AL.

BARKER, C. J.

sary to be paid to Currey in order to redeem the property. As the amount involved was small and the value of the property was also small Mr. Currey's counsel waived any objection there might be to amending the bill and treating the suit as a redemption suit, and I consented to take the account in order to avoid the cost of a reference. The bill was therefore amended and the suit now stands as a redemption suit. As to the account the evidence is most unsatisfactory in many ways. Quint kept no books, and, so far as appears, no accounts of any kind; and except a general statement by his wife as to the work done by him for Currey, and which was to go in payment of his indebtedness, there is no evidence on that point except what is supplied by Currey himself. After the mortgage was given by William Quint in February, 1891, Currey went on supplying him with goods and Quint paid him moneys on account, and did work for him. Currey produces an account against Quint, the correctness of it, so far as it goes, is not questioned. It commences November 2nd, 1886, and ends on March 4th, 1896, and the total amount of debits is $693.45. The cash credited during the same period amounts to $224.80, though by an error in the addition, Currey's account as stated makes the amount $124.80, or $100 less. This leaves a balance due of $468.65 on the whole account, subject to a further reduction by the value of the work done; and it is in reference to this that the whole dispute arises. As to this part of the case it is to be borne in mind, that, where a mortgagor seeks to discharge himself from the liability by payment, the *onus* is upon him. *Colwell* v. *Robinson* (1). There are two parts of the evidence which bear upon this point. There are Currey's books in which are entries of times during which Quint worked for him. As I make them out they are as follows:—

(1) 23 N. B. R. 69.

In 1891—17 days at $1.00	$17.00
1892—32 " " "	32.00
1893—66¼ " " "	66.25
1894—From Dec. 3, 1893 to July 20, 1894, less 9 days—say 7¼ months at $20	145.00
	$ 260.25

Currey says there was more work done than is entered in his books, though I do not think he had a very correct idea of what was in his books. In addition to the books, Currey speaks of a settlement which he and Quint had as to the amount due him. This took place about a year before Quint's death and it is admitted that no work was done after that. At that time he says, they had the books, went over the accounts, but they had no way of fixing the amount of the work as he had kept no account, thinking that Quint had done so—and he says they then agreed to put the value of the work at $300 and this left a balance due of about $270. This statement is corroborated by the evidence of Mrs. Quint. It is also corroborated by the figures, putting the cash credits as they had them at $124.80, instead of $224.80 as they should be.

Total account		$693.45
Cash Credit	$124.80	
Work	300.00	424.80
		$268.65

This balance is only a trifle under the $270 spoken of by Currey, and I think in the absence of any more precise evidence I am justified in adopting $300 as the sum to be credited on the account. In other words the true balance on the whole account after crediting the proper cash payments would be $168.65. As, however, the whole account was not secured by the mortgage it becomes necessary to separate the two accounts, the secured from the unsecured, and ascertain the balance due on the mortgage. The books show that the

1908.

NIXON v. CURREY ET AL.

BARKER, C. J.

debits on the 14th February, 1891, when the mortgage was given, amounted to $325.25 and the cash paid before that $195.12, leaving a balance of $130.13, which with the value of the advances and less credits on account of work (if any) would represent the principal money secured. It is difficult to tell from Currey's evidence exactly what was intended to be secured by the mortgage in addition to the amount then due, which he says was about $90. It seems fairly certain that the whole amount to be secured was limited to $200—in fact both sides adopt that view—but what was included in the term "advances" it is difficult if not altogether impossible to determine. Currey was interrogated on the point by both counsel, and according to his answer to me it would rather seem that the advances were confined to supplies furnished in moneys paid distinctly for the erection of the barn. According to his account of the agreement, as given on cross-examination, the arrangement was that the advances were not only to include these two sums, but also the goods supplied until the time when the barn should be completed, which it was said was two or three years. In the first case the advances according to the plaintiff's counsel amount to $34. I confess I cannot tell from the account how this amount was arrived at, but no objection was made to its accuracy. In the second case I assume that the advances would exceed the limit of $200. Seventeen years have passed since this transaction took place, and every person who had any personal knowledge of it is dead, except the defendant Currey himself. Instead of taking his security in the ordinary form of a mortgage in which the terms of the agreement were set out, he chose to take an absolute conveyance subject to verbal conditions, on the fulfilment of which he was to reconvey the property. If under these circumstances he is unable to give positive evidence as to the sum for which the mortgage was to stand as a security, and thus discharge the *onus* upon him, he cannot complain, if in taking an account of what is due to him on his security, the smaller of the two sums I have mentioned is preferred to the other, as the sum which was originally

made a charge on the land. I therefore hold as a matter of fact that the mortgage was to secure what was then due and the advances which were to be made and which proved to amount to $34. Irrespective of any work which ought to be credited before the mortgage was given, the mortgage account would stand thus:—

Amount of account to Feby. 11, 1891....	$ 325.25
Credit cash paid before tha.....	195.12
	$ 130.13
Add advances for barn.....	34.00
	$ 164.13

It is contended, however, and I think correctly contended from the evidence, that this sum should be reduced by a further credit for work, as it is clear from the evidence that all of the work was not done subsequent to February, 1891, though Currey's books do not show any memorandum as to work done previous to that date. There is no distinct evidence on this point one way or the other. When the $300 was agreed on as the amount to be credited on the whole account, no distribution of the amount was made, as to the sum to be credited before, and the sum to be credited after the mortgage was given. We have, however, Currey's evidence, in which he swears that when the mortgage was given Quint owed him about $90. That sum could only be arrived at by crediting the account with $40 on account of work, reducing the $130.13 down to $90, and reducing the work to be credited afterwards from $300 to $260. The true amount due on the mortgage as I find it is $124.13. In stating this I have not allowed any interest. I have made no allowance for profits for the year during which it is said Currey was in possession, and I have credited the $260—the value of the work done subsequent to the mortgage—in payment of the unsecured part of the mortgage. As to the first, I think the account was not an interest bearing account and was never so treated

1908.

NIXON v. CURREY ET AL.

BARKER, C. J.

by either party, and the agreement when the mortgage was given, was that on the payment of the debt, the property would be reconveyed to Quint. *Thompson* v. *Drew* (1).

As to the second point, there is no evidence upon which to base any finding. It does appear that Currey took some hay, but there is no evidence either as to value or amount. As to the appropriation of payments, the rule is well established that a debtor owing several debts has in the first place the option of ascribing a payment which he makes to any of the several debts as he may think fit, the rule being "*solvitur in modum solventis.*" The debtor must, however, make the appropriation at the time of payment, and if he fails in doing this, the creditor may appropriate the payment to any part of the indebtedness he chooses, and such appropriation need not be shown by any specific act or declaration, but may be inferred, as any other inference may be made, from facts and circumstances. *City Discount Co.* v. *McLean* (2); *Mills* v. *Fowkes* (3); *Simson* v. *Ingham* (4); *St. John* v. *Rykert* (5); *Mayberry* v. *Hunt* (6).

While the creditor cannot recede from an appropriation once made, his right to appropriate exists up to the last moment, or, as it is said in *Philpott* v. *Jones* (7), up to the time the case goes to the jury. This is not a case where in the absence of any appropriation by either party the law will appropriate the first payments to the earliest indebtedness. It is not pretended here that Quint ever made any appropriation, and at the hearing and so soon as any question of this account arose, the defendant Currey has claimed the right to appropriate the payments, first in liquidation of the unsecured account, that is, to that part of the whole account not covered by the mortgage security. There is nothing in the evidence to show any other or any different appropriation than this one, which is the most natural and reasonable

(1) 20 Bea. 49.
(2) L. R. 9 C. P. 692.
(3) 5 Bing. N. C. 455.
(4) 2 B. & C. 65.
(5) 10 S. C. R. 278, per Strong, J.
(6) 34 N. B. R. 628.
(7) 2 A. & E. 41.

appropriation to be made. That part of the account not secured by the mortgage is as follows:—

Amount of account subsequent to Feb. 14, 1891, less the $34 included in the mortgage account,		$334 20
CR.		
Cash paid subsequent to Feb. 14, 1891,	$ 29 68	
Cash by work,	260 00	289 68
Balance due on open account,		$ 44 52
" " mortgage,		124 13
" " on all accounts,		$168 65

The amount due the plaintiff on his judgment is $239.50 and interest on that amount since March 30th, 1896.

The defendant Currey must have his costs after answer added to amount due under the mortgage.

The plaintiff will have the right to redeem in three months. Ordinarily the order would be that in default the bill would stand dismissed with costs, but under the peculiar circumstances of this case, and the parties wishing a sale, there will be a sale in case the plaintiff fails to redeem. *Hallett* v. *Furze* (1).

(1) 31 Ch. D. 312.

1909. MORRISON v. BISHOP OF FREDERICTON, ET AL.

March 2.

Will—Construction—Parol evidence—General Intention of Testator.

The following provision was contained in the will of Miss F. "that the sum of twenty dollars per annum be paid annually to Madeline Fisher, daughter of G. Frederick Fisher, formerly of Fredericton, now deceased, as long as she lives and remains single." M. F. had been married, but before the date of the will, had been divorced *a vinculo*, which fact was well known to the testatrix.

Held, that M. F. was entitled to the legacy.

The following clause was contained in the will of Mrs. F.:—"I release and direct my executors to cancel, without collecting the money, the mortgage to me from John Doherty." Mrs. F. held no mortgage from J. D., and she had never had any dealings with anyone of the name of J. D., but she did hold one from W. D.

Held, that parol evidence was admissible to correct such a mistake.

The codicil to Mrs F's. will contained the following provision:—"All the residue of my estate given to the City of Fredericton by the said will, I give and bequeath to T. Carleton Allen and J. Albert Gregory both of the said city, barristers-at-law, in trust for the purpose of founding an institution to be called the J. J. Fraser Fanaline Place for a home for old ladies, and for that purpose to execute a deed of settlement, containing such provisions and regulations and appointing such trustees, including themselves if they see fit, as they shall consider expedient, at which Home I direct that the said Sarah F. Bliss shall have a comfortable living for her life." The fund created by this provision is not at present sufficient for the purpose for which it was intended.

Held, that the general intention of the testatrix that S. F. B. should have a comfortable living at the Home for the remainder of her life, should not be defeated by reason of the funds being at present inadequate for the maintenance of the Home as intended, and that an allowance from the annual income of the fund would be made to S. F. B. in lieu of the support and living intended for her at the Home.

This is an application for directions in the matter of the construction of the will of Mrs. J. J. Fraser, and of the will of her sister, Miss Fisher. The facts are sufficiently stated in the judgment of the Court.

Albert J. Gregory, K. C., for the plaintiff.

1909.

MORRISON v. BISHOP OF FREDERICTON ET AL.

BARKER, C. J.

Havelock Coy, for the University of New Brunswick.

H. B. Rainsford, for Mrs. Sarah F. Bliss, et al.

J. J. Fraser Winslow, for the Bishop of Fredericton.

R. B. Hanson, for Miss Fisher, et al.

1909. March 2. BARKER, C. J.:—

The position of the several estates whose affairs are involved in this suit is so entirely exceptional, and the directions and decree which I am about to announce are based to so large an extent upon compromises and mutual concessions altogether unavoidable under the circumstances, that it must not be regarded as a precedent. The property belonging to the estate of Miss Fisher and her sister Mrs. Fraser, seems to have been at the time of Mrs. Fraser's death in such confusion and uncertainty, that, without explanations which there was no living person to give, it was impossible to tell how these two estates stood in relation to each other. Those who are interested are, I think, indebted to the counsel, through whose good sense and judgment the conclusion embodied in the referee's report on the questions referred to him, and upon which I understand all parties are agreed, were arrived at.

There are two or three points upon which I am asked to give directions, upon which I shall make a few observations indicating in a general way my reasons for giving the directions contained in the decree I am about to pronounce.

In the first place, as to the legacy to Madeline Fisher by Miss Fisher. The direction in the will is "that the sum of twenty dollars per annum be paid annually to Madeline Fisher, daughter of G. Frederick Fisher, formerly of Fredericton, now deceased, as long as she lives and remains single." It is admitted that this lady was a near relative of the testatrix—a cousin, I think—that she had been in the habit of visiting the testatrix, that she had been married, but before

1909.

MORRISON v. BISHOP OF FREDERICTON ET AL.

BARKER, C. J.

the date of the will had been divorced *a vinculo*. This fact was well known in Fredericton, where the testatrix lived, and there seems to be no doubt that it was known to the testatrix. She has not been married again. I think she is entitled to her annuity. She certainly was not married, and was therefore single because she was free to marry. "Single," as the testatrix used the word, means that the legatee was to have the annuity "until she married."

As to the Doherty mortgage. Mrs. Fraser's will contains the following clause:—"I release and direct my executors to cancel, without collecting the money, the mortgage to me from John Doherty." There is clearly a mistake in the name; it should be William Doherty. Parol evidence is admissible to correct such a mistake: *Smith* v. *Coney* (1); *Doe d. Cook* v. *Danvers* (2). The evidence shows that the testatrix held no mortgage from John Doherty, but she did hold one from William, and there was no John Doherty known in the vicinity.

The other and more difficult question arises out of the provisions in Mrs. Fraser's will providing for the establishment and maintenance of "Fanaline Place," her late residence, as a home for old ladies. The provision in the will is as follows:—"My property on Queen street, known as Fanaline Place, I leave upon trust to E. Byron Winslow executor, and Frances A. Fisher executrix, to be held by them for such purposes as may be mentioned herein, or in any memorandum of directions which may be signed by me now or hereafter. I desire that the house called Fanaline Place be rented and after deducting from rent such money as will be required to pay all necessary taxes, insurance and repairs, the residue of the money accruing from the rent be placed from time to time in Savings Bank to accumulate, or invested in some way as may be deemed best by my executor and executrix for purposes hereinafter mentioned in this my will. And after the decease of my sister Frances I do will

(1) 6 Ves. 42. (2) 7 East. 299.

and bequeath my house known as Fanaline Place, and all the land fenced in around it, to the City of Fredericton, upon trust to be used entirely and altogether as an old ladies home, and known as the J. J. Fraser Fanaline Home, in memory of my dear husband, subject to conditions and directions set forth in this my will, or in any memorandum of directions in reference thereto which may be signed by me at the time of making this my will or in any future, or additional memorandum of directions which may at any future time be signed by me. And I hereby declare and direct that each and every of such memorandum shall be as valid and effectual for the declaration of such uses, purposes and interests as if the same had been incorporated in and made part of this my will or contained in a codicil or codicils thereto." Then follows a provision for the payment to her sister Frances during her life of $500.00 a year out of the income of her bonds, mortgages and other property, except Fanaline Place, and the will then proceeds thus:—"And I further direct that whatever further interest may be obtained from the aforesaid bonds, mortgages, bank shares or whatever other source, shall be taken from time to time by my executor and executrix and placed in Savings Bank with rent money aforesaid, and left to accumulate till after decease of my sister Frances when I will, bequeath and devise all bonds, mortgages, bank shares or from whatever source belonging to me interest may be drawn to the City of Fredericton upon trust, the interest to be used as a fund, the principal in no wise to be touched, to go towards the maintenance and keeping up of the home for old ladies, called the J. J. Fraser Fanaline Home, and I further hope and humbly pray that the government will grant a sum sufficient for the full maintenance of the Home." Between the date of this will and the codicil, which is dated October 20th, 1907, Mr. Winslow and Miss Fisher, who were named executor and executrix, both died. The codicil makes the following provision:—"All the residue of my estate given to the City of Fredericton by the said will, I give and bequeath to T. Carleton Allen

1909.

MORRISON v. BISHOP OF FREDERICTON ET AL.

BARKER, C. J.

and J. Albert Gregory both of the said city, barristers-at-law, in trust for the purpose of founding an institution to be called the J. J. Fraser Fanaline Place for a home for old ladies, and for that purpose to execute a deed of settlement, containing such provisions and regulations and appointing such trustees, including themselves if they see fit, as they shall consider expedient, at which Home I direct that the said Sarah F. Bliss shall have a comfortable living for her life." Mrs. Fraser in the same codicil gave Mrs. Bliss a legacy of $200.00, which has been paid her.

It turns out that the funds applicable for the establishment of this Fanaline Place Home are at present inadequate for that purpose. The net annual interest of the fund will probably not exceed $600.00. The testatrix seems to have had that idea in mind, for she expresses the hope and prayer that the government will grant a sum sufficient for the full maintenance of the Home. Until therefore the fund shall of itself have accumulated sufficiently or been augmented from other sources, some portion of the public who would otherwise have benefited by the institution must be disappointed. Does that, however, apply to the particular case of Mrs. Bliss? I think not. She is now nearly eighty years of age, and there is I think a clearly expressed intention in this codicil, made by Mrs. Fraser only two days before her death, that Mrs. Bliss should have a comfortable living at this Home for the rest of her life. In cases like the present in administering the trust, the general intention of the testator will not be allowed to be defeated by the failure of the particular mode prescribed for effecting it. It is true that the living with which it was supposed Mrs. Bliss would be furnished was one as a resident of this Home. But is she to have none at all because the fund is at present insufficient for the full purpose for which it was intended, and will likely remain so until after Mrs. Bliss' death? Should the intention of the testatrix as to Mrs. Bliss, to whom she gave a prior right to the benefit of this fund, be defeated either because for want of money the Home cannot at present be carried on

as intended and support furnished for more than Mrs. Bliss herself, or because the living cannot be furnished in the particular house intended for the purpose? I think not. This Court in such cases will see that the charitable wishes and intentions of the testator are not thus defeated. If a sum is allowed her for her living until the Home is established, not in excess of the cost of furnishing her a living in the Home if it were in operation, the fund will not have suffered, and the object of the testatrix will have been accomplished: *Biscoe* v. *Jackson* (1); *Re Davis Trusts* (2); *Incorporated Society* v. *Price* (3).

Ordinarily the matter would be referred for inquiry as to the amount, but it is unnecessary to incur that expense here. I shall fix the sum at $300.00 annually, and the trustees will pay that sum annually to Mrs. Bliss during her life, or until she be furnished a living at Fanaline Place when established as a Home for old ladies under the trusts of the will.

The costs of all parties will be taxed and paid one-half by the plaintiff out of the estate of Frances Fisher, and the other one-half by the executors, &c., of Mrs. Fraser out of her estate.

(1) 35 Ch. D. 460. (2) 61 L. T., N. S. 430. (3) 1 J. & LaT. 498.

1909.

May 18.

ROBINSON v. ESTABROOKS AND McALARY.

Lease—Improvident Contract—Misrepresentation—Fraud—Fiduciary Relationship.

R. was the owner of certain premises situated in Saint John, which she leased to E. and M. by a written Indenture of Lease made February 4th, 1908.

The defendant M. offered to draw the lease for her, and did so, and it was executed by all the parties at the same time, in the presence of the father of the defendant E.

The lease was read over to R. by M. on two separate occasions, and was given to R. to read for herself.

R. is a middle-aged woman of property. She has been accustomed to transact all her own business, and manage her own property without assistance from anyone, and it was not contended that she was not fully capable of making an agreement of this nature.

Held, that the lease would not be set aside, as there was no fraud or misrepresentation; that the defendant M. did not stand in any fiduciary relationship to R. by reason of his having drawn the lease, and the rule as to independent advice in such cases was not applicable here.

The lease contained the following provision for renewal:—"For a further term of five years or more and containing and subject to precisely the same covenants, provisions and agreements as are herein contained."

The defendants consenting the words "or more" in the renewal clause were expunged.

Bill filed to set aside a lease from Mary G. Robinson to H. Ashley Estabrooks and Joseph W. McAlary on the ground of fraud and misrepresentation, or failing that, to rectify the lease by striking out certain portions and inserting the usual covenants and conditions. The facts fully appear in the judgment of the Court.

Argument was heard April 10, 1909.

M. G. Teed, K. C., for the plaintiff:—

Lease should be set aside, as it is unfair, and the parties to it did not stand on equal terms. Plaintiff had no independent advice, and did not understand the terms of the lease. Defend-

ant McAlary stood in a confidential relationship to the plaintiff. Failing to set aside the lease, it should be rectified by striking out the renewal clause, and also the words "barn, carriage shed and outbuildings," and inserting the usual clauses and conditions. Failing this, the words "or more" should be struck out of the renewal clause. Kerr on Fraud and Mistake (1); Fry on Specific Performance (2); *Tate* v. *Williamson* (3); *Davis* v. *Abraham* (4); *Baker* v. *Monk* (5); *Torrance* v. *Bolton* (6); *Hoghton* v. *Hoghton* (7); *Cooke* v. *Lamotte* (8); *Harris* v. *Pepperell* (9); Woodfall's Landlord and Tenant (10) and cases there cited, particularly *Church* v. *Brown* (11); *Kendall* v. *Hill* (12); *Hodgkinson* v. *Crowe* (13); *In re Anderton and Milner's Contract* (14); *In re Lander and Bagley's Contract* (15).

H. H. McLean, K. C., for the defendants :—

Lease was read to the plaintiff, was given to her to read and the defendants offered to leave it with her, and she could hardly have failed to understand it ; it contained description of the property and renewal clause. The bill alleges fraud, and it must succeed as a whole or it must fail. If the consideration is fair the plaintiff has no right to complain. The evidence shows that the bargain was a good one for the plaintiff, and the rent reserved as much as could be obtained. Treated as she was, the plaintiff cannot now ask the Court to believe she was deceived or defrauded as to the lease. Fraud has not been established by the plaintiff, nor any right to rectify the lease shown. The lease should stand as it is. *Carman*

(1) pp. 143, 152, 182, 186 and 386.
(2) 2nd Ed. p. 338.
(3) L. R. 2 Ch. 55.
(4) 5 W. R. 465.
(5) 4 DeG. J. & S. 388.
(6) L. R. 8 Ch. 118.
(7) 15 Bea. 278 at p. 311.
(8) 15 Bea. 234 at p. 245.
(9) L. R. 5 Eq. 1.
(10) 1908 Ed. p. 138.
(11) 15 Ves. 258 at p. 265.
(12) 6 Jur. N. S. 968.
(13) L. R. 10 Ch. 622.
(14) 45 Ch. D. 476.
(15) 1892 3 Ch. 41.

1909.

ROBINSON v. ESTABROOKS AND MCALARY.

BARKER, C. J.

v. *Smith* (1); *Tate* v. *Williamson* (*supra*); *Baker* v. *Monk* (*supra*); Fry on Specific Performance (2); *Torrance* v. *Boltton* (*supra*); *Hoghton* v. *Hoghton* (*supra*); *Cooke* v. *Lamotte* (*supra*); Woodfall's Landlord and Tenant (3); Con. Stat. (1903) Chap. 153, Sec. 3.

F. R. Taylor, for the defendants:—

Cites *May* v. *Platt* (4); Dart on Vendors and Purchasers (5); Kerr on Fraud and Mistake (6).

M. G. Teed, K. C., in reply:—

Parties did not deal on equal terms in this matter, and lease should be set aside. See *Baker* v. *Monk* (*supra*) Fraud is said to lurk in generalities. Defendant McAlary drew the lease and clothed himself with the character of the plaintiff's solicitor. He stood in a fiduciary relationship to the plaintiff, and the *onus* is on him to show that she understood the transaction. See *Tate* v. *Williamson* (*supra*); *Davis* v. *Abraham* (*supra*); *Hoghton* v. *Hoghton* (*supra*). If plaintiff did not understand the lease and was misled, the Court can set it aside, whether the bargain was a good one for the plaintiff or not. The rent reserved is not grossly inadequate, but it is too little, and the bargain is an improvident one. The plaintiff was entitled to have a solicitor, who would have seen that the usual covenants and provisos were put in the lease. If the renewal clause was inserted fraudulently, then the whole lease should be set aside, as fraud in one part destroys the whole.

1909. May 18. BARKER, C. J.:—

The plaintiff, who is an unmarried woman living in the City of St. John, is the owner of a property fronting on Douglas Avenue, about 400 or 500 feet from the junction of that street with Main street. It has a frontage of some 80 feet on the Avenue and extends back some 150 feet. On it

(1) 3 N. B. E. R. 44.
(2) 2nd Ed. 338, sec. 754.
(3) 1908 Ed. 110.
(4) 1900 1 Ch. 616.
(5) 6th Ed. 839.
(6) 1901 Ed. 363.

1909.

ROBINSON v. ESTABROOKS AND MCALARY.

BARKER, C. J.

stands a four storey brick building some 40 feet wide. In the ground flat there are two shops capable of being used together, and the three upper flats are used as tenements. On the rear of the lot there is a warehouse used in connection with the stores, a barn and some sheds. The plaintiff purchased this property from one Watson in August, 1906, for the sum of $6,400. It was then, and apparently is yet, subject to two mortgages, one for $2,500, and one for $1,000. The difference between the amount of these two mortgages and the purchase money, $2,900, the plaintiff paid in cash at the time of the purchase. In the latter part of 1907 or the early part of 1908, the defendant McAlary, who had been in business for some five or six years, and the defendant Estabrooks who had never been in business at all on his own account, entered into partnership with a view of carrying on a wholesale and retail grocery business, and for that purpose they applied to the plaintiff for a lease of a portion of the premises I have described, and which had been vacant for some time. As a result of the negotations plaintiff and defendants on the 4th February, 1908, entered into a lease for a term of five years from May 1st, 1908, at an annual rental of $175, with a covenant for a renewal for a further term of five years. This lease is under seal; it was executed on the day it bears date by the plaintiff and defendants, in the presence of one H. A. Estabrooks, who is the father of the defendant of that name, and it was registered on the 24th February. The premises demised as described in the lease are as follows:—"Two stores and rooms (including the refrigerator) and all appurtenances in connection therewith situate in brick building No. 34, 36, 38 Douglas Avenue, St. John, N. B., also including the warehouses, barn, carriage sheds, and out-buildings situate in rear of said brick building, with privilege of erecting new warehouse if desired in connection with the said premises, with right of way to and from all said premises, and yard room, to be free from all taxes, bills of every kind and nature whatsoever." The lease contains the usual covenant for payment of rent, and also a provision for a renewal

1909.

ROBINSON &c. v. ESTABROOKS AND McALARY.

BARKER, C. J.

"for a further term of five years or more, and containing and subject to precisely the same covenants, provisions and agreements as are herein contained." In May, 1908, the plaintiff commenced this suit for the purpose of setting aside the lease on the ground that it had been procured by means of fraud and misrepresentation. In section nine of the bill, the plaintiff alleges that what she agreed to lease to the defendants were the two stores, the use of the refrigerator, the upper or northerly warehouse and a shed adjoining it on the north side of the lot, with the right of way to the rear of the lot—also a right to repair the shed or to rebuild the same—and that the improvements were to belong to her, and that the tenancy was to be only for five years without any right of renewal, and the lease was to be upon the covenants and conditions usually contained in a lease of that nature. It is alleged in the same section that negotiations for renting the property commenced in the autumn of 1907, and that the plaintiff finally agreed to give a lease such as I have mentioned. In section eleven the plaintiff alleges that the defendant McAlary asked her to agree to a renewal of the term, but she distinctly refused to do so. The bill also alleges that the plaintiff is very ignorant of business matters, that she had no independent advice, that $175 a year is a grossly inadequate rent for the premises, that she was induced to permit or assent to the defendant McAlary drawing the lease, that he did draw it, and represented the lease in question to be in accordance with the terms agreed on which I have mentioned. The bill also alleges that McAlary read over the lease to the plaintiff, "but," to quote from section twelve, "in so reading the same, did not make the said plaintiff understand, and the said plaintiff did not understand, and the said defendant Joseph A. McAlary did not read the said lease so that the plaintiff could understand that the said lease contained anything more than as above set forth as having been agreed to." The bill also alleges that the plaintiff was thus induced to execute the lease, believing it to be in accordance with the terms settled upon as set forth in section nine. Section seventen of the bill is

as follows :—"That the said plaintiff charges and alleges that the said defendants have by fraud and misrepresentation induced the said plaintiff to execute the said instrument which was so executed by her, as above set forth." The bill prays for a decree setting aside the lease on the ground of fraud, and, failing that, for a decree rectifying the lease by striking out certain portions and inserting the usual covenants and conditions which it is said were improperly omitted.

In the view I take of the evidence in this case, it is unnecessary to discuss these two heads of relief separately. If the plaintiff can succeed at all, it must I think be on the ground of fraud, and in disposing of that question the other will be disposed of also. This plaintiff is not a woman whose mental powers were either naturally weak or had been impaired by old age or disease. On the contrary, she manages her own affairs without assistance and her capacity to make a contract, such as this lease is, and to fully understand its nature and effect, is not questioned. She is not in straitened circumstances driving her to make improvident bargains in order to relieve her pressing necessities. On the contrary, she is a woman of property amply sufficient for her maintenance in comfort. The bill alleges that she is very ignorant of business affairs. But her own evidence disproves that, at all events, so far as the particular kind of business involved in this dispute is concerned. She seems to have bought and sold valuable properties without the assistance of anyone; she rented her premises, made out and served notices to quit, collected rents, and managed her property in all its details without requiring aid from anyone. In section nine of the bill she has placed herself on record in regard to this very transaction as one who for weeks was in negotiation with McAlary over this lease, who absolutely refused to any renewal clause and who finally consented to an arrangement as clear cut, as positive and as business like as only one of experience and knowledge of such affairs could have secured. All those attendant circumstances which make success easy for those who set out to defraud in transactions of this character are

1909.

ROBINSON v. ESTABROOKS AND MCALARY.

BARKER, C. J.

absent here. In such a case questions such as the improvidence of the contract, the inadequacy of the rent, the unfairness of the provisions of the agreement and the supposed inequality of the terms upon which the parties met have but little bearing on the real matter in dispute. The facts are I think against the plaintiff, even on these minor points. When the plaintiff purchased this property in 1906 the stores, warehouse and barn leased to these defendants were rented for $164. The sheds are of little or no value. Secord occupied the stores in 1905 and 1906 at a rental of $100 a year. He refused to pay an advanced rent in May, 1907, and moved his business elsewhere. The stores were vacant from May, 1907, until these defendants took them, though the plaintiff naturally tried to find a tenant. In addition to this, the premises were out of repair, the stores had to be cleaned up and shelving put in with an office. This cost the sum of $257.51. The defendants were also obliged to expend $32.67 in fitting up a stall in the warehouse, and the cost of the repairs necessary to put the warehouse and barn in good order was estimated at from three to five hundred dollars. In addition to this, if the defendants carry out their intention of erecting a new warehouse, it will revert to the plaintiff at the end of the term. There is no evidence that the plaintiff could have got an increased rent, and there is strong evidence that as a business stand it is not nearly so valuable as it would be on Main street, a few hundred feet away. There is nothing improvident I think in the lease or the rent reserved. It was also contended that this lease must be set aside on the ground that the plaintiff had no independent or competent advice. I am at a loss to see how any such question can arise here. The plaintiff's competency to contract is in no way disputed, neither is her capacity to fully comprehend the nature and effect of the business in hand. Why is her freedom to contract to be enjoyed only in the presence of an adviser whom she has not asked for and does not require? It was said that McAlary stood in some fiduciary relation to the plaintiff in reference to this property, which entitled her

1909.

ROBINSON v. ESTABROOKS AND McALARY.

BARKER, C. J.

to the protection of an independent adviser, and therefore upon well settled equitable rules, the lease would be set aside on that ground. There is absolutely nothing in the evidence, as given by the plaintiff herself, to show any such fiduciary relation. The only fact that seemed to be relied on was that he offered to draw the lease and she consented to his doing so. He says that she complained of lawyer's charges, and he then said he would draw the lease, and if it did not suit her, she need not sign it. The independent advice to which a donor or grantor is entitled when dealing with a person occupying some fiduciary relation to him is for his protection in making the contract, so that the person who is to receive the benefit may not secure it as a result of the influence naturally arising out of the relation itself, or of the influence actively used in his own favor. In this particular case, before anything was said about drawing the lease, the parties had settled between themselves all the terms of the contract and agreed to them, and the provisions of the lease, whether good for the defendants or not, could in no possible way be attributed to a fiduciary relation subsequently created, even if what took place could under any circumstances be construed as having that effect, which as at present advised I think it could not. The verbal agreement was binding as a tenancy at will, and it only required a writing to satisfy the Statute of Frauds. What McAlary was to do was simply to reduce the verbal arrangement into writing for the signatures of the parties, without in any way altering the effect, adding such clauses as might be usual in such instruments in order to secure the performance of their mutual obligations according to their intention. If in doing so an error as to some material matter should be made either by way of mistake, inadvertence or fraud, and the plaintiff executed the instrument, she might, on a proper case shown, have it rectified so as to conform to the actual agreement between the parties or have it set aside on the ground of fraud. No question of independent advice could arise—the necessity for that ended when the negotiations culminated in a complete and concluded agreement. The

1909.

ROBINSON v. ESTABROOKS AND MCALARY.

BARKER, C. J.

only thing which might be said is that where fraud is charged, as it is here, he was given a chance of smuggling something into the lease for his own benefit with a dishonest intention. Coming now to the substantial point in this—that is, the charge of fraud and misrepresentation—what are the facts? I have already mentioned the plaintiff's position as to the premises and her anxiety to secure a tenant. What was the defendants position? They were starting a business in premises which were originally built and for a long time occupied in a business such as they were opening. They required the warehouse to store their heavy goods in, and the barn and out-buildings to stable their horses and delivery wagons used in connection with their business. They had a business to make on premises for which there seemed no demand. In view of the situation of both parties, the lease in question seems to me not unreasonable. The plaintiff's account of this transaction is that McAlary came to her and offered $150 for the two stores, what she calls the upper half of the warehouse, the right of way to the rear of the lot from the street and a shed. She asked $200, but they eventually agreed on $175. There was nothing she says about the barn or a renewal or improvements. That was the result of their negotiations. The defendant McAlary she says drew the lease in question and took it to her, and when both defendants were there, read it over to her, and that as he read it, all the property described was the two stores, the refrigerator, the upper half of the warehouse, the shed and the right of way, and to quote her own language, "he nodded his head at the same time, to make it sure." As to the renewal clause her evidence is as follows:—

"Q. When he read it to you, did he read anything about renewal, and what, if anything, took place if he did? A. He said, I gave it to him for five years, and then at their request he said, have it for five more; and I said, no, not at all, never, and he said, if you don't want to at the end of the five, you need not give it, you need not renew it. I never intended to renew it, never.

"Q. What he read was for five years, and at their request a renewal for five years more, and you objected to it? A. Yes, I objected to it and didn't give it, and it rested there.

This is the actual lease in dispute, and by the plaintiff's evidence just quoted, it will be seen that McAlary read the precise provision for renewal as it is in the lease which she then signed. The examination continues:—

"Q. And he said, if at the end of five years you didn't want to give it you need not? A. Yes.

"Q. Did you sign it, having that understanding in your mind that you need not give it unless you wished? A. Certainly.

"Q. Was anything said, or did you understand anything being said that at their request you were to make a lease for more than five years by way of renewal. A. No, never.

"Q. You never understood anything about more than five years? A. I never.

How it is possible for these statements to be reconciled, I do not know. In answer to a question, she had said that he read this very renewal clause from the lease, and that when he read that it was for five years and at their request a renewal for five more, she objected to it and didn't give it. And a moment afterwards she said she understood nothing about a renewal—it was only for five years. The plaintiff says this was the occasion when the lease was executed, both defendants were there and McAlary read it over to her to see if it was right. She was then asked:—

"Q. After it was read over in this way, did you read it yourself? A. I never read it. He says I did. I never read it.

"Q. Did he hand it to you? A. Yes, he handed it to me, but I didn't read it. There was a lot of fine writing between it, and it seemed kind of dark, and I said, I suppose it is all right, I didn't read it."

1909.

ROBINSON v. ESTABROOKS AND MCALARY.

BARKER, C. J.

She then tells how the witness was sent for, and the lease was executed in his presence. There is no pretence that the lease was changed in any way, and it is clear from the plaintiff's own testimony that she must have signed the lease with the renewal clause in it just as she says McAlary read it to her, though she did object. This is important, because the defendants say that she did object at first, but afterwards consented to the clause. Later on in her evidence the plaintiff states that on this occasion there was no one present but McAlary and herself. On her cross-examination she swears positively that the lease was only read to her once on the day it was executed, and that when the witness and the defendant Estabrooks came it was not read over to her. McAlary's evidence as to what took place when the lease was executed is this: There is no dispute as to the statement that the plaintiff and defendants executed this lease when they were all together on the 4th February, 1908, in the presence of Henry A. Estabrooks, who signed as the subscribing witness. McAlary says that when the lease was prepared by him he and the other defendant went to the plaintiff's home, that he read it over to her precisely as it is now, except her second name was not in—that he omitted nothing from it—that he handed the plaintiff the lease and told her to read it over for herself and see that everything was right, that she had it in her hand for fully fifteen minutes. She objected to the renewal and said she wouldn't sign it at all. The defendants then said they could not take the premises on any other condition, because there was a lot of repairs—that Estabrooks got up to go out, saying it was no use. They then offered to leave the lease with her, to take her time and look it over. When Estabrooks got up to go out, the plaintiff said she might as well sign the lease now as ever. McAlary said, you need not sign it now if you don't want to, that he did not want her to sign it, if it was not right. Estabrooks then went out and brought back his father as a witness, and, after he came, the lease was again read over just as it is, omitting nothing, that the plaintiff and others said it was satisfactory.

The plaintiff went and got the ink, her middle name was inserted where necessary, and the parties executed it. McAlary then told the plaintiff that he would give her a copy later on, to which she replied, "all right, any time." This witness also states that just before signing the lease the defendant Estabrooks asked her if she had given Watson and Godard notice to quit. They then occupied the barn and warehouse, and she said she had, and added:—"Whether you lease the premises or not they have to go, because they are not paying the rent." The defendant Estabrooks, previous to his going into this business, was in his father's employ at Gagetown. He says that he came down to St. John about the 10th of January, when he and McAlary inspected these premises with a view of making the plaintiff an offer. After they had gone over the buildings they made her an offer of $150 for the two stores, the buildings in the rear, and barn and shed, that is the premises mentioned in the lease. She wanted $200. They then told her they could not see their way clear to give it, and she wanted to know if they wouldn't think it over, which they agreed to do. Five years was the time mentioned. After talking the matter over they concluded to offer $175. He went home, and about the latter part of the month he heard from McAlary, and by appointment he came to St. John on the 3rd of February, his father accompanying him on some business of his own. On the afternoon of the 4th February they took the lease and went to the plaintiff, when the lease was read to her by McAlary just as it is. The plaintiff objected to nothing, except the renewal clause. His evidence on this point is as follows:—

"Q. Did he read the whole lease? A. He did.

"Q. Everything that is in it? A. He did.

"Q. And Miss Robinson objected to the clause for renewal after he had read it? A. Yes.

"Q. What did she say about it? A. Said she couldn't give a lease for renewal; she wouldn't sign a lease like that.

1909.

ROBINSON v. ESTABROOKS AND MCALARY.

BARKER, C. J.

"Q. Was anything said by you or McAlary then to her? A. I told her that was my errand down, and if she didn't care to sign it we wouldn't take it on any other terms.

"Q. What business did you and McAlary intend to carry on there? A. Grocery business.

"Q. Wholesale and retail grocery business? A. Yes.

"Q. And you wanted the property for a longer term than five years if you were successful there? A. Certainly, and it had to be repaired.

"Q. When you said you would not take it on any other terms but with a right of a further term of renewal, what did Miss Robinson say or do then? A. I got up to go and she said she might as well sign it now as any time.

"Q. Said she would sign it? A. She would sign it."

He then went to a store where his father was, not far away, and brought him to the plaintiff. He says that the lease was given to the plaintiff by McAlary to read—that she had it in her hands for fifteen or twenty minutes, long enough to read it, and she was turning the sheets over and acting as if reading it. That was before Henry Estabrooks came in. After he had come, and while he and the defendants and plaintiff were all together, this witness states that the lease was again read over by McAlary, and the plaintiff made no objection to it, and it was signed. He also states that before the lease was signed he asked the plaintiff if she had given Watson and Goddard notice to quit, and she said she had, that they were poor tenants and didn't pay their rent.

Henry A. Estabrooks evidence entirely corroborates that of the defendants as to what took place at the time of the execution of the lease on the 4th February at the plaintiff's house. He says he recollects that McAlary, who read it, mentioned the renewal clause, and the barn and out-buildings just as they are mentioned in the lease. He also says that before the lease was signed Ashley Estabrooks asked the plaintiff if she had notified the parties in the barn to quit the 1st of May, and she said she had.

In *Hutchinson* v. *Calder*, a case noted in Cassels Dig. 785, the Supreme Court of Canada, is thus reported:— "Where the Court below dismissed the plaintiff's bill praying for the recission of an executed contract, held that a clear case of fraud must be established to obtain the recission of an executed contract, and the allegations of fraud made by the plaintiff being uncorroborated and contradicted in every particular by the defendant, neither the Court below, nor the Court in appeal would be justified in rescinding the contract in question." The evidence to which I have referred brings this case within the rule laid down in the authority just quoted, and I should be justified in dismissing the bill without further remark. It is, however, only fair in cases of this kind to those who have been deliberately charged with gross fraud that if the Court entertains the view that the charge has been entirely disproved, it should say so and not take refuge behind a mere technical rule. There are other portions of the evidence, which, in this connection, should not be lost sight of. Some reliance was placed on the fact that no copy of this lease was given to the plaintiff until she had made repeated applications for it. It cannot be that the defendants were in any way keeping the matter a secret, because they put it on the public records within three weeks of its date. When the plaintiff's mind became so disturbed by the rumours as to the iniquity of this lease set afloat by some of her meddlesome neighbors, she applied to the defendants for a copy of it. This was in the latter part of March, or early part of April, and the evidence shows that she received it about the middle of April. And yet she never even read it until about the first of May. She says she "chased" after the defendants for this copy, went repeatedly for it, so great was her anxiety as to its contents and the rights she had given the defendants under it, and when she got it she did not take the trouble to look at it. Unless the plaintiff's account is much exaggerated, it seems incredible to me that she should have treated the copy with such indifference. It is equally incredible that if this lease was read to the plaintiff certainly

1909.

ROBINSON v. ESTABROOKS AND MCALARY.

BARKER, C. J.

on two occasions, as these witnesses positively swear, in its present form and without omissions that she should not have understood that the barn was included. A technical term or a formal covenant she might have misunderstood, but the words of the lease are the two stores and rooms, etc., "including the warehouse, barn, carriage sheds and out-buildings, etc." For McAlary, in the presence of his partner, to attempt such a piece of deception by purposely omitting these words seems silly, for Estabrooks, unless a party to the fraud, must have detected it. There was no more reason for omitting the words "barn," "carriage sheds, etc.," than for omitting the renewal clause. Of the two, perhaps that was the more important provision. Besides this the lease was immediately handed the plaintiff, so that she might read it, and the fraud would be discovered. This lease, however, was not the only paper executed that day. It was part of the arrangement that the defendants were to have immediate possession of the premises in order to make the necessary repairs. A written agreement to this effect authorizing them to take possession for that purpose was put in evidence. It was signed by the plaintiff at the same time as the lease, in presence of the same witness, and it describes the property in the same words as are used in the lease. The plaintiff admits she made a verbal agreement to that effect, but she says positively that the signature to that paper is not hers, and that she never heard of the paper until long after the transaction took place. As to this paper she is positively contradicted by the two defendants who were present when it was signed and who say it was read over to her, and by Estabrooks the witness to the signature. In addition to this she swore positively that the signature to the lease in dispute, the instrument which she wishes to set aside, was not hers, and it was with great reluctance that she eventually admitted that it might be. Her signature to her answer to the cross-interrogatories filed in the suit was shown her, and she swore most positively that it was not genuine. To charge this lady with a wilful disregard for the truth would, I have no doubt, be

doing her an injustice. I cannot, however, satisfactorily account for the pertinacity with which she adhered to statements which were palpably incorrect, and others which were not only improbable in themselves, but were positively contradicted by at least three witnesses. It is sufficient for me to say that it is quite impossible for this Court to accept her evidence as a basis for granting the relief asked for, and I think the fraud with which the defendants are charged is not proved.

Mr. Teed contended that if all other relief was refused the plaintiff was at least entitled to have the words "or more" struck out of the renewal clause, so that it would be limited to a second term of only five years and no more. It would seem from the defendants' evidence that they only expected a lease for five years and a renewal for five, and that would be the meaning of it if the word "or" were expunged. They consent to the words "or more" being struck out if there is any doubt in reference to the meaning of the clause in its present form. Had that been made the only ground of complaint originally, I have no doubt this litigation might have been avoided.

There will be a decree expunging the words "or more" in the renewal clause, the defendants consenting thereto, and in other respects the bill will be dismissed.

The plaintiff must pay the costs.

1909.

June 12.

SEELY v. KERR, ET AL.

Lease from City of Saint John—Foreshore or Water Lots—Riparian Rights—Rights of Lessees—Damaging Erections—Injunction.

The plaintiff S. is the lessee from the City of Saint John of two water lots (so-called) situated between high and low water mark in the harbor of Saint John, on which a wharf or wharves and buildings have been erected, which have been used at different times for various purposes. One of their advantages consists of access by the waters of the harbor of Saint John, there being ten feet of water on the southern side of the plaintiff's wharf at high tide. The southern side is the only part of the plaintiff's wharf to which he has direct access by the waters of the harbor, his lot or lots, as originally leased, being shut off on the other three sides. The lease, under renewals of which S. is tenant, was granted by the City of Saint John some fifty years ago, both lots being included in the one lease at that time.

The defendant K. is the lessee from the City of Saint John of the water lot lying immediately south of S's. lots. It is bounded on the north by S's. southerly line, and extends along the entire southern side of S's. lot. K's. lease was granted a few months ago, being dated March 10th, 1909, and is precisely similar in terms to S's. leases, except as to rent reserved.

K. is proceeding to build a wharf covering his entire lot, which when finished, will completely close up all direct access by water from the harbor to S's. lots.

By the Charter of the City of Saint John, confirmed by an Act of the Legislature, the title to these water lots was vested in the City, and in addition to this the City was made the conservator of the water of the harbor, and has sole power over it. In the Charter is the following saving clause:—"So always as such piers or wharves so to be erected or streets so to be laid out, do not extend to the taking away of any person's right or property, without his, her or their consent, or by some known laws of the said Province of New Brunswick or by the law of the land."

Held, that the right of direct access by water from the harbor appertained to the plaintiff's lots and could not be taken away, and that the plaintiff was entitled to an injunction restraining the defendants from interfering with this right.

Motion on notice for an injunction to restrain the defendants from further proceeding with the building of a wharf on a water lot leased to them by the City of Saint John. The facts fully appear in the judgment of the Court.

Argument was heard June 7, 8, 1909.

A. A. Wilson, K. C., for the plaintiff:—

The lease under which the plaintiff holds was granted by the city over fifty years ago, and the lessees have always had right of access by water to these lots, and the plaintiff now has this right by prescription. The plaintiff as one of the public, one of the citizens, has a right to the use of the waters of the harbor. The plaintiff also has right of access by the waters of the harbor to his lots, as a riparian proprietor. See *Lyon* v. *Fishmongers' Co.* (1); *Booth* v. *Ratte* (2); *Marshall* v. *Guion* (3); *Williams* v. *City of New York* (4); *VanDolson* v. *City of New York* (5); Farnham on Waters (6); Gould on Waters (7).

C. N. Skinner, K. C., for the defendants:—

The city is the only riparian owner in regard to the harbor by the charter itself. The plaintiff never has been and is not a riparian owner. The charter gives these rights to the city as trustee for the citizens. Everything is vested in the city, viz., foreshore rights, riparian rights, etc. The city holds the waters of the harbor for the benefit of the public. Under the charter the city has the right to deal with the harbor and with all wharf building as to them seems best; and the mayor and aldermen are forever made the conservators of the harbor. The plaintiff's title is from the city, and he cannot cut down the city's rights. The servient estate cannot cut down the remainder man's rights. See Local and Private Statutes of New Brunswick (8); Washburn on Easements and Servitudes (9).

(1) L. R. 1 App. Cas. 662 at p. 673.
(2) L. R. 15 App. Cas. 188.
(3) 4 Denio 58 N. Y. C. L. R. 581.
(4) 11 Northeastern Rep. 829
(5) 17 Fed. Rep. 817.
(6) Vol. I. pp. 536, 558.
(7) p. 275, sec. 148.
(8) Vol. 3 pp 982. 984, 998, 1010 and 1014.
(9) Ed. 1863, pp. 110, 162 and 163.

1909.

SEELY v. KERR, ET AL.

BARKER, C. J.

A. O. Earle, K. C., for the plaintiff, in reply :—

Rights granted by the charter are subject to the private rights of individuals. Fifty years enjoyment gives rights to the plaintiff, and he is entitled to access by water. The equities of the case are all in favor of the plaintiff. Malice is shown by the defendants in hastening the work after they knew proceedings for an injunction had been instituted. See *Lyon* v. *Fishmongers' Co.* (*supra*).

1909. June 29. BARKER, C. J.:—

This is a motion on notice for an injunction to restrain the defendants from further proceeding with the building of a wharf on a water lot leased to them by the City of Saint John so as to obstruct the plaintiff's access by water to his lot also under lease to him from the City. The facts are not complicated and there is substantially no dispute in reference to them. It appears that by a certain Indenture of Lease dated February 2nd, 1882, the City of Saint John leased to one John Sandall a certain water lot described in the lease as follows: "That certain lot, piece or parcel of land beach or flats situate lying and being in Sydney Ward in the said City and known and distinguished in the plan of water lots laid out by the said Mayor, Aldermen and Commonalty of the City of Saint John approved of in Common Council the 26th October, A. D. 1836 and on file in the office of the Common Clerk of the said City by the number (2) two Block A. the said lot being 50 feet front on Charlotte Street extending back preserving the same breadth 80 feet or to the east side line of the wharf erected as and for a public highway on the east side of Sydney Market Slip." The term was seven years from May 1st, 1877, and the annual rent was $14. In addition to the usual convenants for payment of rent and the right to re-enter in case of default, the lease contains a proviso that in case the lessee shall during the term erect or put upon the lot any wharves, bridges, buildings or other erections, the value of the same shall at the

1909.

SEELY v. KERR, ET AL. BARKER, C. J.

expiration of the term be appraised by two persons, one to be chosen by the by the lessor and one by the lessee, which two in case of their disagreement shall choose a third, and the value so appraised the City agreed to pay or to renew the lease for a term not less than seven years upon the same terms. This lease was in fact a renewal of a similar lease made by the City to Sandall dated March 16th, 1858, for twelve years. On the 26th November, 1879, the City leased to one Joseph A. McAvity water lot No. 1, in Block A, for a term of seven years at an annual rental of $14., and in all respects upon the same terms and conditions as the lease to Sandall. Lot 1, leased to McAvity is of the same size as Lot. 2., it lies directly north of it and is bounded on its eastern side by the western side of Charlotte Street and on the west by the Sydney Market Wharf. This last lease is also a renewal of a similar lease made by the City to one John McAvity dated March 17th, 1858, for twelve years, It appears that many years ago—the precise time is not stated but I should say some forty odd years ago—wharves were built on these two lots and they were eventually used together as one lot. Their value, if unobstructed, is placed at $3,000 and the rent last year was $450. Through a series of intermediate assignments the present plaintiff became the assignee of these leases and of the improvements upon the lots in question on the 18th June, 1900, since which time he has been in possession of them as the tenant of the City. None of these leases contain any reservation of any kind by the City as to the use or occupation of the adjoining water lots. The western side of Charlotte Street at this point extends down in a southerly direction to what is known as the Ballast Wharf, a distance of some seven hundred feet. It runs below high water mark and is built up as a wharf at which vessels load and discharge and for which the City collects wharfage. At the southern side of the plaintiff's Lot No. 2 there is at high water an average depth of water of about ten feet, and schooners of from eighty to one hundred and fifty tons come and discharge cargo there,

1909.

SEELY v. KERR, ET AL.

BARKER, C. J.

though at low water the ground is dry. The wharves have been used at various times for different purposes as the business of the owner for the time being required—sometimes as a lumber yard and sometimes as a coal yard—and vessels came there discharging lumber or coal at the southern side of the lot as required for the business at the time being carried on there.

The defendants are a corporation under the New Brunswick Joint Stock Company's Act, and Francis Kerr is its manager and principal shareholder. On the 10th March last (1909) he obtained for the defendants from the City of St. John a lease of water lot No. 3, lying immediately to the south of the plaintiff's lot. It extends along the southern line of lot No. 2 and across the southern end of the Sydney Street Wharf, in all a distance of one hundred and forty feet and has a width of one hundred feet, making a lot one hundred by one hundred and forty feet. The defendants have in course of erection on this lot a wharf, occupying its entire area, for the purpose of carrying on the coal business. The effect of this structure is to deprive the plaintiff altogether of access to his wharf by water as the defendants' wharf occupies the entire water frontage of eighty feet which the plaintiff and others used as I have described. The defendants' lease was not produced, but I understand that it is precisely similar in terms to the plaintiff's lease, except as to the rent reserved. Speaking in general terms the situation of these lots is this. They are both held by tenants of the same landland under leases, one granted over forty years ago, the other a few months ago; they are both water lots lying between high and low water mark and forming a part of the foreshore owned by the city when the first lease was made and continuously since; the wharf now under construction by the defendants will when completed close up the water frontage of the plaintiff's lot, the effect of which will necessarily be to materially reduce its value. The defendants say that they have by virtue of their lease authority to do this—not that the lease in any way specifically authorizes it, for it does not—but simply as a

result of the demise itself. At first blush it seems a somewhat startling proposition that under the conditions existing here, the city can thus enrich one of its tenants at the expense of another, or increase the harbor facilities for the benefit of the public by expropriating the property of a private citizen without his consent and without compensation. I thought it likely that the Recorder of the City, who appeared for the defendants and is necessarily familiar with the legislation procured by the city during the last century, would cite some statute bearing on the subject, but with the exception of the Charter of the City he has produced none, and I therefore assume that there is none. This reduces the question within a comparatively narrow compass.

It is scarcely necessary to point out that by the Charter of the City of St. John, confirmed as it was by an act of the legislature, the title to these water lots between high and low water mark is vested in the City. In addition to this the City, by the express terms of the Charter, is made the conservator of the water of the harbor, and has the sole power of amending and improving the same for the more convenient, safe and easy navigating, anchoring, riding and fastening the shipping resorting to the City; and for the better regulating and ordering the same, the City shall and may as it shall see proper, erect and build such and so many piers and wharves into the river and for the loading and unloading of goods as for the making docks and slips for the purposes aforesaid, so always as such piers or wharves so to be erected do not extend to the taking away of any person's right or property, without his, her or their consent, or by some known laws of the said Province of New Brunswick or by the law of the land. Without the authority of the City the erection of a wharf, such as the defendants are constructing, would be altogether illegal and the structure would be an obstruction to the public navigation and removable by the City authorities as a nuisance: *Brown* v. *Reed* (1); *Eagles* v. *Merritt* (2).

(1) 2 Pug. 206. (2) 2 Allen 550.

1909.

SEELY v. KERR, ET AL.

BARKER, C. J.

That a private individual may have rights in public navigable waters beyond his rights as one of the public is settled by *Lyon* v. *Wardens of the Fishmongers' Co.* (1). The question arose between two riparian owners on the Thames, the control of which is vested in a Board of Conservators who are given powers, similar in many respects in reference to that river, to those given by the City Charter to the City in reference to the harbor. One of these riparian proprietors was proceeding under a license from the Conservators to erect an embankment in front of a wharf on a portion of the property of the other, the effect of which would have been to take away his access to the river at that point. The license was granted in pursuance of section fifty-three of the Thames Conservancy Act, which provides as follows:—"It shall be lawful for the Conservators to grant to the owner or occupier of any land fronting and immediately adjoining the river Thames, a license to make any dock, basin, pier, jetty, wharf, quay or embankment, wall, or other work, immediately in front of his land, and into the body of the said river, upon payment of such fair and reasonable consideration as is by this Act directed, and under and subject to such other conditions and restrictions as the Conservators shall think fit to impose." Speaking of this section Lord Cairns says:—"My Lords, it is to be observed that the power granted by the 53rd section to the Conservators is not simply a power to be exercised by them with any view to the improvement of the navigation of the Thames. It is of course a power which, like every other power given them by the Act, they are to exercise so as to preserve the navigation from injury; but subject to this, it is a power of granting to individuals, upon a money payment, the privilege of doing what they otherwise could not do in a navigable river, of pushing out an embankment or work in front of their land into the body of the river. * * * Now, it is farther to be observed that no compensation whatever is provided by the Conservancy Act, for any injury done to the adjacent

(1) 1 A. C. 662.

1909.

SEELY v. KERR, ET AL. BARKER, C. J.

owners of lands on the banks of the river, by the execution of a license granted under the 53rd section. Admitting, therefore, as may well be done, that a license under the 53rd section, would be a perfect justification for an embankment made by a riparian owner in front of his own land, so far as it merely affected the public right of navigation, it would appear to be, *a priori*, in the very highest degree improbable that an Act of Parliament could intend, through the operation of that section, to authorize the Conservators to permit one riparian owner to affect injuriously the land of another riparian owner, in consideration of a payment to be made, not to the person injured, but to the Conservators themselves." Is there any substantial distinction between the two cases? In the one we find the Conservators granting a license authorizing the building of an embankment for a pecuniary compensation; in the other they gave a lease for a term of years at an annual rent of a part of the foreshore, not specifically but impliedly authorizing the erection of a wharf on the demised lot. In both cases, while we may assume that the Conservators did not consider the erections injurious to the public right of navigation, they became private property and were intended for the special use and advantage of private individuals. In both cases the sole question involved was the right of access to one's property by water. The effect of the license, as well as the lease, was only to prevent the erections authorized to be built on the lot from being indictable as public nuisances by reason of their interfering with the public rights of navigation. In the same case Lord Cairns says:—"Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank, now is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in com-

1909.

SEELY v. KERR, ET AL. BARKER, C. J.

mon with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction. * * * The taking away of river frontage of a wharf, or the raising of an impediment along the frontage, interrupting the access between the wharf and the river, may be an injury to the public right of navigation; but it is not the less an injury to the owner of the wharf, which, in the absence of any Parliamentary authority, would be compensated by damages, or altogether prevented." The right of access to one's property by water and by land is governed by the same principle. This Court recognized that doctrine in *Byron* v. *Stimpson* (1), where it was held that a riparian owner whose land was bounded by high water mark was entitled to an unobstructed access from his land to the navigable waters of the sea. In the *Attorney-General* v. *The Conservators of the Thames* (2), Wood, V. C., at page 31 is thus reported:—"The plaintiff, an innkeeper on the banks of a navigable river, complained that the access of the public to his house was obstructed by timber which the defendant had placed in the river; and it would be the height of absurdity to say, that a private right is not interfered with, when a man who has been accustomed to enter his house from a highway finds his doorway made impassable, so that he no longer has access to his house from the public highway. This would equally be a private injury to him, whether the right of the public to pass and re-pass along the highway were or were not at the same time interfered with." Has the City any better right to take from the plaintiff his right of access by water than they have to take away his right of access by land from Charlotte Street by some structure in no way connected with the street maintenance? *Rose* v. *Groves* (3).

The precise nature of this right of access has come up for discussion in many cases in reference to compensation to

(1) 1 P. & B. 697. (2) 1 H. & M. 1. (3) 5 Man. & G. 613.

1909.

SEELY v. KERR, ET AL. BARKER, C. J.

be paid by railway and other companies vested with the power of expropriating private lands. The statutes under which the compensation was claimed are not all alike, but in all the right of access, both by land and water, has been held an injury to the property which must be paid for. *The Duke of Buccleuch* v. *Metropolitan Board of Works* (1); *The Metropolitan Board of Works* v. *McCarthy* (2); *North Shore Railway Co.* v. *Pion* (3).

It was held in the *Lyons* v. *Fishmongers* case that the right of access which was sought to be taken away was a right within the saving clause in the Thames Conservancy Act and therefore the Conservancy authorities had no power to license the building of the embankment. On this point Lord Cairns says: "It appears to me impossible to say that a mode of enjoyment of land on the bank of a navigable river which is thus valuable, and as to which a landowner can thus protect himself against disturbance, is otherwise than a right or claim to which the owner of land on the bank of the river is by law entitled within the meaning of such a saving clause as that which I have read." Section 179 of the Thames Act which is there referred to is as follows:—"None of the powers by this Act conferred, or anything in this Act contained, shall extend to take away, alter or abridge, any right, claim, privilege, franchise, exemption, or immunity to which any owner or occupier of any lands, tenements, or hereditaments on the banks of the river, &c." The saving clause in the Charter of the City is: "so always as such piers or wharves so to be erected or streets so to be laid out, do not extend to the taking away of any person's right or property, without his, her or their consent, or by some known laws of the said Province of New Brunswick or by the law of the land." In reference to the saving clause in the Thames Act Lord Selbourne says: "That a public body, such as the Thames Conservancy Board, should be empowered by Parliament to sell, for money, to private persons the right to execute, for their own benefit, works injuriously affecting the

(1) L. R. 7 H. L. 243. (2) L. R. 5 H. L. 418. (3) 14 A. C. 612.

1909.

SEELY v. KERR, ET AL.

BARKER, C. J.

land of an adjoining proprietor without compensating him for that injury (which is the contention of the respondents), is inconsistent with the ordinary principles and with the general course of public legislation on such subjects. When, therefore, we find in the Act which is alleged to confer such powers a saving clause in the large and untechnical terms of the 179th section, by which (without any forced or unreasonable extention of their natural meaning) this class of rights may be sufficiently protected, I think we ought not to hesitate to construe it so as to afford that protection."

The principal value of a wharf property consists in its right of access by water, and, as applied to the plaintiff's property the right is one which under the saving clause in the Charter neither the City nor its lessee could without his consent take away from him. Per King, J. in *Magee* v. *The Mayor, etc., of Saint John* (1).

I think the plaintiff is entitled to an injunction restraining the defendants from obstructing his access to his wharf by the wharf which they are building or have completed on their lot. At the hearing if I am right in my view the plaintiff will be entitled to a mandatory injunction for the removal of the obstructions or for damages. I shall not exercise the power which the Court has on this motion to grant a mandatory injunction, althougth in view of the defendants' action after notice of this motion was given I think I should be justified in doing so. See *Daniel* v. *Ferguson* (2); *Smith* v. *Day* (3). Costs reserved.

The defendants will be restrained from erecting or permitting to be erected any wharf or other structure on the lot occupied by them under the lease dated March 11th, 1909, from the City of Saint John mentioned in the plaintiff's bill and lying immediately to the south of plaintiff's Lot No. 2 mentioned in the bill, whereby the plaintiff's right of access to the waters of the harbour of Saint John on the

(1) 23 N. B. R. 275, at page 300. (2) 1891, 2 Ch. D. 27.
(3) 13 Ch. D. 651.

southern side of his wharf or the privilege heretofore enjoyed by the plaintiff of loading and unloading, embarking and disembarking goods on the south side of the said wharf may be defeated, destroyed or prejudiced.

1909.

July 13.

EARLE v. HARRISON, ET AL.

Mortgagee in Possession—Exceptions to Referee's Report—Accounting—Interest—Rents.

A mortgagee in possession is not as a rule entitled to commission for collecting rents. There must be evidence to support such a charge.

Before a mortgagee in possession can be made liable for rents which he has failed to collect there must be evidence to show that it has been due to his default in some way.

This was a suit for foreclosure and sale under a mortgage dated April 27th, 1899, to secure the sum of $450.00 for two years, with interest at 7%.

The bill was filed June 10th, 1902. The mortgage went into possession August 29th, 1902. The decree was made August 16th, 1908, and a reference was ordered to Charles F. Sanford, Referee in Equity, to take the accounts. After the mortgagee went into possession, the premises were managed by his agents Messrs. Bustin & Porter, who procured tenants, collected rents, paid taxes and did repairs. At the hearing before the referee the defendants were represented by counsel. Objection having been made to the accounts as filed, it was agreed by all parties that the referee should make up the accounts. The referee accordingly submitted an account in which every payment of rent was credited as a payment on account of the money due at that time, and the interest was then computed on the balance brought down. Evidence was put in to prove this account. One of the items of expenditure, under date of August 10th, 1908, was as follows: "To paid for plumbing $20.00." In support of this item the witness, Mr. Bustin, produced an itemized statement of account from J. S. Coughlan, a plumber, amounting to $28.83, and stated

that he had ordered the plumber to do work on the houses when the tenants complained, and the tenants afterwards said the plumber had fixed things up. Other than that he had no personal knowledge that the work had been done. Counsel for the mortgagee moved to amend the account by increasing the item to $28.83. The referee refused to do this and allowed the item at $20.00. The referee found due on the mortgage on August 29th, 1902, $587.20; expenditures to March 4th, 1909, $976.14; interest to March 4th, 1909, $243.51; rents collected $1,239.99; balance due on mortgage March 4th, 1909, $560.76; rents due February 1st, 1909, $483.71, which amount added to the rents collected totaled $1,723.70. Of this amount the referee found that the plaintiff should have collected 80% or $1,378.96, and therefore charged him with the difference $138.97. It appeared that during the hearing, Mr. Bustin in answer to a question from the referee had stated that 85% or 90% of gross rental should be collected from property as a rule, but apart from this there was no evidence adduced to show what percentage should have been collected in this particular case. In the accounts as originally filed whenever a payment of rent was credited, a corresponding charge of 10% commission was made. In the accounts as made up by the referee no commission charges appeared, and he refused to allow a commission. The referee found there was due on March 4th, 1909, the sum of $421.79.

The plaintiff filed exceptions to the referee's report as follows:—

First Exception:—For that the findings of the said referee are not supported by the evidence:

Second Exception:—For that the said referee was in error in not allowing as a disbursement, in addition to the Twenty Dollars ($20.00) allowed by him for the amount of bill of John S. Coughlan, the sum of Eight Dollars ($8.00) and Eighty Three Cents (0.83):

1909.

EARLE v. HARRISON, ET AL.

Third Exception :—For that the said referee was in error in allowing only Two Hundred and Forty Three Dollars and Fifty One Cents ($243.51) as the amount of interest chargeable under the mortgage set out in the plaintiff's bill in this cause during the period between the Ninth day of August, A. D. 1902, and the Fourth day of March, A. D. 1909:

Fourth Exception :—For that the said referee was in error in charging the said plaintiff with One Hundred and Thirty Eight Dollars and Ninety Seven Cents ($138.97) in respect of rents of the mortgaged premises which he had failed to collect:

Fifth Exception :—For that the said referee was in error in finding that the said plaintiff was not entitled to be allowed commission paid his agent for the collection of the rents of the said mortgaged premises.

Argument was heard May 18, 1909.

E. T. C. Knowles, for the plaintiff, in support of the exceptions :—

The referee should have allowed the plaintiff to amend the account by changing the Coughlan item from $20.00 to $28.83. The referee's system of making up the account by a system of rests was right up to the time the plaintiff took possession, but from then he should have made up the interest to the date of the finding (March 4th, 1909), and then deducted the credits from that: further, he should have made up the whole outlay and allowed interest on that before deducting the amount received. The rule is the mortgagee is not bound to accept payment by driblets: *Union Bank of London* v. *Ingram* (1); *Bright* v. *Campbell* (2); *Ainsworth* v. *Wilding* (3); *Wrigley* v. *Gill* (4). As there was no wilful default, the plaintiff is not liable for the rents he failed to

(1) 16 Ch. D. 53.
(2) 41 Ch. D. 388.
(3) 1905, 1 Ch. 435 at p. 440.
(4) 1906, 1 Ch. 165.

1909.

EARLE v. HARRISON, ET AL.

collect: Fisher on Mortgages (1). Here it was impossible to collect more as the tenants were of a poor class: *Coldwell* v. *Hall* (2); *Union Bank of London* v. *Ingram* (*supra*). The plaintiff was absent frequently from the city, and the circumstances were such that he was justified in employing an agent, and therefore he was entitled to commission: *Bright* v. *Campbell* (*supra*).

J. A. Barry for the defendant Harrison, and *C. F. Inches* for the other defendants, contra:—

There was an agreement. The referee's account was made up in accordance with a method determined on by all the parties, and therefore should not be changed.

D. Mullin, K. C., for the defendant, Harrison contra:—

The plaintiff should have expelled tenants in arrears, and should have distrained. The plaintiff's agents were guilty of gross mismanagement.

(BARKER, C. J. The evidence must show the facts from which the Court must judge that 80% of the rents should be collected).

Commission of 10% was an extraordinary charge, the more so when it was just as convenient for the tenants to pay at the plaintiff's office as to the plaintiff's agents: Coote on Mortgage (3); Fisher on Mortgage (4); *Godfrey* v. *Watson* (5). The account should be made up as outlined in Bell and Dunn on Mortgages (6). A mortgagee in possession is accountable for rents he ought to have collected: *Chaplin* v. *Young* (7); *Parkinson* v. *Hanbury* (8).

Knowles in reply:—

The cases cited for the plaintiff before the referee and contained in the referee's report are applicable. The ap-

(1) 3rd Ed., Vol. 2, 944.
(2) 9 Gr. Ch. R. 110, at p. 115.
(3) 4th Ed. 743.
(4) 3rd Ed., Vol. 2, 953.
(5) 3 Atk. 484.
(6) p. 155.
(7) 33 Bea. 330.
(8) L. R. 2 E. & I. App. 1.

1909. pointment of an agent is determined by the reasonableness of the matter, and not by the convenience of the tenants.

FARLE v. HARRISON, ET AL. BARKER, C. J.

1909. July 13. BARKER, C. J.

The plaintiff has excepted to the referee's report as to the amount due on the mortgage. The plaintiff took possession under his mortgage on the 29th August, 1902. The mortgage was given to secure the payment of $450.00 and interest at the rate of 7%. The referee has found that when the plaintiff took possession there was due on the mortgage $587.20, and about this sum there is no dispute. He has also found that the plaintiff since he went into possession has expended in the payment of taxes, ground rents, necessary repairs and improvements up to March 4th, 1909, the sum of $976.14, and about this there is no dispute. He has also reported that the interest chargeable under the mortgage from August 29th, 1902, to March 4th, 1909, is $243.51. He also finds that the plaintiff received from rents during the same period the sum of $1,239.99, leaving a balance due on the mortgage of $560.76 on March 4th, 1909. There seems to be an error as the balance should be $566.86. From the balance of $560.76 the referee has deducted the sum of $138.97 for rents which the plaintiff is chargeable as having been lost by his default. This leaves the sum of $421.79 as the true balance found by the referee to be due on the mortgage on the 4th March, 1909. The third exception refers to the item of $243.51 which the plaintiff alleges was made up on a wrong principle. He claims that it should be $267.17. I do not think either sum is correct. The principle upon which the account of a mortgagee in possession should be made up is stated by Jessel, M. R., in *Union Bank of London* v. *Ingram* (1). He says—"In taking the account you take all the mortgagee's receipts, &c., * * * * for all the rents and receipts go in reduction of the principal and interest." (See page 56.) See also *Bright* v. *Campbell* (2).

(1) 16 Ch. D. 53. (2) 41 Ch. D. 388.

The referee made up the account by crediting rents as they came in on the mortgage as payments. The difference is not very great. The plaintiff's amount is wrong. He has charged 7% on the balance of $587.20 which of itself is partly made up of interest. By the endorsement on the summons which was issued March 11th, 1902, there was due for Interest $12.50, and the interest from March 11th, 1902, to August 29th, 1902, is $14.74. These two items amounting to $27.24 should be deducted from the $587.20 and interest charged on the difference, or $559.96 from August 29th, 1902, to March 4th, 1909—six years and one hundred and eighty-seven days—which amounts to $255.26. That will be the sum instead of $243.51 as stated by the Referee and $267.17 as claimed by the plaintiff.

I think the referee was quite right in disallowing the claim for commission for collecting the rents. There does not seem to be anything in the evidence to warrant any such charge. The referee was equally wrong as to the $138.97 which he charged to the plaintiff as a loss on rents not collected. As to this item the referee says in his report :—"I find that the mortgagee in possession should have collected at least eighty per cent. of the rental of the said mortgaged premises during the period of possession of the same, or the sum of $138.97 more than he did collect, and therefore charge the plaintiff with the said sum of $138.97 which I deduct from the balance of $560.76, &c." Before a mortgage in possession can be made liable for rents which he has failed to collect, there must be evidence to show that it has been due to his default in some way. I never heard of any such rule as the referee has acted upon—there is no evidence of any such rule and of course no such rule could well exist.

The account will be stated thus :—

There was due on the mortgage on August 29th, 1902, when the plaintiff took possession, ...	$ 587 20

1909.

EARLE v. HARRISON, ET AL.

BARKER, C. J.

Taxes, ground rents, improvements up to March 4th, 1909,.....	$976 14
Interest on the mortgage from August 29th, 1902, to March 4th, 1909,.....	255 26
	$1818 60

CR.

By rents, &c.,.....	$1239 99
March 4th, 1909, Balance due,.....	$ 578 61

DYER v. McGUIRE, ET AL. 1909.

July 13.

Conveyance—Fraud—Stat. 13 Eliz. Cap. 5—Valuable Consideration—Bona Fides.

On February 10th, 1908 the plaintiff D. commenced an action at law against the defendent M , a verdict was given for D. and judgment was signed for $764.58 on June 5th, 1908, which judgment still remains unsatisfied.

On May 20th, 1908, M. conveyed certain real estate which he owned in Charlotte County to his son A. M. for the consideration of $900, taking in part payment a mortgage for $500, accompanied by a promissory note for a like amount.

A. M. performed work for his father M and on May 20th, 1908, the latter was indebted to him in the sum of $400, which with the mortgage for $500 made up the sum of $900 the consideration for which M's property was conveyed to A. M.

M. was not insolvent at the time he made the conveyance to his son A. M. The only creditors he had besides his son were the plaintiff, and his solicitor to whom he owed a small amount for professional services rendered in connection with D's. suit against him.

Held, that the conveyance would not be set aside and the bill must be dismissed, as the evidence showed that the sale was made *bona fide* for a valuable consideration with the intent to pass the property, and in such a case it was immaterial whether or not there was an intention to defeat or defraud a creditor.

This suit was brought for the purpose of setting aside certain conveyances of real estate as having been made to delay, hinder and defeat the plaintiff, a creditor of the defendant Robert McGuire, and which are therefore fraudulent under the Statute 13th, Eliz. Cap. 5. On the 10th February, 1908, the plaintiff commenced an action at law against the defendant Robert McGuire for the recovery of the sum of $764.58 alleged to be due to the plaintiff for goods sold and delivered by him to McGuire. The action was tried at the Charlotte Circuit held in May 1908, and resulted in a verdict by the jury for the whole amount. The postea was stayed until the first Monday in the Trinity Term following, which

1909.

DYER v. MCGUIRE, ET AL.

was June 3rd. No motion was made for a new trial and on the 5th June, 1908, judgment was signed for $764.58, which remains unsatisfied. A writ of Fi. Fa. was issued to the Sheriff of Charlotte County on June 6th, 1908, which was afterwards returned "*nulla bona*". At the time the action was commenced the defendant Robert McGuire owned a house and some land on which he was living, in Saint Patrick, Charlotte County, valued at $900.00 On the 20th May, 1908, the defendant Robert McGuire conveyed this property to his son the defendant Archibald E. McGuire for the consideration of $900.00. This conveyance was acknowledged the same day and registered on May 22nd, 1908. That at the same time, that is May 20th, Archibald E. McGuire and his wife executed a mortgage to Robert McGuire to secure the sum of $500.00 in three years with interest at 5% accompanied by his promissory note for the same amount and of a like tenor and date. This mortgage was acknowledged by Archibald McGuire on May 20th, and by his wife on May 21st, and it was registered May 22nd. On the 21st May, McGuire assigned this mortgage and the mortgage debt to one Melbourne MacMonagle for the consideration of $500.00. It was acknowledged the same day and registered on the 22nd, May. On July 8th, 1908, MacMonagle assigned the mortgage and note to his daughter the defendant Millie I. Hunt for an alleged consideration of $506.84, the amount then due on it. That assignment was acknowledged July 8th, and registered July 9th. The bill alleges that all these conveyances were made without consideration and fraudulently as against the plaintiff as a creditor of Robert McGuire's, and in order to prevent him from realizing the amount of his judgment, and that they are void under the Statute of Elizabeth.

Argument was heard May 22nd, 1909.

A. O. Earle, K. C. for the defendant Millie I Hunt:—

The bill should be dismissed as against this defendant, as there is no evidence at all against her.

L. A. Currey, K. C. (*M. N. Cockburn*, K. C. with him) for the plaintiff:—

The whole of these transactions are tainted with fraud. The knowledge of the father was also the knowledge of the daughter.

(This application for the dismissal of the bill as against Millie I. Hunt was refused by the Court.)

All these transfers were fraudulent and are therefore null and void; further they were made *pendente lite* to the knowledge of the parties. There was a relationship of some kind among all the parties to the several conveyances. The alleged consideration was an old debt, and there was an absence of items; it was also inadequate, and there was a misstatement in regard to it. In the transaction between McGuire and MacMonagle there has been an inability to prove the payment of any consideration. MacMonagle acted for all the parties to these transfers and had full knowledge of every transaction, and his knowledge as attorney and agent was binding on the others.

M. MacMonagle, K. C. for the defendants Archibald E. McGuire and Robert McGuire contra:—

Robert McGuire had the right to prefer one creditor to another, and Archibald E. McGuire has shown a reasonably good debt. In *In re Johnson* (1), the Court found that the deed was an honestly intended family arrangement, and not executed with the object of defeating creditors, and that such a deed was valid under the Stat. 13th. Eliz. Chap. 5. *Whelpley* v. *Riley* (2), is a New Brunswick case, where there was held to be no such fraud as to void the sale. In *Ex parte Games* (3), it was held that a bill of sale would only be void if it were not *bona fide*, that is if it were a mere cloak for retaining a benefit to the grantor. In *Hale* v. *Metropolitan Saloon Omnibus Company* (4), it was held that if *bona*

(1) 20 Ch. D. 389.
(2) 2 Allen 275.
(3) 12 Ch. D. 314.
(4) 28 L. J., Ch. 777

1909.

DYER v. MCGUIRE, ET AL.

BARKER, C. J.

fide for a valuable consideration, a sale of goods is not invalidated. See also *Wood* v. *Dixie* (1), and *Earle* v. *Pickin* (2).

Currey, K. C. in reply.

(His Honor recitated the facts of the case as stated above, and proceeded as follows.)

1909. July 13. BARKER, C. J. :—

The case set up by the way of answer is this. It is alleged that the defendant Robert McGuire was indebted to his son in the sum of $400.00 for money lent and for work and labor, and that he and his father agreed upon the sale of this house and premises to him for $900.00 to be paid for as follows:—$400.00 in satisfaction of the debt, and the balance of $500.00 to be secured by his note and a mortgage payable in three years. Robert McGuire was also indebted to MacMonagle in the sum of $154.40 for costs incurred in the defence of McGuire in the Dyer suit, and in settlement of that sum and in consideration of the balance to be paid in cash he assigned the mortgage and note to MacMonagle. The evidence shows that MacMonagle on the 21st May, 1908, when the mortgage was assigned to him gave his note to Robert McGuire on demand for $345.60, the difference between the $500.00 and his bill of costs. This amount MacMonagle swears he paid to McGuire in cash on the 2nd June, 1908, and his note was given up. The evidence also shows that the defendant Mrs. Hunt, who is a daughter of Mr. MacMonagle and resides somewhere in Maine, was entitled under her grandfather's will to a legacy of $500.00. Isaac McElroy the grandfather died in 1890, and by his will which is dated Dec. 5th, 1890, he gave to his three granddaughters, children of his daughter Mrs. MacMonagle, $500.00 each. Letters testamentary were granted to the

(1) 7 Q. B. R. 892. (2) 5 C. & P. 542.

1909.

DYER v. MCGUIRE, ET AL.

BARKER, C. J.

testator's daughter Mrs. MacMonagle as executrix, and his son William McElroy as executor. The evidence shows that money for the payment of these legacies had come into the hands of Mrs. MacMonagle as executrix, and on her death it came to MacMonagle who became liable to the legatees for the amount due them. He said that he had sometime since settled with the two other daughters by assigning them mortgages, and he settled with Mrs. Hunt in the same way by assigning to her this mortgage and note which he considered a perfectly good security for the amount. This account is corroborated by the evidence of Mrs. Hunt and there is nothing to contradict it in any way. The case depends mainly upon the evidence as to the indebtedness of Robert McGuire to his son, for I take it to be long since settled by *Wood* v. *Dixie* (1), and numerous other cases that a conveyance by way of sale for a valuable consideration will be upheld, although the vendor's object may have been to defeat an execution creditor, provided the sale is made *bona fide* and with the intention to pass the property. In *Whelphey* v. *Riley* (2), Parker, J. directed the jury "on the authority of *Wood* v. *Dixie* that the circumstance of Hall (the debtor) selling the hay in order to prevent its being taken in execution on the expected judgments in the suits then pending (no judgments or executions being then in existence), although he then intended to run away from the Province, would not constitute such fraud as to deprive him of the power to sell, and thus make the sale void; nor would the knowledge of these facts by the plaintiff (that is the vendee) prevent his becoming the purchaser, and thereby obtaining the property in the hay for a full valuable consideration, although it might cast suspicion on the whole transaction and call for a careful inquiry into the reality of the bargain and sale. The property was not bound until the executions were delivered to be executed, and therefore Hall, although in debt or even insolvent, might lawfully dispose of it for a valid consideration." This charge was sustained by the full Court. In *Alton* v. *Harrison* (3),

(1) 7 Q. B. D. 892. (2) 2 Allen 275. (3) L. R. 4 Ch. Ap. 622.

1909.

DYER v. MCGUIRE, ET AL.

BARKER, C. J.

the law is thus laid down: "In this, as in all other cases of the same kind, the question is as to the *bona fides* of the transaction. If the deed of mortgage and bill of sale was executed by Harrison honestly for the purpose of giving a security to the five creditors, and was not a contrivance resorted to for his own personal benefit, it is not void, but must have effect." Gifford, L. J. adds "If this appeal were to succeed the result would be, that one creditor would be paid in full, and the other creditors entirely left out, which is exactly that which the appellants now complain of as unjust. I have no hesitation in saying that it makes no difference in regard to the Statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bona fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the Statute of Elizabeth." See *Dalglish* v. *McCarthy* (1), *Mulcahy* v. *Archibald* (2).

This is not the case of a voluntary conveyance, nor is it the case of a business man in insolvent circumstances, making a conveyance of his property in order to defeat certain or all of his creditors. McGuire does not seem to have owed any person but Dyer the plaintiff for the goods, and his son for his work and for money lent, and MacMonagle for the costs of his defence to Dyer's action at law. Robert McGuire was not produced as a witness. It appears that in the action to recover the price of the goods, he, by way of counter claim, set up a claim against the present plaintiff for alienating his wife's affections from him. It seems that McGuire's wife left him a year or two ago and he, rightly or wrongly, attributed it to the plaintiff's influence and charged him with having illicit intercourse with her. The jury found in favor of the plaintiff on this charge, and, after the trial was ended, McGuire was arrested on a charge of perjury as to his evidence at that trial. He was tried and found guilty. A case was reserved as to the improper admission of some evidence, and a new trial was ordered. When the present hearing took

(1) 19 Grant 578. (2) 28 S. C. R. 523.

place he was confined in the gaol of Charlotte awaiting the argument of the case reserved. He was not sworn as a witness in the present case. The only evidence that we have as to the indebtedness from Robert McGuire to his son is that of the son and his wife. Archibald McGuire, the son, is about twenty-seven years of age, has been married some three years, and has been earning his own living since he was seventeen or eighteen years old. He says that about a month before these conveyances were made, he was living at Woodland, which is I understand, somewhere in Maine, though not far from Charlotte County, and his father sent for him to go and see him. The father was then living alone on this land in question, Elmville is the name of the place. His evidence then proceeds:—

"Q. Was he there living on the land? A. Yes.

"Q. Had he anyone living with him on the land at that time? A. No, he was living alone.

"Q. What took place at that time between you and your father with reference to this land? A. He told me he was going to sell his place, he wanted me to buy it.

"Q. You said he wanted you to buy the land? A. Yes.

"Q. Go on and state what took place between you and your father about it. A. He said he owed me a little bill, and I might as well buy the place, he was going to sell it, he was there alone and he was tired staying there alone, and I told him I didn't have the money just then, and he said I could give him a mortgage for the balance he owed me and I could pay it sometime. I thought it over and agreed to take it.

"Q. How much did he want for the farm in the first instance? A. He told me about a thousand dollars, he would let me pay for it.

"Q Did you agree to give a thousand dollars? A. No, we agreed on nine hundred.

"Q. Then you got a deed of it at that time. A. No.

1909.

DYER v. McGUIRE, ET AL.

BARKER, C. J.

"Q. How long after that before you got a deed of it? A. It must have been a month anyway.

"Q. At any time before you got the deed of it, did you make up a bill against your father? A. He said he owed me he didn't know how much, and we made up the bill between us to see how much he did owe me.

"Q. Did you make up the bill? A. Yes."

This conversation McGuire says, and there is nothing to contradict it, took place about a month before the conveyance was made. It must, therefore, have been before the trial took place, as the verdict was given on the 14th May. He alleges a very natural reason for selling his home—his wife had left him and he was alone. The account which Archibald made up against his father amounts to $400.00, and consists of six items. The first is for four months work in 1904, $100. There is a charge of $150.00 for five months work with him in 1905. A charge of $24.00 for two weeks work at $2.00 a day in 1906. A charge of $48.00 for a month and twenty-four days work in January, 1907, and a charge of $37.50 for a month and a half's work in March, 1907. The last item is a charge of $40.50 for money lent. As to this the evidence is not very satisfactory, except as to about $20.00 or $30.00. But as to the other items, the evidence of Archibald McGuire is positive as to the work being done, and as to the amount there is no suggestion that it is excessive. Mrs. McGuire corroborates her husband's evidence as to several of the items. It is true that the account was not kept in a very regular way, but, on the other hand, the charges relate to work, the particulars of which it is not difficult to recollect. It is also true that $400.00 seems a large sum for Archibald McGuire in his circumstances of life to allow to accumulate as a debt due by his father. No doubt it is, and that is a feature of the case to be considered. The dealing, however, was between father and son—Archibald says that he did ask for his money at times, but his father never seemed to have any money. Reliance is also placed on certain admissions, which the defendant Archibald McGuire, is said

to have made to the plaintiff and Mr. Cockburn his solicitor in a conversation apparently brought about by the latter. Mr. Cockburn gives this account of it in his evidence:—"I told Mr. McGuire, speaking of these transfers, that I considered them all fraudulent and made for the purpose of defeating Mr. Dyer in obtaining satisfaction of his verdict for the judgment which he had then signed, and Archibald E. McGuire said when the property had to pass out of his father's hands, his father had to lose the property, he felt he had as good a right to be paid for his work as Mr. Dyer to be paid for his bill. I said, for what work do you claim you have a right to be paid? And he said, for work on the farm. I asked if his father had ever agreed, when working on the farm to pay him wages, and he said no, and I asked if he had ever asked or demanded wages from his father during that time, and he said he hadn't, and I asked if previous to bringing suit by Dyer against his father Robert McGuire, had he ever asked or demanded wages, and he said no, and I asked if Mr. Dyer hadn't sued his father and obtained a verdict against him would he have asked for wages or for a deed of the property, and he said no, I wouldn't. I said, Archie, this matter will have to be brought up in Court to set aside those transfers, and I hope you will tell the same story there as you are telling now, and he said, I wouldn't tell any other story for I wouldn't tell a lie for the whole thing, and he further asked if the deed should turn out to be a fraud what responsibility he would have in the matter, and I said, Archie, you will have to take chances in that. I also stated if he expected to be allowed to hold this property he would have to satisfy Mr. Dyer's claim. I further stated to him, I thought it was rather a poor way for a young man like him to be starting life, to be mixed up in a transaction as shady as I regarded these proceedings." It seems to me that if McGuire's claim is a good one, as I think the evidence shows it to be, his right to be paid is just as good as that of the plaintiff. I never feel much impressed with evidence of admissions brought about as these were, but take them as Mr. Cockburn

1909.

DYER v. McGUIRE, ET AL.

BARKER, C. J.

has given them, what do they amount to? McGuire then as before and since put forward his claim for work, which the evidence shows to have been done, and his right to be paid for it does not rest on his worrying his father or asking for security.

There is one other piece of evidence given by the plaintiff to which I should refer. One P. E. Mills, a provincial constable living at St. Stephen, went to Woodland a town in Maine on the 28th January, 1908, to serve Robert McGuire with an order to appear in this suit. He found McGuire at a house there sawing wood. McGuire was a stranger to him, and instead of serving the paper which he went there to do, he engaged in a long conservation with him about the Dyer suit and the transfer of the property. The whole conversation is inadmissible against anyone except himself, and if any part of the case rested upon the evidence of this interview, I should not act upon it. It seems that Mills, who, according to his own testimony, has not taken anything in the way of intoxicating liquor for three years, that day took a flask with him, gave McGuire a drink and then gave him the flask. He returned a second time on that day and then served the order for appearance. The same witness arrested McGuire on the charge of perjury on the 14th of April last, and on their way from St. Stephen to St. Andrews on the steamer "Aurora" a conversation took place between Mr. Cockburn and McGuire which Mills described as follows:—"Mr. Cockburn approached to where we were and entered into conversation with Robert McGuire. He asked Mr. McGuire if his son had paid him anything on the day he received the deed and he said, no, he hadn't—that he owed his son for labor performed and for money he had borrowed at various times in small sums as long ago as when his mother was living home, and that he gave the deed to his son for the amount of money, $400 I think he said, and labor the son had done for him, and he received no money at that time, at the time he gave the deed, but that his son had given his note, I think he said for $500 on that day.

"Q. What further was stated? A. Mr. Cockburn asked him if MacMonagle paid him anything, and he said that he owed MacMonagle quite a large bill and that he gave MacMonagle the mortgage for the bill and some money, he couldn't remember how much the bill was, nor how much money he received from MacMonagle."

That is evidence given by the plaintiff's own witness on the part of the plaintiff himself. The declaration of the defendant Robert McGuire entirely corroborates the evidence of his son in reference to this transaction.

When the conveyance was made to Archibald McGuire and the mortgage was given back with Archibald's note for $500 and interest, it only paid Archibald's indebtedness and left Robert with a mortgage subject to execution and sufficient to pay the plaintiff's claim less costs. That this mortgage was assigned to MacMonagle does not alter Archibald McGuire's position for he had nothing to do with that assignment. It was a transaction between his father and MacMonagle in which he had no interest whatever. If that was fraudulent it does not arise here for MacMonagle is not a a party to this suit.

I think the evidence shows that it was the intention of Robert and Archibald McGuire to pass the estate in the property according to the terms of the conveyance and that it was made *bona fide* for a valuable consideration and that it was not intended to defeat or defraud the plaintiff, though that is I think immaterial. In *Harman* v. *Richards* (1), the Lord Justice Turner says: "It remains, then, to be considered whether the settlement, which was thus made for valuable consideration, was also made *bona fide*; for a deed, though made for valuable consideration, may be affected by *mala fides*. But those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have, I think a task of great difficulty to discharge."

In *Freeman* v. *Pope* (2), Gifford L. J. says: "I do not think that the Vice Chancellor need have felt any difficulty

(1) 10 Hare 78. (2) 5 C. Ap. at page 544.

1909.

DYER v. MCGUIRE, ET AL.

BARKER, C. J.

about the case of *Spirett* v. *Willows* (1), but he seems to have considered, that in order to defeat a voluntary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved, that is, in such cases as *Holmes* v. *Penney* (2), and *Lloyd* v. *Attwood* (3), where the instruments sought to be set aside were founded on valuable consideration; but where the settlement is voluntary, there the intent may be inferred in a variety of ways."

In *In re Johnson, Golden* v. *Gillam* (4), Fry, J. says: "I therefore proceed to inquire, looking to all the circumstances of the case and at the nature of the instrument itself, whether I can or ought to infer an intent to defraud creditors in the parties to the deed. I say in the parties to the deed, because it appears to me to be plain that whatever fraudulent intent there may have been in the mind of Judith Johnson (the vendor), it would not avoid the deed unless it was shown to have been concurred in by Alice, who became the purchaser under the deed. It has not been contended and it could not be contended, that the mere fraudulent intent of the vendor could avoid the deed, if the purchaser were free from that fraud. * * * It appears plain from the case of *Holmes* v. *Penney* (5), that the mere fact of a *bona fide* creditor being defeated is not of itself sufficient to set aside a deed founded on a valuable consideration." In *Mulcahy* v. *Archibald* (6), already referred to, the Court says: "The goods which were transferred to her (plaintiff) by Wrayton from the proceeds of which the goods levied upon were bought were transferred to her on an account of this indebtedness. No doubt it was the intention on the part of Wrayton to prevent this seizure under the judgment which he expected Blais would very soon recover against him and for the very purpose of securing his sister at the expense of Blais and with intent

(1) 3 D. J. & S. 293.
(2) 3 K. & J. 90.
(3) 3 DeG. & J. 614.
(4) 20 Ch. D. 389.
(5) 3 K. & J. 90.
(6) 28 S. C. R. 523.

either to delay him in his remedies or to defeat them altogether. The Statute of Elizabeth, while making void transfers, the object of which is to defeat or delay creditors, does not make void but expressly protects them in the interest of transferees who have given valuable consideration therefor, and it has been decided over and over again that knowledge on the part of such a transferee of the motive or design of the transferor is not conclusive of bad faith or will not preclude him from obtaining the benefit of his security. So long as there is an existing debt and the transfer to him is made for the purpose of securing that debt and he does not either directly or indirectly make himself an instrument for the purpose of subsequently benefiting the transferor he is protected and the transaction cannot be held void." See also *Middleton* v. *Pollock* (1).

Apart from the suspicion which naturally attaches to transfers of property following each other in such close proximity on the eve of a judgment being signed against the debtor, there is nothing in the evidence in this case to show any fraudulent intent in the McGuires, much less in Archibald, or to show that the transfers were not made *bona fide* for the purpose of securing Archibald's debt. To infer fraud so as to defeat these transfers solely from the circumstances under which they were made, and to reject the testimony which has been given on behalf of the defendants as unworthy of credit, solely because it is inconsistent with a mere inference, would be contrary to the recognized practice in judicial investigations, unless the circumstances were entirely exceptional in their character.

The bill must be dismissed with costs.

(1) 2 Ch. D. 104 at page 108.

1909.

August 17.

FENETY ET AL v. JOHNSTON.

Specific Performance—Memorandum of Agreement—Statute of Frauds—Construction of Will—Title—Con. Stat. (1903) Chap. 160. Sec. 24—Conveyance by Executors and Trustees.

G. E F. died in 1899, and by his will left the greater part of his property to his executors and trustees upon various trusts.

The testator's widow is still living, and the surviving executors and trustees are the plaintiffs, G. C. F. and W. T. H. F. two of the testator's children.

In December, 1907, negotiations were entered into by the defendant J. and W. T. H. F., acting for and with the consent of his co-trustee and mother, for the sale and purchase of the Linden Hall property, which with other real estate had been devised by the testator to his executors. An agreement was made, and a memorandum containing its terms was drawn up by J. and signed by him and W. T. H. F. There was only one copy of this memorandum which was retained by J., and later destroyed by him when he determined not to go on with the purchase. This memorandum as stated by the plaintiff W. T. H. F. was as follows:—

"December 13th, 1907.

"Johnston to purchase from Fenety estate property on Brunswick Street, 76 x 185, 25 feet to be clear on upper side, 15 feet on lower side; estate to give an unencumbered title; Johnston to hand the estate 25 shares of Toronto Street Railway and 10 shares Fredericton Gas Stock—all furniture, including that belonging to Mrs. Roberts, to be removed from the premises. Stock not to be transferred before January 2nd, 1908."

"L. W. JOHNSTON,
WM. T. H. FENETY."

It contained the name of the vendor and purchaser, the property to be sold and the price to be paid.

Held, that there was a valid agreement for purchase and sale; that the memorandum was amply sufficient to satisfy the Statute of Frauds, and was capable of being enforced.

The will contained the following provision,—"I give, devise and bequeath all my other property both real and personal whatsoever and wheresoever situate of which I may be seized or possessed or otherwise entitled, to my executors and trustees herein named upon the trusts following, &c." The clause in the will which referred to the Linden Hall property was,—"Upon trust that my trustees will hold my residence known as Linden Hall and the grounds connected therewith (but not to include the property purchased by me and known as the Grammar School property) during the will and pleasure of my wife, and there she may live as long as she desires, free

from rent, she paying one-half of the taxes, insurance, water-rates and such like—also she paying in full the running expenses in keeping up the establishment, during her occupancy, it being my intention that she may live in her present home so long as she may so wish. If, however, the above property be leased or sold during my wife's lifetime, with her consent, then in such a case I desire, if leased, the rent derivable therefrom shall be used as rent for a house for her to live in and such house is to be as good as one of my present houses situate on College Road, Sunbury Street, Fredericton, and if after paying such rent with the money received from the rent of the said Linden Hall property, there remains a balance from time to time, this balance shall be added to the principal sum already set aside for my wife's maintenance, the income in the meantime being paid to my said wife. Should however the said property be sold during my wife's lifetime, with her consent, the purchase money shall be used as follows:—so much of it shall be invested as will yield enough interest to pay rent for as good a house as one of my College Road houses, and in such a house my wife may live, such interest being used to pay the rent therefor, and the balance of the said purchase money shall be divided equally among my children then living."

Held, that while no express power of sale was contained in the will, there was an implied power in the executors and trustees to sell the Linden Hall property, to be drawn from the provisions contained in the will itself, and to enable them to carry out the trusts declared in the will; and that a conveyance executed by the surviving trustees and executors, in whom the title was vested, and the widow of the testator, gave a good title to the property in question, and that it was not necessary that the beneficiaries under the will, other than the widow, should join in the conveyance.

Memorials of judgment on record against some of the *cestui que trusts* are not a bar to the trustees giving a good title to the property, as they have no interest in the real estate involved, which would be liable under an execution.

Courts of first instance in deciding questions of title are bound to decide according to their own view, whether they have doubts or not, leaving it to be decided by a Court of Appeal.

The bill in this case was filed for the specific performance of a contract for the purchase by the defendant of a certain property in the City of Fredericton known as "Linden Hall," a part of the estate of the late George E. Fenety, in his possession at the time of his death in September, 1899. Mr. Fenety left a will dated Dec. 29th, 1895, with three codicils dated respectively, Aug. 26th, 1898, Dec. 9th, 1898, and March 10th, 1899. The will and codicils were duly proved and letters testamentary were granted to William T. H. Fenety, Georgina C. Fenety, and

1909.

FENETY ET AL v. JOHNSTON.

Frederick S. Sharpe, the executors and trustees appointed in the will, on the 26th Oct., 1899. Sharpe died some time before this transaction arose, and the plaintiffs are the two surviving executors and trustees, who are also two of the testator's children. The testator left him surviving four sons and three daughters and his widow, who is still living. In December, 1907, the plaintiff William T. H. Fenety, acting with the consent and authority of his co-trustee and mother, entered into negotiations with the defendant for the purchase by him of a portion of the Linden Hall property. Mrs. Fenety, the widow, had continued for some years after her husband's death to reside on this property, but at the time in question she was occupying a house elsewhere in Fredericton, and Linden Hall was in the occupation of a tenant. The negotiations in question resulted in an agreement to purchase being made, a memorandum of which was made and signed by the defendant and by the plaintiff William H. Fenety, acting for and by authority of his co-trustee and mother.

Argument was heard July 15, 1909.

A. J. Gregory, K. C. (*J. J. Fraser Winslow* with him) for the plaintiffs:—

Under the will of the late George E. Fenety the property in question in this suit was vested in fee in the executors and trustees, and a conveyance by them gives a good title: Con. Stat. N. B., (1903) Chap. 160. Sec. 24 & 25. Con. Stat. N. B., (1903) Chap. 163. Sec. 3. The testator's widow is living, and joined in the conveyance. There was an implied power in the will in the executors and trustees to sell this property. See *Mower* v. *Orr* (1); *Forbes* v. *Peacock* (2); *Flux* v. *Best* (3); *Carlisle* v. *Cook* (4); *Collier* v. *Walters* (5). Under the Acts referred to and cases cited plaintiffs are entitled to a decree for specific performance. See also *Hussey* v. *Horne-Payne* (6).

(1) 7 Hare 472.
(2) 11 M. & W. 630.
(3) 31 L. T. N. S. 645.
(4) L. R. 1 Ir. 269.
(5) L. R. 7 Eq. Cas. 252.
(6) 4 App. Cas. 311.

1909.

FENETY ET AL. v. JOHNSTON.

BARKER, C. J.

J. D. Phinney, K. C., for the defendant :—

Memorandum signed by the parties did not amount to an agreement or contract. Defendant thought it was simply a memorandum for his own and his solicitor's use, and was his private property. Before Court will decree specific performance, title must be reasonably clear and marketable: *Osborne* v. *Rowlett* (1); *Francis* v. *St. Germain* (2). Under the will of the testator the trustees were not given power to sell this property. The provisions in the will are not strong enough to vest the property in the trustees and take away the rights of the heirs. A prudent solicitor would not advise that a title given by the trustees was wholly satisfactory. Mr. Barry seems to have been recognised by all the parties as the arbiter whose decision as to the title was to be final. Parol evidence is admissible in the construction of this memorandum or agreement. See Taylor on Evidence (3); Addison on Contracts (4); *Watters* v. *Milligan* (5); *Burns* v. *Chisholm* (6).

Gregory, K. C., in reply :—

Title offered is a perfectly good one and should be accepted by the defendant. The parties did not agree upon Mr. Barry as arbiter. He was simply the defendant's solicitor, and the plaintiffs never agreed that his decision as to the title should be final. The memorandum of agreement was drawn up and contained everything that was necessary, and was signed by the parties, and if the plaintiffs had wished to withdraw the defendant could have enforced it.

1909. August 17. BARKER, C. J.:—

(His Honor recited the facts of the case as stated above, and proceeded as follows):—

The first question to be disposed of is one of fact. Was

(1) 13 Ch. D. 774.
(2) 6 Gr. Ch. R. 636.
(3) Vol. 2 Sec. 1135.
(4) 10th Ed. p. 452.
(5) 22 N. B. R. 622.
(6) 32 N. B. R. 588 at p. 629.

1909. FENETY ET AL v. JOHNSTON. BARKER, C. J.

there a concluded and complete agreement arrived at between the parties and signed so as to satisfy the Statute of Frauds, and if so what are its terms. The memorandum of which there was but the one copy which was retained by the defendant was destroyed by him after he had knowledge and full notice that the plaintiff intended to enforce the contract. The defendant claimed the right to withdraw his offer, as he calls it, when he could not get a conveyance signed by all the beneficiaries and he says he then destroyed the memorandum as being of no further use. There is however in my opinion no substantial difference between the two versions given of it—one by the defendant and one by the plaintiff William Fenety. The latter in his evidence gives the following as his recollection of it :—

"December 13th, 1907.

"Johnston to purchase from Fenety estate property on Brunswick Street 76 x 185, 25 feet to be clear on upper side, 15 feet on lower side; estate to give an unencumbered title; Johnston to hand the estate 25 shares of Toronto Street Railway and 10 shares Fredericton Gas stock—all furniture including that belonging to Mrs. Roberts to be removed from the premises. Stock not to be transferred before January 2nd, 1908.

(Sgd.) L. W. JOHNSTON,
WM. T. H. FENETY."

The defendant in his answer states the memorandum as follows :—

"Johnston agrees with Fenety estate to exchange ten shares Fredericton Gas Company stock and twenty five shares of Toronto Street Railway stock for a satisfactory deed, free and unencumbered in every way of the Linden Hall property, so called, with a lot of land 76 x 185 feet, beginning at a point 15 feet east of a line to Brunswick Street, paralled with the west side cellar wall line of Linden Hall. The buildings of said lot to be delivered in the same condition as now, nothing to be removed but the furniture of the present tenant and that belonging to Mrs. G. Roberts.

L. W. JOHNSTON,
W. T. H. FENETY."

In his evidence the defendant stated the memorandum as in his answer down to the word "feet". He omitted the clause "beginning at a point 15 feet east of a line to Brunswick Street parallel with the west side cellar wall line of Linden Hall" and then proceeded, "the property" instead of "the buildings of said lot", to be delivered, &c. There is no essential difference between these three versions. If there were I should feel at liberty to adopt the plaintiff's version in view of the defendant's destruction of the writing when he knew it was to be made the basis of proceedings against him. Each is amply sufficient to satisfy the Statute of Frauds as a written memorandum of an agreement capable of being enforced. They state the names of vendor and purchaser, the property to be sold and the price to be paid—*Catling* v. *King* (1); *Shardlow* v. *Cotterell* (2).

It is not denied that the parties actually agreed upon the sale and purchase of this property on the terms mentioned in this memorandum which they signed. The defendant however sought to show that this memorandum was not intended as an agreement but merely as instructions drawn out by himself to his solicitor by which he was to be guided in carrying the verbal agreement into effect. It does not seem to me of much importance what particular use the defendant intended to make of this memorandum. The important question is did it in fact contain the terms of the verbal agreement to purchase, so as to satisfy the requirements of the Statute of Frauds? If it did that is all that the plaintiff requires as to that branch of the case. Before referring to the evidence on this point I shall mention another point strongly relied on at the hearing. It was there contended that it was one of the conditions of the contract that the question of title was to be altogether subject to the decision of Mr. Barry the defendant's solicitor, so that no question of that kind could ever come before a Court, Mr. Barry's opinion upon that point, so far as this transaction is concerned, being conclusive upon both parties. It is true

(1) 5 Ch. D. 660. (2) 20 Ch. D. 90.

1909.

FENETY ET AL. v. JOHNSTON.

BARKER, C. J.

that Mr. Barry was acting for the defendant as his solicitor in the way usual in transactions of this kind, and that the defendant was relying upon his opinion as to the title. Mr. Barry was however not to draw the conveyance or, so far as I can see, do anything which required this written memorandum for his guidance, however useful it may have been. He certainly was not acting for the plaintiffs in any way. I think the defendant's own evidence on this point is directly at variance with his contention. In his direct examination after telling of their negotiations as to the terms and their final agreement verbally which seems to have taken place on the 20th Dec., 1907, the defendant's evidence proceeds thus:—

"Q. Did you tell him (i. e. the plaintiff Fenety) to come in the next day? A. Yes.

"Q. About what date was that, the next day? A. Well as I have it in my mind it was the 21st of December.

"Q. What took place on that occasion? A. Well I had the securities with me and prior to his coming there.

"Q. This was in the Assessor's office? A. Yes, and prior to his coming there I had drawn up a memorandum and when he came in I showed him the securities and showed him the memorandum, and told him that I intended Mr. Barry should investigate the title and pass upon the validity of the deed they would offer, and that I had made a memorandum for Mr. Barry's guidance, which was there which I would like him to read to see if it was correct, and he read the paper and after he had read it he asked me if he should sign it and I told him I dare say he might as well, it would do no harm.

"Q. Did you sign it yourself? A. I had signed it before he arrived.

"Q. This was a paper of your own preparation? A. Entirely so.

"Q. You told him Mr. Barry was to pass upon the title? A. Yes I did.

"Q. Did he assent to that or make any objection? A. I presume he assented to it; he raised no objection at all.

1909.

FENETY ET AL. v. JOHNSTON.

BARKER, C. J.

He asked me if the matter was to be entirely in Mr. Barry's hands thereafter and I said it was.

"Q. Was anything said as to the title being satisfactory to Mr. Barry or words to that effect? A. Certainly I told him Mr. Barry would investigate the title and pass upon the validity of the deed.

"Q. Mr. Barry had been your solicitor for a good many years? A. He has acted for me on a great many occasions."

This evidence shows that the defendant had selected Mr. Barry as his adviser but it altogether fails in proving that it was in any way agreed by the plaintiffs that they were obliged as a part of their contract to furnish a title satisfactory to Mr. Barry. They were no doubt to give a good title and one free from encumbrances, but they never agreed that Mr. Barry should be the sole arbiter by whose decision they were to be bound. This evidence shows that at this time the defendant handed this memorandum of agreement and the stock certificates which were to be handed over in payment, to Mr. Barry, in whose hands, as the defendant said, he left the matter entirely. He said nothing whatever as to Mr. Barry's opinion being accepted. It seems strange that if there was so important a condition in the contract as is put forward, that a memorandum written out for Mr. Barry's guidance in closing up the matter should not have been incorporated in it. On his cross-examination on this point the defendant gave the following evidence:

"Q. When this memorandum was drawn you had agreed to exchange this stock for that property? A. Under certain conditions.

"Q. Under conditions of getting a good title? A. Conditions regarding a title satisfactory to Mr. Barry my solicitor.

"Q. There was nothing said in the agreement, this memorandum itself, as to it being satisfactory to Mr. Barry? A. Nothing at all.

"Q. And that memorandum was drawn up to embody the terms of the agreement? A. It was."

1909.

FENETY ET AL. v. JOHNSTON.

BARKER, C. J.

It seems that the plaintiff and defendant went to Mr. Barry's office immediately after this memorandum was signed and Mr. Barry thus describes what took place.

"I remember the occasion. I have no means of fixing the day absolutely, but I have no doubt it was at the time stated, the 21st of December in the year 1907. Mr. Johnston and Mr. Fenety came into my office, my private office. * * They came into my own office and Mr. Johnston had a package with him in a brown envelope and told me that he was treating for the purshase of the Linden Hall property and wanted me to search the records and investigate the title and see it was satisfactory in every way and he left the papers with me. I put them in my safe. (The papers were the memorandum of agreement and the two stock certificates in an envelope). * * *

"Q. You say Mr. Johnston asked you to complete the matter and see the title was satisfactory, did he? A. Yes, that is what he came to me for, to investigate the title and see that it was in every way satisfactory."

Mr. Barry says that he drew up a description of the property and made searches at the Record Office. He was asked on cross-examination:

"Q. Did you form an opinion that the conveyance by the trustees without the heirs joining would be an inadequate or invalid deed? A. I formed the opinion it would be very doubtful. There is a very grave doubt in my mind as yet. I think I would not take a title today without it."

It will be seen that these instructions given by the defendant to Mr. Barry were nothing more than any one purchasing property usually gives to his solicitor. There is nothing in the conversation to suggest that by his decision the plaintiff was to be bound. I find as a fact that there never was any such agreement at all.

In *Hussey* v. *Horne-Payne* (1); an action similar to this, it appeared that this provision "subject to the title being

(1) 4 A. C. 311.

approved by our Solicitor" was sought to be introduced into a contract entered into by correspondence. In reference to it Lord Cairns says:—"I feel great difficulty in thinking that any person could have intended a term of this kind to have that operation, because, as was pointed out in the course of the argument, it virtually would reduce the agreement to that which is illusory. It would make the vendor bound by the agreement but it would leave the purchaser perfectly free. He might appoint any solicitor he pleased—he might change his solicitor from time to time. There is no *directio personarum* there is no appointment of an arbitrator in whom both sides might be supposed to have confidence. It would be simply leaving the purchaser, through the medium of his solicitors, at liberty to say from caprice at any moment, we do not like the title, we do not approve of the title, and therefore the agreement goes for nothing. My Lords, I have great difficulty in thinking that any person would agree to a term which would have that operation. But it appears to me very doubtful whether the words have that meaning. I am disposed rather to look upon them, and the case cited from *Ireland* would be authority, if authority were needed for that view, I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser." See *Andrews* v. *Calori* (1).

1909.

FENETY ET AL v. JOHNSTON.

BARKER, C. J.

Admitting that parties might bind themselves by so one sided a contract as such a condition would create it would never be inferred from evidence such as I have quoted, especially where we have the contract drawn up by the defendant himself "to embody the terms of the agreement", as he says, and it contains no such provision. In addition to this I think this memorandum of agreement signed by the parties and drawn up by the defendant for the purposes I have mentioned is available for the plaintiff as a foundation for

(1) 38 S. C. R. 588.

1909.

FENETY ET AL v. JOHNSTON.

BARKER, C. J.

this action, though the defendant intended giving it to his solicitor for his guidance in carrying out the agreement of which the signed memorandum was the legal evidence. If two parties negotiate by correspondence and eventually arrive at a point where all the essential terms of a contract have been determined and agreed upon, the contract is enforceable though it appears by the correspondence that it was the intention of one of the parties that the agreement was to be put in due form by a solicitor. *Rossiter* v. *Miller* (1).

The defendant however says the title which you offer me is not good; at all events it is not such a title as I can be compelled to accept. In the first place the beneficiaries under the will must join in the conveyance, and in the second place there are memorials of judgment on record against one or more of the beneficiaries. As to the first question the evidence shows that a conveyance duly executed by the plaintiffs as trustees, and by the widow and children except one, was tendered to the defendant and he refused to accept it. Though six of the beneficiaries joined in the conveyance it was not because that was necessary but only in order to meet the wishes of the defendant's solicitor. And the plaintiffs now claim that a conveyance executed by themselves as surviving trustees and by the widow will give a good title to the defendant, free from all incumbrances, and satisfy all the requirements expressed or implied in the contract of sale.

The testator by his will after making a specific legacy and giving directions as to the payment of his debts, gave to his wife "Eliza A. during the term of her natural life, the household stores, furniture and effects of every description whatsoever, which may be found in my dwelling house or belonging thereto at the time of my death, as well as all animals, carriages, sleighs, waggons, harness, stable implements, goods and effects contained in and about the barn in connection with my premises with full power to my said wife to sell any or all of the above mentioned property." What-

(1) 3 A. C. 1124.

1909.

FENETY ET AL v. JOHNSTON.

BARKER, C. J.

ever of this property remained at the death of the widow the executors were directed to sell and divide the proceeds equally among the children then living. The proceeds of any sales of this property by the widow were to be added to the principal sum to be set aside for her maintenance as is hereafter mentioned and the income was to go to the widow during her life. Then follows this clause: "I give, devise and bequeath all my other property both real and personal whatsoever and wheresoever situate of which I may be seized or possessed or otherwise entitled, to my executors and trustees herein named upon the trusts following—that is to say (1) upon trust that my trustees will invest (or set aside investments already held by me and yielding interest) such of my property as will be sufficient to yield interest amounting yearly to $1,200 and upon trust that my trustees shall pay the said amount of $1,200 to my wife quarterly during her lifetime for her sole benefit and support, &c." Then follows certain directions as to keeping up this fund so that the annual income may be maintained at $1,200. On the death of the widow this fund was "to be dealt with by my trustees as follows": Then follows a direction for the trustees to divide it among the testator's children. The second clause of the will has reference to the Linden Hall property and is as follows: "Upon trust that my trustees will hold my residence known as "Linden Hall" and the grounds connected therewith (but not to include the property purchased by me and known as the Grammar School property) during the will and pleasure of my wife, and there she may live as long as she desires, free from rent, she paying one half of the taxes, insurance, water rates and such like—also she paying in full the running expenses in keeping up the establishment, during her occupancy, it being my intention that she may live in her present home so long as she may so wish. If, however, the above property be leased or sold during my wife's lifetime, with her consent, then in such a case I desire, if leased, the rent derivable therefrom shall be used as rent for a house for her to live in and such house is to be as good

1909.

FENETY ET AL. v. JOHNSTON.

BARKER, C. J.

as one of my present houses situate on College Road, Sunbury Street, Fredericton, and if after paying such rent with the money received from the rent of the said Linden Hall property, there remains a balance from time to time, this balance shall be added to the principal sum already set aside for my wife's maintenance, the income in the meantime being paid to my said wife. Should however the said property be sold during my wife's lifetime, with her consent, the purchase money shall be used as follows:—so much of it shall be invested as will yield enough interest to pay rent for as good a house as one of my College Road houses, and in such a house my wife may live, such interest being used to pay the rent therefor, and the balance of the said purchase money shall be divided equally among my children then living."

It is clear I think from this clause in the will that it was optional with the testator's widow either to continue to reside at Linden Hall or to do as she in fact has done, select a residence elsewhere. If the property was leased she was entitled out of the rents sufficient to pay the rent of another house, and if it was sold sufficient of the purchase money to produce interest equal to the rent was to be invested for that purpose. In view of these facts and of the special direction that the trustees to whom the property was devised "were to hold it during the will and pleasure of the widow" I should be disposed to think, though it is not necessary to decide that point for the purposes of this case, that the widow had the right to have the property leased or sold, quite irrespective of the wishes of anyone else; she had a right to occupy Linden Hall free of rent; she had a right to abandon it and live elsewhere, and if she did she had the right to have the rents of Linden Hall or the interest of a part or all of the proceeds of its sale appropriated to the payment of her rent. It was impossible for the trustees to carry out these trusts without leasing or selling and the widow's consent was all that was required.

Sec. 24 of Chap. 160 respecting Wills (2 Con. Stat. p. 1945) provides that "where any real estate shall be devised

to any trustee or executor, such devise shall be construed to pass the fee simple, or the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication." By virtue of this provision the trustees took the fee simple in this property which the testator had at the time of his death. Apart from this it is abundantly clear I think that the testator intended to vest the fee in his trustees as necessary for them to have in order to execute the trusts declared in the will. I have already mentioned those referring to the Linden Hall property, but there are others. By a codicil to the will the testator directed that the houses built by him in Fredericton, bringing in rents, should not be sold during his wife's life, but that the rents should be devoted toward her $1,200 a year allowance. This portion of the real estate will therefore form part of the property distributable on the widow's death. Clause four of the will deals with the residue of the property, that is, what is not specifically devised in clauses one and two, and as to this residue the will provides that it be held "upon trust that my trustees will deal with all the residue of my property, or estate, both real and personal in manner and form following, that is to say, that they shall divide it as fairly as possible into seven equal shares which shares are to be dealt with by the trustees in the following manner." Then follow specific directions which I may state generally. The trustees, or the survivors, are to pay over to each of the four sons one share, but if either of them predeceased him leaving children under age, then the trustees are to hold the share and pay the interest to the guardian of the youngest child for the benefit of all until the youngest child became of age, when the trustees were to divide it among the children. Similar provisions were made as to the widow of a child who was to have the income for life or during widowhood. The other three shares the trustees were to retain and keep separate—one for the benefit of each daughter, and to pay the annual income to

1909.

FENETY ET AL. v. JOHNSTON.

BARKER, C. J.

such daughter during life for her separate use. Then followed provisions to be observed in case of the death of a daughter before the testator, leaving children, similar to those made in the case of the sons. By a second codicil the testator directs that on the division of the estate property as far as it can be his three children G. Linden Fenety, Walter Pierson Fenety and Georgina C. Fenety should be provided for first—that is to say, each shall receive $10,000 as their first instalment, which sums shall be severally paid to them in cash or as otherwise may be agreed upon or as may be most convenient to the executors. The trustees were also empowered to vary and transfer any security or securities they may hold, and each of them was only responsible for his own default. The testator also declared that all trusts and powers reposed and vested in the trustees might be exercised by the survivor or survivors of them or the heirs, executors or administrators of such survivor or other the trustees or trustee for the time being of the will.

In *Davies* to *Jones and Evans* (1), on an application under the Vendor and Purchaser Act for a decision of the Court as to title, Pearson J. after referring to the rule as laid down by Lord Mansfield in *Oakes* v. *Cook* (2), and by Bayley B. in *Anthony* v. *Rees* (3), says:—"Now, in my opinion, there were two things required, one was that the executors were to carry out all the intentions of the testator, and another was that they were to distribute the residue of the estate among the wife and daughters in the manner pointed out; consequently the wife and daughters take nothing absolutely, and the only way in which I can give effect to the whole of the will is by saying that the executors must in the first place raise so much as may be necessary for paying the testator's debts and funeral expenses, and after that they are to provide for the legacies, and then to have in their own hands whatever remains and to divide that between the wife and children in the manner directed by the will. I must therefore hold that they had the legal estate for the purpose

(1) 24 Ch. D. 190. (2) Burr. 1686. (3) 2 Cr. & J. 83.

1909.

FENETY ET AL. v. JOHNSTON.

BARKER, C. J.

of the will, and my opinion is that they can make a good title to the purchaser." In that case there was no devise of the property to the executors as there is in his, but it was held that they took the title to the residuary estate, which they were to distribute, that being necessary to enable them to discharge their duty under the will, and, having the title, they could give a good title to a purchaser. See *Young* v. *Elliott* (1), *Collier* v. *Walters* (2).

It is true that this will contains no direction or express power of sale of the real estate. There is, however, a clearly implied power for that purpose. Such a power would be implied when it was necessary for the trustees in order to carry out the trusts imposed upon them. I have already cited the clause as to the Linden Hall property, and that the testator himself considered that he had conferred and intended to confer such a power as to all of his real estate, appears from the codicil to which I have already referred, by which he directed that his Fredericton houses should not be sold or disposed of during the life time of his wife, thereby placing a limitation on the power given by the will. In *Glover* v. *Wilson* (3), Strong J. says:—"It is clearly established by many authorities, amongst which may be cited the following:—*Forbes* v. *Peacock* (4); *Ward* v. *Devon* (5); *Tylden* v. *Hyde* (6); *Curtiss* v. *Fulbrook* (7); William's Real Assets (8); Dart Vendors, &c. (9); and Sugden on Powers (10)—that where a testator by his will directs real property to be sold, without saying by whom, and the proceeds to be distributed or applied by his executors, they take a power to sell and convey the fee. Now, in this informal will, we find a clear though clumsily expressed power to sell in the following words: 'Also, it is my will that, when the aforesaid property be sold, that the interest be put to the clothing and schooling of my children and to the support of my wife, so long as she

(1) 23 U. C. Q. B. 420.
(2) 17 Eq. 252.
(3) 17 Grant 111.
(4) 11 Sim. 152; 11 M. & W. 637.
(5) 11 Sim. 160.
(6) 2 S. & S. 238.
(7) 8 Hare 25.
(8) p. 84.
(9) p. 400.
(10) pp. 118, 119.

1909.

FENETY ET AL. v. JOHNSTON.

BARKER, C. J.

remains my widow,' and the proceeds being directed to be applied to maintenance indicates that an immediate and not a postponed sale was intended." Strong, J. then points out how that the executors were to apply the estate and effects, and proceeds thus. "I think, therefore, that Eliza Glover, the testator's daughter, born after the making of this will, is not, either as one of the co-heirs at law or as entitled to the benefit of the trust for maintenance, a necessary party to the conveyance, inasmuch as the executors take a legal power of sale, and I must, therefore, allow the appeal with costs."

In *Mower* v. *Orr* (1), the testator gave his estate, including copyhold of inheritance, leaseholds, merchandise, money in the funds, and cash, to his children and grandchildren, in twenty shares, and directed some of such shares to be invested in the government funds for the infant legatees and requested his executors on his death to get his property together and divide it, it was held, that the will must be taken to direct a sale and conversion of the copyhold estate. There was no devise of the estate or any part of it to the trustees as in the present case. The Vice Chancellor held that the testator must be understood as directing the conversion of the copyhold estate into personalty. The division of the entire property into a number of shares and the directions contained in the will as to the investment and disposition of some of such shares, precluded the supposition that the testator intended the copyhold should remain unsold—and a sale was accordingly ordered.

In *Hamilton* v. *Buckmaster* (2), a bill was filed for the specific performance of a contract to purchase a leasehold house, raising the question whether the executrix, who had entered into the contract, had power to sell under her testator's will. The executors were directed to sell "all his (testator's) stocks, shares, and securities, and such other part of his personal estate as was in its nature saleable, and collect and get in all money due and owing to him, and all other his estate, and convert the same into money and stand possessed

(1) 7 Hare 472.

(2) L. R. 3 Eq. 323.

1909.

FENETY ET AL v. JOHNSTON.

BARKER, C. J.

of the proceeds upon trust to pay debts, funeral and testamentary expenses, and invest the residue thereof upon the trusts therein declared." After the date of the will the testator became possessed of the freehold house in question. It was put up for sale by the executrix who, in the absence of the executor (the testator's heir-at-law) in India, had alone proved the will. The defendant purchased the property but refused to complete the purchase on the ground that the title was defective inasmuch as the will contained no power to sell this freehold property and that at all events the concurrence of the devisee (if any) or the heir-at-law should be procured. Wood, V. C., said that he never had any doubt that the executrix had power to sell the house and he made a decree in favor of the plaintiff holding that the words "and all other his estate" included this freehold property. See *Flux* v. *Best* (1); *Carlisle* v. *Cook* (2); *Cooke* v *Simpson* (3).

In all of these cases, and many others of the same kind can be found, it is clearly held that where a testator devises real estate to trustees upon certain trusts so as to vest the absolute interest in them and directs or authorizes a sale of the property, the trustees have the sole power to sell, to convey to the purchaser, to receive the purchase money and give a discharge for it. And if instead of thus devising the estate to the trustees, the testator gives such directions to his trustees as render a sale of the property necessary in order to carry out the directions, the trustees take the estate for that purpose and their conveyance to the purchaser is good. In none of the cases so far as I have examined them, has the conveyance been executed by others than the trustees. In this present case the testator made special provision for grandchildren under age in case of the death of any of his children dying before him leaving children. If the defendant's contention can be sustained, had such a case happened this property could never have been sold as the minors could

(1) 31 L. T. N. S. 645. (2) 1 L. R. Irish 269.
(3) 46 L. J. Ch. 463.

1909.

FENETY ET AL v. JOHNSTON.

BARKER, C. J.

not have joined in the conveyance and without it the title would be imperfect. The testator's intentions as to his wife's maintenance would have thus been in a great measure frustrated. I have no doubt myself that the trustees' conveyance was quite sufficient to pass the title without the concurrence of any one except the widow, to signify her consent to the sale.

The defendant's counsel contended that at least the title offered to the defendant was so doubtful that this Court would not force it on a purchaser; and in support of that contention he cited two cases. One is *Francis* v. *St. Germain* (1), in which the Court sitting on appeal sustained the decision of Esten, V. C., against the title. The facts of the case were not at all similar to the facts of the present case, and it therefore has no bearing on this case for no one disputes the general proposition that a doubtful title will not be forced on a purchaser. The other case is *Osborne* to *Rowlett* (2), and so far as it bears upon the present case is an authority against the defendant. It supports the rule to which I shall presently refer by which Courts of first instance in dealing with this question are bound to decide according to their view, whether they have doubts or not, leaving it to be decided by a Court of Appeal. In that case Jessel, M. R., says "The case is one which I am bound to decide, as between vendor and purchaser, whether a good title can be made or not." Two or three other cases will illustrate the rule I have mentioned. In *Hamilton* v. *Buckmaster* (*supra*), already referred to which was decided in 1866, Mr. Dart, one of the conveyancing counsel to the Court, had given an opinion against the title. Wood, V. C., said that he never had any doubt that the title was good but the question was whether the title could be forced upon a purchaser. He says, "with respect to enforcing specific performance against the purchaser, it has been contended that, having regard to the difference of opinion between the eminent counsel who have advised

(1) 6 Grant 636. (2) 13 Ch. D. 774.

1909.

FENETY ET AL v. JOHNSTON.

BARKER, C. J.

upon this title, there is such a reasonable doubt that I ought not to force the title upon the purchaser. But am I to make this estate unmarketable, for that will be the effect of refusing specific performance? If, in deciding in favour of the vendor, I am wrong, my decision can be set right by the Court of Appeal—but if I decide in favour of the purchaser, then I shall be condemning the title beyond the power of appeal, as the Court of Appeal has always held, that the simple expression of doubt in the Court below is sufficient to prevent the title from being forced upon a purchaser." The latter part of this passage is scarcely borne out by *Beioley* v. *Carter* (1). The Master of the Rolls in that case decided that the title was bad and dismissed the plaintiff's bill for specific performance. Selwyn, L. J., on delivering the opinion of the Court of Appeal said—"We have not lost sight of the fact that this is a suit for specific performance, nor of the fact that the greatest weight is due to the opinion of the Master of the Rolls, nor of the observations of the Lords Justices in *Collier* v. *McBean* (2), in which the danger and difficulty of forcing a doubtful title upon a purchaser are dwelt upon. At the same time it is the duty of a Court of Appeal to form an opinion upon the question of title and to act upon it, as is well expressed by Lord St. Leonards in the case of *Sheppard* v. *Doolan* (3). His Lordship there says—'With respect to the common cases of doubtful title, I cannot agree with the proposition that an unfavourable decision in the Court of inferior jurisdiction renders the title doubtful. The Judge of the Superior Court would still be bound to exercise his own discretion, and decide according to his own judgment. I have myself often argued at the Bar in support of the proposition, but always without success; for although I have urged that no Judge could consider a title to be free from doubt when one or two Judges competent to decide the question had pronounced it to be defective, I have been ever met by this answer—that to adopt such a doctrine

(1) 4 Ch. Ap. 230. (2) L. R. 1 Ch. 81.
(3) 3 D. & War. 8.

1909.

FENETY ET AL v. JOHNSTON.

BARKER, C. J.

would be in effect to leave the ultimate decision of the question to the Court below, while the law provides an appeal to the Court above.' We, therefore, consider it to be our duty to decide the case, and in doing so there are two questions to be considered." The Court there overruled the Master of the Rolls and decided the title to be perfectly good and decreed specific performance.

If therefore I had doubt as to the correctness of the conclusion at which I have arrived it would be my duty to act on my judgment as in other cases and leave it to a Court of Appeal to correct me if I am wrong.

There was one other objection raised to the title though on the argument the defendant's counsel did not I think mention it. That was as to the memorials of judgment on record against some of the *cestui que trusts*. These beneficiaries however take no interest in this Linden Hall property. It was devised to the trustees with a power of sale and whatever they might eventually receive from the trustees under the trusts of the will as their portion of the proceeds of the sale, they had no interest in the property itself leviable under an execution. See *Re Lewis* and *Thorne* (1).

The result is that in my opinion there was a completed binding agreement for the purchase and sale of this property —that the objections to the title are unfounded; that the trustees' conveyance to the purchaser will pass a good title free from any of these objections, and that the concurrence of the beneficaries other than the widow is not at all necessary for the validity of the conveyance to which the defendant is entitled. There will therefore be a decree in favour of the plaintiffs and a reference as to the dividends received on the shares, &c.

Reserve costs and other questions till report.

(1) 14 Ont. R. 133.

CLARK v. CLARK, ET AL., EXECUTORS.

1909.
September 21

Will—Residuary Clause—Construction—Gift inter vivos—Declaration of Trust—Testamentary Gift—Wills Act.

J. A. C. the testator died April 15th, 1907. In his will, which was dated March 13th, 1906, there was the following residuary clause:—"all the rest and residue of my estate, real and personal excepting only such personal property as may be found in my private cash box, or in my box in the vaults of the Bank of New Brunswick, St. John, and which I had already given to my daughter Hannah Gertrude, to meet the immediate personal necessities of herself and her sister Jean, I give in trust to my executors, etc."

On or before April 11th, 1905 the testator gave to J. S. C., one of the executors afterwards named in his will, an envelope which J. S. C. believed to contain securities, and which the testator at that time stated he had given to his daughter H. G. C., and requested J. S. C. to take the envelope and deposit it in a vault box in the Bank of New Brunswick. J. S. C. leased a vault box as directed, in the names of J. A. C. and H. G. C., either to have access, and gave both the keys of the box to J. A. C,

After J. A. C's death a number of securities were found in the private cash box, and in the vault box an envelope containing securities was found, addressed "Rev'd. John A. Clark, Hannah Gertrude Clark," and also a number of loose securities.

Held, that only those securities which had been actually assigned, and to which she had the legal title, and which was therefore ear-marked for her, were the property of H. G. C. as given to her by the testator during his lifetime.

Held, also, that in respect to the other securities there was no perfected gift *inter vivos*, as no delivery had been shown; that there was no valid declaration of trust by the testator in favor of H. G. C.; that there was no valid testamentary gift to H. G. C.; and that therefore the other securities were a part of the testator's residuary estate.

Where the only evidence of a gift of a promisory note is its endorsement to the alleged donee without delivery, the title does not pass.

Money deposited by one, in a savings account, in his own name and another's, payable to the survivor, as a rule becomes the property of the survivor absolutely. *In re Paul Daley* (1), distinguished.

Bill filed by Jean Spurr Clark a daughter of the late John A. Clark for the administration of his estate, and for directions in regard to the construction of his will. The facts fully appear in the judgment of the Court.

(1) 37 N. B. R. 483.

1909.

CLARK v. CLARK ET AL.

Argument was heard August 18, 1909.

A. O. Earle, K. C. (*James A. Belyea*, K. C., with him) for the plaintiff:—

The securities found in the Bank of New Brunswick in the name of Hannah Gertrude Clark (the deceased daughter of the testator John A. Clark), or in which her name jointly with her father's was inserted, belong to her absolutely. The safety box in which all these securities were found, was taken out jointly in the names of the testator John A. Clark and his daughter Hannah Gertrude Clark, either to have access. The testator had a great deal of confidence in this daughter, as is shown by his treatment of her, and the provisions of the will. His son is only given an annuity under the will. Hannah Gertrude Clark is entitled to the property found in the two boxes mentioned in the will.

D. Mullin, K. C. (*J. A. Barry* with him) for the defendant Percy S. Clark:—

There was no valid gift under the will. The evidence should show a delivery to the donee. The keys of the safety deposit box in the Bank of New Brunswick were returned to the testator John A. Clark; consequently there was no delivery which was essential to the gift. The gift under the will was for a definite purpose, for the "immediate personal necessities." The securities in the boxes amount to some $23,000, which would be a very large amount to give for such a purpose. The testator only intended to give the income. The word "such" used in the will should be read "such of" and will only pass a portion of the securities. Some of these securities bear the name of Hannah Gertrude Clark, and are therefore ear-marked for her. It was not the testator's intention to give all the securities in the boxes to Hannah Gertrude Clark, and the executors must show what property was ear-marked for her. The testator never parted with the possession of these securities, and without parting

with the possession he could not make a valid gift. See *Irons* v. *Smallpiece* (1); *Bunn* v. *Markham* (2); *Cochrane* v. *Moore* (3). In reference to the promissory note found among the securities, see *In re Mitchell* v. *Smith* (4). In reference to the stocks and shares, see *Antrobus* v. *Smith* (5); *Rhodenhiser* v. *Bolliver* (6). See also *In re Paul Daley's Estate* (7); *Marshal* v. *Crutwell* (8); *Warrener* v. *Rodgers* (9).

J. A. Barry :—

The word "such" as used shows that all the securities were not intended to pass to Hannah Gertrude Clark. The property was ear-marked by the subsequent words of the will. See, in reference to the bank books, *Ex parte Gerow* (10); in reference to the endorsement on the promissory note, *Weldon* v. *Weldon* (11); in reference to the question of delivery, *Hall* v *Hall* (12).

Earle, K. C., in reply :—

The only question before the Court is the question of evidence. The will states that he "had given" and the evidence of the only witness supports this. The testator stated to this witness that he had given property to Hannah Gertrude Clark, and he repeats this statement in his will.

J. MacMillan Trueman for the executors of Hannah Gertrude Clark took no part.

1909. September 21. BARKER, C. J. :—

The question upon which the direction of the Court is asked arises under a clause in the will of the Reverend John A. Clark who died April 15th, 1907, leaving him surviving

(1) 2 B. & Ald. 551.
(2) 7 Taunton 234.
(3) L. R. 25 Q. B. D. 57.
(4) 4 DeG. J. & S. 422.
(5) 12 Ves. 39.
(6) 31 N. S. R. 236.
(7) 37 N. B. R. 483.
(8) L. R. 20 Eq. 328.
(9) L. R. 16 Eq. 340.
(10) 5 All. 512.
(11) 2 All. 590.
(12) 20 Ont. R., (1891), 684.

1909.

CLARK v. CLARK ET AL.

BARKER, C. J.

a widow and three children, two daughters and a son. Hannah Gertrude Clark, one of the daughters, died on the 14th of November, 1908, before these proceedings were instituted and we are therefore without her evidence. Mr. Clark's will, which is dated March 13th, 1906, contains the following residuary clause: "All the rest and residue of my estate, real and personal excepting only such personal property as may be found in my private cash box, or in my box in the vaults of the Bank of New Brunswick, St. John, and which I had already given to my daughter Hannah Gertrude, to meet the immediate personal necessities of herself and her sister Jean, I give in trust to my executors to apply all net increase to the support and maintenance of my children and their step-mother as long as she remains my widow." There follow various provisions as to the ultimate disposal of the property about which no question is raised at present. The dispute arises as to what property, if any, is included within the exception and which the daughter Hannah Gertrude took by gift from her father during his life time. The claim put forward by the plaintiff Jean Spurr Clark, who is the sister of Hannah Gertrude Clark and the devisee of substantially all her property under her will, is that all the property found in the private cash box and the Bank vault box at the time of John A. Clark's death had been given to Hannah Gertrude Clark by their father before his death and was excepted from his testamentary disposal by the clause I have mentioned. If this claim can be sustained, the gift would comprise property valued at about $30,000, more than half of the whole estate left by the testator. Claims like the present are included in one of three different classes. The first is that of gifts *inter vivos* which this is said to have been, and the second is by transfer of the property by way of trust or a valid declaration of trust.

In *Richards* v. *Delbridge* (1), Jessel, M. R., said "A man may transfer his property without valuable consideration, in one of two ways:—he may either do such acts as

(1) 18 Eq. 11.

1909.

CLARK v. CLARK ET AL.

BARKER, C. J.

amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or in trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true that he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning." In that case it appeared that Delbridge who was the owner of a mill and machinery and a stock in trade connected with the mill business, made and signed the following memorandum endorsed upon the lease of the mill property: "7th March, 1873. This deed and all thereto belonging I give to Edward Bernetto Richards from this time forth, with all the stock in trade." Soon after making this memorandum Delbridge delivered the lease on behalf of Richards who was then an infant, to his (Richard's) mother and she retained possession of it. The bill was filed for a declaration that by the memorandum Delbridge created himself a trustee of the property for Richards. A demurrer to the bill for want of equity was sustained. It was clear there that a voluntary gift was intended but the donor had not executed any transfer of the legal estate, he had not done all that he might to perfect the gift and as a volunteer he had no equities which he could ask the Court to enforce by way of completing the gift.

In *Milroy* v. *Lord* (1), it appeared that a transfer was made by one Medley to one Lord of fifty shares of the capital

(1) 4 DeG. F. & J. 264.

1909.

CLARK v. CLARK ET AL.

BARKER, C. J.

stock of the Bank of Lousiana, then standing in his name in the books of the bank to be held by him upon trusts for the benefit of his niece. This deed of assignment was executed by both Medley and Lord under their seals. By the constitution of the Bank shares were transferable in the books of the Company the certificates of stock being surrendered at the time of transfer. No such transfer was ever made. Stuart, V. C., held that these shares were bound by the trusts declared in the deed of assignment, but he was overruled on appeal. Lord Justice Knight Bruce speaking of the bank shares says, "They stood in Mr. Medley's name before and at the time of his execution of that instrument (the deed of assignment) and continued so to stand until his death. He was during the whole time, and when he died, the legal proprietor of them, and unless so far, if at all, as the beneficial title was affected by that instrument, the absolute proprietor of them beneficially likewise. He might, however, have affected the legal title. It was in his power to make a transfer of the shares so as to confer the legal proprietorship on another person or other persons. But as I have said, no such thing was done." In the same case Lord Justice Turner says—"I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done every thing which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an

imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried."

In *Heartley* v. *Nicholson* (1), the same principle is laid down by Bacon, V. C., and applied to an intended transfer of shares in a Colliery Company. He is thus reported: "That no perfect transfer was at any time made by the testator appears to be perfectly clear; but it is not less clear to me that the testator intended to give, and on the 11th Feby. believed that he had given, the shares in question to the plaintiff, his daughter. It is, however, established as unquestionable law that this Court cannot by its authority render that gift perfect which the donor had left imperfect, and it will not and cannot convert an imperfect gift into a declaration of trust, merely on account of that imperfection." As to the donor constituting himself a trustee the Vice Chancellor says, "It is not necessary that the declaration of a trust should be in terms explicit. But what I take the law to require is, that the donor should have evinced by acts which admit of no other interpretation, that he himself had ceased to be, and that some other person had become, the beneficial owner of the subject of the gift or transfer, and that such legal right to it, if any, as he retained was held by him in trust for the donee." In the same case the Vice Chancellor expresses his approval of the distinction between a present gift and a creation of a trust for the donee's benefit as laid down by Jessel, M. R., in the following passage in *Richards* v. *Delbridge* (*supra*): "The true distinction appears to me to be plain, and beyond dispute; for a man to

(1) 19 Eq. 233.

1909.

CLARK v. CLARK ET AL.

BARKER, C. J.

make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not to retain it in the donor's own hands for any purpose, fiduciary or otherwise." See also *Warrener* v. *Rodgers* (1). These cases must I think be taken as stating the true principle governing the question under discussion though they are at variance with two previous decisions, *Richardson* v. *Richardson* (2), and *Morgan* v. *Malleson* (3).

It is much to be regretted that the rights of those interested in so large a sum of money must necessarily be determined upon evidence so meagre and uncertain as that which remains available since the death of Hannah Gertrude Clark. The only witness who knows anything about the questions involved, and the only witness who has been examined, is the defendant J. Sutton Clark, who is the surviving executor of John A. Clark (Hannah Gertrude Clark having been the other) and also one of the executors of Hannah Gertrude Clark. Sutton Clark says that in consequence of a letter received from his uncle—the testator—he came to St. John to see him. They talked some business matters over and the testator brought forward—to use the witness's own expression—some securities which he said he had given to his daughter and told him to take them to the Bank of New Brunswick and put them in a vault box there. I do not know that the daughter's name was even mentioned but it was taken for granted at the hearing that Hannah Gertrude was the one referred to. It was not stated what the securities were or what their value was. They were enclosed in an envelope I think at Sutton Clark's suggestion, given to him, and in pursuance of the testator's directions, he went to the Bank of New Brunswick, took out a safety box lease in the names of John A. Clark and Hannah G. Clark, either to have access, and deposited the envelope with its contents as given to him in the box and gave the keys (there were two) to the testator. He never saw either the box or the keys

(1) 16 Eq. 340. (2) 3 Eq. 686. (3) 10 Eq. 475

or the securities afterwards until after the testator's death, when as executor he was taking charge of the estate. He did not state the date of this interview, but it took place immediately before the safety box was procured. The lease is dated April 11th, 1905, and the securities must have been deposited at or about that date, which would be eleven months before the will was made and two years before the testator's death. When the executors took charge of the estate they found two boxes as mentioned in the will—one, the bank vault box just referred to and a private cash box at the testator's residence, the keys of both being then in the possession of Hannah Gertrude Clark, but under what circumstances or at what time or for what purpose she became possessed of them there is absolutely no evidence whatever. The private cash box was then opened and found to contain the following:

A pass book from the Bank of New Brunswick, Savings Bank account in John A. Clark's name for $810.69,

A pass book from the Dominion Savings Bank, account in John A. Clark's name for $1527.93.

A dividend warrant on shares of the British Bank on certificate for ten shares in the name of John A. Clark, Hannah Gertrude Clark and Jean Spurr Clark for $73.

Certificate in the name of John A. Clark from the British Columbia Permanent Loan & Savings Company for $3692.00, and some miscellaneous articles of no value.

I may as well without going farther dispose of the claims to the property in this box. There does not seem to me any evidence of any kind to suggest that, with the exception of the dividend warrant for $73, it was not all estate property belonging to the testator when he died. The dividend warrant carries on its face the evidence of ownership and the money will go accordingly. The property was found in what the testator in his will calls "my private cash box" at his own home; and there is nothing to indicate that Hannah Clark had any interest in it except as to the bank dividend. It is true she had the key of the box, but she was executrix and as such entitled to it. If she had not been, I should not have attached my signifi-

1909.

CLARK v. CLARK ET AL.

BARKER, C. J.

cance to the mere fact of her having possession of the key. Some one must under such circumstances take possession of the key for the safety of the property. Of itself it is no evidence of ownership either of the box or its contents.

The contents of the Bank vault box were as follows: An envelope tied up and addressed "Revd. John A. Clark, Hannah Gertrude Clark" containing the following:—

4 N. S. Steel & Coal Co. debentures for $1000 each, payable to bearer, 6%	$4000 00
2 Town of Sydney Debentures for $1000 each, payable to bearer, 4%	2000 00
10 shares British Columbia Loan &c. Co., for $100 each, payable to John A. Clark,	1000 00
4 Town of North Sydney Debentures for $500 each, bearing interest at 4½%, payable to bearer,	2000 00
2 shares in the British Columbia Permanent Loan &c., Co. for $200 each, payable to John A. Clark,	400 00
1 Debenture of the British Columbia Permanent Loan &c. Co. for $1000, payable to John A. Clark,	1000 00
2 Centenary Church Debentures for $500 each, payable to bearer,	1000 00
	$11400 00

The above securities were in the envelope. In addition to these there was also in the box a promissory note dated June 1st, 1905, for $1000, made by Roderick McDonald of Halifax, N. S., in favor of John A. Clark and endorsed by him to Hannah Gertrude Clark. A pass book with the Canada Permanent Mortgage Co., for $3270.89 in the name of John A. Clark and Hannah Gertrude Clark payable to the survivor of them. Also a bond and mortgage for $8000 from Annie E. Earle, wife of Wm. E. Earle, to Hannah Gertrude Clark. A life insurance policy on Earle's life for $1000, payable to his wife and by her assigned to Hannah Gertrude Clark issued by the

Ontario Mutual Insurance Co. Another life policy in the same Company for $1000 on Earle's life, payable to his wife and by her endorsed to Hannah Gertrude Clark. Some fire insurance policies in different companies upon Earle's property made payable by him to Hannah Gertrude Clark for $6000.—Several fire insurance policies on the King Square property owned by the testator and which is valued at about $15000. All of these books and securities including those in the envelope were found in the Bank vault box which the testator in his will describes as "my box in the vault of the Bank of New Brunswick"; and they together with what was in the private cash box, comprise substantially all the personal property included in the testator's residuary estate Great reliance is placed on the evidence of Sutton Clark as to the so-called declarations of the testator in reference to the securities placed in the envelope and deposited in the Bank box. I am asked to infer that when the testator said "I have given these securities, &c.", it should be inferred that a complete gift had been made, and that where delivery was necessary for that purpose it should be inferred that a delivery had actually taken place. I do not feel at liberty to act upon the assumption that a gift completed by a delivery had actually been made, in view of the manner in which the testator dealt with the property for the two succeeding years of his life and in view of other circumstances to which I shall presently refer. During these two years the testator had the custody of the box and the control of everything in it. During that time he seems to have deposited in it the McDonald note, the Earle papers, the pass book in the Canadian Permanent Mortgage Co., and the insurance policies on the King Square property for none of these seem to have been put in the box originally. It is impossible for the plaintiff or any one else to select any one security found in the envelope on the testator's death and identify it as having been in the envelope originally deposited in the box. I am asked to infer that the contents of the envelope when originally deposited in the box were the same as when they were examined

1909.

CLARK v. CLARK ET AL.

BARKER, C. J.

two years later after the testator had died. I am speaking of the debentures transferable by delivery. As to these I think there is really no evidence of any gift, and that so far as inferences may fairly be drawn from the facts and circumstances, there never was any delivery. As to these the plaintiff's claim must fail. The ten shares in the British Columbia Loan Company and the two shares in the British Columbia Permanent Loan Company are in the name of John A. Clark as the legal owner and were so when he died. The debenture in the same Company is made payable on its face to John A. Clark. As to these, even if the testator intended to make a gift, there never was any assignment which was necessary in order to complete it. As to the remainder of the property there is first the McDonald note for $1000 in favor of the testator and endorsed specially to his daughter Hannah. It is evident that this note was not among the papers deposited in the box by Sutton Clark, because it is dated June 1st, 1905, some seven weeks after the box lease was taken out. The only evidence of a gift is the indorsement. If a delivery of the note had also taken place it would have been complete. There is nothing to show nor anything from which one could infer that the daughter ever saw this note or heard of it until after her father's death. The money on deposit with the Canada Permanent Mortgage Company stands in a somewhat different position. That was a deposit made by the testator in the joint names of himself and his daughter "payable to the survivor." *In re Paul Daley* (1), was cited to show that money so deposited did not necessarily go to the survivor. In that case the money was not deposited so as to go to the survivor, but simply in the joint names of Daley and his daughter with power to either to withdraw; and the Judge there thought that there was evidence to rebut any presumption of a gift. In the present case the testator when he deposited the money did so under a contract with the Company that they would pay it to his daughter if she survived him. There could therefore be no doubt that it was

(1) 37 N. B. R. 483.

the testator's intention that his daughter if she survived him should have the money and he did all that was necessary in order to carry out that intention. I think she is entitled to the money. *Fowkes* v. *Pascoe* (1).

The Earle mortgage was evidently an investment for the benefit of the testator's daughter. She is the mortgagee and as such has the legal title and is entitled to the money secured by it. The insurances on this property as well as the life insurance policy assigned were a part of the mortgage transaction and stand in the same position as the mortgage.

Of the property found in the boxes I think the daughter Hannah Gertrude was entitled to retain as her property given to her by her father during his life the following:—

Her share in the Bank Dividend warrant for $73 which I assume to be one third, say	24 34
Canada Permanent Mortgage Company pass book	3270 89
Earle Mortgage,	8000 00
	$11295 23

The remainder of the property will go to the executors of John A. Clark as part of his residuary estate. In arriving at this result it will be seen that only those moneys and securities which had actually been assigned to the daughter and of which she had the legal title have been allotted to her, and it may be thought that Sutton Clark's evidence uncontradicted as it was, has been entirely ignored. That is not so, but on examination of it, it really had not much bearing on the important points involved. It certainly, so far as it went to prove a gift, made out no stronger a case than that presented in *Morgan* v. *Malleson*, (*supra*) in reference to which Bacon, V. C. in expressing his disapproval of that decision said:—"I am strongly inclined to believe that there must be some imperfection in the report of it, because what staggers me most is to find that the decision, as it stands,

(1) 10 Ch. App. 343.

1909.

CLARK v. CLARK ET AL.

BARKER, C. J.

would seem to establish that if a man writes a letter to say, "I have given" a bank note, or an Indian Bond, or anything else, "to A. B." and no more, and retains the bank note or bond and the memorandum in his own possession, that letter has a valid operation as between himself and A. B. If that were all that appeared in the case I should certainly consider such a letter to be a mere nullity." See *Warrener* v. *Rodgers*. (1)

A strong argument against the claim put forward as to all this property may be found in the schene of the will itself. The testator seems to have derived his property from two sources, a part from his father and the remainder from some other source; it was said from his first wife. His interest in his father's estate which was unsettled at the time of his death has since been settled at about $10,000. The testator gave his interest in that estate to be divided equally between his three children, after the payment of two legacies of $250 each. He gave all his personal and household effects of every description to his daughter Hannah Gertrude "to be used for the furnishing and maintenance of a home over which she is to have control and which is to be the home of her sister Jean as long as she remains unmarried, and also of her step-mother my present wife, so long as she remains my widow." The residue of that part of the estate is disposed of by the clause I have before mentioned and it directs the executors to apply the net income to the support and maintenance of the children and their step-mother so long as she remains his widow. This fund is divisable after the year 1911, as follows, two ninths to Hannah, two ninths to Jean, two ninths in trust for the son and the income of the remaining three ninths to the step-mother during widowhood. It is obvious if Hannah Gertrude took by way of gift all the personal property, the remainder would have been altogether inadequate for the maintenance of the children and step-mother, and the

(1) 16 Eq. 340 at page 349.

1909.

CLARK v. CLARK ET AL.

BARKER, C. J.

provision for the latter, on a division of the fund, and which is the only provision the testator seems to have made for his wife, would be, one would say, out of proportion to the value of the estate.

I have mentioned two of the three classes of cases in which questions of this kind arise. The third is where there is a gift but not to take affect until the donor's death and which is therefore testamentary in its character. I think it not unlikely that the testator may have had some such idea in his mind. In his will he excepts such of the personal property in the boxes, not "which I have already given", but "which I had already given" that is as I read the words, as he had before his death given. The immediate personal necessities of the two daughters for the relief of which the gifts were made, could not very well refer to necessities during the testator's life, because he would relieve these himself. The marking of the envelope with the names of the testator and daughter sustains the notion that she was to have an interest, but it equally sustains the notion that he had not parted with his. And strongest of all is the fact that up to his death he retained the posession and control of all these securities, treated them as his own and collected the interest and dividends for his own use. This is entirely opposed to the idea of a present gift, except where the gift had been in fact completed and became irrevocable as in the case of the assigned securities I have mentioned, and which answer the description of the property excepted. If any such gift as I have described were intended as to the other securities or any of them, it would be testamentary in its character and of no validity by reason of the formalities of the Wills Act requisite in such cases having been disregarded. *Warrener* v. *Rodgers*. (*supra*.)

There will be a declaration such as I have mentioned and the costs of all parties will be paid out of the residuary estate of the testator, the executors costs to be allowed as between solicitor and client.

1909.
September 21.

SMITH, ET AL., TRUSTEES, ETC., OF ROBERTSON v. ROBERTSON, ET AL.

—No. 2. See *ante* p. 139.

Will—Construction—Heirs at Law—Statute of Distributions—Statutory Next of Kin—General Scheme of Will.

R. died in 1876 leaving a will by which he devised practically all his property to trustees, upon trust for the benefit of his children and their heirs.

D. D. R., a son of the testator, died after his father, leaving him surviving a widow and five children.

Held, that the word "heirs" in the will should be construed in its strict legal and technical sense, and was intended to mean the heirs at law and not the statutory next of kin; and that the widow of the deceased son was not entitled to any part of the testator's property, under his will.

This is an application by the trustees for further directions, in the matter of the construction of the will of the late Hon. John Robertson.

The point upon which the trustees now ask for directions is as to the meaning of the word "heirs" in the clause in the will which provides for the final distribution of the scheduled property. See *ante* p. 139.

In accordance with the declaration made by this Court in February, 1909, the trustees have sold the property included in schedule (A.), that is Mrs. Almon's property, and the fund is now ready for distribution under the will.

See *ante* p. 141 for the statement of facts in the report of the previous hearing.

Argument was heard August 27, 1909.

Bowyer S. Smith for the plaintiffs:—

The general rule is that the word "heirs" must be construed in its strict sense, i. e., the persons who would

1909.

SMITH ET AL. v. ROBERTSON ET AL.

inherit real estate in the case of an intestacy. This is the case unless there is something in the context of the will or instrument to modify that meaning: *De Beauvoir* v. *De Beauvoir* (1), *Smith* v. *Butcher* (2), *In the goods of Dixon* (3), *Coatsworth* v. *Carson* (4), *Bateman* v. *Bateman* (5). The fact of the conversion of the real estate into personalty does not alter the meaning of the word "heirs." The widow of the deceased son of the testator is not one of the "heirs" as mentioned in the testator's will and should be excluded.

W. A. Ewing, K. C., for the daughters of David D. Robertson the deceased son, defendants:—

In the will the words "issue", "children" and "heirs" are used interchangably, and therefore the word "heirs" does not include the widow of the deceased son, and she does not inherit under the testator's will: *Bull* v. *Comberbach* (6).

M. G. Teed, K. C., for Martha M. S. Robertson, the widow of David D. Robertson the deceased son, defendant:—

If the heir takes by succession or substitution the property will go according to its nature. In this case, by looking at the will carefully, it is easily seen that the heirs take by succession and substitution; the words "*per stirpes* and not *per capita*" show this. The word "heirs" cannot mean heirs-at-law in the strict sense, but the heirs who would take under the Statute of Distributions. See *Hamilton* v. *Mills* (7), *Wingfield* v. *Wingfield* (8), *Keay* v. *Boulton* (9), *In re Stannard, Stannard* v. *Burt* (10).

Smith in reply:—

As this fund is a blended fund, the meaning of the word "heirs" cannot be determined from the nature of the property.

(1) 3 H. of L. Cas. 524.
(2) 10 Ch. D. 113.
(3) 4 Prob. D. 81.
(4) 24 Ont. Rep. 185.
(5) 17 Gr, Ch. R. 227.
(6) 25 Bea. 540.
(7) 29 Bea. 193.
(8) L. R. 9 Ch. D. 658.
(9) L. R. 25 Ch. D. 212.
(10) 52 L. J., Ch. (1883) 355.

1909.

SMITH ET AL. v. ROBERTSON ET AL.

BARKER, C. J.

1909. September 21. BARKER, C. J.:—

Further directions. When this case was before me in February last there was a declaration made (1) that in order to make the payment to the executors of the will of L. J. Almon of the one third share of the property comprised in schedule "A" appointed to him the plaintiffs have power to sell and dispose of it as they may deem necessary, and (2) that unappointed two third shares of Mary Allan Almon in the same property should be divided now into five equal shares, one share to each of the surviving children of the testator and one share to the heirs of David D. Robertson.

In accordance with this declaration the plaintiffs have sold the property included in Schedule "A", that is Mrs. Almon's property and the fund is ready for distribution under the will. This property was by the terms of the will vested in the plaintiffs the present trustees upon trust on Mrs. Almon's death to convey one third of it to such person or persons and upon such trusts as she might appoint. The remaining two thirds were in the case of a daughter dying leaving children surviving, to be held by the trustees for the benefit of the children as particularly directed in the will. In case a daughter died leaving no issue surviving the will provided as follows: "And in the event of my daughter dying, leaving no issue her surviving, then and in such case I will and direct that the said two thirds and one third before mention (if no disposition of the same shall be made by my said daughter) shall be equally divided by my said executors and trustees between her sisters and brothers and their respective heirs in equal proportions *per stirpes* and not *per capita*." Mrs. Almon executed her power of appointment as to one third of the property in favour of her husband who survived her. She died without ever having had any children, leaving four sisters and the widow of her deceased brother David D. Robertson and their five children surviving. The question as to which the trustees now ask for directions is as to the meaning to be given to the word "heirs" in the clause I

have quoted. On the part of the widow of David D. Robertson it is claimed that the word must be read as meaning the statutory next of kin so that so much of the one fifth share of the fund as consisted of personal estate would be divisible under the Statute of Distributions in which case the widow would be entitled to one third. On the part of the children of David D. Robertson it is claimed that the word must be read in its primary sense as "heirs at law," in which case the whole fund would go to them to the exclusion of the widow. No doubt there are many cases to be found where Judges, in order to carry out what from the provisions in the will, they concluded was the testator's intention, have given to the word "heirs" and other similar expressions having a well understood technical meaning, an altogether different interpretation similar to that proposed here, and in order to carry into effect this intention, they have incorporated into the will provisions of the Statute of Distributions, as must be done in the present case in order to include the widow as a participant in this fund. After an examination of many of these cases I have come to the conclusion that they are not applicable to the present and that the widow's claim cannot be sustained. It is not disputed that this must be the result unless the word "heirs" was used by the testator in some other than its primary and ordinary meaning.

In *Keay* v. *Boulton* (1), cited by Mr. Teed as a representative case of the class to which I have referred Pearson, J., says, "The next question is, what is the meaning of the word "heirs", the gift including both real and personal property? Is the word "heirs" used in the sense of *persona designata*, indicating the person who would have been the heir at law of real estate of a child who had died intestate, or is it to be read in a qualified sense, so as to give the real estate to those persons who would in the event of the intestacy of the deceased children have taken their real estate and the personal estate to their next of kin according to the Statute of Distributions? I think this case is to be decided by

(1) 25 Ch. D. 212.

1909.

SMITH ET AL. v. ROBERTSON ET AL.

BARKER, C. J.

authority and by authority only. No doubt the word "heir" has a technical meaning, i. e. the heir at law of real estate, and if there is nothing in the will to show a contrary intention the heir at law must take the property as *persona designata*." It is therefore necessary in order to sustain the widow's claim that we should find something in the will clearly indicating an intention on the testator's part in using the word "heirs" not to mean the heirs at law but a different class of persons altogether.

The scheme of this will, stated shortly, is this,—eliminating the provisions made for his widow, the testator for the benefit of his five daughters, divided up certain real and personal property into five parts, one for each daughter. Each part was estimated to be worth $50,000 and they were mentioned and described in five separate schedules distinguished respectively by the letters A, B, C, D & E, the property comprised in Schedule A, having been allotted to Mrs. Almon and representing the fund now ready for distribution. On the death of a daughter the property comprised in her schedule was to be disposed of by the trustees in the manner already mentioned. These properties as they are described in the schedules, consisted principally of real estate —that in Schedule D seems to have been entirely so—but the others consist of both real and personal. The trustees had power to vary investments and with the consent of the daughter to sell her real estate and invest the proceeds of such sale, as well as moneys received by way of insurance against loss by fire, in mortgage and other securities; so that it is wholly unlikely that the nature of these scheduled properties would remain to-day as they were at the testator's death over thirty years ago. I cannot think that the testator had any intention in providing for the final distribution of his estate—for the residuary estate is subject to the same trusts—that the question as to who should take it under his will should depend in any way upon the nature of the property as it might happen to be at the date of distribution. He treated real and personal property as one fund and not separately.

1909.

SMITH ET AL. v. ROBERTSON ET AL.

BARKER, C.J.

His intention clearly was that the whole fund should go to the one class irrespective of its nature. It was one third of the whole property over which the daughter had a power of appointment and in transferring that to the appointee the trustees were under no obligation to divide it one third of the personal and one third of the real. Both were treated as one fund. By the language of the will it is in the case which has happened, the two unappointed thirds "of the lands, tenements, hereditments and premises apportioned to her in such schedule" which the trustees are to divide equally between the sisters and brother and their respective heirs in equal proportions *per stirpes* and not *per capita*. The evidence of intention is quite as strong as in the case of *Gwynee* v. *Muddock* (1), in which the Master of the Rolls says—"I have not found any case directly applicable; but there is no doubt, the heir at law properly and technically speaking, may take personal property bequeathed to him by that description. It is always a question of intention, what the testator means by the use of such description. Where two descriptions of property are given together in one mass, then the difficulty arises, who is meant; for both the next of kin and the heir cannot take; unless this construction can be made *reddendo singula singulis*, that the next of kin shall take the personal estate; and the heir at law the real estate. But in this case the testator could not mean that; for he blends all the real and personal estate together; and after the death of Ann Williams directs that his nighest heir at law shall enjoy the same. As both are to be enjoyed together, it is absolutely necessary for the Court to say, who shall enjoy both. It would be contrary to the intention to divide them; and it would be contrary to the words to give the whole to the next of kin. Therefore the Court has no alternative but to adhere to the words of the will; and permit the person, who answers the description of heir at law to enjoy the whole." See *De Beauvoir* v. *De Beauvoir* (2); *Smith* v. *Butcher* (3); *In the goods of Dixon* (4).

(1) 14 Ves. 488.
(2) 3 H. of L. C. 524 at p. 550.
(3) 10 Ch. D. 113.
(4) 4 Prob. D. 81.

1909.

SMITH ET AL v. ROBERTSON ET AL.

BARKER, C. J.

It is scarcely necessary to point out that the wife is not next of kin to her husband nor the husband to the wife. *Watt* v. *Watt* (1), *Cholmondeley* v. *Ashburton* (2), *Kilner* v. *Leech* (3). What she takes under the Statute of Distributions she takes as widow. She takes an arbitrary proportion and the remainder goes among the next of kin as specially provided. In its primary sense the phrase "next of kin" does not include either husband or wife. *Garrick* v. *Lord Camden* (4), *In re Fitzgerald* (5), *Milne* v. *Gilbart* (6). It is therefore necessary in order to include the widow as one of those entitled to the personal property that the word "heirs" shall be read as including all persons who, in the case of an intestacy, would be entitled under the Statute of Distributions. In other words I must hold as a matter of constructon, that when this testator directed his trustees, in the events which have happened, to divide the one fifth of this property share and share alike among the heirs of his deceased son David D. Robertson he only intended so far as it was personal property that they should have two thirds of it and the remaining one third go to one who was not next of kin or of kin to him at all. Is such a departure from the ordinary and primary meaning of the testator's language admissible; for after all it is as Kindersley, V. C., says in *Low* v. *Smith* (7), "a mere application of what is the ordinary elementary rule of construction, that for the purpose of construing any word in any will that ever was executed, such word must receive its ordinary and primary meaning, unless the Court is satisfied that the testator intended to use it in a secondary and less proper sense." There is not in this whole will any mention of the Statute of Distributions or any reference to it in any way. Roper in his work on legacies at page 121 says:—"It may be considered settled that a testator is to be understood to mean by the expression "next of kin," when

(1) 3 Ves. 244.
(2) 6 Bea. 86.
(3) 10 Bea. 362.
(4) 14 Ves. 372.
(5) 58 L. J. Ch. 662.
(6) 2 DeG. M. & G. 715, affld. on app. 5 Ib. 510.
(7) 2 Jur. N. S. 344.

he does not refer to the statute or to a distribution of the property as if he had died intestate those persons only who should be nearest of kin to him to the exclusion of others who might happen to be within the degree limited by the statute." And he treats the conflict of opinions on this point as definitely settled by *Elmsley* v. *Young* (1), as to which he says, "After a full discussion of the conflicting authorities the Lord Commissioner decided that the words "next of kin" when used *simpliciter*, are to be construed strictly as meaning the next of kin in degree according to the civil law of computation and not the persons entitled according to the Statute of Distributions; it is to be observed that the above is the case of a deed and not of a will. But this decision has been followed in the case of a will in *Cooper* v. *Denison* (2)". The cases are fully discussed in *Elmsley* v. *Young* (*supra*) and in summing up the different arguments Lord Commissioner Bosanquet says—"The two grounds, then, upon which the decision of Mr. J. Buller proceeds, are first, that the words "next of kin" have, since the statute, acquired a particular meaning; and secondly, that the case of *Thomas* v. *Hole* was a decision in point to govern that case. Now how, and when, and to what extent did the words "next of kin" acquire any particular meaning distinct from their known legal meaning? That before the statute the meaning of those words was clear and intelligible, and that there was no difficulty in applying them, as they had been applied on former occasions and according to the language of Lord Coke, to the next in blood, there can be no doubt. How, then, did they acquire a different meaning; and how can that meaning be applied to an instrument which does not profess to relate to the Statute of Distributions—which does not profess to relate to an intestacy—but which, on the contrary, professes to point out the particular persons who are to take the property, and which, as it appears to me, indicates an anxiety not to leave any part of the settler's property undisposed of? Do the words "next of kin" imply that a distribution is to be made

(1) 2 M. & K. 780. (2) 13 Sim. 290.

1909.

SMITH ET AL. v. ROBERTSON ET AL.

BARKER, C. J.

according to the directions of the statute or are they to be construed "next of kin" as described in the statute? That they do not imply a distribution according to the provisions of the statute, is, I think, clear from this circumstance, that they do not extend to the wife; for it is not argued that they extend to the wife."

In the present case the testator has used the word heirs, but if he had used the term "next of kin" the case from which I have just quoted is an authority for saying that the widow would not have been included as there is no reference direct or indirect to the Statute of Distributions, and the words therefore have their ordinary meaning. *Halton* v. *Foster* (1), and *Withy* v. *Mangles* (2), are to the same effect.

There is one other provision of the will which is opposed to the construction proposed on the part of the widow. The will directs that this property (real and personal) shall be equally divided by the trustees between the surviving sisters and brother and (not or) their respective heirs in equal proportions *per stirpes* and not *per capita*. It is clear that whoever is entitled as heirs to take the property are to take it in equal proportions. How can that apply to a widow, who, if entitled at all, is entitled under the statute to one third of the whole. The words "in equal proportions *per stirpes* and not *per capita*", which are not apt words to use in reference to a widow's interest in her husband's personal property where he dies intestate, must be struck out altogether in order to give the proposed meaning to the word "heirs." That would be making a new will, and as it seems to me rejecting a plain meaning used in order to do so. I think the widow is not entitled to participate in the fund.

The costs of all parties will be paid out of the general residuary estate. Trustees' to be taxed as between solicitor and client.

(1) 3 Ch. App. 505. (2) 10 C. & F. 215

SEELY v. KERR, ET AL. 1909.

December 3.

—No. 2. See *ante* p. 184.

Injunction.

Bill filed for an injunction to compel the removal of the wharf erected by the Francis Kerr Co., Ltd., on a water lot leased to them by the City of Saint John, and for damages.

Argument was heard November 30, and December 3, 1909.

A. O. Earle, K. C., and *A. A. Wilson*, K. C., for the plaintiff.

C. N. Skinner, K. C., for the defendants.

1909. December 3. BARKER, C. J.:—

The interim injunction granted by me on the previous hearing of this case will be made perpetual, and varied so as to be mandatory, compelling the removal of the wharf. The defendants must pay all costs.

ORDER.

The defendants will be restrained from erecting or permitting to remain erected or built any wharf or other structure on the lot leased to them under lease dated the Eleventh day of March, A. D. 1909, by the City of Saint John, mentioned in the plaintiff's bill, and lying immediately to the south of plaintiff's lot number two, mentioned in the plaintiff's bill, so as to injure or obstruct the plaintiff's right of access to the waters of the harbour of the City of Saint John on the southern side of the plaintiff's wharf, in the said bill mentioned, on the said plaintiff's lot, or the privileges heretofore enjoyed by the plaintiff of laying and mooring crafts, loading and unloading, and embarking and disembarking goods on the south side of the said plaintiff's said wharf.

1909. TAYLOR v. McLEOD, ET AL, TRUSTEES OF TAYLOR.

December 31.

Will—Construction—Fund for Maintenance and Education—Time for Payment—Costs.

B. G. F. the testator died October 1st, 1895, leaving him surviving a widow and one child, a son, the present plaintiff.

The will contains the following provision:—"And I hereby will and bequeath all my estate, real and personal (of which I may die possessed) to my said executors and trustees for the following purposes—that they shall, in the first place convert all property into cash within one year from the date of my death, and after the payment of my just debts shall invest the remainder in safe interest paying investments and out of such investments I direct that the sum of one thousand pounds (£1,000) or the equivalent thereof be set apart and used by my said executors and trustees for the purpose of educating and giving a profession to my son Gordon Winslow Taylor providing he has not already been educated and received a profession." The will also provides that the plaintiff is not to receive his share of the residue of the estate until he reaches the age of twenty five years.

G. W. T. became twenty one years of age September 2nd, 1909.

Held, that as the plaintiff has reached the age of twenty one years he is now entitled to have paid over to him the £1,000 fund with accumulations and interest, or to have transferred to him the securities in which this fund is invested.

Trustees who refuse to pay over a legacy when they have no reasonable doubt but that it should be paid, will not be allowed any costs in an action to compel its payment.

Quære, in such a case are not trustees personally liable for the costs of the proceedings?

Bill filed for the administration of the trusts of the will of the late Byron G. Taylor. The facts are sufficiently stated in the judgment of the Court.

Argument was heard December 21, 1909.

J. Roy Campbell for the plaintiff:—

There appear to be two classes of cases respecting testamentary gifts of this nature, viz.—(1.) Where there is a gift to a person for a particular purpose, and where the gift is for the benefit of the person: (2.) Where a discretion is

given to trustees or executors to apply money to a particular purpose. The present case falls within the first class, and the plaintiff is now entitled to have the fund in the hands of the trustees paid over to him, as it was bequeathed for his benefit, even though the particular purpose for which it was left fails. See Jarman on Wills (1), *Nevill* v. *Nevill* (2), *Apreece* v. *Apreece* (3), *Leighton* v. *Bailie* (4), *In re Bowes, Strathmore* v. *Vane* (5), *Hutchinson* v. *Rough* (6), *Earl of Mexborough* v. *Savile* (7). In the second class of cases there is a power given to trustees to apply money to a particular purpose, and it is left in the discretion of the trustees as to whether or not they shall exercise that power. See *Cooper* v. *Mantell* (8), *Robinson* v. *Cleator* (9).

C. H. Ferguson for the trustees, the defendants, took no part.

December 31. 1909. BARKER, C. J.:—

In form this bill is one for the administration of the trusts of the will of the late Byron G. Taylor, but in substance and fact it is for the payment of a legacy which the plaintiff, his son, claims from the defendants, who are the trustees under his will.

The testator died on the first of October, 1895, leaving him surviving a widow and one child—the plaintiff—who was then about seven years old. The will contains the following provisions—"And I hereby will and bequeath all my estate, real and personal (of which I may died possessed) to my said executors and trustees for the following purpose—that they shall, in the first place convert all property into cash within one year from the date of my death, and after the payment of my just debts shall invest the remainder in safe interest paying investments and out of such investments

(1) 5th Ed. Vol. 1, 367.
(2) 2 Ver. 431.
(3) 1 Ves. & B. 364.
(4) 3 Myl. & K. 267.
(5) 1896, 1 Ch. D. 507.
(6) 40 L. T. 289.
(7) 88 L. T. 131.
(8) 22 Bea. 231.
(9) 15 Ves. 526.

1909.

TAYLOR v. MCLEOD ET AL.

BARKER, C. J.

I direct that the sum of one thousand pounds (£1,000) or the equivalent thereof be set apart and used by my said executors and trustees for the purpose of educating and giving a profession to my son Gordon Winslow Taylor providing he has not already been educated and received a profession." The will then contained directions as to the disposal of the residue of the estate and provides that the plaintiff's share of it shall be paid over to him on his attaining the age of twenty five years, the income of the share being in the meantime available for his support and maintenance. This £1,000 fund was set aside and it is in the defendants' hands invested as follows:—$5,000 in City of Saint John debentures, $500 in Kings County debentures and $45.66 on special deposit in the Bank of New Brunswick. This is the unexpended balance of the original fund and accumulations after deducting $1,500, allowed the plaintiff by the defendants to enable him to travel in Europe in 1907.

The plaintiff reached the age of twenty one years on the 2nd September, 1909, and he has filed this bill by which it is prayed that this estate be administered under the direction of this Court. The plaintiff claims that he is entitled to have paid over to him, now that he is of age, the £1,000 fund, and to secure that is the sole object of this bill. There is no dispute as to the facts, and the only point upon which I intend making any observation is the question of costs. Section twelve of the bill is as follows:—"That since the said plaintiff has attained the age of twenty one years as aforesaid he has applied to the said defendants, George Otty Dixon Otty and James A. Belyea, to have the balance of the said fund and interest or the securities representing the same, transferred to him the said plaintiff, but the said two last mentioned defendants informed the said plaintiff that the defendants were unwilling and would not do so without the sanction of this Honourable Court." The defendants admit this statement to be true. I think the plaintiff is entitled to the payment of this fund. It is clearly a legacy for his benefit and in the absence of any provision postponing its

payment to a later date, as in the case with the remainder of the estate, would be payable to the plaintiff on his coming of age when he could give a valid discharge to the trustees. The authorities cited by Mr. Campbell, and there are many others which might be cited, sustain the plaintiff's claim. There must therefore be a decree for the payment of the fund to the plaintiff.

As to the costs—To make them payable out of the fund as would be the usual course is simply so far as the plaintiff's costs are concerned, to order his costs to be paid out of his own money. I asked the plaintiff's counsel if he claimed that the defendants should pay the costs of this suit and he distinctly said that he did not. There is therefore no one to pay them but himself and there seems no order necessary as he is liable on his own retainer. An order might be made for the trustees to pay them out of the fund and pay the balance over to the plaintiff. There is no object to be gained by that, more especially as a security would have to be sold for the purpose, and that no one wanted done. As to the defendants' costs, in what position do they stand? I asked their counsel to point out why the defendants refused to pay, and in what way doubts as to the plaintiff's right to the money had arisen. He frankly told me that in his opinion the money ought to be paid, and the two defendants Otty and Belyea, both of whom are lawyers, were apparently of the same opinion. These proceedings therefore have been rendered necessary, not by any doubt the trustees had or could even suggest as to the plaintiff's right, but because they refused to pay without the sanction of this Court. I am disposed to think that there are authorities which in such a case would render them personally liable for the costs of the proceedings, but that is not asked here and so the only question is whether they should have costs. I have come to the conclusion that they should not.

In *Knight* v. *Martin* (1), a trustee who refused to pay a legacy without the direction of the Court in a case which

(1) 1 Russ. & Myl. 70.

1909.

TAYLOR v. McLEOD ET AL.

BARKER, C. J.

admitted of no doubt was refused his costs, and only escaped an order to pay costs because he might have been ignorant and did not act from any improper motive. *Campbell* v. *Home* (1), and cases cited in the note at page 670 are to the same effect.

The same rule has been applied to trustees paying the fund into Court under the Trustees Act to escape some fancied liability. They have been obliged to pay the costs of getting the money out of Court. In *In re Elliot's Trusts* (2), Malins, V. C., says:—"By the present proceedings the fund will be greatly diminished and I am sorry to find that the trustees were not taught a better lesson when, in deciding the case in July last, regarding the sister's share, which they also paid into Court, I ordered them to pay the costs. I decided that they were not then bound to make inquiries about the encumbrances on the fund. I think these proceedings were perfectly unjustifiable, and although it is clear that the Court will incline towards the payment of the costs of trustees when they act in a *bona fide* way, still, on the other hand, it is most important that trustees should not incur unnecessary expenses for the mere purpose of relieving themselves of all liability, and particularly so when there is no reasonable doubt in their way. * * * I can find no excuse for their having paid the money into Court except a restless anxiety to get rid of it and I cannot relieve them from the payment of costs." See also *In re Cuter's Trusts* (3), *In re Knight's Trusts* (4).

The same rule has been adopted in the case of trustees unnecessarily seeking advice or opinions of the Court on questions of management.

While the Court will afford trustees every assistance and protection when they are acting *bona fide* and are in doubt on reasonable grounds as to the proper course to pursue, it is obvious, that, if the trust funds are to be utilized in proceedings and applications to meet cases where the trustees

(1) 1 Y. & C. Ch. R. 664.
(2) 15 Eq. 194.
(3) 25 Bea. 361.
(4) 27 Bea. 45.

1909.

TAYLOR v. McLEOD ET AL.

BARKER, C. J.

themselves cannot even suggest a doubt as to the course they should take or when there is no substantial doubt as to what should be done, trustees would be of little use, they would be little more than clerks or ministerial officers of the Court paid out of the trust funds.

There will be a decree for the trustees to pay over the fund as invested with accumulations and interest.

There will be no order as to costs.

No order as to administering the estate in this Court. There seems very little to be done and the Probate Court can pass the accounts. Under the circumstances there is no reason for taking the administration over.

1910.
March 15.

GODARD v. GODARD.

Injunction—Trespass—Legal and Equitable Remedies—Supreme Court in Equity Act, Con. Stat. (1903) Chap. 112, Sec. 34.

In an ordinary case of trespass where there is an adequate legal remedy in the nature of damages, an injunction will only be granted by a Court of Equity when special circumstances are shewn.

Application on notice to continue an injunction obtained *ex parte*.

Fowler & Jonah for the plaintiff.

M. G. Teed, K. C., and *J. Herbert McFadzen* for the defendant.

Argument was heard February 15, 1910.

1910. March 15. BARKER, C. J.:—

After a careful examination of the bill and affidavits, I have come to the conclusion that this application to continue the injunction must be refused. I granted it with hesitation, and was too much influenced by the fact that the defendant had the protection afforded by the plaintiff's indemnity as to damages. Although this present application has been supported by additional affidavits to those originally used before me, it ought not to succeed.

The case set up by the bill and supported by the affidavits is nothing more than an ordinary case of

1910.

GODARD v. GODARD.

BARKER, C. J.

trespass for cutting down and carrying away trees from off the plaintiff's land. No relief is sought, except an injunction restraining further cutting, the removal of the trees already cut and damages for the trespass. The dispute seems to be a *bona fide* one between the plaintiff and defendant as to which of them owns the land in question. So long as the distinction between legal and equitable remedies is maintained, cases of trespass like this, where there is an adequate remedy by action at law, will not be entertained by this Court. It is true that Section 34 of the Supreme Court in Equity Act authorizes this Court, if it should think fit, to interfere in cases of apprehended trespass, and cases no doubt arise where that authority will be exercised. But if the Court were to interfere in this present case, there is no case of trespass where this Court might not as well be asked to act, and the result would be that all such cases might be transferred here instead of remaining in the other branch of the Court where they properly belong. It might be that a defendant is wholly unable to pay damages, or it might appear that acts done professedly of right were really mere trespasses, or other circumstances might exist to render the interposition of this Court necessary for the proper protection of all parties with the least possible injury. In the present case there is no suggestion in the bill or affidavits that the defendant is unable to pay any damages for which he may be found liable. The extent of the cutting or the value of the trees cut is not made to appear very clearly, but there is nothing to indicate that the defendant acted recklessly or in any different way from what an undisputed owner might have done in the prudent use of his property. Besides this, it seems an action at law was brought in 1908 for similar cutting, which was not proceeded with, although the cutting was not abandoned. I can see no stronger reason for restraining the defendant at plaintiff's instance than for restraining

1910.

GODARD v. GODARD.

BARKER, C. J.

the plaintiff at the defendant's instance. The case does not differ materially from *Wood* v. *LeBlanc* (1), See also *Webster* v. *The South-Eastern Railway Company* (2).

The application to continue the injunction will be refused with costs, without prejudice to the plaintiff to take any proceeding at law.

(1) 2 N. B. E. R. 427. (2) (1851) 15 Jur. 73.

LOMBARD v. THE DUNBAR COMPANY.

1910.

May 17.

Infringement of Patent—Injunction—Damages—Patent Act, R. S. C. (1906) Chap. 69.

The plaintiff L. obtained two Canadian patents for a certain log-hauling machine. The first was applied for April 17th, 1901, and was granted July 16th, 1901. The second was applied for May 22nd, 1907, and was granted November 19th, 1907. L. also obtained a patent in the United States for the same device, which was applied for November 22nd, 1905, and granted in May, 1907.

Four of the machines were manufactured in the United States in accordance with the specifications of the 1907 Canadian patent, and were sold there in the years 1905 and 1906 with the knowledge and consent of L.

On the hearing all rights under the Canadian patent of 1901 were formally abandoned by L.

Held, that the Canadian patent dated November 19th, 1907, is void on the ground of non-compliance with the provisions of the Patent Act, as the invention so patented was in public use and on sale with the consent of the inventor thereof for more than one year previous to the application for the said patent in Canada. R. S. C., Chap. 69, Sec. 7.

The words "in Canada" in section seven of the Patent Act have reference to the application for the patent, and not to the sale of the machine to be patented. *Smith* v. *Goldie* (1) followed.

In the Canadian patent of 1907 small rollers were substituted for roller chains, as specified in the 1901 patent, to perform a certain function in connection with the operation of the machine. These rollers were afterwards found to be impracticable, and in all the machines manufactured both by L. or his agents, and by the defendants, with the exception of the four machines mentioned above, the roller chains were used as specified in the patent of 1901.

Three of the machines were manufactured in Canada by L.'s agents in 1908, and two were sold in Canada in that year. Three of the machines were also manufactured in the United States by L. in the years 1906 and 1907, and were sold by him in Canada during those years. All of these machines were fitted with the roller chains according to the specifications for the patent of 1901, and not with the small rollers as provided for in the patent of 1907.

Held, also, that the Canadian patent dated November 19th, 1907, is void on the ground of non-compliance with the provisions of the Patent Act, as the construction or manufacture of the invention so patented had not been commenced or carried on in Canada within two years from the date of the said patent. R. S. C., Chap. 69, Sec. 38.

(1) 7 Ont. App. 628. (On appeal 9 S. C. R. 46)

1910.

LOMBARD v. THE DUNBAR COMPANY.

BARKER, C. J.

Bill filed for an injunction and for damages. The facts are fully stated in the judgment of the Court.

Louis E. Young and *Ira G. Hersey* (of the Maine bar) for the plaintiff.

F. B. Carvell, K. C., for the defendants.

Argument was heard January 4th, 1910.

1910. May 17. BARKER, C. J.:—

The plaintiff is a resident of the State of Maine, and the defendants are a Company incorporated under the New Brunswick Joint Stock Companies Act, and doing business at Woodstock. The plaintiff is asking for an injunction restraining the defendants from infringing two Canadian patents issued to him as the original inventor of certain improvements in log hauling machines, and for damages sustained by reason of sales made by the Company. The first of these patents is numbered 72263, and dated July 16th, 1901, and the other is numbered 108676, and dated November 19th, 1907. The bill, which was sworn to by the plaintiff on the 7th of December, 1908, alleges as to the earlier patent, that the plaintiff "was the original and first inventor and owner of new and useful improvements in logging engines not known or used in the Dominion of Canada, and not patented or described in any printed publication in this or any foreign country before his said invention was discovered, and not more than one year prior to his hereinafter recited application for a patent therefor, and not in public use or on sale for more than one year prior to his hereinafter recited application for a patent therefor; and no application for a foreign patent for said invention was filed for more than twelve months prior to filing of the application in the Dominion of Canada." Section seven contains a precisely similar allegation as to the 1907 patent. Section eleven alleges that both of these patents were then in full force and effect and that the plaintiff was the sole owner of the patents and improvements. Section

twelve is as follows:—"That since the issue of the patents to the plaintiff as set out in the preceding paragraph of this bill the plaintiff has been at all times in a position under said patent to supply the public in the Dominion of Canada with the said logging engines and log haulers, and he has invested and expended large sums of money, and been at great expense, in making, constructing and building said logging engines and log haulers under said patents, and has made valuable contracts with divers persons to manufacture, build and sell for him, the said plaintiff, said machinery and log haulers as aforesaid throughout the Dominion of Canada, and is now engaged in the manufacture and sale of the said log haulers under said patents as aforesaid, and believes that he will realize and receive large gains and profits therefrom, if infringement of said patents by the defendants shall be prevented." The bill further alleges that the defendants had manufactured and sold three log hauling machines in Canada for which they had been paid $18,000, and that these machines were infringements of his patents. Although no mention is made of it in the original bill, the evidence shows that the plaintiff, on the 21st of May, 1907, obtained a patent in the United States for precisely the same improvements and on precisely the same claims and specifications as those on which the Canadian patent issued in 1907. The United States patent is numbered 854364, and although it was not issued until May, 1907, it was applied for on November 22nd, 1905, eighteen months before. The application for the 1901 patent in Canada was made on or about April 17th, of that year, and the 1907 patent was applied for on the 22nd of May of that year.

On the hearing the plaintiff's counsel formally abandoned all rights under the patent of 1901 and also all claims for damages. The discussion is therefore limited to the plaintiff's rights under his Canadian patent of 1907.

1910.

LOMBARD v. THE DUNBAR COMPANY.

BARKER, C. J.

The machine in question was designed by the plaintiff for hauling, by means of a traction engine propelled by steam power, heavy loads of lumber over rough roads, soft ground and roads covered with snow. Traction engines for hauling heavy loads on smooth and solid roads were well known, but as such roads are not always to be found in the lumber woods, the plaintiff's aim was to discover some means by which the machine would operate equally well whatever might be the nature of the road. He therefore designed a revolving belt—a "lag belt" he called it — a foot or more in width which formed a continuous track for the wheels. This, I should say, not only from the evidence, but from the claims set out in the applications for both patents, was the only part of the machine for which any claim for novelty could very well be maintained. The combination, however, with it of other appliances well known, and their arrangement so as to make a valuable machine accomplishing a new and useful result, was the idea patented. After giving some evidence as to the novelty of the machine as patented in 1901 the plaintiff gave the following:—

"Q. At that time the idea came to you and you worked out yourself the principles and constructed the mechanism of this machine which you call an improvement in logging engines? A. Yes.

"Q. In this improvement in logging engines, where does the improvement mainly consist? A. In the traction.

"Q. In all former logging or other engines they have been confined to what we call a round wheel as a traction member? A. Yes.

"Q. The spirit of your invention at that time was the changing of this and the invention of a traction member with what difference? A. It gave a great traction to the ground and simply laid a plank on the ground and made you go over snowy roads the same as even roads and accomplished a feat never before done.

"Q. A member bearing on the ground? A. The same as throwing a plank on the ground and getting on to it.

"Q. A distance of about what length? A. Oh! about five feet in length approximately. . . .

"Q. The reason for making the machine in that form was to enable the engine to do what? A. To enable the engine to pass over the snowy roads and rough roads and to do it easily, and have a great hauling traction to get over snowy places the same as snow or mud, and pass over uneven places like on a skid and do that in this kind of business which it was designed to do, which the round wheel absolutely could not accomplish. It would sink and bury itself, and this had a flat and would go over the snow, and what I was trying to accomplish was to get an engine that would go through loose snow and mud and so on, and do it practically was what I was aiming at."

The plaintiff soon found that a machine made according to the 1901 patent was defective. He explains it as follows:—

"Q. Wherein wouldn't it work? A. Well, when we got this machine out and put it on the hard ground or ice where there was no snow or mud the machine worked and its idea and principle were all right, but just as soon as we struck loose, soft snow or soft, clayey mud, the mud worked right under those cogs, and would throw it out of place and haul a belt out so straight that it wouldn't work and filled all up, and we would constantly have to stop and take these out with little chisels and when frozen there it would keep the steam up half an hour and stop and thaw them, because the snow sifted in and the cogs underneath them would fill with ice so solid we couldn't move the machine, and while my principle was right it was impracticable to go in this snowy country with, under my first patent."

1910.

LOMBARD v. THE DUNBAR COMPANY.

BARKER, C. J.

The plaintiff then describes at some length the various methods which he tried in order to find some way to get rid of all these difficulties. Many of them failed, but eventually he conceived the idea of substituting sprocket gear for the cog wheels, and after some fitting and making some changes in the adjustment of the parts to suit the new gear, he had a machine which, to borrow his own phrase, "did the trick." This led to the application for the patent applied for in the United States in May, 1905, and to the 1907 patent obtained in Canada.

It has been contended before me that the machine is not novel either in its principle or results and therefore not patentable. I do not assent to this. The machine as completed does accomplish a useful purpose not accomplished before, and although it may be merely a combination of parts—each perfect in itself and in common use—the combination is patentable as a new and useful arrangement of these parts producing a new result. It was also contended by the defendants' counsel that, at all events as to the patent of 1907, the machine then patented could not be said to be novel, in view of the fact that the plaintiff had himself obtained a patent in 1901 for a machine to serve the same purpose, precisely similar in principle and containing the flexible road belt, which was really the only novelty in the combination and without which the machine would have been an entire failure.

It is unnecessary, in the view which I take of the case, to go into any critical examination of the nature or importance of the alleged difference between the two as specified in the two applications, because I think it must be disposed of on other grounds.

In order to obtain a patent in Canada it is necessary that in addition to the novelty and utility of the machine, or other subject matter to be patented, that it shall not have been in public use or on sale with the consent or

allowance of the inventor for more than one year previously to the application being made (Patent Act, Sec. 7, Chap. 69, R. S. C.) As I have already pointed out, the bill alleges as to the application for the 1907 patent, that the machine had not been so in use or on sale, and to the truth of that statement the plaintiff, by his affidavit verifying the bill, pledged his oath. The evidence of the plaintiff himself shows that this statement is not correct. After he had made the changes in the first machine necessary to obviate the defects in it, and designed, as he supposed, one which would work successfully, he had a machine built according to the specifications of his United States patent which was applied for on November 22nd, 1905, a little over two years before his patent was granted in Canada. On a test of this machine it was found that the arrangement of rollers designed to overcome the friction between the bottom of the frame and the top of the lag bed was altogether unsatisfactory. This arrangement had been introduced into the patent of 1907 as an improvement on roller chains provided for in the 1901 patent, to accomplish the same result. I shall have occasion later on, when dealing with another point in the case, to refer to the evidence on this point. For the present it is sufficient to say that when the plaintiff found out that those rollers did not answer their purpose he abandoned them altogether and went back to the roller chains, and in all the machines which he has constructed and put on the market since, except four, he has used these roller chains. These four machines were made with the rollers according to the specifications of the 1907 patent in the United States and sold there. One was sold by the plaintiff to the Western Lumber Company, of Montana, October 25th, 1905. One to the Joggins Lumber Company, of Oldtown, Maine, December 26th, 1905. One to the Berlin Mills Company, of Berlin, New Hampshire, January 9th, 1906, and one to the Stockholm Lumber

1910.

LOMBARD v. THE DUNBAR COMPANY.

BARKER, C. J.

Company, of Maine, February 3rd, 1906. It is therefore clear that the plaintiff's statement as to these machines not being in public use or on sale by his consent was not correct, for these four machines, which were all that the plaintiff had ever manufactured of that particular kind specified by him as a new and useful invention in his application made in Canada on the 22nd of May, 1907, had been manufactured and sold by the plaintiff himself in the United States between October 25th, 1905, and February 3rd, 1906, all of them more than a year before he made his application in Canada. The plaintiff, in answer to this, contends that Section Seven (7) of the Patent Act refers only to the previous use of the invention in Canada, and as his machines were manufactured and sold in the United States the section does not apply. That section has, however, been amended since *Smith* v. *Goldie* (1), was decided in 1882, and the words "in Canada" in the section as amended have reference to the application for the patent and not to the sale of the machine to be patented. The plaintiff further contended that he was protected under Section Eight (8) as a foreign patentee, inasmuch as he had applied within a year from obtaining his United States patent. As I read that section it only keeps the field open as against other applicants for a year, within which the foreign patentee may apply. It in no way gives him any right to obtain a patent in Canada merely because he has one in a foreign country. In order to do that he must comply with the provisions of Section Seven (7). In my opinion the Canadian patent of 1907 must be declared void.

There is another ground upon which I think the plaintiff must fail. Section Thirty-eight (38) of the Patent Act provides that unless otherwise ordered every patent shall be subject to various conditions, the most important of which is that which relates to the manu-

(1) 7 Ont. App. 628. (On appeal 9 S. C. R. 46.)

facture in Canada of the patented article. It is provided that any patent shall be null and void at the end of two years from its date, unless the patentee shall, within that time, commence and continue to manufacture the patented article so that it can be made available for the use of those desiring it. Admittedly there has been no extension of the time, and the two years expired on the 19th of November, 1909, after this suit was commenced, but before the hearing which took place in January, 1910. In order to comply with the provisions as to manufacture in Canada the plaintiff entered into a contract with "The Jenckes Machine Company, Limited," a company doing business at Sherbrooke, in the Province of Quebec, for the manufacture of the machine as patented in 1907. The contract is dated June 3rd, 1908, and it assigns to the company the exclusive right to manufacture the machines in accordance with the specifications of the 1907 patent and sell them in any part of Canada east of Port Arthur. The price of each machine of a certain type was to be $5,500 and the plaintiff was to have a royalty of $1,000 on each machine sold. This company has manufactured three machines—one of which was sold to the North Shore Power, Railway & Navigation Company, of Quebec, on September 3rd, 1908; one to the Lake Megantic Pulp Company on October 15th, 1908; and the third was on hand. These are all the machines manufactured in Canada. The plaintiff, however, sold from his own establishment at Waterville to Canadian purchasers at least three other machines which he knew were going to Canada for use there, and two of which he must have known were actually in use in Canada when he applied for his patent of 1907. One of these machines was sold on December 6th, 1906, to Andre Cushing & Company, of Saint John, one on December 13th, 1906, to the Tracadie Lumber Company, of Chatham; and one on November 5th, 1907, to John Henderson & Company, of Sayabec, in Quebec.

1910.

LOMBARD v. THE DUNBAR COMPANY.

BARKER, C. J.

All these machines, including those I have mentioned, the ones manufactured at Sherbrooke and all others manufactured by the plaintiff himself, except the four first mentioned, which were sold in the United States, were fitted with the roller chains as patented in 1901, for which the plaintiff discarded the rollers specified for in the patent of 1907, and which, on a practical test, were found useless for the purposes for which they were designed. As to the relative efficiency of the two appliances used for taking care of the friction in operating the machine, I shall quote from the evidence of the plaintiff and the defendants, Manager Dunbar and his son, both of them mechanics of long experience. The plaintiff's evidence is as follows:—

"Q. In your 1901 patent you have two roller chains that travel completely around a portion of the traction member? A. Yes.

"Q. What was the object of these two roller chains in the 1901 patent? A. They were to support the centre of the lag bed.

"Q. Nothing else? A. That is all, just to keep it flat on the snow.

"Q. Wasn't it intended to some extent to remove friction? A. Well, of course, you take it, and if they were not there it would be the same as hauling a load on the floor without wheels under it and putting wheels under it.

"Q. And almost impossible to do it? A. Yes.

"Q. And the principal object of the rollers was to get rid of the friction of the lag bed travelling along the bottom part of the frame which supported the whole weight of the machine? A. Yes.

"Q. Because if those were taken out, then as you attempted to revolve the lag bed the upper side of the lag bed would have to scrape or drag against the lower side of the machine? A. Just like dragging it on the floor.

"Q. Without this it would be like holding one fast against the other? A. Yes.

"Q. But by inserting those rollers you overcome the friction between the bottom of the frame and the top of the lag bed? A. Yes. . . . .

"Q. You found that those rollers were a failure? A. Well, found they were not so good as the chain.

"Q. Wherein were they a failure? A. Well, they were so small and revolved so fast and when anything would go under go over them, put the whole strain on to one particular bearing and put them right out, cut the gudgeons or bearings right up.

"Q. Spoiled them? A. Yes, destroyed them.

"Q. And you were continually making new portions to replace both gudgeons and bearings? A. Yes.

"Q. And you went back to your roller chains of 1901? A. Yes.

"Q. Only you applied it in a little different manner? A. Yes.

"Q. But you don't claim any difference in the application of that in 1907 and in 1901? A. No, in just the roller chains.

"Q. You come back to the roller chains? A. Yes.

"Q. And the machine manufactured by the Jenckes Machine Company had the roller chain exactly the same in principle as the patent of 1901? A. Yes, just the same principle.

"Q. You don't claim any patent in the different application of the roller chains between 1907 and what it was in 1901? A. No, we don't claim any difference on the roller chain, but on the rest of the construction."

The two Dunbars in effect say, that without some means of obviating the friction, the machine was useless and that it was practically impossible to reduce it by means of the rollers as described in the 1907 patent for the reasons which have been mentioned. They also say that in machines made by them, and which are claimed

1910.

LOMBARD v. THE DUNBAR COMPANY.

BARKER, C. J.

to be infringements of the plaintiff's patent, they have always used roller belts as the plaintiff uses them or substantially the same. It is therefore contended that the article patented has never been manufactured in Canada, that what has been manufactured as satisfying the requirements of the Statute is not the machine patented. That would have been useless and unsaleable. The machine which has been manufactured and sold, is a machine which is useful and saleable because a part of the combination patented has been abandoned and something not included in the specification substituted in its place. It has been argued that the differences between the two are so trivial and unimportant that the manufacture of either would satisfy the requirements of the Statute as to this patented machine. In the manufacture of a patented article, trivial departures from the specifications of the patent may in many cases be disregarded as immaterial, but where, by the substitution of one constituent of a patented combination of parts for something else not specified at all, the combination is changed from a failure to a success, the two can scarcely be treated as identical. It must be remembered in dealing with this point that the machine as patented is a combination of mechanical contrivances none of which, except possibly one, were new. In such cases where an infringement is charged, the combination is treated as an entirety and the omission of any material part deprives the remainder of the protection of the patent.

In *Prouty* v. *Mears* (1) Chief Justice Taney, in delivering the opinion of the Supreme Court of the United States, says:—"The patent is for a combination, and the improvement consists in arranging different portions of the plough and combining them together in the manner stated in the specification for the purpose of producing a certain effect. None of the parts referred to are new, and none are claimed as new, nor is any portion of the

(1) 16 Peters 336.

combination less than the whole claimed as new or stated to produce any given result. The end in view is proposed to be accomplished by the union of all arranged and combined together in the manner described. And this combination, composed of all the parts mentioned in the specification, and arranged with reference to each other and to other parts of the plough in the manner therein described, is stated to be the improvement and is the thing patented. The use of any two of these parts only, or of two combined with a third, which is substantially different in form, or in the manner of its arrangement and connection with the others, is therefore not the thing patented. It is not the same combination if it substantially differs from it in any of its parts."

This case was cited and acted upon in *Eames* v. *Godfrey* (1) where the Court, after quoting the extract which I have just given from *Prouty* v. *Mears*, say:—

'The Court (that is the Court appealed from) laid down a broad rule without qualification, that although Eames' mechanism for distending the leg of the boot-tree did differ in its construction and operation from that patented, yet if it performed the same functions as the mechanism in the combination, there was an infringement. This view of the law was wrong in principle and authority. Eames had a right to use any of the parts in Godfrey's combination, if he did not use the whole; and if he used all the parts but one, and, for that, substituted another mechanical structure, substantially different in its construction and operation, but serving the same purpose, he was not guilty of an infringement."

In *Schumacher* v. *Cornell* (2) the Court say:—"A combination is always an entirety. In such cases the patentee cannot abandon a part and claim the rest, nor can he be permitted to prove that a part is useless and

(1) 68 U. S. 547. 1 Wall 78. (2) 96 U. S. 549.

1910.

LOMBARD v. THE DUNBAR COMPANY.

BARKER, C. J.

therefore immaterial. He must stand by his claim as he has made it. If more or less than the whole of his ingredients are used by another, such party is not liable as an infringer, because he has not used the invention or discovery patented. With the change of the elements the identity of the product disappears." See also *Vance* v. *Campbell* (1); *Gill* v. *Wells* (2); *Seed* v. *Higgins and Others* (3); *Barber* v. *Grace* (4).

These cases may be cited as authorities for holding that the defendants have not infringed the plaintiff's patent as they have never used the roller arrangement which formed a part of the claim for the 1907 patent. If that were so it can scarcely be contended that the manufacture of a machine which differs from a patented machine so that it is not an infringement of it, is nevertheless a manufacture of the patented machine so as to satisfy the Statute. But if this were not so, it is obvious that a patentee cannot by manufacturing a machine so far different from the machine he has patented in its form of construction and results as to render the one useful while the other is not, extend the protection of the patent to the machine as manufactured. It was contended that the roller belt was nothing more than a mechanical equivalent of the rollers called for by the specifications for the 1907 patent and therefore covered by it. But that is not so, Curtis in his work on patents (Sec. 331) says:—"Patent laws have for their leading purpose the encouragement of useful inventions. Practical utility is their object, and it would be strange if, with such object in view, the law should consider two things substantially the same which, practically and in reference to their utility, are substantially different."

The patent must therefore be held void for want of manufacture in Canada within the two years fixed by the Statute. The plaintiff's bill will therefore be

(1) 1 Black, 427, 66 U. S. 168.
(2) 22 Wall 1, 89 U. S. 711.
(3) 8 H. L. C. 550.
(4) 1 Ex., Wels. Hurl, & Gor. 339.

1910.

LOMBARD v. THE DUNBAR COMPANY.

BARKER, C. J.

dismissed with costs on the ground that the plaintiff's Canadian patent dated November 19th, 1907, Number 108676 is void,—(1) Because the machine was in public use and on sale with the consent of the inventor thereof for more than one year previously to the plaintiff's application for the said patent in Canada; and (2) Because the said plaintiff has not within two years from the date of the said patent (the time not having been extended) commenced or carried on in Canada the construction or manufacture of the said invention patented as required by Section Thirty-eight (38) of the Patent Act.

Bill dismissed with costs.

1910.
September 20.

SHAW ET AL *v.* ROBINSON ET AL.

Injunction—Declaration as to rights of Parties—Absolute assignment in nature of Trust.

The plaintiff S. and the defendant R. were associated in matters connected with mining in New Brunswick, for some time prior to the transaction over which this suit has arisen, both in promoting and developing coal mines, and their transactions had been for the benefit of both. S. was in a position in which he could interest capitalists in New York and Boston, and R. was a practical man and spent the greater part of his time superintending the mining and development work at the mines, and in obtaining concessions and licenses from the Government at Fredericton.

Their first transaction was in reference to the Crawford Mine (so called). In June, 1908, R. sold this property to the Canadian Coal Company, a different Company from the plaintiff in this suit. R. owned this property and S. found the purchasers, and was paid a percentage of the proceeds for his services. S. also held a number of bonds of the Company belonging to R., as part of the purchase price, and which he was to dispose of for Rs'. benefit.

On September 12th, 1908, R. executed an absolute assignment of certain applications for license to work to the plaintiff, the Canadian Coal Lands, Limited. On the same day he was paid the sum of one thousand dollars by S. Previous to this date, R. had received money from S. to cover expenses in connection with procuring the licenses mentioned above.

The Canadian Coal Lands, Limited, was not an active organization, but what is called a "holding Company." It had only five members, each holding one share, and on January 4th, 1910, after this dispute had arisen it assigned its interest in these areas to S.

Held, that the assignment to the plaintiff Company by R. was made for the sole purpose of enabling S. to sell the mining rights for the joint benefit of himself and R., and that it was not an absolute sale to the plaintiff Company.

Bill filed for an injunction restraining the defendants from selling, assigning, transferring or incumbering, certain licenses issued by the Crown Land Office of New Brunswick, and for a declaration of the rights of the parties. The facts fully appear in the judgment of the Court.

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

M. G. Teed, K. C., for the plaintiffs.

Hon. H. F. McLeod, and *W. Watson Allen*, K. C., for the defendants.

Argument was heard July 28, 1910.

1910. September 20. BARKER, C. J.:—

The bill alleges that on or about the 25th June, 1908, one J. J. Fraser Winslow, James Holland and Stewart Benson, either jointly or separately, or both, had made six different applications under the general Mining Act of New Brunswick for licenses to work for mines and minerals upon certain Crown lands in Queens County. These applications were numbered from 79 to 84 inclusive, and comprised about one square mile each, or about six square miles in all.

That both before and after these applications had been made, negotiations had taken place between the defendant Robinson and the plaintiff Shaw with a view of obtaining these areas for coal mining purposes, and that as a result of these negotiations "It was ultimately and in the month of August, A. D. 1908, finally agreed between the plaintiff Shaw and the defendant Robinson that Robinson should acquire the rights of Winslow, Holland and Benson in the applications, and the plaintiff Shaw should purchase the same from him for the sum of one thousand dollars over and above certain expenses, the account of which Robinson was to make up." That in order to carry out this arrangement and sale, Robinson obtained from Winslow, Holland and Benson assignments of their rights under the said applications. These assignments were all made by the consent of the Surveyor General and registered in the Crown Land Office on the 21st August, 1908.

The bill further alleges that in pursuance of the arrangement Shaw, for the purpose of handling and managing the Coal areas, procured the incorporation

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

in the State of Maine of the Plaintiff Company. That he, Shaw, paid from time to time to Robinson moneys on account of the expenses, and that he did on the twelfth day of September, 1908, pay to Robinson one thousand dollars as the balance of these moneys, and at the same time the defendant Robinson, at Shaw's request, made and executed to the Plaintiff Company an assignment of these six applications, which assignment is as follows:

"Know all men by these presents that I, Alexander G. Robinson, of Marysville, in the County of York, in consideration of one dollar to me in hand well and truly paid by Canadian Coal Lands, Limited, of the State of Maine, one of the United States of America, have sold, assigned, transferred, and set over, and by these presents do sell, assign, transfer and set over to Canadian Coal Lands, Limited, its successors and assigns, applications for license to work, numbered 79, 80, 81, 82, 83, and 84, dated June the 25th, A. D. 1908, in the Parish of Chipman and Canning, County of Queens, to have and to hold the same to the said Canadian Coal Lands, Limited, its successors and assigns.

In witness whereof I have hereunto set my hand and seal the twelfth day of September, A. D. 1908. Signed, sealed and delivered.

(Sgd.) ALEXANDER G. ROBINSON.

In presence of

(Sgd.) CHARLES JOSEPH FITZPATRICK."

This assignment was registered in the Crown Land Office on the 16th September, 1908. The bill further alleges that the plaintiff Shaw out of his own moneys paid all the expenses amounting to twelve hundred dollars, and the one thousand dollars for the assignment, and that the plaintiff the Canadian Coal Lands Company, Limited, holds the same as trustee for him the said Shaw. The bill then alleges that on Shaw's application the

Surveyor General issued licenses to work under the Mining Act to the plaintiff Company on the areas included in the six applications; these licenses were numbered 67, 68, 69, 70, 71, and 72, each for one square mile, and all dated August 1st, 1908.

It seems from the evidence and facts that are now in dispute that later on a difference arose between the plaintiff Shaw and Robinson as to the real arrangement and agreement between them as to the assignment, Shaw claiming that Robinson had no interest in it and Robinson claiming that he had. This is in reality the question of fact to be determined and will be dealt with on the evidence. It seems that by a letter dated at Fredericton on March 18th, 1909, from Robinson to Shaw, he put forward his claim as to the real agreement between them, which he said had been violated, and in consequence of which he (Robinson) claimed that all the licenses issued to the plaintiff Company should be assigned forthwith to him. This the plaintiff refused to do, whereupon Robinson on the 25th March, 1909, presented a petition to the Surveyor General to have the assignment by him to the Company, and the licenses issued thereon to the Company, rescinded and cancelled. On this application the Surveyor General, assuming to have jurisdiction in the matter, after giving notice to Shaw, held an investigation, and after hearing the evidence he made an order on the eighth day of April by which he found in accordance with Robinson's contention, that the assignment by Robinson to the Coal Company, though absolute on its face, was in fact obtained from him in trust for the purpose of arranging a sale of the coal areas for his benefit without any delay, and that as the agreement as to the sale had been violated and nothing done in compliance with the arrangement, he cancelled the assignment and licenses and ordered new licenses to issue of these areas to Robinson. Accordingly the assignment and licenses were marked

1910

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

in the Crown Land Office as "cancelled" and new licenses were issued to Robinson. These were numbered 75 to 80 inclusive, and dated April 8th, 1909, the day on which the Surveyor General made his order. In consequence of the plaintiff's inability, by reason of the short notice of this hearing, to fully prepare himself and procure his witnesses, he subsequently applied to the Surveyor General to re-open the matter and to rescind his order of the 8th April as well as the licenses issued under it to Robinson. On this application the Surveyor General re-heard the matter but adhered to his previous finding, and so matters stood as they were. Subsequently an application was made to the Supreme Court for a certiorari to remove the Surveyor General's order of the 8th April with a view to its being quashed, on the ground of a want of jurisdiction, and an order to that effect was afterwards made. The defendant Puddington claims as assignee of Robinson, for value without notice, of these licenses issued to him, under two assignments dated August 31st, 1909, and registered in the Crown Land Office on the 8th September, 1909.

The answer set up by Robinson is this. He says that previous to any question arising as to these areas, Shaw and he had had some dealings about the Crawford Mine, so called, a mile area owned by Robinson and somewhere near these other areas. Quoting from Section 2 of Robinson answer, he says:—"I told him, (Shaw) there was a possibility of a piece of New Brunswick Coal and Railway areas being open and asked if it would be possible to handle it. At that time the plaintiff Shaw said he thought it was too large. Afterwards I went to the said James Holland and he, with the said Winslow and Benson, applied for the above areas. It was not at that time, I believe, the intention of the said Shaw to obtain the said licenses or mining areas. The said mining licenses or areas were not applied for, for or on behalf of the said Shaw. The owners of the said licenses

were the said Holland, Winslow, Benson and myself. We agreed that if the said Shaw promoted a Company he was to have one mile for his work in so doing. The said Shaw was a party to this agreement. It is not true that in August, 1909, or at any other time, that it was agreed between the said Shaw and myself that I should acquire the rights of the said Holland, Winslow, and Benson, or of any of them, in the said several applications for licenses to work and should sell and assign the same unto the said Shaw all or any of the said applications or the rights thereunder or the licenses to be issued thereon, or any of them, for the sum of one thousand dollars, or for any other sum of money, or for any consideration whatsoever. There was no such agreement. On the twenty-first day of August, A. D. 1908, I purchased and acquired the interests of the said Winslow, Holland, and Benson on my own behalf and for myself. The said Shaw had no interest in the said licenses. The said Shaw had had a Company called the Canadian Coal Lands, Limited, incorporated at Augusta, in the State of Maine, in the United States of America, and represented that he was in a position to dispose of stock of the said Company to an American investor if the licenses were assigned to the said Canadian Coal Lands, Limited, and the said Shaw was to share in the proceeds of the stock for his work and expenses in promoting the Company. On the twelfth day of September, A. D. 1908, I assigned the said licenses and areas to the Canadian Coal Lands, Limited. in trust to be sold for my benefit, and the agreement which I made with the said Shaw was that said Canadian Coal Lands, Limited, should hold the said applications and areas in trust to be promoted and placed upon the market, and the stock sold for my benefit, and the said Shaw was to receive half of the proceeds of the stock for promoting the said Company and selling the stock. The said Shaw stated that he already had

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

a purchaser for the said stock and that I would receive my money within a few days." The defendant then admits in his answer the assignments to him from Winslow, Holland and Benson and the issuing of the licenses. He denies that Shaw ever paid him twelve hundred dollars or any other sum for expenses as he alleges, and while he admits a payment of one thousand dollars by Shaw to him on the 12th September, 1908, he says it was in no way on account of the purchase money for these licenses or in any way connected with it, but that "it was an advance or loan on account of moneys due me on the sale of my stock in the Crawford mine so called." Quoting from section 6 of his answer Robinson says: "My stock in the Crawford Mine in the hands of the said Shaw, who was under agreement to sell the same and pay over the proceeds to me and the sum of one thousand dollars, was an advance pending further sale of said stock in said Crawford Mine, and a large block of said stock in said Crawford Mine is still unaccounted for by the said Shaw."

By the prayer of the bill the plaintiffs, in addition to an injunction preventing the defendant Robinson from assigning the licenses issued to Robinson or interfering with the areas mentioned in them, asked that they should be set aside, as well as the assignments to Puddington dated August 31st, 1909, as being a cloud upon the plaintiff's title, and that the licenses issued to the Canadian Coal Lands, Limited, numbered 67, 68, 69, 70, and 71 and 72 be decreed valid and subsisting and to have priority of the licenses issued to Robinson.

The transactions in reference to the Crawford Mine are only indirectly mixed up with those relating to the six mile area, out of which this suit has arisen. It is necessary to refer, however, to some of them as they throw some light on the later dealings between Shaw and Robinson. In the first place I must point out that

by the provisions of the "General Mining Act" (Chap. 30 of Con. Stat. 1903) so far as it relates to mines other than gold and silver, the Surveyor General is authorized by section 89 to grant "licenses to search" in force for a year and six months, under which the licensee is authorized to dig and explore for such minerals other than gold and silver, and he is to report the result to the Surveyor General. Provision is also made for the granting of "licenses to work." These are granted for a period of two or three years and authorize the licensee to commence and carry on effective mining operations. Such licensee is entitled, on application within the term of the license, to apply for and obtain a lease of the area, which lease in the case of coal, runs for twenty years and is subject to a variety of conditions which are unimportant here.

On the 17th October, 1906, the Surveyor General granted a coal mining lease, No. 157, to one G. Byron Crawford and the defendant Robinson of a square mile situate at Salmon Bay in Queens County. On the 10th of December, 1907, Crawford gave Robinson a lease of a piece of land adjoining the area comprised in lease 157 and which was considered necessary for the convenient operation of the mine. On the 25th June, 1908, Robinson assigned lease No. 157 to the Canadian Coal Corporation, a Company incorporated in Maine, having its head office in Augusta, but a different Corporation from the plaintiff Company. On the following day, "June 26th, 1908," Robinson transferred the Crawford lease to the same Company, and since that time the Crawford Mine has been operated by that Company, Robinson being its manager with full charge of the work.

The sale of the Crawford Mine to the Canadian Coal Company was negotiated by Shaw for Robinson, and it was a part of the arrangement of sale that until the Company got into a sufficiently strong position financially to enable it to operate the mine, Robinson

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

was to do so on their account. Robinson gave Shaw authority to sell the Crawford Mine for thirty thousand dollars. It was sold, and for his services Shaw received thirteen thousand dollars in the bonds of the Company. In this transaction Shaw says he was working for Robinson, not the Company. This was the origin of the business relations between Shaw and Robinson. Robinson owned the property and Shaw found the purchasers and was paid a percentage of the proceeds. Taking Shaw's own account he says that the question of the six mile area was brought up to him by Robinson in the winter of 1907 or first of 1908, and this question was asked:

"Q. What was suggested or how did it come up? A. Mr. Robinson suggested that through his connections it would be possible to get the whole or part of it on a sub-lease and that something might be done with it in the way of inducing capital to operate it or taking speculative holding. And the next step or next time it was discussed, was when this piece, so called six miles and actually secured by a party of Fredericton men, in the form of a sub-lease in which there were six to benefit, and I believe I was to be one of them.

"Q. Was that secured from the Crown Land or from the old Company? A. No, the old Company, and that was offered to me to handle in such form as I might suggest. And the next step was after interviewing a party who I thought might do something in the way of purchasing it from us and operating it. I offered them verbally what was suggested and we talked the thing over in Fredericton and decided nothing further could be done on that lot, that the sub-lease from the old railroad would not be valid and the matter was dropped."

The difficulty was simply one of the title. That was the only reason why the scheme failed and the property was not handed over to Shaw to handle as he thought best, but of course for the benefit of the six of

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

whom he was one. Shaw says that some months afterwards Robinson told him that Winslow, Holland and Benson had secured rights to search, and he (Robinson) suggested to him (Shaw) that those three had tried to sell these rights, that they had only paid twenty-five dollars or fifty dollars each, and he thought if he (Shaw) would advance him money and pay him for his trouble he could get them to assign their leases to him, and he would make them over to Shaw as he had no money to work them and that it was on that basis he went ahead and advanced his expenses and told him to see what he could do. The indefiniteness and uncertainty of this arrangement is so apparent that the plaintiff's examination was continued as follows:

"Q. About that time (July, 1908) or afterwards you say you and Mr. Robinson had some more definite negotiations? A. I think he told me before the property was actually sold, I speak of that to fix the date, he had advised me, as he expressed it, of the trickery of Holland, Benson and Winslow to go and get these licenses from the Crown Land Department and I said he wanted to know what I thought of it and I said, well you know what I think of it, and let it stand that way. I got the impression, although I don't think he asked me then if I would be interested to take the matter up again, but after his property was turned over to the Canadian Coal Corporation.

"Q. That is the one mile? A. The only property as I understand, he ever held there, this one mile. Then he said, I find that these men, Holland, Benson and Winslow, they have invested fifty dollars or one hundred dollars apiece there and they have tried to sell it and looked into the matter of opening up the mines and found they could not afford to do it and he said, if you will keep out of sight and not let them think you are after it again, if you will be interested enough I could get it if I offered them two hundred dollars apiece or some-

1910.

SHAW ET AT v. ROBINSON ET AL.

BARKER, C. J.

think like that, and did a little work underground and might be able to buy it, and what would you give me should I succeed in getting it? I considered the matter and in some way he gave me to understand" (The Solicitor General here objected).

"Q. Give me as near as you can what took place? A. It is a good time back to remember the words but there was something to this effect, that they were stuck and they had the money tied up in it and he could buy them out for about two hundred dollars apiece and he wanted to take them in his own name, because if they knew he was transferring them direct to me, they would want more money, and he wanted to know how much I would give him for his trouble. Well I told him to go on and see what he could do first, see if the chances were good that he could make the purchase for me, and later in the month he advised me to come on with the money, about such a date, to buy out two of them and I came on to Fredericton. I started for Fredericton and it seems he had written me and told me not to come to Fredericton for fear they would get wise. He didn't want them to know I was coming down to see them.

"Q. Up to this time had you ultimately agreed or arrived at a definite figure or basis upon which you were to take the rights over if he got them? A. No."

The date is fixed as August 17th, A. D. 1908, when Robinson met Shaw at Fredericton Junction on his way to Fredericton, and Shaw at his suggestion went on to St. John. The letter to which Shaw refers containing Robinson's reference to Benson's and Winslow's ideas going up is dated August 12th, A. D. 1908.

Stopping here for a moment let us see what was the condition of affairs at that time and how it bears upon the plaintiff's present claim of sole and absolute ownership. Admittedly the first proposition which included six persons as interested failed because of the supposed invalidity of a sub-lease from the old Railway Company. That

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

difficulty was obviated by acquiring the rights under the Mining Act direct from the Government, and Benson, Winslow and Holland acquired the rights or licenses to work. Then Robinson suggests to Shaw that if he was interested enough to take up the matter again, he could purchase Benson's, Winslow's and Holland's interests best. The matter which was to be taken up again was the matter which they had before abandoned. The proposal by Robinson now was to purchase out Benson, Winslow and Holland, which would leave him and Shaw as owners. The plaintiff then says that Robinson was to purchase these interests for him, and he was to pay Robinson for his trouble. The amount Robinson was to receive was not fixed and the amount to be paid for the outstanding interests was not ascertained, and Shaw had come to Fredericton from Boston to pay for Winslow's and Benson's interest, two hundred dollars each — which would leave Holland's interest outstanding. It seems that Shaw went to St. John by the Boston train on August 17th, A. D. 1908, remained there until evening when he returned by train to Boston. During that afternoon he had communication with Robinson at Fredericton by telephone in which he says Robinson told him he could get the third man's interest and that he, Robinson, would take one thousand dollars over and above expenses for his part of the deal. And in reply to that Shaw says that he accepted the offer. "I told him if he would get the three people lined up and make the transfer to me or whoever I wanted, and have it secure so that there would be no legal entanglements I would give him a thousand dollars and pay his expenses." The plaintiff says "that he then sent Mr. Andrews, of Augusta, his solicitor, to Fredericton to get the transfers from Robinson, that he gave him two five hundred dollar bills and four or five hundred dollars in smaller advances and instructed him to take the money down and if Robinson had the title, that is the right to work from the

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

department, either assigned to me or in such shape he could assign to a Company which I had formed. I had Mr. Andrews organize this Canadian Coal Lands, Limited, and I wanted the title from the department or the assignment from Mr. Robinson to go to this Company and told Mr. Andrews not to pay over the money unless the title was in such a shape he could do it, and his report was he only had applications to assign and not the rights to work, and he came back for want of further instruction." The plaintiff further says in consequence of a letter he received from Robinson a few days later he himself went to Fredericton when the transfer from Robinson to the plaintiff Company was executed, and the one thousand dollars paid. This letter is dated August 21st, A. D. 1908, and speaks of Andrews having been there the day before and of the three transfers having been made to Robinson. In fact they were registered at the Crown Land Office that day. In this letter Robinson says "They (*i. e.*, the Crown Land Department) cannot issue the lease till the ground is surveyed and we have commenced work," clearly indicating a joint ownership. The plaintiff's case is that he actually paid all the expenses, including the cost of survey, the amounts paid to Winslow and Benson, in all amounting to twelve hundred and fifty dollars, and that he also paid Robinson the one thousand dollars when the assignment to the plaintiff Company was executed by him at Fredericton on the 12th September, by virtue of which he became the absolute owner of the rights secured by the six licenses to work. I have already pointed out some features of the earlier history of this transaction which seemed to me to be opposed to the plaintiff's version of it. There are two or three other points to which I shall refer. I have already given the plaintiff's statement as to his instructions to Mr. Andrews and Mr. Andrew's report of what he did. It seems that with the one thousand dollars he brought with him to Fredericton he brought an assignment of

these licenses to the plaintiff Company to be executed by Robinson, apparently the same document which was afterwards executed. Holland, who seems to have been acting professionally for Robinson, says that Andrews telephoned for him and Robinson to meet him at his hotel at Fredericton. His evidence proceeds thus:—

"Q. What occurred there? A. After coming there he wanted to present a paper for Mr. Robinson to sign, as I said it was a large area of six and a half miles.

"Q. To sign to whom? A. To the Canadian Coal Lands, Limited. Wanted to take over the larger area anyway and asked me to execute the assignment, that he had been sent by Mr. Shaw for that purpose, and he also spoke of having one thousand dollars with him. I don't remember seeing it. So he said upon executing this paper he would pay him this one thousand dollars. And Mr. Robinson said words to this effect; Where will I stand if I sign it? And he said I don't know. Mr. Robinson said. What am I signing it for? He wouldn't know that, Mr. Shaw told told him to get him to sign it. And Mr. Robinson said he wouldn't sign it. Then Mr. Andrews made the remark to Robinson, "I don't blame you for not signing it," so Andrews went away and the paper was not signed.

Robinson gives evidence to the same effect. He says:—

"Q. What did he (Andrews) want you to do? A. He said he was sent down by Mr. Shaw to get me to sign certain papers for which he was to hand me a thousand dollars which he produced and laid on the table.

"Q. What did you say? A. I said, this is rather indefinite, where do I come in in this matter? I said, I own half the matter, or at present the whole of it. He said, I don't know anything about it only just I was sent down by Mr. Shaw to get your signature on this paper.

"Q. Did you sign? A. I didn't.

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

"Q. Did you hear Shaw say yesterday the reason you didn't sign was you told Andrews the papers were not ready? A. There weren't any papers.

"Q. Did you hear Shaw say that or words to that effect? A. Yes, which papers do you mean?

"Q. That is what Mr. Shaw said? A. Well the leases were on hand at the time.

"Q. Did you hear Shaw say yesterday that the reason you didn't sign when Andrews came down was because the papers were not ready? A. I did,

"Q. Is that so? A. That is not so.

"Q. So Mr. Andrews went home without you signing? A. Yes, I said to Andrews, If you were in my position what would you do? And he said, I wouldn't sign."

It is clear from this evidence that Robinson did refuse to make the assignment at that time. The plaintiff's case is that he did pay twelve hundred dollars or about that sum to Robinson for expenses as he agreed, and the one thousand dollars to himself, in all twenty-two hundred dollars. As to this Robinson not only says there never was any agreement to pay the expenses but that in fact Shaw never paid the sum or any part of it. One would suppose that in reference to such a transaction, which had taken place such a short time before, there would have been no material difference between their accounts of what took place. Neither of these gentleman seemed to be in very good circumstances. Robinson was struggling to keep the Crawford Mine in operation and was largely indebted to Puddington for advances. And while Shaw spoke somewhat flippantly of his generally having from five hundred to one thousand in his pocket he was largely indebted to Sherman. Shaw says that on the 16th of August, A. D. 1908, he left Boston for Fredericton in consequence of a letter from Robinson dated August 12th. His ticket seems to have been a through ticket and that part of it covering the route from

Fredericton Junction to Fredericton, was produced in Court, it having been unused by reason of Shaw going on to St. John as I have already mentioned. I quote Shaw's account of what took place at the Junction.

"Q. You received that letter of the twelfth and did you come down? A. Yes.

"Q. Do you remember was there any communication between you and him as to where you would meet him? A. I was going to Fredericton.

"Q. Do you know of any communication between you. He says not to go to Fredericton, you intended to go to Fredericton? A. Yes, as I remember I couldn't see how my going would have any bearing on my buying from them in one way or the other. I don't agree with him in that.

"Q. Did you go to Fredericton or what occurred? A. No, I got as far as Fredericton Junction. I think I must have wired I was going to Fredericton in spite of that, because at Fredericton Junction he met me and as quick as I stepped off the train he said, Have you got the money? And he told me how much he spent to find out if he could buy them out and he must have two hundred dollars apiece to pay these men because they were ready to make the transfer.

"Q. Which two was it? A. I don't remember, but my impression would be. Well I couldn't say, it was two of the three that he was right ready to buy out, and he said you go on to St. John, don't come up with me. Well, I had several hundred dollars in my pocket, and my impression is I gave him two hundred dollars apiece for them and two or perhaps it might have been two hundred dollars or one hundred dollars more. I know while the train was standing at the Junction there I counted this out to him, and got in the train and went back to St. John, and of course my ticket wasn't good and I put it in my pocket with the letter and kept it there.

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

"Q. This will fix the date. Is this the date. It is marked "Union Station, Boston, August 16th, A. D. 1908?" A. Yes I got to Fredericton Junction August 17th and I left St. John that night and went home.

"Q. You on that occasion paid him four hundred or five hundred dollars? A. It was more than four hundred dollars and my impression was it was about six hundred dollars.

"Q. That was for what? A. The four hundred was to buy out these two men and the other was for expenses that he—well we were only there two or three minutes while the train stopped at the Junction, but I remember he told me he had been to that expense, and went on to tell me the details, and I said, never mind the details.

"Q. That was on account of the cost of acquiring the rights to this six mile area? A. Yes."

In view of all the circumstances I confess this account seems to me incredible. On the examination which took place before the Surveyor General in April, 1909, only seven months after the meeting at Fredericton Junction had taken place and when the whole transaction would, one would suppose, be fresh in his memory, he gave an entirely different account. In fact he did not mention any payment at the Junction but gave a somewhat uncertain account both as to the time and place of the payment going to make up the twelve hundred dollars which he says he paid for expenses. His explanation of this slip in his memory as given in his evidence is as follows:

"Q. Are you able to tell us any amounts you paid him? A. I remember the final amount and I remember the two amounts at Fredericton Junction, and if I hadn't found that ticket and letter I don't suppose I would have had anything to bring that back to my mind exactly.

"Q. That doesn't say amounts, does it? A. No but it brings back that I paid him four hundred dollars and some more."

The ticket referred to is the unused portion of the through ticket from Boston to Fredericton. It was certainly useful to fix the date of Shaw's arrival at the Junction, but in what possible way it could recall payments or amounts or anything else as he puts forward, I cannot see. He was in the Boston express, which he says only stopped a minute or two, he must have purchased a ticket there for St. John, and for him to have the hurried conversation with Robinson and to have shuffled out of his pocket four or five or six hundred dollars and given it to Robinson and then forgotten the whole transaction nine months afterwards, and two years afterwards have the whole incident brought back to his recollection by finding this unused portion of his ticket is to me so extremely improbable that I ought not to give effect to it, especially in view of the positive denial of Robinson. In this connection it must be remembered that up to this time no agreement had been made as Shaw says himself, the right of Benson, Winslow and Holland had not been assigned or paid for and Shaw had, according to his account, paid out for expenses some one thousand dollars without any account and without any definite arrangement one way or the other. The balance of these expenses, two hundred dollars, Shaw says he paid Robinson on the boat going from Gagetown to Chipman, which sum included the expenses of the survey, some seventy-five dollars. This was somewhere between the 20th and 25th of August. This evidence it is said is supported by that of Miss Quirk, who was Mr. Shaw's secretary. She says that on this trip when she and two other ladies were present, there was a discussion between Shaw and Robinson about this six mile area the effect of which was that "Robinson was to get this six mile area and transfer it to Shaw and after the surveying was

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

done and the report filed at the Crown Land Office, he was to be paid a certain amount and the licenses were to be transferred to Shaw." I cannot but think that Miss Quirk was giving evidence of matter of which she had no personal knowledge, for it seems very improbable that in scraps of conversation between these two men travelling on a steamer with their lady friends they should be discussing the terms of an arrangement between them which had been made and concluded some days before. She says she saw money paid by Shaw to Robinson on the boat but she could not say the amount. Miss Quirk, from her position, no doubt had become familiar with the dealings between Shaw and Robinson and in such cases it is by no means unusual for a witness unconsciously to mix up information derived in this way with facts within her personal knowledge and then give the impression made upon her mind as what really took place. When analysed I think Miss Quirk's evidence is of little importance except as to one point, that is as to the payment of money to Robinson, whatever may have been the amount or the object of it.

Coming now to the plaintiff's version of what took place at the Queen Hotel on the 12th of September when the assignment to the plaintiff Company was executed, and the one thousand dollars was paid. Besides Shaw and Robinson there were present Holland, who, although he had assigned his rights to Robinson, seems to have had as between himself and Robinson a certain interest in them, and Fitzpatrick, the clerk of the hotel who witnessed the signature. Shaw cannot remember whether the assignment was executed in duplicate or not, but he says that after it had been signed he took up the paper or papers and put one thousand dollars on the table and said "there is the payment for them," and I remember walking out to the door with Fitzpatrick and turning around Mr. Robinson or Mr. Holland had made a snowball out of the two bills and were throwing them

at each other, were very much pleased and having a jollification." Fitzpatrick did not see any money paid. He witnessed the signature and that is all he remembers of any importance. Holland is an attorney who has been practising at Fredericton for some years, and though he seems to have advised Robinson as to all these matters, he says it was only as a friend. He says that some two or three weeks after Andrews had been down to procure the assignment Shaw came to Fredericton and he and Robinson and Holland had a conversation which, so far as I can tell from the evidence, took place at Holland's office on the day the assignment was executed or shortly before. Holland's evidence is as follows:—

"Q. Did you have any conversation in relation to this and if so tell us what it was, as near as you can the gist of it. A. They talked generally of the large area, relative to the sale of the matter. Mr. Shaw made the remark then that if this six and one-half miles were placed in the Canadian Coal Lands, Limited, he could immediately go to some persons in New York and dispose of it in a short period for a very large amount, between fifty thousand dollars and one hundred thousand dollars.

"Q. Did he mention any parties? A. He did mention Mr. Sherman, mentioned a man by the name of Wier I think.

"Q. That was in your office was it? A. In my office.

"Q. In September? A. Possibly August, August and September both. We talked about it all the time he was there and he was in there on more than one occasion. He didn't leave until on in September.

"Q. Said if it was transferred to this Corporation he had people to whom he could sell it for a large amount of money? A. I made the remark that being interested in the property at the time, Mr. Shaw where am I going to stand in this matter? I have bought out Mr. Benson's

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

interest and Mr. Robinson has acquired Mr. Winslow's interest, shall we assign these interests jointly to the Company or shall I assign to Mr. Robinson? He suggested in order to clear up matters that I assign my interest to Mr. Robinson and Mr. Robinson place directly on lease in the Company's name and that he would go to Mr. Sherman and other gentlemen in New York and sell it for cash and Mr. Robinson was to receive fifty thousand dollars and Mr. Shaw the excess.

"Q. Over and above fifty thousand dollars? A. Yes I was to receive five thousand dollars. . . . .

"Q. When did the conversation in reference to Mr. Shaw being able if the matter was placed in the hands of the Canadian Coal Lands, Limited, being able to sell it to these people for a large sum of money, when did that take place? A. Well this conversation took place in my office in the afternoon of the assignment of the interests.

"Q. What took place in the Queen Hotel? A. Mr. Shaw came there, the bell boy came up first — someone suggested they wanted to execute this assignment there from Mr. Robinson, this Coal Company to hold for Robinson. I was there as Mr. Robinson's, there interested in the property and also looking after my own interests.

"Q. Acting as Mr. Robinson's attorney too? A. Well, in a friendly nature. But the bell boy came and someone suggested to let him witness, and I said No, get the clerk. Then the bell boy went and Fitzpatrick came up and witnessed, and I said to Mr. Shaw, I am interested in this matter, and I expect by the assignment I should get at least five thousand dollars, and I said, Mr. Shaw, you are going to pay to-day one thousand dollars and I didn't want to get my interest in this large area mixed in any way, and the payment of one thousand dollars is a loan to help out Mr. Robinson and carry out the whole matter; and I said, fourteen

thousand dollars or fifteen thousand dollars, don't pay the money at present, don't pay before the execution of this paper, and it is to be considered between the whole of us that this payment has nothing to do with assigning the interest in this large area to the Canadian Coal Lands.

"Q. You said that? A. I did, and I put the nominal sum of one dollar in the assignment and there was no money paid over prior to the execution, I tried to keep it separate.

"Q. And Mr. Robinson executed this assignment to the Canadian Coal Lands, Limited? A. Yes, he did.

"Q Did you hear Mr. Shaw say you and Mr. Robinson were using these five hundred dollar bills after you got them for snowballs. Is that correct? A. My recollection was that Shaw had them then.

"Q. Did you see anyone throwing them? A. Yes, I saw Mr Shaw throwing them over toward the corner when Fitzpatrick was going out, but I didn't touch it. I never had it in my hand.

"Q. Did Mr. Robinson throw it on the floor? A. No, Mr. Robinson didn't have any. They were not paid over until after the execution of the paper."

On his cross-examination Holland said that he was with Shaw in most cases when the matter was under discussion and he never heard it intimated either by Shaw or Robinson that Shaw was buying out or paying expenses. Robinson's evidence on the same point is as follows:—After speaking of the meeting of himself and Shaw at Holland's office he is asked this question:

"Q. What talk did you have in Mr. Holland's office and who was there? A. Mr. Shaw, Holland and myself.

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

"Q. What talk did you have there? A. Relative to this matter? Well, Holland, Shaw and I talked the matter over.

"Q. Was it a question of assigning this transfer to the Canadian Coal Lands, Limited? A. I think that was brought up incidentally. That was Shaw's mission down, he assured me they wouldn't touch the matter unless it was in what he called the hands of a holding company.

"Q. Who wouldn't touch it? A. Mr. Shaw's friends.

"Q. Did Mr. Shaw make any representations as to what he would be able to do or was ready to do? A. Mr. Shaw assured me the matter would be closed up in a very short time.

"Q. How closed up? A. The matter would be taken out of the holding company and I would get my cash for it, not less than fifty thousand dollars, that was the amount stated.

"Q. What did he represent? What did Mr. Shaw say? Did he mention any names of any persons he had? A. Well, I think Mr. Sherman was the only name he mentioned.

"Q. Mr. Sherman of Boston? A. Yes.

"Q. What did he say about Mr. Sherman? A. That Sherman was willing and anxious to take the matter out of our hands as soon as we could get it into shape, that is as soon as it was handed over to this holding company.

"Q. And you were to receive fifty thousand dollars? A. To receive not less than fifty thousand dollars.

"Q. Was there any further conversation in Mr. Holland's office that day? A. Yes, I referred to this matter of getting the money out of the other.

"Q. At this time there was money coming to you from the sale of your bonds in the Crawford Mine? A. Yes, and I thought he had been a long time clearing

the matter up, and he suggested at first that he would put one thousand dollars in to help me through with my expenses in connection with the handling of the big area, that is until the matter was sold, and we talked the matter over and I said,—No, I didn't want the two matters tangled at all, one would have to be settled up before the other was touched. He then said as he had brought the one thousand dollars down that he would leave it with me until he had sold such bonds as would reimburse him for the one thousand dollars.

"Q. Was that all the conversation then? A. No, he asked me if I would sign the transfer to the Canadian Coal Lands, Limited, and after quite a lot of hesitation I finally signed, with the understanding.

"Q. Was this in Holland's office? A. I said I would sign and it was then arranged I was to sign as he represented there had been no stock printed. I asked for the stock to hold as security and he said there had had been no stock or bonds printed. The stock I was to hold would be the stock of the Canadian Coal Lands, Limited, that is the big area.

"Q. But there had been none printed? A. There had been none printed, therefore I couldn't hold it.

"Q. Then when did you meet again? A. It was either that afternoon or next day, I am not just sure as to that, I rather think it was the next day.

"Q. Where did you meet? A. Just at Fredericton at the Queen Hotel.

"Q. Where did you meet? A. At Mr. Shaw's room at the Queen Hotel.

"Q. Who was there? A. Mr. Shaw, Mr. Holland and myself.

"Q. Will you tell us the conversation? A. Well, the conversation was general. There had been nothing said about the matter. It was understood I was to sign this thing over and I did so. Before I signed it Mr. Holland brought up the same question. Mr. Shaw,

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

he says, this has nothing whatever to do with the six mile area, and Mr. Shaw assured him nothing whatever.

"Q. Mr. Shaw paid you one thousand dollars? A. He did.

"Q. Did you hear him say yesterday when he handed you this one thousand dollars that you and Mr. Holland seemed greatly elated and you rolled it up in a ball and threw it about as a snowball. A. I did.

"Q. Is it so? A. No, I handled a good deal of money every year but never got so familiar with it as to throw it about.

"Q. Did you throw it about? A. I did not.

"Q. Did Mr. Shaw? A. He did. He threw it in a corner. There was quite a laugh over it.

"Q. Did you throw any money around? A. No.

"Q. Did Mr. Holland? A. No."

I have already made some reference to what seems to be well established by the evidence that in the earlier negotiations in reference to securing this six and one-half mile area, not only Shaw, but every one else interested had in view a joint venture. That this was so, so far as Shaw is concerned, is plain by the letter in evidence. In a letter from Shaw to Robinson dated April 27th, A. D. 1908, principally in reference to the Crawford Mine deal, there are the following passages as to the large area. "I am very much pleased at your success in getting hold of the other lots and shall be more so when you actually have it. Mr. Sherman is enthusiastic about it also, and thinks you must be a pretty keen sort of a business man in order to be able to pull it through. . . . . While their methods are not exactly yours and mine, I rather think when the deal is pulled through (evidently referring to the Crawford Mine) you will find that we have all learned something and we will then take our coat off and go into the bigger undertaking of handling the six and one-half

mile area. I am going to fix it so you will be an officer in that Company and will stand in with the "push" to make not only one profit, but as the saying is, "to be in with the bunch" with anything that is going. The one lot which we have gotten for Sherman I think will be a big help to this end."

In another letter from Shaw to Robinson dated May 14th, A. D. 1908, he wrote as follows:—"You probably are aware that I must have spent a good deal of money and a lot of my time for some weeks past on the matter of your mine and the six and one-half mile adjoining. As a matter of fact when I figure up how much I have spent in cash I am surprised at myself for going into the thing as far as I have without calling on you any further than I have done. I am not asking for anything now and do not want it, as I agreed that whatever expenses I went to I would wait until the thing had been brought to its conclusion. The fact is, I have created a fabric woven upon certain definite lines and to retract, revise or go back on same at this date is absolutely out of the question. You know that my purpose, while I am not doing it for my health but am doing for whatever I expect to make out of it, is to see a square deal given to you, I am therefore at a loss to understand why you have apparently allowed your friends to change your purpose and would say that it will be absolutely necessary for you to follow out the original plan and secure direct leases from the Government for the seven lots, comprising the six and one-half miles, and each individual to give me authority to dispose of the property in the best way possible. As to the exact price I cannot dicker on that until I have something to dicker with. I am not going to let things out of my hands. It is sufficient for me to keep my agreement with you. You will get just as much and your friends will get just as much for their lots as I will get for mine and that the property will not be dis-

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

posed of except at the best figure. The fact that Mr. Sherman and I are to have a full mile each in that arrangement should be sufficient guarantee to you and the others there that they would get the last dollar obtainable. . . . The Government lease for twenty years is renewable for three periods more, making eighty years, no time lapses, whereas the sub-leases has already been running some time. The question of title would immediately arise on the sub-lease, whereas a direct grant from the Government could not be overthrown. The large amount of money and considerable time I have spent in working this matter up has been done with the object in view that you would not only get a good profit on your own mile that you have developed, but that you would obtain a large profit, that I would do likewise, and that your friends would all participate equally in the transfer of the different lots into the hands of the people I have interested, and further than this that I had so arranged and laid plans before them that we would all participate later in and with them in the large profits and other undertakings which would unquestionably follow. I cannot make myself any clearer to you and it is up to you to do your part and forward the papers to me as soon as possible."

These letters show clearly that the scheme for the acquisition of this large area was originated by Robinson and proposed to Shaw and that it was intended for their joint benefit. When Winslow, Benson and Holland got rights under their applications they had to be got rid of or remain in as a shareholder in the venture. It was a speculation, not for the development of the mine but for the sale of the mining rights. Shaw was to manipulate the sale and for that purpose he stipulated for the control. It is also clear from these letters as well as the other evidence that the question of the sub-lease had no importance whatever as to the object and intention of the parties. As a title it was objected to as

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

unsatisfactory and the Government leases were therefore insisted upon in its place. There does not seem to be anything to suggest a reason why Robinson should have accepted the offer which Shaw says he made or that Shaw should have thought of making any such offer. I therefore find as a fact that when Robinson made the assignment to the plaintiff Company at Shaw's request, it was for the sole purpose of enabling Shaw to sell the mining rights for the joint benefit of himself and Robinson in the way I have mentioned and that the assignment was not made in completion of a sale as the plaintiffs claim. In this connection it is right to point out that the plaintiff company seems not to have been an active organization, it had only five members, each holding one share. It was what the plaintiff called a "holding company," and on the 4th of January, 1910, after this dispute had arisen it assigned its interest in these areas to Mr. Shaw.

In arriving at the conclusion I have just announced I have not overlooked an argument that was addressed to me on the part of the plaintiff. It was said that this case must be dealt with as though the bill had been filed by Robinson against Shaw for a declaration of his rights in the property, in which case it was said, as the assignment is absolute on its face, he must in order to succeed, show by clear and cogent evidence that it was in reality subject to certain trusts in his favor. I had occasion to consider that question in *McLeod* v. *Weldon* (1) and in *Beaton* v. *Wilbur* (2). This case stands in a different position. It relates solely to the rights of two competing licensees of the Crown of these mining areas. The Crown is in no way a party to this suit or in any way bound by any decree which may be made, and it is by no means clear that if the plaintiff had a decree in the terms asked for in the bill, he would obtain any practical or useful result. As the case stands the Surveyor General

(1) 1 N. B. Eq. 181. (2) 3 N. B. Eq. 309.

1910.

SHAW ET AL v. ROBINSON ET AL.

BARKER, C. J.

has issued two sets of licenses for the same areas. What position he may assume in view of the order cancelling the first issue having been set aside, I cannot say. I should myself have thought that if the plaintiff could succeed at all, it would be by virtue of an equity he would have to compel Robinson to assign the latter licenses to him, Robinson, having, as the plaintiff says, agreed to sell and convey to him the first licenses and having in execution of that agreement actually assigned the licenses, or at all events his right to get them, and the Surveyor General having on Robinson's application revoked the licenses and issued the others to him direct, one would think, as the revocation was in fact made though without authority, Robinson would hold the new leases as a trustee for Shaw they being at all events so far as Robinson is concerned the undoubted titles to the areas, which Shaw had bought from Robinson and paid for. He would seem to stand in much the same position as a vendor who sells and is paid for a piece of land to which he has no title, does when he afterward acquires the title. See the *Continental Trusts Company* v. *Mineral Products Company* (1). If that view is correct the plaintiff's bill would be in effect for the specific performance of a contract, in which case it is doubtful if the rule to which reference has been made would apply. This point was not commented upon by the counsel and I only allude to it incidentally as showing a possible answer to the argument put forward.

There are, however, other considerations in a case like this which are important in determining the question of fact. It is said to be necessary in putting schemes like this on the market, that the promoter should have unquestioned authority not only to enter into a contract for the sale but also to carry it out, without further reference to any one. This was the reason for Shaw's stipulation in these negotiations that he should as he

(1) 3 N. B. Eq. 28 Affirmed on appeal 37 N. B. 140, 37 S. C. R. 517.

terms it "handle" the property as he wished. There can be no better authority to sell than that which arises from the ownership of the property to be sold; and one can see that in transactions like this it is not altogether an unlikely thing to do to make an assignment which does not in reality disclose the true consideration. Out of all the assignments and other documents in evidence but two or three of them disclose the true consideration on their face. It is therefore not to be wondered at if the assignment in question from Robinson to the Coal Lands Company, which is absolute on its face, should be subject to some trust inconsistent with the absolute and beneficial ownership which it seems to confer. There is in this case no dispute as to the fact that though the assignment to the Company is absolute on its face, it was not intended either by Shaw or Robinson, to give to the Company the absolute and beneficial ownership of the property. That question is not in dispute here, the dispute does not arise over that point. Shaw says though the assignment is absolute, the Company held it in trust for me. And Robinson says though the assignment is absolute on its face the Company held it in trust for me. The question of fact to be determined is whether it was held in trust for Shaw or Robinson, it being admitted that it was held for one or the other.

The form of the assignment is therefore unimportant and has no bearing upon the question in dispute. But if it had I should still be of the opinion that the facts and circumstances do not support the plaintiff's contentions.

The bill must be dismissed with costs.

JONES, EXECUTOR OF CATHERINE MURDOCH,

v.

SAINT STEPHEN'S CHURCH ET AL.

1910.
September 20.

Construction of Will—Legacy—Charitable Intention.

Catherine Murdoch died October 26th, 1909, leaving a will dated November 27th, 1905.

The following legacy is found in the will:—"I give and bequeath the sum of one thousand dollars to be paid by my said executor to the Aged and Infirm Ministers' Fund in connection with Saint Stephen's Presbyterian Church in the City of Saint John."

The defendant, the Board of Trustees of the Presbyterian Church in Canada, Eastern Section, is a corporation created for the purpose of taking in trust any property which may be conveyed or bequeathed or intended for the use of the said Church or any scheme or trust, not incorporated, in connection therewith.

The Presbyterian Church in Canada maintains a fund which is not incorporated, known as the Aged and Infirm Ministers' Fund, in connection with the Presbyterian Church in Canada, and in this fund the ministers of Saint Stephen's Church are entitled to participate. There is no separate fund in connection with Saint Stephen's Church.

Held, that the bequest does not fail for uncertainty, as the intention of the testator is easily ascertained; and that it should be paid to the defendant, the Board of Trustees of the Presbyterian Church in Canada, Eastern Section, for the Aged and Infirm Ministers' Fund in connection with the Presbyterian Church in Canada.

Bill filed for the construction of the will and for a declaration of the parties' rights.

The testatrix, Catherine Murdoch, died on the 26th of October, 1909, having made a will bearing date November 27th, 1905, which was duly proved, and letters testamentary of which were duly granted to Mr. Jones, the executor named in it. The legacies, with the exception of the one involved in this suit, have all been paid, and it appears that after payment of all the legacies,

testamentary and all other expenses and debts, there will be a substantial residuary estate which the testatrix disposed of as follows:—"I give, devise and bequeath all the rest and residue of my estate, real and personal, unto the Trustees of Saint Stephen's Presbyterian Church in the City of Saint John, and the Saint John Natural History Society, to be divided between them share and share alike." These legacies were all to be paid free of succession duty, and in case of the death, during the lifetime of the testatrix, of any person named as a legatee, the legacy was not to lapse, but it was to be paid to the next of kin of the person so dying. All of these legacies, with the exception of four, are given to individual legatees. These four are as follows:—"I give and bequeath unto Pioneer Lodge of Odd Fellows in the said City of St. John the sum of $500.00 to be used and applied for the benefit of widows and orphans of members of that lodge." A legacy in similar terms of $500.00 to the Trustees of St. Andrew's Society of Saint John to be used for charitable puproses. A legacy of $1,000.00 to the New Brunswick Society for the Prevention of Cruelty to Animals. And the legacy over which this controversy has arisen, which is given as follows:—"I give and bequeath the sum of one thousand dollars to be paid by my said executor to the Aged and Infirm Ministers' Fund in connection with Saint Stephen's Presbyterian Church in the City of Saint John." This legacy is claimed by the defendants, "Saint Stephen's Church in the City of Saint John," the corporate name of that Church as fixed by 61 Vic. Cap. 74 (1898). It is also claimed by the defendants, "The Board of Trustees of the Presbyterian Church in Canada, Eastern Section," a corporation created by 7 Ed. VII., Cap. 79 (1907). These two defendants also claim that if neither of them is able, by reason of the uncertainty of the demise, to establish a right to be paid the legacy, it is a charitable bequest which would not

1910.

JONES, Executor of CATHERINE MURDOCH, v. ST. STEPHEN'S CHURCH ET AL.

be allowed to fail for want of a trustee and that it would be administered by this Court for the benefit of the fund mentioned. The defendants, "The Natural History Society of New Brunswick," a corporation created by 46 Vic., Cap. 29 (1883), claim not only that the other defendants are not entitled and that the bequest is not a charitable gift, but that it is void for uncertainty and becomes a part of the residuary estate which, in that case, both the defendants, the Natural History Society and the Saint Stephen's Church, claim as residuary legatees notwithstanding the difference between their corporate names and their names as designated in the residuary devise. This bill has been filed for a declaration of the parties' rights.

W. A. Ewing, K. C., for the plaintiff.

W. B. Wallace, K. C., and *Macrae, Sinclair & Macrae*, for the defendant Saint Stephen's Church.

M. G. Teed, K. C., and *Homer D. Forbes* for the defendant the Board of Trustees of the Presbyterian Church in Canada, Eastern Section.

J. Roy Campbell for the defendant the Natural History Society of New Brunswick.

Argument was heard August 10, 1910.

W. A. Ewing, K. C., for the plaintiff:—There was a charitable intention. This legacy comes in the will between two other charitable bequests, and a gift of that nature will not lapse for uncertainty. *In re White* v. *White*, (1) A gift to effect a charitable purpose is good. If you show an intent the Court will carry it out. *In re Mann, Hardy* v. *Attorney-General*, (2); *In*

(1) 1893 2 Ch. D. 41 (at p. 53.) (2) 1903, 1 Ch. D. 232.

re Davis, Hannen v. *Hillyer*, (1); *In re Maguire* (2); *In the Matter of the Clergy Society*. (3); *In re Douglas, Obert* v. *Barrow*, (4). Having established the fact of the charitable intention the gift does not lapse, and if there is no one to take, the Court will administer it *cy-pres*.

M. G. Teed, K. C., for the defendant, The Board of Trustees of the Presbyterian Church in Canada, Eastern Section:—Refers to the authorities cited by Mr. Ewing and also *Dobie* v. *The Temporalities Board* (5); *Attorney-General* v. *Comber* (6); and *Power* v. *Attorney-General*. (7). There is much legislation:—Acts of Assembly (N. B.) 38 Vict. (1875), Cap. 99, 7 Ed. VII. (1907) Cap. 79, and other Acts. Under the words of the Statute we are the persons entitled to the bequest, not the Trustees of Saint Stephen's Church. If the New Brunswick statute had not been passed the bequest would have gone to the Presbyterian Church in Canada and not to Saint Stephen's Church. The statute of 1907 is to cover just such cases as this.

W. B. Wallace, K. C., for the defendant Saint Stephen's Church:—The defendant, the Board of Trustees, was organized in connection with the Eastern Section of the Church only. The Aged and Infirm Ministers' Fund is controlled by the main Church. If it is paid to the Board the bequest would not get to the proper place where the donor intended it to go. Saint Stephen's Church is just as competent to hand over the bequest as the Board of Trustees. They are incorporated. They are residuary legatees. The testatrix might want Saint Stephen's Church to have so much money given through them. The Trustees of Saint Stephen's Church are capable of giving receipts

(1) 1902, 1 Ch. D. 876 (at p. 882).
(2) L. R. 9 Eq. 632.
(3) 2 K & J 615.
(4) 35 Ch. D. 472.
(5) 7 A. C. 136.
(6) 2 Sim & Stuart 93.
(7) 1 Ball & B. 145.

1910.

JONES, Executor of CATHERINE MURDOCH, v. ST. STEPHEN'S CHURCH ET AL.

for any moneys payable to them. (The Court:—The question is, is it payable to them?) As we have evidence that the testatrix had been contributing to that fund through Saint Stephen's Church, then her intentions was that this money should go in the same way. (The Court:—She had been accustomed to pay into the plate, but the executor in this case must find some one who can give him a legal discharge. Saint Stephen's Church Trustees can not give a discharge because the money is not given to them. It is not given specifically. There is no such fund in connection with the Church. It is a collection. It is not a fund in connection with the Church any more than there is a fund for the payment of the minister's salary.) I contend there is a fund, and it is to be paid to that fund if there is anyone to give a discharge. The question also arises if it comes under the heading of charity. It is doubtful if it does. (The Court:—Does it not then follow that if Saint Stephen's Church cannot give a discharge, it fails?) No, but the question is as to where it will go. It would not fail, but would go *cy-pres*. It will be for the Court to say whether it goes to the Trustees of Saint Stephen's Church or to the Presbyterian Church in Canada. Cites:—*Attorney-General* v. *Comber* (supra); *Powell* v. *Attorney-General* (1); *Mayor of Lyons* v. *Advocate General of Bengal* (2); *In re Rymer, Rymer* v. *Stanfield* (3).

J. Roy Campbell for the defendant the Natural History Society of New Brunswick:—We are willing that the money should be paid to the person that can give a satisfactory receipt. The bequest may be void for uncertainty, but we do not claim that it is. If it is void we would get one-half as one of the residuary legatees. It is not a charitable bequest. Cites:—*Pemsel's Case* (4): *Cunnack* v. *Edwards* (5); *Thomas*

(1) 3 Mer. 48
(2) L. R. 1 A. C. 91 (at p. 112).
(3) 1895 1 Ch. D. 19.
(4) 1891 A. C. 531 (at p. 583.)
(5) L. R. 1896 2 Ch. D. 679.

v. *Howell* (1); *Baker* v. *Sutton* (2) *Townsend*, v. *Carus* (3); *Grimond* v. *Grimond* (4).

Wallace:—In reference to costs. Costs should not come out of the bequest, but out of the residuary estate. Costs out of the estate as between attorney and client. *Mills* v. *Farmer* (5). Blunder of testatrix is the ground. *In re White, White* v. *White* (supra).

Ewing:—In any event solicitor for the executor should have costs as between solicitor and client. *In re Mann, Hardy* v. *Attorney-General* (supra).

Campbell:—The costs should come out of the bequest, not out of the residuary estate.

1910. September 20. BARKER, C. J.:

(His Honor recited the facts of the case as stated above and proceeded as follows.)

The evidence shews there is not now and there never has been any Aged and Infirm Ministers Fund in connection with St. Stephen's Presbyterian Church in the sense of a fund for the benefit of the ministers of that Church or of a fund of that character administered by that Church or under its control. There has, however, been a fund connected with the Presbyterian Church in Canada known as the Aged and Infirm Ministers Fund in which all the ministers of that Church, including the Ministers of St. Stephen's Church, have a right to participate, subject to the rules and regulations made for its management. There are various branches of Church work organized and maintained by these various Presbyterian Churches and among them is the mainten-

(1) L. R. 18 Eq. 198.
(2) 1 Keen 224.
(3) 3 Hare 257.
(4) 1905 A. C. 124.
(5) 1 Mer. 55 (at p. 104.

1910.

JONES, Executor of CATHERINE MURDOCH, v. ST. STEPHEN'S CHURCH ET AL.

BARKER, C. J.

ance of this fund for aged and infirm ministers. Collections in the various congregations are taken up during the year and each contributor may, if he wishes, designate the particular scheme of work to which he wishes his offering to be devoted. Once a year these contributions for general purposes are divided by the officers of the particular congregation and allotted to the several funds,—so much for missions, so much for the Aged and Infirm Ministers Fund, and so on, always regarding any special purpose indicated by contributors. These funds are then remitted according to the present practice, as I understand it, to an official of the Church at Halifax who accounts for it and remits it to the proper officer of the Presbyterian Church in Canada whose office is at Toronto, where they are carried to the credit of the several funds as the yearly contribution of the particular congregation. These funds are managed and administered by committees appointed for the purpose by the Presbyterian Church of Canada. The precise details as to the transmission of the money may have varied from time to time in some immaterial particulars but whether they did or not is unimportant because (using St. Stephen's Church by way of illustration) whatever amount was allotted by the officers of that Church as a contribution to the Aged and Infirm Ministers Fund came into the hands of the proper official at Toronto and became a part of the general fund to be managed and used according to the rules and regulations provided in reference to it. The fund is maintained by interest from invested funds, private contributions and the congregational offerings I have mentioned. For the purposes of administration and making a distribution of the fund equitable in view of the different conditions prevailing in the western part of Canada from those to be found in the East there seems to have been at one time what was called an Eastern and a Western Section of the Church. There was, however, but the one fund,

and since 1904 there has not been any division even nominally. By the rules and regulations by which this fund is governed the minister of St. Stephen's Church was entitled to participate, provided he himself contributed to the fund an annual fee of eight dollars. And under the regulations the Rev. Dr. Macrae did receive, for some time previous to his death, four hundred dollars a year. Stated generally every Presbyterian minister in Canada has a right, on complying with the conditions and requirements laid down by the Church as to age, contributions and service, to receive an allowance which comes to him from the Toronto office. Mr. Willett, who is fully conversant with its object and the details of its working by an experience covering a long number of years, aptly describes it. He says, "It is a superannuation fund, an insurance fund on superannuation principles and they (*i. e.*, the ministers) contribute among themselves and the congregations and well-disposed people help the funds as well. It is purely for the purpose of aged and infirm ministers on an insurance basis complying with the rules of the Church." The scheme serves the same purpose for the Ministers of the Presbyterian Church that the Civil Service Superannuation Act does for the civil service officials and the similar organizations maintained in connection with the larger banking institutions of the present day do for their officers and clerks. Whether this legacy could under these circumstances be regarded as a charitable bequest even under the legal definition of that term I shall not stop to consider for I think the case may be disposed of on another ground.

The evidence shews that the testatrix was a member of the congregation of St. Stephen's Church and always a regular and generous contributor to all these schemes of Church work, not forgetting them even when abroad but sending her gifts when absent from home. That she, in fact, intended this particular fund to benefit by

1910.

JONES, Executor of CATHERINE MURDOCH, v. ST. STEPHEN'S CHURCH [illegible] ET AL.

BARKER, C. J.

the legacy there cannot I think be any doubt. Has she expressed that intention with sufficient clearness to give it effect? For there is ample authority for holding that a devise will not fail for uncertainty if the Court can arrive at a reasonable degree of certainty as to the person intended to be benefited. *Adams* v. *Jones* (1); *Tyrrell* v. *Senior* (2). When you find that the fund referred to is a fund for the Aged and Infirm Ministers Fund in connection with St. Stephen's Presbyterian Church in the City of St. John, and that the fund in question is the only fund of the kind with which St. Stephen's Church has any connection, and that the connection is of the substantial character I have described, and the same as that of all the Presbyterian Churches in Canada, there is no difficulty in fixing on this fund as the one intended to be benefited by the testatrix. The fact that she had contributed generously and regularly to its support during her lifetime is not necessary for the conclusion as to her intention, though it supports it. To whom is the legacy to be paid? There is no legatee named as in the case of the other legacies. "I give and bequeath the sum of $1,000 to be paid by my said executor to the Aged and Infirm Ministers Fund, etc." The language is very similar to that in *Lockhart* v. *Ray* (3) which was as follows, "I bequeath to the worn out Preachers and Widows Fund in connection with the Wesleyan Conferences here the sum of £1250, to be paid out of the moneys due me by Robert Chestnut of Fredericton." No question was made as to the payment being made to the corporate body having and controlling that fund (see same case on appeal 6 S. C. R. at page 322). It cannot be said in the present case that the testatrix intended to give this fund to the St. Stephen's Church. She has rather shown an intention not to do so, because in disposing of the residuary estate she

(1) 9 Hare 485. (2) 20 Ont. Ap. 156.
(3) 20 N. B. R. 129.

expressly gives one-half to that Church, by what I assume she supposed to be its corporate name and no doubt will be accepted as such. The only object the testatrix had in using the words "in connection with St. Stephen's Church, etc." was thereby to identify the particular Ministers' Fund which she wished to benefit. It is equally true that the testatrix did not in terms specify any individual or society or corporation as legatee, and we are left therefore to ascertain what corporate body represents the fund and can take it so that it may reach its destination. I think the defendants, "The Board of Trustees of the Presbyterian Church in Canada, Eastern Section," sufficiently represent the fund and that payment may be made to them. That body was incorporated in 1907 by an Act of the Provincial Legislature, 7 Edward VII, Cap. 79. Section 2, provides as follows: — "All gifts, devises, conveyances or transfers of any lands or tenements or interests therein and all assignments, gifts, and bequests of personal estate in this Province, which have been or shall hereafter be made to or intended for the Presbyterian Church in Canada Eastern Section, or any of the trusts in connection with the said Church, and any of the religious or charitable schemes of the said Church by the name thereof, except any trusts, schemes or institutions connected with the said Church which are now or may hereafter be incorporated, shall vest in the said board of trustees as fully and effectually as if the assignment, gift, devise, bequest, conveyance or transfer had been made to it and shall be held by the said board of trustees for the benefit of the said Church of the particular scheme of the said Church or of any of the said trusts in connection therewith to or for which the said real estate has been or may be bought, given, devised or bequeathed." The part of Canada comprising what the Presbyterian Church in Canada called the "Eastern Section" included the three Maritime Provinces and Newfoundland, so

1910.

JONES, Executor of CATHERINE MURDOCH, v. ST. STEPHEN'S CHURCH ET AL.

BARKER, C. J.

that St. Stephen's Church in St. John was one of the churches. And there can be no doubt that this bequest was intended for one of the religious or charitable schemes of that Church and as the fund was not incorporated, it by virtue of this section vests in this corporation for the benefit of the scheme mentioned. Section 3 makes provision for the appropriation and application of the money, and section 12 authorizes this Board of Trustees under the corporate seal to give a discharge on payment.

The evidence does not make it very clear whether the distinction between the Eastern and Western sections is still kept up or whether it existed or not at the time the will was made. This seems to me to be unimportant. The fund was the same, whether for the convenient management or application of it there were two divisions or sections or one. In either case it was the Aged and Infirm Ministers Fund in connection with St. Stephen's Church in the City of St. John. The bequest should, I think, be paid to the defendants, "The Board of Trustees of the Presbyterian Church in Canada Eastern Section," for the Aged and Infirm Ministers Fund.

Costs out of the residuary estate. Plaintiff's costs to be taxed as between solicitor and client.

PUGSLEY v. THE NEW BRUNSWICK COAL AND RAILWAY COMPANY, ET AL.

1910.
September 20.

Bill filed by Director for an Accounting—Demurrer—Rights of Parties.

A director of a company cannot file a bill for an accounting against the company and his co-directors, unless special circumstances are shown.

The report of a Royal Commission, whose duties were inquisitorial and not judicial, finding that a sum of money received by the directors is unaccounted for; and the fact that the complaining director was the Attorney-General of the Province, and as such an *ex officio* director of the company by the Act of Incorporation, are not such special circumstances as would support a bill for such an accounting.

Bill filed by a director against the company and his co-directors for an accounting. This is a demurrer to the bill by one of the defendants, a co-director with the plaintiff in the company, for want of equity. The facts fully appear in the judgment of the Court.

Argument was heard July 27, 1910.

M. G. Teed, K. C., on behalf of one of the defendants in support of the demurrer:—

The plaintiff has no right or title in him to maintain the bill. 1 Daniells Practice in Chancery 4th Ed. (Am.) 314. If any interest is shown here it would be in the company, and if action be brought it should be brought by the company. Storey's Equity Pleading, Sec. 261; *Foss* v. *Harbottle*, (1); *Mozley* v. *Alston*, (2); *Cooper* v. *The Shropshire Union Railway and Canal Company*, (3); *Patrick* v. *The Empire Coal and Tramway Company, Limited*, (4); and *Harris* v. *Sumner*, (5). If there are any reasons why the company

(1) 2 Hare 461.
(2) 1 Phillips 790.
(3) 13 Jurs. 443.
(4) 3 N. B. E. R. 571.
(5) 4 N. B. E. R. 58.

1910.

PUGSLEY v. NEW BRUNSWICK COAL AND RAILWAY COMPANY ET AL.

should not file the bill, then the bill should show it. The bill alleges that the directors have performed their duties, and that the moneys received were used for the legitimate purposes of the company. The situation then is, that the plaintiff, having no interest, brings this suit against persons whom he says have fully accounted.

W. B. Wallace, K. C., for the plaintiff, *contra:*—

By Chapter 12, 1 Edward VII., (1901), all matters in connection with this company were put under the supervision of the Lieutenant-Governor in Council. The Provincial Secretary and the Attorney-General were made directors of the company, *ex officio*, to look after the interest of the Government in regard to the moneys advanced, and so the plaintiff, who was then Attorney-General of the Province, had an interest, and as he stood in a fiduciary capacity in reference to this property, which was afterwards transferred back to the Government, he is now entitled to an accounting for the time he was in office. His remedy lies in equity. *Attorney-General* v. *Mayor of Dublin*, (1);. The deficit report by the Commissioners is a charge against the directors. Executors and administrators, and so also directors, can be sued in this Court. The directors would be responsible to the plaintiff who was in a fiduciary capacity in charge of the company's money. (The Court:-- It is the Government's money. The plaintiff was put there to represent the Government, but he was a director, and has no different liability, as between him and the company, than any other director. If he had a duty to the Province to perform, then the matter should be settled between him and the Province, and if necessary the Province should be made a party.) But a charge has been made against the plaintiff, and further, irrespective of liability, this is a matter of very intricate accounts, and there is no other way besides this to reach the parties who kept them. (The Court: — There is nothing due

(1) 1 Bligh, N. S. 312.

between these parties and the company is not asking anything. The true way in which to view the situation is to eliminate the commission altogether. It was appointed by the Government to find out what became of the money, but the report is not binding on the directors.) It being a public document they have a right to come into this Court. (The Court:—But what would they come for, the moneys have been spent. If I do find the report erroneous I cannot set it aside. If I find nothing due the plaintiff, and something due other parties, I could not even then do anything but dismiss the bill. The bill states that everything has been done, so there is nothing to account for.) Under the peculiar circumstances of the difficult accounts we have a right to come into this Court. (The Court:—But all accounts are more or less intricate. You must eliminate the commission and argue the case on that basis. If the Government chooses to take proceedings the plaintiff can show the report is wrong. If they do not take proceedings the fact that the planitiff would lie under some stigma, would relate to the moral side of it, while I am dealing solely with the money side of it.) The report shows that bonds were issued which were not. That makes a difference in the interest. That makes a complication in the accounts. By this suit the plaintiff can show what the proper balance is. (The Court:—An account is not complicated because an item is omitted.) The whole point turns on the question as to whether there is any interest in the plaintiff. The interest is that he stands in a fiduciary capacity. (The Court:—So does every director. It is the fact that a trust exists that makes the fiduciary character.) As between themselves they are agents. (The Court:— But only to the company. The trust is to the company.) The Statute puts the plaintiff in a different capacity. He represented the Government. (The Court:— But the Government is not complaining.)

1910.

PUGSLEY v. NEW BRUNSWICK COAL AND RAILWAY COMPANY ET AL.

BARKER, C. J.

A. O. Earle, K. C., for the plaintiff, *contra*:—

The plaintiff has no remedy at law. He must have one somewhere and so it is here. His duty is fiduciary. He ceases to act. It is then found that he and his co-directors have been derelict in their duty. The company takes no steps, the Government takes none, so to clear himself of the charges that hang over him he must seek his relief here. (The Court:—Suppose that these charges were made in a newspaper ?) It is a question of degree. The report is binding on the directors because it is a public document. In *Sturla* v. *Freccia*, (1) a report seems to have been evidence. The effect of taking an account now is the perpetuation of testimony, and if no account is taken, then there would be an estoppel. *Foss* v. *Harbottle* (supra) does not apply. The Government has no pecuniary interest. The grant went from it and it could not file a bill to get anything back. The company cannot take proceedings because it is insolvent and its franchise is gone. So the director must himself file a bill if he wants relief. It is because of the necessity of the case.

Teed, K. C., in reply:—

Sturla v. *Freccia* (supra) has no bearing.

1910. September 20. BARKER, C. J.:—

This is a demurrer to the plaintiff's bill by the defendant Bruce for want of equity. The facts, so far as they are material to the present hearing are these. By an Act of the Provincial Legislature passed in 1901 (1 Edward VII., Chap. 12, Sec. 1) the Lieutenant-Governor in Council was authorized to guarantee the bonds or debentures to the amount of $250,000 of any company authorized to construct a line of railway from the terminus of the Central Railway at Chipman in

(1) 5 A.C. 623.

Queens County, to Gibson in York County, with interest at the rate of three per cent. By the same Act it was provided that the Provincial Secretary and Attorney General of the Province should be *ex officio* members of the Board of Directors of the said Company and have the same powers and privileges as any other member of the Board. The principal object of this enactment, as it appears by the preamble, was the development of large and valuable coal deposits in the Counties of Queens and Sunbury, from which it was supposed the Province would derive substantial returns in the way of royalty and otherwise. The Act contains various provisions designed to secure the money for which the Province was to become responsible. The specifications for the railway were subject to the approval of the Governor in Council (sec. 3.) The Province was not to be under any liability until after the railway had been completed and in running order, properly equipped with sufficient rolling stock so as to pass the inspection of an official to be appointed by the government for that purpose. The Company was required (sec. 6) to keep such books and accounts as the Government might from time to time require, and these books and accounts were at all times to be open to the inspection of the Government or such persons as they might appoint for that purpose. In addition to this the Company's books and accounts were to be audited every half year by an expert accountant appointed for that purpose by the Governor in Council. Section 7 also provided that the company should produce and file semi-annually with the Provincial Secretary a statement of the company's business, with the net profits for the preceding half-year and that this statement should be verified under oath by the president or secretary of the company. It was also provided that the road bed, rolling stock and plant of the Company, and its tolls and earnings,

1910.

PUGSLEY v. NEW BRUNSWICK COAL AND RAILWAY COMPANY ET AL.

BARKER, C. J.

should be conveyed to trustees by way of mortgage to secure the principal and interest of the bonds. The defendant, "The New Brunswick Coal and Railway Company," was incorporated by an Act of the Legislature of New Brunswick passed in the same year (1901, Chap. 77) and by sec. 5 it was authorized to carry on a mining, milling and manufacturing business, with very general and extreme powers, including the power of building and maintaining a railway between Chipman and Gibson. The head office was to be at Fredericton; the capital stock was fixed at $100,000, divided into shares of $100 each. The company was also authorized to issue bonds for $250,000, to be secured by a mortgage on its stock and plant; and in case it acquired any other railway it could, with the permission of the Government, issue additional bonds to such an amount as the Lieutenant-Governor in Council might allow, not, however, to exceed the amount which the acquired railway had power to issue. The Coal Company soon after its organization entered into contract with the government for the construction of the road from Chipman to Gibson, and they also secured from the Central Railway Company an option to purchase its railway and stock for $180,000. In order to carry out that option an Act of the Legislature was passed by virtue of which the purchase of the Central Railway by the Coal Company was ratified. Some change was made as to the issue of the bonds, but eventually the government did guarantee the bonds of the Coal Company in all to the sum of $450,000 to provide the money for the construction of the road from Chipman to Gibson—for the purchase of the Central Railway and for some extra improvements on that road. In addition to this the government also advanced the Company large sums of money by way of subsidies and loans to meet current expenses.

In 1905 another Act of the Legislature (5 Ed. VII.,

Chap. 16) was passed by which, for various reasons specifically set forth in the preamble, the government was authorized to take over the Coal Company's line and property and manage it by means of a commission of two members to be appointed by the government. And in order to provide the money necessary to pay outstanding liabilities, to purchase rolling stock and make necessary improvements, the commissioners were authorized to make and issue four per cent. bonds, amounting in all to the further sum of $250,000, also to be guaranteed by the Province. The commissioners were required to submit annually to the Legislature a report of their receipts and expenditures. Under this Act the Railway was taken over by the government and bonds to the extent of $250,000 were issued and their payment guaranteed by the Province. The plaintiff, when all these Acts were passed and during the construction of the road by the Coal Company down to 1907, was Attorney-General of the Province and as such an *ex officio* Director of the Company.

In 1908 an Act of the Legislature (8 Ed. VII., Chap. 19) was passed authorizing the Lieutenant-Governor to cause a commission to issue to three persons to hold an investigation or enquiry into certain matters connected with the Central Railway Company and the New Brunswick Coal and Railway Company, and in pursuance of that authority Mr. Justice Landry and Messrs. McDougall and Teed were appointed commissioners. They made an investigation and on the 29th day of March, 1909, made a report by which they found that, after making allowance for all disbursements made by the Coal Company and taking account of receipts, there was the sum of $135,035.35 unaccounted for. The bill alleges that this account as taken by the Commissioners is incorrect by reason of certain errors and omissions which are specifically set forth and that if the account were correctly taken there would not be

1910.

PUGSLEY v. NEW BRUNSWICK COAL AND RAILWAY COMPANY ET AL.

BARKER, C. J.

anything unaccounted for. The bill also alleges that the Directors appointed proper and trustworthy officers to attend to the financial and other business of the Coal Company, and that it was the duty of the plaintiff, as one of the *ex officio* directors of the company, as well as the duty of the other directors of the company, to take all necessary and reasonable steps to see that the affairs of the company were well managed and that all available moneys were used for the legitimate purpose of the company and for the best possible advantage of the company. The plaintiff also alleges that in all respects he and the other directors of the company did everything which was reasonably possible and feasible, so far as the construction of the railway and its branches were concerned, and its operation was done in the interests of the said province. The bill also alleges that all moneys received from the governments of the Province and Dominion for or on behalf of the defendant company, and also all loans and advances received for or on behalf of the defendant company, and also all proceeds of the sales of debentures of the said company and all other moneys whatsoever received for or on account of the defendant company, were used for the legitimate purposes of the company.

The twenty-second section of the bill is as follows: "That no accounting has ever been had between said officers and directors and the defendant company, and in view of the position which the plaintiff occupied in respect to the defendant company as an *ex officio* director thereof, by virtue of his having been Attorney-General of the Province of New Brunswick and by reason of the appointment of the said commissioners pursuant to the Legislative authority referred to, and in view of the report which they made alleging that the amount $135,035.35 was unaccounted for and also of the complicated character of the accounts of the defendant company and death of said officer and the company's audroit,

the plaintiff believes and alleges that he and the other directors of the company are entitled to have an account of the receipts and disbursements of the defendant company." The prayer of the bill is "that an account may be taken under the direction of this Honorable Court of the receipts and expenditures of all subsidies and other moneys received by the said defendant company or the directors and officers thereof from the Dominion Government and the Government of the Province of New Brunswick, and also the expenditures and appropriations of the proceeds of all debentures, bonds or securities for money guaranteed by the said Province, and of all the dealings and transactions of the said defendant company or the directors thereof in any way connected with the business of said defendant company and said receipts and expenditures."

The parties defendant include the Coal Company and all the directors besides the plaintiff who are living, and the personal representatives of Messrs. Stetson, Winslow and Trueman, who died before this suit was commenced.

In discussing the question raised by this demurrer the plaintiff's counsel seemed to attach so much importance to the fact that the government commissioners had by the report which they made, found, if not directly, at all events by inference, that the plaintiff and his co-directors, some or all of them had, by reason of their breaches of trust as such directors, incurred a very large liability, it will perhaps simplify matters if I first discuss the plaintiff's position and rights irrespective of the report and then see whether they are altered in any way by what the commissioners did.

The relation which exists between a company such as this Coal Company and its directors has been described sometimes as that of trustee and *cestui que trust* and sometimes as that of principal and agent. Directors are sometimes described as agents of the company,

1910.

PUGSLEY v. NEW BRUNSWICK COAL AND RAILWAY COMPANY ET AL.

BARKER, C. J.

which undoubtedly they are, and sometimes as trustees of the powers of the company for the body of shareholders. If directors appropriate the company's money to their own use and benefit, or use it for purposes *ultra vires* of the company, they are in both cases guilty of a breach of trust, and though the measure of the liability may not be the same in the two cases, in both the breach of trust is the foundation of the jurisdiction of this Court. *In re Bolt & Iron Company* (1) it appeared that the president and manager of the company had taken from the Company's fund an amount in payment of his salary. It was treated as a breach of trust, though he took the money *bona fide*, believing that he had a right to do so. See also *Ex parte Kelley* (2) and *Ranesk*ill v. *Edwards* (3). In *Patrick* v. *Stanley* (4) the Vice-Chancellor says, "It was there said that this was a case of principal and agent and that if the principal may file a bill against the agent, the agent may file a bill against the principal, but I cannot admit that the rights of principal and agent are co-relative. The right of the principal rests upon the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal." This is an authority for holding that this bill could not be sustained as against the company. It is still more difficult to see what interest the plaintiff has to file a bill against his co-directors. The plaintiff alleges that he and his co-directors had a duty to see that the Company's moneys were all properly expended and used for the legitimate purposes of the Company and he also alleges that he and his co-directors have fully and honestly discharged their duty both to the company and the Province, and that if an account were taken it would be found that neither he nor the other directors owed the company anything. The bill does not allege that the Company is making any claim. The effect of taking

(1) 14 O. R. 211 and on appeal 16 Ont. A. C. 307.
(2) 21 Ch. D. 492. (3) 31 Ch. 100. (4) 9 Hare at page 628.

the account would be to show that the directors owed the Company nothing, a fact which according to the bill no one who is a party to this suit ever denied. I think I am not travelling outside the admissions of the plaintiff's counsel on the argument if I assume that this bill would never have been filed if the case rested solely on the aspect of it which so far I have presented. It was said, however, that the investigation and report of the commission had altered the plaintiff's position so as to give him rights to come to this Court which he had not before. The allegations in section 22 of the bill which I have quoted at length are intended to furnish additional reasons for sustaining this position. There is no doubt that the Legislature, when it stipulated, as one of the conditions upon which the bonds of the Company were to be guaranteed by the Province, that the Attorney-General and Provincial Secretary should be *ex officio* Directors, regarded that arrangement as a safeguard to the Province against any misapplication of the Company's moneys or their waste from loose and incompetent management. The plaintiff in his bill speaks of his duty to the Province and his duty to the Company — separates the one from the other. With his duty to the Province so far as it is distinct from his duty to the Company this Court has nothing to do in this proceeding, for this bill both in its allegation and in the parties to it, has reference solely to the dealings between the plaintiff and the Company in his capacity as Director. In that view I am unable to see in what particular his right to maintain this suit is greater or different by reason of the appointment of the commissioners or the report which they have made. The report is intended for the information of the Governor in Council — the duties of the commissioners were inquisitorial and not judicial. *Re Gordon* v. *City of Toronto* (1). The report is not binding upon anyone, and it would seem from the reasoning in *Stubla* v. *Freccia* (2) that it is not

(1) 16 Ont. Ap. 452. (2) 5 A. C. per Lord Blackburn at p. 644.

1910.

PUGSLEY v. NEW BRUNSWICK COAL AND RAILWAY COMPANY ET AL.

BAKKER, C. J.

even evidence against the plaintiff. It, in fact, from the allegation in the bill, only finds that as a result of the investigation the commissioners were able to make, there is a sum of $135.035.35 out of the $958,799.75 received by the Company (and the correctness of this sum does not seem to be questioned) which is unaccounted for; that is, as I understand it, they are unable to tell what became of it. It is true that the report does not fix the liability for this balance upon any particular individuals. It is, however, a necessary inference that if the balance were correctly stated it represents a liability which the directors, some or all of them, must assume. Under these circumstances it is easy to understand how this Company and its directors who were responsible for the management of its affairs during the period when these large expenditures were being made, should seek the aid of some judicial tribunal for a thorough investigation of these accounts, and in that way correct the errors and supply the omissions to which the plaintiff alleges this large balance is attributable. But that does not add to the jurisdiction of this Court or give the plaintiff a right to file a bill for that purpose. It is still an accounting to be enforced by the principal against the agents. On a bill properly framed for the purpose this Court would have no difficulty in making the enquiries usual in such cases, and any special enquiries which the allegations in the bill or other circumstances might render necessary. If the real object of such a bill were to show by evidence that the directors had fully discharged their duties and fully accounted, as the object of this bill is said to be, and in that way by a decree of this Court prove that the commissioners' reputed balance was altogether wrong, that object would not be attained by a decree simply recording a result agreed upon by the parties and to which none of them made any objection, or by any decree based on anything short of a thorough enquiry and investigation.

The demurrer must be allowed with costs.

KENNEDY, ADMINISTRATOR,

v.

SLATER, ADMINISTRATOR.

1910.
October 4.

Practice—Concurrent Jurisdiction of Chancery and Probate Courts—Con. Stat. (1903) Chap. 118.

In matters where the Chancery and Probate Courts have concurrent jurisdiction, the Chancery Court will not act, when the question involved can be more conveniently and inexpensively disposed of in the Probate Court, unless some special reason be shown why the Probate Court should not act.

Originating summons by the administrator of David Kennedy who died on the 21st of February, 1907, his wife having pre-deceased him, raising the question as to whether or not the administrator of a deceased grand-daughter who died March 31st, 1910, is entitled to a share of the estate. The facts are fully stated in the judgment of the Court.

Argument was heard September 20, 1910.

W. B. Jones, K. C., for the plaintiff.

M. G. Teed, K. C., for the defendant.

1910. October 4. BARKER, C. J.:—

This matter comes before me by way of originating summons and arises out of the following facts. David Kennedy died intestate on the 21st February, 1907, possessed of certain real and personal property and leaving one son and three daughters surviving (his wife having pre-deceased him), and one grand-daughter,

1910.

KENNEDY, Administrator, v. SLATER, Administrator.

BARKER, C. J.

Helena M. Slater, child of Jennie H. Slater, who was a daughter of David Kennedy and died in 1902. Helena M. Slater died March 31st, 1910. The question for determination is whether she was entitled at the time of her death to a share in the surplus of the personal estate of her grandfather, David Kennedy. This involves the construction to be placed on Section 2 of Chapter 161 (Con. Stat. of N. B. 1903), relating to intestate estates, and will arise in the ordinary course of procedure when a distribution of the personal property is made by the Judge of Probate. It is unnecessary for me to refer to the argument of Mr. Jones, because for reasons which I shall give I do not intend entertaining the application. Two objections were taken to the proceeding,—one, that the case is not one intended to be disposed of on an originating summons; and the other, that in view of the jurisdiction of the Probate Court, this Court, though it has full jurisdiction, would refuse to hear it.

The application is not for the administration of the estate, but simply to determine whether or not this grandchild is entitled to participate in the surplus. It is not necessary to decide the question, but as at present advised I think the proceeding is correct, though some amendment may have been required as to the parties. In fact *In re Natt.*, (1) relied on by the plaintiff as sustaining his contention, arose on an originating summons. See Order 55. Rule 3 (*a*) and (*b*). Jud. Act, 1909.

Without in any way interfering with the jurisdiction of this Court as to the administration of intestate estates, the legislature has created a Probate Court for each County, whose jurisdiction has been from time to time increased, so that it can now deal with trustees' accounts and other matters quite beyond the original area of its jurisdiction. It has always been vested with the power of passing estate accounts and ordering the distribution of the surplusage of the personal pro-

(1) 37 Ch. D., 517.

1910.

KENNEDY, Administrator, v. SLATER, Administrator.

BARKER, C. J.

perty. Section 2 of Chap. 161, to which I have just referred, enacts thus:—"Subject to the provisions of the next following section, the surplusage of the personal estate of the intestate shall be distributed by the Judge of Probate in manner following, etc." Section 50 of "The Probate Courts Act," Chap. 118. (Con. Stat. of N. B., 1903), provides for a distribution of the surplus of the personal estate to be made after the lapse of eighteen months from the time of granting letters of administration. This can be compelled on the application of any heir or next of kin, and upon the hearing the Judge of Probate is to make a decree for the payment of the distributive share. And the bond which the administrator is obliged to give on his appointment, binds him after having his accounts of administration filed and allowed, to pay the surplus as the Probate Court or other competent Court by decree shall adjudge. There is of course the appeal to the Supreme Court as there is from actions in this division. Within a few years the Probate Courts' jurisdiction has been extended to matters relating to trustees which before that came exclusively within this Court's control. Their accounts are passed and allowed with the same effect as if allowed by this Court (Sec. 58). A trustee may be removed in certain cases and a new trustee appointed in his place, and if the estate is in danger of being wasted the Judge of Probate may require additional security (Sec. 73). I think this extended jurisdiction to the Probate Courts must have been intended by the Legislature to relieve this Court from the obligation to act, where there exists no special reason why the Probate Court should not act, and where considerations of convenience and expense are in favour of that course being adopted. It has been said that the Probate Court is not a Court of construction and the late Mr. Justice Palmer acted on that principal in *Parks* v. *Parks* (1). That case, however,

(1) N. B. Eq. Cases, 382.

1910.

KENNEDY, Administrator, v. SLATER, Administrator.

BARKER, C. J.

involved the construction of a will, and it was held that an order of the Court to pay a legacy, which was made under an erroneous view of the meaning of the will, was no protection to the executor who paid the legacy as directed. That, however, is an entirely different case from this. It arises under a long established practice and jurisdiction. The plaintiff must go to the Probate Court and pass his accounts in order to determine what the surplus personal estate is which the Judge of Probate is required to distribute or to make a decree for that purpose, and the question involved here can thus be easily and inexpensively settled. Under these circumstances I think I should decline to act and leave the matter for the Probate Court.

I have consulted Mr. Justice McLeod as to the course I intended to take and I am authorized to say that he concurs in it. There will therefore be no order made as the matter will drop, and there will be no order as to costs.

TILLEY, Assignee of deForest, v. DEFOREST, ET AL. 1910.
October 18.

Specific Performance—General Assignment—Trade Mark—Good Will of Business.

In March, 1894, the firm of G. S. deF. & S, consisting of the defendant, H. W. deF., and his brother C. W. deF., registered a trade mark for a certain blend of tea known as "Union Blend," which was prepared under a formula made by the defendant.

In May, 1901, C. W. deF. assigned his interest in the trade mark to the defendant and shortly after seems to have retired from the business.

In May, 1908, the business was put into a joint stock company in which the defendant was by far the largest stock holder, he paying for his stock by assigning to the company all his interest in the business, which he valued at $50,000. This assignment, dated June 29th, 1908, after particularly setting out the real estate and chattels personal, contained the following, "and all personal property of whatsoever nature and description owned by the said H. W. deF. in connection with the business of the said H. W. deF. together with the good-will of the business of the said H. W. deF." There was also a covenant in the assignment that the defendant would execute and deliver all papers necessary to give a perfect title to the property. The trade mark itself was not specifically mentioned in the assignment. The defendant was elected president of this company and for two years this trade mark was used and the business carried on, chiefly under his management.

In May, 1910 the company, being insolvent, assigned to the plaintiff under Chap. 141, Con. Stat. of N. B. (1903). On investigation the plaintiff found that there was no specific assignment of the trade mark to the company which could be used for registry under the Trade Mark Act.

Held, that the words used in the assignment are amply comprehensive to pass the trade mark, and that the defendant is bound to execute a specific assignment of it to the plaintiff as assignee of the company.

Bill filed for specific performance. The facts are fully stated in the judgment of the Court.

M. G. Teed, K. C., for the plaintiff.

Daniel Mullin, K. C., for the defendant Harry W. deForest.

Amon A. Wilson, K. C., for the defendant J. Harvey Brown.

Argument was heard October 4, 1910.

1910.

TILLEY v. DEFOREST ET AL.

BARKER C. J.

M. G. Teed, K. C., for the plaintiff: The plaintiff is entitled to the trade mark under the general agreement between Harry W. deForest and the company. It passes as part of the good-will and as appurtenant to it. 2 Rev. Stat. of Can., Chap. 71. Sec. 15. It will probably be contended that the trade mark was a personal possession of Harry W. deForest and was not intended to pass to the company. See Sebastien on Trade Marks, 4th Ed., pp. 9, 10, 98, 99, 101 and 103. Mr. deForest was not required to use his own personal skill in the preparation of the tea, he had general supervision, but it was not necessary that he should be personally present. See *Churton* v. *Douglas*; (1); *Bury* v. *Bedford* (2); *Levy* v. *Walker* (3); *Mossop* v. *Mason* (4); *Banks* v, *Gibson* (5). The plaintiff is entitled to a decree for the specific performance of the transfer of the trade mark.

Daniel Mullin, K. C., for the defendant: It is a question whether the trade mark was conveyed under the general agreement. If it was intended to be conveyed it is a strange thing that it was not specifically mentioned; that the word "trade mark" was not set out. The trade mark was the personal property of the defendant and belonged to him, and not to the business, and it was never intended that it should be conveyed to the company. See *Lecouturier* v *Rey* (6).

Amon A. Wilson, K. C., took no part.

1910. October 18. BARKER, C. J.

This case lies within a very narrow compass, and the facts upon which its decision rests are substantially not disputed.

(1) Johnson, 174.
(2) 4 De G. J. & S., 352.
(3) 10 Ch D., 436.
(4) 18 Gr. Ch. Rep. 453.
(5) 34 Beav,, 566.
(6) 1910 A. C., 262.

1910.

TILLEY v. DEFOREST ET AL.

BARKER, C. J.

Previous to the year 1894 the firm of George S. deForest & Sons, consisting at that time of the defendant Harry W. deForest and his brother Clarence W. deForest, carried on a general wholesale grocery business at St. John, dealing, among other things, largely in teas. They eventually put upon the market a particular blend of tea under the name of the "Union Blend," consisting of a blend of Indian and Ceylon teas under a formula made by the defendant Harry W. deForest. This tea seems to have acquired quite a reputation not only in New Brunswick, but in other provinces. On the 14th March, 1894, the firm of George S. deForest & Sons (which at that time consisted of the defendant and his brother Clarence) applied in the firm's name to the Minister of Agriculture, under the provisions of the "Trade-mark and Design Act," for the registry of a certain label as a specific trade-mark, and on this application the trade-mark was registered on the 22nd March, 1894. It is described in the certificate of registery as follows:—"This is to certify that this trade-mark (specific) to be applied to the sale of tea, and which consists of a red label having printed on it in gold the words, etc., 'Union Blend selected from First Pickings of Choicest New Seasons Teas — a figure formed of two triangles and containing initials G. S. deF. & S., etc.,' has been registered by George S. deForest & Sons of the City of St. John, Province of New Brunswick, on the 22nd day of March, A. D. 1894." By an assignment under seal Clarence W. deForest on the 1st of May, 1901, assigned his interest in the trade-mark as registered to the defendant Harry deForest. In 1908 the defendant registered the trade-mark in the United States in his own name. Sometime after Clarence deForest assigned his interest in the trade-mark he seems to have gone out of the partnership, and the defendant Harry deForest continued the business in his own name. He established a branch in St. John's, Newfoundland, and later on in Boston.

1910.

TILLEY v. DEFOREST ET AL.

BARKER, C. J.

He continued to use the trade-mark — he spent large sums of money in advertising the tea sold as the "Union Blend," and his sales were made not only in the Maritime Provinces but in Newfoundland and in parts of Maine and in Boston. In May, 1908, the business was put into a joint stock company under the Provincial Act under the name of "Harry W. deForest, Limited." The capital stock was $99,000, divided into 990 shares of $100 each, of which 542 shares were subscribed: Harry W. deForest taking 500 shares and the other forty-two were divided as follows:—Charles W. Howell and Noel F. Sheraton each ten shares; Clarence W. deForest two shares, and Annie E. W. deForest twenty shares. These forty-two shares were to be paid for in cash, and the 500 shares taken by the defendant were to be paid for in full by the transfer by him to the company of his interest (speaking generally) in the business, which he valued at $50,000, over and above the liabilities which the company were to assume. In the petition for incorporation the applicants whom I have just mentioned say as follows:—"The objects and purposes for which incorporation of the said company is sought are as follows: (*a*) 'To purchase or otherwise acquire and take over all the stock-in-trade, merchandise and property of all and singular the tea business now carried on and engaged in by Harry W. deForest of the City of St. John, together with the offices and buildings now occupied by the said Harry W. deForest as a tea office and warehouse in the City of St. John, and the land and appurtenances thereto belonging or appertaining.' (*b*) 'To carry on and continue the tea business now owned and conducted by the said Harry W. deForest, and to buy, sell, import, export, purchase and acquire tea and to carry on a wholesale and retail business." The sixth section of the petition is as follows:—"The said company as one of its objects and purposes as above stated seeks authority to purchase, acquire and take over, hold and own the

1910.

TILLEY v. DEFOREST ET AL.

BARKER C. J.

tea business heretofore carried on by Henry W. deForest, one of your petitioners, at the said City of St. John, together with the good-will, stock-in-trade, business, property, assets, rights and credits, subject to the said debts and liabilities as aforesaid, which said good-will, stock-in-trade, business, property, assets, rights and credits aforesaid are valued at and worth $50,000, and are necessary to the business of the said company, and good value to the said company at the said sum of $50,000." Section twelve of the petition, which is verified by an affidavit of the defendant, states the terms upon which he was to pay for his stock by transferring to the company when incorporated "all the good-will, stock-in-trade goods, wares and merchandise, chattels, estate, property and effects, rights and credits owned by him in connection with the business, etc.," for which he was to receive 500 paid up shares of the capital stock, and the company was to assume the liabilities of the defendant arising out of the business. After the letters patent of incorporation had been issued the defendant executed an assignment of the property, which under the arrangement, he was to hand over as representing the $50,000, the par value of the shares he agreed to take. This assignment is dated June 29th, 1908, and after reciting the various terms of the arrangement it proceeds thus:—"Now this Indenture witnesseth, that the said Harry W. deForest, for and in consideration of the issue to him of five hundred shares of the capital stock of the said Harry W. deForest, Limited, and in further consideration of the sum of one dollar of lawful money of Canada to him in hand well and truly paid, etc., has assigned, transferred, etc., all his right, title and interest in and to the said mentioned and described land and premises situate on the corner of Union and Mill streets aforesaid, with the buildings and appurtenances thereto belonging or appertaining,

1910.

TILLEY v. DEFOREST ET AL.

BARKER, C. J.

and all the goods, wares, merchandise, money, chattels and effects, machinery, warehouse supplies, horses, sleds, waggons, harness, book debts and all personal property of whatsoever nature and description, owned by the said Harry W. deForest in connection with the business of the said Harry W. deForest, together with the good-will of the business of the said Harry W. deForest." The assignment contains the following covenant:—"And the said Harry W. deForest hereby covenants and agrees to and with the said Harry W. deForest, Limited, that he will execute and deliver all necessary papers or documents in order to convey and give a perfect title to the said property hereinbefore referred to and intended to be conveyed to the said Harry W. deForest, Limited."

On the delivery of this assignment the certificates for the five hundred paid up shares were issued to the defendant. The company was organized. The defendant was elected president, and the business was carried on by the company chiefly under his management. There were no new books opened, but the busniess carried on by H. W. deForest in his name before the incorporation was continued by the company in its name afterwards. Of the $50,000 carried to his credit in stock account, $35,434 represented the estimated value of the trade-mark or good-will of the business. It continued to be used by the company as it had been originally by the firm of George S. deForest & Sons, and later by H. W. deForest when he carried on the business in his own name. Large sums were spent after the incorporation in advertising. The parties differ as to the amount, but it must have exceeded $20,000. The business had been extended—it had been for many years limited to teas, and the sales in 1905 amounted to about seven hundred thousand pounds, of which the principal quantity was "Union Blend."

In May last it was discovered that the company's financial position was such that it could not carry on its

business, and accordingly it made an assignment to the plaintiff on the 3rd of May, in pursuance of Chap. 141, Con. Stat. 1903, N. B., respecting assignments by insolvent persons. On investigating the company's affairs the assignee found that the assignment of the trade-mark from Clarence deForest had not been registered, and there was no specific assignment to the company which could conveniently, if at all, be used for registry under the Trade-mark Act. The plaintiff thereupon applied to the defendant to execute a transfer, not only in order to carry out his intentions as to the property but also his covenant to execute such further conveyances as might be necessary for the completion of the title. This the defendant refused to do for a reason so altogether insufficient that it is not worth discussing. The plaintiff then brought this action to compel the defendant to execute the necessary assignment.

Assuming the trade-mark to be assignable, it passed, I think, under the assignment from the defendant to the company. The words used are, in my opinion, amply comprehensive to pass the trade-mark and thus carry out what was beyond all doubt intended by the defendant as by everyone who had anything to do with the transaction. *Gage* v. *Canada Publishing Company* (1). In *Lecouturier* v. *Rey* (2) the Lord Chancellor treated the trade-mark as property situated in England, and therefore regulated in accordance with the law of England. The object of organizing the company was to transfer the assets and business of the defendant to the company so that the business should be continued and carried on by it. That is what in fact was done. It would be a strained construction of the conveyance to hold that under such circumstances such words as "assets," "property" and "good-will" did not include the principal asset of the whole business. Without it the business

(1) 10 P. R. 169. (2) [1910] A. C. 262.

1910.

TILLEY v. DEFOREST ET AL.

BARKER, C. J.

could not be continued or carried on as before. It is in that way quite within the rule mentioned by Fry, L. J., in *Pinto* v. *Badman* mentioned in the case I have just cited. He says:—"It has been laid down by the clearest authority that a trade-mark can be assigned when it is transferred together with, to use Lord Cranmouth's language, the manufacture of the goods on which the mark has been used to be affixed." Viewed as a question between the defendant and the creditors of the company in which he held nearly all of the subscribed shares, which he had himself organized and promoted for the purpose of taking over and continuing the business, and to which he had made the assignment I have already referred to, it seems difficult to suggest any good reason for his refusing to perfect the title to the trade-mark as he has been requested to do. It seems to have been regarded by him as the most valuable part of the assets; he had received a large sum for its transfer, and it is fair to assume that it was a chief factor in enabling the company to obtain so large a credit as $100,000, which the evidence shows to have been its indebtedness at the time of its failure. The case relied on by the defendant's counsel is *Lecouturier* v. *Rey* (1) already mentioned. All that case decides is this, that where a foreign manufacturer had acquired a reputation in England it is beyond the power of a foreign Court or foreign Legislature to prevent the manufacturers from availing themselves in England of the benefit of that reputation. As I have already pointed out, the benefit of the reputation is, as Lord Loreburn there says, not only property, but property in England, and therefore subject to English law. There does not seem to me any analogy between that case and this. The "Chartreuse," manufactured solely by the Carthusian monks, was made according to a formula known for a long period only by two or three of the Order.

(1) [1910] A. C. 262.

Under the legislation which took place in France in 1901 known as the law of Association, and which was directed against unlicensed religious associations, the monastery of La Grande Chartreuse was dissolved and their property in France, including their distillery and French trade-marks, were confiscated and sold. This, however, it was held did not include either the secret of the manufacture or the benefit of the reputation which the liqueur had acquired in England. Had these monks done what the defendant did with his business they would have stood in a different position. Had they organized a joint stock company for the purpose of taking over their business of making and manufacturing the "Chartreuse" made and manufactured by them for the benefit of the company in which they were, or might be interested, the company could scarcely carry out its purpose without using by right the word "Chartreuse" as indicating the article for sale, or without owning the right to use the process of manufacture which up to that time had remained a well guarded secret known only to two or three people at any one time. The case relied on by the defendant has not any bearing on this case, which is simply the case of assigning a registered trade-mark. This brings me to the Act of Parliament under which the mark was registered (Chap. 71 R. S. C. 1906.) Section 13 provides that the proprietor of a trade mark may, on complying with certain regulations, have it registered for his own exclusive use, and "thereafter such proprietor shall have the exclusive right to use the trade-mark to designate articles manufactured or sold by him." Section 15 provides that "Every trade mark registered in the office of the minister shall be assignable in law." There is no limitation here as there is in Section 70 of the English Act (Chap. 57, 1883) which is as follows:—"A trade-mark when registered shall be assigned and transmitted only in connection with the good-will of the business concerned

1910.

TILLEY v. DEFOREST ET AL.

BARKER, C. J.

in the particular goods or classes of goods for which it has been registered, and shall be determinable with that good-will." The good-will was sold and assigned in this case. Section 19 of our Statute gives the proprietor of a registered trade-mark a right of action against any person using it, or any fraudulent imitation of it, or any person who sells any article bearing the trade-mark.

Stated shortly, the defendant, who was the proprietor of this trade-mark, sold it with the good-will of his business to the company for a valuable consideration which he received — he made an assignment of the property, not specifically mentioning the trade-mark, but by words, in my opinion, amply sufficient for the purpose of transferring it — he and the company used it, and for the two years which the company existed treated it as the company's property and he, as a part of the arrangement under which the company was organized, gave a covenant that he would execute all papers necessary to give a perfect title to the property. The plaintiff, as the assignee of the company, required a specific assignment of the trade mark by name, in order to have it registered under the Statute and the rights protected. He asked the defendant to do this at his expense. He has refused for reasons which seem to me altogether insufficient.

The plaintiff must have a decree with costs.

McGAFFIGAN V. THE WILLETT FRUIT COMPANY, ET AL.

1911.
April 18.

Party Wall—Right to Support—Easement—User—Lost Grant—Injunction—Costs.

The plaintiff McG. and the defendants the W. F. Co. are the owners of adjoining lots which originally comprised one lot. On each lot is a building which entirely covers its whole area.

The wall about which this dispute has arisen is used as the northern wall of the plaintiff's building and the southern wall of the defendants'. It is clear however from the evidence that it stands entirely on the plaintiff's lot.

In 1877 the buildings on these two lots were destroyed by fire, the foundations however being left standing, and when the buildings were rebuilt, immediately after the fire, these old foundations were used, the walls were rebuilt on them, and the then owner of the defendants' lot used the wall in question as a support for the joists of the building he constructed.

The original lot was first divided in 1833 when the part now owned by the plaintiff was conveyed to one T. P. who continued to own it down to the time of his death in 1875. T. P. died intestate leaving him surviving a widow and five daughters. In 1896 this piece of property became vested in one of these daughters by a conveyance from all of the other heirs of T. P. to her. In 1899 she and her husband conveyed it to one E. F. J., who was acting for the plaintiff and later on in the same year conveyed it to him.

The eldest daughter of T. P. became of age in 1876 and the youngest in 1887. One of the daughters married before she reached her majority.

Held, that while the wall in question is entirely the property of the plaintiff and is not a party wall, the defendants have an easement for the support of the joists of their building in the wall as constructed after the fire in 1877, it having been openly and uninterruptedly used for that purpose for a period of more than twenty years; that a lost grant must be presumed to which this user would be referred.

Semble, the plaintiff when he purchased the building in 1899 had at least constructive notice of this easement.

Held, also, that as the youngest daughter of T. P. became of age in 1887, over twenty two years before this action was commenced, the grant might have been made at any time during the two years succeeding her attaining her majority; and further that coverture does not bar the presumption of the making of this grant.

The defendants recently constructed an elevator in their building, and for that purpose let beams or joists into the wall in question and used it for the support of the elevator.

1911.

McGAFFIGAN v. THE WILLET FRUIT COMPANY ET AL.

Mandatory injunction granted for the removal of these beams or joists.

No costs to either party, each having succeeded in part.

Bill filed for an injunction, and for a declaration of the parties rights. The facts fully appear in the judgment of the Court.

M. G. Teed, K. C., for the plaintiff.

A. A. Wilson, K. C., and *J. King Kelley*, for the defendants.

January 5, 1911.

M. G. Teed, K. C., on behalf of the plaintiff applied for an order for inspection of the premises in question under Order 50, Rule 3, Jud. Act 1909. In support of the application cites:—*East India Co.* v. *Kynaston* (1); *Walker* v. *Fletcher* (2); *Attorney General* v. *Chambers* (3); *Lewis* v. *March* (4); *Bennett* v. *Whitehouse* (5); *Barlow* v. *Bailey* (6); *Bennett* v. *Griffiths* (7).

A. A. Wilson, K. C., on behalf of the defendants, *contra*.

Order for inspection made under old practice.

Argument was heard February 3, and March 28, 1911.

M. G. Teed, K. C., for the plaintiff:—The plaintiff submits:—

1. That the whole of this wall is on the plaintiff's land, and belongs exclusively to him.

2. That there is no evidence of a party wall either by ownership or contribution to cost.

(1) 3 Bligh, 153 and 168 (Notes); 3 Swanston 248.
(2) 3 Bligh, 172.
(3) 12 Bea. 159.
(4) 8 Hare 97.
(5) 28 Bea. 119.
(6) 22 L. T. 464.
(7) 7 Jur. N. S. 284.

3. That no right by user or lost grant is made out or established.

(*a*) Because the user was not open or notorious or known to the plaintiff or his predecessors in title.

(*b*) Because from the nature of the user being from the defendants' property, the plaintiff had no right to enter on that property or to abate the user and therefore it was not adverse and time would not run against him.

(*c*) Because the plaintiff's premises are admitted to have been continually in the occupation of tenants up to the time of the defendants' purchase, therefore the twenty year user would not run against them.

(*d*) Because one of the heirs of the Parks' estate (Mrs. Wm. Pugsley) was continually under disability of infancy or coveture up to the time of the plaintiff's purchase.

4. That if the defendants have acquired the right by user to have the timbers which support their building in the wall, the breaking of the wall and entering timbers for an elevator in 1909, was not justified.

5. That there is no evidence of any user of the chimneys on the upper floor for twenty years.

Under these points we submit that there should be a declaration that the wall belongs exclusively to the plaintiff. Cites:—Gale on Easements (8th Ed.) 228-231. *Union Lighterage Co.* v. *London Graving Dock Co.* (1); *Loggie* v. *Montgomery* (2).

Mr. Wilson for the defendants *contra* submits:—

1. That the wall is a party wall, as the evidence shows, and is used as such. See 22 Am. and Eng. Ency. of Law, 236.

The defendants' building is two feet higher than the plaintiff's building, and the wall in question goes up two

(1) (1901) 2 Ch. 300; On appeal, (1902) 2 Ch. 557.

(2) 38 N. B. R. 112.

1911.

McGAFFIGAN v. THE WILLET FRUIT COMPANY ET AL.

feet four inches above the plaintiff's building. The general custom in building walls of this nature is that they go eight inches above the roof of the building to which they belong. Also the chimneys in the wall with flues on the side of the defendants' building show it to be a party wall. The evidence all goes to show a party wall. The only evidence of entering or breaking the wall of late years, is where two timbers were put in for the support of the elevator.

2. In case it is decided that it is not a party wall by agreement, then it is a party wall by prescription. See Washburn on Easements 4th Ed. 605, 608, 609. In regard to party walls see *Cubitt* v. *Porter* (1); *Wiltshire* v. *Sidford* (2); *Lewis* v. *Allison* (3); *Standard Bank of British South America* v. *Stokes* (4); *Rains* v. *Buxton* (5); In *Re Jennens, Willis* v. *Howe* (6).

We submit that this wall is a party wall by agreement, and if it is not a party wall by agreement, then it is a party wall by prescription.

M. G. Teed, K. C., in reply: The principles which govern as to real estate and easements are entirely different. The legal documentary title to the wall is in the plaintiff without any doubt This wall ought not to be assumed to be a party wall by agreement as the evidence does not support that in any way. As to user it must be notorious and open. Undoubtedly the joists were put in the wall when the building was built. The owners could have seen it at that time but later on they could not. Easement would only give the defendants the right to do what had been done for twenty years, it would not give any property in the wall, and they would have no right to do anything further.

March 28, 1911.

(1) 8 B. & C. 257, 259.
(2) 8 B. & C. 259, Note.
(3) 30 S. C. R. 173.
(4) 9 Ch. D. 68.
(5) 14 Ch. D. 537.
(6) 50 L. J. Ch. 4.

M. G. Teed, K. C., on behalf of the plaintiff submits:—

1. That four of the heirs of Thomas Parks were infants at the time the building was put up, and no notice could be presumed against them.

2. That the user was not open and notorious.

3. That Mrs. William Pugsley, one of the Parks' heirs, has never ceased to be under the disability of either infancy or coverture, as she married before she was of age.

4. Assuming that a lost grant could be presumed against Mrs. Daniel Pugsley, who was of age when the building was erected, it could not run against the other heirs.

5. A user cannot be acquired against one of many tenants in common, but must be against all of them.

Under these points it is not possible for any easement to exist. See Washburn on Easements (3rd. Ed.) 131-160; Gale on Easements (8th Ed.) 214-215; *Bradbury* v. *Grinsell* (1); *Daniel* v. *North* (2); Freeman on Co-tenants (2nd. Ed.) Sec. 185; *Portmore* v. *Bunn* (3); *Durham & Sunderland Railway Co.* v. *Wawn* (4); *Ross* v. *Hunter* (5). Mrs. Hall and the plaintiff acquired a title free from such incumbrances as are set up by the defendants.

Wilson, K. C., for the defendants *contra:* — The plaintiff cannot take advantage of Mrs. Wm. Pugsley's coverture as Mr. Wm. Pugsley is not dead. See *Ingalls et al* v. *Reid* (6); *Jumpsen* v. *Pitchers* (7). In regard to stale demands see *Brooks* v. *Muckleston* (8); *Roe dem Langdon* v. *Rowlston* (9).

(1) 2 Saunders 175 i.
(2) 11 East 372.
(3) 3 D. & R. 145; 1 B. and C. 694.
(4) 3 Beav. 119.
(5) 7 S. C. R. 289, see page 301
(6) 15 Up. Can. Rep., C. P. 490.
(7) 13 Sim. 327, see page 332.
(8) (1909) 2 Ch. D. 519.
(9) 2 Taunt. 441.

1911.

McGAFFIGAN v. THE WILLET FRUIT COMPANY ET AL.

Teed, K. C., in reply:—The plaintiff submits that one tenant in common cannot make a grant of any specific property (easement).

BARKER, C. J.

1911. April 18. BARKER C. J.:

The dispute involved in this action arises out of the use of what the defendants allege to be a party wall between their building and the building adjoining it on the south owned by the plaintiff. These buildings are situated on the western side of Dock street in the City of Saint John. The plaintiff's lot—or the Parks lot, as it is called by the witnesses—has a frontage of twenty-five feet on the western side of the street, and it is joined on the north by the defendants' lot—or the Butt lot, as some of the witnesses call it. The buildings in both lots occupy their entire frontage on Dock street, so that the wall in question is the northerly wall of the plaintiff's building and the southerly one of the defendants. The owners of these lots derive their title through the same origin. They formed a part of a lot described in the earlier conveyances as No. 3, which was conveyed in 1832 to one Ratchford by the devisees of one John Black. In August, 1833, Ratchford conveyed that part of this lot No. 3, which the plaintiff now owns, to the late Thomas Parks, who continued to own it up to the time of his death in October, 1875. He died intestate, leaving him surviving a widow and five daughters, who continued the ownership down to May 1st, 1896, when all, except Mrs. Hall, joined in a conveyance to her. She and her husband conveyed to E. F. Jones by deed dated January 19th, 1899. Jones had really purchased for the plaintiff, and he conveyed the lot to him by deed dated January 24th, 1899, and registered on the twenty-eighth of that month. That part of the lot No. 3, which is now the defendants' lot, was conveyed by

Ratchford to one Vaughan in September, 1833, and eventually the defendants acquired it under a conveyance from one Annie McLean dated September 2nd, 1909, and registered December 24th, 1909. One W. F. Butt owned this lot at the time of the fire in St. John in June, 1877, when all the buildings on these lots were destroyed. He remained owner until after the new buildings had been erected. In the conveyance of the plaintiff's lot from Ratchford to Parks it is described as follows: "A certain piece or parcel of the said lot "No. 3 and which said piece or parcel is abutted and "bounded as follows: Commencing at the northwest "angle of the lot known on the plan aforesaid as No. 2, "thence northwesterly and westerly along the line of "Dock street twenty-five feet; thence southerly and "westerly in a line parallel to the northwestern line of "lot No. 2 forty-one feet, six inches, thence southerly "twenty-four feet more or less till it strikes the north "west line of lot No. 2 at the distance of fourteen feet, "six inches from the angle formed in the lots by the "house now standing on lot No. 2, thence northerly "along the northwest line of lot No. 2, fifty-six feet "more or less to the place of beginning." This description has been continued in the conveyance to the plaintiff. The defendants' lot is, in its description in the conveyance to Vaughan in September, 1833, as well as that in the subsequent conveyances in terms bounded by the Parks land as conveyed to him in August, 1833. Beyond the fact that there were buildings on these lots at the time of the fire in June, 1877, there is nothing whatever in the evidence either as to their uses or manner of construction to assist in the determination of the question now in dispute. The Parks building had two underground storeys—a basement and sub-basement—in one of which were wine vaults. These vaults were not destroyed by the fire and the foundation of this wall

1911.

McGAFFIGAN v. THE WILLET FRUIT COMPANY ET AL.

BARKER, C. J.

in question remained comparatively uninjured, so that it was in fact used as the foundation for the new wall. In July, 1877, a few weeks after the fire, building operations were commenced by the then owner of these lots and by the owners of other lots in Dock street. That this wall in question was built on the old foundation is, I think, beyond doubt. Mr. Pugsley, who married one of Mr. Parks' daughters, and seems to have had some supervision of the building operations, says that the new wall was built on the old foundation. This fact, from what the witnesses who examined the premises say, is capable of determination by an inspection of the wall itself.

The first and most important question is, on whose ground does this wall stand and who is the owner of it? This question must I think be answered in favor of the plaintiff. Mr. Murdoch, the City Engineer, says that in July, 1877, about three weeks after the fire, he was employed by Mr. Pugsley acting on behalf of the Parks heirs, to make a survey of their lot. The ground was then being cleaned up and prepared for rebuilding. Mr. Murdoch had the Ratchford conveyance and some other deeds with him—he made the necessary measurements and a plan of the lot which he produced. This was July 15th, 1877. He says the foundation of this wall was not destroyed. Referring to the plan he was asked—

"Q. What does the red line through the centre or apparently the centre of the south line of the Parks lot indicate? A. The line of division between the properties.

"Q. And you found from your survey the line of division between the Parks lot, now the McGaffigan property, to the southeast was in the centre wall? A. Yes, about the centre wall.

"Q. Then how did you find to the northward? A. I found the line in the north face of the wall there.

"Q. In other words you found the whole wall on the Parks lot, the north wall?

"(By the Court) All this northerly wall you found was on the Parks property? A. Yes.

"Q. And half on the other side? A. Yes."

The witness went on to say that the distance from the southern line of the Parks lot which he found to be in the middle or about the middle of the wall between that lot and the contiguous lot on the south, to the northern side of the wall in question, was just twenty-five feet or the exact frontage on the street which the conveyance gives.

The evidence of Mr. Mott, an architect of considerable experience, leads to the same conclusion. Before purchasing the lot the plaintiff employed Mott to inspect the building and examine the premises in order to furnish him with an opinion as to their value. Mr. Mott took the measurements of the building and from the details in its finish and manner of construction, which he described at some length, he concluded that the wall was built not as a party wall but as a distinct part of the building, and he seems to have valued it for the plaintiff as a part of the property he was then about purchasing.

From this evidence, which is not disputed, there is no difficulty in finding as a fact that the wall in question stands altogether on the plaintiff's lot and is his exclusive property.

In *Watson* v. *Gray* (1) Fry J., classifies party walls under four heads. The first and most common class is where the two adjoining owners are tenants in common. "In the next place," he says, "the terms may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighboring

(1) 14 Ch. D., 192.

1911.

McGAFFIGAN v. THE WILLET FRUIT COMPANY ET AL.

BARKER, C. J.

owners. Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favor of the owner of the other moiety."

The defendants in their answer claim the wall to be a party wall. The evidence does not sustain that contention. It is certainly not a party wall within the definition given by Fry J., in the case I have just mentioned. That, however, does not determine the point at issue. It is possible—and this I think is the defendants' true claim—that by the uninterrupted use of this wall for so long a period, they, the defendants, have acquired an easement for the use of the wall for the support of their building as begun in 1877, though they acquired no right of property either in the wall itself or in the land in which it stands. That remained in the Parks heirs and is now in the plaintiff. This easement is limited in its nature and extent by the nature and extent of the user out of which the easement arises. The distinction between a party wall in which the contiguous owners have rights of property and a wall owned by one and built altogether by himself in his own land, but subject to an easement in favor of the adjoining owner for the support of his building, is illustrated and pointed out in *Waddington* v. *Naylor* (1) and *James et al* v. *Clement* (2).

There is no doubt from the evidence, that when these buildings were erected in 1877, the joists of the defendants' building were let into this brick wall and that from that time down to the present, the building

(1) 60 L. T. 480.

(2) 13 Ont. 115.

has derived its support in that way. There was no secrecy about this. It was open and notorious; it was patent to any one who chose to use his eyes, whether from mere curiosity or from interests. Those who were interested in the Parks property knew where the northern boundary of their lot was. They had had it measured and ascertained by Murdoch and they built the new wall on the foundation of the old one.

So far, therefore, as the case rests upon their knowledge of matters as they stood at that time, and as they remained up to the time they parted with the property, they must have had, or at all events they must be taken to have had, full notice of the use to which this wall was subjected by the owner of the adjoining lot—commenced by Butt in 1877 and continued from that time down without interruption or objection until the plaintiff's letter to Brown in November, 1908—a period of over thirty years. More than twenty years had elapsed when the plaintiff purchased in January, 1899. He must have known at that time where the northerly line of his lot was. Mott, his architect and valuer, who examined the building for him previous to his purchase ascertained very easily that there was no wall on the defendants' lot and there was nothing therefore to support their building unless the wall in dispute was used for that purpose.

I do not know that it is necessary at all for the determination of this suit to determine whether the present plaintiff, when he purchased, had notice of the actual condition of things, but if it were I should hold that he had constructive notice at least. He knew where his northerly line was. He knew what he is now contending for, that this wall was all on his lot, and it was plain, according to the evidence, that there was no wall beyond that line and that this could be seen

1911.

MCGAFFIGAN v. THE WILLETT FRUIT COMPANY ET AL.

BARKER, C. J.

from the street without entering the defendants' building at all. There was a visible state of circumstances which was altogether unlikely, and, in this case, I should say impossible—to exist without a burden. In that respect it is a much stronger case than *Allen* v. *Seckham* (1), or *Hervey* v. *Smith* (2).

This case is not governed by the Prescription Act. The rights were all acquired and this when action commenced before January 1st, 1910, when that part of the Prescription Act relating to easements of this kind came into force. The evidence therefore having established an open and uninterrupted use for over twenty years before the present plaintiff purchased, and over thirty before he made any complaint, I am, I think, bound as a matter of law to presume a lost grant—to which this user would be referred. In the latest edition of Gale on Easements (1908) the author sums up the effect of *Dalton* v. *Angus* (3) thus, "the effect of this decision is effectually to establish the rule that an easement of support for new buildings may be acquired by twenty years' open and uninterrupted user, and although the Lords do not expressly discuss the general question as to what evidence is admissible to rebut the presumption of lost grant, the effect of their judgment is to affirm the opinion of Thesiger and Cotton, L. J J. It follows that the presumption cannot be displaced by merely showing that no grant was in fact made; the long enjoyment either estops the servient owner from relying on such evidence or overrides it when given." (p. 197) It is, I think, clear from modern authorities, that although this presumption may be rebutted, a grant will be presumed in all cases where it is reasonably possible. For instance, in *Goodman* v. *The Mayor of Saltash* (4) a question arises as to a right to an oyster

(1) 11 Ch. D. 790.
(2) 22 Bea. 299.
(3) 6 A. C. 740.
(4) 7 A. C. 633.

fishing in a tidal river which had been exercised from time immemorial by a borough Corporation. The House of Lords held that the lawful origin for the usage ought to be presumed if reasonably possible, and that the presumption which ought to be drawn as reasonable in law and probable in fact, was that the original grant to the Corporation was subject to a trust or condition in favor of the inhabitants in accordance with the usage. Kay J., in speaking of this case says, "The Court felt themselves bound to refer that usage to some legal origin and invented a most ingenious legal origin by supposing a grant to the Corporation in trust for certain persons, the free inhabitants of ancient tenements within the borough." *Tilbury* v. *Silva* (1). In the same case at page 118, Bowen L. J., says:—"There is no doubt that it is the principle of the English law to suppose a legal origin for long established use—to assume that there is some justification to be found for acts of open enjoyment which are continued as long as the memory of living people extends." In the *Attorney-General* v. *Simpson* (2) at page 698, Farwell J., says: "The principle is, that, when the Court finds an open and uninterrupted enjoyment of property for a long period unexplained, the Court will, if reasonably possible, find a lawful origin for the right in question."

In *East Stonehouse Urban Council* v. *Willoughby Bros.* (3) at page 332, Channell J., speaks of this presumption as "the rule which says that on long continued user or possession being proved, anything requisite to give that user and possession a legal origin ought to be presumed by the Court." He adds, "This doctrine has long been known to our law, but in recent times it has been applied more widely and to a greater variety of cases than formerly."

(1) 45 Ch. D. 98. (2) [1901] 2 Ch. 671. (3) [1902] 2 K. B. 318.

1911.

McGAFFIGAN v. THE WILLETT FRUIT COMPANY ET AL.

BARKER, C. J.

In the absence of any evidence as to the nature of the occupation of the buildings of these lots previous to the fire in 1877 I think we must presume a grant made then or since. No doubt such a presumption may be rebutted by showing that any such grant was impossible. For instance in the case of *Mill* v. *The Commissioners of the New Forest* (1) the presumed grant was from the Crown at a time when by Statute the Crown was prohibited from making it. At page 521, Jervis C. J., says: "Suppose that a claim to the right of use of water in respect of a particular house is established by proof of enjoyment for twenty years and that it is then shown that the house had been built only twenty-one years, *non constat* but the right might have been granted the day before the twenty years commenced. But here it is shown, that the enjoyment commencing when it did, the Crown could not have granted the right."

In *Phillips* v. *Halliday* (2) the dispute arose over the possession of a pew in a parish church, annexed to a dwelling house. It appeared that the lessee of the house had obtained possession of this pew two centuries ago, from the Churchwardens who had no power or authority to make any grant of it. The Court held that the grant of a faculty which would be valid ought to be presumed. Lord Herschell says: "Now I apprehend that when there has been long continued possession in assertion of a right, it is a well settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title." (p. 231). At page 235 Lord Herschell continues: "The argument on behalf of the appellants is this. Here, they say, we see the

(1) 2 Jur. (N. S.) 520

(1) [1891] A. C. 228.

origin of this alleged right—it arose out of the erroneous supposition of the Vicar and Churchwardens, or the Churchwardens, that they could sell to a parishioner a portion of the site of the church, and that having done so, and he having erected a pew upon it, a good title to it vested in him which he could assert and maintain at law. My Lords, they are, of course, perfectly justified in saying that a transaction of that sort is one which could have no validity. Their position then, is this—we show that in its origin this alleged right was acquired in a manner not legal, and that being so, you have no right to presume (as you would have but for the existence of that entry and the information which it gives) that the right has been acquired in a legal manner, and therefore to presume, if necessary, a faculty for the purpose of so establishing it. I am unable to accede to that proposition. It cannot be disputed, whatever may be said of the earlier period, that at any time from and after the year 1687—that is within seven years of this original arrangement, a faculty (supposing that I am right in the propositions of law which I have already put before your Lordships) could have been granted which would have given a complete legal title. Why should the House or the Court refuse to presume, or abstain from presuming, a legal title to this alleged right, which they would otherwise have presumed, because in its inception it may be shown to have rested upon a foundation which would not support it? Why does not the doctrine which I have referred to, the maxim which has been so often acted upon, apply just as well to the acts necessary to confirm a title originally invalid as to the acts necessary to create a valid title in the first instance? It seems to me that the argument of the learned Counsel for the appellants must go to this length, that for however many centuries it may be proved that an alleged right has been asserted and

1911.

McGAFFIGAN v. THE WILLETT FRUIT COMPANY ET AL.

BARKER, C. J.

enjoyed, if it can be shewn in its inception to have rested upon a foundation invalid in point of law, then, although the title might have been perfectly well validated by some act which you would otherwise have presumed, you are never justified in presuming that act to have been done. My Lords, I am perfectly unable to see upon what basis such a principle can rest. It seems to me that the very reason which has been held not only to justify, but almost to compel, the Court to make presumption of this description, applies just as much in the latter case as in the former."

Several grounds are taken in answer to the case set up by the defendants. In the first place it is said that the premises have for all these years been in the possession of tenants and that the owner had therefore no means of interrupting the user. The evidence as to this point is of the most general character and at most would go to show the ordinary yearly tenancies.

Besides this the easement involved in this case differs materially from an easement of air or light such as was discussed in *Ring* v. *Pugsley* (1). You cannot by action compel an owner of a building to close his windows for fear he may by uninterrupted user acquire a right in reference to your property. You must erect the incumbrance on your own land in the exercise of your right as owner, and if you cannot for that purpose enter on the premises of your lessee the time does not run against you. That is, however, different from this case. This action could as well have been brought twenty years ago as now. In the next place it is contended that any presumption of grant is rebutted because the only persons who in 1877 could have made a grant were the five daughters of Mr. Parks in whom the title was, and they were under the disability of infancy for a part of the time, and of coverture for a part of the

(1) 2 P. & B. (N. B. R.) 303.

time, which rendered it impossible for them to make a valid grant. The evidence shows that these daughters were born as follows:—the eldest (afterward married to Dr. Daniel Pugsley) October 16th, 1855, the second, on March 10th, 1857, the third May 29th, 1858, the fourth August 12th, 1862, and the youngest on March 23rd, 1866. The eldest daughter was therefore of age in October, 1876, over six months before the fire, and the youngest became of age on the 23rd of March, 1887. All of them were of age when they were married except Mrs. William Pugsley—who became of age in March, 1878, having been married on the 6th of January, 1876. I am not able at present to accede to the objection that infancy of itself rebuts this presumption of law. The conveyance of an infant is as effectual for passing the title as that of a person of full age, subject to this, that he has the privilege, if he chooses to avail himself of it, of avoiding the conveyance within a reasonable time after he became of age. *Edwards* v. *Carter* (1) *McDonald* v. *Restigouche Salmon Club* (2). The conveyance of an infant is perfectly valid and does not require any confirmation by the grantor after attaining full age to make it so. It is, however, not necessary for the purposes of this case to determine that question, because ample time elapsed after all these daughters had attained full age to make a grant. Between March 25th, 1887, when the youngest child became of age, until December, 1909, when this action was commenced, is a period of over twenty-two years. What was there to prevent a grant being made during the first two years of the twenty-two? Nothing so far as I can discern, except coverture. But how is that any obstacle? The property was owned as the separate property of the wives, though it could not be conveyed without the husbands joining in the conveyance. But when you are at lib-

(1) [1893] A. C. 360. (2) 33 N. B. 472.

1911.

McGAFFIGAN v. THE WILLETT FRUIT COMPANY ET AL.

BARKER, C. J.

erty, if not bound, to presume a grant, there seems to me no more difficulty in presuming one made by the husband and wife, if that was necessary, than by the wife only, for the fact whether it was made or not by the wife alone or jointly with her husband, is not a factor in the discussion. I therefore see no difficulty in making the presumption and I see nothing to rebut it.

It was further contended that when these children came of age the user was not open and therefore time did not run against them. What I have said on this point in reference to the plaintiff applies more strongly to those daughters, not one of whom has gone on the stand to deny actual knowledge of the origin of this right which has been exercised for so long a period without objection. Assuming that until they became of age time would not run against them they had then as full knowledge and notice of the use and of its nature and extent as they had years before.

It appears that there are two flues in the wall with openings on its north side into the defendants' premises. Farrell was the first tenant of the premises after the fire. He occupied them for some twenty years from the fall of 1877 immediately after the new building was finished. These openings were no doubt left by the Parks builder in the wall when it was built and they have been there ever since and used by the occupants when necessary. During some part of the time the plaintiff was a tenant of some part of these premises. Farrell seems to have used one of these flues and although the plaintiff does not seem to have actually used the other there can be no doubt that he knew it was there. The evidence is not clear as to its actual use, but the inference is, I think, irresistible that the Parks heirs, or those who acted for them, left these openings for the accommodation of the adjoining premises—under what circumstances I cannot say, for there

is no evidence. If the right is continued to them it does not seem to me that the present plaintiff has any cause for complaint.

There will be a declaration:

1. That the wall in question is not a party wall—that it stands altogether on the plaintiff's land and is owned exclusively by him.

2. That the defendants have no right of property in the said wall or title to the land on which it stands, but they are entitled to the use of the said wall for the support of their said buildings by keeping and maintaining the joists of the same in the northern side of the wall as placed in 1877 and used since. They are also entitled to the continued use of the two openings into the flues.

3. The defendants must, within four months from service of decree, remove all joists or beams let into the said wall or fastened thereto as part of the elevator recently put into the said building or in any way connected therewith.

4. As to the costs I think each party must pay his own. The plaintiff has succeeded in part and the defendants in part.

1911.
July 31.

TURNBULL REAL ESTATE COMPANY v. SEGEE ET AL.

Land—Documentary Title—Title by Possession—Occupancy—Injunction—Damages.

In 1765 a certain block of land, a portion of which is the land in question in this suit, was granted by the Crown to J. S., R. S. and J. W., and from that date a documentary title can be traced to the present time vesting this land in the plaintiff company.

In 1855, the then owner of the land and the predecessor in title of the plaintiff company, gave a lease of a portion of it, and from that time to the present the different owners and predecessors in title of the plaintiff company have given leases to various persons and collected the rents. The plaintiff company during its ownership has also given leases and collected rents.

In 1872, the defendant S. and his father went on the property and drove some stakes on the boundaries of the land in dispute, cut wood and made some excavations, either searching for magnesia or for some other reason. From this date down to the present, the defendant has been more or less on the land, digging holes and making excavations. He did not live on the land but went on it and performed these acts whenever he was able. During all this time the land not occupied by buildings was under lease to other persons for pasturage purposes, though the defendant recently drove off their animals on numerous occasions.

The defendant's father died in 1891, but neither he nor the defendant ever collected any rent from the tenants on the land in dispute, while the plaintiff company and its predecessors in title have collected rents during the whole time of their ownership.

In September, 1909, through his solicitor, the defendant wrote to the various tenants claiming damages for trespass and threatening suit, but nothing further was ever done; and in October, 1909, he gave a deed of a portion of this land to one M. M. W.

Held, that the defendant has no title by possession as his possession was not open, notorious and *exclusive;* as the plaintiff company and its predecessors in title exercised their rights and occupancy during the whole of the defendant's alleged possession.

Decree that the plaintiff company is the owner in fee simple of the tract of land in dispute, and for an injunction restraining the defendants from interfering with or disposing of or using or dealing with its land in any way, and further, that the defendants give the plaintiff company possession of the lands and premises. The Deed to M. M. W. will be declared void and set aside.

An application for an injunction restraining the defendants from trespassing on the plaintiff's land, and

for an order that the defendants deliver up possession to the plaintiff, that a deed given by the defendant Segee to the defendant Ward of a portion of the land be set aside, and for damages. The facts are sufficiently stated in the judgment of the Court.

J. D. Hazen, A. G., and *W. A. Ewing*, K. C., for the plaintiff.

G. W. Fowler, K. C., and *W. B. Jonah* for the defendant.

Argument was heard May 13, 1911.

G. W. Fowler, K. C., for the defendant: The plaintiffs' claim is based upon a grant from the Crown. This grant provided that the grantee should pay a quit rent of one shilling a year, and in case three years rent should be unpaid or any of the grantees should within ten years in any way, except by will, give away the land, the grant should be null and void. Under a like penalty of forfeiture, the grantees were to improve or enclose one-third of the land in the first ten years, another third in twenty years and the balance in thirty years. As the plaintiffs have failed to prove due fulfilment of these conditions, it must be taken that the property reverted to the Crown, and the only title the plaintiffs can set up is by possession, and this they have not proved. The settling of these lands was the very basis upon which the grant was issued, and that part of the lands that was not improved or enclosed within the thirty years became absolutely forfeited.

(McLEOD J.:—But these grantees went into possession and the Crown at this date would not take steps to repossess.)

The grantees cannot be said to have been there under color of right so that possession of part could be considered as possession of the whole, and therefore as there would be no actual physical possession of the unenclosed and

1911.

TURNBULL REAL ESTATE COMPANY v. SEGEE ET AL.

unimproved portion of the premises, that portion was open like any other Crown land for any squatter to go in. In 1872 the defendant's father did go in, and in 1873 began to exercise acts of ownership. He set out stakes, which he kept renewed from time to time. It was just such an enclosure as if he had squatted on improved land and enclosed it with a fence. He quarried stone and cut wood and sold both. All acts, which, taken alone, might be regarded as mere trespasses, yet, when accompanied by the maintaining of stakes, became unequivocal acts of ownership.

The father's acts enured for the benefit of his son the defendant.

(McLEOD, J: The acts of A. will not enure to the benefit of the act of B., unless A. conveys the right accrued to him or unless B. takes by heirship).

But here there was community between the parties. The defendant and his father took possession by staking out the whole territory except the McDonald lot, the Burke lot and the Rogers lot, but he doesn't appear to have exercised ownership over the western portion; but he does show possession as far west as the Giggey lot on the front, and extending back to the lime kiln road, cutting it about in two. Segee was joking when he said he was looking for treasure. Claiming the eastern half, his acts of possession for that began with his father's staking in 1872 with iron and wooden stakes, and that act of taking possession was open, definite and notorious, and therefore fulfils the condition to make out the possession under the statute. The father continued that down to 1891, the time of his death, jointly with his son. The defendant, who was his heir and also was jointly interested with him in the possession, has continued it down to the present time, by cutting wood off the premises, by planting and cultivating it, by replacing stakes first set as they became

dislodged, either by rotting out or being displaced, by erecting buildings, by digging a well, by erecting fences, quarrying and selling stone, cutting and selling wood, and grazing and pasturing.

(McLEOD, J.; In other words, you say he used it exactly as an owner and used it exclusively as an owner would?)

He used it exclusively as an owner would, driving off other people's cattle when they came there, forbidding and preventing anyone from making use of the property, or cutting or quarrying stone, or taking it away and from grazing and pasturing the property.

On the point that the possession of the father enures to the son, see *Handley* vs. *Archibald* (1). The evidence of the witnesses as to the defendant's possession is clear. They have all shown absolutely that the Segees claimed the property, and that it was known as their land. All these acts were open and notorious. It is singular that, with all these acts going on, if the plaintiffs owned the property, they took no preventative steps. The part leased by the plaintiffs for grazing was a very small portion, and if adverse possession of this land was shown all the time, the granting of the land did not amount to anything against the possession.

(McLEOD, J.: He hadn't the possession if the owner takes and deeds it and uses it).

But he doesn't; this man holds possession, and drives the cattle off, and refuses to allow them to graze there. The fact that they put their cattle somewhere else strengthens our case. The working of the quarry for almost every day off and on for thirty years shows continuous acts that cannot be recognized with ownership in anybody else. That the law with regard to possessory

(1) 30 S. C. R., 130.

1911.

TURNBULL REAL ESTATE COMPANY v. SEGEE ET AL.

titles is all a question of fact, see *Doedem DesBarres* v. *White* (1). The facts do really fit in with the requirements that it shall be adverse possession.

(McLEOD, J.: I do not know whether it has to be adverse now, it is simply a possession under the statute. The old rule was "adverse," and that the claimant was in possession so long that they presumed a grant. But now we have the statute).

J. D. Hazen, A. G., for the plaintiff: There is nothing before the Court to show that the conditions of the grant have not been fulfilled. The Act respecting Witnesses and Evidence (2), provided that in putting in a grant of this kind the conditions can be left out entirely. The burden is on the defendant to show the conditions have not been fulfilled. As there is no evidence to that effect, the presumption must be that they have been fulfilled. If any one could object, it would not be the defendant but the Crown. The fact that for one hundred and forty-six years the Crown allowed it to go on is good evidence of acquiesence. The plaintiff has a perfect documentary title from 1765, and has also proved possessory title from the year 1860. The leases given since that date cover all the property, and the lessees actually occupied the property. So it cannot be said the defendant acquired possession. As the defendant entered without a deed or any color of title, he can claim no more land than he actually occupied. The placing of stakes fifty yards apart therefore cannot affect the question. "The whole doctrine of adverse possession rests upon the presumed acquiesence of the owner,"—Washburn on Real Property (3). In view of the leases given by the plaintiff it is absurd to

(1) 1 Kerr, 3 N. B. 595. (2) C. S., N. B., 1903, Cap. 27, Sec. 30.
(3) 2nd. Ed., 498.

presume any acquiesence on its part. Washburn continues: "Acquiesence cannot be presumed, until the owner has, or may be presumed to have, notice of the possession." The plaintiff never heard of a claim by the defendant until 1899. If two persons are claiming possession, one having a title, and the other not, the person who has the title is in actual possession and the other is a mere trespasser. *Jones* v. *Chapman* (1). Here, two people are claiming possession, and the title is vested in the plaintiff. The defendant was a trespasser. It cannot be said he had any possession at all. See also *doe dem desBarres* v. *White* (2) and *Sherren* v. *Pearson* (3) quoting from the judgment of Parker, J., in *desBarres* vs. *White*.

The defendant says he was there for the purpose of but one act, viz., to get magnesia. This would not give title by possession: Washburn (4). Nor would the mere making of an enclosure: Washburn (5); *McIntyre* v. *Thompson* (6); *Wood* vs. *LeBlanc* (7); *Allison* v. *Rednor* (8).

The defendant confines his claim to the eastern half. Yet the only claim to title from the evidence is, that he cut bushes there. The part where he actually quarried stone was included in the leases, and he therefore could not claim that. The evidence would lead to the conclusion that they were digging there under the insane delusion that there was treasure hidden there. That was the opinion of the people in the vicinity. He was therefore merely a trespasser. All the acts done by the defendant, or his father, are consistent with possession being in the real owner. The defendant must have known of Mr. Baxter's lease. The defendant never paid the taxes; he never asked the occupiers for rent, nor put them off.

(1) 2 Ex. 803, at 821.
(2) 1 Kerr, 3 N. B., 595. at pp. 627 and 640.
(3) 14 S. C. R., 581, at 586.
(4) 2nd. Ed., p. 506.
(5) 2nd. Ed., p. 506.
(6) 1 O. L. R. (C.A.) 163.
(7) 34 S. C. R., 627.
(8) 14 U. C. Q. B., 459.

1911.

TURNBULL REAL ESTATE COMPANY v. SEGEE ET AL.

McLEOD, J.

No part of the land was ever fenced off by defendant, or his father, and the defendant and his father cannot have occupied it continuously. If defendant had any possession at all it was for only about eighteen years and nine months. The father died intestate, leaving a number of children, of whom the defendant is one. If the defendant claims as heir to his father, he is only tenant in common. The defendant, could not claim title from his father, whose possession, if any, did not ripen into title at the time of his death, so that he could devise the land or give title to any one. *Miller* v. *Robertson* (1), is distinguishable from the present case, as there the plaintiff only claimed title by possession.

The Court:—The injunction continues for the present.

1911. July 31. McLEOD, J.

This is an action brought by the Turnbull Real Estate Company asking for a decree declaring that the plaintiffs are the owners in fee simple of a certain tract or lot of land mentioned and described in the Statement of Claim, and also for an injunction to restrain the defendants, their workmen and servants, from entering upon or trespassing upon the said lands and premises or any part thereof and from committing waste or spoil thereon and from continuing to trespass thereon or any part thereof and to prevent them from conveying, mortgaging, leasing, disposing of or dealing with or attempting to deal with the said lands and premises or any part thereof in any way, and for a decree that the defendants give the plaintiffs possession of the lands and premises described, and for a decree setting aside and declaring void a deed bearing date the 15th day of October, 1909, from the defendant John A. Segee to the defendant Mabel M. Ward. And also for a decree that the defendants pay the plaintiffs damages to be

(1) 35 S. C. R. 80.

1911.

TURNBULL REAL ESTATE COMPANY v. SEGEE ET AL.

McLEOD, J.

assessed by this Honorable Court in respect of the said trespasses so committed by them respectively, and also for costs of the action.

The defendant Segee in his Statement of Defence claims that he has acquired a title to the land in dispute by possession, and the defendant Mabel M. Ward claims a certain lot of the said sixty acres under a deed made to her by the defendant Segee the 15th day of October, 1909.

I will first state the plaintiffs' claim of title. In the year 1765 the Government of the Province of Nova Scotia of which Province New Brunswick then formed a part, granted a large block of land containing about 2,000 acres to James Simonds, Richard Simonds and James White, situated in what is now the City of Saint John, North End. This grant was registered in the Province of Nova Scotia on October 3rd, 1765.

The Province of New Brunswick was afterwards established and set apart from Nova Scotia, and on the 21st of February, 1785, this grant was registered in New Brunswick under an Act passed by the Legislature of that Province entitled "An Act respecting Nova Scotia grants."

I shall not follow all the agreements and conveyances from that time until the present, but a part of this grant of which the land claimed by the defendant forms a part was conveyed to and came into the possession of Charles Simonds about 1831, and Charles Simonds by his will which was admitted to Probate in the City of Saint John on the 18th of April, 1859, devised all the land so owned or possessed by him to his two sons, Henry G. Simonds and Richard Simonds.

On October 29th, 1859, Henry G. Simonds and Richard Simonds made a partition of the land so devised to them by their father, Charles Simonds, and by that partition the land claimed by the defendant was included in the portion assigned to Richard Simonds.

1911.

TURNBULL REAL ESTATE COMPANY v. SEGEE ET AL.

McLEOD, J.

Richard Simonds subsequently executed two mortgages on the land conveyed to him in the partition, one to Stephen Wiggins and Frederick A. Wiggins, dated the 14th of October, 1861, which was duly registered in the City and County of Saint John, and one to the executors and trustees of Thomas Gass, dated the 10th of November, 1864, which was also duly registered. These mortgages covered the land in dispute.

Richard Simonds died in 1866, and by his will devised the whole of his property to Thomas Gilbert. This will was admitted to Probate in the City of Saint John on December 12th, 1866. Thomas Gilbert immediately went into possession of all the property so devised to him, including the portion now claimed by the defendant.

On the 14th of May, 1880, the mortgage given to the executors and trustees of Thomas Gass was assigned by the surviving executor and trustee of Thomas Gass to Thomas Gilbert, which assignment was recorded in the records in and for the City and County of Saint John on May 14th, 1880.

On the 25th day of May, 1885, Thomas Gilbert and his wife conveyed the whole of the property devised to him by Richard Simonds by way of mortgage to the Bank of New Brunswick, which mortgage was duly registered; and on the 22nd day of November, 1886, he, by deed, absolutely conveyed the whole of the property so mortgaged to the Bank of New Brunswick, which deed was duly registered. The Bank of New Brunswick therefore at this time owned all the Richard Simonds property, subject, however, to the mortgage given by Richard Simonds to Stephen Wiggins and Frederick A. Wiggins in October, 1861.

On the 30th of April, 1887, the Bank of New Brunswick by deed conveyed the whole property to W. Wallace Turnbull subject to the Wiggins mortgage, which deed was duly registered. On the 5th of September, 1887, the executors of Frederick A. Wiggins, in whom the Wiggins

1911.

TURNBULL REAL ESTATE COMPANY v. SEGEE ET AL.

McLEOD, J.

mortgage had vested, assigned that mortgage to W. Wallace Turnbull and Mr. Turnbull then owned the whole property free from incumbrance. This assignment also confirmed all the leases that had been given by the different owners of the equity of redemption during the time the mortgage was held on the property.

Mr. Turnbull went into possession of the whole of the property on the 27th of September, 1887. Mr. Turnbull and his wife by deed conveyed the whole of the property to their son Ernest H. Turnbull, which deed was duly registered, and he went into possession and remained in possession until July, 1891, when on the 30th of July, 1891, he reconveyed it to Mr. W. W. Turnbull, which deed was duly registered.

Subsequently and early in 1892 the plaintiff company was incorporated for the purpose of taking over the property and on July 25th, 1892, Mr. Turnbull and his wife conveyed the whole of the property to the plaintiff company, which deed was duly registered, and the plaintiff company went into possession of the property and has remained in possession ever since.

It will thus be seen that the plaintiff company has a good documentary title by these various conveyances from the grantees from the Crown and their various successors in title, unless its title to these sixty acres or any portion of it has been disturbed by possession of the defendant.

On the argument it was contended by Mr. Fowler on behalf of the defence that the conditions in the grant had not been fulfilled by the grantee and therefore the grant or a portion of it, of which the land in dispute was a part, failed and became void for the following reasons:

He says the grant contains a covenant that the grantee should pay a certain quit rent of one shilling a year, and further that they were to improve or enclose one-third of the land in fifteen years, the second third in twenty years

1911.

TURNBULL REAL ESTATE COMPANY v. SEGEE ET AL.

McLEOD, J.

and the last third in thirty years, otherwise their title to the land would be forfeited; and he claims that the plaintiff should prove that all this was done.

There is no proof with reference to that whatever. The grantees and their successors in title have remained in possession during these nearly one hundred and fifty years and I certainly shall not at this time undertake to determine that that grant became void over a hundred years ago. The grant was made in 1765 and the thirty years would expire before the commencement of the last century. Under these circumstances I think it is too much to expect me to undertake for a moment to determine that the grant is void. I will dismiss this objection without further remarks.

The defendant's claim is one entirely of possession. He says that the possession commenced in 1872 by his father. In order to obtain possession of land of which another person has the title that possession must be open, notorious and apparent.

Doe dem Des Barre v. *White* (1) was cited by the defendants' counsel but I do not think that case under the evidence given supports his contentions. In that case it was said that the presumption is that the owner remains in possession of that which is not actually in possession of others until proof be given of acts of possession by the defendant. It is sufficient for the plaintiff as owner of the fee, to show the land continued in its natural state and uninclosed within twenty years before action.

In *Sherren* vs. *Pearson* (2) Ritchie C. J., at p. 585, says:—"To enable the defendant to recover he must show an actual possession, an occupation exclusive, continuous, open or visible and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose." And Taschereau J. (afterwards Chief Justice Taschereau) in the same case says:—"Owners of wilderness

(1) 1 Kerr, N. B. 595. (2) 14 S. C. R. 581.

or wooded lands lying along side of or in the rear of other cultivated fields are not bound to fence them or to hire men to protect them from spoliation. The spoiler, however, does not, by managing without discovery even for successive years to carry away valuable timber, necessarily acquire, in addition, title to the land. The law does not so reward spoliation."

I think I need not refer to further authorities.

It is undoubted law that a man going on land the title of which is in another person and the possession also in that person, cannot gain title unless his possession is open and exclusive, and when I say "exclusive" I mean it must be exclusive in itself, he cannot gain it if the owner of the land is in possession at the same time. With that statement I shall proceed first to see how the plaintiff company and its predecessors in title occupied this land.

So far back as in the time when Charles Simonds owned it, 1855, he leased a lot of this sixty acres to one Rogers, and Rogers or his successors in title have continued since that down to the present time to lease that lot and pay rent for it.

Thomas Gilbert while he was in possession leased one lot in 1871 to one John McDonald. He also gave a lease of a lot to a Mr. McCutcheon in 1873. He gave a lease of a lot to George Greer in 1878 and one to Martin Jeffries in 1880 and one to George Burke in 1884. Mr. Turnbull also leased it during his lifetime and the plaintiffs have leased lots of this very sixty acres.

It appears on the plan attached to the plaintiff's statement of claim that there are eleven lots leased within this sixty acres fronting on the road that surrounds it. In addition to that the balance of the land was leased, as far as I can say from the evidence, in the first instance in 1882 to a man named John Carvell. He was a man who kept cattle and sold milk. He leased that, together with other lots, for pasturage purposes. He was occupying

1911.

TURNBULL REAL ESTATE COMPANY v. SEGEE ET AL.

McLEOD, J.

it for pasturage purposes under this lease, when Mr. Turnbull came into possession of it in 1887 and he continued to occupy it and paid $25 a year rent for it until 1892. This is the same property the defendant claims by possession. It also appears by the evidence of one witness, a Mr. Jeffries, that during the time he (Carvell) had the lease he put a brush fence around it to protect his pasture.

On the 16th of May, 1892, Mr. Turnbull gave a lease to Robert E. Baxter. It is as follows:

"MR. ROBERT E. BAXTER,

"DEAR SIR:—

"I hereby offer to lease you for the purpose of pasturage only the land on Adelaide Road formerly under lease to Mr. John H. Carvell, term five years from the 1st of May instant, you to keep the property fenced to your own satisfaction, at your own cost and expense, I to be at liberty without any deduction in rent to lease for building purposes any of the land fronting on the Adelaide Road to a distance from the Road of say not exceeding 150 feet. The rent to be $25 a year, payable quarterly, the first payment to be made on the first day of August next, the sum of $6.25.

"Yours truly,

"W. W. TURNBULL."

"I accept the above offer.

"ROBERT E. BAXTER."

This lease expired in 1897. It was not immediately leased but in 1898 the plaintiff company leased it to Major H. Green for the term of fifteen years. There were other lots included in the lease and the rent was $60 a year.

Major H. Green has continued to occupy it for pasturage purposes.

Then back to the time Mr. Gilbert owned the property, at all events, these eleven lots fronting on the road surrounding those sixty acres were under lease to different parties all paying rent to the landlord, first to Gilbert, afterwards to Mr. Turnbull, then to Ernest H. Turnbull and then to the plaintiff company. The rest of the sixty acres was leased first to Mr. Carvell, which lease as I have said began in 1882 and continued to 1892, then a lease was made to Mr. Baxter for five years, which expired in 1897. From 1897 to 1898 it was not leased, but in 1898 it was leased to Mr. Green who still continues in possession. That is the statement of the plaintiff's title and the plaintiff's possession. The plaintiff's title from the Crown I hold to be good.

The question is, has the defendant now disturbed the plaintiff's title? He has no title in himself, his father had no title in himself and in my opinion neither the defendant nor his father ever got a title by possession. The defendant Segee does not claim that his father ever had any legal title to the land but he says that his father went into possession of the land in 1872 and continued in possession until 1891 and that he, the defendant Segee, continued that possession down until the present time. He states that his father asked Mr. Gilbert for a lease and Mr. Gilbert told him he couldn't give it to him. Mr. Gilbert denies that and says he never asked him for a lease of it. That is a question of evidence upon which I must pass. I take the statement of Mr. Gilbert to be correct and find that he never asked for a lease of the land.

The defendant says that his father went on the land about 1872 and staked around the sixty acres, knowing he had no title to the land but thinking if no one came along to claim it he would get the title by possession. As to staking the lot around the evidence is not

1911.

TURNBULL REAL ESTATE COMPANY v. SEGEE ET AL.

McLEOD, J.

clear. There is some evidence that it was staked around and some that it was not. My opinion after having heard all the evidence is that the sixty acres was not staked around. I cannot find that his father did take any actual open possession of the land and certainly not of the sixty acres. There is no pretence that any of the tenants ever paid him anything or that he ever asked them for anything. There is no pretence that he ever interfered with them and he does not appear to have done anything on the land, except it was said he was quarrying stone, but I think the evidence does not support that. It does not appear that he quarried stone or sold stone to anyone. I do not know what his occupation was but he made an ointment and from the evidence I think he was digging among the crevices of the rock for material for making this ointment. He, as well as the defendant Segee, appears to have been searching for magnesia.

It is said he planted a patch of potatoes there but he never gathered them; they were overrun and destroyed by cattle. The whole sixty acres does not appear to have been enclosed at all and in former times anyone went on it and cut wood on it and cattle owned by anyone went on it. His father never appears to have looked after the patch of potatoes, he did not enclose it and it was, as I have said, destroyed by cattle. If a man thought he was in possession of the land and professed to be in sole possession, he would protect the crops he put upon it in some way.

The defendant Segee's father died in 1891 and he claims that he continued his father's possession. After having heard the evidence given and having since carefully examined it I find as a matter of fact that the defendant's father did not have open and exclusive possession of the sixty acres or any part of it, he simply went on the land from time to time for the purposes I have said. I may say that the defendant's father left him surviving

five children but none of them except the defendant seem to have made any claim to the land. One witness I think says George Segee, a brother of the defendant, did some quarrying there. The defendant himself says and the principal evidence he gives of occupation at all is that he was quarrying stone there.

I have examined his evidence with great care and have come to the conclusion he was not quarrying stone there. He appears to have sold no stone except in 1909 he says he sold one or two loads for $2.75, but although he says he sold stone prior to 1909 he cannot give the name of a single man to whom he sold. Instead of quarrying in the cliffs where the stone was, he dug down into the ground to get out material for some purpose—the general idea was, I gather from the evidence, that he was digging for treasure, or sometimes digging for magnesia. He himself says a part of his object was to find magnesia. I find he was not quarrying for stone.

It is true he says some stone was hauled from there. My opinion however, from the evidence, is that the quantity of stone he claims was hauled from there was really hauled from a limekiln that was then not used and was just outside the sixty acres. The defendant did not work or farm any of the land himself.

The plaintiff company and its predecessors were all the time using this land for the purpose, and the only purpose for which it was fit to be used, that is a part of this land was fit for pasturage and they had it under pasturage and rented for that and received the rent for it. What lots there were along the road, so far as they could, they leased and received the rents. The defendant does not pretend that he ever collected rent or that the tenants paid him in any way.

So far as I can gather I think the first time the defendant practically made a claim to the property was in 1909, on September 18th, when Mr. Currey, a barrister of this

1911.

TURNBULL REAL ESTATE COMPANY v. SEGEE ET AL.

McLEOD, J.

City, wrote the tenants a letter of which the following is a copy: (I read the one written to Thomas Gillen, one of the tenants). He says:

"DEAR SIR:—

"Mr. John A. Segee complains you have been trespassing on his property situated on Millidgeville Road and has retained me to claim damages for trespass thereon. Unless you call and make satisfactory settlement for his claim my instructions are to issue a writ for trespass in the Supreme Court."

The same letter was sent to all those tenants who had leases. Some of them had been holding under leases for years and years and paying rent to the plaintiff company or its predecessors in title. No attention was paid to the letters and nothing further was done at that time.

In 1909 he built successively four different shanties on this lot. Those shanties were successively torn down by the plaintiff company and he appears to have taken no action about it.

He never lived on the property except that he says he has been living on it for the past six months. If that be true he must be simply living in a shanty, because in his own evidence he says that he commenced to build it on October 8th and finished on October 22nd. I find no cause for his pretension that he had possession of the land that he pretends to have sold to Mabel Ward, except that he gave her a deed of it.

Without going over the evidence in detail I come to the conclusion and find that the defendant had no exclusive possession of the property, in fact he had no possession at all; all that he did was to go there from time to time digging down in the ground for the purpose of finding some treasure or other, as he himself said time and time again, or for the purpose of finding magnesia; but he did not in any way interfere with the possession of the plaintiff company in its lot.

He says he sometimes drove off the cattle that were there, but the owners continued to use the pasture. I believe the last year or two he made trouble and disturbed Mr. Green's cattle pasturing there.

Under these circumstances I find as a matter of fact:

First, That the plaintiff company had the title to the property and the company and its predecessors in title have had a continuous possession until the present time.

Second, I find that the defendant did not have any open and exclusive possession so as to exclude the plaintiff company.

A judgment must therefore be ordered for the plaintiff.

As to the defendant Mabel M. Ward who only received her title from the defendant Segee in October, 1909, and he had no ownership of the land and could not give any title to it as he did not own it, the deed conveyed nothing to her but it is a blot on the plaintiff company's title and must be set aside.

The decree will be that the plaintiffs are owners in fee simple of the tract of land mentioned and described in the fifteenth paragraph of the plaintiff's Statement of Claim and there will be an injunction restraining the defendants Segee and Mabel M. Ward, as asked for in the Statement of Claim, and further that the defendants give the plaintiff possession of the lands and premises. The deed to Mabel M. Ward will be declared void and set aside.

As for the damages, I cannot give all the damages claimed by the plaintiff. I cannot give damages for the legal expenses. The damages will be for the cost of filling in the excavations and for taking down the four buildings—everything outside of the legal expenses.

The defendant Segee will pay the damages and the decree will be with costs against the defendants.

1911.
November 21.

DONALD v. McMANUS, ET AL.

Agreement—Collateral Declarations—Specific Performance—Accounting.

On September 7th, 1907, a written agreement was entered into between the plaintiff D. D. and the defendants C. McM. and L. McM., for the sale of certain lands, the title to which was vested in the defendants, for the sum of two hundred dollars ($200).

At the same time there was a verbal understanding between the parties to the agreement and S. D., the mother of the plaintiff, that the agreement was only to be used to raise money to pay the creditors of the plaintiff and S. D., and was not to be used for any purpose until the assent of R. C. D., the father of the plaintiff, had been obtained.

The agreement was never used for the purpose of paying the creditors and the assent of R. C. D. to it was never obtained.

Held, that the agreement was valid, although the assent of the plaintiff's father was never obtained, and that the verbal agreement not to use was only a collateral agreement, and did not affect the validity of the agreement itself.

Held also, that the defendants are liable to account to the plaintiff for the moneys received by them on the sale of the property, subject to the trust that such moneys be held for the benefit of the creditors of the plaintiff and his mother.

Billed filed for an accounting, and for the payment of money due under an agreement. The facts are fully stated in the judgment of the Court.

W. B. Chandler, K. C., for the plaintiff.

M. G. Teed, K. C., and *E. A. Reilly*, for the defendants.

Argument was heard August 25, 1911.

1911. November 21. BARKER C. J.:

The plaintiff and the defendant Lucy McManus, who is the wife of the other defendant, are children of one Robert C. Donald who for some years carried on the business of a contractor. In 1896 he made an assignment

1911.

DONALD v. MCMANUS ET AL.

BARKER, C. J.

for the benefit of his creditors and since that time he has not had any property in his own name nor has he carried on any business openly on his own account. His wife, Susanna Donald seems to have acquired his property, or at all events that portion of it at Sunny Brae, in the Parish of Moncton, and in the latter part of 1903 or early in 1904—the precise time is immaterial—she made a conveyance of this property to her son-in-law, the defendant, Cecil McManus. On a portion of it the defendants have built a house now in their occupation. On another portion Robert C. Donald has erected a house which is occupied by him and his family. The remainder of the property out of which arose this litigation was, on the 22nd March, 1905, leased by the defendant Cecil McManus to one William T. Campbell for five years from April 1, 1905, at an annual rental of $180. This lease contained a provision by which the tenant had the right at any time during the continuation of the term to purchase the property for $3,000. In May, 1908, The Builders Woodworking Co., Limited, which had acquired Campbell's interest in the lease and were then operating the factory on the premises, gave notice of their intention to purchase; and on the 22nd June, 1908, the defendants executed a conveyance of the property to that Company in completion of their purchase. The price of $3,000 was paid by the Company's assuming two mortgages then on the property—one to W. W. Wells for $1,062.01 and one to Reilly for $350—a debt due the Company by Robert Donald of some $500 and a balance of $1,018.13 paid by $500 in cash, and two promissory notes. Though the purchase was made in June the money was not paid until the following September. The $1,018.13 was then paid to the defendant Lucy McManus. She paid it over to her father without consulting the plaintiff, and he, without consulting the plaintiff, utilized about half of the amount in building his house on the land occupied by him, and of

1911.

DONALD v. MCMANUS ET AL.

BARKER, C. J.

the remainder a part went to his creditors, though the evidence does not give any particulars as to the expenditure.

In the year 1900 the plaintiff and his father built a mill on this property and continued to carry on a wood-working factory for some three years, sometimes as the Donald Company, but later on in the plaintiff's name. The business resulted in a loss, and when it stopped in December, 1903, the indebtedness amounted to about $6,000. For about $2,000 of this, Susanna Donald was liable and for a large part, if not for the whole balance, the plaintiff was liable, and he says, and he is not contradicted, a portion of this indebtedness was made up of Robert Donald's old indebtedness and which the plaintiff had to assume. In this condition of matters the plaintiff went away to Boston where he has been living ever since, and Mrs. Donald, in whose name the title to the property was, conveyed it to her son-in-law, and the creditors have apparently received but little. In September, 1907, the plaintiff came to Hampton where he met the defendants and his mother by appointment. While there, the defendants at his request executed under their hands and seals the following agreement:—

AGREEMENT.

"Agreement of Cecil W. McManus and Lucy M. McManus of Amherst, Nova Scotia, to Andrew D. Donald of Boston, Mass. For the sum of two hundred dollars ($200), value received, we promise to convey to said Andrew D. Donald or assignee by a good deed and title, all property of any nature mentioned in an agreement between Cecil W. McManus of one part and William T. Campbell of the other part, said agreement being dated March 22, 1905, subject to a mortgage given to W. W. Wells by one R. C. Donald for the sum of one thousand sixty-two dollars and one cent ($1,062.01).

"This is also subject to agreement, bill of sale (or any other designature as may be applied to said paper) in the

sum of three hundred and fifty dollars ($350) to Albert E. Reilly, and is also subject to agreement of lease and option to William T. Campbell, until deed is given—we promising to pay to said Andrew D. Donald, all moneys received in any way from said property.

"CECIL W. MCMANUS, (L. S.)
"LUCY MCD. MCMANUS, (L. S)

"All erasures and substitutions
made before signatures.
"SUSANNA DONALD.

"Signed, sealed and delivered
in presence of,
"FRED W. FREEZE.

"September 7, A. D. 1907.

This action is brought for an account of the moneys received from the sale of the property and for payment of the amount due under the agreement. At the hearing all parties interested, the plaintiff and defendants and Robert Donald and his wife, all seemed not only willing but anxious that the money should be paid over to the creditors. Notwithstanding this, my efforts to give practical effect to their apparent wishes by an amicable arrangement were thwarted I regret to say, by some family quarrel which has grown out of this business, the importance of which seems to me to have been much exaggerated.

The defence set up is contained in Section 10 of the statement. It is this:—That when the agreement was made it was agreed and understood by and between the plaintiff and defendants and Susanna Donald, that it was made subject to the terms and conditions that it should be null and void and of no force or effect and should not operate as an agreement unless and until Robert C. Donald consented to, approved and ratified it, and in the absence

1911.

DONALD v. MCMANUS ET AL.

BARKER, C. J.

of such approval the agreement should be of no force or effect. An alternative claim was added at the hearing to the effect that the agreement was made and given to and obtained by the plaintiff for the purpose of enabling him thereby or on the security thereof to obtain moneys to compromise and discharge certain debts due by the plaintiff and Susanna Donald and for no other purpose and that the plaintiff should compromise and discharge the debts on or before the 1st day of January then next. It was owned that the father's consent never was given, that no money was raised for the payment of debts and the agreement was not used for that purpose.

I have carefully read over the evidence since the hearing and compared the statements of the different witnesses. In one particular the plaintiff's evidence is in conflict with that of the other witnesses but with that exception there are no more differences in the accounts given by the different witnesses than we might look for in a family discussion carried on at intervals during a week on a subject upon which all the parties who took part in it, now substantially agree. For there is no doubt that the defendants and Mrs. Donald had no objections to the agreement. Mrs. Donald says that she made an objection that it might make trouble between the defendants and the plaintiff. None of the other witnesses mention this. I have come to the conclusion that the evidence does not sustain the defence set up that there was any undertaking going to the validity of the agreement. Whatever promises or declarations or assurances the plaintiff may have given as to obtaining his father's consent to his using the agreement as he proposed they were collateral altogether to the agreement itself. The agreement is under seal, it was delivered absolutely and neither contained any condition nor was it subject to any upon which its validity depended which prevented it becoming operative on its execution.

1911.

DONALD v. MCMANUS ET AL.

BARKER, C. J.

The defendant Mrs. McManus seems to have been in charge of the property and the active member of the family in its management. In her evidence she states that they were all together at Hampton for a week and that the question of this agreement came up about the third day after her arrival. The matter was of course introduced by the plaintiff and when asked as to what took place Mrs. McManus said: "Well, he said he wished to come back home and wished to have his debts paid and he had a friend who offered to loan him means to relieve his mother's indebtedness and his own and he wished, he said, to get this money from his friend whom he would give his personal note for it and he asked this only not to use it unless his father consented and only to show to his friend whom he was getting this from." It is altogether improbable that this statement is correct just as it is given. To read it as an answer to the question one would think that this was the plaintiff's introduction of the subject and that the suggestion as to his father's consent, and all of that came from him as a part of his original proposal, when it is clear from the evidence that it did not. The passage I have quoted simply contains a summarized account by the witness of the results of conversations and discussions on the subject as she remembered them. She then went on to speak of the indebtedness of her mother and brother and her examination continued.

"Q. Well how did this question of your father's consent the agreement not to be used as you termed it without your father's consent, how did that come up? A. Both my husband and I, we didn't agree to sign it without his consent.

"Q. Was that discussed between you more than once? A. Yes on three or four occasions.

"Q. And what do you say he promised? A. That he wouldn't use it or even show it to any person until he

1911.

DONALD v. MCMANUS ET AL.

BARKER, C. J.

had his father's consent, as he was more reluctant about it."

On her cross-examination she was asked this question.

"Q. What objection had you to signing? A. I wished my father to be consulted about it before—I asked it to be left for his consideration before it was signed.

"Q. That he might see the agreement? A. Yes I wished him to see it.

"Q. Your father was then in Charlottetown? A. Yes.

"Q. And what did your brother say about that? A. He said we could trust him and if we would sign it, and trust him he would make this promise, that it would never be shown to any one or go out of his hands or be used in any way without his father's consent.

"Q. Is that all he said about it? A. That is all I remember.

"Q. Was anything said about obtaining your father's consent? A. Certainly, I told him I would write as soon as I got home, I would write and explain it to him."

At another part of her examination she was asked:—

"Q. You say you sent a copy of the agreement to your father? Did you take a copy or did your brother give you a copy to send to your father, or was there a duplicate agreement? A. He gave it to me.

"Q. Was that the copy you sent your father? A. Yes.

"Q. Was it given you for that purpose—was it spoken of that you were going to send it to your father? A. I can't remember but I think it must have been.

"Q. (By the Court) Do I understand as far as you recollect he gave you the copy for you to send your father, to show what the agreement was, in order to get his consent? A. Yes.

"Q. In that view you got it—for that purpose? A. Yes.

"Q. So you were to communicate with your father not he? A. Yes."

In accordance with this understanding Mrs. McManus did write her father a letter—it is dated at Amherst, September 16, 1907, and that portion of it relating to this agreement is as follows:—

"Duncan seems in a great hurry to get a settlement with his creditors. That Mr. Jacques he speaks of told him he would advance him money enough to fix them up on a note from him (Duncan). He didn't ask any security but Duncan brought a paper for us to sign. I am sending you the copy of it. He said it wouldn't go out of his hands, that he merely wanted to show it to Mr. Jacques, that he would take his note and after all the creditors were settled with, he could have it and perhaps get a working interest with the Frenchmen for himself." 'This refers to Messrs. Bourque & Le Blanc who were the Woodworker Company.) "Ma was sure you would consent to it, but I told Duncan I thought you should have it all explained to you, so Duncan said he would not show Jacques the paper or use it in any way until you approved of it. I intended to send it a week ago but time slipped by so." There is nothing in this letter to sustain the contention that this agreement was not to become operative until it was consented to by Mr. Donald. On the contrary the absence of any such stipulation in the instrument itself and the circumstances under which it was executed point to an entirely different conclusion. If there had been any such agreement or any intention on the defendants' part to make one, Mrs. McManus was sufficiently intelligent to have understood it and sufficiently sensible to have made that fact clear to her father in the letter of explanation she wrote him. So far from this being the case, Cecil McManus, in whom the title to the property then stood, and his wife, who seems to have occupied some kind of a fiduciary position

1911.

DONALD v. McMANUS ET AL.

BARKER, C. J.

in reference to the property, not definitely disclosed by the evidence, both favored the plaintiff's proposal and were both willing to accede to it. Mrs. Donald, who was one of the two debtors to be substantially benefited by the proposed arrangement, was not only willing that it should be entered into, but expressed herself as sure that her husband would be equally so. Under these circumstances it seemed a most natural thing for the defandants to enter into this agreement. They only ran the risk of incurring Mr. Donald's censure, and in that event, remote as it seemed to be, they had the plaintiff's assurance that he would not use the agreement to fall back upon. To this letter, so far as the evidence goes, there does not seem to have been any reply. There does not seem to have been any communication with the plaintiff on the subject—I refer to Mr. Donald's consent—until September, 1908, a year later, when the plaintiff was in St. John. His father at that time wanted the agreement given up. I think it likely that he did know before that of his father's objections to him having the control, though there is no positive evidence on the subject. Mrs. Donald in her evidence varies the statement somewhat. She was asked what the plaintiff said and how the question of the agreement first came up.

"A. I can't remember the exact words.

"Q. In a general way as near as you can tell. A. The impression was if he had that signed he could get money to pay his debts.

"Q. That would be the compromise? A. Yes, and the idea was it would be done right then, before Christmas.

"Q. Is that what he stated? A. That is what he stated to us.

"Q. That is the purpose for which he wanted it? A. That is the purpose for which he asked it."

On her cross-examination she was asked.

"Q. Your husband was anxious to get this paper back from your son, wasn't he? A. Yes.

"Q. For what reason? A. For the reason he didn't think he had any right to it when he didn't fulfil his part of the agreement. He was doing what he promised not to do.

"Q. And what was the objection he made, because he didn't carry out the proposed arrangement with the creditors? A. Yes."

It seems inconsistent for the defendants to put forward that there never was any agreement by reason of Mr. Donald's refusal to sanction it, and at the same time have Mr. Donald demanding the surrender of it because the plaintiff had not performed it. The plaintiff does not deny that he was anxious to raise money to enable him to make some arrangement with his creditors. In his account as to what took place at Hampton he says:—"I told them I wanted to raise money to either settle with my creditors, go into busniess and settle later or I might settle right away as soon as I could raise money with the agreement." He says the only objection raised to his getting it came from his mother who thought that it might make trouble for Cecil and his wife owing to the agreement in the Campbell lease.

Section 10 of the statement of defence as amended at the hearing alleges "that the defendants further say that the said agreement was made and given to and obtained by the plaintiff for the purpose of enabling the plaintiff thereby or on the security thereof, to obtain moneys wherewith to compromise and discharge certain debts and claims then due and owing by the plaintiff and Susanna Donald, the mother of the plaintiff and for no other purpose, and that the plaintiff should compromise and discharge the said debts and claims on or before the first day of January next following the date thereof. And the defendants say that the plaintiff did not use the said agreement for such purpose

1911.

DONALD v. MCMANUS ET AL.

BARKER, C. J.

and did not raise or obtain the moneys and did not compromise, pay or satisfy the said debts and claims or any part thereof." If you eliminate from this statement that part of it which alleges that the compromise was to be arranged before the first of January, which there is no evidence to sustain, it contains what I think the evidence shows to have been the object of the agreement. And now that it is the plaintiff's object to utilize the money derived from the sale and which the defendants undertook to account for and pay over to him for that purpose, what valid reason can be given why they should not be compelled to do so.

Some letters were put in evidence which throw some light on the nature of the transaction by showing how it was dealt with by the parties interested. The payment of the purchase money by the Woodworkers Company though due in June, 1908, was not actually paid until the following September. On the 26th March, 1908, Mrs. McManus wrote a long letter to the plaintiff referring principally to family matters, but ending with the following passage:—

"Well Duncan it is about mail time—I'm sorry that the business has turned out as it has for it will no doubt be a disappointment to you, but there seems no help for it."

On the 26th May, 1908, Mrs. McManus wrote the plaintiff another letter in which she says:—

"I went over there "(Mr. Reilly's office)" and he told me they had given him notice that they were going to buy in thirty days so that will close it and since *poor wretched dollars and cents* seem to have made such a break between brother and sisters I can't help but thank God that it will be settled" "Ma will take a run to see you as soon as the business is fixed—it will be the safest way to send the money—"

This refers to the identical money which the plaintiff claims in this action. His right to it was not disputed by her and her mother was going to Boston apparently for the purpose of carrying the money to him.

On the 24th July, 1908, Mrs. McManus wrote another letter to the plaintiff in which she says:—

"Dear Duncan:—This is Friday noon. We hope to make arrangements to settle the business this evening and Ma would start to-morrow but Papa's wishes have to be considered and I wish, Duncan, you would write to him and tell him just exactly what you intend to do—for my part I can't get the thing off our hands soon enough and would wish you to have every cent of it now—but you know, Duncan, we can't have father long, and *must* respect his wishes for he has certainly had a hard time and worked for us when we were not able to work for ourselves and I'm *very sure* that in years to come we will never be sorry for the little pleasure we can give him by doing in some little measure what he wants us to. If you would just have such a paper made out as Papa wants, agreeing to take what's over and above all expenses and I suppose Murray's, Ma seemed to think he would be willing to sign off for $300. As soon as you do that Papa will let Ma take the money to you. Now, Duncan, the more quiet and peaceably this business can be settled so as to please Papa will be the best, and I can't help but feel that it is the only way we could expect to have any luck with it. This is the wish of your sister Lucy."

In this letter as in the other the plaintiff's right to the money is not questioned, there is not a word as to the invalidity of the agreement or anything now set up as a defence to this action. On the contrary an appeal is made to the plaintiff on his regard for his father, with a view of creating sympathy for him. On the 24th July, 1908, Mrs. Donald wrote a letter to the plaintiff from which I make

1911.

DONALD v. McMANUS ET AL.

BARKER, C. J.

the following extract. After a reference to the delay in completing the sale and the trouble and anxiety caused to Mrs. McManus in consequence of it, she says:—

"I know Lucy and Cecil are more anxious to have the whole thing off their hands, than you are to get it, and she wants to know what you expect them to tell you by return mail, concerning the paper of last September as they do not understand just what you wish them to do, so you must know there is no way of forcing the Frenchmen to do things faster; and, Duncan, I don't think it is reasonable or nice to treat Lucy the way you are doing after all the trouble she had over the business, sending them typewritten letters and threatening to put the business in other hands and all that as if they were holding it against your wishes. You know they could put it off their hands in a hurry by deeding it to you subject to the law, and put the deed on record in Dorchester and you can see how quick it would all disappear, but they know your wishes and so the one thing for them to do is to submit to your hard feelings towards them and everything else till the Frenchmen can come to time. She says she will let you know the moment they buy as she would rather not touch the money at all, and I think when they buy you had better come home and arrange the thing as quietly and peaceably as you can for it would have been better for us all if the whole thing had gone up in smoke long ago than have such wrangling and hard feelings over a few dollars. You had better write them and tell them what it is you expect to have from them in reference to September, 1907, and if they had better put a deed on record here, or wait for the Frenchmen to buy."

Nearly a year had passed since the making of this agreement when this letter was written. Mr. Donald's attitude towards it, whatever it was, must have been known then and Mrs. Donald had herself a personal know-

ledge of all the circumstances connected with the making of the agreement and she had, as a debtor for some $2,000, a special interest in seeing that what she now says was the object of giving it, should be accomplished. And yet there is not a word in this letter implying a doubt as to the plaintiff's right to the property under the agreement, that is recognized throughout. Neither is there even a suggestion that the agreement had been obtained on conditions which had not been fulfilled, or that it had been used by the plaintiff in violation of his agreement or that he had failed in making good promises made when he got it.

If in fact the defendants' contentions were correct that this agreement was executed subject to a condition that it should not operate as an agreement until it had been consented to by Mr. Donald, it would perhaps be an irrelevant inquiry as to his reasons for withholding it. The relations between the parties have, however, some bearing upon the disposal which should be made of the case. It is not very easy from the evidence to say exactly what Mr. Donald's reasons were. At one time his wife says that he complained that the plaintiff had not fulfilled his promise to compromise the debts before Christmas. At another he complained that it was unfair to the creditors here that the plaintiff should have this property to enable him to go into business in Boston. That is, as I understood it, that this property was intended for the creditors, that it equitably and honestly belonged to them and that this agreement would place it in the power of the plaintiff to defraud the creditors, put the money in his pocket, and live unmolested in Boston. At another time Mr. Donald put forward as a reason for withholding his consent to the agreement that he would not trust the plaintiff, but for what reason does not appear. On other occasions he seems to have objected to the plaintiff having the money because of his determination not to treat Murray as generously as he thought he should. The truth is, that for reasons

1911.

DONALD P. McMANUS ET AL.

BARKER, C. J.

which do not seem to have appealed with the same force to the other members of the family so far as one may judge from the correspondence in evidence, Mr. Donald had become angry with the plaintiff and refused to speak to him or have anything to do with him. This seems to have arisen out of the Murray transaction which is simply this, as told by Donald himself. When he and the plaintiff were starting the milling business, Murray lent them $600 and they gave him a bill of sale by way of security with the understanding that Murray should not put it on record to hurt the credit of the business unless they—that is, the plaintiff and his father—notified him there was going to be trouble. The plaintiff, it seems afterwards, gave a bill of sale of the same property to some one else who filed it in the Registry Office, and in that way got priority over Murray. Mr. Donald seems to have thought this a very dishonorable thing in his son. So it was. Mr. Donald seems also to have thought that by reason of it Murray was entitled on any compromise with the creditors, to special consideration. Before deciding that point it would be well to consider with what justice the other creditors might complain of Mr. Donald himself where they had been induced to give him credit on the belief that his business property was unincumbered when in fact it was subject to a secret mortgage unregistered at his request so that his business credit should not be impaired. When asked what he said to the plaintiff about this Murray transaction, he answered:—"I said about as hard things as I could. I don't remember just what I said. I didn't think any man should be treated in that way, that he should be protected when he put confidence in us." On his cross-examination Mr. Donald was asked this question as to the letter Mrs. McManus wrote him in September, 1907, already copied.

"Q. And will you undertake to swear you wrote your son? A. No I don't remember as I wrote for some time.

"Q. Anything at all about the agreement? A. I wrote sometime after.

"Q. But when you got this letter from your daughter? A. I think I didn't write to anyone I was so annoyed.

"Q. Then you didn't write to anyone. A. I thought it better not to express myself on paper."

There is one point upon which I think the evidence is against the plaintiff though in my view it is of very little importance. It is put forward that the plaintiff promised or agreed that he would not use the agreement in any way without his father's consent, and it is said that seeking to enforce this agreement is using it. So it is in a way, but not in the way indicated by the evidence. The plaintiff himself says he made no such promise, and the absence of all allusion to any such thing in the correspondence, gives support to his evidence. There is, however, the evidence of Mrs. McManus, Cecil McManus and Mrs. Donald to the contrary and their statements cannot be ignored. The most that can be said of them is that whatever was said had reference to the proposal made by the plaintiff. He sought this agreement and told them precisely why he wanted it and how he proposed to use it. I accept his statement in that respect, for the reasons given by some of the witnesses that he only wanted it to show his friend in Boston who would give him the money on his own note without security, seem altogether without point. The plaintiff's promise had to do simply, if he made any, with the use of the paper in any of the ways proposed by him. He would not hypothecate it, or use it so as to raise money on it. Assuming that he made this promise and that he did raise money on the security as he apparently did, it was only a collateral agreement, and who has been injured by what he did? No one, so far as I can discover. He has the agreement now unencumbered and asks for its performance. It seems an unusual defence to set up. "We admit that we gave you this agreement, but you said

1911.

DONALD v. MCMANUS ET AL.

BARKER, C. J.

you wouldn't show it to anyone without Mr. Donald's consent and you did." In the correspondence that is in evidence, in all the discussions which have taken place, and in all the hard things that Mr. Donald felt justified in saying about his son, I can find no mention of any such answer to the plaintiff's claims. It is evident that little or no weight was ever attached to this statement by anyone, and the plaintiff's right to the money has been recognized by these defendants and Mr. Donald without question. The agreement was given at the instance of the plaintiff to enable him to raise money to compromise with the creditors of himself and his mother. That being so I think he is entitled to recover the proceeds of the sale whatever the amount may be, but he must hold the money in trust for these creditors, so that the object of giving it to him may not be defeated. One word as to the position in which these defendants stand. On her cross-examination Mrs. McManus was questioned as to the interest of her father in this property.

"Q. (By the Court) Do you say he had an interest in the property although the title had gone out of him years before? A Yes.

"Q. An interest how? Do you and your husband hold it for him? A. Yes.

"Q. You were simply holding it for him? A. Yes.

"Q. Had you any written agreement with your father? A. No.

"Q. Do you claim you were simply protecting this property against your father's creditors? A. Well I was, yes.

"Q. Then in plain language what you say you were doing is assisting your father to deprive his creditors of his property? A. Not at all.

"Q. Were you holding it for the benefit of your father's creditors? A. Yes."

Later on in her cross-examination she was asked this question in reference to one of the letters I have mentioned.

"Q. If you did write that 'and would wish you to have every cent of it now,' it meant you wanted your brother to have every cent of the proceeds of that property, didn't it? A. I wanted it to go for his debts."

Mrs. McManus seems to have been in the embarassing position of the man who tried to serve two masters. She says that when she took this property over in 1904 there was no special agreement as to the terms upon which she, or rather her husband, should hold it. There is no pretence that it was a purchase and in her evidence which I have given, whatever may be her inclination as to her father or whatever she may regard as her duty to him, she says that she was not holding the property to assist her father in depriving his creditors of it, but that she was holding it for their benefit and, as she stated in her letter to the plaintiff, she wanted this money now in dispute to go for his debts. The plaintiff has stated that his reason for asking for the agreement was to enable him to secure an arrangement with their creditors. On his cross-examination he was asked this question:—

"Q. You got this paper and you claimed and still claim, the right to take the value of this property or the proceeds of it and use it wherever you like in the States or elsewhere? Is that what you are seeking for the money now, to use in your business in the States? A. I am seeking for it to use it for my creditors, my just bills.

"Q. Here? A. Yes, I haven't got any anywhere else."

There must be a declaration that the defendants are liable to account to the plaintiff for the moneys received by them on the sale of the property, and that such moneys shall be held in trust for the creditors of the plaintiff and Mrs. Donald. There will be a reference to a Master to report what that amount is and also the names of the creditors and the amounts of their respective claims.

All other questions reserved until after his report.

1911.
December 19.

THE BISHOP OF FREDERICTON vs. THE UNION ASSURANCE COMPANY, ET AL.

Special Case—Construction of Insurance Policies—Different Classes in Policies.

On July 3rd., 1911, Christ Church Cathedral, Fredericton, was partially destroyed by fire, and a chime of bells in the tower was wholly destroyed.

The building was insured for $55,000 in ten different companies, and the schedule of insurance in all of the policies was the same, being as follows:—

		Amount	Rate	Premium
(1)	On the stone building. Roof covered with tin shingles including the tower, spire and chancel thereof, as well as choir room and and vault, and all monuments and memorial tablets in said building, situate on the south side of Church Street in the City of Fredericton, occupied as a place of public worship, and known as Christ Church Cathedral.....	$42,000	.80	$336.00
(2)	On pipe organ and appurtenances belonging thereto including choir music, communion table, pulpit, font, lectern, desks, pews and seating chairs, carpets, stoves, furnaces and their attachments, steam heating apparatus, including piping, clocks, printed books, plate and plated ware, vestments and all church furnishings, furniture and fixtures, fuel, lighting equipment including acetylene plant and all piping used in connection therewith while contained in said building.....	10,000	1.00	100.00
(3)	On stained glass and all other windows in said building.....	3,000	1.00	30.00
		$55,000		$466.00

Held, all parties agreeing that the bells were intended to be insured under the policies, that the "chime of bells" fell within class (2) under the description "all church furnishings, furniture and fixtures."

1911.

THE BISHOP OF FREDERICTON v. THE UNION ASSURANCE COMPANY ET AL.

BARKER C. J.

This is a special case stated for the opinion of the Court, the facts and questions are fully stated in the judgment.

Argument was heard September 12, 1911.

A. J. Gregory, K. C., for the plaintiff.

M. G. Teed, K. C., for the defendant.

1911. December 19. BARKER C. J.:

This matter comes before me by way of a special case on the following facts. On July 3 last, Christ Church Cathedral at Fredericton was struck by lightning and in the fire which resulted the building and contents were considerably injured. There was insurance on the property amounting in all to $55,000, divided among the Norwich Union which carried $10,000, and nine other companies carrying $5,000 each. The risk was distributed on the several parts of the property as follows:—

1. "On the stone building, roof covered with tin shingles, "including the tower, spire and chancel thereof, as well as "choir room and vault, and all monuments and memorial "tablets in said building, situate on the south side of Church "Street in the City of Fredericton, occupied as a place of public "worship, and known as Christ Church Cathedral, $42,000.

2. "On pipe organ and appurtenances belonging thereto, "including choir music, communion table, pulpit, font, "lectern, desks, pews and seating chairs, carpets, stoves, "furnaces and their attachments, steam heating apparatus, "including piping, clocks, printed books, plate and plated "ware, vestments and all church furnishings, furniture and "fixtures, fuel, lighting equipment, including acetylene plant "and all piping used in connection therewith while contained "in said building, $10,000.

3. "On stained glass and all other windows in said "building, $3,000."

1911.

THE BISHOP OF FREDERICTON v. THE UNION ASSURANCE COMPANY ET AL.

BARKER, C. J.

The rate of premium charged on the property mentioned in class (1) was 80% and on the property mentioned in the other two classes $1.00, making the total premium $466. In the Cathedral tower was a chime of eight bells weighing in all some 10,000 pounds, the largest of which weighed some 2,000 pounds. They were securely fastened by bolts to a frame work erected in the tower for that purpose, the upper and floor beams of which were let into the stone walls of the building. These bells were totally destroyed by the fire. The insurance companies, all of which except one, are parties hereto as defendants, have paid in all the sum of $50,710, that is $37,710 for the loss under class (1) and the full amounts insured on the other two. In this sum nothing is included for the loss on the bells. The plaintiff's contention is that these bells, annexed as they were to the tower, constituted a part of the Cathedral building within the meaning of that term in class (1) and that their loss is chargeable to that fund, in which case there is a balance available to meet it. On the other hand the companies contend that the bells, not distinctly mentioned in either class, are included in the second class under the term "all church furnishings, furniture and fixtures," in which case the fund is already exhausted. For it is conceded by all parties that the bells were not only intended to be included but are in fact included in the property described in the policies, a fact which seems to me a fair inference from the unusually particular manner in which the property to be included in each class is described, all of which when pieced together, represented "Christ Church Cathedral on the south side of Church Street in Fredericton," and its contents. The question submitted for the Court's decision is whether or not the bells are included in the property described in class (1).

The only argument addressed to me on the part of the plaintiff was that these bells had been so annexed to the tower that they had become, and in fact were a part of the structure itself; and although bells were not *Eo nomine*

mentioned in the enumeration of subjects in class (1) they were included in the general term "stone building known as the Cathedral Church Fredericton," or in the term "tower" and in that way appropriately and sufficiently described for identification as a part of the property insured in that class. In support of this view *Hobson* v. *Gorringe* (1) and other cases having reference to the question of fixtures, were cited by Mr. Gregory. These cases in my opinion have no bearing on the question in dispute. They relate solely to the relative rights to fixtures, so called, as between vendor and vendee, mortgagor and mortgagee, landlord and tenant and others standing in similar relations to each other. Speaking generally they hold that chattels when affixed to the land in a certain way, and with a certain intention, lose their character as chattels and become a part of the freehold. They cease to be personalty by reason of their annexation to the land and thereby become realty, so long as the annexation continues. The doctrine is based on the maxim "*quicquid plantatur solo, solo cedit.*" Buildings and erections of various kinds may however be placed on land, without losing their character as chattels or becoming fixtures as the word is used in the cases cited. Chattels such as machinery, may be annexed to buildings which are a part of the freehold without themselves losing their character as chattels. It is largely a question of intention depending upon the nature and object of the annexation and various other circumstances. *Doran* v. *Willard* (2); *Fowler* v. *Fowler* (3); *Allan* v. *Rowe* (4); and the *Liscomb Falls Company* v. *Bishop* (5) will illustrate the application of the rule to varied circumstances. In the case of *Hobson* v. *Gorringe*, the engine in question had been purchased under an agreement by which the title was not to pass to the purchaser until full payment of the purchase money. The engine was however annexed to the property so as to make it a part of the freehold, and the mortgagee

(1) (1897) 1 Ch. 182.
(2) 1 Pug. 358.
(3) 2 Pug. 488.
(4) 1 N. B. Eq. 41.
(5) 35 S. C. R. 539.

1911.

THE BISHOP OF FREDERICTON v. THE UNION ASSURANCE COMPANY ET AL.

BARKER, C. J.

who had no notice of the agreement, took and held it as against the seller. As a result of that decision statutes have been passed in this and other provinces, by which in such a case, the chattel though ever so firmly annexed to the freehold, will not cease to be a chattel or become a part of the freehold without the seller's written consent (Consolidated Statutes, 1903, Chapter 143, Section 8.)

In the present case I have no doubt that if this were a mere matter of conveyancing, or of title, and a deed or mortgage of the property had been executed in the usual manner, the title to the bells would have passed by the conveyance as a part of the freehold though neither bells nor fixtures were mentioned in the instrument. They had lost their legal character as chattels and become a part of the realty by becoming fixtures. They however never ceased to be bells or become a part of a stone wall. We are however not dealing with a question of title or a question of conveyancing. The question here is whether for the purpose of this insurance contract, bells are included in the description contained in class (1), and in deciding that question reference must be made to the whole contract. The authorities cited do not I think bear upon this point; they relate to an entirely different subject. An insurance policy is a business, mercantile contract and must be construed as such. The language must be given its ordinary meaning unless there is something in the surrounding circumstances or the nature of the contract itself to make it an exception to that rule. I think it may be taken as beyond question that the parties to this contract did not intend that any part of the property insured should be included in two of the classes. The difference in the rate of premiums as well as the fact that the property was divided up as it has been, make that point clear beyond all doubt. If therefore the term "church furnishings" or "church fixtures" by a fair construction would as they are used in this contract, include these bells, it would I think follow that it was the intention of the contracting parties to include the

bells under that general description in class (2). That these bells were fixtures is not disputed. The plaintiff's whole argument is based on that fact. In its usual primary meaning the word "fixtures" would include anything fixed or fastened as distinguished from something that is moveable, kept in place by its own weight. Why should these bells thus clearly included in the term fixtures, be excluded from the property mentioned in class (2)? Once admit that they are fixtures, the nature or extent or object of the annexation to the building is immaterial so far as this insurance contract is concerned. Mr. Gregory endeavored to point out what would be included in the second class as fixtures and he mentioned an alms box fixed permanently to the fabric of the church as an illustration. What degree or method of annexation would indicate the dividing line at which fixtures to the church become insured when described as a building and ceased to be included in the term fixtures and insurable as such?

In addition to these reasons for including this claim in class (2) there are some reasons for concluding that it was the intention of the parties not to include them in class (1). If the question to be determined was whether the policies covered all bells or not, the omission of them by name would furnish a fair ground for saying they were not, in view not only of their value, as compared with that of many of the enumerated articles but in view of the minute description of the property which the insurance was intended to cover. No such question arises here, because it is admitted that these bells are included in the property described in one of the two classes. One naturally inquiries why and for what object was it thought necessary by the parties to this contract to provide that the stone building which was being insured and which was situate on Church Street, Fredericton, used as a place of worship and known as Christ Church Cathedral, should include the tower, the spire and the chancel? I confess I am not able to give any very satisfactory answer to that question. One would say that the general description would

1911.

THE BISHOP OF FREDERICTON v. THE UNION ASSURANCE COMPANY ET AL.

BARKER, C. J.

necessarily include these three component parts. It must have been intended in providing for the distribution of the risk to give to the word spire, tower and chancel a more restricted meaning than they naturally would have as included in the general term building—that is to say "tower" was to mean that alone—not a tower with a chime of bells attached to it. In other words it was the intention to confine the $42,000 on the fabric pure and simple and nothing inside of it except the monuments and memorials which are specially mentioned. They no doubt were fixtures in the ordinary meaning of that term. The manner and extent of their annexation to the fabric no doubt differed, but only to the extent necessary for the purposes and object of each. And as to the permanency of all, there is no more doubt that it was the intention of those who placed the memorials and tablets in the church as well as those who permitted them to be placed there, that they should remain as long as the Cathedral should itself exist. They were the only additional things which for the purposes of distributing the risk, were to be considered as a part of the fabric. On the whole, I think, in construing this agreement we should give effect to words which are sufficient without forcing their construction, to include these bells in class (2) rather than resort to a doubtful inference so as to include them in class (1).

There will be a declaration that the bells are included in the property mentioned in class (2) and not in class (1).

JACK V. KEARNEY.

1911.

January 19.

Voluntary Settlement of land in favor of son—13 Eliz. c. 5—Pre-existing Debts—Evidence of intention to delay creditors—Agreement by son to support and maintain grantor, and work performed by son on land, as consideration.

A. and his wife and three sons F., J., and R. lived on A's homestead farm. A. helped F. buy an adjoining farm. Both farms were worked by A. and the sons. Two years later, A., wishing to provide for his other sons, made an agreement with F., in pursuance of which, F. conveyed his farm to J. for a nominal monetary consideration, and A. for a like consideration conveyed the homestead to F. who had agreed to convey half thereof to R., and did so. There was a verbal understanding that F. should support A. and wife on the homestead. By this conveyance A. practically denuded himself of all his property except the crop then in the ground, the proceeds from which F. agreed should go to pay A's debts. The crop failed. No express intention was shown to defeat, hinder or delay creditors. In a suit brought by a creditor of A. to set aside the deeds from A. to F., and F. to R. as void under Stat. 13 Eliz., c. 5.

Held, that the deeds were voluntary and without valuable consideration, in whole or in part, and as their effect was to defeat, hinder and delay creditors, they were void.

Even if the Agreement to support was in such a condition that it could be enforced, it was not a consideration sufficient to support the deed against the plaintiff; nor was the fact that the sons worked at home a consideration.

In re Johnson 20 Ch. D. 389, distinguished.

Action by a creditor to set aside conveyances of land as fraudulent under the Stat. 13 Eliz. c. 5.

The facts are sufficiently stated in the judgment of the Court.

Argument was heard October 10 and 11, 1911.

M. G. Teed, K. C., for the plaintiff.

The plaintiff submits that the deeds in question are void under the Statute 13 Eliz., c. 5; there is no value or consideration sufficient to save them from the operation

1911.

JACK v. KEARNEY

of the Statute; being voluntary conveyances within the meaning of the Act, the circumstances are such that a Court should find they were accepted with intent to delay and defraud creditors; the circumstances are such that it is not necessary to show actual intent to defraud, but the effect of the conveyance might be expected to, and in fact has been such as to defeat, delay or defraud creditors, and the Court must attribute a fraudulent intent to the persons executing and receiving deeds; that the assets of Robert Kearney that remained, and the expectations entertained of future crop were not such as to warrant the settlement or deeds; in any event we submit that the undivided one half that is held for Roy cannot be so held and the deeds to that extent must be set aside. In regard to questions of value or consideration see *Three Towns Banking Co.* v. *Maddever* (1); *Cornish* v. *Clark* (2); *Penhall* v. *Elwin* (3). In regard to circumstances implying fraud see Mays on fraudulent conveyances pp. 40, 41; *Smith* v. *Cherrill* (4); *Freeman* v. *Pope* (5); In *re Sinclair ex parte Chaplin* (6). As to reliance being placed on probable value of the crop, see *Crossley* v. *Elworthy* (7); *MacKay* v. *Douglas* (8); *Ex parte Russell* (9); *Spencer* v. *Slater* (10); *The Sun Life Assurance Company of Canada* v. *Elliott* (11).

W. P. Jones, K. C., for the defendants.

There was a valuable and adequate consideration given by Fred. A. Kearney for the deed. He has worked for three years in the interests of the farm and for the last two years under an express agreement. He has rights as well as creditors. His work in 1907, 1908 and 1909 was a direct consideration for the deed sought to be set aside. He also agrees to support his father and mother for the

(1) 27 Ch. D. 523.
(2) L. R. 14 Eq. 184.
(3) 1 Sm. & G. 258.
(4) L. R. 4 Eq. 390.
(5) L. R. 5 Ch. 538.
(6) 26 Ch. D. 319.
(7) L. R. 12 Eq. 158.
(8) L. R. 14 Eq. 106.
(9) 19 Ch. D. 588.
(10) 4 Q. B. D. 13.
(11) 31 S. C. R. 91.

1911.

JACK v. KEARNEY

rest of their lives. The sum of five hundred and ten dollars was paid on the Hamilton Place, and the Hamilton place was part of the consideration. This is not a voluntary conveyance at all. When a consideration is shown in family matters, Courts have not been very particular about the adequacy of it, see Mays on fraudulent conveyances at star page 276 and authorities cited there. In regard to Roy's deed, Roy was to work for five years before he could get the deed. This is simply a rider and part of the family agreement. Without proof of actual fraud on the part of Fred A. Kearney this Court ought not to take away the property and have his work go for nothing. In *re Johnson, Golden* v. *Gillam* (1); *Gale* v. *Williamson* (2); *Whelphey* v. *Riley* (3). Good faith is shown by the belief that ample provision was made for the payment of creditors and also by the fact that he had paid some creditors since the deed was given. Where there is valuable consideration (actual consideration) the burden is on the plaintiff to show actual fraud.

Teed, K. C., in reply.

A voluntary transfer is a transfer where there is no consideration going to grantor, and this is a voluntary conveyance unless the grantor's assets are simply changed and instead of land the creditors have other assets to look to for their claims. Fred was paid for his work by the Hamilton place and by other consideration. See *Three Towns Banking Co.* v. *Maddever* (4). The decree the plaintiff asks would not necessarily result in the loss of the property to Fred. A. Kearney; it would simply mean that property would be liable to the plaintiff's claim. There is no valuable consideration in this case, because the consideration must pass to grantor himself, where creditors are involved. Now as to Roy's deed. It

(1) 20 Ch. D. 389.
(2) 8 M. & W. 405.
(3) 2 Allen 275.
(4) 27 Ch. D. 523.

1911.

JACK v. KEARNEY

McLEOD, J.

certainly ought to be set aside. The consideration was Roy's work and this went to Fred, and not to the father, not to the grantor.

1912. January 19. McLEOD, J.:—

This action is brought to set aside a deed given by the defendant Robert H. Kearney to the defendant Frederick A. Kearney and also a deed from Frederick A. Kearney to the defendant Roy Kearney on the ground that they are both void as against the plaintiff.

The facts of the case are really not in dispute, the defendant Robert H. Kearney being the principal witness on the part of the plaintiff.

The facts are about as follows:—

The defendant Robert H. Kearney is a farmer and in 1909 owned a farm a short distance from Woodstock in Carleton County, worth about four or five thousand dollars, which at that time was subject to a mortgage to the Canada Permanent Loan Company for $2,300 and some odd dollars. He had three sons living with him, Frederick A. and Roy, two of the defendants, and James. Frederick A. was the eldest and was then about twenty-four years old, James the next was about twenty-two years old and Roy about fifteen. The boys all lived at home and worked on the farm. The two older ones had for some years during the winter months worked out pressing hay and part of their earnings was turned into their father and part they spent for themselves.

In 1907 Frederick A. then being about twenty-two years old, wished to leave home and work for himself. His father did not wish that and after some talk between them he agreed to buy another farm and did buy a farm adjoining his own from a Mr. Hamilton. The price paid was $3,100 which included about $300 of personal property. This farm was subject to two mortgages given by Mr.

1911.

JACK v. KEARNEY

McLEOD, J.

Hamilton, amounting to $1,550, and these remained as a charge on it. Five hundred dollars was paid by Robert H. Kearney and Frederick A. Kearney in cash within a few months after the purchase. The farm was conveyed to Frederick A. Kearney and he gave Mr. Hamilton a mortgage for the difference between $1,550 and $2,600, so that the farm was in Frederick A. Kearney's name, subject to three mortgages amounting in all to $2,600. Frederick continued to live at home and the two farms were managed by Robert H. Kearney and worked together by him and his sons.

In the early part of 1909 James Kearney, the second son, then being about twenty-two years of age, began urging his father to give him $1,000 and a pair of horses as he wished to marry and settle by himself. Robert H. Kearney was entirely unable to do that, but it was eventually agreed between him and the two older boys that the defendant Frederick A. Kearney should convey the Hamilton farm to James Kearney and the defendant Robert H. Kearney should convey the homestead to Frederick A. Kearney. This was accordingly done, the consideration mentioned in the deed to Frederick A. Kearney being five dollars. These deeds were given about the 21st of June, 1909, but were not then registered. The deed of the homestead was registered in April, 1910.

It was also agreed that Frederick was to give half the homestead to the defendant Roy Kearney who was then about fifteen years of age, provided he remained and worked on the place until he was twenty-one years of age, and the deed of the one half was made to him by Frederick A. Kearney and handed to his mother to be given to him when he was twenty-one, provided he remained and worked on the place. If he did not remain and work on the place until he was twenty-one the whole farm was to belong to Frederick A. Kearney.

1911.

JACK v. KEARNEY

McLEOD, J.

The defendants also say that it was understood and agreed that Robert H. Kearney and his wife were to have their living and support on the farm during their lives, but there was no written agreement to that effect, and at best from the evidence there was no more than an understanding to that effect.

This conveyance of the farm took practically all the property Robert H. Kearney the defendant had. He had the furniture in the house, which I gather from the evidence was not of much value, and one fifteenth share in a breeding horse which was not quite all paid for, which was of no practical value for creditors. He owed at this time between $1,500 and $2,000.

The crop had all been put in. It consisted principally of potatoes and it was agreed that he was to have the crop of that year to pay his debts. The boys were to assist in gathering it and he was to leave enough for seed for the following spring. The crop however, especially the potatoes was a failure, and there was practically nothing to pay the creditors.

The plaintiff does business at Halifax, Nova Scotia, under the name of The Nova Scotia Fertilizer Company. In January or February, 1909, the defendant Robert H. Kearney purchased from the plaintiff fertilizer to the amount of about $600 which was to be paid for on the 1st of January, 1910. It was delivered in the spring and was used on defendant's homestead farm. On July 1st, 1909, he gave a note for the amount, due six months after date. The note was not paid and the plaintiff after pressing for payment brought an action and on the 18th of February, 1911, recovered judgment for $625.25, principal and interest, and $36.90 for costs and an execution was issued on the judgment but the sheriff was unable to find any property on which to levy and returned the writ endorsed "*Nulla Bona*."

1911.

JACK v. KEARNEY

McLEOD, J.

The plaintiff claims that the deed to Frederick A. Kearney is void under the Statute of Elizabeth. The first question is whether the deed is a voluntary one or not. If it is a voluntary deed and the necessary effect is to defeat, hinder or delay creditors then the law infers an intent to defeat, hinder and delay creditors and the deed will be set aside, without proving actual and express intent, but if it is founded on valuable consideration then it is necessary to prove actual and express intent.

In *Freeman* vs. *Pope* (1), which is a leading case, Lord Hatherley, L. C., at page 541 in referring to the *Spirett* vs. *Willows* case, reported in 3 DeG. J. & S. page 293, says as follows:—

"In that case there was clear and plain evidence of "an actual intention to defeat creditors. But it is estab- "lished by the authorities that in the absence of any such "direct proof of intention, if a person owing debts makes "a settlement which subtracts from the property which is "the proper fund for the payment of these debts, an "amount without which the debts cannot be paid, then, "since it is the necessary consequence of the settlement "(supposing it effectual) that some creditors must remain "unpaid, it would be the duty of the judge to direct the "jury that they must infer the intent of the settler to have "been to defeat, or delay his creditors, and that the case "is within the statute."

And in the same case Sir G. M. Gifford L. J., at page 544 says:—

"There is one class of cases, no doubt, in which an "actual and express intent is necessary to be proved that "is in such cases as *Holmes* vs. *Penney* (2) and *Lloyd* v. "*Attwood* (3), where the instruments sought to be set aside "were founded on valuable consideration; but where the

(1) L. R. 5 Ch. 538. (2) 3 K. & J. 90. (3) 3 DeG. & J. 614.

1911.

JACK v. KEARNEY

McLEOD, J.

"settlement is voluntary, then the intent may be inferred "in a variety of ways. For instance, if after deduction "the property which is the subject of the voluntary settle- "ment, sufficient available assets are not left for the pay- "ment of the settler's debts, then the Law infers intent, "and it will be the duty of the Judge, in leaving the case "to a jury, to tell the jury that they must presume that "that was the intent."

And *Crossley* vs. *Elworthy* (1), decided by Sir P. Malins, V. C., is practically to the same effect, and in *Mackay* vs. *Douglas* (2), the same learned judge says at page 120 as follows:—

"It is not at all necessary to show that a man had any "fraudulent intent in making the settlement as the law "is now settled. It is very true that some of the old "authorities cited by Mr. Fischer, particularly *Stileman* "v. *Ashdown* (3), and many of the decisions long after "that, proceeded upon the assumption that the settlement "could not be set aside unless there was an intention to "defraud, because the words of the statute are "With "intent to defraud, defeat or delay creditors." But that "has been long got rid of and it is not necessary now to "show that. The statute speaks of cases where the credi- "tors are, shall or might be in any wise disturbed, hindered, "delayed or defrauded' and it is not necessary to show "an intention to do that, because if the settlement must "have that effect the court presumes the intention and "will attribute it to the settler."

"That is distinctly laid down by the present Lord "Chancellor on appeal from V. C. James in *Freeman* vs. "*Pope* (ante). I acted upon that principle in *Crossley* vs. "*Elworthy* where I expressly gave Mr. Elworthy the "benefit of my opinion that he did not intend to commit "fraud, but as the settlement had the effect of defeating

(1) L. R. 12 Eq. 158. (2) L. R. 14 Eq. 106. (3) 2 Atk. 477.

"or delaying his creditors I attributed the fraudulent "intention to him within the meaning of the statute, and "set the settlement aside."

See also *In re Maddever* (1) and Fry L. J. in *Ex parte Chaplin* (2) at page 336; *Taylor* vs. *Coenen* (3); *Edmands* vs. *Edmands* (4) at p. 375. The *Sun Life Assurance Company* vs. *Elliot* (5). Numerous other cases may be cited to the same effect.

In the present case I do not think that it has been proved that there was an actual intent to defeat and delay the creditors but the effect of the deed was to do that very thing, and the Court will therefore presume an intent to defeat and delay the creditors. At the time the deed was made the defendant Robert H. Kearney being indebted to an amount between $1,500 and $2,000 denuded himself of practically all his property. According to his own statement he only had his household furniture, which was of little value, and one fifteenth share in a horse kept for breeding purposes and which was not all paid for and was really of no value to his creditors. All he had was the hope that the crop would turn out in the fall to be sufficient to pay his creditors, but that crop failed. He himself received no consideration for the conveyance.

It is true that he said that he and his wife were to have a home and living on the place during their lives. This agreement was, however, not in writing and even if it was in such a condition that it could be enforced it is not in my opinion a consideration sufficient to support the deed against the plaintiff. A man indebted cannot convey his property simply for the purpose of supporting himself and his wife if need be and thus defeat his creditors.

The circumstances of this case are simply that in 1907 the defendant Frederick A. Kearney then being about

(1) 27 Ch. Div. 523.
(2) 26 Ch. Div. 319.
(3) 1 Ch. D. 636.
(4) (1904) P. 362.
(5) 31 S. C. R. 91.

1911.

JACK v. KEARNEY

McLEOD, J.

twenty-two years of age desired to go away and work for himself but Robert H. Kearney did not wish him to go, and in order to make some arrangement for him, agreed to buy and did buy the farm called in this suit the Hamilton farm which adjoined his own farm and it was conveyed to Frederick A. Five hundred dollars was paid on it and the balance remained on mortgage. To that no objection can be taken. In 1909 his son James being then about twenty-two years old and wishing to be married, pressed to have some provision made for him and then it was arranged between Robert H. Kearney and his son Frederick A. that Frederick A. should convey the Hamilton place to James (the equity of redemption in that place being according to the price paid for it worth about $500), and that Robert H. Kearney should convey the homestead to his son Frederick A. (The equity of redemption in this place being according to the value put upon it worth about $2,000), Frederick A. on his part agreeing to convey one-half of this homestead to his brother Roy who was then about fifteen years of age, on the conditions I have already stated.

The farming utensils were divided between Frederick A. and James, so that when this conveyance was made Robert H. Kearney was left without anything to pay the plaintiff and other creditors he at that time owed, save and except his hope that the crop would turn out sufficient to pay his debts. His son Frederick A. certainly knew that he owed some debts, although he says that he did not know that he owed the plaintiffs, but the very fact that he and his father agreed that the crop of that year should go towards paying the debts of the father shows that he knew his father had debts and he also knew that the conveyance made to him took all the property that his father had.

The defendants relied strongly on In re Johnson, (1). but that case differs very materially from the present case,

(1) 20 Ch. D. 389.

1911.

JACK v. KEARNEY

McLEOD, J.

In that case Fry J. before whom the case was tried, says that it is clear that the consideration for the deed of the 12th of June, 1878, was in part meritorious and in part valuable.

The facts were that one Judith Johnson, a widow conveyed the property she had to her daughters, Alice and Amy, and they covenanted that they would "pay all the just debts incurred by the said Judith Johnson up to the date of the said indenture in connection with the working and management of the farm," which was the property conveyed and also would maintain the said Judith Johnson during her life. There was one debt for which Judith Johnson was liable but which was not incurred by the said Judith Johnson in connection with the working and management of the farm and that creditor brought an action to set aside the deed on the ground that it was void under the Statute of Elizabeth, but Fry, J. held that he could not succeed because the deed was in part, at all events, made for a valuable consideration, which consideration was the covenant that the daughters should pay the debts of Judith Johnson.

In this case I think there was no valuable consideration there undoubtedly was the desire on the part of Robert H. Kearney to provide for his sons, but as was said by Lord Hatherley L. J. in *Freeman* vs. *Pope* (1) p. 540; "Persons "must be just before they are generous and debts must "be paid before gifts can be made."

I do not think there was any legal obligation on the part of Robert H. Kearney to make a conveyance of his property to his sons. No doubt it would be reasonable for him to make provision to settle his sons in life if he could do so without prejudice to his creditors but he had no right to do it so as necessarily to interfere with their claims. See in *re Maddever* (2) at p. 531.

(1) L. R. 5 Ch. 538. (2) 27 Ch. D. 523.

1911.

JACK v. KEARNEY

McLEOD, J.

I cannot think that what has been put forward by the defence, that the sons worked at home, was any consideration for this deed and therefore I think it is voluntary. The father Robert H. Kearney would naturally support his sons during their minority if need be and would be entitled to their services during that time. Roy Kearney who was only fifteen years old when the deed to him was given gave no consideration whatever for the one-half of the homestead that has been transferred to him. In my opinion the deed of Robert H. Kearney to Frederick A. Kearney must be set aside and also the deed of Frederick A. Kearney to Roy Kearney.

Frederick A. Kearney after the transfer to him gave a mortgage on the property for $2,600, retiring the mortgage of $2,300 that was on it at the time the deed was made to him. As the mortgagee is not a party to this suit he would not be affected by this decision. The order will therefore be that the deed from Robert H. Kearney to Frederick A. Kearney and the deed from Frederick A. Kearney to Roy Kearney be set aside as against the plaintiff. The mortgage will not be affected by this order. The defendants will pay the costs of this suit.

INDEX.

DEED — *Mortgage — Deed — Confidential Relationship — Undue Influence — Pressure — Misrepresentation — Improvident Contract — Voluntary Gift — Insanity of Grantor.*] William Davidson died in 1890, leaving real estate consisting of his Homestead and lot "A," all of which he left absolutely to his wife Helen Davidson, and appointed her and the Defendant William Ferguson executors. In 1898 James Davidson, son of William and Helen Davidson, being indebted to the Defendants William Ferguson and Philip Arsenault, became insolvent and assigned to Philip Arsenault. Nearly all the creditors, including William Ferguson and Philip Arsenault, agreed to compromise at ten cents on the dollar, but James Davisdon made a secret agreement with William Ferguson and Philip Arsenault that they should be paid in full. By arrangement between James Davidson, William Ferguson and Philip Arsenault, William Ferguson for James Davidson purchased the assets from Philip Arsenault as assignee for $1,000.00, and for the securing William Ferguson the balance advanced and balance of his old debt against James Davidson, Helen Davidson in 1899, being then about seventy-six years of age, without any independent advice, executed to William Ferguson a mortgage of lot "A" for $822.90. William Ferguson gave James Davidson a Power of Attorney to deal with these assets, who in the name of William Ferguson sold and converted them into money to an amount greater than the mortgage. In December, 1899, James Davidson arranged that his mother

Deed—Continued.

should sell to Philip Arsenault the said lot "A" for $600, $200 of it to go on Philip Arsenault's old account against James Davidson, and $400 by notes made by Philip Arsenault in favour of William Ferguson, and which the latter took on his account against James Davidson. Both the mortgage and deed were written by James Davidson, and Helen Davidson had no independent advice and had become of feeble intellect. In March, 1900, Helen Davidson made a will leaving all her property to her son James and his family. William Ferguson drew this will, is named in it an executor, and had full knowledge of its contents. In December, 1902, James Davidson being indebted to William Ferguson to the amount of $1,250.97, Helen Davidson, at the request of William Ferguson and James Davidson, gave a mortgage of the homestead to William Ferguson for $1,250.97 to secure that amount, which was shown by the evidence to be the total sum due from James Davidson to William Ferguson at that time. Helen Davidson lived practically all the time with James Davidson, and he had great influence over her, which fact was well-known to both William Ferguson and Philip Arsenault. *Held*, that the first mortgage to Ferguson, made in March, 1899, was discharged and must be set aside, as the amount which it had been given to secure had been paid in full. *Held*, that the conveyance to Arsenault, made in December, 1899, must be set aside, as obtained through undue influence and pressure on the part of James Davidson, and solely for his benefit; and on the ground of the mental weakness of the grantor, and that she had no independent advice; that Arsenault, as he knew the relation which James Davidson occupied with regard to the grantor, and all the circumstances in connection with the transaction, stood in no better position than James Davidson would stand, and was bound by, and responsible for, any acts committed by Davidson, or omitted to be done by him. *Held*, that the second mortgage to Ferguson, made in December, 1902, must be set aside, as obtained through undue influence and pressure on the part of James Davidson and William Ferguson, and solely for their own benefit; that Ferguson had the same knowledge of all the facts as Arsenault, and was bound in the same

FRAUDS, STATUTE OF — *Specific Performance — Memorandum of Agreement — Statute of Frauds — Construction of Will — Title — Con. Stat.* (1903) *Chap.* 160. *Sec.* 24 — *Conveyance by Executors and Trustees.*] G. E. F. died in 1899, and by his will left the greater part of his property to his executors and trustees upon various trusts. The testator's widow is still living, and the surviving executors and trustees are the plaintiffs, G. C. F. and W. T. H. F. two of the testator's children. In December, 1907, negotiations were entered into by the defendant J. and W. T. H. F., acting for and with the consent of his co-trustee and mother, for the sale and purchase of the Linden Hall property, which with other real estate had been devised by the testator to his executors. An agreement was made, and a memorandum containing its terms was drawn up by J. and signed by him and W. T. H. F. There was only one copy of this memorandum which was retained by J., and later destroyed by him when he determined not to go on with the purchase. This memorandum as stated by the plaintiff W. T. H. F. was as follows:—

"December 13th, 1907.

"Johnston to purchase from Fenety estate property on Brunswick Street, 76 x 185, 25 feet to be clear on upper side, 15 feet on lower side; estate to give an unencumbered title; Johnston to hand the estate 25 shares of Toronto Street Railway and 10 shares Fredericton Gas Stock — all furniture, including that belonging to Mrs. Roberts, to be removed from the premises. Stock not to be transferred before January 2nd, 1908."

"L. W. JOHNSTON,
WM. T. H. FENETY."

It contained the name of the vendor and purchaser, the property to be sold and the price to be paid. *Held*, that there was a valid agreement for purchase and sale; that the memorandum was amply sufficient to satisfy the Statute of Frauds, and was capable of being enforced. The will contained the following provision,—"I give, devise and bequeath all my other property both real and personal whatsoever and wheresoever situate of which I may be seized or possessed or otherwise entitled, to my executors and trustees herein named upon the trusts following, etc." The

Frauds, Statute of — Continued.

clause in the will which referred to the Linden Hall property was,—"Upon trust that my trustees will hold my residence known as Linden Hall and the grounds connected therewith (but not to include the property purchased by me and known as the Grammar School property) during the will and pleasure of my wife, and there she may live as long as she desires, free from rent, she paying one-half of the taxes, insurance, water-rates and such like — also she paying in full the running expenses in keeping up the establishment, during her occupancy, it being my intention that she may live in her present home so long as she may wish. If, however, the above property be leased or sold during my wife's lifetime with her consent, then in such a case I desire, if leased, the rent derivable therefrom shall be used as rent for a house for her to live in and such house is to be as good as one of my present houses situate on College Road, Sunbury Street, Fredericton and if after paying such rent with the money received from the rent of the said Linden Hall property, there remains a balance from time to time, this balance shall be added to the principal sum already set aside for my wife's maintenance, the income in the meantime being paid to my said wife. Should however the said property be sold during my wife's lifetime, with her consent, the purchase money shall be used as follows:— so much of it shall be invested as will yield enough interest to pay rent for as good a house as one of my College Road houses, and in such a house my wife may live, such interest being used to pay the rent therefor, and the balance of the said purchase money shall be divided equally among my children then living." *Held*, that while no express power of sale was contained in the will, there was an implied power in the executors and trustees to sell the Linden Hall property, to be drawn from the provisions contained in the will itself, and to enable them to carry out the trusts declared in the will; and that a conveyance executed by the surviving trustees and executors, in whom the title was vested, and the widow of the testator, gave a good title to the property in question, and that it was not necessary that the beneficiaries under the will, other than the widow, should join in the conveyance. Memorials of judgment on record against

TRADE MARK — *Specific Performance — General Assignment — Trade Mark — Good Will of Business.*] In March, 1894, the firm of G. S. de F. & S., consisting of the defendant, H. W. deF., and his brother C. W. deF., registered a trade mark for a certain blend of tea known as "Union Blend," which was prepared under a formula made by the defendant. In May, 1901, C. W. deF. assigned his interest in the trade mark to the defendant and shortly after seems to have retired from the business. In May, 1908, the business was put into a joint stock company in which the defendant was by far the largest stock holder, he paying for his stock by assigning to the company all his interest in the business, which he valued at $50,000. This assignment, dated June 29th, 1908, after particularly setting out the real estate and chattels personal, contained the following, "and all personal property of whatsoever nature and description owned by the said H. W. deF. in connection with the business of the said H. W. deF. together with the good-will of the business of the said H. W. deF." There was also a covenant in the assignment that the defendant would execute and deliver all papers necessary to give a perfect title to the property. The trade mark itself was not specifically mentioned in the assignment. The defendant was elected president of this company and for two years this trade mark was used and the business carried on, chiefly under his management. In May, 1910, the company, being insolvent, assigned to the plaintiff under Chap. 141, Con. Stat. of N. B. (1903). On investigation the plaintiff found that there was no specific assignment of the trade mark to the company which could be used for registry under the Trade Mark Act. *Held*, that the words used in the assignment are amply comprehensive to pass the trade mark, and that the defendant is bound to execute a specific assignment of it to

Trade Mark — Continued.

the plaintiff as assignee of the company. TILLEY, ASSIGNEE OF DEFOREST *v.* DEFOREST, *et al* 343

TRESPASS — *Land—Documentary Title—Title by Possession — Occupancy — Injunction — Damages.*] In 1765 a certain block of land, a portion of which is the land in question in this suit, was granted by the Crown to J. S., R. S. and J. W., and from that date a documentary title can be traced to the present time vesting this land in the plaintiff company. In 1855, the then owner of the land and the predecessor in title of the plaintiff company, gave a lease of a portion of it, and from that time to the present the different owners and predecessors in title of the plaintiff company have given leases to various persons and collected the rents. The plaintiff company during its ownership has also given leases and collected rents. In 1872, the defendant S. and his father went on the property and drove some stakes on the boundaries of the land in dispute, cut wood and made some excavations, either searching for magnesia or for some other reason. From this date down to the present, the defendant has been more or less on the land, digging holes and making excavations. He did not live on the land but went on it and performed these acts whenever he was able. During all this time the land not occupied by buildings was under lease to other persons for pasturage purposes, though the defendant recently drove off their animals on numerous occasions. The defendant's father died in 1891, but neither he nor the defendant ever collected any rent from the tenants on the land in dispute, while the plaintiff company and its predecessors in title have collected rents during the whole time of their ownership. In September, 1909, through his solicitor, the defendant wrote to the various tenants claiming damages for trespass and threatening suit, but nothing further was ever done; and in October, 1909, he gave a deed of a portion of this land to one M. M. W. *Held*, that the defendant has no title by possession as his possession was not open, notorious and *exclusive:* as the plaintiff company and its predecessors in title exercised their rights and occupancy during the whole of the defendant's alleged possession. Decree that the plaintiff company is the owner in

entitled to any share of the accumulated income. That can only be divided when all possible claims upon it have ceased. It was ordered that the costs in this matter as between solicitor and client, be paid out of the *corpus* of the estate. EARLE, TRUSTEE, ETC., OF LAWTON *v.* LAWTON, *et al*.....92

3.—— *Construction — Administration of Trusts — Legatee's Power of Appointment — Time for Distribution — Implied Power to Sell Real Estate — Interest in Residuary Estate.*] R. died in 1876, leaving practically all his property upon trust for the benefit of his widow and children. In his will, in order to make an equal distribution of a large portion of his estate among his five daughters, he grouped together certain properties, in part real estate and in part personal, in five separate schedules. The property in schedule (A) was devised to the testator's daughter M. A. A. who died in 1902, leaving a will by which, in exercise of the power of appointment in her father's will, she devised one-third of her estate to her husband who survived her. The clause in the will relating to the final distribution of the scheduled property was as follows:—"And upon trust on the death of either of my said daughters to convey one-third of the said lands, tenements, hereditaments and premises apportioned to her in such schedule, to such person or persons upon the trusts and for the ends, intents and purposes or in such manner as my said daughter may by any writing under her hand, attested by two or more witnesses, or by her last will and testament direct and appoint, and as to the remaining two-thirds, to hold the same for the child or children, or such of them of my said daughter so dying, upon the trusts and in the proportion, and for the intents and purposes my said daughter may by her last will and testament direct and appoint and in default of such direction and appointment then and in such case the said two-thirds and one-third shall be held by said executors and trustees in trust for such child or children and be divided equally between them and their heirs, share and share alike, on the youngest child living attaining the age of twenty-one years and in the meantime and until such child shall attain such age, the rents, issues and profits thereof shall be applied by my said executors

toward the support, maintenance and education of such child or children, and in the event of my daughter dying, leaving no issue her surviving, then and in such case I will and direct that the said two-thirds and one-third before mentioned (if no disposition of the same shall be made by my said duaghter) shall be equally divided by my said executors and trustees between her sisters and brother and their respective heirs in equal proportions *per stirpes* and not *per capita*." *Held*, that the trustees, in order to make a distribution, had power to sell and dispose of the scheduled property apportioned to the deceased daughter, such power being implied in the will in order to carry out the trusts, though no express power was given. *Held* also, that, the deceased daughter having died without issue, the unappointed two-thirds of her scheduled property should be equally divided now between the surviving daughters and the heirs of the deceased son. The residuary clause in the will was:—"The rest, residue and remainder of my said estate, both real and personal and whatsoever and wheresoever situate, I give, devise and bequeath the same to my said executors and trustees, upon the trusts and for the intents and purposes following, that is to say: Upon trust after paying my brother Duncan Robertson or his heirs, to whom I give and.. bequeath the same, the legacy or sum of four thousand dollars, Dominion currency to sell and dispose of the same as and when they shall in their discretion see fit and consider to be most for the benefit and advantage of my said estate, and shall apportion the same or the proceeds of such parts or portions as shall be sold from time to time, equally to and among my said children, share and share alike, and shall hold the same for my said children and their heirs, share and share alike, subject to any advances or sums made or to be made by me, as aforesaid upon the same trusts, with regard to my said daughters as are hereinbefore declared with respect to the said estate in the said schedules mentioned." *Held*, that the deceased daughter had a disposing power over one-third of her share of the residuary estate; and that the remaining two-thirds was divisible as was directed in regard to the scheduled property. SMITH