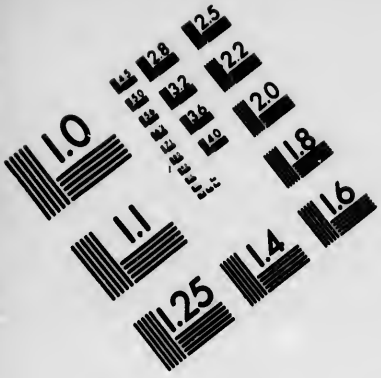

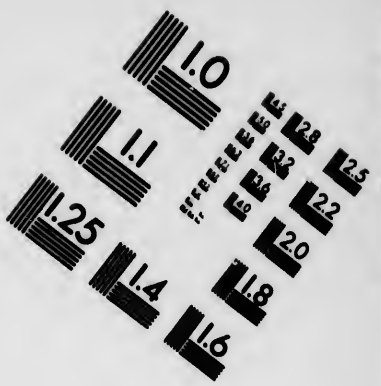

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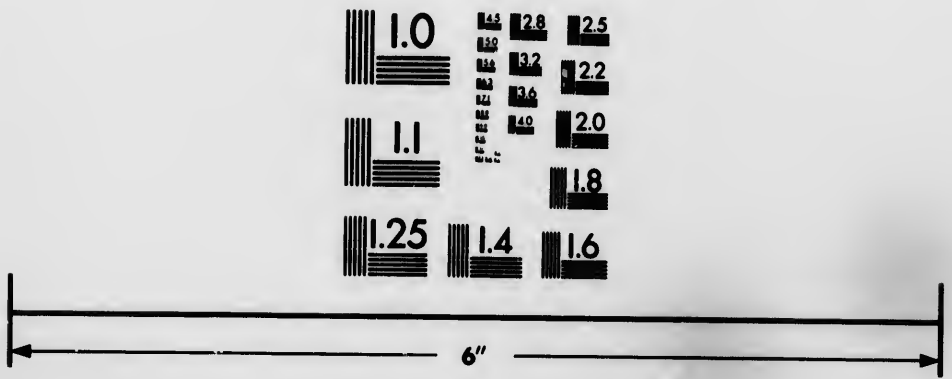

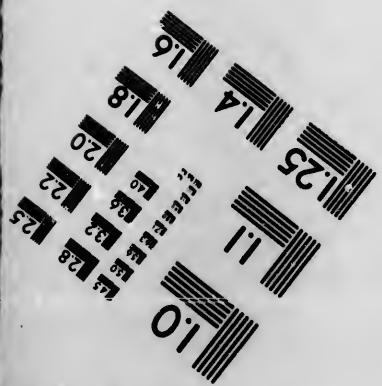

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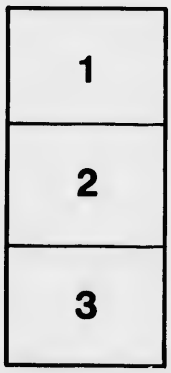

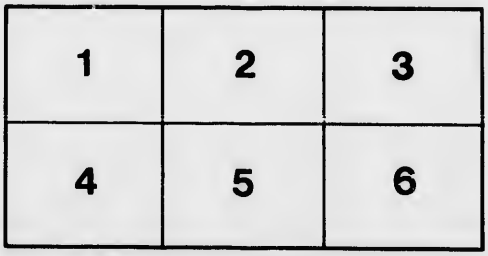

REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

ONTARIO,

BY

ALEXANDER GRANT, BARRISTER,

REPORTER TO THE COURT.

VOLUME XIX.

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1873.

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" OLIVER MOWAT, } *Vice-Chancellors.*
" S. H. STRONG, }
" S. H. BLAKE, }

" ADAM CROOKS, LL.D., Q.C., } *Attorneys-General.*
" OLIVER MOWAT, Q. C., }

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

ONTARIO,

DURING A PORTION OF THE YEAR 1872.

THE MERCHANTS' BANK OF CANADA v. MORRISON.

Mortgages—Priorities—Parol evidence of mistake.

Two mortgages were successively taken by distinct creditors, which omitted, by mistake, a piece of ground which the mortgagor held under a contract of purchase only: the second mortgage was afterwards assigned for value, without notice of the first mortgage; the mortgagor died insolvent; one of the heirs, out of his own money, paid the balance of purchase money due on the omitted lot, and obtained from the vendor's heirs a conveyance of that lot to himself. Afterwards the mortgagees respectively discovered the mistake in their mortgages, and each filed a bill to have his mortgage rectified, taking no notice of the other mortgage, and not making the holder of it a defendant: the second mortgagee obtained his decree first, and thereby the estate was vested in him; and the defendant (the heir of the mortgagor) was ordered to pay the costs and to receive credit for what he had paid for his conveyance; the holders of the first mortgage then filed a bill against the plaintiff in the other suit, claiming a prior equity in respect of the omitted parcel:

Held, on rehearing, reversing the decision of Vice Chancellor Mowat, reported *ante* Vol. XVIII. p. 382, that the defendant (the holder of the second mortgage) could not avail himself of the legal estate in such a case; and that the plaintiff was entitled to the relief prayed. [MOWAT, V. C., dissenting.]

Parol evidence is admissible to reform a mortgage which omitted land shewn by the mortgagor to the mortgagee as part of the property to be mortgaged.

Statement.

On the 25th November, 1856, the late *David Roblin* executed a mortgage on certain land to *George Moffatt* to secure £1968 16s. 9d.; and on the 4th July, 1857,

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he executed a second mortgage on the same land to *Joseph A. Woodruff* to secure £5000, the amount of a loan made to the mortgagor by *Samuel Zimmerman*. It was intended that these mortgages should embrace a parcel of land adjoining the land described in them. Of this parcel the mortgagor had not acquired the legal estate, but he had contracted to purchase the lot, and had built his house and made other improvements upon it. After his death, viz., on the 15th February, 1864, one of his sons, *David Allen Roblin*, paid the vendor of this parcel the balance due to him in respect of the purchase money and got a conveyance of the land to himself. It was not until some time after this that the holders of the mortgages discovered that the descriptions therein did not cover this parcel; and they thereupon filed separate bills against *David Allen Roblin* and the other heirs of the mortgagor, for the rectification of the mortgages. The first mortgage was then owned by the plaintiffs, and the second mortgage by the defendant.

Statement.

The defendant was not a party to the plaintiffs' suit, and the plaintiffs were not parties to the defendant's suit. The defendant was the first to obtain a decree (5th April, 1869,) and thereby the legal estate became and was vested in him. The decree was with costs, and *David Allen Roblin* received credit for the $150 which he had paid to the vendor.

The present bill was for a declaration that the plaintiffs, having the first mortgage on the land therein described, was the first charge on the omitted parcel also; and the bill prayed consequential relief. The defendant resisted this claim; asserted by his answer that at or before the mortgage was assigned to him, or at or before he paid the valuable consideration in respect of which the assignment was made, he had no notice of the plaintiffs' claim; alleged the registration of his decree; and claimed the benefit of the Registry Acts. The bill did not allege notice to the defendant

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of the first mortgage at or before the time of the assignment to the defendant (1st August, 1857); the only notice which it charged was notice of the plaintiffs' present claim before the filing of the defendant's bill for the rectification of his mortgage. There was no evidence of notice, either at or before the time of the assignment of 1st August, 1857. It appeared that the mortgagor was an intimate friend of all the parties; and they seemed to have relied on his representations as to the title, without the precaution of examining the Registry before the execution of the mortgage to *Woodruff*, or of the assignment to the defendant.

Vice Chancellor *Mowat*, before whom the cause was heard, dismissed the bill with costs.

The plaintiffs reheard the cause.

Mr. *Moss*, for the plaintiffs.

Mr. *S. Blake* and Mr. *Bethune*, for the defendants.

SPRAGGE, C.—It appears to me that there is a short point upon which this cause may properly be disposed of. Jan. 10.

The suit is brought under an order of this Court, that the first mortgagees should proceed to file a bill for the purpose of determining the question of priority between them, and the second mortgagees; the plaintiffs represent the first mortgagees; the defendant *Morrison* represents the second, as trustee for parties beneficially interested; and the defendant *Handy* is a derivative mortgagee. Judgment.

This bill may be regarded as a bill to vary the decree made in *Morrison* v. *Roblin*, by which decree the plaintiffs in that suit obtained the legal estate, upon which alone they can rest their claim to priority over the first mortgagee. That decree was obtained behind

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the back of the prior mortgagee, and the Court was not informed of the very important facts, that there was this prior mortgagee, whose mortgage comprised the same lands as were comprised in his mortgage, and that the prior mortgagee claimed the same equity as was claimed by his bill in regard to the same parcel omitted by mistake; and that these facts were known to the second mortgagee. If the Court had been informed of these facts, it would certainly not have made the decree that was made, but would have acted upon the maxim: *qui prior est in tempore, potior est in jure.* There can be no possible doubt upon this point.

This was a *suppressio veri:* and by it the Court was deceived into making a decree which, if the facts withheld from the knowledge of the Court had been disclosed, would certainly not have been made: and the short question is, whether a decree so obtained can be held by the party so obtaining it.

Judgment.

I can hardly conceive that authorities can be necessary upon such a point. There are, however, several that establish the principle: Lord *Redesdale*, in his treatise on Pleading (*a*), puts the case of a decree obtained in the absence of parties interested, and without their interest being disclosed, under the head of impeaching decrees obtained by fraud, and after saying that where a decree has been obtained by fraud, the Court will restore the parties to their former situation whatever their rights may be; he adds "besides cases of direct fraud in obtaining a decree it seems to have been considered that where a decree has been made against a trustee, the *cestui que* trust not being before the Court, and the trust not discovered; or against a person who has made some conveyance or incumbrance not discovered; or where a decree has been made in favor of or against an heir when the

(*a*) 4 Ed. p. 93.

ancestor has in fact disposed by will of the subject matter of the suit; the concealment of the trust, or subsequent conveyance or incumbrance, or will, in these several cases, ought to be treated as a fraud." (*a*) And Lord *Redesdale*, when upon the bench, affirmed the principle referred to in his treatise. This he did in *Giffard* v. *Hort.* (*b*) The circumstances of the case were as he styled them "pretty numerous"; but the result is thus shortly stated in the head note, "a decree obtained without making parties those whose rights are affected thereby, is fraudulent and void as to those parties." In the course of his lordship's judgment he commented upon the conduct of one who had instituted separate suits, one in Chancery, the other in the Exchequer, in respect of different parts of the same transactions; and observed what is apposite to this case: "It is very striking if one considers what would have been the proper decree if these two causes had come on together in the same Court." In another part of his judgment he puts the case of creditors coming in before the Master, observing that in that case "they have been held entitled to rehear the cause though not parties, *because the decree affected their interest*," and he adds "if the right of a remainderman or a person entitled to the estate in any way is bound by the decree he must have a right to appeal from it, as well as the person against whom it was made."

Judgment.

In *Richmond* v. *Tayleur* (*c*), Lord *Macclesfield* held this language: "If any fraud or surprise upon the Court had been proved, I would have set aside the decree; but on the contrary it appears that the Court was fairly and fully apprised of the case, of the articles, and of the point in question." In *Morrison* v. *Roblin* everything was kept in the dark that did not make for the interest of the plaintiff. *Richmond* v. *Tayleur* was referred to

(*a*) See also Cooper's Eq. Pl. 96-7; Story's Eq. Pl sec. 427.
(*b*) 1 S. & L. 386.
(*c*) 1 P. Wm. 734.

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with approbation by Lord *Hardwicke* in *Barnesley* v. *Powel* (*a*), where he said, "There are several instances of relief, notwithstanding a former decree, if obtained by fraud and imposition, which infects judgments at law and decrees of all Courts, and annuls the whole in the consideration of this Court, as held by Lord *Macclesfield* in *Richmond* v. *Tayleur*."

It may be urged for the defendants in this case, that the subsequent mortgagee did not know, *as a fact*, that the prior mortgagee had the same equity as himself, inasmuch as he did not know what lands *Roblin* had contracted to mortgage to him; and I am not prepared to say that it was a necessary inference from what he did know, that the first mortgagee had the same equity as himself; but he knew that such a claim was made by the prior mortgagee, and that he had instituted a suit to enforce it; and he had reason to believe that the claim was a just one, and wilfully, as I think, abstained from

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inquiry, and withheld from the Court facts which, if disclosed, would have certainly led the Court to institute an inquiry, or to direct that the prior mortgagee should be added as a party, or that the two suits should be brought on for hearing together. If any of these courses had been taken they would have led to the establishment, by the prior mortgagee, of his prior equity, and the Court would not have been surprised into a decree giving the legal estate to the subsequent mortgagee. That the Court would not, with its eyes open, have made such a decree as has been made, I take to be too clear to admit of argument.

The result is, that the legal estate was obtained by fraud, *i. e.*, by a legal fraud, and cannot confer any right upon the party so obtaining it, that can be recognized in a Court of Equity, as a ground for giving him

(*a*) 1 Ves. Sen. 120.

a preference over another, who, but for the decree and the legal estate thereby conferred, would be entitled to a preference over him. 1872. Merchants' Bank of Canada v. Morrison.

In that view the bill need not, I apprehend, be in terms a bill impeaching the decree in *Morrison* v. *Roblin*. The defendant in this suit must rely upon his legal estate; and the Court necessarily sees how that legal estate was acquired, viz., by a legal fraud. The bill shews the necessary facts, and they are undisputed. The defendant's case, founded in a legal fraud, must fail; and the prayer of the bill is appropriate, *i. e.*, that it may be declared that the plaintiff's mortgage forms the first lien and charge upon the premises in question, and is entitled to priority over that of the defendants. Still the pleading is not as distinct as it might be. It does not in terms assert the equity that the decree was obtained by the concealment of facts and the omission of parties, which amount to a *suppressio veri*. It is, I think, a proper case for amendment, if the plaintiffs desire it. It would not be an introduction of new facts, but only placing the plaintiffs' case upon an additional ground of equity, upon the facts already alleged, and could not, I apprehend, be any surprise upon the defendants. Judgment.

I have placed my judgment thus far upon the ground that there was a *suppressio veri*, and so a legal fraud on the part of the plaintiff in *Morrison* v. *Roblin;* but I am of opinion that it is not necessary to go so far. The fact that *The Merchants' Bank* had the prior equity, and that the Court, in ignorance of that fact, made a decree which, taken by itself, displaces that equity is alone, I think, sufficient. The instances put by Lord *Redesdale* in *Giffard* v. *Hort*, of creditors coming in after decree, and of remainder-men and others affected by a decree, seem to rest upon the simple ground that their interests are affected by a decree to which they were not parties, and

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therefore, as put by Lord *Redesdale*, they "must have a right to appeal from it."

The cases referred to may be said to differ from the one before us in this: that in none of them was it in the power of a third party by any act of his to affect their interests, while here it was in the power of *David Allen Roblin*, if his position was that of a mortgagee with the legal estate prior both to *The Merchants' Bank* and *Morrison*, to confer upon whichever he pleased the legal estate. I doubt very much whether such was his position; but assuming that it was, it does not in my opinion at all affect the question as to the correctness of this decree. If he had such a power, he did not exercise it, nor did he by act or language, intimate any desire to exercise it. He stood upon what he set up as his own rights, and when the Court overruled them, his position was that of a passive instrument in the hands of the Court, as to the disposition of the legal estate; and the Court, by its vesting order, gave it to the subsequent incumbrancer. The utmost that I conceive the Court could have done, if it conceded to *David A. Roblin* the position now claimed for him, would have been to abstain from fettering his will as to the disposition of the legal estate; it would not have been actively instrumental in giving it to a puisne incumbrancer, because by doing so it would be making itself the instrument of wrong. As it is, the Court has unconsciously been made the instrument of wrong.

Judgment.

It is only where a party having the legal estate himself exercises his will to give it to a puisne, rather than a prior incumbrancer, that the case of *Marsh* v. *Lee* can apply. The Court itself never does it or directs it to be done, and certainly never would, except when imposed upon or taken by surprise; and when that is the case, the principles to which I have already adverted come in, and the party whose interests are affected is entitled to relief.

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That the Court will not itself do what a party with the legal estate may do, is apparent from the way in which the case of *Marsh* v. *Lee* has been regarded by subsequent Judges. Mr. *Spence* (*a*), in his treatise on Equity Jurisdiction, says that it "has been followed principally, it would seem, on account of the sanction it obtained from the imposing name of Sir *Matthew Hale;* it has often been reflected on as not without great appearance of hardship; it seems reasonable, it has been frequently said, that each mortgagee should be paid according to his priority, and that leaving the second mortgagee to be defeated by a contrivance between the first mortgagee and the third is acting with great severity: the doctrine, therefore, has not been extended to cases which cannot be brought within the reasons on which the judgment in *Marsh* v. *Lee* was founded." I agree entirely in these observations; they are indeed the substance of the language of the Master of the Rolls in *Brace* v. *The Duchess of Marlborough.* (*b*)

Judgment.

The point, too, is very clearly and forcibly put by Mr. Justice *Story:* (*c*) "There is, certainly, great apparent hardship in this rule; for it seems most conformable to natural justice that each mortgagee should, in such a case, be paid according to the order and priority of his incumbrance. The general reasoning, by which this doctrine is maintained, is this: *In æquali jure, melior est conditio possidentis.* Where the equity is equal, the law shall prevail; and he that hath only a title in equity shall not prevail against a title by law and equity in another. But, however correct this reasoning may be when rightly applied, its applicability to the case stated may reasonably be doubted. It is assuming the whole case, to say, that the right is equal, and the equity is equal. The second mortgagee has a

(*a*) Vol. 2, p. 739. (*b*) 2 P. W. 492.
(*c*) E. J. S. 413.

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prior right, and at least an equal equity; and then the rule seems justly to apply, that, where the equities are equal, that title which is prior in time shall prevail: *Qui prior est in tempore, potior est in jure.*"

I think it very clear that the Court would never knowingly lend its aid to such a wrong as is involved in giving the preference to the puisne incumbrancer. The Court has, in this case, unwittingly been made the instrument of such wrong; and I can come to no other conclusion, with great deference to the judgment of my brother *Mowat*, than that a decree obtained as the decree in *Morrison* v. *Roblin* was obtained, cannot be allowed to stand. I think the plaintiffs in this case entitled to relief with costs.

Judgment.

It is right that I should say, though it is perhaps scarcely necessary, that I impute no actual fraud to the plaintiff in the suit of *Morrison* v. *Roblin*. His name was used, as I understand, as the representative of parties having the beneficial interest, and they and their legal advisers, I apprehend, took the course they did, viewing it merely as a race for priority. In this, I think, they were wrong; and I have said already how their proceedings must, in my judgment, be viewed in a Court of Equity.

MOWAT, V. C.—The short facts of this case are, that each of the parties to the suit had an equity in respect of the property in question; that the plaintiffs' equity was first in point of time; but that the defendant's equity was acquired without notice of the plaintiffs' equity; that the defendant subsequently acquired the legal estate; and that he claims to hold the estate so acquired, as a security for his original debt, and for a sum of $150 charged against him as the consideration for the legal estate. In my judgment on the hearing, I held that, the defendant having acquired his original equity without

notice of the plaintiffs' equity, the defendant had, in the eye of this Court, an "equal equity" with the plaintiffs, though it was subsequent in point of time; and that, having such equal equity, he was entitled to avail himself of the legal estate as a *tabula in naufragio*, and to hold it as against the plaintiffs' equity until his whole debt should be paid. The general principles on which I proceeded are not questioned, I believe; but it was contended, that there are circumstances in the case which make those general principles inapplicable to it.

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In weighing those circumstances it is well to reflect a little on the spirit in which they are to be considered. It is proper to remember, that the maxim on which the bank relies, that between equal equities the first in point of time is entitled to priority, is a rule, not of ethics, but of positive law; that, if two equities are really in all other respects equal, and the second equity was obtained without notice of the first, there is no moral obligation upon the holder of the one any more than upon the holder of the other to give way unless the law so requires; and that the honest efforts of the holder of the second charge to get the law in his favor do not necessarily expose him to any just rebuke on the part of the moralist. It is further to be borne in mind, that between rival claimants in courts of common law, priority of contract or other equity is generally disregarded, and that priority of conveyance or legal estate is usually the sole guide; that the maxim as to equal equities is recognized in this Court alone; that numerous exceptions to it are as well recognized here as the maxim itself is; that the possession of the legal estate by a purchaser or mortgagee for value without notice is one of these recognized exceptions; and that, if neither party has the legal estate, it is where "after a close examination of all" other considerations, "there appears nothing to give to the one a better equity than the other, then, and then only,

Judgment.

1872. resort must be had to the maxim, *qui prior est tempore potior est jure;* and priority of time then gives the better equity" (*a*).

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It is proper to remember, also, that the general doctrine on which I proceeded in decreeing for the defendant has been settled and acted upon for two hundred years; that it has been defended by some learned Judges as right, and as founded on correct principles; that Judges who would have preferred a different doctrine have nevertheless acknowledged the obligation of the old rule, and have frankly applied it to every case coming fairly within its principle; and that the doctrine is therefore to be regarded as a settled canon regulating such transactions, and as not now open to question. There are circumstances of difference in every contested case, but the course of the Courts in dealing with the subject did not leave me at liberty to search in the circumstances of the present case for distinctions, unsupported by sufficient authority, in order to escape from the duty of giving the benefit of the doctrine in question to the present defendant; and I thought, as I still think, that Mr. *Morrison* had a right to get the legal estate if he could; and that there was nothing in the position of the person from whom the legal estate came to the defendant, or in the means by which the defendant happens to have obtained the legal estate, or in any of the circumstances of the case, to disentitle him to hold such estate until his mortgage debt and the $150 are fully paid.

Judgment.

The leading case on the general doctrine is *Marsh* v. *Lee* (*b*), where the point decided was, that "if a third mortgagee, having advanced his money without notice of a second mortgage, afterwards buys in a first mortgage or statute, though it be *pendente lite* pending a bill

(*a*) Rice v. Rice, 2 Drew. at 85.
(*b*) 2 Ventr. 337; 1 Wh. & T. L. C. 550.

brought by the second mortgagee to redeem the first; yet the third mortgagee, having obtained the first mortgage or statute, and having the law on his side, and equal equity, he shall thereby squeeze out and gain priority over the second mortgage." That was a decision of Lord Keeper Sir *Orlando Bridgman*, Chief Baron *Hale*, and Justice *Ramsford*. Its correctness was attacked in a subsequent case of *Edmond* v. *Povey* (*a*), before Lord *Keeper North*; and after long debate by counsel the report states, that his Lordship "told them he wondered that counsel laid their shoulders to a point that had been so long since settled and received as the constant course of Chancery." He said that there had been "strong arguments used against the unreasonableness of this practice, and there might be likewise strong reasons brought for the maintaining of it, and so it was at first a case very disputable; but being once solemnly settled, as it was in the case of *Marsh* v. *Lee*, he would not now suffer that point to be stirred."

Judgment.

In *Wortley* v. *Berkhead* (*b*) Lord *Hardwicke* said that *Marsh* v. *Lee* had, he believed, been "rightly settled." He explained the principle to be, that "where there is a legal title and equity of one side, this Court never thought fit that, by reason of a prior equity against a man who had a legal title, that man should be hurt; and this by reason of that force which this Court necessarily and rightly allows to the common law and to legal titles." In *Willoughby* v. *Willoughby* (*c*) the same distinguished Judge discussed the whole law of the subject at great length; and, in the course of his observations, he shewed, that where a subsequent purchaser (or mortgagee) acquires the legal estate, "(a plank by which at law he may save himself from sinking) there can be no ground in *equity or conscience* to take it from him"; and that "this is the meaning of what is

(*a*) 1 Vern. 187. (*b*) 2 Ves. Sen. 571. (*c*) 1. Term. 763.

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generally expressed by saying, that where a man has both law and equity on his side, he shall not be hurt in a Court of Equity. (*a*) * * As he is innocent and has paid or given the value, and has got the law with him, how can a Court of Equity take it from him *without contradicting all their rules?*"

In *Maundrill* v. *Maundrill* (*b*) Lord *Eldon* said, that "it was very early decided, that, if *A.* and *B.* advanced money innocently, and *C.* bought also innocently, not having notice of each other's advances, he who first had the *luck* to get in the legal estate had as good a right as any one, and should hold by his legal title the possession against the prior equities."

In *Carter* v. *Carter* (*c*) the present Lord Chancellor (then Vice Chancellor) pointed out that "there are several cases where the purchaser has been allowed at the last moment, after payment in full, and up to decree, to get in an earlier mortgage; and there is *no breach of duty in a person assigning his mortgage to anybody who pays him. Any purchaser is entitled to hold that which without breach of duty has been conveyed to him.*"

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So, in *Bates* v. *Johnson* (*d*) the same learned Judge said, "that *any person* having an unsatisfied mortgage *or charge* upon real property is at liberty, at any time before decree, to convey the legal estate in the property, in respect of his unsatisfied charge, to any subsequent incumbrancer who may have advanced his money without notice of any intervening or other charge or incumbrance; and, by so doing, may give to that other incumbrancer a right *which this Court cannot take from him*, to insist upon the legal estate, *which, as the Court holds, he has thus properly acquired.*" There the estate of the mortgagor was subject to a prior trust; he

(*a*) Ib. 767.
(*b*) 10 V. at 260.
(*c*) 3 K. & J. at 641.
(*d*) Johns. at 315.

executed two mortgages, fraudulently concealing from the mortgagees the prior trust; the first mortgagee took the legal estate; the second mortgagee, whose charge was equitable only, paid off the prior mortgage pending a suit by the *cestui que trust* for redemption; and he thus got in the legal estate. The Lord Chancellor, with reference to these circumstances, said, that a first mortgagee in such a case was "in the same position as any other unsatisfied mortgagee having notice of a subsequent incumbrance, and has the right to transfer the legal estate so vested in him to *any person* who will pay off his debt. He is not to be fettered or incumbered by any considerations arising out of a trust which he had never undertaken, and of which he was never informed until after he has parted with his money. Having the legal estate in his hands, he is justified in transferring it as he took it from the original mortgagor, and subject only to the equity of redemption limited by his mortgage deed, and may transfer it to the second or the third incumbrancer, as he may see fit. That being the position of the first mortgagee, what is the position of the subsequent mortgagee, who, having like the first advanced his money without notice of any prior trust, obtains from the first that legal estate which the first may thus lawfully convey? *The two positions seem to me correlative.* If the holder of the legal estate can thus lawfully convey it, the party to whom he so conveys it can lawfully avail himself of it for the purpose of repaying to himself every advance which he may have made upon the security of the property without notice of the rights of any other person in priority to his own."

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Judgm. at.

These, and many other authorities, shew (amongst other things) that, where the party holding the legal estate has an unsatisfied charge on the property, the circumstance that both he and the second mortgagee had notice of the prior equitable charge or trust at the

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time of the transfer of the legal estate to the second mortgagee, is wholly immaterial. The legal owner has, notwithstanding, an absolute right so to convey the estate; and the intermediate mortgagee cannot interfere with the exercise of that right, on the ground of his mortgage being of the earlier date; and the transferee to whom the legal estate is conveyed has a right to retain it until his whole debt is paid.

The authorities are clear, also, that this right exists until a decree is made against the second mortgagee settling the priorities (*a*). As to the effect of such a decree, and the reason of it, Lord *Eldon* made the following observations in *Ex parte Knott* (*b*):—"There is no difficulty upon the point as to a decree to settle priorities. After that you cannot tack, certainly, for there is a judgment for the creditors that they shall be paid according to their priorities. But you may, as was held in the House of Lords, up to the time of the decree struggle for the *tabula in naufragio;* and, though the decree is in a sense only a judgment upon the rights as they stood at the time the bill was filed, yet it was decided in that case that until the decree you might do so." The case in the House of Lords to which Lord *Eldon* refers (*c*) was a suit by second mortgagees for redemption; and, the first mortgagee having by his answer, and before assigning to the subsequent mortgagee, submitted to assign his legal security to the plaintiffs, and that the estate should be sold, and all the incumbrancers paid according to their respective priorities, it was argued (unsuccessfully) that, after that submission, he could not assign to the subsequent mortgagee so as to change the priorities. Counsel for the defendant argued in the present case, that the decree made in the original suit of *The Merchants' Bank* v.

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(*a*) See Re Scott's Estates, 14 Ir. Ch. 61. (*b*) 11 Ves. 619.
(*c*) Belcher v. Renforth, 5 Bro. P. C. 292.

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Roblin before the omission of the property from the mortgages had been perceived, prevented any subsequent change of priorities as to this property. But to that contention there appear to be several satisfactory answers. It is sufficient to say briefly, (1) that that suit did not touch the property now in question; (2) that no question of priority of charge on that property did or could arise in the suit; (3) that the present defendant was no party to the suit; and (4) that the decree therein was merely interlocutory, and did not profess to settle any priorities.

Reference was made, on behalf of the Bank, to some of the cases in which one equitable incumbrancer has been said to be entitled to priority over another equitable incumbrancer, because the one had "a better right to call for the legal estate" than the other (*a*). But that "better right" does not depend on mere priority, in point of time, of the two equitable incumbrancers, and does not exist (as appears from the cases which I have already quoted from, as well as many others) as between the holders of two equitable charges the second of which was taken without notice of the first. In such a case, if there are no other circumstances sufficient to make a difference, the equities are considered to be equal, and each incumbrancer has an equal right to get in, if he can, a prior legal charge. The question as to which has the better right to call for the legal estate arises generally where neither party has got in the legal estate; and even in such cases, *Rice* v. *Rice* (*b*) may be referred to as shewing that many circumstances may give to the subsequent incumbrancer a better right to the benefit of the legal estate than a prior equitable incumbrancer possesses.

Judgment.

(*a*) Windham v. Richardson, 2 Ch. Ca. 218; Maundrell v. Maundrell, 5 Ves. 22; S. C. 10 Ves. 371. See Willoughby v. Willoughby, 1 Term. 763; Dart. V. & P. 4 ed. 760.

(*b*) 2 Drew. 73.

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It was suggested for the plaintiffs, that the right claimed by the defendant did not exist because the mortgage to Mr. *Woodruff* was not given to secure a contemporaneous advance, but was for a prior advance made by Mr. *Zimmerman*, whom Mr. *Woodruff* represented as executor or administrator. *Ex parte Knott* (*a*) and *Spencer* v. *Pearson* (*b*) shew that such a circumstance makes no difference on a question like the present.

It was argued, also, that a subsequent mortgagee cannot avail himself of the legal estate unless he acquired it from (as I believe the argument was) one who held the legal estate under an instrument which purported to be a mortgage. But there is no authority for such a contention. The case of a first mortgage is put in the books *exempli gratia* only. But the doctrine is general, and applies even to a statute (*c*). It does not, indeed, authorize a second incumbrancer to possess himself of the legal estate by a conveyance from one who holds it on an express trust for the first incumbrancer (*d*), or perhaps from one who is a dry trustee and has notice of the prior equity (*e*); but this is not either of such cases; and except in such cases the doctrine applies generally. Indeed, a vendor's lien for unpaid purchase money after conveyance is spoken of in the books as an equitable mortgage (*f*); and where he has not conveyed, he has all the rights which he would have had if he had conveyed and taken back a mortgage; and he has probably some additional rights. Among the rights which he certainly has is that of transferring his interest in the property as vendor, subject to the contract; just as a mortgagee has a right to convey his interest subject to the mortgagor's

Judgment.

(*a*) 11 V. 609. (*b*) 24 B. 266.
(*c*) Windham v. Richardson, 3 Ch. Ca. 212; &c.
(*d*) Sugden, V. & P. p. 740. (*e*) Ib.
(*f*) Miller on Eq. Mort. p. 4; Trower on Debtor and Creditor, 342; 1 Hilliard on Mort. 463.

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equity of redemption. The vendor, having this right to convey subject to his contract with the vendee, may undoubtedly make such conveyance to whom he chooses; and if he chooses to make it to the holder of the second of two subsequent incumbrances, I think that this second incumbrancer cannot, consistently with settled authorities, be deprived of any advantage which the legal estate gives him as a security for his whole debt.

If a conveyance by *Clark* the vendor to Mr. *Morrison* would have given the latter the right which he claims, does the circumstance of the legal estate having first gone to *David Allen Roblin*, and from him to Mr. *Morrison*, make any difference? It was said, that the mortgagor could not himself have given the defendant priority by conveying to him the legal estate after the defendant had notice of the prior equitable charge; and that what the mortgagor could not do one of his co-heirs could not do, though a third person might. It may be assumed (*a*), that if the mortgagor himself had obtained the legal estate, a conveyance by him to the second incumbrancer, with notice at the time of the conveyance, could not be made use of by the second incumbrancer against the prior equitable incumbrancer, though Mr. *Dart* expresses doubts on the subject (*b*). But what seems to me clear is, that if heirs are under a like disqualification, it is only to the extent of the interest which they have acquired by law as heirs or devisees of the mortgagor, and that the disqualification does not apply to any interest which comes to one of them by purchase or otherwise. I apprehend that it is perfectly clear that, for example, an estate purchased by an heir with his own money, he having received nothing by descent, would not be available, at the suit of a grantee, vendee, or covenantee of the ancestor, for the fulfilment of the ancestor's obligations.

Judgment.

(*a*) See Wigg v. Wigg, 1 Atk. 382; Davies v. Thomas, 2 Y. & C. Ex. 234; Sharples v. Adams, 32 Beav. at 216. (*b*) p. 760.

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The legal estate here had never been in the ancestor, and he had never entitled himself to it by paying the purchase money; the sum ($150) which *David Allen Roblin* paid to *Clark's* representatives, in consideration of the conveyance, was not the money of *David Allen's* father or of his father's estate; and his father's co-heirs or other representatives could not have got the estate from *David Allen* without repaying to him this money. *David Allen* had the legal estate, and he had in equity this charge on it as against all the world; and the interest, legal and equitable, which he thus possessed he certainly could convey.

It may be observed, too, that his father's interest in the property at the time of his father's death was of no money value, for it was subject to the two mortgages and to the unpaid purchase money; and these debts together exceeded considerably the value of the property. That is the reason for the present controversy. Now,

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in the case of an executor redeeming with his own money goods pledged by the testator, "in case he have no fund as executor, and he advance the money out of his own purse for the redemption, and it be fully equivalent to the value of the chattel, the property is altered by such payment, and shall be vested in the executor as a purchaser in his own right." Where the chattel is worth more than the amount so paid, the difference is assets in equity; but not at law unless the redemption was before forfeiture (*a*). An heir cannot be in a less favorable position than an executor in such a case (*b*); and it is familiar law, that an heir to whom lands come by descent may retain for his own

(*a*) Williams on Executors, 6th ed., p. 1534, and authorities there cited.

(*b*) See McIntyre v. Shaw, 12 Gr. 296; and cases there mentioned. Also Vaughan v. Vanderstegen, 2 Drew. 409; Neesom v. Clarkson, 4 H. at 100.

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specialty debt (*a*); and that, if he pays debts to the full value of the land, he may retain the land (*b*).

It is quite true that *David Allen Roblin*, after having paid the $150 and obtained a conveyance of the land to himself, could claim nothing more against his father's co-heirs than the money so advanced; but that would have been the case with any stranger to whom *Clark* or his heirs had conveyed with notice of the contract with the deceased.

As *David Allen Roblin* was entitled to retain the estate as a security for what he had paid, so he could convey it; the two positions are correlative, as Lord *Hatherley* said in the case of *Bates* v. *Johnson* already cited. *David Allen Roblin* could not effectually transfer to another a greater equitable interest than the $150 (if any equitable interest had remained after satisfying that sum and the mortgage debts); but neither could *Clark* or his heirs have given to a stranger a greater interest; nor can any mortgagee give a greater equitable interest in the mortgaged property than he himself possesses; and yet, if *Clark* had given a deed to the deceased and taken back a mortgage, and had transferred that mortgage to the defendant, it would not be disputed that the defendant might hold the property in the way he now claims. So if, as the law stands, the mortgagor himself, in case he had the legal estate, after having made two mortgages, could not postpone his first mortgage by conveying the legal estate to the second mortgagee, neither could he claim the $150 against either mortgagee. But the son, to the extent of that charge, was not in the same position as his father would have been, and, on the contrary, the son had the same rights as a stranger, and, until the amount

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(*a*) Loomis v. Stotherd, 1 S. & S. 461.
(*b*) 4 Bac. Abr. tit Heir. & Ancester (I.) Bouvier's ed.

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What, then, in view of all these considerations, must be the position of a co-heir in the position of *David Allen Roblin* with reference to the question raised in the present suit? It may be answered in language corresponding with that used by Lord *Hatherley* in *Bates* v. *Johnson* (*a*), and must, I think, be answered in language to the same effect. "Having the legal estate in his hands, he is justified in transferring it as he took it from" his grantor; "and subject only to the equity" which his father's estate has to redeem, if the property had been worth redeeming; and "it appears to me that there is nothing to justify me in holding that" *David Allen Roblin* "could not lawfully part with his legal estate so long as his debt remained unpaid. And he having parted with it, I find nothing on the authorities to authorize me in saying that I am to take the legal estate away from the holder of it until the whole of his debt has been satisfied."

Judgment.

It was contended that the circumstance of the legal estate having come to Mr. *Morrison* under a decree of the Court, makes a difference in favor of the Bank. I respectfully think that if that circumstance makes any difference, it is in favor of the defendant. If according to the decisions it ordinarily (*a*) "depends on the choice or caprice of the owner of the" legal charge, which of the two parties should have the advantage in question, *a fortiori* should the obtaining of the legal estate by a judicial decree, be effective in favor of the party who obtains it.

I find, however, that the Chancellor has arrived at the conclusion that Mr. *Morrison's* omission to make the Bank a party to his suit was a fraud on the Court. That

(*a*) Johns. at p. 319. (*b*) See 9 Bythwood, by Jarman, p. 127.

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ground was not taken by the bill; nor was it advanced in argument, either on the rehearing or when the case was before me. It is of course clear that a judgment or decree obtained by fraud on the Court which pronounced the decree, is not binding (*a*). But the fraud which it is necessary to establish for that purpose is actual or moral fraud; whether by *suggestio falsi* or *suppressio veri* is of course immaterial. The question was fully considered in the late case of *Patch* v. *Ward* (*b*), and it is therefore unnecessary to cite or remark upon previous authorities. In that case Lord Justice *Cairns* made the following observations: "The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject, the Duchess of Kingston's case, where the Judges, being consulted by the House of Lords, replied to one of the questions, 'Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord *Coke* says that it avoids all judicial acts, ecclesiastical or temporal.' The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is, on the part of the person chargeable with it, the *malus animus*, the *mala mens*, putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him." Fraud in that sense is out of the question in the present case. It does not appear that the advantage of getting his decree first had even occurred to Mr. *Morrison* before the decree was obtained; it may be assumed that it had not occurred to the Bank or the advisers of the Bank, either, or Mr. *Morrison* would have been made a party to their bill. But whether the possible advantage had occurred to Mr. *Morrison* or not, it is an advantage which all the authorities for 200 years agree that he had a right to acquire if he could. It was

Judgment.

(*a*) See cases, Kerr on Frauds, 282.
(*b*) L. R. 3 Ch. App. at 206, 207.

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an advantage which his grantor, by a conveyance out of Court, might have given to the defendant without any imputation on either of them of any fraud, actual or constructive; and the order of the Court had no greater effect in giving to the defendant the advantage which he claims, than a conveyance by *David Allen Roblin* out of Court would have done.

Judgment.

I am not prepared to concede that the Court could have held the Bank to be a necessary or proper party to Mr. *Morrison's* suit, if the question had been raised in it; for it is to be remembered, that the evidence which was to establish in Mr. *Morrison's* suit a mistake which entitled him to relief against the defendant *David Allen Roblin*, would not establish the Bank's right to like relief. The two transactions did not occur at the same time; and the case of each mortgagee depended on an entirely distinct and separate agreement, and on the intention of the parties at the time of entering into such separate agreement. But, at all events, each mortgagee chose to litigate the question with *David Allen Roblin*, in the absence of the other mortgagee. To the bill of *The Merchants' Bank*, Mr. *Morrison* was not a party; and he in his turn was not advised to make the Bank a party to his suit. I humbly think that the omission to do so was no fraud, actual or constructive. Thereafter, by superior diligence, or superior good fortune, Mr. *Morrison* had the "luck" (to use Lord *Eldon's* word) to get his decree first, and therefore to get the legal estate. Up to that time *David Allen Roblin* had the power of conveying it to either mortgagee, and I have shewn that neither law nor equity would have interfered, directly or indirectly, with his exercise of that power; it was a matter for his own discretion. He chose not to exercise his power directly, but chose to let the two suits take their course, without setting up in either that he desired both mortgagees to be parties to the same suit. He chose, in effect, to make the conveyance to that one of

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the two mortgagees who should first obtain a decree; and he certainly had a right to do that. It was no larger a right than conveying to either spontaneously would have been. To hold the defendant to have thereby become entitled to the advantage which he now claims is not to extend the equitable doctrine; but is simply to apply it, as I think we are bound to do. The suit and decree were but a mode of conveyance.

The maxim, *actus curiæ neminem gravabit*, was referred to by the plaintiffs' counsel. That maxim is applied where a party dies during a *curia advisari vult*: and the delay has been the act of the Court and not that of the party; in which case judgment is allowed to be entered *nunc pro tunc*; and it is in cases falling within that principle that the maxim is applied (*a*). But where the delay of the Court in giving judgment in one case enables a creditor in another case to obtain his judgment first, the Court does not deprive the latter of that advantage. (I may add that in the present case the delay which enabled Mr. *Morrison* to obtain his decree first, was not the delay of the Court.) There is another legal maxim of much more frequent application in equity than the maxim which I have mentioned. I refer to the maxim, "*vigilantibus non dormientibus jura subveniunt*;" and this maxim is against the Bank, and is the maxim which governs a case of this kind, as the authorities which I have mentioned shew. There is a third maxim, on which the whole case of the Bank as an equitable incumbrancer depends; yet this also is against the Bank on the question of the effect of the defendant's having the legal estate; the defendant obtained his decree and vesting order first, and "*qui prior est tempore potior est jure*" (*b*).

Judgment.

A case identical in principle with the present is

(*a*) Brooms Leg. Maxims, 4 ed. p. 123.

(*b*) See Broom's Legal Maxims p. 345.

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that of a creditor, prior to the Consolidated Statute 29 Victoria chapter 28, section 28, wherever there was a deficiency of assets. In such a case the executor was permitted both at law and in equity to prefer one creditor to another of the same degree before suit; and, on the other hand, one creditor was permitted to obtain a preference over third persons by being the first to obtain a judgment or decree for his debt. In equity, a creditor's suit might be on behalf of all creditors, and then all shared the assets; but a creditor was not bound to take that course, and was guilty of no fraud though he endeavored, by confining the suit in equity to his own debt, to obtain a preference over other creditors (*a*). As the executor might have given to the creditor a preference out of court, so a preference obtained by means of a suit against him was held to stand in the same position. This analogy seems to me conclusive with reference to the objection under consideration.

Judgment.

Finding that the other members of the Court were inclined to take a different view of the case from that on which I acted in giving judgment, I have considered every point again with anxious care, and with the self-distrust which a judge must feel where an opinion of his is not shared by the other members of the Court. But the result of my re-examination of the case has, unfortunately, been only to confirm me in my original opinion; and I confess that, but for the opposite view of the Chancellor and my brother *Strong* (whose opinions are always entitled to great respect), I would still think that the defendant's right to a decree is clear.

I may add that my present judgment assumes that the defendant's mortgage was taken without notice of the plaintiffs' equity, because I believe that on that point

(*a*) See 1 Daul. 4 ed. 228; Wms. on Executors, 6 ed. 967, 1253; and the cases collected. *ib.*

the other members of the Court concur in the opinion which I expressed in my reported judgment (*a*).

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After I had written the greater part of what I have now read, the Chancellor was good enough to refer me to some of the observations which in his judgment he has cited from some text books and reports, and which were not referred to at the bar. I have not thought it necessary to add to my judgment any lengthened remarks on these references. I would merely say that, so far as the observations cited are good law at the present day, they have in my opinion no application to the present case—in which no fraudulent purpose has been proved or can be assumed; and in which, if the parties to the suit in question had been agreed, the whole object and effect of the suit and decree could have been as well accomplished (and, in the view of equity, rightfully accomplished) by the voluntary act of the parties to the suit, out of Court, without the concurrence, or notwithstanding the opposition, of the absent party.

Judgment.

STRONG, V. C.—The proceedings in the suits instituted successively by the defendant and the plaintiffs were not, I think, according to the course of the Court. It is obvious that the ordinary rule as to parties, required that the Bank should have been made defendants to the bill filed by the present defendant, which would have enabled the Court to have settled the rights of all parties in one suit. The omission so to constitute that first suit was, I infer, with the very object of acquiring the legal estate, and with the hope of thereby obtaining that priority which the defendant now claims. I am of opinion, however, that the defendant has failed in this design, and that the decree in the suit of *Morrison* v. *Roblin* has not the effect of giving the defendant the first equity by reason of his having got

(*a*) Ante vol., 8, p. 382.

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in, by means of it, the legal estate. That decree, as regards the present plaintiffs, was "*res inter alios*," and no declaration or direction contained in it or act done in pursuance of it can, upon the plainest principles of justice, affect the Bank. To treat the decree as giving priority to the defendant is to attribute to it a most unjust operation. The Chancellor has pointed out, in the learned judgment which he has just delivered, that a decree which deals with the rights of an absent party, of whose interests the party obtaining the decree is cognizant, may be impeached for fraud. Therefore, to give the decree in question the effect which has been ascribed to it by the decree in this cause, is to impute to it an operation which as regards the present plaintiffs must be fraudulent. I therefore consider the decree in the cause of *Morrison* v. *Roblin* as merely settling the equities between the parties to that suit, and as having no influence whatever on the question of priority between the parties now before the Court.

Judgment.

Had there been a conveyance by the heirs-at-law of *Roblin*, enforced by this decree, instead of a vesting order, I should have been of the same opinion.

Further, I think the maxim invoked by Mr. *Moss*, "*Actus curiæ nemini facit injuriam*" applies, and that neither principle nor authority warrants the Court in giving the same effect to the legal estate acquired *in invitum* by the force and operation of a decree as is given to a legal estate voluntarily conveyed by a prior incumbrancer. I consider such a decision an unauthorized extension of the most harsh and arbitrary rule to be found in the English law of property, a doctrine which ought to have no place in the jurisprudence of a country possessing a general registry law. I do not presume to say this without authority. I am warranted in doing so by the observations of a very great Judge, and one little prone to find fault with existing rules of law,

Lord *Eldon*, in *Maundrell* v. *Maundrell* (*a*) and *ex parte Knott* (*b*).

I also hold the opinion that *David Allen Roblin* was a trustee of the legal estate, bound to deal with it as strictly as his father, one of whose co-heirs he was, would have been bound to do; and if it be true that these mortgagees have the equities which they claim, there can be no doubt but that the legal estate in the mortgagor's hands would have been impressed with an equity—a trust—in favour of the plaintiffs paramount to that claimed by the defendant. It cannot be disputed that, in a case where a man creates successively two equitable charges, retaining the legal estate in his own hands, he is not at liberty to give the subsequent chargee priority by conveying to him the legal estate even though such chargee had no notice of the first charge when he acquired his title. I cannot distinguish the present case from that I have just put. I do not see that *David Allen Roblin* had any better right to a lien for the money he paid the vendor as against these mortgagees than his father could have had. The heir is not compelled to take the estate, if he so elects he can disclaim; but if he does not do so, he takes the estate with all its burthens. Moreover, even if *David Allen Roblin* had been entitled to such a lien, it would have given him no right to deal with the legal estate, in respect of which he was a trustee. A trustee having the legal estate and also a charge in his own favor, is not authorized by reason of the existence of the charge to deal with the legal estate in breach of his trust, and the legal estate so conveyed cannot give priority. I think the case of *Carter* v. *Carter* (*c*) has a direct application here.

Judgment.

Mumford Stokwafser 18 Beav. 555-6 decided since this case was Lefevell M. R.

I am therefore prepared to determine that nothing which has occurred up to the present time has given the defendant priority over the plaintiffs.

(*a*) 10 Vesey 246. (*b*) 11 Vesey 613. (*c*) 3 K. & J.

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But it now becomes important to enquire what are the rights of the plaintiffs as against the defendant. In the cause of *The Merchants' Bank* v. *Roblin*, the decree settled the rights of the parties to that suit by determining as against *Roblin's* heirs, that the plaintiffs' mortgage ought to be rectified by including the unsettled parcels, which were accordingly vested in the plaintiffs. But just as the decree in the suit of *Morrison* v. *Roblin* was "*res inter alios*," as regards the present plaintiffs, so the decree obtained by the latter in no way bound the present defendant, against whom the plaintiffs have never, up to the present time, established that there was in truth any omission of parcels by accident, mistake, or otherwise, from their mortgage. Hence, indeed, arose the necessity for the present suit. In order therefore to entitle themselves to a declaration of priority, it is incumbent on the plaintiffs to prove the mistake which they say occurred in the preparation of their mortgage deed. By consent, the evidence taken in the suit of *The Merchants' Bank* v. *Roblin* has been read in this cause, and by the testimony of Mr. *Bell*, the solicitor who prepared the mortgage to Messrs. *Moffatt & Co.*, the error is very clearly and satisfactorily proved. Mr. *Bell* says: "*Roblin* proposed to give a mortgage on his house at Napanee, and other property; he spoke to me frequently about it:" and again, "The agent and I went to see the house a few days before the mortgage was executed; the agent came to me, and we went down expressly to see what the house was worth, as this was our chief security, whatever belonged to and was part of the house property was to be included. The mortgage was drawn under my immediate observation; it remained in my hands till it was assigned. It was represented to us by *Roblin*, and I believed *Roblin*, that the house was on the property; he gave us the description himself; we would not have thought of taking the property if we had supposed the house had not been on it: the house was the chief security."

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Although no point was made by the defendant's counsel of the Statute of Frauds, and it is not pleaded by the answer, I had some doubts as to the admissibility of parol evidence, and a careful investigation of the authorities has not convinced me that a conveyance can be rectified, by including parcels omitted by mistake, merely on parol proof of an agreement to convey the non-included lands. I incline to think that in such a case the Statute would constitute a defence.

But the evidence here is very different from that which I have just mentioned. Mr. *Bell*, in the passage extracted from his evidence, very distinctly proves that *Roblin* himself pointed out the house as being on the lands mortgaged, and also furnished the description contained in the mortgage deed. It would therefore, upon the clear principle that the Statute cannot be made an instrument of fraud, have been impossible for *Roblin* himself to have set it up as a defence. The authorities upon this are conclusive: *Cass* v. *Waterhouse* (*a*); *Oxwick* v. *Brockett* (*b*); *Calverley* v. *Williams* (*c*). A text writer of authority, Mr. *Dart* (*d*), states the law as follows: "If lands shewn to a purchaser are excepted in the conveyance under a name by which he did not know them, he can claim them in equity. He has also, it would appear, the same rights as respects lands accidentally omitted from the conveyance, *if shewn to him as part of his purchase, or*, if he can prove an agreement for their purchase sufficient within the Statute of Frauds." And Lord *St. Leonards* states the law to the same effect. (*e*)

Judgment.

And if the evidence would have been sufficient against *Roblin*, it must be conclusive against the present defendant, who cannot use the legal estate which he has got in

(*a*) Prec. Chan. 29. (*b*) 1 Eq. Ca. Ab. 355. (*c*) 1 Ves. 210.
(*d*) Vendors and Purchasers, Ed. 4, p. 739.
(*e*) V. & P. 14th ed. p. 826.

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by his decree as a shield, and who though a purchaser for value, has in respect of his equity a priority to be regulated only by the rule "*qui prior est in tempore potior est in jure*," and therefore one to be subordinated to the earlier right of the plaintiffs: *Philips* v. *Philips*. (*a*)

I am of opinion that the plaintiffs are entitled to a decree declaring their priority with costs.

GILLIES v. HOW.

Fraudulent assignment—Lapse of time—Suit by creditor instead of administrator of debtor—Evidence—Estoppel.

In January, 1860, a debtor assigned to certain creditors his interest in land under a contract of purchase: the assignment was made absolute in form so as to deceive and defraud other creditors; but the purpose as between the parties was merely to secure the debt due to the assignees: Shortly afterwards the assignees, with the debtor's consent, had an arbitration with the vendor in respect of the contract, obtained an award for $1,600 in lieu of the land, and received the money. In 1871 a bill was filed by another creditor against the debtor's administrator and the assignees, for payment out of the $1,600, and it was

Held, that the plaintiff was entitled to such payment; that in view of the fraud and trust, the lapse of time was no defence, and that a bill against the assignees by the creditor, instead of by the administrator, was proper.

In a suit by a creditor *A.* and his assignee *B.*, to enforce payment of a debt due by *C.* out of the proceeds of certain property assigned by *C.* to *D.*, it had been declared that the assignments were fraudulent and void against the plaintiffs in the suit:

Held, in another suit by *B.* and his assignee against *D.* and *C.'s* representatives in respect of another debt due by *C.* to *B.*, that, notwithstanding the difference of parties, the decree in the first suit was binding in the second on the question of fraud.

Statement.

The plaintiff *Gillies* recovered judgment against the administrator of *Duncan McAlpine*, deceased, and

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(*a*) 8 Jurist, N. S. p. 145.

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delivered to the proper Sheriff executions against the lands and goods of the deceased in the hands of the administrator. The other plaintiff was the assignee of the judgment. The object of the bill was to obtain payment from the defendants, *William How*, the younger, *Edward How* and *George How*.

The deceased debtor had contracted for the purchase of some land from one Mrs. *Achsa Ann Forrester*. This contract he assigned twice to the defendants *How* absolutely. The first of the two assignments was in 1857, and was accompanied by a memorandum, under the hands of the *Hows*, shewing the assignment to be a security only. The second assignment was in 1860, and was not accompanied by any such memorandum; but the bill alleged that this assignment was, notwithstanding, intended, like the previous assignment, not as an absolute transfer for the benefit of the *Hows*, but only as a security for the debt due to them; and that subject thereto the assignment was in trust for the assignor. The bill further alleged that the reason for not expressing the trust in either assignment, was to deceive and defraud the other creditors of the assignor. Shortly after the second assignment, the *Hows*, with the concurrence of the assignor, had an arbitration with Mrs. *Forrester* in regard to her liability for breach of the contract. The result of the arbitration was an award for $1,600 in favor of the *Hows*; and they recovered the money.

Statement.

In 1861 one *Worts*, a registered judgment creditor of *McAlpine*, filed his bill for payment of his debt; and he therein, amongst other things, impeached the assignments to the *Hows* as fraudulent against *McAlpine's* creditors. The present plaintiff *Gillies* afterwards purchased *Worts's* judgment, and became a co-plaintiff. On the 10th March, 1869, the present Chancellor, then Vice Chancellor *Spragge*, made a decree in that suit, declaring

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the assignments to be fraudulent and void against the plaintiffs, *Worts* and *Gillies*, as creditors of *McAlpine*; directing an account of what was due in respect of *Worts's* judgment; and ordering the *Hows* to pay the amount out of the money received by them from Mrs. *Forrester*. The decree did not direct an account or payment of other debts. The cause was afterwards reheard; and on the rehearing it appeared, that the judgment had been registered before either of the impeached assignments took place, and that the plaintiffs had a lien on *McAlpine's* interest in the property in priority to the assignments, even if the assignments were valid. The Court, therefore, did not find it necessary to consider, and did not consider the question of fraud. The order as drawn up, however, was a simple affirmance of the decree.

Statement.

Before that suit had gone to a hearing, *McAlpine's* administrator filed a bill claiming from the *Hows* the surplus of the money recovered from Mrs. *Forrester* over and above the debt due by *McAlpine* to them. The *Hows* set up that the second assignment was an absolute sale; but the decree there was for the defendants, chiefly on the ground that if the assignment was not intended to be absolute, that form had been adopted to deceive and defraud *McAlpine's* creditors (*a*), and that the administrator could not set up the fraud. There was afterwards an award between *McAlpine's* administrator and the *Hows;* and the arbitrator's award was based on the same view.

The plaintiffs in the present suit set up the fraud, claimed that it was sufficiently established by the evidence in the suit of *Worts* v. *How;* and claimed also that the decree in that suit estopped the defendants from now denying the fraud. The evidence in the suit of *Worts* v. *How* was read by consent; no other evidence on the question of fraud was given.

(*a*) See McAlpine v. How, 9 Gr. 372.

Mr. *Hodgins*, for the plaintiffs.

Mr. *Crooks*, Q. C., for the defendants.

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Jan. 10th.

MOWAT, V. C.—Feeling that whatever independent view I might be led to take of the evidence, I could not, sitting as a single Judge, adopt an opposite conclusion on it to that arrived at by the learned Judge who had taken the evidence; I declined to hear any argument on that evidence; leaving it to the parties to bring the case before the three Judges, if the defendants should be advised that sufficient appeared to induce the Court on a rehearing to take a different view from that of the learned Judge. But the decree in that suit seems technically binding in this suit (*a*); for, though the Judges did not pronounce any opinion on the question of fraud, still, the decree on rehearing does not purport to alter that part of the Vice Chancellor's decree which declared the assignments to be fraudulent against *Worts* and *Gillies* as creditors. If the defendants desire to bring the question of fraud before the three Judges in the present suit, their counsel will probably have to consider how the difficulty from the form of the decree in the other suit is to be got rid of.

Judgment.

The defendants' counsel contended that the time which had elapsed before the filing of the present bill (27th January, 1871,) is a bar to the suit. But this lapse of time is immaterial on the assumption that the impeached transactions were fraudulent, and that as between the parties to them there was a trust agreed upon, which *McAlpine's* creditors have a right to enforce, though, on grounds of public policy, he himself may not have had that right. Either of the elements of fraud and trust, which belong to the transaction according to

(*a*) See Coke v. Fountain, I Vern. 413; Nevil v. Johnson, 2 *ib.* 447; Askew v. Poulterers' Co. 2 Ves. Sen. 89, 90; Bolt's Supp. 299; Blakemore v. Glamorgan Canal Co., 2 C. M. & R. 133; &c.

1872. Gillies v. How. the judgment of the Chancellor in *Worts* v. *How*, is a sufficient answer to this defence, even assuming that the transaction is to be treated as one affecting personalty. Besides the cases cited to me on this point, I refer to those collected in Messrs. *Darby* and *Bosanquet's* Treatise, part 4, cap. 2 (*a*).

The learned counsel for the defendants further contended that the suit should be by the administrator. But, as the Court decided in *McAlpine* v. *How* that the fraud cannot be set up by the administrator, I must assume that a suit by the creditors themselves is not only open to them but is their only remedy.

Judgment. My decree must be for the plaintiffs, with costs against the *Hows*. I presume that no reference will be necessary.

Feb. 3rd. The defendants afterwards moved to vary the minutes by giving to the defendants a right to retain their debt out of the $1600, and limiting the plaintiffs' right to the residue.

Attorney General *Crooks* and Mr. *J. Hoskin*, for the motion, argued that the second assignment alone could be regarded as fraudulent and void against the plaintiffs; as a memorandum had accompanied the first assignment shewing this assignment was a security, and fraud was therefore out of the question.

Mr. *Hodgins*, contra.

The Vice Chancellor held that, the decree in *Worts* v. *How* having expressly declared both assignments to be fraudulent and void against the plaintiffs therein, the point was not open to consideration in this suit as long as that decree stood.

Motion refused.

(*a*) p. 182 et seq.

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WALKER v. WALKER.

Husband and wife—Separation deed—Covenant for payment of annuity to wife.

An unqualified covenant in a separation deed for payment of an annuity to the wife for her life, is not avoided by the subsequent reconciliation of the parties; or by the wife's leaving her husband afterwards without cause.

Demurrer to bill.

The bill was by a husband against his wife and a trustee of a postnuptial settlement executed by the husband on the 11th of October, 1867.

By this settlement, after reciting that unhappy differences had arisen between the husband and wife, that the wife had filed a bill in this Court for alimony, that they had mutually agreed to live separate for the remainder of their natural lives, that the husband had agreed to pay to the trustee for and towards the support and maintenance of the wife $80 a year, and to charge the same on certain land thereinafter described; and that the wife had agreed to accept this annuity in full satisfaction of her claims, and to put an end to the suit; the husband covenanted to allow the wife to live separate; not to molest her; to pay the annuity for and during her natural life by the instalments therein mentioned; and the trustee covenanted to indemnify the husband in respect of any debts contracted by his wife; the husband conveyed to the trustee certain land, and charged the same with the annuity to be paid by himself, his heirs, executors or administrators. Statement.

And it was thereby declared and agreed that the said property should not be transferred or conveyed back to the husband or to his heirs, executors, administrators, or assigns, during the natural life of the wife unless compelled so to do by the Court of Chancery, and then at

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the cost and expense of the husband, his heirs, and assigns; but the same should remain chargeable as aforesaid with the said annuity during the natural life of the wife. It was also provided that, in case of the trustee's death, resignation or incapacity, the wife should name a new trustee in his place; and that she might at any time apply to the Court of Chancery for the removal of the trustee for the time being, and for the appointment of a new trustee in his place, at the husband's expense.

The bill stated, that shortly after the execution and registration of the deed the parties became reconciled; that the wife lived and co-habited with the husband for about a year and a half thereafter; but that, on the 2nd of July, 1869, she, without any just cause or provocation, deserted and left the plaintiff, and had lived separate from him ever since, and that she refused to live or co-habit with him any more; and the plaintiff claimed that under these circumstances he was entitled to a reconveyance of the property, and a discharge of his obligations under the deed.

By consent, the deed was read as part of the bill, instead of the statements which the bill contained as to the terms of the instrument.

The defendant demurred for want of equity.

Mr. *James Maclennan*, for the demurrer.

Mr. *Snelling*, contra.

Judgment. Jan. 10th.

MOWAT, V. C.—The first question argued was, whether the reconciliation and cohabitation after the making of the deed avoided the deed. I have looked into all the cases cited and some others. In several of the cases the general doctrine is said to be, that reconciliation puts an

end to a deed of separation—to the whole of the deed (*a*); and I was referred to a passage in Mr. *Jacob's* notes to *Roper* on Husband and Wife (*b*), published in 1826, and in *Bright* on Husband and Wife, (*c*) published December, 1848, stating, that "since a reconciliation in general avoids the deed, it makes no difference in substance in this respect, whether it be framed with a view to a separation during life, or to a separation until the parties shall agree to co-habit." But the later authorities have established a somewhat different doctrine; and to reconcile these with other cases which contain observations appearing to countenance the doctrine contended for by the plaintiff's counsel, it is necessary that the cases which he relied on should be read in connection with the particular facts of those cases.

In *Byrne* v. *Carew* (*d*), a case decided in 1849, Lord Chancellor *Brady* suggested, that the way to reconcile the authorities as they stood then was this:—He said that "a provision for payment during the separation will be set aside by a reconciliation and not set up again, and a clause to revive it on a second separation is invalid; but if the parties being about to separate provide for payment during separation and also that, though they should be afterwards reconciled, yet the payment shall continue throughout, that is legal." The provision in *Byrne* v. *Carew* was for the lady's life; and his lordship treated this as lasting "for the entire of the lady's lifetime, whether she should be living separate from or along with her husband." The question was, whether the deed was valid; and against its validity it was contended, that the deed in effect provided for a future separation; the general rule being that a contract providing for future, as distinguished from a present separation is not valid. But he

Judgment.

(*a*) See Westmeath v. Westmeath, 5 Bli. N. S. at 385; Bateman v. Ross, 1 Dow. at 245; &c.

(*b*) Vol. 2, p. 273. (*c*) Vol. 2, p. 320. (*d*) 13 Ir. Eq. at p. 91.

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met the objection by holding that "she is to have the annuity at all events, and at once, and therefore it should have a contrary effect; for, having this provision while she lives with her husband and is maintained by him, and only the same provision if she leaves him and has to support herself, she must be a loser by leaving him." It is clear that there is no illegality in a husband making a postnuptial settlement on his wife, and giving her thereby a separate provision for her life; and Lord Chancellor *Brady* held that such a voluntary deed was valid, though the occasion of it was unhappy differences and an agreement to live apart.

The subsequent case of *Randall* v. *Gould* (*a*) is quite in point as to the effect of reconciliation after a deed like the present. That was an action on a separation deed, whereby the husband had agreed to pay to the plaintiff during her life 10s. weekly, provided that, in case the husband and wife should by writing under their hands agree to cohabit, and should cohabit for one month next thereafter, the deed should be void. They did cohabit afterwards for more than a month, but had not by writing agreed to do so as the deed stipulated for. The following was the judgment of the Court:—

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"The cohabitation clearly does not avoid the deed under the express proviso. The question then arises, whether a deed so framed is impliedly avoided by such cohabitation. * * If there had been no express proviso for avoiding the deed in a certain manner, we are of opinion that, looking to the whole scope of this deed, the covenant to pay the weekly allowance would not have been avoided by the reconciliation and cohabitation of the husband and wife. It is not merely an allowance to her while she lives separate from her husband; it was absolutely to be paid to her by way of

(*a*) 8 El. & Bl. 457.

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a provision during the term of her natural life; not being suspended or reviving as she should live with him or leave him. It is therefore a postnuptial settlement upon her by her husband, holding out no temptation to her to separate from him; and it is as little liable to exception as a covenant to pay pin money in a regular marriage settlement. *Jee* v. *Thurlow* (*a*), *Wilson* v. *Mushett* (*b*), and *Webster* v. *Webster* (*c*), are express authorities in support of the view we have taken of this case."

Randall v. *Gould* was recognized by the Court of Common Pleas in this Province in *McArthur* v. *Webb* (*d*), and its authority was one of the grounds on which the Court there adjudged against the husband. These authorities establish that reconciliation does not avoid a separation deed such as that in question before me.

Judgment.

Plaintiff's counsel relied, also, on the charges in the bill, as to the wife having after the reconciliation left her husband again without any just cause. For part of his argument he cited no authority whatever; and the cases, which shew that a deed of this kind is not put an end to by a reconciliation, proceed on a principle which shews equally, that her subsequent desertion has no such effect, viz., that the covenant is absolute to pay for life, and that such a covenant is perfectly legal. In *Field* v. *Serres* (*e*) it was decided that, even a wife's adultery was no bar to an action on the husband's bond given after marriage to secure an annuity to the wife for her maintenance; and in *Jee* v. *Thurlow* (*f*) Lord *Tenterden* stated the ground of that decision to have been, "that, if the husband, when executing such a

(*a*) 2 B. & C. 547.
(*b*) 8 B. & Adol. 743.
(*c*) 1 Sm. & G. 489; S. C. 4 D. M. & G. 437.
(*d*) 21 U. C. C. P. 358.
(*e*) 1 N. R. 121.
(*f*) 2 B. & C. 547.

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deed as this, thinks proper to enter into an unqualified covenant, he must be bound by it." The Court, accordingly, in *Jee* v. *Thurlow*, followed the previous decision, notwithstanding the additional circumstance in the later case that the husband had obtained a decree *a mensa et thoro* by reason of the wife's adultery. Nothing like adultery is charged in the present case.

The plaintiff's counsel further relied on the covenant, that the property was not to be restored to the husband without the decree of this Court. That covenant appears to have been introduced for the security of the wife, and perhaps also of the trustee; and certainly does not entitle the plaintiff or his heirs to get back the property without shewing and proving a case which would by law entitle him to get it back. The object seems to have been, to take from the trustee all discretion on the subject, by providing that, in case the question of a reconveyance arose, he was not to be bound, or even at liberty, to decide the question, but was to retain the property until this Court should order him to reconvey it.

Judgment.

On the whole, I am clear that the demurrer must be allowed with costs.

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THE ERIE AND NIAGARA RAILWAY COMPANY v. THE GREAT WESTERN RAILWAY COMPANY.

Railway Company—Superfluous lands.

The rule that railway companies, when acting in good faith, are the best judges of what lands &c., are required for the railway does not apply in a proceeding by a creditor against the company; in such a case the Court is the proper authority to determine that point.

The Court in such a case ordered a reference to the Master to inquire whether the company held any lands which were superfluous or not necessary for the use of the company; but the company were declared entitled to retain for their use a gravel pit, obtained under the compulsory powers in their act, with necessary approaches thereto; and also to sufficient land for the erection of offices for the management of the business of the company.

This was a motion on petition by the defendants for an order declaring certain lands, set forth in the petition as belonging to the plaintiffs to be superfluous or surplus of the plaintiffs' company and directing a sale thereof for payment of the amount found due, on taking of the accounts, from the plaintiffs to the defendants; or for an order directing an inquiry as to the same. Statement.

Mr. *S. Blake*, in support of the motion, contended that whatever lands were held by *The Erie and Niagara Railway Company* beyond those actually required for the use of the company in running the road were superfluous, and as such liable to be sold for payment of the debts of the company.

The plaintiffs here are bound to shew that these lands are indispensible to the proper carrying on of the undertaking, just as an insolvent would be bound to prove that certain of his effects were exempt from seizure. Here the plaintiffs seek to exempt certain of these lands as containing a gravel pit, and which it is alleged is used by them in ballasting and repairing the road, without shewing that gravel could not be procured

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elsewhere. As well might it be said in such a case that a railway company would be entitled to retain a lot containing an oil well, a paint bed, an iron mine, or timber pit for the uses of the company, because it might with equal truth be contended that these several commodities were indispensible for the proper working and repairing of the road.

Mr. *Crooks*, Q. C., contra. The rule enunciated by English Judges is, that unless a railway company is acting *mala fide* the company must always be the best judge of what is required for the proper carrying of the undertaking.

The gravel pit sought now to be sold it is shewn, by the sworn statements in the cause, is indispensible for the proper maintenance of the road; for the ballasting and otherwise keeping it in repair. And it is also shewn that this is the only gravel pit obtainable near the road along the whole line of railway. An attempt has been made in taking evidence on the present application to shew that the ballasting could be as effectually done with sand as gravel; but this is entirely negatived by the evidence; as it is established that sand injures the road by rotting the ties; and renders the road so dusty as to interfere most injuriously with the comfort of those travelling on it.

Jan. 24.

SPRAGGE, C.—The defendants, *The Great Western Railway Company*, are creditors of the plaintiffs.

Judgment.

The decree referred it to the Master at Hamilton to inquire and state whether the plaintiffs have any lands which are not used or required for the purposes of their railway, and are liable for sale under execution; and ordered that such lands, if any, should be sold in default of payment. The decree on further directions changes the phrascology in this, that it orders that "the superfluous lands" of the plaintiffs be sold under the direction of the Master.

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The president of the plaintiffs' company carried into the Master's office a statement of lands which he conceived to be superfluous lands. The petition now presented states that there are other lands besides those mentioned in the president's statement, which are superfluous and which ought to be sold.

It is objected first, that this is asking a new reference in respect of that which has been already reported upon. I do not think it lies in the mouth of the plaintiffs to make this objection, if in fact there are superfluous lands. It amounts to saying you ought not to have believed our sworn statement. The solicitor for the defendants' company swore that he was not aware till after the report, and not until recently, that the plaintiffs possessed the lands now in question.

The inquiry then is, whether the lands, for the sale of which the petition asks for an order, are not used or required for the purposes of the plaintiffs' railway, which are, as interpreted by the order on further directions, superfluous lands.

Judgment.

There are two parcels to which the petition applies; one which is called, sub-division lots 3 and 4, which the plaintiffs seek to protect as a gravel pit, necessary for the maintenance of their road; and a parcel of land in the village of Fort Erie, upon which is erected a building intended for the offices of the company.

Lots 3 and 4, with lots 1 and 2 adjoining them, were purchased by the plaintiffs' company together, and formed part of a parcel of 93½ acres in the township of Stamford. Lots 1 and 2 were admitted by the plaintiffs, in the Master's office, to be superfluous lands, and were comprised in their statement of lands of that character. The question is as to lots 3 and 4, and also as to the Fort Erie lot.

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Under the Fort Erie Railway Act of 1863, the company are empowered to acquire lands containing gravel beds, for the repairing and maintaining as well as the construction of the railway. There are cases which decide that railway companies cannot, under their ordinary powers, take land for the mere purpose of getting materials for the construction of their railway; and the provision in the Act of 1863, to which I have been referred, may probably have been introduced to meet that difficulty, and is some indication of the opinion of the Legislature that gravel was necessary for the proper construction of this road: otherwise the Legislature, by giving compulsory powers to the company, was interfering with private rights unnecessarily. Mr. *Blake* argues that gravel beds stand upon the same footing as any other lands producing articles necessary for the use of the railway, *e. g.*, oil lands, lands having timber suitable for ties, iron mines, and the like. I think there is this distinction, that for these several things the company may go into the market, while for gravel they cannot do so; in this instance, at any rate, for it is in evidence that it is the only gravel bed accessible to this road. It is suggested that the road might be ballasted without gravel—that sand might be used. The answer is (and that upon evidence), that sand rots the ties and creates dust. I agree that this company is in the position of a debtor unable to pay his debts; and that they must shew a *necessity* for the retention of this gravel bed, in order to the due working of their railway. I think they do shew that gravel is a necessary material, because the other material suggested—sand—is unsuitable; and they shew that there is no other place available to them from which this necessary material can be procured. I have gone into the question of the necessity of this material because, looking at the position of this company, I am not prepared to say that the statutory power to acquire gravel beds would be, by itself, an answer to this application.

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Again, looking at the position of the company, they should be restricted to so much of this land as consists of gravel bed, and of the necessary approaches thereto, for the purposes of the company; as to which there must be an inquiry: the rest, if there is any residue, which upon the evidence I take it that there will be, must be sold as superfluous.

There must also be an inquiry as to the lots in the village of Fort Erie. Offices are necessary for the conduct of the business of the company. Offices were built on the land in question; and only were disused or partially used, while the railway was under lease to another company. Sufficient offices with safes are indispensable, and there must be sufficient land for light and for out offices. The company may have more land than is necessary. I cannot say from the evidence that they have not.

Judgment.

The cases in which it is said that provided there is *bona fides* in railway companies, they are the judges of what is necessary for the purposes of their railway; and the Court will not overrule their judgment, stand upon a different footing from this case. In this case which is not a case between a railway company and the proprietor of land; but between a creditor of the company and the company as a debtor, it is the very question that must be decided by the Court. In this case, indeed, the question has been decided in effect by the reference to the Master: the Court has taken upon itself to ascertain by its officer, whether the company has any superfluous lands, and it is not open to the company now to say that the Court will not take upon itself to determine that question.

As to costs, if the Master shall find that any substantial portion of the lands in question, is superfluous, the Erie and Niagara railway company should pay the

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costs and this by reason of their omission to carry in an account of such portion or portions into the Master's office; thus seeking to keep back from their creditors land which should have been disclosed to them as properly exigible for the satisfaction of their debt. But if nothing has been kept back, the costs should be paid by the defendants. By costs, I mean the costs of this application, and of the inquiry that I have directed. This is in effect making the costs, costs in the cause. I would reserve the costs, but for the additional expense. The only reason for reserving the costs would be, that a question might arise as to whether what the Master may find to be superfluous, in case of his finding any superfluous, would be substantial in quantity or value. The costs will be as I have indicated above; but either party is to be at liberty to apply in regard to them.

Judgment.

Box v. The Provincial Insurance Company.

Appeal order—Interest.

Where the Court of Appeal orders payment of money, and says nothing as to any antecedent interest thereon, such interest cannot afterwards be added by the Court of Chancery; at all events, in cases in which, though interest is usually given, it was not a matter of strict legal right but of discretion.

The Court of Appeal (ante volume xviii. page 280) by its order in this case, as drawn up, declared "that the plaintiff had an insurable interest in whatever wheat (if any) stored in the storehouse of *Robert Todd* in the pleadings mentioned, would be applicable, under the receipt in the pleadings referred to, to the fulfilment or satisfaction of the appellants' purchase from the said *Todd*; and with this declaration it (was) ordered that the cause be remitted back to the Court of Chancery to ascertain the same; and, in the event

of its appearing that there was any wheat so applicable, the respondents (were ordered to) pay to the appellants the value thereof, not exceeding the sum of $5000, together with the costs of this suit," &c. On the 24th of February, 1870, the order in Appeal was made an order of this Court; and on the 20th of April, 1870, a further order was made in this Court referring it to the Master at Stratford to ascertain and report what wheat, if any, was stored and applicable as specified in the order of the Court of Appeal. On the 2nd of December, 1870, the Master made his report finding, that the plaintiff had 3,500 bushels of wheat stored and applicable as mentioned, and that the value thereof at the time of the fire was $4,650. In this report the defendants acquiesced; and the case came on for further directions on the 31st of January, 1872.

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Mr. *S. Blake*, for the plaintiffs, asked that the decree now to be made should direct the payment of the amount found by the report, with interest from sixty days after notice of the loss to the company.

Mr. *Meyers*, for the defendants, objected to interest being allowed from an earlier date than the date of the Master's report, as that was the first date it could be said the amount of loss was ascertained, and the order of the Court of Appeal had not given interest.

The authorities referred to are stated in the judgment.

MOWAT, V. C.—On further directions counsel for the plaintiffs claimed to be entitled to interest from the 17th of May, 1867; that date being sixty days after the fire. The difficulty in their way is, that the order of the Court of Appeal says nothing of interest.

Feb. 8th.

It has, no doubt, been customary for this Court to give interest on money recovered against an insurance

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company; and a jury at law is entitled to give interest in like cases; but it is a matter for the discretion of the jury; the statute (*a*) having expressly provided that the jury "in actions on policies of insurance *may* give interest over and above the money recoverable thereon."

Rodger v. *The Comptoir D'Escompte de Paris* (*b*) was referred to on the part of the plaintiffs. There a judgment had been recovered against the appellants in the Supreme Court at Hong Kong; and the amount had been paid by them. The Privy Council afterwards reversed the judgment, and directed a non-suit to be entered "whereof the Governor, &c., were to take notice and govern themselves accordingly." On this order the appellants applied to the Court at Hong Kong for an order for repayment of the money which they had paid, with interest thereon. The Court made the order as to principal, but held that the appellants were not entitled to the interest. On a second appeal to the Privy Council, the latter part of this determination was reversed, on the ground that it was the duty of all Courts to take care that the act of the Court does no injury to suitors; and that if the appellants were not allowed interest on what the Court had erroneously compelled them to pay, grave injury would be done to them; they would "by reason of an act of the Court have paid a sum which it was now ascertained was ordered to be paid by mistake and wrongfully," and they would be getting it back "without the ordinary fruits which are derived from the enjoyment of money." I think that that case has no application to the present. The order of the Privy Council did not order payment of either principal or interest; and the question, therefore, as to the effect of an order in appeal which expressly directs payment of principal did not arise. The Court at Hong Kong

Judgment.

(*a*) 7 W. 4 c. 3. sec. 21; Consol. U. C. Ch. 43 sec. 3; Imperial Stat. 3 and 4 Wm. IV., ch. 42 sec. 29.

(*b*) L. R. 3 Privy Council, 466.

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acknowledged that without any express decision from the Privy Council the appellants were entitled to restitution of the principal, but held that they were not entitled to interest thereon. The Privy Council decided otherwise. By its first order the Privy Council had dealt with the case as it stood when the judgment appealed from was pronounced; the question as to restitution arose from matter subsequent, and the Privy Council did not on the first appeal profess to deal with that question to any extent.

But the present case is not one of restitution at all. The Court of Appeal had before it the facts on which the plaintiffs' right to interest as well as principal depended; in my judgment on the rehearing I had mentioned the matter of interest; but none of the Appeal Judges in their judgments said any thing as to interest; and the order which the plaintiffs procured to be drawn and which they accepted named principal only. It is impossible to say that, wherever the Court of Appeal expressly directs payment of money this Court has power to add interest from the time at which the cause of suit accrued. I think that the reverse is the correct rule; and that this Court must assume in such cases that the Court of Appeal intended the defendants to pay principal only; at all events, if antecedent interest, though usually given, was a matter of discretion, and not a strict legal right.

Judgment.

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MARA v. FITZGERALD.

Specific performance—Tenant for a year.

This Court will not entertain a bill for the specific performance of a contract for a lease of real estate for a year; and where a tenant in possession contracted to assign his possession and with it his right to a renewal of his term for a year, the Court refused to specifically perform the agreement; the remedy at law being sufficient.

Statement.

The bill stated that the plaintiff was lessee of an office on Church Street, in the City of Toronto, and in possession thereof, using the same as an office for carrying on his business of a real estate agent; and such possesion was valuable to him for such purpose, and that his lessor had, at the request of the plaintiff, promised him a further lease of the premises; and that he would not lease the same to any other person, if plaintiff desired to continue lessee thereof: that the defendants, in May, 1871, applied to the lessor for a lease to them of the premises upon the expiration of plaintiff's lease, which would be on the 30th August then next ensuing; but which request of the defendant the lessor refused to comply with, assigning as a reason for such refusal his previous promise to the plaintiff; expressing at the same time his willingness to grant the defendants such lease if they could obtain the consent of plaintiff thereto, and procure him to relinquish his prior right to such lease; whereupon defendants applied to plaintiff for a relinquishment of his said right, and on the 27th July, 1871, an agreement in writing was entered into and signed by plaintiff and defendants, whereby they agreed to pay plaintiff $300 on condition of plaintiff vacating and giving full possession to them of the said premises, on the 1st September following, and the plaintiff agreed to deliver up such possession on that day: that this agreement was intended and understood between the plaintiff and defendants as being a relinquishment of

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the plaintiff's right to a further lease, and an assent on his part to the defendants' obtaining a lease from the lessor; and that immediately thereafter the defendants applied to, and obtained from, the lessor a binding agreement for a lease of the said premises to them, commencing on the said 1st September.

The bill further stated that the plaintiff was ready and willing to give up possession of the premises to the defendants on the 1st of September, and on that day tendered possession to the defendants, but they requested him to retain the same for a few days longer, as they were not ready to go into possession; and they expressly waived and released the plaintiff from the condition of the agreement requiring him to deliver possession on that day: that on the 9th September plaintiff delivered up full possession of the premises to the defendants, who assumed possession thereof.

Statement.

The bill then alleged applications to defendants to pay the sum of $300, as agreed upon, which was refused; and submitted that the agreement had been "so partly performed as to entitle him to have the same fully performed, and to payment of the sum of $300 with interest," and that by reason of the condition of the agreement not having bee[illegible]rictly complied with by the plaintiff, he was without remedy upon such agreement, except in this Court; and prayed specific performance by the defendants; the plaintiff having fully performed the same on his part, "and that the plaintiff may be paid the said sum of $300 with interest, and the costs of this suit."

The defendants filed a demurrer for want of equity.

Mr. *Ferguson*, for the demurrer. The facts stated in the bill shew that plaintiff has a complete remedy at law; the allegation of plaintiff having tendered the

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possession being sufficient to enable him to recover the consideration money in a Court of law, if the allegation was substantiated upon a trial there; besides, this Court will not entertain a suit to enforce an agreement for a lease for one year. In reality this is nothing more than an action to recover in this Court judgment for $300, which is properly recoverable in a Court of law.

Mr. *George Kerr*, Jun., and Mr. *C. Moss*, contra. The agreement being for an interest in land, is sufficient to attract the jurisdiction of this Court; and the fact that the plaintiff had not fully performed the agreement on his part, prevented the plaintiff recovering at law.

Feb. 8th.

Judgment.

STRONG, V. C.—Putting the case as high as possible for the plaintiff (and on demurrer the intendment ought to be against him), the allegations of the bill amount to nothing more than this, that the plaintiff having the possession agreed to deliver it up at the end of his term to the defendants, and also agreed to sell to them the option which he had acquired from the lessor of a renewal for a year, in consideration of $300 to be paid to him by the defendants.

It is adopting a construction very favorable to the plaintiff to say that the allegation of the option is sufficient, for it is very informally stated, and it is not shewn to have been in writing, signed by the landlord; further, the contract in terms does not include the option, but is restricted to a purchase of the possession only. But I will consider the case as if the option had been given by an instrument signed by the landlord and had been expressly included in the agreement between the parties.

This is not a contract which the Court would have decreed the execution of, at the instance of the defend-

ants. *Clayton* v. *Illingworth* (*a*), shews that a contract to grant a lease for a year will not be carried into execution; and if that is so, certainly an agreement for the sale of an option to take such a lease will not be performed. And the same authority shews that a contract for the purchase of the mere precarious occupation of a tenant by sufferance ought not to be enforced by decree. There is therefore a want of mutuality which is always fatal to a suit for specific performance.

Further, would it not be inconsistent with good policy, that the Court should interfere in the case of the sale of such a possession. In the absence of authority to the contrary, I am inclined to think it would, as being in the nature of a fraud on the landlord's right, though I need not rest my decision on that ground.

Judgment.

It is however said that the statement contained in the 9th paragraph of the bill shews that there is no remedy at law. But granting that, it forms no foundation for the jurisdiction; for if the subject matter of a contract is such as to make it not proper for specific performance, it can make no difference that the agreement not complying with the Statute of Frauds, has been partly performed. If it were the case that the Court would entertain jurisdiction in such a case, then wherever there was part performance, even though the contract related to a subject to which where the agreement is legally sufficient, the decree of the Court is never applied, the contract might be enforced in equity. This would be an anomalous doctrine; and it appears from the authorities that it is not the law. (*b*) But although, in my opinion, it can make no difference, it does not appear from paragraph 9, which states that the plaintiff tendered possession on 1st September, but

(*a*) 10 Hare, 451.

(*b*) Kirk v. Bromley Union, 2 Ph. 640; Fry on S. P. pp. 178–179.

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The new agreement is totally invalid at law, and there was a sufficient offer of possession on the day fixed by the written agreement to operate as a performance of it. (*a*)

Demurrer allowed with costs.

ASHTON v. PRYNE.

Specific performance—Covenant to clear land.

The plaintiffs contracted with the defendant that he should clear for them, in a husbandman-like manner, certain swamp lands which they owned, and that he should take the timber as compensation. The defendant cut down and removed the timber accordingly, but he did not clear up the land, and the plaintiffs thereupon filed a bill for specific performance. A demurrer thereto was allowed, the work in question being the sole object of the suit, and the remedy at law being adequate.

Demurrer to bill for want of equity.

Statement

The bill was filed respecting a contract made in 1865, between the plaintiffs and defendant, respecting a parcel of fifteen acres of swamp land owned by the plaintiffs. The bill alleged that there was on it some valuable timber, and the contract was stated to have been, "that the defendant should clear up, in a proper husbandman-like manner, fit for crop, according to the custom of the country, the said fifteen acres of land; * * and that the plaintiffs should allow the said defendant, as compensa-

(*a*) Noble v. Ward, L. R. 1 Exch. 117; S. C. in Ap. L. R. 2 Exch. 135.

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tion therefor, to cut the timber standing, growing, and being on the said swamp land, and to take the same for his own use." The bill alleged that the defendant had cut down and removed all the valuable timber, and had not performed that part of the agreement for which the timber was to be his compensation. The prayer was, that the contract might be specifically performed, and that the defendant might be ordered to clear the said swamp land in a proper and husbandman-like manner; or that an account might be taken of the timber, and of the damage which the defendant had done to the plaintiffs, and that he might be ordered to pay the same; and for further relief.

It was not shewn that there was any difficulty in the way of the plaintiffs recovering at law.

Mr. *Moss*, for the demurrer.

Mr. *Walkem*, contra.

Counsel, amongst other cases, referred to *Avery* v. *Griffin* (*a*), *Castle* v. *Wilkinson* (*b*), *Paxton* v. *Newton* (*c*), *Booth* v. *Pollard* (*d*), *Pollard* v. *Clayton* (*e*), *Soames* v. *Edge* (*f*), *Flint* v. *Brandon* (*g*).

Judgment.

March 6.

MOWAT, V. C.—At the close of the argument I intimated my opinion that the bill could not be sustained; but, in consequence of the urgency of the learned counsel for the plaintiffs, I reserved judgment in order to look into some cases which he cited. I have since examined these cases and others; but it is quite plain that the bill cannot be sustained, according to the modern doctrines of equity.

(*a*) L. R. C., Eq. 606.
(*b*) L. R. 5 Ch. App,, 434.
(*c*) 2 S. & G. 437.
(*d*) 4 Y. & C., Ex. 61.
(*e*) I. K. & J., 462.
(*f*) Johns. 669.
(*g*) 8 Ves. 159.

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It is to be observed, that the work, the doing of which the plaintiffs ask the Court to compel, is the only part of the contract which remains to be performed; that this relief is not incident to other relief which the plaintiffs ask, but is the whole relief asked by the first alternative in their prayer; and that this work is to be done on land which is owned by the plaintiffs, in which the defendant has no interest, and of which he is not in possession.

It is clearly settled that under such circumstances equity does not decree specific performance of an agreement to perform work like this; but leaves the parties to their legal remedies for damages. The case nearest to the present amongst those cited is *Flint* v. *Brandon* (*a*); and there is no doubt that that case is in accordance with the present doctrine on the subject. That was a suit for the specific performance of a contract to make good a gravel pit of which the plaintiff was in possession; and a decree was refused. Sir *Wm. Grant* in giving judgment said: "This Court does not, I apprehend, profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective. * * * The matter in controversy is nothing more than the sum it will cost to put the ground in the condition in which by the covenant it ought to be. The plaintiff will be entitled to recover damages in an action for breach of the contract. In some respects the legal remedy is better than this Court can give; for the plaintiff recovering, and having the disposition of the money, may perform the work in such manner as he thinks proper; whereas, if a specific performance is decreed a question may arise whether a work is sufficiently performed." Every one of these observations is applicable to the present case.

Judgment.

As to the alternative prayer for damages, it is settled that Lord *Cairns's* Act (*b*) gave jurisdiction to award

(*a*) 8 V. 159. (*b*) Can. 28 Vic. ch 17, sec. 3.

damages in those cases in which before the Act the Court had jurisdiction to entertain the suit. In such cases the Court may give damages in addition to, or in substitution for, specific performance. But in a case like the present, the Court had no jurisdiction before the Act.

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The demurrer must therefore be allowed with costs.

SINCLAIR v. DEWAR. [IN APPEAL.*]

Letters of Administration—Relation to.

A person intending to take out letters of administration executed a power of attorney to a creditor of the intestate, authorizing him to receive all moneys due the intestate: the power was given upon an agreement that the attorney should pay himself out of any money he should receive: the appointor afterwards revoked the power, and then took out letters of administration:

Held, [reversing the decree of the Court below] that the power was not valid against the administrator, and that payments made to the attorney by a debtor after administration granted and with notice of the revocation were unauthorized payments, and did not discharge the debtor. [SPRAGGE, C., dissenting.]

This was an appeal from a decree of the Court below as reported *ante* volume xvii., page 621. Statement.

The facts established in the cause appeared to be, that on the 3rd January, 1868, *John Dewar* made a mortgage of his freehold property to *Donald Sinclair* to secure payment of $700 in four equal annual instalments with interest on the principal sum from time to time unpaid; the first instalment being payable 3rd January, 1869. On any default in the payment of interest, the whole principal was to be immediately payable.

Donald Sinclair died intestate, and administration of his effects was granted to his sister *Mary Baxter* on

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* *Present*—DRAPER, C.J., SPRAGGE, C., HAGARTY, C.J., MORRISON, J., MOWAT, V.C., GWYNNE, J., GALT, J., and STRONG, V.C.]

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24th October, 1868. On 5th January, 1869, *Mary Baxter*, for valuable consideration, assigned the mortgage to the plaintiff. The mortgagor, the defendant, never paid him anything on account of the security.

On the 27th July, 1868, *Mary Baxter* gave a power of attorney to *Alexander Dewar* (father of defendant) to collect and receive all sums of money due to her as administratrix of her deceased brother, particularly referring to the mortgage in question. On the same day the letters of administration were applied for. On the 2nd October following she made an affidavit stating that the power of attorney was null, and had been obtained by false representations.

On the 20th December, 1868, the defendant was served with a notice, dated on the 18th of that month, not to pay any part of the estate of the intestate without the plaintiff's order. Plaintiff signed this order as attorney for the estate.

Statement.

On 4th January, 1866, *Alexander Dewar* gave defendant a receipt for $180, "being the first instalment with interest" on the mortgage dated 3rd January, 1868, which receipt was signed "*Mary Baxter*, administratrix, per *Alexander Dewar*." The defendant gave evidence that he paid two sums of $20 each, the latter on 4th August, 1868, and $140, the balance, on Monday the 4th January, 1869.

At the hearing the bill was dismissed with costs, against which decision the plaintiff appealed on the following, amongst other, grounds: that the alleged appointment by *Mary Baxter* of *Alexander Dewar* as her attorney was made prior to her appointment as administratrix of the estate of *Donald Sinclair*, deceased, and was not binding upon the estate; that such appointment of *Alexander Dewar* was not beneficial to the

estate, and was not ratified by the administratrix after her appointment, and was therefore inoperative and of no effect as regards the estate; that the appointment of *Alexander Dewar* as such attorney was revoked by *Mary Baxter* before she was appointed administratrix; that the power of attorney to *Alexander Dewar* was revoked, and the respondent had notice of the revocation previous to the alleged payment of the mortgage moneys in question, and such payment, if made at all, was not made to a person entitled to receive it; that at the time of filing the bill of complaint the appellant was the assignee of the mortgage in question; the moneys in question were unpaid and overdue, and he was entitled thereto, and to be paid the same by the respondent; that *Mary Baxter* had no authority to give, and could not and did not give, to *Alexander Dewar*, under the circumstances set forth in the evidence, an irrevocable power to collect or receive the moneys in question.

Statement.

The defendant insisted that the decree should be sustained for the following, amongst other, reasons: because the power of attorney was irrevocable, in that when the same was given, an interest in the subject matter was given to *Alexander Dewar*, and he was under the terms of the agreement entitled to retain a certain portion of the moneys to be received by him under the said power of attorney, and because a power of attorney coupled with an interest in the subject matter of the power is irrevocable; because the appellant is a mere trustee of the mortgage debt, or of one-half thereof, for *Mary Baxter;* and she having agreed that *Alexander Dewar* should collect the said mortgage money and apply a part thereof in payment of his own debt and pay the balance to her, she the said *Mary Baxter* and the said appellant as her assignee and trustee, are estopped from claiming the money paid to *Alexander Dewar* who had already an interest in the mortgage debt; the said mortgage, to the extent of the interest of *Mary Baxter* therein, or to

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the extent of the debt of the said *Alexander Dewar* was in equity assigned to him, and the appellant being a subsequent assignee thereof with notice, and without having given any valuable consideration therefor, cannot recover from the respondent the amount paid by him to *Alexander Dewar;* and because the granting of letters of administration to *Mary Baxter* confirmed the appointment of *Alexander Dewar* and the said letters related back to and confirmed the acts and deeds of the said *Mary Baxter* in connection with the said estate, made and done by her prior to the granting of said letters, including such power of attorney.

Mr. *Becher*, Q.C., and Mr. *Barker*, for the appellant.

Statement.

The chief ground for making the decree appealed from is, that the authority conferred by Mrs. *Baxter* upon *Alexander Dewar*, having been coupled with an interest, the same could not be revoked, *Dewar* being at the time a creditor of the estate. No doubt the position is correct, that a power coupled with an interest is irrevocable. So an order by a debtor upon a person indebted to him, in favour of a creditor, is not revocable as being an equitable assignment of the claim (*a*); but here the party conferring the power, at the time she did so, had herself no authority to confer such power, and before being clothed with that authority, she revoked whatever agency or power she had conferred upon *Dewar*. *Gaussen* v. *Morton* (*b*) is distinguishable from the present case. *Campanari* v. *Woodburn* (*c*), *Morgan* v. *Thomas* (*d*), *Bacon* v. *Simpson* (*e*), *Crossfield* v. *Such* (*f*), were, amongst other cases, referred to.

Mr. *McMichael* and Mr. *A. Hoskin* for the respondent.

(*a*) Farquahar v. The City of Toronto, 12 Gr. 186.
(*b*) 10 B. & C. 731.
(*c*) 15 C. B. 400.
(*d*) 8 Exch. 302.
(*e*) 3 M. & W. 78.
(*f*) 8 Exch. 825.

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At the time Mrs. *Baxter* conferred the authority she did on *Dewar*, the estate owed him a debt, and that debt was paid by the receipt of the money due upon the mortgage by the creditor, under the power so given by *Mary Baxter*,—in fact, *Alexander Dewar* accepting the power conferred by her, and collecting the money under it, really benefited the estate to the amount he thus collected.

The power here was clearly one coupled with an interest, and being so, was irrevocable; and although, at the time of conferring the power on *Dewar*, Mrs. *Baxter* had not obtained letters of administration, and she had not authority to confer such power as she professed to give, still, when administration was obtained by her, that act related back, thus validating what she had previously attempted to do,—although it is clear that had she never obtained letters of administration, the power she had thus attempted to confer on *Dewar* would have been utterly useless.

Christie v. *Clark* (*a*), *Abbott* v. *Stratton* (*b*), *Re Parkinson's* Estate (*c*), *Oxenden* v. *Clapp* (*d*), *Thompson* v. *Harding* (*e*), *Hill* v. *Curtis* (*f*), were relied on.

Judgment.

March 11.

DRAPER, C. J.—During the argument the inclination of my opinion was in defendant's favour, but after a consideration of the cases I am led to an opposite conclusion.

I think it cannot for a moment be denied that until the letters of administration were granted, the power of attorney to *Alexander Dewar* could have no operation, any more than if it had been an absolute assignment of the mortgage, professedly by an administrator who had

(*a*) 16. U. C. C. P. 544.
(*b*) 9 Ir. Eq., 233.
(*c*) 12 L. T. N. S. 26.
(*d*) 2 B. & Ad. 309.
(*e*) 2 E. & B. 630.
(*f*) L. R. 1 Eq. 90.

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not at the time obtained letters of administration. The power, therefore, depends upon the subsequent grant of such letters, and upon that grant having relation back to the date of the power. I have seen no case establishing such a relation. Where a wrongful act has been done to the goods of an intestate before administration has been granted, the administrator, who afterwards obtains such grant, may sue in trespass or trover for the wrong and the reason given is, that otherwise there would be no remedy for the wrong. And the very learned judgment in *Tharpe* v. *Stallwood* (*a*) goes no farther than this, and does not help the defendant. A power of attorney to distrain or compound debts due to the intestate will not authorize acts which the donor had no legal authority to do until he became administrator. No authority has been cited to shew that such an act done, before administration is granted, becomes *ipso facto* valid by relation to the date of the grant. The doctrine of relation, which the authorities affirm is relation to the death of the testator and the cases which establish it are collected in *Williams* Executors (3rd ed.) 557 *et. seq.*, such as *Foster* v. *Bates* (*b*), *Bodger* v. *Arch* (*c*), *Welchman* v. *Sturgis* (*d*), *Rex* v. *Horsely* (*e*).

Judgment.

Lord *Holt's* opinion in *Whitehall* v. *Squire* (*f*) is clearly against the defendant, though the case was decided on a particular ground by the other two Justices against his view. This case was commented upon by Lord *Ellenborough*, C. J., in *Mountford* v. *Gibson* (*g*). He observes, "I take the principle to have been clearly established by Lord *Holt* in *Whitehall* v. *Squire*. That was a case where the plaintiff having received a horse belonging to the intestate from the defendant in remuneration of services performed at the request of the defendant about

(*a*) 5 M. & Gr. 760. (*b*) 12 M. & W. 226.
(*c*) 10 Exch. 333. (*d*) 13 Q. B. 552. (*e*) 8 Ea. 405.
(*f*) 1 Salk. 295, Carth 103, where the case is more fully reported.
(*g*) 4 Ea. 441 ; see also, Bacon v. Simpson, 3 M. & W. 78.

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the funeral of the intestate, afterwards administered to the intestate and brought trover against the defendant for the value of the horse so received by himself before he became administrator. By Lord *Holt's* opinion, the plaintiff should have recovered; and he never intimated that the delivery being made by one acting as an executor *de son tort* would be a bar to an action by the rightful administrator, and the other two Judges who differed from him in the conclusion never questioned the right of the administrator to maintain such an action in general, but they held that the plaintiff being a *particeps criminis* in the very act he complained of should not be permitted to recover upon it against the person with whom he had colluded." It would be a strange thing that a power of attorney to act for an administrator, given before the grant should be effectual to bind the administrator or the estate after such grant, when if a man gives a release and afterwards takes out letters of administration it will not bar him, because the right was not in him at the time of the release. The judgment of *Parke*, B., in *Morgan* v. *Thomas* (*a*), and in the note (*y*) to page 355 of *Williams* Ex. (3rd ed.) is a case noted in which *Abbott*, C. J., adopted the same view.

Judgment.

This alone is sufficient to dispose of the case in my opinion, but I ought to add that I am not at all satisfied that the principle that a power coupled with an interest cannot be revoked. I refer to *Walsh* v. *Whitcombe* (*b*), to the language of *Wilde*, C. J., in *Smart* v. *Sandars* (*c*), and to *De Comas* v. *Prost* (*d*).

I think the decree should have been in favour of the plaintiff.

HAGARTY, C. J.—It amounts, I think, to this, that a person intending to obtain a particular authority over

(*a*) 8 Exch. 305. (*b*) 2 Esp. N. P. C. 565. (*c*) 5 C. B. at pp. 916, 917.
(*d*) 11 Jur. N. S. 417; 3 Moo. P. C. N. S. 158, S. C.

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an estate makes an arrangement which she could only make with such authority. Prior to obtaining such authority she expressly revokes the proposed arrangement. It could only be as administratrix that there could be any reason or value for her doing as she did; creating an authority coupled with an interest. In her natural capacity she had no liability for the debts of the estate. Admitting the entire doctrine of ratifying a lien I do not see it helps here.

When she became administratrix she had revoked as far as she could any authority to *Dewar*. It is granted that she could have ratified the prior act, but she never did so.

GWYNNE, J.—On the 3rd January, 1868, the defendant executed the mortgage to and in favor of *Donald Sinclair*, deceased.

Judgment.

On the 3rd March, 1868, *Donald Sinclair* died intestate leaving *Dugald Sinclair* and *Mary Baxter*, widow, his brother and sister, and next of kin him surviving.

On the 24th October, 1868, letters of administration of the estate of the said *Donald Sinclair* were granted to him and *Mary Baxter*.

On the 4th March, 1869, the defendant paid to his father, *Alexander Dewar*, professedly as agent of the said *Mary Baxter*, as such administratrix with full knowledge and notice that she had withdrawn any agency theretofore conferred upon him, the sum of $140 which then came due under the above mortgage; and at the time of such payment, as the learned Chancellor has found as a fact, the defendant's father had notice that the said *Mary Baxter* had revoked the authority, which she had invested him with, to receive the money, if she had ever invested him with any such authority.

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The only question is, as it appears to me, was *Alexander Dewar*, agent of the administratrix, to receive the money when the defendant paid him $140? if he was, the payment was good, and the defendant is discharged; if not, the payment was unauthorized, and did not discharge him. I think the finding of the learned Chancellor is conclusive that the defendant was well aware, when he so paid the money to his father, that the administratrix had withdrawn any authority which he may have before had; that such finding excludes all question as to the validity of the payment. It was in that case knowingly made by the defendant to a person not authorized to receive it. I attach no weight whatever to the fact that the instrument executed by Mrs. *Baxter* to *Alexander Dewar*, when on the eve of obtaining these letters of administration, was under seal, for she, not being then administratrix, could pass no interest in the intestate's estate to *Alexander Dewar*, and the whole operation of the authority therein contained could be only to enable him on her behalf to receive for her the assets of the estate, to be accounted for to her when she should obtain the letters of administration, and the seal to the instrument gave it no greater force than if *Alexander Dewar* had been appointed by Mrs. *Baxter* by a letter without seal to receive on her behalf such assets. The question which arises here is not if *Alexander Dewar*, in virtue of an appointment as agent of Mrs. *Baxter* to receive such assets, and before any revocation of such agency, had received the $140 before the letters of administration had issued, whether such payment could be set up as a defence to an action at the suit of Mrs. *Baxter as administratrix* after letters of administration had issued: the simple point here is, was *Alexander Dewar* agent of the administratrix on the 4th January, 1869, when he received the money, and had he *then* authority to receive it? and that is a question of pure fact which on the evidence is determined against the defendant.

Judgment.

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STRONG, V. C.—Two questions only seem to have been raised at the hearing of this cause in the Court below. One was, as to whether the transfer of the mortgage to the plaintiff conferred a sufficient title to maintain this suit. The other, whether the power of attorney of the 27th July, 1868, gave the attorney *Alexander Dewar* an authority coupled with an interest, and therefore an authority not revocable by the instrument of the 2nd October, 1868. The Chancellor determined the first of these points against the defendant; the second in his favour. There can be no doubt but that the bond executed by the plaintiff constituted a valuable consideration for the assignment of the mortgage. With reference to the power of attorney, if it was effectual, it is clear, upon the facts found to be proved, that it was irrevocable. But upon this appeal the plaintiff insists upon a ground which does not appear to have been touched upon in the Court below. He now contends that this power of attorney having been given by *Mary Baxter* before she was appointed administratrix, and never having been confirmed afterwards was wholly inoperative, and therefore insufficient to authorize the payment to *Alexander Dewar* of the instalment of the mortgage paid to him by the mortgagor on the 4th January, 1869. An instrument like this letter of attorney given to a creditor by a debtor, with a view to the satisfaction of the debt out of the moneys recovered under it, is in law regarded as a power coupled with an interest, and therefore one which the constituent cannot revoke, and the attorney is said to be *procurator in rem suam*; but in a Court of Equity such an instrument operates as an equitable assignment, and would therefore in this forum be unaffected even by the death of the constituent, though at law that event would undoubtedly annul it. This Court is therefore called upon to determine what is the effect, in equity, of such an instrument as this, executed before administration granted, by the person who subsequently procures administration. I

Judgment.

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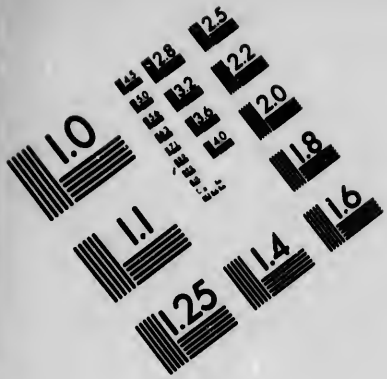
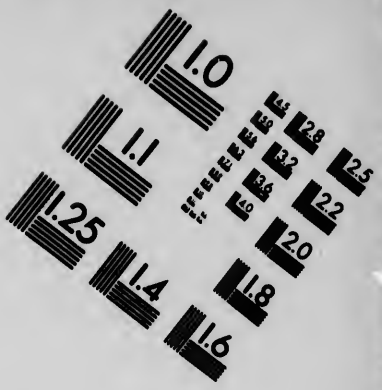
consider a transaction of this nature, a dealing with a "right and credit" belonging to the estate of the intestate, to stand on precisely the same footing as an alienation of chattel property, and that if the act done before administration is not binding in one case neither can it be in the other. In the case of an executor, his act before proving the will is no doubt made valid by the relation of probate subsequently obtained. In *Sykes* v. *Sykes* (*a*) *Montague Smith*, J., says "Executors before probate can do almost anything incident to their office; probate is only evidence and not the source of their title and the proof of this is, that an action could be brought by them before probate, and that if probate was taken out time enough for profert, according to the old practice, that was sufficient. They can even sell the property of the testator." But a grant of administration is not a mere confirmation of a title derived from the intestate, or even from the law, but the origin of the title itself: *Wankford* v. *Wankford* (*b*). Therefore upon principle I should have thought it very plain that nothing done by the administrator before he acquired his title as such, could bind him, since it could not be said to have been done in the exercise of an office which had not at the time been conferred upon him, and in his ministerial capacity he could not be affected as by an estoppel by an act which might have bound him in that way personally. And this conclusion is, I think, borne out by the authorities.

Judgment.

If it be true, as it has been sometimes laid down, that an administrator may before obtaining letters of administration do any act which is for the benefit of the estate, this cannot apply in the present case to make valid what is virtually a transfer of part of the assets. In the late case of *Metters* v. *Brown* (*c*) a person, who afterwards became administrator, made a mortgage of leaseholds belonging to an intestate, and

(*a*) L. R. 5 C. P. 113. (*b*) 1 Salk. 299. (*c*) 1 H. & C. 686.





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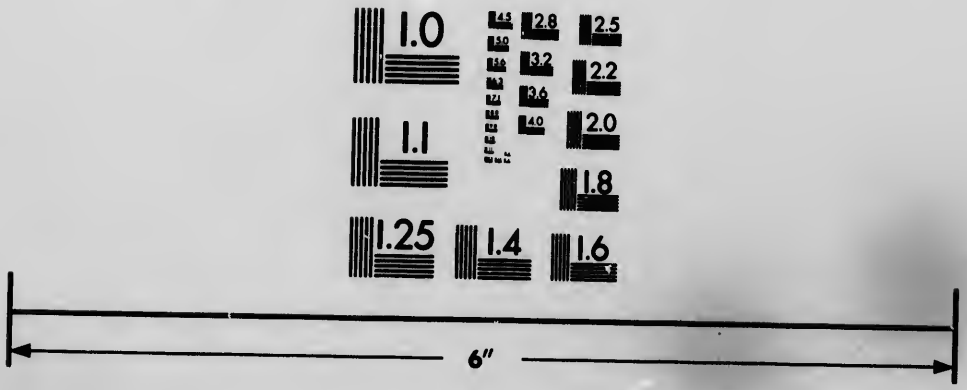

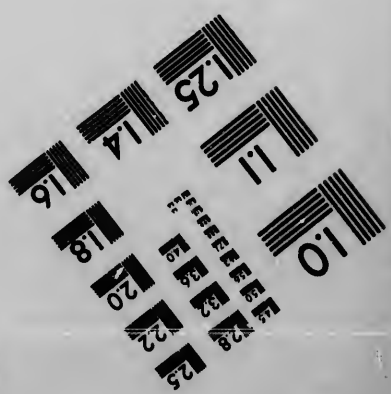

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after administration granted he was held not bound by it in his representative capacity. In *Doe* v. *Glenn* (*a*) the brother of an intestate who died entitled to a leasehold interest subject to a condition of re-entry for non-payment of rent took it upon himself to waive a demand under the statute, and to surrender possession to the landlord, but he was held not to be bound by this in an action of ejectment which as rightful administrator under a grant subsequently obtained he brought to regain the possession. In *Holland* v. *King* (*b*) notice before letters of administration by the person who afterwards obtained them, was held insufficient under the provisions of a partnership deed which authorized the personal representative of a deceased partner to succeed him in the business upon giving such a notice. It was there most distinctly held that letters of administration have not relation back. *Stewart* v. *Edmunds* (*c*) was a case where an intestate had deposited plate for safe custody, and died indebted to the depositee; the person who afterwards became administrator agreed that the deposit should be converted into a pledge, and the plate be retained for the debt, but on his obtaining administration he was held not bound by this agreement. It is true that this is opposed to the old case of *Whitehall* v. *Squire* (*d*), which was similar in its circumstances, but in this last case *Holt*, C. J., dissented, and it must be considered as overruled by *Stewart* v. *Edmunds*, in which case it was cited. These decisions, to which may be added the case of *Morgan* v. *Thomas* (*e*), and the high authority of Sir *E. Vaughan Williams*, in his work on Executors (ed. 6) p. 389 *et. seq.*, establish that *Mary Baxter* did not by the power of attorney debar herself from the right of enforcing payment at law of this mortgage after she became administratrix; and I can see no reason, and I find no authority to shew, why a

Judgment.

(*a*) 1 A. & E. 49. (*b*) 6 C. B. 727.
(*c*) Wms. Exrs. (6th ed.) 392, (in note.)
(*d*) 1 Salk. 195. (*e*) 8 Exch. 302.

different rule on this point should prevail at law and in equity.

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It was argued that *Hill* v. *Curtis* (*a*) is in favour of the defendant. I do not so understand that case. *Kenrick* v. *Burges* (*b*) which is cited there is beyond all question distinctly overruled by the later authorities already referred to. But it appears plain that the principle on which Vice Chancellor *Wood* proceeded in *Hill* v. *Curtis* was, that the acts of the agents before administration were for the benefit of the estate, and were moreover ratified by the successive administrators after administration granted. This appears from the following passage in the judgment: "The case of *Foster* v. *Bates* says that if a person without instructions acting on behalf of a representative, whoever he may be, enters into a contract for the benefit of the intestate's estate, and that contract is afterwards ratified by the administrator, the ratification relates back and is equivalent to a prior authority. Thus in the absence of fraud I have no doubt that the administrator in this case might adopt the acts of the agent, and that his subsequent rightful appointment would give validity to the agency." This shews that *Hill* v. *Curtis* is distinguishable from the present case, which must be ruled by the authorities first quoted.

Judgment.

I am of opinion that the payment by the defendant to *Alexander Dewar* was not good, and that the plaintiff is therefore entitled to the usual foreclosure decree.

SPRAGGE, C.—The two points upon which Mr. *Becher* took exception to the judgment given at the hearing, may very well be considered together. They were, that *Mary Baxter* had not power before the grant to her of letters of administration to give the power of attorney

(*a*) L. R. 1 Eq. L. 90. (*b*) Moore 126.

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to *Dewar:* and this, as an abstract proposition, may be conceded. The other point was, that the power was revocable.

All depends, in my judgment, upon the effect of the subseqnent grant of administration to *Mary Baxter*.

There are differences certainly between the position of an executor before probate, and of a next of kin, or other person to whom administration may be granted, before administration is granted: the title of the executor vesting upon the death of the testator, while the title of an administrator does not vest till administration granted. The question is, whether upon administration being granted it does not relate back to the death of the intestate.

Judgment.

In *Tharpe* v. *Stallwood* (*a*) it was held that an administrator might maintain trespass, for acts of trespass committed before administration granted. The reason given is, that otherwise there would be no remedy for the wrong done; but that reason could not have prevailed unless there were title in the administrator by relation.

The same principle of title by relation was established very explicitly in *Foster* v. *Bates* (*b*), where after administration granted an administrator ratified a contract which had been entered into by a stranger after the death of an intestate. The Court held this ratification equivalent to a prior authorization; and an action upon the contract was held maintainable by the administrator. If the person who entered into the contract had himself afterwards obtained administration no ratification would have been necessary. The language of Lord *Wensleydale*, then Mr. Baron *Parke*, by whom the judgment of

(*a*) 5 M. & G. 760; 12 L. J. L. P. 241. (*b*) 12 M. & W. 226.

the Court was delivered, was; "It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate." 1872. Sinclair v. Dewar.

The case of *Hill* v. *Curtis* (*a*) was before the present Lord Chancellor and affirms the same doctrine. Referring to *Sharland* v. *Mildon*(*b*), before Sir *James Wigram*, his Lordship said: "The case of *Sharland* v. *Mildon* shews that if before administration is taken out an agent is employed, the ageney is not lawful so long as the employer is a wrong-doer. But (and this I take to be Lord *Hatherley's* own judgment) if the employer becomes administratrix, then all she has done is made right, and all that her agent has done is made right also." The effect of this judgment is stated in a note to Mr. Justice *William's* book on the Law of Executors (*c*) to be, that the tort of the employer was purged by his becoming administrator, and his order became rightful *ab initio*, so that the agent's act was also purged. Judgment.

To apply the doctrine of title by relation to this case. I have said all that I think it necessary to say as to the power given by *Mary Baxter* to *Dewar* being a power coupled with an interest, if between parties acting *sui juris*. The interest of *Dewar* as a creditor existed apart from the power. The power was the creature of *Mary Baxter*, and *Dewar's* interest fastened upon it, *eo instanti* that it was given, and gave to it a quality which without that interest it did not possess, that of being irrevocable. As between the two it was irrevocable, and would be so whether the parties were *sui juris*, or she administratrix of the estate. As it was, before administration granted, the power was contingent upon her filling that character, and would be in abeyance until she filled it; and if she never filled it, would be a nullity.

(*a*) 1 L. R. Eq. 90. (*b*) 5 Hare, 469 (*c*) 6 Ed. p. 254, note *n*.

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Then comes the question, what was the effect of administration being granted to her. The cases to which I have referred are authorities for this, that upon administration being granted the title of the administrator relates back to the time of the intestate's death. The reasons for these decisions may have been the prevention of wrong, and therefore the quality of relation was held to be an incident of administration, *without its being so held these cases could not have been decided as they were.* Then there is the judgment of Lord *Wensleydale* who held the doctrine to be "clear."

It appears to me that the necessary effect of this doctrine is to set up, or "make right," as Lord *Hatherley* puts it, what has been done by the administrator; with the same effect and in the same order, as if it had been done *after* administration granted; or, in other words, as if administration had been granted before the acts done. The word "relation" *ex vi termini* imports this, and the words "rightful *ab initio*" can have no other meaning.

Judgment.

Further, it seems to be a necessary result of the doctrine, that the *title* of the administrator relates back: that all his acts, "in the absence of fraud," to use the language of Lord *Hatherley* (*a*), are validated; he had title, *i. e.*, authority to do whatever an administrator might rightfully do.

It may be conceded that at the time when *Mary Baxter* revoked the power she had given to *Dewar*, there existed no power coupled with an interest in *Dewar*. This would be because *Mary Baxter* had not then a title to do any act; and what she purported to do was not effectual; but if so, there was nothing to revoke. Her revocation was not more effectual than the power she

(*a*) 1 L. R. Eq. 100.

had given: the interest of *Dewar* as a creditor was existing all the time; and if the power, and its revocation also, were set up as acts which the person subsequently appointed administrator had done, having such authority, neither more nor less as an administrator duly appointed would have had, *Dewar* would have had his power set up, his interest being coupled with it: and assuming the revocation to be also set up, it could be only as an act done with the same effect as if letters of administration had preceded these several acts, in which case the revocation would be ineffectual. 1872. Sinclair v. Dewar.

All this appears to me to follow logically from the doctrine as enunciated by Lord *Wensleydale* in the language that I have quoted, and established by the cases to which I have referred.

I see no reason why the doctrine should not be applied in this case. There was no fraud in the giving of the power nor in anything connected with it: nor was there any detriment to the estate; for the debt to *Dewar* is not disputed. The estate is not indeed any party to this question. As between the plaintiff and defendant, *Dewar* has certainly the better right. The plaintiff has really no interest in the question; and would be a mere volunteer were it not for the bond to account referred to in my judgment at the hearing. *Dewar* being a creditor could himself have taken out letters of administration in case the next of kin had failed to do so, or could have sued the administratrix for the debt. That indeed he can still do; and such being the case, how is the estate advantaged by this attempt to prevent his paying himself? He took the power, as he himself says, "on these conditions, that I would have to pay her her own share of the money, and have full liberty to keep my share;" and this is corroborated by the evidence of Mr. *Horton and by John, son of Mary Baxter.* The power was of course revocable except in so far as it was coupled with *Dewar's* interest. Judgment.

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Further, this power was given on the occasion of the application by *Mary Baxter* for administration, and the application was made and the affidavit sworn before the power of attorney, but some delay occurred in getting out the letters. Moreover money was paid, or rather advanced to her by *Dewar*. It was nothing less than bad faith on the part of *Mary Baxter* under all these circumstances to revoke the power of attorney.

The justice of the case is certainly with *Dewar*, and, in my judgment, the law also.

JARDINE v. HOPE.

Partnership—Interest—Commission—Rendered accounts.

In the absence of a special custom or an agreement, interest is not usually allowable to a partner on advances of capital made by him to the partnership, or for partnership purposes.

Where parties entered into an agreement that they should purchase goods on joint account, and at the joint risk, and that one of the parties should furnish the funds in the first instance, it was *held* that interest could not be charged on the funds so furnished.

In such a case a firm in Canada was to advance the funds, and the goods were to be consigned for sale to their firm in Liverpool, which went by a different name:

Held, that they could not charge commission on their sales.

Three months before the filing of a bill respecting the partnership accounts had been furnished in which interest and commission were charged, and none of the partners had before suit suggested their objections to those charges: *Held*, that they were not precluded by this delay from objecting thereto in the suit.

Appeal by the defendants *Hope & Co.*, from the report of the Master at Hamilton.

On the 9th October, 1869, the appellants and their co-defendants *Murphy & Murray*, agreed with the plaintiff to purchase from him 20 tons of hops, to be shipped to Liverpool and sold on joint-account; the plaintiff was to receive ten cents per pound; and any

profits beyond that were to be divided into three parts, —the plaintiff to have one part, the appellants one, and *Murphy & Murray* one; the loss, if any, was to be shared in the same proportion; if account sales were not to hand in four weeks, the other parties were to advance the plaintiff $1,000; the appellants were to forward and attend to all necessary shipping orders.

Shortly before the 15th November of the same year, the same parties entered into a further agreement for purchasing additional quantities of hops on joint-account, for shipment to Liverpool. The defendants *Hope & Co.*, in their answer, set up that this was "a continuation of, and on the same terms as to profits and losses as, the said former venture; and there being an apparent certainty of profits from the first venture being in the hands of *Wemyss & Co.* at once (which was the case), the defendants *Adam Hope & Co.*, agreed to provide the funds in the first instance for the purchase of the hops for the second venture, their understanding being, that the second venture was but a continuation of the first venture, and that the profits of the first venture were applicable to the reduction of the amounts advanced in purchasing the hops of the second venture." The hops were purchased accordingly, and were sold at a considerable loss. Statement.

A decree, referring it to the Master at Hamilton to take the accounts, was made on the 19th May, 1871. In November following, the Master made the report appealed from, and it was thereby found that *Hope & Co.* had advanced $8,955 23, and had received $7,157 97, leaving a balance in their favour of $1,797 26; which balance represented the loss on the partnership transactions, one-third of which was to be borne by each of the three parties to the adventures.

The appeal against this report was brought on for argument on the 22nd February, 1872; and the grounds

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of appeal were, that the Master had refused to allow to the appellants interest on their advances, or commission on the sales in Liverpool.

Mr. *S. Blake*, and Mr. *Bethune*, for the appeal.

Mr. *Proudfoot*, and Mr. *Duff*, contra.

For the appellants it was contended that as to the charge of interest, the evidence shewed *Hope & Co.* were in the habit of discounting paper, out of the proceeds of which they made the advances required in carrying on the adventures, and although the advances by them in any way would, it was submitted, have entitled them to a charge for interest, the fact that they themselves had to pay this interest, in other words discount on the notes of their customers, rendered it still more equitable that the other parties to the transaction should not be heard at this late day to object to the charge. *Ex parte Chippendale* (*a*) was relied upon.

Statement.

As to the charge for commission, it is right to assume that it is objected to now only because of there having been a loss sustained on the last venture. An account of sales was regularly furnished to the parties containing this charge and no objection was ever raised to it, and by the receipt and retention of those accounts without any objection being made, it will be now considered that the parties had acquiesced in them, and will not be heard to dispute them. The fact that this commission was to be allowed to *Wemyss & Co.* was one great inducement for *Hope & Co.* entering into the arrangement under which they were bound to make advances of money for the purpose of carrying out the adventures.

For the respondents it was contended that under the circumstances here appearing interest could not be

(*a*) 4 D. M. & G. 19.

allowed. The American cases establish the principle that it is only where there has been a course of dealing between the parties or an agreement to that effect, that interest will be allowed upon advances made by one partner to the firm. *Ex parte Chippendale* relied on by the appellants is not an authority for the question now raised. It is true the *dicta* of Lord Justice *Knight Bruce* in that case go the length the appellants seek to carry them, but they were not necessary for the decision of that case. At page 35 of that report it is said that from time to time as advances were made such advances were made known to the shareholders; and being a public company the Court there allowed the charge under the special circumstances of the case.

In *Hill* v. *King* (*a*) interest was not allowed on capital brought in by one partner although the other had not brought in any; and the judgment of the Court in *Cooke* v. *Benbow* (*b*) shows clearly that reasons may exist why one partner should advance moneys to the firm without being allowed interest, and the reasons there given apply to this case. As a rule interest will in co-partnership accounts be disallowed in the absence of an agreement that it shall be paid. And in *Watney* v. *Wells* (*c*) interest was disallowed even from the time of the dissolution of partnership. In fact the rule may be broadly stated to be that in the absence of agreement to the contrary, interest will in no case be allowed on sums advanced by one partner for the purposes of the partnership.

Statement.

Acquiescence is alleged here as entitling *Hope & Co.* to their allowance of interest, and the fact that the accounts were rendered charging interest and retained by plaintiff, is adduced as evidence of his acquiescence in the charge: in the absence of express contract this is insuf-

(*a*) 9 Jur. N. S. 527. (*b*) 3 D. G. S. 1.
(*c*) L. R. 2. Ch. App. 250.

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ficient to warrant the charge, *Clements* v. *Bowes* (*a*) The same is said with respect to the charge for commission; but here the plaintiff was not aware of the identity of the partners constituting the two firms; to make acquiescence of any avail, it must be shewn that that fact was known to the other parties to the adventure; the result of allowing this commission and interest would be to relieve *Hope & Co.* from all loss comparatively, while by the articles of partnership it was stipulated that all losses and profits should be borne and participated in by all parties equally: *Whittle* v. *McFarlane* (*b*), *Bentley* v. *Craven* (*c*), *Davidson* v. *Thirkell* (*d*), were referred to.

March 6.

Judgment.

MOWAT, V. C.—As to interest. By the Common Law, in the absence of a special custom, or an agreement, a debt did not bear interest; and with respect to partnership accounts, it is well settled that this rule applies to advances of capital made by a partner; whatever the rule may be as to moneys, which can be distinguished as being loans instead of advances of capital. On that point I may refer to *Cooke* v. *Benbow* (*e*). There Lord Justice *Turner* made the following statement of the doctrine: "In cases where it is intended that partners should be entitled to interest on capital brought in by them, a stipulation to that effect is invariably found in the articles of partnership; and where no such stipulation is found in the articles, it cannot be assumed to have been the intention of the parties that interest should be paid. . . . I am not aware of any instance where, in taking a partnership account, the Court has allowed interest on capital, in the absence of express contract. It would in my opinion be very mischievous to introduce such an innovation, the result of which would be, that in every partnership account a calculation of interest would have

(*a*) 1 Drew 692.
(*b*) 1 Knapp. 311.
(*c*) 18 Beav. 75.
(*d*) 3 Gr. 330.
(*e*) 3 Deg. J. & S. 1. See also *Stevens* v. *Cook*, 5 Jur. N. S. 1416.

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to be made as often as it appeared that any partner had more capital in the business than he was bound to keep in it." Lord Justice *Knight Bruce's* judgment appears to be to the same effect. He said, "Each claim fails in my judgment for defect of agreemen."

The appellant's counsel admitted that the rule was so with respect to capital; but he argued that the appellants' advances were advances which had not been originally contemplated, were mere loans, and were not advances of capital. The answer of these defendants is opposed to that contention, for it is there expressly stated that they, *Hope & Co.*, "agreed to provide the funds in the first instance for the purchase of the hops for the second venture." I see no way of distinguishing such advances from advances of capital. It is to be observed, too, that nothing was said of interest on the funds thus to be provided; nor of interest on the $1,000 which was to be paid to the plaintiff under the first agreement in case the account sales did not come to hand in four weeks.

Judgment.

As to advances by a partner in the shape of temporary loans, there seems to be no very well settled rule. Lord Justice *Turner* had a very strong opinion against interest even on such loans, as appears from the case already mentioned (*a*). In the previous case of Exp. *Chippendale* (*b*), Lord Justice *Knight Bruce* had expressed a different view, and then thought that interest was allowable there on the ground of a general rule to that effect in the case of all partnerships; while Lord Justice *Turner* thought it allowable on the special circumstances of the case only, and added that he had been unable to find reasons which were altogether satisfactory to his mind upon the question, and that he should hesitate to lay down any general rule on the subject. Exp. *Chippendale* was a case of advances by the directors

(*a*) See 3 DeG. J. & S. supra; Ex. p. Chippendale, 4 Deg. McN. & G. at 43. (*b*) At 36.

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(and some shareholders) of a public company, and the case has been followed in other cases of public companies (*a*). In such cases it is more easy to distinguish mere loans from advances of capital, than it generally is in the case of private partnerships; and I have found no case of the latter kind in which, in absence of an agreement or of special circumstances, interest has been allowed (*b*). Mr. *Lindley* expresses an opinion in favour of the allowance generally (*c*). But the point is immaterial in the present case.

The next question is, as to the commission which the appellants claim on the sales at Liverpool. The claim is put on the grounds of antecedent agreement, and of subsequent recognition. *Prima facie* the commission would not be chargeable (*d*). *Hope & Co.* have a house in Liverpool consisting of the same partners, but doing business there under the name of *Wemyss & Co.* The difference of name cannot affect the question of the right to commission. The evidence offered of agreement and of subsequent recognition was parol evidence, and was conflicting; the evidence was conflicting, also, as to whether the respondents were aware at the time of the alleged agreement, or of the alleged recognition, that the two firms were identical; and in a case of conflicting evidence, the court as a rule does not interfere with the Master's judgment.

Judgment.

With respect to both the interest and the commission, the appellants' counsel relied a good deal on the respond-

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(*a*) Ex. p. Bignold, 22 B. 167; Troupe's case, 29 B. 393; Magdalene Steam Navigation Company, Johns. 690; Lowndes v. The Garnett and Mosely Gold Mining Company of America, 3 New R. at 604.

(*b*) See Hart v. Clarke, 6 DeG. McN. & G. 254; Stevens v. Cook, 5 Jur. N. S. 1415; Watney v. Wells, L. R. 2 Ch. 250; Rhodes v. Rhodes, 6 Jur. N. S. 600.

(*c*) Lindley on Partnership, 2d ed., p. 772.

(*d*) See cases collected Ib. at pp. 758, 759.

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ents' alleged acquiescence in certain rendered accounts in which these charges were made. The first account which the appellants appear to have rendered was on the 20th May, 1870; part only of the hops had then been sold; and all were not sold until some time after the filing of the defendants' answer in this suit. Interest was charged in this account; and accounts were from time to time rendered to the respondents of the sales afterwards made; these accounts contained the charges for commission. *Murphy & Murray* admit that they did not communicate to *Hope & Co.* any objection to any thing in these accounts; and they assert that on the other hand they never acknowled[illegible] the correctness of the accounts. The plaintiff seems from the time of receiving the first account to have disputed the right of the other parties to mix up the accounts relating to the two adventures; and claimed that other persons were interested in his third of the first adventure (on which there had been a large profit) who had no interest in the second (on which there was a loss); and this dispute is suggested as the reason why *Murphy & Murray* did not point out their own objections to the accounts. The plaintiff says that he objected to the charges for interest and commission also; but that is contradicted by the Messrs. *Hope*. He filed his bill on the 9th of September, 1870. Its object was to make good his claim to have the accounts of the first adventure kept separate from those of the second; but in this object he failed; and the decree directed a general reference. The question therefore is, did the omission of the parties from the 27th of May to the 9th of September, say three months, to specify any objection to the charges for commission and interest debar them from setting up the objections in this suit? I have looked at the authorities to which I was referred (*a*), and I am of opinion that the omission had not that effect.

Judgment.

(*a*) Lord Clancarty v. La Touche, 1 B. & B. 428; Taylor on Ev., 708; 2 Lind. on Part., 91 Comp; Irving v. Young, 1 S. & S. 333; Clement v. Bowes, 1 Drew, 692.

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The result is, that the appeal must be dismissed with costs, including the costs of Mr. *Duff's* attendance to argue the case on a former day when the argument was postponed for the convenience of the other parties.

In re Lawson and Hutchinson.

Arbitration—Award—Irregular conduct of Arbitrators—Practice.

Where at the commencement of a reference, *L*, the arbitrator for one side, conferred privately with the parties who nominated him on the matters in question, and on the evidence to be offered; and continued this course to the end, it was *held* that the impropriety was not cured by shewing that after the reference had made some progress, the other arbitrator acted with similar irregularity on the other side.

The reference was to two arbitrators, with power for the arbitrators to appoint an umpire, who was to make an award if the two arbitrators disagreed; an umpire was accordingly appointed; and, the arbitrators differing, the umpire made an award:

Held, that each party was entitled to the free judgment of the two arbitrators on the matters in difference, as a condition precedent to the umpire's authority coming into force; as well as their free judgment in the appointment of the umpire; and that the irregularity of the arbitrator *L's* course in holding private conferences with one of the parties was sufficient to avoid the award of the umpire.

After the two arbitrators had finally differed, the umpire had a private conversation on the subject of the reference with the arbitrator *L.*, in the absence of the other arbitrator and of the parties: *Held*, that, as *L.* had acted as the agent for one side, private conversation with him was as injurious and objectionable as private conversation with the principals would have been.

The Court allowed the party prejudiced, to serve a suplementary notice embodying the objections as to the course of the umpire and arbitrator *L.*, the same having come to light on cross-examination, and there being strong reason for apprehending that the award was not a fair award.

It is no objection to a motion to set aside an award, that the award has been made an order of Court.

This was a motion to set aside an award, or to refer the same back.

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The submission, in pursuance of which the award was made, was between *Robert Lawson* and his wife, of the one part, and *Thomas Hutchinson* of the other part, and related to the differences between the parties respecting the estates of *Jacob Hutchinson*, deceased, and *Sarah*, his wife, deceased; the father and mother of Mrs. *Lawson* and *Thomas Hutchinson*; and respecting certain advances which *Thomas Hutchinson* claimed to have made to his mother. The arbitrators named in the submission were *Neil C. Love* and *William M. Westmacott*. They were authorized to name an umpire; they accordingly named *William Hewitt*; and the award was made by him,

Statement.

Jacob Hutchinson, the father, had made a will bearing date the 9th October, 1834, and thereby he gave all his estate real and personal to his two children, subject to an annuity of £40 to his wife; and he gave to her the rents and profits of his estate, for the support and education of his children during their minority. The widow, it appeared, had received the annuity from the executor up to 1844. About that time she commenced receiving the rents of the testator's property; and between that time and 1853, she bought some land on Terauley street, Toronto, for $800; and erected thereon buildings of the value of $1,000 or $1,100; and she expended $400 on some land belonging to the testator, in Milbrook. In 1853, she became insane; and *Thomas Hutchinson* thenceforward received the rents and supported her until her death, in 1871. He supported his sister also until her marriage in 1856 or 1857. *Thomas* alleged, that the money expended on the two properties was his, the produce of his wages as a carriage maker; and that in 1852, his mother acknowledged having $2,000 of his in her hands. He further claimed that after entering into the receipt of the rents, he expended in the support and care of his mother and sister, more than he received. He therefore insisted

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that he was a creditor of his mother's estate, and that the amount coming to him on this account should be paid to him before any division of the property. His sister, on the other hand, claimed that he was entitled to nothing in respect of his alleged advances, and that the whole property should be equally divided.

Statement.

Being unable to settle, the arbitration was agreed to. *Hutchinson* named Mr. *Westmacott* as his arbitrator; and the *Lawsons* named Mr. *Love*, an old and intimate friend of theirs. The evidence shewed that both he and Mr. *Westmacott* were most respectable men. At Mr. *Love's* suggestion, they proceeded to appoint an umpire before entering on the arbitration; and he suggested Mr. *Hewitt*, a merchant of the city, and also a very respectable man. Mr. *Westmacott* knew Mr. *Hewitt* very well, and therefore consented to his appointment at once, without any reference being made to *Hutchinson*. When *Hutchinson* was informed of the appointment by *Westmacott*, he objected to it because of *Hewitt's* close relations with *Lawson*. *Westmacott* had not been aware of these; but after being informed of them, he still thought that *Hewitt* could be relied on for deciding fairly, notwithstanding his relations with *Lawson;* and, the appointment having been already made, the reference was proceeded with without further objection. The evidence was taken before all three; and, the two arbitrators finding afterwards that they could not agree, the umpire made the award in question.

The award was dated the 9th December, 1871; and the umpire thereby awarded and adjudged that *Hutchinson* owed to his mother's estate $711.36; that he should pay to his sister half this sum; that the property should be divided between them equally; and that *Hutchinson* should pay the expenses of the arbitration.

The umpire declining to disclose the purport of the award until the costs were paid, *Hutchinson* paid the amount, and obtained the award. On the 15th December, 1871, the *Lawsons* made the submission an order of Court; and on the 19th the award also was made an order of Court.

Notice of motion for setting aside the award, or referring it back, was given on the 23rd January, 1872, and the motion came on for argument on the 20th February.

Statement.

The notice specified the following grounds for the relief asked: (1.) That the award was contrary to law and evidence; (2.) That the umpire had exceeded his authority in awarding that *Lawson* was not in any wise indebted to *Hutchinson;* (3.) That the evidence of one Mrs. *Rawlins* had been received without her having been sworn; (4.) That *Hutchinson* had not been permitted to have, or had by the opposition of the *Lawsons* and *Love* been prevented from having, the assistance of a solicitor or counsel at the arbitration; (5.) That a reasonable time had not been given to him to produce the books relating to his father's estate; (6.) That he had discovered fresh evidence; (7.) That the umpire was unfitted, from his business and friendly relations with the *Lawsons*, to discharge his duties as umpire with impartiality and fairness; (8.) That the evidence and award prove an undue bias in favour of the *Lawsons*, amounting in law to misconduct on his part; and (9.) On grounds disclosed in the affidavits filed.

On the examinations which afterwards took place for the purpose of the application, some other facts came out as to the course pursued by Mr. *Love* and Mr. *Hewitt* during the arbitration, and on which facts additional objections to the award were based in argument.

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Lawson deposed as follows:—"While the arbitration was going on, we consulted together of course; that is, *Love* and I did; and we laid our plans as to what evidence to produce to bring out the truth. I went to his place to consult with him; he did not come to my place. We consulted together about the evidence. *Love* had a conversation with Mrs. *Lawson* on the subject of her evidence, I think before she was examined. I prompted Mr. *Love* as a rule as to the questions he should put to Mrs. *Lawson*. She and I consulted together about it, as is natural, I suppose. We had about fifteen minutes' conversation with *Love* on the occasion when Mrs. *Lawson* had the conversation with him. Mr. *Love* accompanied me to *Price's*, and had a conversation with him before he was examined. We wanted to know what he could say. *Price* examined his books, and gave us extracts from them. He shewed us the books from which he took the extracts. *Price* was afterwards examined at *Hutchinson's* instance, before the arbitrators. He produced his books. We would have called *Price* as a witness, had we not ascertained that *Hutchinson* had seen *Price* and was satisfied with his evidence. Neither the other arbitrator, nor *Hewitt*, nor *Hutchinson* was present when we saw *Price* on that evening."

Statement.

Mr. *Love* gave the following account of the same matters:—"During the course of the arbitration, I had frequent interviews with Mr. *Lawson* about the case. After the arbitration commenced, I had one short interview at my house with Mrs. *Lawson* as to the amount *Thomas Hutchinson* claimed to have paid his mother. I was rather staggered, I confess, at the large amount he claimed to have paid. After I was appointed, but before the arbitration commenced, I went to see Mr. *Price* in relation to this matter."

Mr. *Hewitt* deposed, that pending the reference he had had no conversation with *Lawson* about the matters

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in difference, and that he did not recollect having any with Mrs. *Lawson*. He said further: "I don't doubt but that I might have conversed with *Love* in reference to the arbitration when *Westmacott* was not present. I won't say that I had no conversation with *Love* about the award on the Thursday evening, when we walked down together from *Westmacott's*." This meeting at *Westmacott's* on Thursday evening, was the last before the umpire made his award. Mr. *Hewitt* stated also, that he had a conversation with *Westmacott* once or twice previously, when *Love* was not present; but that nothing of any importance took place. Mr. *Westmacott* afterwards wrote a note to the umpire, stating his view of what the award should be; and suggesting that Mr. *Love* should do the same. It does not appear whether the umpire communicated this note to Mr. *Love*.

Mr. *Stephens*, for the motion.

Mr. *Moss* and Mr. *Foster*, contra.

The following, amongst other cases, were referred to: *Hamilton* v. *Wilson* (*a*), *Ridoat* v. *Pye* (*b*), *Allan* v. *Frances* (*c*), *Dean* v. *The Peterborough and Cobourg Railway Co.* (*d*), *Eardley* v. *Otley* (*e*), *Reynolds* v. *Askew* (*f*), *Heming* v. *Swinnerton* (*g*), *Hogge* v. *Burgess* (*h*), *Latta* v. *Wallbridge* (*i*), *Ormes* v. *Beadel* (*k*), *Ross* v. *The Corporation of Bruce* (*l*).

March 6.

Judgment.

MOWAT, V. C.—It was not disputed that the private conversations which Mr. *Love* had had with the *Lawsons* were sufficient *prima facie* to avoid any award which *Love* could make; for it has over and over again been held, both in England and in this country, that it is illegal for an arbitrator to consider himself as the agent of the

(*a*) 4 U. C. O. S. 16. (*b*) 1 B. & P. 91. (*c*) 4 D. & L. 607. (*d*) 2 Pr. R. 79. (*e*) 2 Chit. 42. (*f*) 5 Dow. 682. (*g*) Coop. at 418. (*h*) 2 H. & M. 292. (*i*) 7 U. C. L. J. 207. (*k*) 2 Giff. 166. (*l*) 21 U. C. C. P. 548.

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party who appoints him, or to hold any private conversation with him or with the witnesses, on the subject of the matters in dispute; that an arbitrator is a judge, whose duty it is to be indifferent between the parties; and that any such course as took place here on the part of Mr. *Love*, however innocent in intention, avoids the award. (*a*)

But it was said that Mr. *Westmacott*, in the interest of *Hutchinson*, transgressed the same rule. On the other hand, it was sworn that these irregularities on Mr. *Westmacott's* part did not begin until after material progress had been made with the reference; and an excuse, though not a sufficient one, is suggested for them. But irregularities of the kind mentioned on the part of an arbitrator on one side, are not condoned by proof of similar irregularities on the part of the arbitrator on the other side. That was expressly decided in *Harvey* v. *Shelton* (*b*); in giving judgment in that case, Lord *Langdale* said:—"This is not a matter of mere private consideration between two adverse parties, but a matter concerning the due administration of justice, in which all persons who may ever chance to be litigant, in Courts of justice or before arbitrators, have the strongest interest in maintaining that the principles of justice shall be carefully adhered to in every case."

Judgment.

That case affords also an answer to the objection which Mr. *Moss* took, that after an award is made an order of Court, a motion to set aside the award cannot be made. The same objection was unsuccessfully made in the case cited (*c*); and I have not found any case in which a different view was taken. If the award is set aside, the order and all other proceedings founded on it fall with it; as in the case of the reversal of a decree.

(*a*) Calcraft v. Roebuck, 1 Ves. Jur. 256; Fetherstone v. Cooper, 9 Ves. 69; Watson v. Duke of Northumberland, 11 Ves. 153; *Re* Tidswell, 23 Beav., 2; Haigh v. Haigh, 3 Deg. F. & J., 157.

(*b*) 7 Beav. 455; See Russell on awards, ed. of 1870; p. 670.

(*c*) p. 464.

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It was said that, the award not having been made by *Love*, the irregularity of conferring with the *Lawsons* after his appointment became immaterial. But that is not so, for he acted as an arbitrator in appointing the umpire; and *Hutchinson* had a right to Mr. *Love's* free judgment on the matters in difference also, as a condition precedent to the umpire's authority coming into force.

As to the private conversations between Mr. *Love* and Mr. *Hewitt* on the subject of the arbitration or award in the absence of Mr. *Westmacott*, I do not know that these would have been material if Mr. *Love* had not, in the way which he states, made himself an agent for two of the parties; but, in view of that circumstance, private conversation with him was at least as injurious and objectionable as private conversation with the principals would have been.

Judgment.

These objections are not specified in the notice of motion, the facts to which they relate having come out on the cross-examination of the parties before the examiner.

One objection specified in the notice is, as to the umpire's want of authority to award that *Lawson* was not indebted to *Hutchinson*; the transactions on which that question depends being partnership transactions, and having nothing to do with the matters referred. But it is admitted, that that part of the award is separable from the rest.

The selection of umpire is also objected to; and, no doubt, the selection was an unfortunate one, however respectable and well-intentioned the gentleman selected may have been. The most intimate and confidential friend of one of the parties ought not to have been imposed on the other to decide, alone and without appeal, the differences between t[illegible]; for an unprofes-

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sional person, unaccustomed to judicial work, or to mental self-examination, is very apt to mistake the natural leanings of his friendship for the unbiased judgment of his understanding. Mr. *Hewitt* is shewn to have had closer private relations with the *Lawsons* than their arbitrator, Mr. *Love*, had had; they had at the time of the arbitration, and had had for many years previously, constant confidential and other business and dealings together; *Hewitt* was *Lawson's* standing indorser to a considerable amount; they were office-bearers in the same Church; they had for many years been close friends; and, in fact, *Hewitt* appears to have been in every way the most intimate friend that *Lawson* had. But I do not understand that this close relationship is alone sufficient to render an award by such an umpire invalid. When *Hutchinson* became aware of the appointment, it excited his alarm and that of his friends, and he expostulated with Mr. *Westmacott* about it; but Mr. *Westmacott* persuaded him to go on with the arbitration, and he did so.

Judgment.

So, the successful opposition which was made to *Hutchinson's* having a solicitor present was a great disadvantage to him, especially in view of the selection made of an umpire; but *Hutchinson* seems to have yielded to the opposition, instead of insisting on having the professional assistance which he desired.

The notice refers to the merits, also (*a*); and I confess that, after repeatedly reading the evidence which was before the arbitrators and umpire, and such of the exhibits as were given to me, I have been unable to perceive the propriety of the umpire's inference, that *Hutchinson* owed to the estate $711.36; instead of being a creditor—which had been the only question between the parties. It is not denied that the *Lawsons* themselves had never claimed that *Hutchinson* was a debtor to the

(*a*) Widder v. The Buffalo and Lake Huron Railway Co., 27 U. C. Q. B. 425, and cases there referred to.

estate; and all which, before the arbitration or during the arbitration, they had claimed or hoped to get, was an equal division of the property. The case must be a very clear one indeed in which an arbitrator can with propriety give to a party more than he himself claims.

If the various figures which *Hutchinson* gives, and statements which he makes in the affidavits sworn for the purpose of the present application, are taken as correct so far as they are not denied on the other side, the unfairness of the award is clear.

It was by Mr. *Love*, and after the evidence had been closed, that the suggestion was first made that *Hutchinson* was a debtor to the estate; and I cannot help thinking that the calculation which brought out this result was a bit of ingenuity on Mr. *Love's* part, adopted in consequence of what he thought (and perhaps justly thought) the unreasonably large claim which *Hutchinson* made against the estate; and Mr. *Love* probably hoped that his calculation, when compared with *Hutchinson's* claim, might lead to a fair award by the umpire, as a compromise between the two. I am satisfied from what Mr. *Love* says, that he would not have found against Mr. *Hutchinson* the large sum named in the award, if Mr. *Love* had made the award himself; but, unfortunately, Mr. *Hewitt* adopted as his award the suggestion thus started for the first time by Mr. *Love*. Judgment.

It is not necessary to consider whether such an award, when compared with the evidence, shews (without further proof) bias and misconduct to the extent necessary on the authority of *Widder* v. *The B. & L. H. Ry. Co.* in the Court of Appeal (*a*), and the cases there cited, to invalidate the award; because I think that I should not exclude from my consideration the objections founded

(*a*) 27 U. C. Q. B.

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on the admitted course of the arbitrators and umpire. The evidence is sufficient to create grave doubts as to the correctness of the award, and is sufficient to satisfy me that Mr. *Hutchinson* laboured under great disadvantages in consequence of the selection made of an umpire, and in consequence of being diverted from obtaining the professional assistance for which that selection created a special necessity; and, in view of these considerations, as well as of the important substantial character of the new objections which the evidence has brought to light, I could not with any propriety refuse to Mr. *Hutchinson* the benefit of these objections; any more than, in a like case at the hearing of a cause, I would refuse leave to a party to amend his pleading in order to let in substantial grounds of suit or defence, shewn by the evidence of the opposite party, but not taken by the pleading filed.

Judgment

If necessary for this purpose, I shall give leave to amend the notice (*a*), or (what would be better) to serve instanter a supplementary notice containing the omitted objections; and, as there is no question about the facts, and as the objections have been fully discussed, I presume that the respondents will not desire an opportunity of putting in further evidence, or of having a further argument, and that an order may at once be drawn up setting aside the award.

I dare say from the evidence, that a more moderate award might have been acquiesced in by Mr. *Hutchinson*, though it had not given him what he claimed; and considering all that has occurred, as well as the relation of the principal parties as brother and sister, I shall be disappointed, if now that both parties have had professional advice, they do not come to some amicable arrangement without further litigation. In hope of such

(*a*) Vide Heywood v. Waite, 18 W. R., 205; 1 Seton, 35, 36; Daniell's Pr. 4th ed. 1456 to 1459, &c.

a settlement, I shall say nothing at present as to the costs of this application. 1871.

Re Lawson and Hutchinson.

O'Donohgue v. Hembroff.

Vendor's lien—Priority among assignees of portions thereof—Petition to amend decree—Lapse of time.

The vendor on the sale of land took promissory notes for the purchase money, indorsed and sold some of them, and was liable on these in case of non-payment by the makers:

Held, that on the sale of the property these were entitled to priority of payment over the notes retained by the vendor.

In such a case notes indorsed without recourse are payable *pari passu* with the retained notes.

A petition to amend a decree, under the 336th Consolidated Order after the time within which there could be a re-hearing without leave may be presented, without a prior application for leave; but such a case must be shewn on the petition as would entitle the petitioner to leave, if such an application were made.

In 1856, the defendant *Hembroff*, sold and conveyed certain lands, for which he was to be paid £2,000; for half of which sum he took a bond, and for the other half he took seven promissory notes of the vendees. Having transferred some of the notes, they became the property of the plaintiff; and on all but one of the notes so transferred she held judgments against all the parties including *Hembroff;* on one, the plaintiff had a judgment against all parties except *Hembroff*. The cause was heard before Vice-Chancellor *Mowat*, on the 25th March, 1871; and at the close of the argument he decided the points which had been discussed. The following is a note of the judgment which his Honour then pronounced:— Statement.

"Declare lien to exist for the purchase money; Master to take an account of the amount due on account

1872. O'Donohgue v. Hembroff. thereof, and to whom owing; the executions to be first paid (the purchase money at sheriff's sale being deducted). All parties, except the Bank of Upper Canada, to add their costs to their shares of the debt; parties will agree on minutes."

In settling the minutes, the plaintiff's solicitor claimed before the Registrar that the decree should contain a clause declaring plaintiff entitled to stand first in priority for the amount which should be found due to her for principal, interest and costs; and, the parties differing, the point was spoken to before the Vice-Chancellor on the 5th of May. At this time it was by mistake assumed by both parties, that the plaintiff had judgments against *Hembroff* on all the promissory notes which she held.

Statement. THE VICE-CHANCELLOR was of opinion that *Hembroff's* indorsing the notes, and thereby assuming responsibility for them to the holder, might well imply as against him an agreement that the notes so indorsed and transferred should have priority of lien over the note or notes which *Hembroff* retained, and that the judgment against him, not having been impeached, debarred him from contesting his liability on the notes, or the plaintiff's consequent right to priority. His Honour thought it unreasonable that, when the property came to be sold to pay the purchase money, *Hembroff* should be entitled to take any of the money until the plaintiff, to whom he was liable, had been paid.

A declaration to the effect which the plaintiff asked was therefore inserted in the decree, and the decree was completed and entered on the 9th of May. Subsequently it appeared that the evidence at the hearing did not shew anything different from what the fact was in regard to the judgments, and that on one of the plaintiff's notes she had no judgment against *Hembroff*. It was con-

tended before the Master that the language of the decree was such that the Master was not concluded to find priority in respect of this note. He decided otherwise on the 9th of October. The cause had abated before this time, viz., on the 4th of October, by *Hembroff's* death. On the 20th of October his solicitors, not being aware of his death, presented a petition under the 336th Consolidated Order, praying that the decree might be amended; that it might be declared that the plaintiff was only entitled to priority over the petitioner in respect of the judgment recovered against him; that it might be referred to the Master to settle the priorities between the plaintiff and the petitioner in respect of the judgment to which the petitioner was not a party, and the amount due to the petitioner; and that for these purposes all necessary directions might be given and for further relief. This petition had to be abandoned on account of the petitioner's death. On the 15th of January, 1872, the suit was revived by the plaintiff, and soon afterwards the administratrix of *Hembroff* presented a petition to the same effect as the prior petition, which came on to be argued before Vice-Chancellor *Mowat*.

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

Mr. *Fitzgerald*, contra.

Judgment.

March 20.

MOWAT, V. C.—The plaintiff's counsel objected that this petition was not presented within the time which parties can re-hear a cause without leave. I see no good reason for requiring a separate application to be made for leave to present a petition under the 336th Order. The petitioner has to shew that the amendment which he asks is proper in itself, and that it should be made notwithstanding the lapse of time; and he can do so as well on one application as on two applications. Looking at the dates and circumstances here, leave to re-hear would no doubt have been granted if the amendment

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could only be made on a re-hearing, and if leave to re-hear for this purpose were necssary.

On the merits: if *Hembroff* was not liable on his indorsement of the note in question, I do not see any sufficient reason for giving this note priority over those which *Hembroff* retained. The lien being for all the notes, and arising at the same time, and from one and the same act, I think that the proceeds of the property, if insufficient to pay all, should be applied upon them *pari passu*, except so far as by agreement, express or implied, *Hembroff* has given to any of those which he has transferred priority over the others. I think that the decree should be amended by restricting the declaration of priority to the plaintiff's judgment against *Hembroff*, and referring it to the Master to settle all other priorities. No costs.

Judgment.

PEERS v. ALLEN.

Tender, absolute or conditional.

A tender of mortgage money with a statement that the party tendering did not consider that the amount tendered was due, and that the other would thereafter be compelled to repay the excess, was held not to have been invalidated by this statement.

A tender to the holder of a mortgage (who claimed a larger sum) with a condition that the mortgage, on the sum tendered being accepted, should be given up, was held bad, as being a conditional tender.

This was a suit for the foreclosure of a mortgage dated 7th January, 1845. The plaintiff was the owner of the mortgage; and the defendants were the owners of the equity of redemption. The mortgage was between other parties. On the 13th December, 1871, a decree was made; and thereby, amongst other things, the

Master at Woodstock was directed to take an account of the amount due, and to ascertain and state whether any tender had been made to the plaintiff on account of the mortgage, and when. Further directions and costs were reserved. On the 22nd February, 1872, the Master made his report, and he thereby found that the amount due at that date was $682.99, and that there had been no tender. 1872. Peers v. Allen.

Against this report the defendants appealed on two principal grounds: (1) That the Master had not given them credit for a sum of £53.10, which they claimed; and (2), That the evidence was sufficient to prove a tender.

Mr. *Hodgins*, for the appeal.

Mr. *Huson Murray*, contra.

MOWAT, V. C.—With respect to the first point, the defendants claimed, that on the 19th November, 1855, a sum of £53 15*s.* was paid to the plaintiff's assignor on the mortgage, and that on the following day a further sum of £53 10*s.* was paid. The Master was of opinion that but one of these two sums had been paid; and after giving judgment to that effect on the evidence (which was conflicting), he refused to open the case in order to have the evidence of one of the defendants taken on commission in Manitoba. I have read the evidence carefully, and am of opinion that there is no sufficient ground for reversing the Master's decision, either as to the effect of the evidence given, or as to letting in the further evidence. March 27. Judgment.

The second objection to the report was as to the tender. The Master thought the tender to have been technically bad; and the question of its sufficiency as a strict legal tender was the point discussed before me.

1872.

Peers v. Allen.

The evidence of the tender was by the defendants' solicitor, and was as follows: "On the 28th September, 1871, I went to Blandford and told the plaintiff that I had the money *to pay off the mortgage*. I think he asked me how much I had. I said I had $1,500 (which I had). I told him I was ready to pay it to him *for the mortgage*, now in suit. He said that his lawyers had the mortgage, and they told him there was $2,200 due on it. I then took the money out, and told him that I was ready to give it to him. I said that I did not think there was so much (meaning as $1,500) due on the mortgage, and that if it turned out there was not that much due, that he would have to repay the difference. We talked for a while, and I then said, 'You had better take this money, *and give up the mortgage*.' He refused to take the money. A good deal more was said, but this is the substance of it."

Judgment.

The Master construed this evidence as shewing that the money was offered on the condition, that if the plaintiff accepted it he was to release or give up the mortgage. I think it very probable that that was the solicitor's meaning; and that the plaintiff so understood it. If he had understood that the offer was unconditional, he would probably have accepted the money; but what the solicitor told him was, that he had the money to pay off the mortgage; that he was ready to pay it to the plaintiff for the mortgage; and again, "You had better take the money, and give up the mortgage." If upon this language there was more doubt than there seems to me to be, there would be great difficulty in interfering with the Master's construction of it, as he heard the evidence and was the party to decide upon it as a jury would at law.

The witness's warning that the plaintiff would have to repay the excess if it should be proved afterwards that less than $1,500 was due, did not make the

tender bad (*a*). But the condition, that the plaintiff was to waive any claim to a further sum, clearly made the tender technically ineffectual. 1872. Peers v. Allen.

The appeal must be dismissed with costs.

EDWARDS v. DURGEN.

Infants—Past maintenance.

It is for the discretion of the Court, in view of all the circumstances, whether to allow for past maintenance out of the corpus of an infant's estate not intended by a testator to be so applied.

A farmer, by his will, gave to his widow his goods and chattels absolutely; also an annuity; and the use of his homestead and other real estate during her widowhood; she married again and claimed to be paid for the past maintenance of the testator's children from the time of his death, out of the corpus of the estate devised to them at twenty-one and otherwise. The Court, on further directions, refused to allow the claim.

Statement.

This suit was by the executors of the estate of *George Augustus Smith*, of the township of Zone, yeoman, who died on the 22nd March, 1867. The plaintiffs were his executors. The defendants were his widow and children, and *Thaddeus H. Durgen*, with whom the widow had intermarried on the 9th June, 1869.

The testator, on the day previous to his decease, made his will, and thereby gave to his wife during her widowhood an annuity of $150, the use of the homestead and farm where they were living, and of another parcel of fifteen acres in the same township; and he gave to her absolutely his farming implements, and imple-

(*a*) Manning v. Lunn, 2 C. & Kir, 13; Scott v. Uxbridge & Rickmansworth Railway Co., L. R. 1 C. P. 596; Sweny v. Smith, L. R. 7 Eq. 324.

1872.

Edwards v. Durgen.

ments of trade, which were stated to have been of the value of $249; stock, &c., belonging to his farm, which were of the value of $391.25, and all his household furniture, wearing apparel, and "provender," &c., the value of which did not appear. Out of the residue of his personalty, he gave a legacy of $250 to each of his two daughters, payable at twenty-one (they were then respectively five and fourteen years old); and he directed a farm to be bought for his son *Emery* (then nine years old), which farm was to be selected by *Emery*, was to be of the same value as the estate devised to the testator's sons *George* and *Edward* respectively, and was to be bought for *Emery* when he came of age. (It was stated at the bar that the homestead was worth about $2000.) To *Jonas*, his eldest son (then twelve years old), he devised another lot in Zone, which the testator then owned, and which he desired that *Jonas* should not have the power of disposing of until he was twenty-three years old. To *George* and *Edward* (then respectively seven and two years old) he gave the homestead after their mother's death or marriage. The three younger sons were to perform certain services for *Jonas* in clearing up the lot devised to him and in building a house on it; the obligation in respect of these services the testator made a charge on the lands given to the three younger sons. The fifteen acre parcel was to be sold after his widow's death or marriage, and the proceeds were to be added to the personal estate.

Statement.

The decree was made on the 13th April, 1870. It contained (amongst other things) a declaration that the widow was entitled to dower in addition to the benefits conferred on her by the will; also the directions usual in an administration order; and a direction to the Master to "inquire and state" what would be a proper allowance for the maintenance and education of the infant defendants from the time of the testator's death, and for the time to come; and out of what fund such allowance

ought to be paid. Further directions and costs were reserved. 1872. Edwards v. Durgen.

The Master made his report on the 29th July, 1871, and it thereby appeared that the outstanding debts of the testator amounted to $65 only; that the plaintiffs had in their hands a money balance of $401.93, being the produce partly of rents, and partly of personalty; and that there were mortgages, promissory notes, and other debts, due to the estate, to the amount of about $3000.

The Master further reported, that $1742 would be a proper sum to be allowed to the widow for the past maintenance of her children up to the 22nd July, 1871; that that part of this sum which was for the maintenance of the two daughters more than exhausted the legacies; and the Master stated his opinion to be, that there should be a sale of the devised lands, or of so much as was necessary, to pay for the maintenance of the devisees; and that as much as necessary of the money which the testator gave to purchase a farm for *Emery*, should be taken to pay for his maintenance; there being no other funds out of which the said respective payments could be made.

On further directions counsel for all parties agreed to minutes in accordance with this report; but in the interest of the infants the Court reserved judgment for the purpose of considering whether what was thus asked for in respect of their estate ought to be granted.

Mr. *Gibson*, for the plaintiffs.

Mr. *S. Blake*, for *Durgen* and wife.

Mr. *Holden*, for the infants.

MOWAT, V. C.—Most of the English cases on the subject of past maintenance are collected in the text March 26. Judgment.

1872.

Edwards v. Durgen.

books (*a*); and after considering these cases and the Canadian cases to which I was referred (*b*), I have arrived at the conclusion that I ought not to sanction the proposed application of the interests given to the children by the testator.

There is no doubt that the Court has power to employ the corpus of an infant's estate for his maintenance; and that the Court exercises this power wherever that course is shewn, to the satisfaction of the Court, to be more for the infant's benefit, than to preserve the property intact until the infant comes of age; and it is the modern doctrine, that payments made by trustees or executors out of the corpus without the previous sanction of the Court are to be allowed where the Court considers the payments reasonable and proper; and such allowance may be made whether the payments were for advancement or maintenance; though payments by way of advancement are more readily allowed than payments by way of maintenance. In all cases, payments made without previous authority are made at the risk of the parties; and the allowance afterwards is for the discretion of the court in view of all the circumstances. In the case of *Re Hunter* (*c*) the present Chancellor refused to allow any part of a sum of $5773, which the mother and guardian of infant children had expended, and faithfully expended, as the Chancellor had no doubt, for the maintenance and education of the children; and which the Master had reported was a proper sum to be allowed to her. The infants there were three daughters: the eldest was then twenty, and the youngest sixteen; the second was married; they all had been educated and

Judgment.

(*a*) See Lewin on Trusts, 5 ed. 419, *et seq.*; Seton on Decrees, ed. 704, 705, 712; Williams on Exrs. 6 ed. 1306, *et seq.*

(*b*) Re Hunter, 14 Gr. 680; Buckley v. Buckley, 15 Gr. 650; Stewart v. Glasgow, Ib. 653; Fielder v. O'Hara, 2 Ch. Chamb. 255; Stewart v. Fletcher, 16 Gr. 235.

(*c*) 14 Gr. 680.

maintained by their mother. His Lordship observed, that the effect of the application would be to leave the two young ladies, of sixteen and twenty, entirely destitute; he had no doubt that the mother had done her best to educate and bring up her daughters well; and he had no doubt that she intended to expend for their benefit, as well as her own, the money which she asked to be paid; but he thought that it would be very improvident to make the order. It appears, from the Chancellor's judgment, that it was given after a consideration of the authorities.

1872.

Edwards v. Durgen.

In the present case, I have no doubt that the testator considered that his widow would be able to contrive to maintain and educate the children with the provision which he made for her; he left it to her unshackled by any trust, and the provision appears from the report to have been about as large as he could have left in that way without sacrificing the capital which he had got together. He left to her absolutely all his furniture, farm stock, and implements, besides "provender," and other articles; and gave to her during her life or widowhood an annuity of $150 a year, and the use of the homestead and farm where they were living at the time, and of the fifteen acre parcel. I have no doubt that he thought that he was in this way making a provision for his widow which would enable her to bring up their children in the way to which they had been accustomed, and which was suitable to their condition in life; and that it was for that reason that he made no express direction as to their maintenance, but provided only for their start or settlement in life when they should reach maturity. I do not suppose that her maintenance of them, at all events until after her second marriage, was based on any expectation of their property being anticipated to repay her, in opposition to the terms of the will. Many a widow in the same station has brought up quite as large and young a family respectably on a smaller provision than

Judgment.

1872.

Edwards v. Dargen.

the testator made for his widow; and her duty to her children required that she should do her best to save for them their property, instead of anticipating it and consuming it in their childhood. Perhaps she did her best; I have no reason to think that she did not; or that the sum which she claims has not been spent, over and above her and their income. If there has been such an over-expenditure, it was imprudent, and can form no just foundation for re-imbursement out of the scanty capital which the testator reserved for their children's manhood. If there had been an annual income coming to them, out of which she might be paid, the case would be very different. Or if she had received nothing from her husband's estate, her case would have been stronger than it is; but when I find that he gave to her almost, if not quite, the whole income, and gave to her absolutely a large amount of goods and chattels, with the evident intention and expectation that she should see to their children's

Judgment.

upbringing, I see no propriety in a mode of management which, without any previous authority for it, would involve the liability of the children for this large sum. Her second marriage has no doubt created new and antagonistic interests; and the result is, demands on her part which, if I give effect to them, would thwart the testator's prudent purposes; would defeat the scheme on which his will was framed; would deprive the two daughters of every shilling of the legacies which they were to receive on coming of age, and leave them henceforward, being now of the ages of nineteen and nine, with nothing either for their future maintenance, or for their settlement in life; would involve a sale to strangers of the homestead which the testator desired to preserve in the family; would deprive all the sons of the farms which their father desired that they should have for their livelihood; would leave them, notwithstanding these sales, to shift for themselves from the age of eighteen to that of twenty-one; and would then leave them with but half, or less than half, of the small capital

which their father expected them to possess; unless in the interval some new necessity should scatter even this small pittance. What is proposed, would fritter away the greater part of the children's little patrimony, without its being shewn that they have been any better off since their father's death than they would have been if he had left them nothing. It would require a very strong case indeed to sanction an allowance for past maintenance to this executrix, involving such results, without any previous order from the Court, or even any previous arrangement with trustees, or the like, occupying the position of protectors of the children's interests.

Considering the state of the assets as found by the report, and considering the other circumstances on which I have remarked, and treating *Re Hunter* as an authority, I am clear that no part of the claim for past maintenance out of the corpus of the estate can be allowed.

Judgment.

It was suggested that the decree had already decided that this charge for past maintenance out of the corpus should be allowed. But that is not so. When the decree was made, nothing appeared as to the income of the real estate; the amount of the personal estate was not ascertained; and all that the decree directed on this point was, that the Master should make inquiries and report. No such claim for past maintenance had been raised by the pleadings; and the clause in question was probably introduced at the instance of some of the parties, without being even mentioned to the learned Judge whose name appears in the margin of the decree.

With respect to future maintenance, I do not feel at liberty to act on the Master's report. If, in consequence of the widow's new relations, an application of capital has become necessary in the interest of the children,

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a scheme for the purpose should be submitted, and evidence given that the children's interests require its adoption. The corpus should not be broken in upon, even for future maintenance, unless it is clearly shewn to be necessary for their best interest. If the parties concur in thinking it desirable to sell meanwhile the fifteen acre parcel, that may be done either by tender or in some other inexpensive way. The other land is not to be disposed of at present.

Judgment.

I see no objection to so much of the minutes agreed to as directs payment of the creditors *Thomas* and *Smith;* also payment to Mrs. *Durgen* of $214.52, being balance found in her favor as executrix; payment of the arrears of her annuity until her marriage; and payment of the costs to this time, except the costs of the claim for maintenance, as to which I give to the defendants *Durgen* no costs.

CARRADICE v. CURRIE.

Fraudulent conveyances—Preferences—Statute 22 Vic., ch. 26, sec. 18.

Adequacy of consideration is not necessary to maintain a transaction under the 13th Elizabeth: though in some cases the inadequacy may afford some evidence of guilty knowledge. But a conveyance by a father to his son in consideration of an annuity of less value than the property conveyed does not suggest the son's guilty knowledge of a fraud by his father in the same way that a conveyance for an inadequate price to a stranger sometimes does.

The statute 22 Vic., ch. 26, sec. 18, against preferences, does not apply to a conveyance of real estate sold by the debtor before his insolvency, but not paid for.

Application to let in evidence after the hearing of a cause, refused on the circumstances.

This was a suit by an execution creditor of *Duncan Currie* to set aside, as fraudulent against creditors, an

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Carradice v. Currie.

assignment made by *Duncan* on the 9th of September, 1869, to his son *John*, of the equitable interest of the former in certain land, which he had contracted to purchase from the Crown, and upon which the father and son were living. There had been a previous transaction between the parties, which the plaintiff admitted to be unimpeachable. This transaction took place on the 13th of February, 1869. By an instrument of that date *Duncan* had agreed to sell to *John*, in payment for his past services, certain chattels for $379, and one-third of certain stock at $31.66, making together $410.66; *Duncan* further agreed to permit *John* to have the use for three years of the remaining two-thirds of the stock therein mentioned, and valued at $95.00; and *John* agreed to keep in feed for *Duncan* one cow, one horse, and three sheep; *Duncan* was to retain for his own use one half of the dwelling-house which the parties then occupied; and he agreed to sell to *John* his interest in the land for $1,000; *John* was to pay all debts and demands against the land, and against *Duncan* personally.

Statement.

Some months afterwards, viz., on the 4th of September, 1869, *Angus Currie*, brother of *Duncan*, died, leaving a will, whereby he gave all his estate to his widow, and appointed her and plaintiff his executrix and executor. They proved the will; and on the 22nd of September, 1869, they agreed to transfer the whole estate to *Duncan Currie*, in consideration of his paying the testator's debts and an annuity to the widow. The transfer was made accordingly. It was in respect of *Duncan's* liability under this agreement that the plaintiff had recovered his judgment.

On the 9th of December, 1869, *Duncan* executed to *John* a transfer of his interest in the land, as provided by the agreement of February. On the same day *John* executed, and *Duncan* accepted, a bond which recited this assignment of the land, and recited that *John* had

1872.

Carradice v. Currie.

agreed to give therefor as follows: $80 a year; the use of the orchard; the half of the house; the keep of one horse, one cow, and four sheep; stabling for the same, in summer and winter; firewood prepared for the stove for the use of the house; with free ingress and egress to and from the premises at all times—all these benefits *Duncan* was to have for his life, and they were to continue for the benefit of his wife, if she should survive him; and it was further recited that *John* agreed to pay all the debts which *Duncan* had contracted before the 15th of March, 1869; and to give the use of a certian parcel of four acres to his brother *Lachlan* for life, if *Lachlan* should fall into indigent circumstances. The bond was conditioned for the performance of the agreement thus recited.

The cause came on to be heard before Vice-Chancellor *Strong* at Guelph, when the Court dismissed the plaintiff's bill with costs.

Subsequently an application was made by the plaintiff on petition, before the same learned Judge, for an order to allow the plaintiff to produce further evidence, and to proceed to another hearing of the cause. This application the VICE-CHANCELLOR refused with costs.

The plaintiff thereupon reheard the cause, as also the order refusing such application.

Mr. *S. Blake* and Mr. *Ferguson*, for the plaintiff.

Mr. *Moss*, for the defendants.

The judgment of the Court was delivered by

April 2.

Judgment.

MOWAT, V. C.—If *Duncan* made the bargain of December, with a view to delay or defeat the enforcement of the liability for which the plaintiff has recovered

judgment, still, if *John* had no notice of the fraud, the transaction being for value was valid. 1872.

Carradice v. Currie.

Now, *John* denies notice. He denies that he even had notice of his father's having made any agreement, or incurred any liability, in respect of the estate of *Angus;* and my brother *Strong*, before whom the cause was heard, was of opinion that *John* had not notice. It is not suggested that *Duncan* owed any other debt, or contemplated incurring any debt; and, though the case is not free from suspicious circumstances in regard to the debt in question, there is not enough in these circumstances to permit us to reverse the finding of the Judge who heard the evidence.

The consideration which *John* contracted to give in lieu of the $1,000, was an annuity of $80 a year as long as either *Duncan* or his wife should live, with firewood and the use of the orchard. Most of the other things agreed to in December, *Duncan* was by the previous agreement entitled to in addition to the $1,000. These new obligations of *John's* were an inadequate consideration for the $1,000; but no authority was cited, and no principle was suggested, which would justify us in holding that the inadequacy of the consideration made the transaction void as against a creditor. Adequacy of consideration is not necessary to maintain a transaction under the 13 Elizabeth (*a*); though in some cases the inadequacy may afford some evidence of guilty knowledge (*b*). But a conveyance by a father to his son in consideration of an annuity of less value than the property conveyed does not suggest guilty knowledge of a fraud by the grantor, in the same way that a conveyance for an inadequate price to a stranger sometimes does. Judgment.

(*a*) Nunn. v. Wilsmore, 8 T. R. 529; Holmes v. Penny, 3 K. & J. 90; Reaume v. Guichard, 6 U. C. C. P., 170; Thompson v. Webster, 4 DeG. & J. 600.

(*b*) Lee v. Hart, 10 Exch. at 560, S. C. 11 Exch. 880.

1872.

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The Consol. Stat., 22 Vic., ch. 26, sec. 18, also was relied on for the plaintiff. It has been frequently held that that enactment does not apply to a conveyance of real estate. I am not aware of any decision as to the particular case of a vendor's interest after he had contracted to sell; but the same policy which excluded other interests in real estate from the operation of the act, seems to apply to interests of this kind also.

No relief is asked on the footing of the transaction of December being a valid transaction.

The plaintiff has appealed also from an order of my learned brother dismissing a petition praying to be allowed to put in further evidence. The plaintiff wishes to examine three witnesses who were not examined at the hearing. The first of these is the plaintiff, who represents himself as remembering a conversation with *John*, which did not occur to his mind until after the hearing; the second witness is a clerk of the plaintiff's solicitor, who tells a conversation he had with *John*, when serving him with some papers since the hearing; and the third witness is a person who speaks to a conversation he had with *John* before the 9th of December. *John* has denied the material parts of the statements made in the affidavits of all three. It would be impossible to admit the first two, if they stood alone. As to the third witness I am satisfied that the plaintiff did not know anything of his testimony until after the hearing and that there was no want of diligence on the plaintiff's part. But, considering the danger of opening a case in order to let in supplementary evidence of a conversation; considering this conversation is spoken to by one witness only; that his knowledge of *John* was extremely slight; that the witnesses's cross-examination suggests great doubt whether he has not mistaken another member of the family for John; and that there are numerous discrepancies between the witness's affidavit and cross-

Judgment.

examination, indicating vagueness and inaccuracy of recollection on his part. I cannot say that the learned Vice-Chancellor, who had heard the other witnesses give their evidence, was wrong in not opening the case at this stage, in order to hear this witness, any more than the other two.

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Per Cur.—Both appeals dismissed with costs.

Baker v. Dawbarn.

Partnership—Separate estate—Fraud on copartners—Dower—Mortgage.

The rule in Equity, as well as in Bankruptcy, is, that the separate estate of a partner is to be applied first in discharge of his separate debts; and, in applying this rule, money paid by co-partners on a liability created by the fraud of the partner towards them, is treated as a separate debt, provable and payable *pari passu* with the other separate creditors, of such partner, in case of his death insolvent.

The mere liability so fraudulently created cannot be proved against the separate estate as a debt until the liability is paid, or until something equivalent to payment takes place. Where the fraud was in the use of the partnership name on bills, the other partners becoming insolvent, the holders of the bills proved them against the partnership estate; the assignee, in a suit for administering the separate estate of the guilty partner, claimed to prove the amount against the separate estate; but the Master restricted the proof to the expected dividend from the partnership estate and the separate estate of the surviving partners; and the Court *held* that the assignee was not entitled to prove for a larger sum.

Where a wife joins in a mortgage, and, on the death of the husband, there are not sufficient assets for the payment of all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors.

Administration order—Further directions.

Statement.

The plaintiff was the widow and administratrix of *John Howard Baker*. She obtained the usual administration order on the 11th of October, 1871, on notice to *Charles*

1872.

Baker v. Dawbarn.

Dawbarn and *Jacob Denton Tripp*, surviving partners and creditors of the deceased. They having become insolvent under the Act, the matter was, on the 18th of October, revived against *John Kerr*, their assignee. On the 21st of January, 1872, the Master made his Report, and thereby found, among other things, that *Kerr* had preferred a claim to rank for $24,573.78, being the amount proved against the partnership estate in insolvency of *Dawbarn & Co.*, whereof *Baker* was, during his lifetime, a partner; it appearing that the said sum was in respect of drafts and bills of exchange which *Baker* had discounted for his own benefit, making use of the name of the firm to procure the discounts; and, it appearing that the said estate in insolvency would not pay a dividend in full upon such claim, the Master restricted the claim to so much of the sum as should be paid in the proceedings in insolvency; no dividend therein having as yet been declared.

Statement.

On further directions two questions were argued; one was as to the propriety of this finding, and the other as to a claim of the widow to have certain mortgages in which she had joined during her husband's lifetime paid out of his personal estate in priority to creditors. It was admitted that the estate of the deceased was insolvent; and counsel for the administratrix and for the separate creditors of *Baker* (for whom the Master had named a separate solicitor) did not dispute that, under the circumstances, *Kerr* was entitled to prove in common with the separate creditors of *Baker* to the extent allowed by the Master; but counsel for *Kerr* claimed that he was entitled to rank for his whole claim.

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

Mr. *Snelling* and Mr. *Wardrope*, for *Kerr*.

Mr. *S. G. Wood*, for the creditors of *Baker*.

Mr. *J. H. McDonald*, for *W. Paterson*.

1872.

Baker v. Dawbarn.

April 2.

MOWAT, V. C.—The general rule both in bankruptcy and in equity has long been settled to be, that the separate estate of a partner is to be applied first in discharge of his separate debts, and that it is the surplus only to which joint creditors of the partnership are entitled. The rule was explained by Lord Justice *Turner* in *Lodge* v. *Prichard* (*a*) as follows: "This rule may perhaps proceed on this ground, that the joint estate is clearly liable both at law and in equity for the joint debts—at law, by reason of the survivorship; and in equity, by virtue of the rights of the partners *inter se* to have it so applied; and that the separate estate is as clearly liable both at law and in equity for the separate debts; and that the carrying over of the surplus of the one estate to the other, although it may not strictly work out the rights, may afford the best means of adjusting the complications which arise from the joint estate being liable to the separate debts only so far as the interest of the partners from whom the debts may be due may extend, and from the separate estates, if taken for the joint debts, having recourse over against the joint estates, and which arise also from the equities between the parties; but whether this rule is strictly correct it is not for us to say. It has undoubtedly been adopted and acted upon by successive Chancellors for a very great length of time, and we cannot now alter it. According to this rule, therefore, joint creditors cannot touch the separate estate until after payment in full of the separate debts. They take the surplus only after payment of those debts." His Lordship added: "The jurisdiction in bankruptcy is equitable as well as legal. The rights of creditors therefore as settled in bankruptcy must be taken to be settled with reference to their equitable as well as to their legal rights; and this being so

Judgment.

(*a*) 1 D. J. & S. at 613.

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Baker v. Dawbarn.

these rules must, as it seems to me, be held to apply no less to cases in which estates fall to be administered in equity than to cases in which they fall to be administered in bankruptcy."

I understand that *Baker's* individual name does not appear on any of the drafts or bills in respect of which the claim of his partners arises; and that it is conceded that the holders cannot claim to be separate creditors of *Baker*. But the assignee's claim is founded upon the argument that, as between *Baker* and his partners, the amount in question is under the circumstances a separate debt, and provable as such by them or their assignee; that, *Baker's* use of the partnership name having been wrongful; there having been in either the expressed or the implied terms of their agreement a prohibition of such an act; and, it having been done without their knowledge consent, privity, or subsequent approbation; and to the intent to apply partnership funds to his own private purposes; their liability was created by a fraud on them, and gave them a right to treat the claim in question as a separate debt against *Baker's* separate estate, according to the authority of *ex parte Harris* (*a*) and other cases. To the extent of the sums paid, the case resembles that in *ex parte Yonge* (*b*) as thus put by Lord *Eldon*: "In this case *Slaney* (the wrongdoer) pledges the partnership credit; as he might with respect to third persons; but he pledges it for a debt, the benefit of which he took entirely to himself. As between him and the partnership there is no doubt that he was first liable. It is true, as Mr. *Leach* has urged, that the two cannot be represented as the creditors of *Slaney* in respect of this transaction; as in fact the three are so; he being one of them; but equity will modify the transaction, and put it in such circumstances that the equitable remedy of the two solvent partners

Judgment.

(*a*) 2 V. & B. 214. (*b*) 3 V. & B. at 40.

shall not be defeated by the fact that they may not have the legal remedy." In that case, the debts had all been paid by the injured partners; the Lord Chancellor in his judgment repeatedly alluded to that fact; and the fact seems upon the authorities to be material. A surety's right to prove in bankruptcy is confined to the sums which he has paid or satisfied. If *Dawbarn & Tripp* had not become insolvent, they certainly would not have been entitled to recover this large amount without having first paid it, or having done what was equivalent to payment; and their insolvency cannot create rights against the separate estate of their partner which before insolvency they did not themselves possess. It had been held in some cases that an indemnity was equivalent to payment; but after great consideration Lord *Eldon*, in *Ex parte Moore* (*a*), negatived that view.

A surety is entitled to file a bill against his principal to compel him to pay the debt to the creditor; and *Dawbarn & Tripp* might before *Baker's* death have filed a like bill against *Baker*, had they discovered the wrong in time. If by means of such a bill *Kerr* could have established his present claim, the Master might have allowed the claim without the expense of such a suit (*b*). But the authorities appear to shew that the death of *Baker* insolvent created a state of things in which nothing but payment of the liability, or something equivalent to payment, would entitle his partners or their assignee to what is now sought. I find no case which would warrant a different conclusion.

Judgment

I referred during the argument to the Act of 1865 (*c*), but counsel did not contend that its provisions had any bearing on the point in question.

(*a*) 2 G. & J. 166.

(*b*) Paynter v. Horston, 3 Mer. 302; McDonald v. Wright, 12 Gr. 552.

(*c*) 29 Vic. ch. 28, s. 28. See Imp. Stat. 32 and 33 Vic. ch. 46, s. 1.

1872.

Baker v. Dawbarn.

The other question argued was, the claim of the widow to have the mortgages in which she had joined, paid in priority to the creditors. The passage in *Park* on Dower, which is mentioned in *Sheppard* v. *Sheppard* (*a*), and was relied on in the present case in support of the widow's claim, does not shew that the widow is entitled against creditors, but refers only, as I take it, to her claims as against the personal representatives, and the heir, of her husband. The learned writer says that, as respects the personal estate, the dowress has like the heir or devisee the right mentioned. Before the late statutes(*b*) the heir or devisee could claim exoneration of the land out of the personal estate, but not to the disappointment of any creditor (*c*). It appears that the widow's claim is, in certain cases, superior to that of the heir, where there is a deficiency of personal estate to pay off a mortgage on land of which she is dowable. These rights of the widow after executing a mortgage illustrate the doctrine which I held in *Forrest* v. *Laycock* (*d*) after a full examination of the authorities, that, as the law stood before a widow became dowable out of equitable estates of which her husband died seized, she did not lose her dower absolutely by joining her husband in a mortgage of the land; and the passages which Mr. *Read* cited from Lord *Redesdale's* judgment in the House of Lords (*e*) shew the same thing; but I apprehend that the right which she retains does not extend to the exoneration of the mortgaged estates from the mortgage out of either the personal estate or the other real estate left by her insolvent husband at his death (*f*). If there is thought to be any anomaly in that, it is not the only anomaly in the law of dower.

Judgment.

(*a*) 14 Gr. at 176. (*b*) 29 Vic. ch. 28, sec. 33; 35 Vic. ch. 15.
(*c*) See Wms. on Exrs. 6 Ed. p. 1567.
(*d*) 18 Gr. 611. (*e*) 1 Bli. 124, 126.
(*f*) See Thorp v. Richards 14 Gr. 174; White v. Bastedo, 15 Gr. 546.

In re De Laronde. 1872.

Probate—Substituted executor—Renunciation.

L. appointed *M.* and *K.* executors and trustees of his will for the management of his property thereby bequeathed (which was personalty) and the payment of the legacies; and he afterwards added and signed a memorandum as follows: "If anything should happen to the trustees, I appoint *R.* to be one of the trustees." *M.* proved the will; after his death *K.* renounced:

Held, that *M.*'s executor did not represent the testator *L.*; and that *R.* was entitled to probate.

This was an appeal by *Adam Hudspeth*, executor of the will of *Robert Miles*, against a judgment of the Surrogate Court of the provisional judicial district of Algoma.

Robert Miles was an executor named in the will of *Louis Denis De Laronde*, whose domicile was in Algoma, and who died there on the 22nd of August, 1868. *Miles* alone proved the will. The following were the terms of the will appointing executors: "I hereby constitute and appoint *Robert Miles*, Esquire, and *Hector Mackenzie*, Esquire (chief factors of the aforesaid Company), trustees and executors of the execution of this my last will for the management of the property hereby bequeathed. In case anything should happen to the executors and trustees, I therefore trust to the gentleman in the replacing of Sir *George Simpson* in the company service of the Hudson Bay Company; and that the annuities be paid to them above mentioned who have attained the age of majority, a month after my death; the others who have not yet come to the age of majority to be paid according to their wants." The will gave legacies to the testator's children, and no annuities to any one. What the will called annuities were evidently these legacies. The will was signed by the testator, and witnessed. Below the signatures was the following sentence signed by the testator: "If anything should happen to the trustees, I appoint *Colin Rankin* to be one of the trustees. (Signed) *Louis Denis De Laronde.*" Statement.

1872.

In re De Laronde.

Miles died on the 19th February, 1870. On the 12th November, 1870, his co-executor *McKenzie* renounced probate of the will; and on the 9th June, 1871, the appellant filed his petition to the Court in Algoma, praying that the probate of *De Laronde's* will might be amended by inserting the petitioner's name in place of the name of *Miles*, and that probate might be granted to the petitioner. The application was refused on the ground that the petitioner was not under the circumstances entitled to represent the testator *De Laronde;* and from this judgment the present appeal was brought.

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

April 2.

Judgment.

MOWAT, V. C.—The learned Judge pointed out in his judgment that, if the petitioner is entitled as executor of *Miles* to represent *De Laronde's* estate, it is not necessary for him to get probate in his own name of *De Laronde's* will; and reference on that point was made to *Williams* on Executors (*a*). It was not suggested on the appeal that that view was incorrect.

The learned Judge held, however, that *McKenzie* not having renounced until after *Miles's* death, the executor of the latter did not represent *De Laronde's* estate; and in the judgment that view is argued out with great ingenuity and force; but a different view having been taken of the corresponding English statute in the case of the goods of *Noddings* (*b*), (to the report of which the learned Judge had not access when he gave his judgment), that decision is binding on us.

But there is another ground on which the decision against the petitioner's right might have been put with effect. In the events which happened, *Colin Rankin* was the person entitled to represent *De Laronde's* estate

(*a*) 6th ed. pp. 368, 369. (*b*) 2 Sw. & Tristr. 15.

and to take probate of his will; for by our law the appointment of an executor does not need to be dated or witnessed, nor does the word "executor" need to be used. Any words which indicate the wish of the testator that a person named should have the charge or office, or the rights which belong to an executor, are sufficient to make him executor. In the will this testator used the words "trustees and executors," but he did not assign different duties to them; and the duties which he did assign to the persons so designated are the ordinary duties of executors, viz., the management of the property thereby bequeathed, and payment to the legatees at the periods and in the manner which his will had specified. 1872. In re De Larondo. Judgment.

Appeal dismissed.

COLTON v. ROOKLEDGE.

Lease—Contract for work partly executed—Specific performance.

Equity, now-a-days, does not, as a general rule, enforce specifically a contract between a landholder and a builder for the erection of a house or the like; but specific performance of agreements to execute works is enforced in cases where the plaintiff shews, what the Court considers to be, a sufficient ground of equity to entitle him to that relief.

A bill alleged, that the plaintiff contracted with the defendants to lease to them certain lands, and to erect thereon for their use a stone building of a specified size according to plans and specifications furnished by the defendants; that accordingly the plaintiff had expended $4000 on the building, under the superintendence of the defendants, and according to plans furnished by them; that he had done everything for which the defendants had given directions; and that the defendants had accepted the building and taken possession of part of it; but it appeared that the machinery was not completed in all respects:

Held, that the allegations of the bill, if proved, would entitle the plaintiff to relief.—[STRONG, V. C., dissenting].

Rehearing.

1872.

Colton v. Rookledge.

The plaintiff was owner of certain land in the village of Gananoque; and of certain water privileges connected therewith. The defendants were paper manufacturers. In April, 1870, certain articles of agreement were entered into by the plaintiff and defendants whereby—after reciting that the defendants, being desirous of carrying on their business at the said village, had applied to the plaintiff for the lease or purchase of the premises, and of a building which they requested the plaintiff to erect for their use, and that the plaintiff was willing, in consideration of the stipulations thereinafter contained, to erect such building, and upon completion thereof, to lease or sell the premises to the defendants,—it was agreed, first: that the plaintiff should erect on the said land a building of stone, 146 feet by 46, and in all other respects according to the plans and specifications furnished to the plaintiff by the defendants, and to do certain work necessary for utilizing the water-power, as was particularly set out in the said articles. Secondly, that the plaintiff should let and the defendants should take, the premises for the term of five years, from the 1st July then next, at certain rents therein specified, payable in advance; and, Thirdly, that upon the completion of the said building, a formal indenture of lease should be executed by both parties; such lease to contain covenants (among other things), for carrying on the business, for not removing the machinery which they were to put into the building, and for enabling the defendants to purchase the premises. It was further agreed, that, until the execution of the lease, the premises were to be held by the defendants from the time they should take possession at the rent, and subject to the covenants and conditions, to be contained in the lease.

Judgment.

The bill further stated that, since the making of this agreement, the plaintiff had been engaged in erecting the building according to the plans and verbal directions

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Cotton v. Rockledge.

given by the defendants; that two of the defendants were present during nearly all the time, overseeing and superintending the progress of the work; that no written specifications had been furnished by the defendants; that the building and all the works which the plaintiff was to do according to the defendants' directions, had been completed so far as such directions had been given; that in any matter remaining to be done, and requiring the defendants' directions, the defendants had been called upon to give the directions, and had refused; but that the plaintiff was ready and willing to complete such work whenever directed by the defendants as to the mode in which they required it to be completed.

The bill further stated that, a month before the filing of the bill, the defendants had brought to the building a large quantity of machinery, and had placed the same in one of the rooms of the building which had been sufficiently completed for the purpose; that the defendants had taken possession of other parts of the building, and had done work therein preparatory to the reception of their machinery; that before the 1st of July, the defendants removed this machinery and removed their business to Newburgh; that before this time, the defendants had accepted the building; that the plaintiff had tendered to them a lease; that the defendants had refused to execute the same, or to specifically perform their agreement with the plaintiff; that the plaintiff had expended about $4,000 on the building; that the defendants had, by means of the premises, thrown upon the plaintiff's hands a costly building which he could not sell or lease, and which was useless for any other purpose than that for which it had been erected; and that the plaintiff would be unable to rent or sell it for any other purpose.

Judgment.

The bill prayed specific performance and other relief.

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The defendants answered the bill, and the cause was taken down for hearing at Kingston at the Autumn Sittings, 1871, before Vice Chancellor *Strong*, who intimated an impression that as, confessedly, the work which the plaintiff had by his agreement to do, was not completed, but something of it remained to be done, the plaintiff would not be entitled to a decree though he should prove his case as stated in the bill. The defendants' counsel thereupon objected to any evidence being gone into; and the bill was dismissed with costs as of a demurrer.

The question on the re-hearing was, whether the opinion expressed and acted upon, was correct. The argument for it was, that the Court cannot in such a case decree the completion of the contract; and, as, therefore, it cannot enforce in favour of the defendants what the agreement provided for, no decree could be made as to the rest of the agreement.

Mr. *Moss* and Mr. *Machar*, for the plaintiff.

Mr. *S. Blake*, for defendants.

April 2.

Judgment.

MOWAT, V. C.—It is quite true that equity now-a-days does not, as a general rule, enforce specifically a contract between a landholder and a builder for the erection of a house or the like, as the Chancellor shewed in the late case of *Dickson* v. *Covert* (*a*); and that case illustrates the applicability, to all cases containing such a stipulation, of the doctrine that specific performance is in the discretion of the Court, and is not to be granted where an action at law is the better remedy.

But on the other hand, Courts of Equity certainly decree specific performance of agreements to execute works, in cases where the plaintiff shews what the Courts

(*a*) 17 Gr. 325.

consider to be a sufficient ground of equity to entitle him to that relief. Amongst the cases (passing by older ones) in which such relief has been granted, I may mention *Price* v. *Penzance* (*a*), *Powell* v. *South Wales Railway Co.* (*b*), *Lytton* v. *The Great Western Ry. Co.* (*c*), *Hood* v. *North Eastern Railway Co.* (*d*), and *Raphael* v. *Thames Valley Railway Co.* (*e*), besides other cases to which I shall have occasion to make a fuller reference.

In many of the cases the work was to be performed on land of which the plaintiffs were not in possession, so that they could not do the work themselves. That circumstance adds weight to every case in which it occurs. In *The South Wales Railway Co.* v *Wythes* (*f*), the learned Vice-Chancellor referred to it as in part the ground on which previous decisions were sustainable. It is remarkable that the Lords Justices, in affirming his decree (*g*), did not put the doctrine on that ground; and in the late case of *Greene* v. *The West Cheshire Ry. Co.* (*h*) the work which the Court decreed the defendants to do was a siding upon land belonging to the plaintiffs, and to be provided by him for the purpose, "for the use, and to the reasonable satisfaction, of the plaintiff." The Vice-Chancellor (*Bacon*) held, that the jurisdiction was not confined to cases where the work was to be done on the land of the opposite party; he pointed out that specific relief had been refused in the *South Wales Ry. Co.* v. *Wythes*, in consequence of "the vague and fragmentary nature of several of the stipulations in the contract;" and he said that there could "be no doubt of the power of the Court to enforce such a decree, so as to ensure a full and specific performance of the contract" to make the siding. The result is thus stated (*i*): "There will be a decree for specific performance in the terms of the first paragraph of the prayer of the bill, the plaintiff

Judgment.

(*a*) 4 H. 506. (*b*) 1 Jur. N. S. 773. (*c*) 2 K. & J. 394.
(*d*) L. R. 8 Eq. 666. (*e*) L. R. 2 Eq. 37. (*f*) 1 K. & J. at 200.
(*g*) 5 DeG. McN. & G. 880. (*h*) L. R. 13 Eq. 44. (*i*) At p. 53.

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undertaking to point out, within one month, the land on which the siding is to be made; either party to have liberty to apply, and the defendants to pay the plaintiff his costs of the suit, including the costs of the motion for injunction."

In *Cubitt* v. *Smith* (*a*) it appeared that the parties had entered into an agreement for a lease, one term of which was, that the defendant, the intended lessee, should build a house on the land according to a plan; and Vice Chancellor *Stuart* decreed a specific performance of the agreement, and ordered the defendant to erect the house as agreed.

In other cases the Court has decreed the specific performance of the agreement, with the exception of the defendant's covenant to build; and as to that covenant has given damages, the Court having a discretion in the matter (*b*).

Judgment.

But in the present case the plaintiff is not seeking to compel the defendants to build; all that the plaintiff wants is, the specific performance of the defendants' contract to take a lease; the building was to be erected by the plaintiff himself. In such a case *Wells* v. *Maxwell* (*c*) is an express authority in his favor. There the plaintiff had agreed to sell to the defendant a piece of land, and it was part of the contract that the plaintiff was to make a new road, of which the defendant was to have the use. The bill was for specific performance, and one of the objections taken to a decree was, that the Court could not enforce the making of the road. But the Master of the Rolls thought that it was "impossible

(*a*) 10 J. N. S. 1123.

(*b*) See Kay v. Johnson, 2 H. & M. 118; Soames v. Edge, Johns 669; Samuda v. Lawford 8 Jur. N. S. 739; Middleton v. Greenwood 2 De G. J. & S. 142.

(*c*) 32 B. 408.

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to support" the objection. He referred to *Storer* v. *The Great Western Ry. Co.* (*a*) and *Sanderson* v. *The Cockermouth Ry. Co.* (*b*) as "clearly instances in which that had been done;" and he added, that there was "nothing more common and ordinary. If the contention of the defendants were to prevail, it would amount to this: that whenever a man enters into a contract for the sale or purchase of a piece of land, and there is anything to be done by either party, by way of easement, or by way of accommodation to the other, this Court cannot specifically enforce the contract. I am of opinion that this is not the rule of the Court, and that it is perfectly distinct from a simple tradesman's contract, between *A. B.* and a builder to build him a house, or between *A. B.* and a roadmaker to make him a road; which rest upon totally different considerations. It is suggested that no means exist by which I could enforce it. The Court has many modes of enforcing it (*c*); but the simplest mode is this: if the vendor refuses to perform it, I should allow the purchaser to make the road, and allow him to deduct from the purchase-money the proper amount of expenses for making it. . . . What I propose to do upon that part of the case is this: I think I could not come to a satisfactory conclusion without some further evidence upon the subject, that the road has been completed to such an extent as is reasonably fair, having regard to the contract between the parties; but I will require the plaintiff to undertake to do this within some reasonable time before the conveyance is executed, either to the satisfaction of the defendant, or of some surveyor to be appointed by the Court. There must be a decree for the specific performance of the contract." This decree was afterwards affirmed by the Lords Justices (*d*).

Judgment.

(*a*) 3 Rail. 106. (*b*) 11 B. 497; 2 H. & T. 327.
(*c*) See Storer v. G. W. Ry. Co. 2 Y. & C. at 54; &c.
(*d*) 9 Jur. 1021. See also Parker v. Taswell 4 Jur. N. S. 183; affirmed Ib. 1006.

1872.

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The formal lease here was to be executed upon the completion of the building; but if the Bill states truly, that the plaintiff has expended $4,000 on the building under the superintendence and supervision of the defendants, and according to the plans which they furnished, and the directions which from time to time they gave; that he has done and completed everything for which they have given directions; that they have refused to give any further directions; that before the 1st July the defendants took possession and occupied portions of the building, and did some work therein; that the building was, in fact, accepted by them, and that it is a building which cannot be sold or leased to any one else, and is useless for any other purpose than that for which it is erected (which allegations he asks an opportunity of proving),—I think (*a*) that the defendants' conduct has debarred them from setting up that the mere admission, that the building is incomplete in regard to some matters for which they have refused to give directions, and which cannot be done without their directions, puts the plaintiff out of Court. The defendants cannot take advantage of their own wrong. Indeed, they do not in their answers allege any incompleteness in the building; their complaint in regard to it (on which they are at issue with the plaintiff) is, that it has been badly built, and is insufficient to bear the strain of their machinery, and is insecure and unsafe. This defence recognizes the substantial completion of the building, subject to the question of its sufficiency.

Judgment.

The pleadings do not shew any difficulty in regard to the unfinished work, whatever it is. When in *Wilson* v. *The Furness Railway Co.* (*b*) the defendants set up the difficulty of enforcing an agreement of this kind, the Vice-Chancellor (now Lord Justice) Sir *W. M. James* said, that "it would be monstrous if the Company,

(*a*) Laird v. The Birkenhead Railway Co. Johns. at 511, et seq.
(*b*) L. R 9 Eq. at 33.

having got the whole benefit of the agreement, could turn round and say, 'This is a sort of thing which the Court finds a difficulty in doing, and will not do.' Rather than allow such a gross piece of dishonesty to go unredressed, the Court would struggle with any amount of difficulties in order to perform the agreement." (a)

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I think that the decree must be set aside; that the plaintiff should be at liberty to take the cause down again for examination of witnesses and hearing; that the plaintiff's costs of the former hearing, and of rehearing, should be reserved to be then disposed of by the Judge who may hear the cause; and that the plaintiff's deposit should be returned to him.

SPRAGGE, C.—I have perused the judgment of my brother, *Mowat*, and agree with it to this extent—that it is competent to the Court to make a decree for specific performance of such an agreement as is stated in the bill; and that evidence should have been received in respect of the issues raised by the pleadings.

Judgment.

The order indicated in the judgment of my learned brother, is, I think, the proper one.

STRONG, V. C.—I adhere to the opinion which I formed at the hearing of this cause, and upon which the decree now re-heard was founded; although I cannot but be distrustful as to its correctness since it differs from that arrived at by the other members of the Court.

It appears on the face of the bill, and it was not disputed at the hearing or on the argument here on the re-hearing, that that statement accords with the fact, that in order to carry this contract into execution, the plain-

(a) See, also, Norris v. Jackson, 3 Giff. 396.

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tiff must perform certain works, provided for in the agreement between the parties, and that any decree which can be made, must direct the completion of these works. At the hearing, I offered the plaintiff leave to amend by stating a case which would have entitled him to a decree unobjectionable on the ground that it would direct the performance of a building contract, but he admitted that he was unable to establish any such case, and I accordingly dismissed the bill with the costs as of a demurrer.

That I was right in the view which I then took, is, I think, established by the case of *Brace* v. *Wehnert*, (*a*) cited by the learned counsel for the defendants in argument on the re-hearing.

Judgment.

That case in its circumstances very much resembled the present. There a house of a certain value was to be built upon the land of the plaintiff, the intended lessor, by the intended lessee, according to a plan to be submitted to, and approved of by the lessor, who, there as here, was the plaintiff. In that case, as in the present, there had been possession by the lessee, though for a much longer period than that which these defendants have had. The Master of the Rolls in his judgment, says—"This contract is not only vague, but it raises the difficulties to be found in all the cases where a specific performance is asked of something which the Court has no means of enforcing, such as to make repairs, to write a book, or exercise a discretion which the Court cannot exercise. I could never compel Mr. *Brace* to approve of a particular plan if submitted to him by the defendant. If I were to say he was bound to approve of any plan which is reasonable (and which I think I could not do), how could I determine upon its reasonableness? The evidence would be of the vaguest possible descrip-

(*a*) 25 Beav. 348.

tion." Now in the present case, the works remaining to be performed are to be according to plans to be furnished by the defendants. But supposing the plans furnished to be objected to by the plaintiff, as unreasonably costly or inconvenient, how is the Court to determine what the plan and character of the works should be.

Is it not most probable that this disagreement as to the plan, will arise, and in that case will not the Court be met with precisely the same difficulty which the Master of the Rolls found insuperable in *Brace* v. *Wehnert*? I have been unable to see how these objections can be overcome.

Again, if the Court does take it upon itself to settle a plan, how is it to provide, from time to time, for the works being carried on in accordance with that plan. All experience points out that disputes will arise upon this head; and I cannot see how they can be satisfactorily settled. It is no answer to say that the Court may nominate an expert to superintend the work. This is a question of jurisdiction, and if the Court possesses the jurisdiction now, it must be one which it could have exercised at a time anterior to the modern change in its practice, which enables it to have recourse to the assistance of experts.

Judgment.

There are, no doubt, exceptional cases like *Storer* v. *The Great Western Railway Company* (*a*), and *Price* v. *Penzance*, (*b*); where the Court has decreed the execution of building agreements, but these cases were such that the plaintiffs would have been utterly remediless if relief in equity had been denied.

The rule and its exceptions are well stated by Mr. *Dart*, at page 904 of his work on Vendors and Purchasers, (4th ed.)

(*a*) 2 Y. & C. C. C. 48, (*b*) 4 Hare, 506.

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I also refer to the cases of *The South Wales Railway Company* v. *Wythes*, and to *The Great Western Railway Company* v. *The Desjardins Canal Company* (*a*), as being decisions directly in point against the possibility of any decree being made consistently with the doctrine of the Court, and the facts stated and admitted by the plaintiff to be the truth of the case.

There being, in my judgment, no jurisdiction to decree specific performance here, that relief not being refused in the exercise of the discretion of the Court, the case does not come within the statute, 28 Vic., ch. 17, sec. 3, and the plaintiff cannot have a reference as to damages. I must, therefore, say here in the language of the Master of the Rolls, in *Brace* v. *Wehnert*:— "The parties must rely on the honour of each other, or on their remedy by action at law for damages." And as the plaintiff alleges that he has erected a costly structure which is useless to him, if the defendants refuse to fulfil their agreement, it would appear that if he can prove what he so states, he may recover at law the full amount of his expenditure made in pursuance of the contract (*b*).

Judgment.

I think the decree should be affirmed.

(*a*) 2 E. & A. 330.
(*b*) Sedg. on Damages, (4th ed.,) p. 319.

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JOHNSTON v. JOHNSTON.

Purhase by trustee for cestui que trust—Father and son.

The defendant had received from the plaintiff, his father, money to buy land; the defendant accordingly bought a party's interest in an unpatented lot, and took an assignment in his own name; when the father afterwards came to this country with his wife and the other members of his family, they all settled on the lot; the mother died five years afterwards, and a few days after her death, and while the plaintiff was in a state of mental depression, the defendant, with the assistance of another son, in whom the father had confidence, induced the father to consent to the defendant's retaining the lot so bought, in consideration, among other things, of the defendant's agreeing to pay for another lot which had been bought, and of his procuring a deed of half this lot to the father and of the other half to the son who was acting for the father; this consideration was not adequate: the transaction was otherwise an improvident one for the father; and there was considerable doubt whether the father had understood the bargain to be as stated by the defendant:

Held, not binding in equity, and that the plaintiff was entitled to a conveyance on payment of the sums which the defendant had paid in pursuance of the alleged contract.

Statement.

Rehearing at the instance of the defendant *James Johnston*, before the two Vice Chancellors.

The original decree was by the Chancellor, who was absent, on account of illness, when the case was reheard.

The decree as drawn up on the original hearing was as follows:—

"Declare that the plaintiff is entitled to an absolute assignment of the premises in question, being the west half of lot number twenty in the second concession of Arthur, county of Wellington, to enable him to obtain the patent thereof from the Crown. Order and decree same accordingly.

"Order that it be referred to the Master at Guelph to take an account of what is properly payable to the defendant *James Johnston* by the plaintiff, in respect of the sum of

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$120 paid by him to the plaintiff; also in respect of the provisions furnished by him to the plaintiff; also in respect of the store account paid to *Irwin*; and also in respect of the amount paid by the defendant *James Johnston* in obtaining the title to lot number sixteen in the first concession of Arthur in the pleadings mentioned.

"Master to tax costs up to and inclusive of decree. Such costs, and the balance, if any, found due by Master to the said plaintiff by the defendant *James Johnston*, to be set off against the amount found due to *James Johnston*.

"Order that party against whom any balance shall be found do pay the amount thereof to the party to whom the same is found due by the said Master within one month after report.

"Order that *James Johnston* upon payment of such balance, if any, found in his favor do execute to the plaintiff the said assignment, such conveyance to be settled," &c.

The facts giving rise to the suit appear in the report of the case *ante* volume xvii., page 493.

Mr. *S. Blake*, for plaintiff.

Mr. *Moss*, for defendant.

Jan. 10th.

Judgment

MOWAT, V.C.—It is clear from the evidence in this case that the defendant *James Johnston* without authority and wrongfully took the assignment of lot No. 20, in his own name, instead of taking it in the name of his father, as whose agent and with whose money he made the purchase; and that, though the defendant thus appeared at the Crown Lands office to be the equitable owner, he had in fact no beneficial interest whatever in the property, and was a mere trustee of it for the plaintiff. The transaction of October, 1866, which the defendant sets up, is therefore an alleged purchase by a trustee from his *cestui que trust*, and by an agent from his principal.

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The property seems to have comprised about two-thirds of the plaintiff's whole means at the date of the alleged transaction; and from the year 1861, when the plaintiff came to this country, up to the time of the alleged agreement, the defendant had persistently excused himself from transferring the purchase into the plaintiff's name; and latterly he had expressly refused to transfer it, unless the plaintiff would pay him $800 or $1,000—a sum to which he had no legal right, and which it was a clear breach of his duty to demand as a condition of making the transfer; the plaintiff was entitled to an unconditional assignment. The plaintiff, however, took no steps to compel the defendant to make the transfer before the death of the plaintiff's wife. This seems to have been at the instance of the family, and in the hope and confidence that the defendant would take no advantage of the circumstance that the lot stood in his name in the Crown Lands office. They were all living on the farm, and working it together.

Judgment.

The Chancellor found, that the plaintiff had been out of his mind at two distinct periods before the transaction in question. One of these periods was in the year 1864, when the malady continued for a month; and the other period was some time earlier. The Chancellor further found, that the plaintiff was subject afterwards to fits of extreme depression; that, with respect to the alleged agreement, it was doubtful if he clearly understood the terms of the bargain as now set up by the defendant; that the defendant's holding the property in his own name, and persistently refusing to assign it to the plaintiff, gave the defendant an undue advantage over the plaintiff in making the alleged bargain; and that the plaintiff was virtually coerced into that bargain, with indecent haste, a few days after his wife's death, and before his mind had recovered its tone. I think that the Chancellor's view of all these particulars is justified by the evidence.

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It further appears, that the plaintiff had no independent adviser in the matter; and that the negotiation was conducted and concluded for him by another son Thomas, or under his advice. Part of the transaction thus brought about through the instrumentality of Thomas, was, that Thomas himself should have a free gift of one half of lot 16. The object of this was, that Thomas, in consideration of getting this half lot, should remain with the old man; but, in fact, Thomas left his father a few weeks afterwards; and he now confesses and swears that the whole transaction had previously been secretly and fraudulently arranged between him and James. What James said in his evidence, in reply to the charge of combining to cheat his father, was, "There was never any arrangement between Thomas and me to cheat my father—*not to my knowledge.*"

Judgment.

The defendant's estimate of the value of lot No. 20, in October, 1866, is $2,000. In endeavouring to make out that the defendant was agreeing to give for this property an adequate consideration, his counsel named $800 as due to the defendant for his services while living on and working the farm with the plaintiff and the rest of the family. But in October, 1866, the defendant got also half the plaintiff's stock; which half the only witness who speaks of its value estimates as worth $500 or $600; this stock the Chancellor's decree leaves with the defendant; and there is no evidence whatever that his services were worth more than this sum, in addition to his board, clothing, and expenses. Besides, it has been decided, both at law and in this Court, that a son cannot claim from his father compensation for his services without an express agreement to that effect. Another item which defendant's counsel relied on towards making up an adequate consideration was $600 said to be due to the Crown on the two lots; but I see no satisfactory evidence that that amount was due to the Crown. He also named $350 as paid or payable for

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the assignor's interest in No. 16; this amount was spread over seven years, and does not appear from any papers which I have seen, to have been payable with interest. On the whole, the defendant failed to prove that he was paying anything like a full price for the property; and I have already said that a large portion of what he was to pay was for the benefit of his brother *Thomas*, and not of the plaintiff. Further, no security whatever was provided for the performance of the agreement on the part of *James*, and in the mean time he held, and was to retain, the right to No. 20 absolutely.

Plainly, therefore, the transaction was an improvident and unequal one; and, as between a trustee and *cestui que* trust, the improvidence and inequality of a contract are conclusive objections to this Court's granting to the trustee a specific performance of it; and in the present case there is the further circumstance of the *cestui que* trust having been coerced into the bargain with indecent haste a few days after the death of his wife, and before his mind had recovered its tone—which the Chancellor found to be the case, and which constitutes another amply sufficient ground for refusing a specific performance of a contract so obtained. Judgment.

Even if the alleged contract had been an executed transaction, perfected by deeds, it would not have been maintainable; for, in such a case, a trustee has to prove these two things (amongst others); and the Court must be satisfied of these two things "after a zealous and scrupulous examination of all the circumstances." (1.) There must be proved to have been a clear and distinct contract, well understood by the *cestui que* trust at the time; and (2) the Court must be satisfied that in entering into it the parties dealt with one another at arm's length, the trustee having no advantage over the *cestui que* trust arising out of the trusteeship. Here, there is no writing as to that part of the alleged bargain which

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related to No. 20, and is now in question; and the evidence of it is chiefly that of the defendant *James*, corroborated in part by patches of conversation detailed by others; while the plaintiff's intention to agree as stated is denied by the plaintiff and *Thomas* on their oaths. The Chancellor said that he had considerable doubt whether the father had a clear understanding of the terms of the agreement; and I am unable to say that that doubt was without foundation in the evidence. Then, as to the defendant's having had in the bargaining no advantage from his trusteeship, I entirely agree with his Lordship that "it is impossible to say that the father would have entered into the agreement if he had occupied his rightful position;" that is, had the property stood in his own name. In truth, the circumstance of the defendant's having the property in his own name, as to all appearance solely interested therein, was the fulcrum of which he deliberately and persistently made use to compel the plaintiff to yield to such terms as the defendant should choose to accept.

Judgment.

Every other difficulty in the defendant's way is enhanced by the personal interest which *Thomas*, who advised the transaction, took under it. He was confessedly the trusted and only agent and adviser of the plaintiff therein. The plaintiff was an old man at the time; he was in the state of mind which the Chancellor's judgment describes; he had just lost his wife, and was feeling deeply her loss; he stood in more than usual need of the continued services and of the considerate kindness of his children; and at this unhappy period the eldest of his children in this country, who was *James*, and who had the father's principal property in his own name, assumed a hostile position to the old man; *Thomas*, the second son, threatened not to "cut another stick" on the property unless a settlement was come to with *James*; and at the same time (as I am satisfied)

led his father to believe that he (*Thomas*) would remain with the old man and work for and with him as before, if *James* was settled with. By what explanations and further inducements he got the old man to intimate his consent to the bargain, as the old man may have understood it, there is no independent evidence; but the bargain to which, through *Thomas*, he is said to have given his verbal consent was, that, though *James* was legally entitled to nothing, yet the plaintiff should surrender to him the homestead, with all the payments and improvements which had been made on it with the plaintiff's money, and by his labor, and by the labor of all his family, since they came to the country; that the plaintiff should surrender to *James* one-half of the stock also; and that the plaintiff should give to *Thomas* himself one-half of the new lot, which there had been a contract to purchase. The plaintiff was to be left with the other half of this new lot, to make out of it his living in his old age as best he could; and to this lot they had not yet got a title; the sums to be paid before a title could be got were nearly equal to the value of the property; and, though the verbal arrangement is said to have been that *James* should pay these, yet all that by his bonds he engaged to do was to procure the patent in ten years, and to convey within one month thereafter. For the due fulfilment of even this engagement he gave no security; and he entered into no written stipulation of which any default by him, or any damage by his father, would for ten years be a breach. Soon after the transaction was effected the plaintiff seems to have been forsaken by all his family; other unfilial conduct on their part, towards him, is in evidence; and after a time the old man awoke to the painful fact, that his sons had (in his own distressful language) "robbed him" of almost everything. It is impossible for such a transaction to be sustained in this Court.

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Judgment.

It was said that the plaintiff's subsequent conduct was

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such an acquiescence in the transaction as binds him. But less than three years after the transaction the plaintiff filed his bill. Before filing his bill (the date does not further appear) he had applied to the Government for a patent; evidence had been given by him and *James* in support of their respective claims, and the Commissioner ultimately (August, 1869,) decided on not issuing the patent until this Court should determine the right. There was nothing in the other circumstances which transpired during the three years, which would amount to such acquiescence as, according to the authorities on that subject, would bar the plaintiff's right to relief.

Judgment.

Defendant's counsel claimed that the decree, if not reversed, should be varied in two respects. He claimed that the defendant should be compensated for his services previous to October, 1866; I have already made observations which dispose of that claim. The defendant's counsel said, also, that the decree as drawn up does not allow the defendant to give evidence of all his payments under the alleged agreement. *James* swore that he was to pay "the debts of the year"; but I do not observe that he has specified any which he had actually paid, except those covered by the decree. If there were any others, they were probably of trifling amount. Whatever the defendant paid was so paid out of those rents and profits with which the decree does not charge him; and my doubt is, whether the decree does not allow him too much, instead of too little. I think that the account directed is quite as favorable to the defendant as he is entitled to.

The decree does not direct the surrender of the defendant's bonds. The decree has not been objected to on that ground, but, if the defendant *James* desires a direction to that effect, it may be given. Subject to that variation, I think that the defendant has nothing to

complain of; and I think that the decree should be affirmed with costs. 1872.

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STRONG, V. C., concurred.

STEELE v. GROSSMITH.

Partnership—Receiver—Parol agreement.

Two partners dissolved partnership: on a bill afterwards filed by one for exclusion, the defendant justified the exclusion on the ground of a parol agreement, which the other denied, and it was not otherwise proved:

Held, that the plaintiff was entitled to a receiver for his security until the hearing.

Motion for receiver and manager, under the circumstances stated in the judgment.

Mr. *Bain*, for the application.

Mr. *Stephens*, contra.

MOWAT, V.C.—The defendant is a wholesale perfumer, and has carried on the business for three years. On the 8th of November, 1871, he and the plaintiff entered into partnership for five years, subject to dissolution at the end of one year if either party should so desire. The defendant's stock was estimated at $1,200; and the plaintiff put in $1,050, and was to have put in $1,300. They quarrelled, however, almost immediately; and, on the 15th of December, 1871, they executed a short deed declaring the partnership to be dissolved from that day. The plaintiff alleges that no terms of dissolution had then been agreed to; but admits that afterwards he verbally agreed to accept $1,100 in lieu of all his claims on the partnership assets, viz.: $100 in cash and $1,000 by monthly instalments of $100 each, Judgment.

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to be secured by the defendant's notes, which the plaintiff says were to be indorsed notes. The defendant alleges that the terms had been agreed to before the deed of dissolution was signed, but that the notes were to be the unindorsed notes of the defendant alone. There is no material evidence, except the affidavits of the plaintiff and defendant themselves, as to whether the notes were to be indorsed. But the plaintiff ultimately, at all events, refused to accept unindorsed notes. This was on the 18th of December. The defendant insisted that the agreement entitled him to carry on the business as his own; which he has done ever since; though he denies that he has excluded the plaintiff from the premises.

Judgment.

Where a partner wrongfully assumes the partnership business to belong to himself individually, and carries it on as such, the other is, as a general rule, entitled to a receiver. The defendant here justifies his conduct by setting up a parol agreement which entitled him to assume the business and carry it on as his own. This agreement the plaintiff denies. The case of *Blakeney* v. *Dufaur* (*a*) appears to shew that, in this state of things, the plaintiff is entitled to a receiver, for the security of the partnership assets until the hearing. There a partnership existed; and one of the terms of the partnership articles was that, if either of the parties did certain acts forbidden by the articles, it should be lawful for the other party, by notice in writing, to expel the offender from the partnership, and to put an end to the partnership. The defendant alleged that the plaintiff had been guilty of misconduct which entitled the defendant to give this notice, and that he had given the notice; and he justified the exclusion of the plaintiff on that ground. The plaintiff denied the misconduct; and the Court held that he was entitled to

(*a*) 15 Beav. 40.

a receiver by way of security of the partnership assets until the question should be tried (*b*).

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I shall appoint the defendant receiver and manager on his giving security, which may be done before me in Chambers. The defendant is the practical man; and I see nothing indicative of any intentional wrong on his part; the differences between the parties may have been the result of a misunderstanding; and I do not intend to interfere unnecessarily with the carrying on of the business until the hearing. If the defendant does not accept the privilege of becoming receiver and manager on giving security, the usual order of reference for the appointment of some person must go.

Judgment.

FORRESTER v. CAMPBELL.

Abortive hearing—Costs of amending pleadings.

At the hearing of a cause the plaintiff was held entitled to a decree on the pleadings as they stood; the defendant had omitted to set up a defence of the registry law; and the plaintiff had for that and other reasons not attempted to prove notice: under those circumstances, the defendant was afterwards allowed to set up the new defence, on terms of paying the costs of the former hearing.

The question of a supplemental answer, reserved by the judgment in this case as reported *ante* volume xvii, page 386 was brought before the Court on the 29th of January, 1872.

Affidavits were filed on both sides. On the part of the plaintiff, it was sworn that he would be unjustly prejudiced by letting in the proposed defence of the registry law now, and various allegations were made in support of that statement. On the part of the defendant *Campbell*

(*b*) See also Clegg v. Fishwick, 1 McN. & G. 294.

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Forrester v. Campbell.

it was sworn that the mortgage had been taken by his solicitors without his knowledge and in his absence; that he knew nothing about it until after the transaction had been completed; that the mortgage was to secure an antecedent debt, and was taken by the defendant's solicitors because the mortgagor was believed to have no other property real or personal; that on that account they had not searched the registry or examined the title before or after taking the mortgage, and did not know or hear of the alleged mistake in the plaintiff's mortgage until the bill in this cause was served. The defendant denied the notice charged in the bill.

Mr. *Moss*, for the plaintiff.

Mr. *J. Bethune*, for defendant.

Feb. 8th.

Judgment.

MOWAT, V. C.—I think that the defendant *Campbell* should be let in to file a supplemental answer, setting up the registry law with such allegations as he may be advised are necessary to bring his case within its protection.

It is with some hesitation that I have arrived at this conclusion, as I do not feel sure, assuming the affidavits of the defendant and his solicitor to be true so far as they go, that their statements and those of the original answer shew enough to entitle the defendant to the protection of the registry law in equity. Thus, I do not see any statement as to the date at which the defendant or his solicitors became aware of the plaintiff's mortgage; or any allegation as to whether they then supposed and believed that the plaintiff's mortgage covered, or that it did not cover, the mill property. If the defendant accepted his mortgage under the belief that the plaintiff had a prior charge on the mill property, that circumstance might be very material in the plaintiff's favor. Mr. *Moss* argued with great force that, as the defendant admits that the mortgage was not taken in

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reliance on the registry law, he ought not now be let in to have the benefit of that registry law. I have thought it right to leave the plaintiff to make what he can of that circumstance at the hearing, instead of giving effect to to it as an argument addressed to my discretion on the present application. But if the fact so referred to should not be found to be a bar to the defence, the omission to look into the title and examine the registry will certainly not be permitted to put the defendant in a better situation than if the regular and usual course had been taken by him in regard to these matters.

As to the terms of letting in the defendant, he should, according to the analogy of the practice at common law, pay the costs of the abortive hearing. The rule here is not so stringent as at common law; this Court looks at the whole case and makes such order as in reference to all the circumstances seems just. But the plaintiff's solicitor has sworn, that he was advised before the hearing that the question of notice was immaterial as the matter then stood; that in consequence he did not exert himself to procure evidence of notice, and did not put any questions on the subject to the defendant himself; and that he believes notice can be proved. In view of these statements; and the plaintiff having shewn himself entitled to a decree on the pleadings as they now stand; and being an innocent party in the transactions in question; and having no personal cognizance of the notice and other matters which the supplemental answer may render material, I think that it would not be just to subject him in any event to the costs of two hearings; or to relieve the defendant from paying to the plaintiff the costs of the last hearing so far as relates to this defendant, and the costs of the present application.

Judgment.

It will, of course, be optional then for the plaintiff either to go to a hearing on the new pleadings, or to submit to the priority which the defendant claims.

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RIDLEY v. SEXTON.

Principal and agent—Interest.

Where a principal was found indebted to his agent, on the taking of accounts in this Court, the Court in exercise of its discretion allowed interest on the amount from the time of filing the declaration, which contained a count for interest, in an action at law brought by the agent and to restrain which the bill in this court was filed, [MOWAT, V. C., dissenting.]

This was a rehearing at the instance of the plaintiffs of the order pronounced in this cause, as reported *ante* volume xviii., page 580.

The only point raised being as to the propriety of the allowance for interest on the claim of the defendant.

Mr. *Maclennan*, for the plaintiffs.

Argument.

Aside from the Statute there is no common law right on the part of a creditor to enforce the payment of interest, unless a special agreement has been entered into for the payment thereof, or it exists by virtue of the custom of merchants. Here the sum due the defendant was not a sum certain; and a jury would not have been justified in allowing interest without its being shewn that a demand in writing had been served on the debtor; for this purpose, it is submitted, that the count for interest in the declaration served on the party is not a sufficient demand under the requirements of the Statute. *Turner* v. *Burkinshaw*, (*a*) is a clear authority in favor of the plaintiffs.

Here, resort was had to this Court, simply on the ground that the accounts were so voluminous and intricate that the machinery of the Court of Law was not

(*a*) L. R. 3 Ch. App. 488.

such as to do justice between the parties in the settlement of them: not with a view of delaying the proceedings. 1872. Ridley v. Sexton.

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

One reason why interest should be allowed in this case is, that the defendant was in a position to obtain judgment in March, 1868, and from that time he could have enforced payment of interest totally irrespective of whether the jury would have allowed it to him or not; and the Master has allowed interest only from the month previous; besides, if the action had been allowed to proceed, the defendant might have claimed interest from November of the previous year, and the jury, in their discretion, would have had a right to allow the claim.

In *Blogg* v. *Johnston* (*a*) and *Turner* v. *Burkinshaw* the parties were differently placed: there the party entitled to receive money chose to go into Chancery: here the parties liable to pay interest institute proceedings in this Court, which, it is contended, have the effect of delaying *Sexton* in the recovery of his demand, If the plaintiffs here are relieved from the payment of the interest, then the delay was to their advantage. He referred to *Arnott* v. *Redfern* (*b*).

STRONG, V. C.—I am of opinion that the order which has been reheard ought to be affirmed. I consider the defendant is entitled to the interest which he claims under the Consolidated Statute, Cap. 43, sec. 2. It is clear that, although the statute in terms only applies to a jury, it is, nevertheless, applicable where money is ordered to be paid by a decree in equity: *McIntosh* v. *The Great Western R. W. Co.* (*c*), *Barrow's Case re Overend, Gurney & Co.* (*d*), *Mildmay* v. April 2nd. Judgment.

(*a*) L. R. 2 Ch. App. 225.
(*b*) 3 Bing. 353.
(*c*) 4 Giff. 69[illegible].
(*d*) L. R. 3 Ch. App. 784.

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Ridley v. Sexton.

Methuen (*a*); and it also applies to a demand like the present, where the exact amount has not been ascertained, but depends on the result of an account to be adjusted: *Edwards* v. *The Great Western Railway Co.* (*b*), The only question, then, is whether the count for interest contained in the declaration is a sufficient demand in writing to meet the requirement of the statute; and I agree with his lordship the Chancellor that the Master was right in the judgment which he formed upon this point. The form of the demand I find to have been considered but in one case,—*Mowatt* v. *Lord Londesborough* (*c*),—and there it was held that no precise or formal demand was necessary, but that, provided it was intimated to the debtor in writing that the creditor claimed interest, the statute was complied with. The count for interest in the declaration is beyond all question a demand made by the defendant on the plaintiff to pay interest, The form of the common *indebitatus* count for interest is, that the plaintiff claims so much for interest—in terms, a demand of interest. It is true that the interest recoverable under the statute is interest by way of damages, whilst the interest which is sought by the declaration is interest due under the head of contract; but this, I conceive, can make no difference. The statute is literally complied with, and the mistake of putting the demand on a wrong ground is no more than "*falsa demonstratio.*" I can conceive no reason why the declaration is not to be considered a sufficient demand. The order, in my judgment, should be affirmed with costs.

Judgment.

MOWAT, V. C.—The appeal was reheard before my brother *Strong* and myself, the Chancellor being unable, from illness, to take part in the rehearing. The only question raised before us was, as to the interest allowed to the defendant on his claim for services.

(*a*) 3 Drew 91. (*b*) 11 C. B. 588.
(*c*) 3 E. & B. 807; S. C. in Error, 4 E. & B. 1.

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By the common law, interest was not allowable on any debt except by agreement or special custom. In the present case it was not contended that interest was payable as of course on such a claim for services; for the contrary is clear; but it was said that the circumstances of the case afford some special grounds on which interest was by law properly chargeable.

The first circumstance in point of time on which the defendant relied was, what had occurred before the action at law was commenced; though it could not have been on this ground that the Master allowed interest, as he made the allowance from the date of filing the declaration only.

The defendant placed his claim in the hands of his attorney for collection on the 23rd of January, 1868; and the action at law was commenced on the 9th of February following. The defendant's employment as agent did not terminate until some time in 1867; and until the 30th of December in that year, or perhaps a day or two later, he was in default in sending his account of the large sums which he had received for the plaintiffs' business since December, 1865. In the fall, or following winter, of 1867, he appears to have for the first time asked *Rae* for a statement of the measurements on which the compensation for the defendant's services was to be based, and he repeated this request when he sent in his own account of 30th December, 1867. On the 3rd of January following, *Rae* wrote to him, acknowledging the receipt of the account, asking for explanations as to certain particulars of the transactions to which the account referred, and promising to prepare the statement of measurements. The defendant gave some only of the information asked by *Rae*, and *Rae* did not furnish the statement desired by the defendant. On the 3rd of February *Rae* reviewed the application contained in his letter of 3rd January; but this letter, like the previous one, received no attention.

Judgment.

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It appears, from the defendant's own affidavit, that he had furnished no account for two years before December, 1867, and that his accounts had, during this period, been repeatedly applied for on the part of the plaintiffs, though he denies that the plaintiffs "were as urgent in demanding them" as the bill and *Rae's* affidavit had stated. The defendant excuses the delay from August to November, 1867, by alleging that, during this period, he was too ill to attend to business; but he says, "I do not deny but that I might have been more prompt and frequent in making out my accounts with the said plaintiffs previous to my last illness." It is plain that neither *Arnott* v. *Redfern* (*a*) nor any other case is an authority for holding under such circumstances the short lapse of time in furnishing the statement which the defendant required, to be a sufficient reason for subjecting the plaintiffs to interest for which they would not otherwise have been liable.

Judgment.

The Master, however, thought that he should charge interest from the day of filing the declaration; and counsel's argument before us in support of this charge was, that the count for interest which the declaration contained was a sufficient demand in writing to entitle the defendant to interest under the Consolidated Statute (*b*). That section provides that, "on the trial of any issue, or any assessment of damages, upon any debt or sum certain, (1) payable by virtue of a written instrument at a certain time, the jury may allow interest to the plaintiff from the time when such debt or sum became payable, or (2) if payable otherwise than by virtue of a written instrument at a certain time, the jury may allow interest from the time when a demand of payment is made in writing informing the debtor that interest will be claimed from the date of such demand." The first part of this section does not

(*a*) 3 Bing. 353. (*b*) U. C. ch. 43, s. 2.

apply to the present case, because (1), though there is a written instrument, it refers to one year only of the defendant's employment; (2) it is not for a debt or sum certain; (3) it regulates compensation in respect of part only of the services on which the Master has allowed interest; and (4) it does not name a certain time for the payment. 1869. Ridley v. Sexton.

Then as to the second branch of the section, I cannot find any reported case before the present in which it was held that the bringing of an action or filing a declaration is such a demand as the statute contemplated. Otherwise interest might be allowed in all cases from one or other of those dates; and I am not aware that any such view is acted upon in courts of law. It seems to me that, if interest was not allowable until the commencement of the action or the filing of the declaration, it was not allowable from either of those dates.

Judgment.

But the principal ground relied on in the argument before us was, that the filing of the bill caused considerable delay; that the defendant might otherwise have got judgment and execution in a month or two, and would have been entitled to interest on his judgment. If this view were adopted, the report would be wrong to the extent merely of the interest from the day of filing the declaration until judgment at law would probably have been obtainable. But, if no bill had been filed, would judgment have been obtained at an earlier date than the Master's report? It is impossible to name any earlier date at which judgment would have been got. The suit at law would have come on for trial at the Spring Assizes. If the case would then have been referred to a compulsory arbitration, counsel for the respondent did not, I think, contend that we could assume that the arbitrator would have disposed of the matter more quickly than the Master did; and there is no ground on which we could make such an assump-

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tion. The cause of so much time having been consumed with the reference was not explained to us; but there was no suggestion that any part of the delay was owing to any neglect or other misconduct of the plaintiffs.

The plaintiffs' motion for an injunction was by consent turned into a motion for a decree; this motion came on upon the 26th of March, 1868; there was no injunction until then; and the decree then made was a consent decree, perpetually enjoining the action at law, and referring it to the Master to take an account of all transactions between the plaintiffs and defendant, and of all matters in difference between them. It being impossible to say that this reference would have been more speedily disposed of by a referee appointed at *nisi prius* than by the Master of this court, one of the defendant's counsel suggested, that no reference was needed, as (it was said) an account had been stated between the parties. To that suggestion the decree constitutes a conclusive answer. As the defendant thereby consented to both an injunction and a general reference to take the accounts, it must be presumed that there was no stated account; and the defendant cannot claim any special advantage from delay which sprang from his own from voluntary act in consenting to transfer the litigation law to equity. I have read the defendant's affidavit filed on the motion, and I find that there was not and is not any ground whatever for the suggestion that there was a stated account. In fact, the defendant's affidavit assumed that, by pleading a set-off, the plaintiffs could bring the whole accounts into question at law, and that they would be disposed of there by the jury or an arbitrator.

Judgment.

If the plaintiffs had a right to have all the accounts investigated and adjudicated upon, before being called on to pay the defendant's claim for his services, it follows that they had a right to have that investigation

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made in this Court, and that they should not be charged with any interest here with which they would not have been chargeable at law. The Court of law had not the machinery for taking the account satisfactorily, and it would be contrary to all propriety that the plaintiffs should be punished by this charge for interest for having resorted to the best means of investigation which our judicial system provides. The case, it must be remembered, is not one of resorting to equity with a pretended equitable defence to a legal demand, and thereby occasioning delay; the defence was a legal one; and it is only on account of the more satisfactory machinery which this Court possesses that the Court had jurisdiction, or that the plaintiffs could come here. The result of the investigation here was, that the defendant was found a debtor on the general accounts, and that, while $14,000 was claimed by him in the action at law, the Master has allowed him a balance of $9,124.77 only. Had that been the award of an arbitrator on a compulsory reference, he would not (I presume) have been entitled to add interest; and, if so, it follows, inevitably, that the Master should not have added interest.

Judgment.

Reference was made for the defendant to cases in which it has been said that the act or error of the Court is not permitted to work an injury to a suitor. But that rule has only a limited application; its application in all cases would be impossible, and has not been thought expedient even to the extent that the application would have been possible. The rule applies where a party has paid money in satisfaction of a judgment which is afterwards reversed; in which case the money must be repaid to him with interest (*a*). The rule applies, also, where a defendant at law has filed a bill in equity setting up a pretended equitable case against a legal right, and

(*a*) Rogers v. D'Escompte, L. R. 3 Pri. Col. 475.

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the suit in equity is unsuccessful, but has caused a delay which barred the other party at law; in which case equity will not permit the bar to operate; for "it would be very strange that a party having no pretence finally to relief in equity, should get it, in effect, by the delay occasioned by the pretence under which he obtained the interference of the Court in his favor" (*a*). But the rule is not applied so as to charge a defendant with interest for the time a suit lasts in respect of a demand which, in its own nature, does not carry interest, whether the suit be of short or long continuance. The contrary receives illustration in the every day practice of all the Courts, as I understand it, and was expressly mentioned in some of the cases cited for the plaintiffs. "Mere legal delay is not a sufficient ground to induce the Court to give interest" (*b*). "Ordinary legal delay in carrying on the proceedings in a suit is not a sufficient ground for allowing interest" (*c*), &c.

Judgment.

The case of *The Hull and Selby Railway Company* v. *The North Eastern Railway Company* (*d*) was cited for the defendant. There the defendants had, under an express order obtained by themselves, paid into Court, immediately before the long vacation, money due from them to the plaintiffs for rent under a written agreement. The Court was of opinion that, if the plaintiffs had sued at law for this rent, the jury would have been entitled under the statute to give interest on the amount; and that it was reasonably clear that, by paying the rent into Court, they had prevented the plaintiffs from recovering interest upon the rent at law; as the statute did not give a separate right of action

(*a*) Bond v. Hopkins, 1 S. & Lef. at 434. See also Pulteney v. Warren, 6 Ves. at 93.

(*b*) Martyn v. Blake, 3 D. & War 125.

(*c*) Earl of Mansfield v. Ogle, 4 DeG. & J. at 42; Blogg v. Johnson, L. R. 2 Ch. App. at 230.

(*d*) 5 DeG. M. & G. 872.

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for the interest, but only authorized the jury to allow interest as damages in a suit for the principal. But what the defendant desires here is, not to get the interest which the jury might have given him at law, but to get interest to which (as I understand) he would have had no claim at law. The case cited, therefore, affords no support to the defendant's claim.

On the whole, I respectfully think that the allowance of interest in the present case was not warranted by the reported cases. If I were legislating, I would be inclined to allow interest in some cases in which the legislature has not yet sanctioned its allowance; but, as a judge, I am bound to allow it only in the cases which the authorities seem to me to warrant.

McIntosh v. The Ontario Bank.

Mortgage—Notice—Will, construction of—Rents—Insurance.

W, claiming as heir-at-law of his father, mortgaged to a bank certain lands which he alleged had descended to him as heir-at-law. In fact, the father had executed a will, whereby the mortgaged property, with other estate of the ancestor, was devised to his five sons, to be equally divided amongst them. The officer of the bank through whom the mortgage was taken was aware that the father had made a will, but understood that the mortgage estate had been devised to *W*:

Held, that there was sufficient notice to put the party on inquiry as to the estate devised to *W*, and that the bank had a claim on the interest of *W* only.

A testator, by his will, devised as follows: "All and singular the rest, residue, and remainder of the estate and effects, real and personal, which I shall die possessed of, or to which at the time of my decease I shall be entitled, I do devise, bequeath, and order to be equally divided amongst my five sons above mentioned." One of the sons (*A*) died during the lifetime of the father without issue:

Held, that the devise of the residue was not a devise to a class; and that by the decease of *A*, his share lapsed and descended to *W*, as heir-at-law of the ancestor.

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One of several devisees claimed to be solely entitled, and mortgaged the property; the mortgagees entered into the receipt of the rents: *Held*, that they must account to the other devisees for their shares of the rents.

One of several devisees, being in exclusive possession and claiming to be solely entitled, insured the buildings on the property; the buildings were afterwards burnt down; the insurance money was recovered on the policies, and new buildings were erected:

Held, that the premiums should be presumed to have been paid out of the rents; and that the party should account for the insurance money, and receive credit for his expenditure on the new buildings.

This cause was heard at the fall sittings (1871) at Whitby, and arose out of the will of one *William McIntosh*.

Statement.

William McIntosh died on the 7th of October, 1849, leaving a will dated the 30th of April, 1842, by which he gave and devised certain properties therein specifically mentioned amongst his children; and the will concluded with the following residuary devise: "Item all and singular the rest, residue, and remainder of the estate and effects, real and personal, which I shall die possessed of, or to which, at the time of my decease, I shall be entitled, I do devise, bequeath and order to be equally divided amongst my five sons above mentioned." The five sons were named in the will, and to each was given a specific property. One of the sons, named *Amasa*, died before his father, viz., on the 29th of September, 1849, and at the death of the testator the defendant *William McIntosh* was his eldest son. After the date of the will, the testator purchased a certain mill property situated at Bond Head, near Newcastle, which was conveyed to him by deed dated the 10th of September, 1846. After the death of the testator, his widow, who was his sole executrix, carried on the mill for some years, for the benefit of the estate, under the superintendence of one *Robert Fairbairn*; and the defendant *William McIntosh* subsequently carried it on in like manner. About the year 1859 the mill was

destroyed by fire, and the defendant *William McIntosh* received the whole of the insurance money paid under the policies then existing on the property.

On the 26th of August, 1859, the defendant *William McIntosh* gave a bond to one *William Wagstaff*, conditioned to convey the whole of the mill property to him upon payment of $6,000. Under this bond *Wagstaff* went into possession of the premises and erected a new mill thereon; but being unable to pay the purchase money, he gave up his right thereto to the defendant *William McIntosh*. *William McIntosh* claimed that the whole of this property descended to him as heir-at-law and did not pass under his father's will. On the 6th of September, 1862, he mortgaged the whole of the property to the defendants, *The Ontario Bank*, to secure the amount of certain notes which he had previously discounted at the bank; and subsequently he executed a second mortgage thereon in favor of the defendant *Dickson*, to secure payment of the amount of a promissory note which he had given to *Dickson*.

Statement

The bank, shortly after the date of their mortgage, went into the receipt of the whole of the rents of the property, and continued in receipt thereof up to the time of filing the present bill.

The plaintiffs were one of the five sons and the children of another son who died since the death of the testator; and the bill was filed against the bank and *Dickson* and the son *William McIntosh*. Another of the five sons died intestate and without issue in the year 1858.

The bill claimed that the mill property was a part of the residuary estate and passed under the residuary clause, and that *Amasa's* share did not go to *William* as heir-at-law, but that the whole residuary estate was

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divisable amongst the four surviving sons in equal shares. The prayer of the bill was, that the plaintiffs might be declared entitled to two-thirds of the mill property; that the bank might be ordered to account for the plaintiffs' share of the rents received by the Bank; that the mortgages might be declared to form no lien on the property, or, at all events, to form no lien on the plaintiffs' share.

Statement.

By their answer the bank and *Dickson* set up that, previous to the execution of their mortgages, the son *William McIntosh* was in the sole and exclusive possession of the whole property, and that he claimed to be the sole owner of the same; that they had no notice of the plaintiffs' claim or title to any part of the property, and no notice of the will nor of its contents, and claimed to be *bona fide* purchasers for value without notice. They also set up that *William McIntosh* had made lasting and valuable improvements upon the property, and they claimed the benefit of the same. They also claimed that the share of *Amasa* descended to *William*, and that their mortgages were a lien upon seven-fifteenths of the property.

The whole will was registered in the registry office for the County of Durham, where the property was situated, on the 18th of January, 1850, but as the property in question was not specifically mentioned in the will, it was not recorded against it specially.

Mr. *Crooks*, Q. C., and Mr. *A. Hoskin*, for plaintiffs.

Mr. *Maclennan* and Mr. *R. R. Loscombe*, for defendants, *The Ontario Bank* and *Dickson*.

The following, amongst other, authorities were cited: *Blaney* v. *Blaney* (*a*), *Windus* v. *Windus* (*b*), *Greated*

(*a*) 1 Cush. at 116. (*b*) 21 Beav. 373.

v. *Greated* (*a*), *Elliott* v. *Davenport* (*b*), *Kent's* Commentaries, vol. 4, pp. 41–2; *Jarman* on Wills, vol 1, ch. 20.

March 6th.

SPRAGGE, C.—I have come to the conclusion that the bank is affected with notice of the contents of the will of the testator *William McIntosh*. The mortgage by *William McIntosh*, the son, was taken through Mr. *Fisher*, the cashier of the bank, and was given to secure an antecedent debt. Mr. *Fisher* knew that the mill property had belonged to the father, and that he died in possession of it; and, as he goes on to say, "that it belonged to the family," and that he had left a will; he knew all this before the mortgage was given. The mortgage was prepared by the bank solicitor, Mr. *Loscombe*, who was not called as a witness. Mr. *Fisher* says that he had an impression that, by the will, the property in question had been devised to the son *William;* that he had understood from the son that there was a will, and that he was heir-at-law (he must mean devisee) under the will of this property; he adds that he speaks from recollection, and has no recollection of any particular conversation with the son on the subject as a matter of business.

Judgment.

The strongest authority for this not being sufficient notice is a dictum of Sir *James Wigram* in *Jones* v. *Smith* (*c*). He noticed that a "point suggested was this: that a purchaser from an heir-at-law, with notice of a will by the ancestor under whom the heir claimed, would be affected with notice of the contents of that will, although he was ignorant of such contents, and even misled by the heir at the time of his purchase. To this conclusion, the correctness of which was assumed at the bar, I am far from assenting. I should say that

(*a*) 26 Beav. 621. (*b*) Tudor's L. Ca. 803.
(*c*) 1 Hare 60.

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the question in that case must depend upon circumstances. If the testator had been long dead and the heir long in possession, and the other circumstances of the case such as to leave the purchaser in credit for perfect good faith, I think a Court of equity would not interfere against the legal title only because the purchaser had notice of a will, respecting which he was misled. If the death of the testator were recent, other considerations might arise affecting the purchaser with the imputation of a fraudulent blindness." The circumstances of this case differ materially from those put by Sir *James Wigram*, as not affecting a purchaser with notice. The testator had indeed been dead since October, 1849, and the mortgage to the bank is dated the 6th of September, 1862; but the mortgagor had not been long in possession or strictly in possession at all; and Mr. *Fisher* does not say that he believed, or that he was told, that the son, the mortgagor, had ever been in possession. For the first seven years after the testator's death, the mill property had been managed by *Robert Fairbairn*, his son-in-law, and the management was then given by the widow to her son the mortgagor. He continued in the management for two years, when the mill was burnt down, and he then entered into a contract in his own name to sell the premises to *William Wagstaff*. There is, therefore, little or nothing in the way of possession by the son, and there was the long previous possession and use by the widow inconsistent with a devise to the son.

Judgment.

Further, there was no representation, as in the case put by Sir *James Wigram*, that the father had died intestate as to this land; but Mr. *Fisher* understood that it was dealt with in the will, and so the contents of the will were brought under his notice.

What was said by Sir *James Wigram* was, as I have said, a dictum only. The case before him was that of a

representation respecting a marriage settlement, and the learned Vice Chancellor distinguishes between the two, observing: "But if I were to admit the plaintiffs' conclusion to be correct in respect of a will, it would by no means follow that the same reasoning would apply to a marriage settlement. A will imports the disposition by the testator of his property. I am not aware of any legal or equitable presumption that a man makes a settlement of his landed estate upon his marriage." The case before Sir *James Wigram* differed also from this, in this respect, that, in that case, the money was advanced upon the security of the property mortgaged. The learned Vice Chancellor observed that the mortgagee's advances were unquestionably made upon the security of the term mortgaged, "and the case is free from the suspicion which sometimes arises where a security is taken by a creditor for antecedent advances:" and later in his judgment he deals with that distinction more fully (*a*), as follows:

Judgment.

"If *Smith's* estate is to be affected by the plaintiffs' claim, it must be upon the ground of his having purposely avoided inquiry in order to avoid discovery. But is such a supposition consistent with a single fact in this case? His debt was not, like that of *Boulnois*, in *Whitbread* v. *Jordan* (*b*), an antecedent debt, for which he might be glad to get any security. The advance of his money was contemporaneous with the mortgage which secures it. His mortgagor was a needy man, and the evidence of *Sarah Jones* proves that *Smith*, at the time of treating for the first mortgage, so considered him. The letter of October, 1826, which the plaintiff has put in evidence, suggests the fraud which was practised upon *Smith*; and the evidence of *Sarah Jones* proves the suggestions in that letter to be true. Where is the ground for questioning the honesty and

(*a*) At pp. 68, 69 & 70. (*b*) 1 Y. & C. 303.

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bona fides of *Smith*, even if his caution could be successfully impeached? How can anything, exceeding want of caution, be imputed to the man who parts with his money upon the bare faith of a security without any assignable motive? The only knowledge *Smith* had was, that there was a settlement. But the contemporaneous assertion respecting that settlement was, that it related to other property than the husband's. A simple denial by *Jones* and wife, that there was any settlement affecting *Jones's* property, would clearly have made *Smith* safe. How can it be argued that such denial is qualified by the statement that there is a settlement relating to other property? Nay more,—is not the apparent candor of that statement calculated rather to inspire confidence, than to excite suspicion and lay a foundation for inquiry? If *Smith* was bound to inquire after one deed of which he was told nothing, except that it did not relate to *Jones's* estate, why, upon the same principle, should he not be bound to examine any other deed, of the mere existence of which he had notice? If notice of the existence of a settlement, declared not to affect the husband's estate, is to put a purchaser upon inquiry, only because it may by possibility affect it, how can the plaintiff stop short of the conclusion, that marriage alone should be constructive notice of any settlement that may have been executed? And why, upon the same principle, should not every man who deals with his neighbour, without knowing he is married, be affected with notice of his marriage, and thence with notice of his marriage settlement (if any), and thence with notice of the contents of the settlement? The basis of the plaintiff's argument is this—that a purchaser is imperatively bound to inquire, wherever he has notice of a fact, which, by bare possibility, may affect the subject of his purchase.

Judgment.

"The affairs of mankind cannot be carried on with ordinary security, if a doctrine like that of constructive

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notce is to be refined upon until it is extended to cases like the present. I should myself incline to limit the cases to which the doctrine is applied, rather than to extend them, were it not that the principle upon which these cases are decided is sound in itself; and that it is better to carry out a sound principle to its limits, even at the occasional expense of individual hardship, than render the law uncertain and fluctuating by arbitrarily refusing to apply an acknowledged principle to cases within its range."

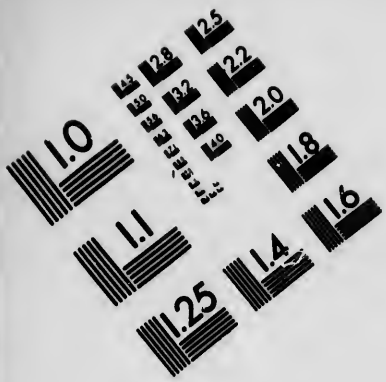
The defendant *William Dickson* had substantially the same notice as the bank, with this exception, that it does not appear that he understood the property mortgaged was dealt with in the father's will. In his case, as in that of the bank, the mortgage was taken for an antecedent debt. It was subsequent to the mortgage of the bank.

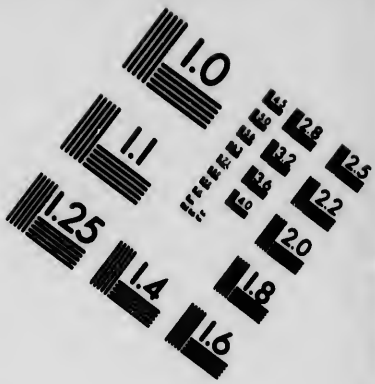
Judgment.

The testator's will was registered, but it was before the Act making registration notice. The mortgages to the bank and to *Dickson* were also registered, and their answers claim the benefit of registration.

I proceed to dispose of the other points raised in this case. My opinion is, that the devise of the residue, by the will of the testator *William McIntosh*, was not a devise to a class, but to the five sons named in the will; that by the death of *Amasa*, his share lapsed, and being undisposed of by the will, it descended to *William* the mortgagor.

A third point is, as to the rents paid by *Wagstaff* and *McNaughton*, lessees of the mill property to the bank. *William*, the lessor, would be bound to account to the other tenants in common for all rents received by him beyond what he was entitled to retain as his own share. The bank, as the assignees of the lease, could





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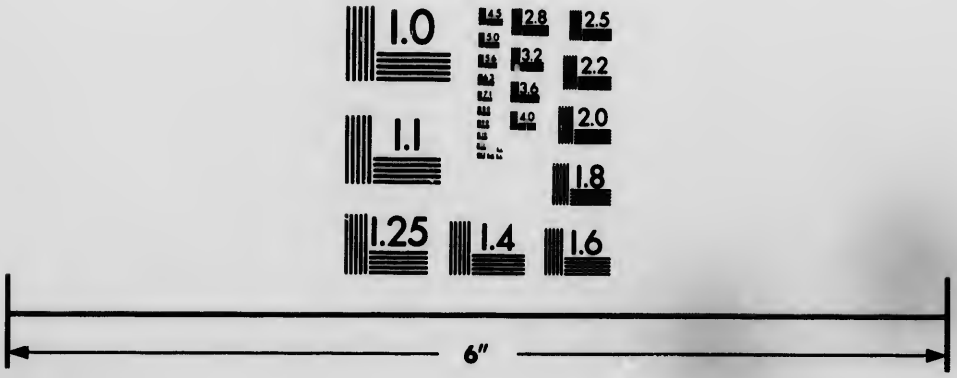

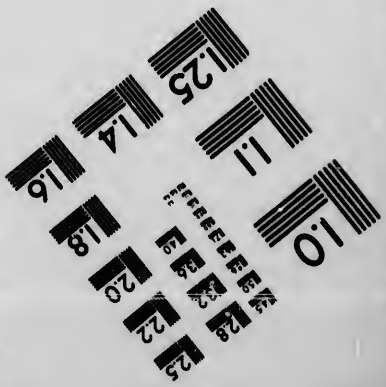

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not, in my opinion, have a larger right than their assignor, and are bound to account for the excess.

The plaintiffs claim that the insurance moneys received by *William McIntosh* after the burning of the mill in 1859 should be charged against his share; and I think they should. The profits were received by him; and I think the proper intendment is, that the premiums of insurance were paid out of the profits. What he received from the assurers represented so much of the real estate. I think a case for this is sufficiently, though not very explicitly, made by paragraph 25 of the bill.

Connected with this is the claim made by the defendants for improvements on the property, by which I understand the new mill built by *Wagstaff*, and this, I think, should be allowed on the other hand. If *William McIntosh* had simply replaced the mill destroyed by fire, the assumption would be, that he did so by applying the insurance moneys received to that purpose, and in that case he would not be chargeable with the insurance moneys. The mill premises were partially replaced by *William McIntosh's* vendee, the price to the vendee being so much less by reason of there being no mill upon them; and the plaintiffs get the benefit of what was done under the contract. They ought not to have both the new mill and the moneys paid upon the destruction of the old one. The value of the new mill should be set against the insurance moneys.

Judgment.

I think there should be no costs up to the hearing.

CRAWFORD v. MELDRUM. 1872.

Practice—Adding party in Master's office.

A registered judgment creditor had filed a bill impeaching a conveyance made by his debtor, which was ultimately declared void, and, in proceeding to take the account in the Master's office, the plaintiff obtained and served an order from the Master, making a prior incumbrancer a party:

Held, that, as the plaintiff, in his proceedings, had elected not to make the prior incumbrancer a party to his bill, his serving him with the order in the Master's office was irregular, and the order was discharged at the instance of such prior incumbrancer.

In such a case, if the prior incumbrancer should afterwards put the judgment creditor to file a bill to redeem, whether he would be entitled to his costs. *Quære.*

After the reversal of the decree in this cause, as reported in the Error and Appeal Reports, volume iii., page 101, the plaintiff carried the order, making the order of the Court of Appeal an order of this Court, into the Master's office, and, in proceeding thereunder, it appeared that one *John Boynton* had a prior incumbrance upon the property in question as mortgagee; and the Master thereupon directed *Boynton* to be served with an office copy of the decree under General order 244. *Boynton* thereupon moved, by way of appeal, to discharge the order of the Master, on the ground that he was not a necessary party to the plaintiff's suit.

Mr. *Hoskin*, in support of the motion.

Mr. *Blake*, Q.C., and Mr. *Hector Cameron*, contra.

March 6th. Judgment.

SPRAGGE, C.—*Crawford* obtained his judgment against *Thomas Meldrum*, and registered it before the 18th of May, 1861. If *Thomas Meldrum* had not conveyed to *Helen Meldrum*, that judgment would have been clearly an incumbrance upon the land. The conveyance, *Thomas* to *Helen*, was declared void, under the

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Statute of Elizabeth, by the Court of Appeal, as against *Crawford*. The judgment therefore was, it would appear, from the date of its recovery, and continued to be, a charge upon the lands conveyed.

I do not, however, give any judgment upon this point, because I am of opinion that the order of the late Master, making *Boynton* a party in his office, must be discharged. The difficulty in *Crawford's* way is one of his own creating. *Boynton* was a prior mortgagee, and it was competent to *Crawford* to have made him a party, in order to redeem him, or not to make him a party, as he saw fit. He did not make him a party, and consequently the order of the Court of Appeal (virtually the decree in the suit) directed that incumbrancers, *other than prior mortgagees* (if any), should be made parties. It is contended that there was a special reference back to the Master to make parties.

Judgment.

I suppose the direction in the order made on appeal from the Master is what is referred to; but that merely directed that all *necessary* parties be added or notified *Boynton* was not a *necessary* party, nor a proper party under the plaintiff's bill and the order of the Court of Appeal; and that order could not be varied by an order made on appeal from the Master, and, of course, it was not intended that it should be varied. There was therefore nothing, in my opinion, to warrant the Master in making *Boynton* a party, and the order making him a party must be discharged, with costs.

Crawford has made him a party in order to redeem him. If he puts *Crawford* to file a bill to redeem him, and it should be held that *Crawford* is entitled to redeem him, there may be a question whether he would be entitled, in such a suit, to his costs.

BUNTIN v. GEORGEN. 1872.

Equitable assignment—Notice—Future claim.

It is no objection to an assignment, in equity, of a claim against a third person, that the work upon which the claim is to arise has yet to be performed.

A printer, being about to execute a contract of printing for a customer, applied to a paper maker for a supply of paper, but which he refused to supply unless secured therefor: thereupon a memorandum was signed, with the printer's name, by one, with the cognizance of the other, of two persons having the general management of the printer's business, agreeing to hand over to the manufacturer a draft upon their customer for the amount of the account, payable at three months from the date of completing the work:

Held, that such document was a sufficient assignment of the claim in equity, and that the giving thereof was within the scope of the general authority of the managers of the business.

The customer, after having been notified of this arrangement, paid the amount to the printer:

Held, that such payment was made in his own wrong; and he was ordered to pay the amount to the plaintiff, the assignee.

The facts of this case appear clearly from the head-note and judgment.

Mr. *Maclennan*, for the plaintiffs.

Mr. *McCarthy*, for the defendants.

SPRAGGE, C.—The late *James Lovell* carried on the business of a printer and publisher in the City of Toronto; and upon his death the business was continued by *Ann Lovell*, his widow, under the style of *A. Lovell & Co.* She did not however take any active part in the management of the business. Acting under advice she retained in her own hands the signing of cheques and notes. With that single exception, the business was managed by two persons in her employ *Robert Lovell* and *James Banks*. The latter in his evidence says, "she did not attend to any other portion of the business (*i. e.* other than the signing of cheques and notes) we, *Robert Lovell* and myself, attended to all other business matters, such as making bargains, &c." Judgment.

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Buntin v. Georgen.

The defendants were about to publish an Almanac, and entered into a contract with *A. Lovell & Co.*, to do the work. The plaintiffs were paper manufacturers and had supplied *A. Lovell & Co.* with paper for their printing business. Upon making the contract with the defendants application was made to the plaintiffs to furnish the necessary paper. *A. Lovell & Co.* being indebted to the plaintiffs to as large an amount as they desired to give them credit, declined to accept the order unless security were given to them. They were asked to furnish paper on another account also, and a paper in the following terms was the result: "We hereby agree to hand over to Messrs. *Buntin Brothers & Co.* our draft on Messrs. *Woodruff, Bentley & Co.*, or pay cash for the amount of work done by us for their Almanac for 1871 as soon as the work is delivered to them, and also our draft on Messrs. *T. W. Georgen & Sons* at three months from the date that we complete their Almanac, for the sum of four hundred and twenty dollars. A. LOVELL & Co."

Judgment.

Toronto, Oct. 3, 1870.

The signature "*A. Lovell & Co.*" is that of *R. Lovell*. The agreement was entered into by him, with the cognizance of *James Banks*.

Upon this, two principal questions are raised: one, that *Robert Lovell* and *Banks* were not competent to enter into such an agreement; the other that the agreement entered into did not operate as an equitable assignment of the debt, that was to accrue due to *A. Lovell & Co.* As to the first: an equitable assignment does not need to be in writing, and does not fall within that which Mrs. *Lovell* reserved to herself. Then, was the agreement of a nature which it was not competent for the managers of the business to enter into? The plaintiffs were not, so far as appears, informed of any restriction whatever upon the managers of the business. They appeared

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to those dealing with *A. Lovell & Co.* as managers of the business in the largest sense of the term. Such a contract entered into under the circumstances that this contract was entered into, was in my opinion within the scope of the implied authority delegated by Mrs. *Lovell* to those to whom she committed the management of her business. It was strictly a business transaction; and, though of a nature that is probably not of frequent occurrence in business, still not of an extraordinary character. It appears by the evidence that Mrs. *Lovell's* means were small and her credit not good, and such an arrangement was a necessity in the management of the business. She could not I think repudiate the agreement, nor does she appear to have done so. The objection is raised by these defendants at the hearing; and then for the first time. It is established in evidence, and it is indeed conceded, that the paper contracted for was furnished by the plaintiffs to *A. Lovell & Co.;* and that the defendants had notice of the agreement between the two former, before they gave their note to the agent of *A. Lovell & Co.* The notice was distinct, that *A. Lovell & Co.* had assigned to the plaintiffs their claim on the defendants for printing Almanacs to the amount of $420; and they were notified to make no settlement except with the plaintiffs. If the agreement did operate as an equitable assignment, the defendants settled with *A. Lovell & Co.* in their own wrong and with their eyes open.

Judgment.

I think the instrument contained all that w. ccessary to constitute such an assignment. What was held to amount to an equitable assignment in *Burn* v. *Carvalho* (*a*) was less explicit. The creditors there wrote to their debtor requesting him to instruct an agent of the debtor, who had goods of the debtor in his hands, in a foreign country, to deliver them over to an agent of the

(*a*) 4 M. & C. 690.

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creditors; and the debtor by letter in answer promised to do so; and Lord *Cottenham* held these letters to amount to an equitable assignment. Mr. Justice *Story* (*a*) says that "in order to constitute an assignment of a debt or other chose in action in equity, no particular form of words is necessary;" of this he gives several instances and quotes several authorities, among them *Burn* v. *Carvalho*. That case resembles the one before me in this, that there was no present formal assignment. There was no order on the foreign agent given by the debtor to the creditors but only an engagement, as in this case, to do something in the future. Judge *Story* goes on to say, "indeed any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of that fund," and he states the reason to be that the fund being matter not assignable at law, nor capable of manual possession, an appropriation of it, is all that the nature of the case admits of, and therefore it is held good in equity.

Judgment.

It is clear that the thing assigned not being yet in *esse* is no objection to the assignment. In this case the existence of the fund was contingent upon the execution of the work to be done by *A. Lovell & Co.* for the defendants. The fund was yet to be earned; but such was also the case in *Langton* v. *Horton* (*b*) where the future cargo of a whale ship was held assignable in equity; and Sir *James Wigram* in his judgment gives several instances in which, as he puts it "by contract an interest in a thing not in existence at the time of the contract may, in equity become the property of a purchaser for value."

The same was decided in respect of freight, yet to be earned, by Sir *Launcelot Shadwell*, in *Douglas* v. *Russell* (*c*), affirmed in appeal by Lord *Brougham*.

(*a*) E. J. sec. 1047. (*b*) 1 Hare 549.
(*c*) 4 Hare 524; 1 M. & K. 483.

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There are other cases establishing the same doctrine; and in *Burn* v. *Carvalho* (*a*), Lord *Cottenham* observes, that assignments of future freight and of non-existing but expected funds have been enforced in equity.

All this, indeed, follows from the principle that an assignment of a fund, whether existing or to be brought into existence, is in equity a declaration of trust in regard to such fund; the holder of the fund becomes a trustee of the assignee, and, as soon as he has notice of the assignment, he holds it for the assignee.

Some argument was founded upon the plaintiffs having, as it was supposed, proved their debt in insolvency against *A. Lovell & Co.*, and that without noticing the security contended for in this suit. I have permitted an affidavit to be put in, shewing how the fact as to this really is, with a view to further inquiry, if necessary. It appears that the plaintiffs *proved* no debt in insolvency, but made only the ordinary affidavit in order to a compulsory liquidation of the insolvent debtor's estate. Mr. *Read* was under a mistake as to this when he gave his evidence, as is shewn by the copy of affidavit really made by him, which is produced. It is a point upon which I should think it right to receive affidavit evidence, unless counsel for the defendant desired to examine Mr. *Read* upon it, which he did not.

Judgment.

I think the case a proper one for this Court, and that there is no good reason for refusing the plaintiffs their costs.

The decree will be for the payment of so much as was due by the defendants to *A. Lovell & Co.* The sum paid by them to the agent of *A. Lovell & Co.* was $400, which was confessedly within the amount due by

(*a*) At p. 703.

1872. several dollars: the amount specified in the paper of assignment was $420. I recommend the parties to settle upon $410 and save the expense of an inquiry, and the decree will be with costs.

Bustin v. Georgen.

BRAUN v. AUMOND.

Master's report—Special circumstances.

A decree was made against a trustee for an account, with a direction to allow him any moneys expended by him on certain specified accounts, to the extent of such moneys as had been received by him in respect of the trust estate. In taking the accounts, the trustee desired the Master to report, as a special circumstance, the fact that he had properly expended, in respect of taxes and otherwise, moneys exceeding the amount received:

Held, on appeal, that the Master had acted properly in refusing to enter into such items of account.

Statement. Appeal from Master's report.

This was a suit to compel the defendant *Aumond* to account for the rents and profits of certain lands vested in him as trustee of the infant defendant, son of the plaintiff, and praying the removal of *Aumond* from the trust.

At the hearing, the Court refused to remove the trustee, and directed an account of his dealings and transactions with the estate, and declared the trustee not entitled to any allowance for maintenanee, &c., except as against moneys received by him; improvements made by him to be allowed out of rents received; and referred it to the Master at Ottawa to take the necessary accounts. In pursuance thereof, the Master made a report, which was the subject of the present appeal by *Aumond*, on the grouuds stated in the head-note and judgment.

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Braun v. Aumond.

Mr. *Moss*, for the appeal.

Mr. *Fitzgerald*, for the infant defendant.

Mr. *Bain*, for the plaintiff, *contra*.

SPRAGGE, C.—My brother *Mowat* informs me that his judgment at the hearing was, that to the extent of moneys of the trust estate received by the defendant, he was to be allowed for moneys expended on the accounts, stated in the decree; but that, beyond the amount received by him, he was not to be allowed at all, on whatever account the expenditure may have been. He would, if he had been asked, have authorized an allowance for taxes paid in respect of the trust estate as well as for repairs and improvements, and for maintenance; but the limit would have been the same—the amount received. According to this, the Master would have been wrong if he had (as the defendant *Aumond* contends that he ought to have done) allowed anything beyond the amount received. March 6th. Judgment.

Then, it is contended, that he ought to have reported the fact of expenditures beyond that limit by way of a special circumstance, if not otherwise; and a reason suggested was, that it might have a bearing upon the question of costs. At the hearing of this appeal I was rather inclined to agree in this, especially as the decree directs an account of the dealings of defendant *Aumond* with the trust estate; but, upon reflection, I think that this might lead to inconvenient results. *Aumond*, wishing to shew expenditure beyond the sums received, would naturally desire to shew *to what amount* he had expended beyond his receipts. This, if not merely idle, as he could not assert it to be, would be in order to serve his own interests at the expense of the trust estate; and the plaintiff would naturally and properly go into evidence upon the same point. This would lead to litiga-

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tion in relation to matters not necessary to the inquiry directed by the decree.

The direction to take an account of the dealings of *Aumond* with the trust estate, would certainly taken by itself warrant the taking of such an account as *Aumond* contends for; but this general direction is qualified by the subsequent language of the decree, that "such allowances and expenditure are not to exceed the amount received by the defendant"; for *cui bono* take an account of that which cannot be brought into the account between the parties. If desired as a material fact upon the question of costs, there should have been a direction to the Master to report upon any fact bearing upon the question of costs. I express no opinion whether such a direction would have warranted what is asked for; but, without such a direction, the duty of the Master is limited to what is directed by the decree.

Judgment.

The appeal is overruled, and it must be with costs.

RICE v. GEORGE.

Mortgage—Wilful default.

The owner of land made a conveyance thereof to the grantee, his heirs and assigns, which was intended as a security for repayment of a sum advanced, with interest, and, after the same was fully paid and satisfied, the deed was expressed to be to the use of *E B*, wife of the grantor, for life; and, after her decease, to the use of the children of the grantor and the said *E B* in fee; no time being specified for payment of the money. Upon the execution of this deed, the grantor put the grantee into possession of the estate, which he continued to occupy for some time. Subsequently the grantee allowed the grantor to resume possession of the property, and afterwards assigned his interest to his sister *E G*, who took no step to recover possession or interfere with the occupation of the grantor or those claiming under him:

On a bill subsequently filed by the children of the grantor, alleging that the moneys secured by such deed had been fully paid and satisfied:

Held, that, under the circumstances, *E G* was not liable for the rents and profits.

1872.

Rice v. George.

The bill in this case was filed on the 20th of January, 1852, by *Thomas Edwin Rice* and *Elizabeth*, his wife (a daughter of the late *John Burn*), and *James Burn*, *Elizabeth George*, *Duncan Cleghorn*, and *Arthur Cleghorn*, setting forth that the late *John Burn*, being seized in fee of lot 20, in the 3rd concession of Hope, and other lands in the district of Newcastle, and being indebted to one *James George* in the sum of £80 and to various other persons in different sums to about £170, it was, on the 18th of December, 1821, agreed between *George* and *Burn* that *George* should advance £170 to pay off such debts, and that, for the purpose of securing the same and the £80 due to *George*, and for the purpose of settling the said lands for the benefit of the family of *Burn*, he (*Burn*) should convey; and accordingly, by indenture of the 18th of December, 1821, he did convey the said lands and premises to *George*, "to hold the same to the said *James George*, his heirs and assigns, to the uses following, viz.: to the use and behoof of the said *James George*, his heirs and assigns, until the said £250 should be paid; then to the use of *Elizabeth Burn*, the wife of the said *John Burn*, during her natural life; then to the use of the children of the said *John Burn* and *Elizabeth Burn*, their heirs and assigns, for ever;" that *Elizabeth Burn* died in May, 1825, and *John Burn* died in the year 1837, leaving him surviving children by his said wife, *George Augustus Burn*, his eldest son and heir-at-law, the plaintiffs *James Burn* and *Elizabeth Rice*, and *Georgina Burn*, since deceased; that *George Augustus Burn*, in 1840, assigned all his interest in certain of the said premises to *John W. Cleghorn*, who afterwards (1846) conveyed to his son *Duncan Cleghorn* all his interest in lot No. 20 aforesaid, and afterwards *John W. Cleghorn* died, leaving the defendant *Arthur Cleghorn*, his eldest son and heir-at-law, who claimed the interest held by his father in the premises; that *Georgina Burn* had devised all her interest in the premises to the plaintiff *Elizabeth Rice*.

Statement.

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The bill then alleged that the debt of £250, with interest, had been fully paid by means of a transfer of lot 20 to *James George*, or, if not so satisfied then, by means of payments made by *John Burn* in his lifetime and by *John W. Cleghorn*, and also by means of rents and profits received out of the said premises; and submitted that, after such a lapse of time, the security if not actually discharged ought to be presumed to have been satisfied; but the defendant *Elizabeth George*, to whom *James George* had conveyed the premises, claimed the whole of said £250, with interest, and refused to deliver up the indenture of December, 1821.

The bill prayed the usual account of all moneys received, or which, but for wilful default, might have been received by *James George* and *Elizabeth George*, and for further and other relief.

Statement.

A decree was made, referring it to the late accountant (Mr. *Turner*), to take the usual accounts and make the necessary inquiries, who, in pursuance of such decree, made his report, finding a balance due by *Elizabeth George* of about $13,000 after payment of the principal and interest secured by the deed of December, 1821. From this finding the defendant *Elizabeth George* appealed.

Mr. *English*, for the appeal.

Mr. *Hector Cameron* and Mr. *Morphy*, for the plaintiffs.

Mr. *Moss*, for defendants *Cleghorn*.

March 6th. Judgment.

SPRAGGE, C.—The question raised upon the appeal is in respect of the alleged occupation of lot 20, 3rd concession of Hope.

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Rice v. George.

This lot, with a leased lot adjoining it, lot 21, and 400 acres in Darlington, were mortgaged by *John Burn* to *James George* on the 18th of December, 1821. *George*, who was a half-brother of *Burn*, made advances and paid debts for him to the amount of £250; and, to secure this, a conveyance of the above date was executed. It was not in the ordinary form of a mortgage. It is a conveyance in fee for the express consideration of £250, and the *habendum* is to hold to *George* in fee "to the use and behoof of the said *James George*, his heirs and assigns, until the said sum of £250, and the interest thereon from the date of these presents, is fully paid and satisfied," and, after such payment, to the use of *Elizabeth Burn*, wife of *John Burn*, for life, and after that period to the use of the children of *John* and *Elizabeth Burn* in fee. No time is mentioned for the payment of the debt. It seems, from the evidence, to have been intended that it should be paid out of the rents of lot 20. The possession and control of the other property comprised in the mortgage remained with *Burn*. The Accountant finds that, in pursuance of the trusts of the deed, *George* went into possession, and that he remained in possession and in receipt of the rents and profits, until his assignment to *Elizabeth George*, his sister, on the 28th of January, 1837.

Judgment.

This is not quite accurate. *George* did receive rents and profits for lot 20 for some years; and necessaries were furnished out of them, with his assent, to the family of *Burn*, leaving a balance against *Burn* of £134 13s. 9d.; and he is further charged with occupation rent at £25 a year. *John Burn* died in 1837, and for two years before that, if not more, *George* was neither in possession of lot 20 nor in receipt of rents and profits from it. Lot 21, called the mill lot, was, during that time, managed and worked by *George*, the eldest son of *John Burn*, *John Burn* himself indulging in

1872. habits of intemperance, and the burthen of managing the mill and providing for the family having devolved upon the eldest son, and the possession of lot 20, the lot in question, went along with that of the mill lot. This appears by the evidence of *Whitney Burn*.

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This had been the position of lot 20 for some two years before the assignment to *Elizabeth George*, and it is certain that *Elizabeth George* herself never was in possession of the lot, and never received any rents and profits from it.

The Accountant charges *Elizabeth George* with the rents and profits of lot 20, and with the value of timber and cordwood cut therefrom, from the date of the first possession taken, as he reports, by *James George*, to the date of his report. The amount is large, $16,938.75, exceeding the principal and interest of the mortgage debt by more than $13,000.

Judgment.

At the date of the assignment to *Elizabeth George*, the mortgage debt and interest amounted to £475, and that is the expressed consideration money for the assignment. The rents and occupation rent up to the same period, less some small advances, are charged by the Accountant at about £210, leaving £265 due on the mortgage debt. No timber or cordwood appears to have been cut before the above date, except perhaps a small quantity under the direction of *George A. Burn*, during the two years preceding his father's death. The evidence is not very clear as to how the possession was after the death of *John Burn* and before the sale by *George A. Burn* to *Cleghorn* in 1840. The inference would be, that there was no change, except that, *John Burn* having died, the possession could not be in him. Upon the sale to *Cleghorn*, he (*Cleghorn*) went into possession, and he and those claiming under him have been in possession ever since; and whatever timber and

cordwood have been taken off the place have been taken off by him and them. 1872.

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I confess I do not see upon what principle *Elizabeth George* can be made chargeable with these rents and profits, and with the value of this timber and cordwood. Assuming that she would be chargeable, if *James George*, not having assigned to her, would have been chargeable, it was not his *duty*, under the trust deed, to go into possession; and assuming further that, by receiving rents, as he did, it was a going into possession, he was guilty of no wrong and no default if he allowed *John Burn* to resume possession. The possession that went along with the mill lot for two years before his death was, in fact, the possession of *John Burn* himself, and after the possession thus resumed by *John Burn*, there was no possession nor any receipt of rents and profits by *James George*, as there certainly was not by *Elizabeth George*.

Judgment.

To make *Elizabeth* chargeable, it must be shewn that it was her duty to take possession of lot 20; to put out those in possession and to possess herself of the land; and this, in my opinion, though it was her *right*, as long as the mortgage debt remained unpaid, it was not her *duty* to do. If she is charged, it must be for wilful neglect and default; a mere forbearance to exercise her right cannot be construed into wilful neglect and default.

The possession of *George A. Burn* of the lands in Hope after his father's death, and his dealing with them as owner, may be accounted for in this way. His father made a will, and by it devised the premises mortgaged, other than the lands in Hope, to different children, and these children went into possession of the lands severally devised to them, leaving the land in Hope, which was not devised, to the heir-at-law, *George*,

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or, at any rate, making no claim against *George* in respect of it; and *George*, after having been in possession from his father's death to December, 1840, sold to *Cleghorn*, and sold as heir-at-law. This devise of *John Burn* was in contravention of his deed to *James George* in several particulars, which I do not stay to point out. I merely refer to it, and to what was done under it, as accounting for the abstinence of those who took possession of lands under the will from interfering with the possession of *George* and of those claiming under him. *James Burn* and Mrs. *Rice* are reported as having gone into possession of the lands severally devised to them, and it is to be inferred that they knew of the possession of *George A. Burn* of the Hope lands, and his dealing with them. *Elizabeth George* was no more than a looker on at all this. It is in the highest degree inequitable in those who acted under the will to attempt to charge her with wilful neglect and default. In my opinion, she is not so chargeable justly or legally.

Judgment.

The appeal is allowed, with costs.

The Royal Canadian Bank v. Payne.

Principal and surety.

A mortgage was given to secure the debt of a third party to the extent of $800 so long as the creditor should continue to sell goods to such third party; subsequently the creditor transferred his business to other persons, with whom the debtor continued to deal for some time. During the course of such dealings the debtor paid in more than sufficient to cover the amount of the mortgage:

Held, that the mortgage was thereby discharged, notwithstanding the continued indebtedness of the debtor to the new firm.

This was a bill by the plaintiffs against *John Payne*, *Joseph Rogers*, and the infant children of the said *Payne*, setting forth that on the 16th September, 1868, by virtue of, and in pursuance of a power of appointment,

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vested in the wife of the defendant *Payne*, she and her husband had created a mortgage on certain lands held in trust for the separate use of *Mrs. Payne* in fee, in favor of *James Edward Smith*, for the purpose of, and as a collateral security to *Smith* to the extent of $800, at any time due by *John Pagne* the younger, to *Smith*. *Smith*, it appeared, was carrying on business in Toronto as a wholesale grocer; *Payne* junior was about commencing business as a country dealer, to whom *Smith* was about to supply goods, and for the purpose of securing payment thereof to the extent of $800, this security was given; that on the 21st September, 1868, there was then due by *Payne* the younger to *Smith*, on notes and book account, the sum of $951, which notes had prior to that day been indorsed over to, and discounted by the plaintiffs, and prior to that time *Smith* had agreed to assign, and on that day did assign the said mortgage to the plaintiffs as collateral and additional security for payment of those notes; that Mrs. *Payne* had since died without having made any other appointment of the property, leaving surviving her, her son *John Payne* the younger, and the infant defendants. *Payne* the younger having become insolvent, executed an assignment to *Rogers* under the Statute, who as representing *Payne* the younger's interest, was made a party to the suit. The plaintiffs claimed that there still remained due on the mortgage $668, and prayed that in default of payment of this amount and interest the mortgage property might be sold.

Statement.

The answers set up, and it appeared from the evidence in the cause that in April, 1869, *James Edward Smith* retired from business, having transferred the same to his brothers, who continued to carry it on for some time under the firm of "*Smith Brothers*," and with whom *Payne*, junior, continued to deal in the same way as with *James Edward Smith*, until the insolvency of *Payne* in 1870; that the notes of *Payne*, junior, held

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by *James Edward Smith*, formed part of the assets purchased by, and transferred to *Smith Brothers*, and during the time *Payne* dealt with *Smith Brothers*, the first notes he gave had been retired at maturity and delivered up to him. Several of the notes held by *James Edward Smith* had been from time to time renewed, and after the change in the firms *Payne* junior had paid in more than sufficient to cover all notes held by *James Edward Smith* at the time of his transferring the business to his brothers. Under these circumstances the defendants contended that the mortgage was discharged.

Mr. *Bain*, for the plaintiffs.

Mr. *Moss* and Mr. *Malloy*, for the defendants.

Samuell v. *Howarth* (*a*), *Cross* v. *Sprigg* (*b*), *Bailey* v. *Edwards* (*c*), *Blake* v. *White* (*d*), were referred to by counsel.

April 14th.

Judgment.

SPRAGGE, C.—The proviso in the mortgage is in these terms: "Provided this mortgage to be void on payment of the amounts from time to time to the extent of $800 of all accounts current, accounts stated, bills of exchange, and promissory notes, in which the said *John Payne*, the younger, shall be indebted to the said *James Edward Smith* in the usual course of trade as between wholesale and retail dealers, it being the intention that this indenture is to be a continuing security to the extent of $800, collateral to the indebtedness of the said *John Payne*, the younger, to the said *James Edward Smith*, so long as the said *James Edward Smith* shall continue to sell goods to the said *John Payne*, the younger." The instrument bears date 16th of September, 1868, and

(*a*) 3 Mer. 272.
(*b*) 6 Hare, 552.
(*c*) 4 B. & S. 761.
(*d*) 1 Y. & C. Ex. 420.

goods were furnished by *Smith* to *John Payne*, junior. In April, 1869, *Smith* retired from business; and the business was afterwards conducted by his brothers under the name of *Smith Brothers;* and *Payne*, junior, then dealt with the new firm. The mortgagors, whose position was that of sureties, were of course not responsible in respect of the dealings with the new firm: and their contention is, that in the events that have occurred they are not liable in respect of the dealings with *James Edward Smith.*

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They contend first that they are discharged, being sureties, by time having been given to the principal debtor. In November, 1869, seven months after the transference of the business to the new firm, there were notes and drafts current, upon which *John Payne*, jun., appeared primarily liable and these were in respect of the general dealings of *Payne* carried on from the business of *James Edward Smith* to that of *Smith Brothers.* Mr. *Bain*, contends that there was not a giving of time during the currency of this paper: that *James Edward Smith* might at any time have sued for the debt. I do not understand this to be the law; no authority is cited for it; and the contrary was decided by Lord *Eldon* in the case of *Samuell* v. *Howarth* (*a*), which was, like this, a case of suretyship.

Judgment.

The defendants further contend that the debt due to *James Edward Smith* at the time of the transference of his business to *Smith Brothers* has been discharged by the course of dealing of the parties; and in this contention I think they are right. There was no special appropriation by any party and in such case there is the general presumption that the moneys paid were intended to be applied in discharge of the items of the debt consecutively, the earliest payment to the oldest item of

(*a*) 3 Mer. 272.

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debt. This is a rule so clearly settled that I do not refer to cases for it; but there is a case so closely resembling this in its circumstances, in which that rule was applied, that I think it well to cite it. I allude to the case of *Bodenham* v. *Purchas* (*a*). A bond was given to the partners in a banking house to secure advances in the course of business. The banking firm was subsequently changed by the death of one partner and the admission of another. At that date there was a considerable balance due to the bankers. Afterwards there were further advances made by the bankers, and payments were made to them on account from time to time, the debtor being credited with the payments, and charged with the original debt, and the subsequent advances as constituting items is one continuous account. The Court composed of Justices *Bayley*, *Abbott* and *Holroyd* held that the rule applied; and that the bankers having received in different payments a sum more than sufficient to discharge the balance due at the date of the change in the firm, the bond was to be considered paid. The case was indeed as was said by the Court, the converse of *Clayton's* case reported in 1 *Merivale* and was decided upon the same principle. The moneys paid in by *John Payne*, junior, after the transference of the business were more than the amount of the indebtedness to *James Edward Smith* at the date of the transfer.

Judgment.

I can see nothing in the contention of Mr. *Bain*, that although the indebtedness to *James Edward Smith* may have been discharged, the indebtedness to the bank was not discharged. The sureties had nothing to do with that, even if *Payne* the trader had, as to which it is not necessary to express any opinion.

There were some other grounds of defence which in my view of the case it is not necessary to notice.

(*a*) 2 B. & Al. 39.

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As to the costs, I should dismiss the bill with costs but for the allegations of fraud contained in the answers, and which are not sustained in evidence. I make a distinction between the costs of the adult defendant, and of the infants. The answer of the former put in on 22nd of May contains charges of fraudulent conduct on the part of *James Edward Smith* as within the personal cognizance of the adult defendant, and they not being sustained I refuse him his costs. The answer of the infants was put in on the first of June, and contains by way of defence, *inter alia*, the same charges; but only on information and belief. I think the guardian was not wrong in inserting by way of defence the same charges of fraud in the answer of the infants. Their being in the answer of the adult, who was cognizant of the facts, was a sufficient justification for this. As against the infants therefore, the bill is dismissed with costs. I may refer upon this to my observations in *Ashbough* v. *Ashbough* (*a*).

Judgment.

MEYERS v. MEYERS.

Insolvent debtor's death—Execution creditors—Sequestration—Arrears of interest.

In case of a debtor dying leaving insufficient assets to pay all his debts, execution creditors whose writs are in the sheriff's hands do not lose their priority; nor does a creditor who has a sequestration in the hands of the sequestrators lose the advantage of it.

Creditors who had filed bills to enforce their claims having, by order made under an administration decree, been restrained from proceeding with their own suits, and directed to prove under the administration decree: it was *held*, that they were entitled to six years' arrears of interest computed back from the commencement of their own suits.

The effect of a sequestration in regard to lands, considered.

Appeals from separate report of the Master at Toronto, dated the 23rd of February, 1872, made under an administration decree, dated the 21st of November,

(*a*) 10 Gr. 485.

1872.

Meyers v. Meyers.

1871, in a suit in which the infant children of *Elijah W. Meyers*, deceased, were plaintiffs, and *Sophia Meyers*, his widow, and *William Cross*, his devisee in trust and executor, were defendants. The report found that *The Bank of British North America*, *Patrick Turley*, *John Bell*, and *Joshua Brush* were creditors of the estate for sums which the Master named; that their claims formed liens on lands of the estate, situate in the county of Northumberland, and that their priorities in respect of such lands were in the order in which their names are above mentioned.

Statement.

The claim of the *Bank* was under a decree obtained by the *Bank* on the 8th of March, 1862, as a registered judgment creditor, and which decree directed a sale of lands. *Turley's* claim was under a sequestration against the testator for the non-payment of money; which sequestration was issued in December, 1865, and was delivered to the sequestrator on the 31st of January, 1866. *Bell's* claim and *Brush's* were as subsequent execution creditors of the testator, they having delivered their writs to the sheriff before the testator's death.

The first appeal was by *Turley*, *Bell*, and *Brush* against the priority which the Master had assigned to the *Bank*, and against the allowance made to the *Bank* for arrears of interest. The second appeal was by the executor; because the Master had not found that the creditors named should be paid *pari passu* with other creditors; and because *Turley*, at all events, was not entitled to any priority.

Mr. *S. Blake*, Q. C., and Mr. *Proctor*, for the first appeal.

Mr. *J. Maclennan* and Mr. *S. G. Wood*, for *The Bank of British North America.*

Mr. *John Paterson*, for the plaintiffs.

Mr. *Fitzgerald* and Mr. *Meyers*, for the executor of *Elijah W. Meyers*. 1872.

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MOWAT, V. C.—Most of the points argued on these appeals I disposed of at the time. On one of these— June 19th.
the construction of 29 Vic., cap. 28, sec. 28—a reference was, after the argument, given to me of two cases, the reports of which had not been in the hands of the profession at the time of the argument. I shall therefore speak first of this point. At the close of the argument for the appellant I stated my opinion to be, that the rights acquired by the execution creditors were not affected by the Act. I thought that the purpose of the enactment, as apparent from the language employed, was to leave creditors in possession of any priority which they had gained in their debtor's lifetime, and to do away with merely the preferences which, as the law had previously stood, the debtor's death created or permitted for the first time. In aid of a different construction, the appellants' counsel referred to the effect of the Act on Crown debts; arguing that the statute destroyed Judgment.
the lien which such debts possessed in the debtor's lifetime; but I do not take that to be so. Crown debts which were a lien in the testator's lifetime continue to be a lien, and to the same extent as if the debtor were still alive, but not to a greater extent; and Crown debts which were not a lien in his lifetime, on any property which the debtor had, were to be entitled to no priority after his death. The learned counsel argued, that the right which the execution creditor had was not properly a lien, and was therefore not protected by the proviso as to liens; but the term "lien" had been used by the Legislature in that sense in the Insolvency Act passed in the same session (*a*). The learned counsel argued for confining the term lien, in the 28th section, to a lien created by contract; but that construction

(*a*) Sec. 13.

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would be an arbitrary one, would be greatly more limited than the language of the proviso warrants, and would exclude many liens which the Legislature cannot be supposed to have intended to exclude. The two cases, a reference to which was given to me after the argument, were *Bradburn* v. *Hall* (*a*), which does not seem to me to have much application, and *Ex parte Williams* (*b*), on which I purpose making a remark or two. There, a writ against goods having been delivered to the sheriff, the debtor afterwards, but on the same day, filed a petition for liquidation under the Bankruptcy Act of 1869, and a receiver was appointed; the receiver got possession before seizure under the writ, and the controversy between the two clauses depended on the question, whether, in such a case, the execution creditor could be considered as "holding a security upon the property of the bankrupt" within the meaning of the Bankruptcy Act, 1869, sec. 12. The Court thought that such a construction would not do "much violence to the words," but the Court said that, to ascertain the intention of the Legislature, the course of legislation on the subject was to be looked at; that, by the Act of James I., the assignee was to take unless the goods had been seized before an act of bankruptcy; that this was the law from that time until 1849, when Parliament made sale as well as seizure necessary to give the execution creditor priority; and the Court held that it was not likely that the Legislature in 1869 meant to dispense with both sale and seizure, and to make delivery to the sheriff enough. The Court further said that a mere right to seize property cannot properly be called a "security." But the Canadian Legislature having nowhere used the word "lien" as applicable to this right, I cannot say, that such a use of the word in the clause in question is unlikely; nor was there any course of legislation to render unlikely the intention which this execution creditor ascribes to the

Judgment.

(*a*) 10 Gr. 518. (*b*) L. R. 7 Ch. App. 316.

Legislature. Up to the passing of this Act, an execution creditor had the lien contended for; it was no change to leave the lien with him, but it would be a change to take it from him; and the Insolvency Act put the delivery of the writ to the sheriff on the same footing with seizure, and gave priority to the execution creditor in either case, provided that the writ had been delivered to the sheriff thirty days before the assignment or attachment in insolvency. I see nothing in either of the two cases cited to lead me to a different opinion from that which I expressed at the close of the argument for the appellant. 1872. Meyers v. Meyers.

On two or three other points raised on the appeals I reserved judgment. One of these was as to arrears of interest. Certain of the creditors had filed bills to enforce their debts. By an order made in the present suit, all proceedings in the suits of these creditors were stayed, and the plaintiffs in these suits were ordered to come in under the decree in the present suit and prove their claims before the Master; and the Master was directed to take an account of what was due to the said several plaintiffs in the said suits. The Master has allowed to each plaintiff six years of arrears before the commencement of his own suit, and the contention before me was, that no arrears should have been allowed beyond six years antecedent to the proof of the claims in the present suit. But I am clear the Master was right (*a*). The creditors' own suits could not be stayed without giving them in this suit all that they would have been entitled to in their own suits. It was for the general benefit and to save costs, that those suits were stayed. Judgment.

Another point reserved was as to the rights of the creditor *Turley*, who had the sequestration. The

(*a*) See Greenway v. Bromfield, 9 H. 201.

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Master has given priority to him as against the subsequent execution creditors; and on the appeal this was objected to on several grounds:

(1) It was said that the writ had been issued on *Praecipe*, and was therefore irregular, according to the decision of the late Chancellor in *Fisken* v. *Wride* (*a*). It was replied that, in April, 1868, the debtor had applied to set aside the writ on this and other grounds, and that the application had been refused for delay and acquiescence. The objection is one of form; an order for the writ would have issued as of course on the proper application being made for it; and if its irregularity is open to objection on the part of creditors who are not parties to the suit, the further delay on their part for nearly four years more, without having taken any steps to set aside the writ, the sequestrator having all this time been in possession, would preclude their taking the objection now. Independently of these considerations, the Master was right in treating the writ as valid as long as it was allowed to stand.

Judgment.

(2) It was said that the sequestration, if binding, affects those lands only which the sequestrator has seized, or of which he is in the receipt of the rents and profits; and that the Master's report does not restrict the operation of the writ to these lands. No evidence was shewn to me that the deceased had any land besides the lands sequestered. If there are other lands, the point raised would depend on the question, whether a sequestration binds lands from the time of being awarded or issued, or from the time only of its being executed; and it does not seem clear how this is (*b*);

(*a*) 2 Chan. Chamb. 212.

(*b*) Smith's Practice, 7th ed. 198; Daniel's Practice, 4th ed. 952; Seton on Decrees. 3rd ed. 1217.

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but the more convenient rule would be to hold the sequestration binding, in analogy to writs of *fi. fa.*, from the time of being delivered to the sequestrator. I learn from the Registrar that the practice in this country has always, within his recollection, been to name the sheriff as the sole sequestrator; and this circumstance would prevent any greater practical inconvenience to persons dealing with the debtor than in the case of *fi. fas.* Besides, the sequestrator acts only under the orders of the Court, and the Court can thus see that no unjust results are produced by the rule.

(3) It was said that the sequestration affects rents only of land, and is so expressed. That was formerly the only operation of the writ in England, except as respects leasehold interests in land; but the rule in England appears to have been lately changed by statute, and sequestered land may now be sold (*a*). In this country, I apprehend that, by virtue of the Act 5 Geo. II., ch. 7, sec. 4, the Court may order the sale of sequestered lands in the same way as the sale of sequestered goods is ordered. I perceive that, in *Shaw* v. *Wright* (*b*), Lord *Loughborough* refused to order a sale of leaseholds because he could not give the purchaser a good legal title. But in a previous case Lord *Hardwicke* ordered a sale of leaseholds (*c*). The difficulty which Lord *Loughborough* felt, if admitted, would stand in the way of the sale not only of leaseholds, but of every description of goods also; and why should not the Court sell an equitable estate, if the sale is necessary to give a plaintiff the fruit of his decree? I apprehend that we have often ordered the sale of equitable interests. Besides, where the debtor has the legal title, why should not the Court compel him to convey it? or why should not the Court make a vesting order in the

Judgment.

(*a*) See Re Rush, L.R. 10 Eq. 442.
(*b*) 3 Ves. 22
(*c*) Sutton v. Stone, 1 Dick. 107.

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purchaser's favor? I see no solid objection to the Court's ordering a sale of sequestered land, wherever the ends of justice appear to demand that course. But, however that may be, if a sale of the property in the present case is necessary in the interests of the other creditors, it could only take place in such a way as would not prejudice the rights of the sequestering party to priority in regard to rents.

(4) It was said that the effect of the sequestration is not preserved by the proviso in the Trustee Act, even if the right of an execution creditor is saved; for the word *lien* is never used with reference to sequestrations. But I think that the right is in principle the same, and that it is such a right as the Legislature intended to preserve.

Judgment.

I therefore overrule all the objections made to the finding of the Master as to this creditor (*Turley*).

All the other grounds of appeal I disposed of at the close of the argument.

The defendants *Turley*, *Brush*, and *Bell* are to pay the costs of their appeal, and the executor must pay the costs of his. There may be a set-off as respects the costs payable to and by the executor. The order may be expressed to be without prejudice to the question, whether the executor should on further directions be allowed the costs of his appeal (including what he may have to pay), out of the estate, as respects the parties interested therein other than the creditors who are parties to the appeal.

McANDREW v. LAFLAMME. 1872.

Administration suit—Costs—Next friend.

In the case of small estates an administration suit can only be justified where every possible means of avoiding the suit had been exhausted before suit brought.

Where a next friend had filed a bill for a minor without having observed this rule, and the suit did not appear to have been necessary in the interests of the minor, the next friend was charged with all the costs.

Hearing on further directions and as to costs.

On the 26th of October, 1871, an administration order was granted on the application of *Bridget McAndrew*, a minor, one of the residuary legatees of *Anthony Mullarkey*, by her next friend, directing the usual accounts and inquiries as to the testator's personal estate; and further directions and costs were reserved. The affidavit in support of the application was made by the minor herself, and stated, among other things, that the executors, or either of them, had never communicated with her, or, as she believed, with any of the other residuary legatees, respecting the said estate, and had not yet accounted for or paid over any part of what they had received; that she had frequently applied to the executors for an account of their dealings with the estate, and had asked them to pay to her her portion thereof; and that they had neglected to pay any part thereof, and had rendered no account of their dealings with the estate. Statement.

The executors, in their affidavits in answer, stated that they had faithfully administered the estate to the best of their ability; that they had always been willing to render an account when called on by the parties interested, and to pay over all moneys which had come to their hands as executors; and that they

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had never been called upon to pay over any such moneys.

On the 23rd of April, 1872, the Master at Cornwall made his report, finding that there had come to the hands of the executors $734.87; that, after allowing various sums set forth in the report, and paying outstanding debts, a balance would remain in the executors' hands of $306.91; that no personal estate was outstanding; that by the will of the deceased his estate was to be divided equally amongst the following six persons: *John Killian*, *Nancy Killian*, and *Bridget Killian*, residing in Pennsylvania (U.S.); *Michael McAndrew* and *Catherine McAndrew*, residing in Ireland; and the plaintiff, who was resident in this country; that, until the issuing of the administration order, "no proceedings appeared to have been taken to ascertain the place of residence of the plaintiff; * * that, up to the date of the report, no money had been paid into Court by the said executors, and that the suit was necessary on behalf of the plaintiff." The testator died on the 1st of May, 1870, and probate was taken on the 15th of December following.

Mr. *Fitzgerald*, for the plaintiff.

Mr. *James Maclennan*, for the defendants.

June 19th.

Judgment.

MOWAT, V. C.—On further directions, the only question argued was as to the costs, each party claiming, through his counsel, that the opposite party should pay all the costs of the suit.

It was not suggested that the suit was rendered necessary by the nature or amount of the estate, or by any difficulty created by the terms of the will. In these respects a case could hardly be more free from complication than that which this little estate seems to have presented.

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But it was contended for the plaintiff, that by reason of the applications which she mentioned in her affidavit filed on the application for the administration order, and by reason of the time which has elapsed without the executors having communicated with her, or paid over to her her portion of the estate, the suit became necessary and proper. The authorities do not sustain that view. The plaintiff being a minor, she was not yet entitled to an account or payment, except on special grounds not to be found in the present case; and, independently of that consideration, the lapse of time since the testator's death is less than has been held insufficient to deprive executors of costs, even where they had had the money of the estate in their hands for such longer time (*a*).

Judgment.

For my own satisfaction, I applied to the learned Master (as the Court has always a right to do) for information respecting the grounds of his finding as to the necessity of the suit; his reply mentions little more than the same facts as the report contained; and supplies in addition nothing which is material.

The necessity for the suit was not a matter on which the Master should have been asked to express an opinion. That was matter for the Court to judge of on further directions, with the aid of the facts stated in the report. If the facts which are stated were a justification of the suit, they would shew that the executors personally, and not the estate, should pay the costs; but the authorities would not warrant charging the executors with the costs.

It is to be observed, that the necessity of the plaintiff's suit must be established, if at all, by the executors' treatment of the plaintiff herself, or by misconduct

(*a*) Holgate v. Haworth, 17 B. 269.

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affecting her own interest. If she had no sufficient cause of complaint on her own account, she cannot establish the propriety of her suit by referring to any ground of complaint which others may have against the executors; and this infant might well have been permitted to leave to others the vindication of their rights. The Master states, in his letter, though not in his report, that the managing executor did not keep the funds of the estate separate from his own; numerous authorities shew that that circumstance does not necessarily deprive the executors of their right to costs. Some of these cases are collected in *Morgan & Davey's* book, pages 120 and 298.

In the case of small estates, an admininistration suit can only be justified where every possible means of avoiding the suit had been exhausted before the suit was brought (*a*). This suit has been brought in the name of a party whose individual interest is only about $50; it has been brought complaining that she has not been paid, though she is a minor, and though, until she comes of age, she is not entitled to payment; and there has been no proof, or even suggestion, that the executors are insolvent, or were making away with the funds; or that for any reason the plaintiff's portion was in danger. The next friend does not even appear to have put himself personally, or by a solicitor, in communication with the executors before bringing the suit.

Judgment.

On the whole, I must say that the suit appears not to have been necessary in the plaintiff's interest; and on the contrary, to have been a hasty and improvident proceeding on the part of her next friend, to the expense of which I cannot justly subject either the estate generally or the plaintiff's share of it.

(*a*) See per Wood, V, C., in Aylmer v. Winterbottom, 4 Jur. N.S. 19.

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The executors will, out of the balance in their hands, satisfy the outstanding debts reported by the Master. The next friend will pay the executors' costs, as between party and party (lower scale); and the difference, if any, between this amount and their costs as between solicitor and client (lower scale), the executors will deduct from what they have in hand; the balance they will pay into Court; and one-sixth of it will belong to each of the six legatees.

GIBSON v. LOVELL.

Tax sale of Chattels—Receiver.

In case of a sale of chattels for taxes, it is not necessary for the purchaser, in order to the maintenance of his title, to be able to shew a strict and literal compliance by the bailiff with the directions of the Assessment Act (29 & 30 Victoria, Ch. 53, Sec. 99).

A sale for city taxes was objected to on the allegation that the public places where the advertisement of the sale was posted were not within the ward where the sale took place; it appeared that the chattels were seized and sold on the premises of the owners with the knowledge of the parties in charge, and without fraud, and without objection by any one:

Held, that the sale was valid.

Chattels in the possession of a receiver were seized and sold by a bailiff for municipal taxes; neither the bailiff nor the purchaser was aware, until after the completion of the sale, that the property was in the receiver's possession. or was intended to be affected by the order appointing the receiver; and both had been informed to the contrary in good faith by the party in charge: the Court refused to hold the sale void.

The establishment in which these chattels were, being afterwards sold by the order of the Court in one lot as a going concern, it was *held* that the purchaser of such chattels at the tax sale was entitled to a corresponding part of the purchase money realised at the Chancery sale.

Statement.

This was a suit respecting partnership accounts. On the 20th of January, 1868, an order was made referring

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it to the Master to appoint a receiver and manager; and providing that *James Lovell*, then a defendant and one of the partners, should carry on the business until the appointment was made. *James Lovell* afterwards died, and the suit was revived against his widow and administratrix. No receiver was appointed under the order, in consequence of a difficulty in giving security. *James Lovell* carried on the business until his death; and it was carried on by his widow, under the name of *Ann Lovell & Co.*, from that time until the 23rd of January, 1871, when a consent order was made appointing the plaintiff's son, *Robert L. Gibson*, and the defendant's son, *Robert Lovell*, to be receivers without security. These young men had, up to that time, been acting as agents, each for his mother, in the litigation between the mothers, and in the matters to which the litigation referred.

Statement.

There was a question in the suit as to the business carried on for a period embracing in part the year 1870; but it was ultimately determined that Mrs. *Lovell* should pay rent for the use of the machinery and plant for this period, and should have the profits or bear the loss. During this period Mrs. *Lovell* purchased an engine and boiler for the use of the business, which were afterwards treated in the cause as partnership property. In the same year, 1870, taxes became due to the municipal corporation in respect of the premises, and had not been paid when the receivers took possession in January, 1871. On the 7th of February, 1871, the collector issued his warrants of distress, and the bailiff seized thereunder a large press belonging to the partnership. One *Banks*, who had for some time been employed by Mrs. *Lovell* in the business as bookkeeper and otherwise, "told the bailiff he might get into trouble, as that was in Chancery, and (he) told him to seize the engine and boiler," which *Banks* supposed not to be partnership property. Accordingly, the bailiff

almost immediately abandoned the seizure of the press; and he seized in lieu the engine and boiler thus pointed out to him. He advertised the sale of these. According to his evidence, the sale was advertised for eight days "in the usual way;" he put up one advertisement on the premises, one at the Court house, and two at his office; and there was one on the fence near his place.

On the day named, the sale was postponed to a future day; there were two postponements afterwards; and three sets of advertisements, it was alleged, had been issued; the last was for the 27th of February. These postponements took place in order to afford an opportunity for the money to be raised without a sale. Efforts were made by Mr. *Banks*, on behalf of Mrs. *Lovell*, to get money to pay the amount required, and, from day to day, *Banks* told Mr. *Gibson* of these efforts. Mr. *Gibson* knew that a seizure had been made. After various unsuccessful efforts to raise money, *Banks*, finding or believing that a sale was inevitable, went to one *John Bacon*, to whom Mrs. *Lovell* was indebted on a promissory note for $450 not then due, and explained to him how matters stood. *Banks* told *Bacon* the injury which would be sustained if some friend should not purchase the property at the sale; and, *Bacon* being friendly, he asked him to buy. *Bacon* was aware that receivers had been appointed; but *Banks* told him that the engine had no connection with the Chancery proceedings, and that the receivers had no control over it. *Bacon* therefore attended the sale, and the engine and boiler were sold to him for $325, which sum he paid. The bailiff on the same day executed to him a bill of sale. Mr. *Gibson*, the other receiver, it appeared, had left town on the morning of the day of sale, and he did not return for some days afterwards. When informed of the sale after his return, he objected both by written notice and verbally; but no steps were taken by

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any party to have the question of the validity of the sale determined. By an arrangement between Mr. *Lovell* and Mr. *Bacon*, the latter allowed the engine and boiler to remain for a time on the premises, and to be used in carrying on the business; and when the establishment came to be sold as a going concern, under the authority of the Court, *Bacon* consented to the engine and boiler being included in the sale on an agreement with *Lovell* that he would pay him $750 out of the first proceeds of the sale. This was somewhat less than the value of the engine and boiler, but was sufficient to cover the amount of *Bacon's* purchase money and of the note which he held against Mrs. *Lovell*. On the 8th of May, the establishment was duly sold to one *Cook*, and the evidence shewed it to have brought more by $1,000 than it would have brought if the engine and boiler had been removed and had not gone to the purchaser.

Judgment.

On the 29th of June, 1871, *Bacon* obtained an order by consent that the referee should inquire whether *Bacon* had any and what interest in the engine and boiler, and whether he was entitled to the said sum of $750 and the interest thereon, or any part thereof; and the plaintiff's solicitors were directed to hold and retain in their hands sufficient securities, of the proceeds of the sale, to pay and satisfy any claims which *Bacon* might be found entitled to. The reference was made to the referee because the partnership accounts had been closed under his superintendence.

On the 7th of March, 1872, the referee made his certificate, finding that *Bacon* was entitled to receive out of the proceeds of the sale $750, with interest from the 8th of May, 1871. Against this finding the plaintiff appealed.

On behalf of the respondent, it was contended that no appeal lay; for that the reference to Mr. *Taylor*

was not under the statute (*a*), but was to him as an arbitrator appointed by the parties. The appeal was argued on the merits also.

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Mr. *Hodgins*, in support of the motion.

Mr. *Fitzgerald* and Mr. *Arnoldi*, contra.

June 19th.

MOWAT, V. C.—[After stating the facts] As to the merits, it was argued, on behalf of the plaintiff, that the sale to *Bacon* was invalid, as the section 99 of 29 & 30 Vic., ch. 53, had not been complied with. That section directs the collector to post up advertisements of the sale in at least three public places in the ward wherein the sale of the goods and chattels distrained is to be made. It was said (though the respondent's counsel disputed the statement) that the public places at which, in addition to the premises in question, the advertisement of this sale was posted up are not in the ward, and that the sale was therefore invalid. In support of this objection, reference was made to the decisions on land-sales for taxes. The last of these, however, *Connor* v. *Douglass* (*b*) in the Court of Error and Appeal, is against the plaintiff. There it was held by Chief Justice *Richards* and a majority of the Judges of the Court of Error and Appeal, that a strict and literal compliance with the directions of the Act as to advertising was not necessary to be shewn in order to maintain a sale even of land. *A fortiori*, must that doctrine be applicable to chattels. An irregularity like this would certainly not affect a sale of chattels under an execution; and, considering that in this case the chattels were seized and sold on the premises of the owners, with the knowledge of the parties in charge, and without any fraud or any objection by anybody,

Judgment.

(*a*) 34 Vic. ch. 10.

(*b*) 15 Gr. 456.

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I think it impossible to hold that the sale was illegal by reason of any such defects as suggested.

But the principal ground of objection to Mr. *Bacon's* claim was, that the sale was void in equity by reason of the property having been in the custody of the Court, through the receivers, at the time of the sale. The answer to this objection is, that neither the purchaser nor even the bailiff was informed of this until after the sale had been completed. On the contrary, they had been expressly told, on what might well seem to them to be competent authority, that the engine and boiler were not affected by the Chancery proceedings, and were not in possession of the receivers. In *Kirk* v. *Houston* (*a*) it was held, that a debtor who had paid his debt after the appointment of a receiver, but before he had notice of the appointment, was not liable to pay it over again, and that the payment was good.

Judgment.

That the mere fact of Mr. *Bacon's* having known that receivers of the partnership estate had been appointed was not constructive notice that their authority extended to the chattels in question, appears from *Crow* v. *Wood* (*b*). There one *Brignall*, having the legal estate distrained on the tenant of property of the income of which a receiver had been appointed. The receiver had for six years been receiving the rents. *Brignall* was aware of the order at the time he distrained; but he was no party to the suit, and the order was vague in its terms. The Master of the Rolls was "clearly of opinion that an order for a receiver ought to state so distinctly on the face of it, over what property the receiver is appointed, that a party may know what it is that the officer of the Court is in possession of;" and as the order there had not done that, the Court refused to interfere. Now the order in the

(*a*) 5 Ir. Eq. 498. (*b*) 13 B. 271.

present case was not so expressed as to enable third persons to know what property was intended, the order mentioning what was intended in general terms only; namely, as "the estate property, assets and effects of the late partnership of *Lovell & Gibson* in the said pleadings mentioned;" and the circumstance of *Bacon* having been expressly told that the chattels offered did not fall within the operation of this order, makes the present case a stronger one than *Crow* v. *Wood*.

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The engine and boiler were in the possession of the receivers; and, in the subsequent taking of the accounts between Mrs. *Lovell* and Mrs. *Gibson*, these chattels were dealt with as partnership property. Whether they were partnership property as between either of the parties and third persons, I am not prepared, on the evidence before me on this appeal, to say. And however that may be, they were certainly liable for the taxes in question. No doubt, if the Court had been applied to before the sale, the bailiff's proceedings would have been restrained and nullified, because the Court does not permit any interference with property in the hands of its officers without the prior leave of the Court. But such leave, if asked for in the present case, would have been granted at once, unless the parties were prepared with the money. The knowledge of that was probably one reason why the plaintiff or her son did not apply to the Court before the sale.

Judgment.

I have no doubt that the bailiff and the purchaser acted in good faith, and that, under all the circumstances, I should not hold the sale to be void.

Some minor points were raised. Thus, it was said that there was no proper evidence that the taxes had been duly assessed; but there is no doubt of the fact; and the objection, not having been taken before the referee, may be considered as having been waived.

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Otherwise I would, if necessary, give the claimant an opportunity of supplying any formal proof required.

It was said, also, that the sale was void because *Bacon* did not register his bill of sale or go into possession. But an unregistered bill of sale is void only against "creditors of the bargainor, and subsequent purchasers or mortgagees in good faith" (*a*). I do not think that registration of this bill of sale was necessary to give effect to it against the plaintiff's partnership interest in the chattels in question.

I agree with the plaintiff's counsel, that the agreement made by *Robert Lovell* with *Bacon* at the time of the sale to *Cook* was not binding on the plaintiff as an agreement; but since the sale included property of *Bacon's*, he is interested to a corresponding extent in the purchase money which *Cook* paid.

Judgment.

On the whole, I think that the referee's finding was right. Being of that opinion, it is unnecessary for me to consider the preliminary objections made to the appeal.

Appeal dismissed with costs to *Bacon*.

(*a*) U. C. Consol., ch. 45, s. 4, p. 453.

HARTY. v. APPLEBY. 1872.

Railway company—Registry laws—Clerical error.

The Registry Law is binding on railway companies. Where it appeared that after an owner of land had contracted with the Grand Trunk Railway Company for the conveyance of parts of the land for a roadway and station ground, he mortgaged the same land to a creditor without notice; and the mortgage was registered before the conveyances to the railway company: it was *held*, that the mortgagee was entitled to priority, and that the company was entitled under its special Act to retain the land on paying to the mortgagee its value at the time the company became entitled to it.

A mortgage and memorial was executed on the 26th February, 1855, but by a clerical error, the date in the mortgage was written as 1851: The memorial stated the date of the mortgage as 1855: *Held*, that the error did not vitiate the registration.

This was a suit by the administrator of *James Harty*, for the foreclosure of a mortgage executed in his favor on the 26th February, 1855, by one *Allen Appleby*, on various lands therein described, to secure £2,496 5*s*. 5*d*. and interest. The mortgagor's title had previously been registered; and this mortgage was registered on the 6th August, 1855. After the execution of the mortgage, and before the registration thereof, namely, on the 3rd March, 1855, the mortgagor executed to the Grand Trunk Railway Company a conveyance of about two acres of the land embraced in the mortgage. This deed was not registered until after the registration of the plaintiff's mortgage, namely, not until the 5th January, 1866. After the registration of the plaintiff's mortgage, namely, on the 19th December, 1855, the mortgagor executed to the company a conveyance of another parcel of the mortgaged land, namely, about six acres, for a station ground. This conveyance was registered on the 20th December, 1855. Statement.

The company set up as a defence to the suit, that prior to the mortgage, namely, on 27th November, 1864,

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the company's solicitor had entered into an agreement with *Appleby* for the purchase of the two acres for a roadway across *Appleby's* property, at the price of £8 15*s.* an acre; and that there was a further agreement between them that if a station were located on *Appleby's* land, and a good station were erected there, *Appleby* would give the land necessary therefor free of charge. This agreement was alleged to have been in writing, but the writing was said to have been lost. It was said that the company afterwards decided to have a station on *Appleby's* land; that they erected thereon a good station; and that after the completion thereof *Appleby* executed a conveyance, pursuant to the agreement, such conveyance being the instrument of the 19th December, 1855. The exact date of commencing this station did not appear. The only material evidence on the point was that of a builder, who deposed that the ground was laid out before he went there in July or August, 1865. The roadway had been surveyed and staked in the summer of 1854, and before the making of the company's agreement with *Appleby*. The land was not fenced, nor did it appear that any grading was done until after the giving of the mortgage. So far as appeared, *Harty* had no notice of either agreement, or of the possession, at the time he took his mortgage, nor until after the mortgage had been registered.

Statement.

The cause came on to be heard at the sittings of the Court at Kingston.

Mr. *Crooks*, A. G., for the plaintiff.

Mr. *Bethune*, for the *Grand Trunk Railway Company*.

Mr. *Walkem*, for the infant defendants.

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June 19.

MOWAT, V. C.—It was argued that by means of the stakes the company had possession of the roadway at the time of the mortgage, and that that circumstance gave them priority over the mortgage. So far as the Registry Law is concerned, it is the settled doctrine in this country that possession is no notice as against a registered deed.

Counsel for the company relied on the Railway Clauses Consolidation Act, section 11, sub-section 2, which provides that "a contract made by any person authorized by the Act to convey lands, *before* the deposit of the map or plan and book of reference, and *before* the setting out and assigning of the lands required for the railway, shall be binding at the price agreed upon for the same lands, if they shall be afterwards so set out and assumed within one year from the date of the covenant or agreement, and although such land may in the meantime have become the property of a third party." But the company have not brought the case within that enactment. No map or plan is produced; no copy of one; no evidence of the contents of any is given. The company's solicitor says that a map or plan was filed in 1854: the evidence was objected to as insufficient alone to prove the fact; and I thought and still think the objection good. But the witness was unable to state the day, in 1854, on which the map or plan to which he deposed was filed; and there is no evidence of any sort, that the deposit was subsequent to the making of the agreement. Unless it was subsequent, the enactment does not apply. Nor would it be possible for me to assume, without evidence, that the map or plan shewed the parcels in question as "lands to be passed over and taken." Besides, the company was not authorized to take so much as six acres for station grounds, except by agreement with the owners. (*a*)

Judgment.

(*a*) Railway C. Consol. sec. 10, No. 9.

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Harty v. Appleby.

It was further said, that by the Grand Trunk Railway Act of 1854 (*a*), the company is not to be adjudged to give up lands in its possession without title, but only to pay the value; and it was argued that that section, and other enactments, gave to the company a statutory title to this property, from the time they took possession, and that the subsequent mortgage of the land conveyed nothing to the mortgagee. But I think the contrary clear. The company are, no doubt, entitled to hold these parcels by paying their value to the party entitled; but the conveyance of the land gives to the mortgagee a right to the money which may represent the value of the land. I am clear also, that the plaintiff is entitled to relief in this suit, and is not driven to sue at law, if an action at law would lie.

Judgment.

It was further contended that the lapse of time since *Harty* became aware of the company's claim, was a bar to relief against the company. But lapse of time has not been set up by the answer; nor would it have been effectual if it had been. For *Harty* had the legal title; and, so far as the registered deeds shewed, he had the equitable title also, to the extent of his mortgage. It was for the company to bring a suit to establish by evidence, if they could, that they had an equity which entitled them to priority over *Harty*. The evidence too, is entirely insufficient to shew any case of culpable delay, if the onus of suing had been on *Harty*. There is no evidence that he had notice of the company's claim long before his death. The only evidence that he had notice at all is, that he had a conversation with the company's solicitor on the subject of these adverse claims, after the death of *Appleby*, in 1864, and "some years" after the mortgage had been given. Whether he knew of the company's claim at an earlier period, or how long this conversation was before *Harty's* death, has not been shewn.

(*a*) Sec. 29.

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The bill states that on the 11th February, 1857, *Harty* released part of the mortgaged property; the company says that he had notice at that time of the conveyances to the company; and the company insists that he thereby forfeited his right against the company. But no such notice was proved.

The defendants further contended that the registration of the plaintiff's mortgage was void because the memorial stated that the mortgage bore date in 1855: while the mortgage, though proved to have been executed in 1855, purports (by a clerical error) to have been executed in 1851. Both mortgage and memorial were executed on the same day. I have no doubt that the date of the deed was a mere slip of the person who wrote the date, and that the slip was not observed when the memorial was written, or when the documents were executed; nor does it appear when first it was observed. A deed operates from the delivery, and not necessarily from the day named: a date is not an essential part of a deed; and the error in this memorial, which is said to render the registration invalid, would not mislead a subsequent purchaser as to the effect of the mortgage, but the contrary. I think the error may and should be treated as a clerical error, which does not vitiate the registration. Judgment.

There is evidence that the value of the land was £8 15*s.* an acre. That may be taken as the value for the purposes of the suit, unless either party desires a reference as to value. Such a reference should be at the party's risk as to the costs of the reference. The company is entitled to retain the land on paying the value at the time of becoming entitled to the property under the agreement with *Appleby*. Interest will be from the filing of the bill. The company must also pay the costs. It will be at the option of the company whether to make the payment at once; or only on default

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after a day is given to redeem—as they have a right to pay off the mortgage, and to take an assignment of the whole mortgaged premises, if they should prefer that course. The form of the decree, as respects other parties, was not discussed, and I presume involves no question.

FOREMAN v. MCGILL.

Will, construction of—Maintenance.

A discretion given to executors to apply the interest of a legacy to the maintenance and education of the legatees, nephews and niece of the testator, is not subject to the control of the Court, where there is no charge of fraud, or the like, against the executors.

Statement.

The bill in this case was filed in the name of certain infants by their father as their next friend. *Janet Laing*, the plaintiffs' maternal aunt, by her last will gave to her executors certain personal estate upon trust for the children of her deceased sister *Margaret Foreman*, the plaintiffs' mother, share and share alike, as soon as they had respectively attained the age of twenty-one years; and in case any of them should die the share of the child dying was to go to his or her child or children, if any; or should there be none, then to the other children of the said sister of the testatrix. The will directed that the executors "shall, if they shall so see fit and deem it expedient, apply the interest derivable from the said mortgages, or any other investment made by them of the said moneys, towards the education and maintenance of the children of the said *Margaret Foreman* deceased, during their minority, should it in the opinion of the executors and trustees be necessary or expedient." And the will authorized the executors to invest on mortgages any of the moneys received by the creditors from time to time for principal or interest upon mortgages held by him in trust as aforesaid.

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Foreman v. McGill.

The bill alleged that the plaintiffs' father had not sufficient means for their education and maintenance; that only part of the income had theretofore been paid to him by the executors; and that the whole or a competent part should be paid.

The acting executor by his answer expressed his belief that the sums he had paid had been sufficient for the purposes specified, and claimed that his discretion should not be interfered with.

The cause came on by way of motion for decree.

Mr. *Crooks*, A. G., for the plaintiffs.

Mr. *Rae*, for the defendants.

June 19th.

MOWAT, V. C.—I am of opinion that the discretion given by this will with respect to the education and maintenance of the children is not subject to the control of the Court, no charge of fraud or the like being made against the executors. The cases of *French* v. *Davidson* (*a*), *Levesey* v. *Harding* (*b*), *Collins* v. *Vining* (*c*), clearly prove that to be the rule in cases like the present. And I have found nothing to the contrary. The case of *Ransome* v. *Burgess* (*d*) cited for the bill, was the case of a marriage settlement, not of a will; and there is a well settled distinction between the two classes of cases, the Court giving to the father rights in the case of a settlement, which are not recognized in the case of a will by a third person.

Judgment.

The bill must be dismissed. I presume that the defendants do not ask for costs against the father.

(*a*) 3 Madd. 396.
(*b*) Taml. 460.
(*c*) 1 C. P. Cooper, 472
(*d*) L. R. 3 Eq. 773.

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HINCKLEY v. GILDERSLEEVE.

Railway—Lease—Interest to sue.

A railway or canal company cannot lease the concern or delegate its powers for a specified term without the sanction of the Legislature. This principle was held applicable to a railway company which had no power of taking land compulsorily but had other special powers and privileges under its act of incorporation.

Parties who for many years had the chief use of a canal and had always resisted payment of tolls demanded by the lessee, were held to have such an interest as entitled them to maintain a bill (to which the Attorney-General was a defendant) to have the lease declared void.

Statement.

This was a suit by the owners of a steamboat which plied between Kingston and Cape Vincent, and on its route passed through the Wolfe Island Canal when the water admitted of it. The plaintiffs complained that the defendant *Lucretia A. M. Gildersleeve*, administratrix of *Overton S. Gildersleeve* deceased, claimed to be entitled to exact tolls from the plaintiffs, under the authority of a lease executed by the company in 1858. The bill prayed that this lease might be declared void; and that the administratrix might be restrained from interfering with the navigation of the canal by the plaintiffs; or that, if the tariff of tolls demanded was legal and obligatory, the plaintiffs might be entitled to set off certain sums which they had expended on the canal and payments made by them to a landowner who was entitled to rent from the company. The company and the Attorney-General were defendants, and did not resist the suit, the only adverse party being the administratrix of the lessee. The bill was filed on the 25th of October, 1871.

The Wolfe Island Railway and Canal Company was incorporated by 14 and 15 Victoria Chapter 149, (1851). The company afterwards cut a canal through the Island, but from want of funds the work was done imperfectly.

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The company made some attempts to use the canal in this state but soon abandoned them; and for about three years the canal was not used. In 1857 the company made an agreement, not under seal, with Mr. *Gildersleeve* that he should complete the canal, pay a judgment which had been obtained against the company (the amount of which did not appear), and have a lease of all the company's property and powers for sixteen years. In pursuance of this agreement Mr. *Gildersleeve* did work on the canal in the autumn of 1857 and spring of 1858. The extent of this work or its cost did not appear; but the work done was accepted by the company as a compliance with Mr. *Gildersleeve's* undertaking in that respect; and on the 15th June, 1858, the company executed the lease in question. By this instrument, after reciting (amongst other things) that the company were "possessed of certain rights, powers and privileges, under and by virtue of the act incorporating them, and that they had agreed to lease to Mr. *Gildersleeve* their "estate, real, personal and mixed, and all and every the rights, powers, tolls, fines, claims and privileges of the company for the term of sixteen years, on the terms following, that is to say, that he the said *Gildersleeve* would at his own cost and charge finish and complete the said canal in manner aforesaid, and would allow to the company at the rate of £110 per annum to be paid in the manner following, that is to say, that he would become responsible for the payment, and would satisfy a certain judgment held by, &c.; for the full amount of which judgment and costs he was to be reimbursed and allowed at and after the rate of seven per cent. per annum"; the company demised accordingly; covenanted not (without the lessee's consent) to reduce the tolls below the rates mentioned in a schedule to the lease, and appointed him to be their attorney irrevocable in the premises for the term mentioned; and the lessee covenanted to keep the canal in repair, and to keep it open for the use of the public on payment of the tolls. From the time of grant-

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ing this lease the company had had no election of directors, no meeting of shareholders, no officers, had given no attention to the canal, and had exercised none of their corporate powers. Until the spring of 1872 the directors did not appear to have had a meeting for thirteen years; and the shareholders so far as appeared had not had any meeting.

Statement.

The plaintiffs appeared to have disputed the validity of the lease from the first. In 1857 they built a steamboat for the route and of such light draft as would pass through the canal. In the spring of 1858 they put this vessel on the route, and used the canal from that time forward with the exception of the year 1860. In that year Mr. *Gildersleeve*, having on the route a steamboat which did not pass through the canal paid the plaintiffs $600 to withdraw their vessel from the route. Until the following year no tolls were demanded from the plaintiffs. A demand having been made in the spring of that year, the plaintiffs made some payments under protest, and filed a bill in Chancery against *Gildersleeve* for an injunction to restrain his interference. On the 15th June, 1861, the parties came to an arrangement for that year without prejudice to the suit; but the suit was not afterwards carried on. By this arrangement *Gildersleeve* was to withdraw his steamboat from the route, and the plaintiffs were to have the use of the canal for their steamboat for the season in case *Gildersleeve* had the control of the canal, which the plaintiffs did not admit; and in consideration of these things the plaintiffs were to pay *Gildersleeve* $800, less the sums which the plaintiffs had paid under protest. The plaintiffs appear to have been since 1858 the only persons who used the canal for a steamboat; the main use of the canal had always been by them; with the exception already mentioned they paid no tolls; and from 1861 to 1871 no demand for tolls was made upon them. But in 1861 they renewed the bridge across a highway

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which was intersected by the canal; they had repaired the canal every year since 1858; they made the only repairs which were made; and the repairs made were absolutely necessary for the navigation of the canal. They also paid since the same date the annual rent payable by the company to a landowner whose property was said to have been obtained by the company on terms of this rent being paid. In 1868 the plaintiffs deepened the canal. They claimed to have expended about $16,000 in these particulars. On the other hand *Gildersleeve* and his administratrix had always employed and paid a man to attend to the opening and closing of the bridge, and had received tolls from others than the plaintiff, the amount however being small. Mr. *Charles F. Gildersleeve*, the agent of the administratrix, thought the plaintiffs' use of the canal as compared with that by all others together was about as twenty to one. The plaintiffs alleged that the tariff, so far as it would affect the plaintiffs was excessive, and was probably meant to be so; but on that subject no evidence was gone into. Statement.

The cause came on for hearing at the Kingston sittings.

Mr. *Crooks* and Mr. *Rogers*, for the plaintiffs.

Mr. *Agnew*, for the company.

Mr. *Moss* and Mr. *Walkem*, for the administratrix.

MOWAT, V. C.—The principal question discussed before me was as to the validity of the lease from the Wolfe Island Railway Co., to *O. S. Gildersleeve;* and the conclusion to which I have come, after looking into the books, is, that the lease is invalid. June 19th. Judgment.

The settled doctrine appears to be (*a*) that "it is

(*a*) Hodge on Railways 69, (4 ed.)

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unlawful for a company, without authority from Parliament to delegate its powers to another company"; and the act incorporating this company contains no such power. It is a well known rule, too, that whatever powers are given by Parliament to these companies are to be construed strictly.

In *Beman* v. *Rufford* (*a*), a company had proceeded to a certain extent in making a railway, and, being in want of funds had entered into an agreement with another company, that when the line was completed it should be worked by that company, who were to find stock and were to have full control of the concern, and to exercise all the rights of the original company for twenty-one years. But Lord *Cranworth* held, that such a transaction was invalid; that it was illegal to delegate to other parties the functions which the Legislature had given to the company; and that the company had "no possible right" to do so (*b*). The case came up on a motion for an injunction, and while his Lordship expressed what he himself called a "strong opinion that the transaction was illegal," he observed, that it was "undoubtedly purely a legal question"; and that (according to what was then the practice of the Court) he "must direct a case to be stated for the opinion of a Court of law on that point." The parties appear, however, to have accepted the opinion as correct: for I find no trace of the action having been proceeded with further, and the judgment of Lord *Cranworth* is referred to in subsequent cases with approbation.

Judgment.

The judgment of Lord Justice *Turner* in the *Great Northern Railway Co.* v. *The Eastern Counties Railway Co.* (*c*) was to the same effect. The learned Judge there designated such an agreement as "an attempt to carry into effect, without the intervention of Parliament, what cannot lawfully be done except by Parliament in the

(*a*) 7 Rail. Ca. 48. (*b*) Ib. at 79. (*c*) 9 H. 306.

exercise of its discretion with reference to the interests of the public." Other cases to the same effect are *Winch* v. *The Birkenhead Railway Co.*, (*a*) *Simpson* v. *Denison*, (*b*) and *McDonnell* v. *Grand Canal Co.* (*c*).

The English Statutes imply the same thing. Thus, the Railway Clauses Consolidation Act (*d*) enacts that "where a company are authorized by their special Act to lease the railway, or any part thereof, the lease to be executed in pursuance of such authority shall contain" certain specified covenants; and it is enacted that a lease so authorized which complies with these provisions shall entitle the lessee to all the powers and privileges of the company. These enactments clearly imply that, unless specially authorized, a railway company had no power to lease.

The only authority referred to as indicating a different state of the law, was *Simpson* v. *Great Western Palace Co.* (*e*). That was not the case of a railway or canal or any like work, but of an hotel; and the company was merely a private association which had been incorporated under the Joint Stock Companies' Act for the erection and carrying on of the hotel. The directors entered into an agreement for leasing part of the hotel for three or five years; a majority of the shareholders at a general meeting sanctioned the agreement; the agreement or lease involved no transfer or delegation of corporate powers and no objection of public policy; it was such a transaction as, if all the shareholders had sanctioned it, would no doubt be effectual; and the only question was, whether it needed the sanction of every one of them, and whether a single dissentient could file a bill to prevent the transaction from being carried out. The case has no application to the present.

Judgment.

(*a*) 7 Ra[illegible]84; 5 DeG. & Sm. 562.
(*b*) 10 H. 51.
(*c*) 3 Ir. Cha[illegible]. 578, 597.
(*d*) Imp. 8 & 9 Vic. ch. 26, sub-sec. 112.
(*e*) 6 Jur. N.S. 985.

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It was suggested that this company had no power to take land compulsorily, and that this circumstance distinguished the case from all those which were opposed to a transaction like this. But those cases are nowhere stated to depend on the companies having had power to take land compulsorily. This company's act not only gave corporate powers; but gave, among other things, powers also to intersect or cross any road or highway lying in the route of their railway or canal, and to construct their railway or canal across, upon, or along the same; as well as special advantages for preventing and punishing injury to their railway or canal, or disturbance or obstruction to its business, and for enforcing payment of tolls. Whatever public policy would be violated by permitting leases, and delegations of powers, in the cases to which I have referred, would be violated also by permitting such transactions on the part of this company.

Judgment.

The next question is, whether the plaintiffs have that sort of interest which would entitle them to sue? It was said, that this was a mere private company; that the company was at liberty to exclude the public, and therefore the plaintiffs, from the use of the canal; that, the public having no right to use the canal except by permission, the plaintiffs had no right in it on the foundation of which the bill could be sustained. I have not been able to adopt these views. The whole scope of the act shews that in incorporating the company, the Legislature had in view the benefit of the public, quite as much as in the case of any other canal or railway in the Province; and the evidence given at the hearing shewed, that the plaintiffs have a greater interest in the canal as carriers than all the rest of the public combined; that the main use of the canal is and always has been by the plaintiffs; and that whatever public policy makes the lease illegal and void is a policy which concerns the plaintiffs in a far larger degree than it affects others.

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The lease then being void, and the plaintiffs being entitled to sue, what is the proper decree to make? Should the decree provide for payment of anything by the plaintiffs for the past? The tariff may, under the circumstances in evidence, be inapplicable to regulate the plaintiffs' liability to the company, and perhaps the plaintiffs' expenditure on the canal may be far more than sufficient compensation. But as to this the evidence does not enable me to form an opinion; and no direction was asked on the part of the company. So, also, what rights does Mr. *Gildersleeve's* estate possess in respect of the judgment which Mr. *Gildersleeve* seems to have purchased or paid? And has his estate any equity against the company in respect to this outlay or otherwise? The Statute of Limitations would or might put a restriction on some of these matters. But the company and the administratrix are co-defendants; and I was not asked on the part of either, to make any inquiry or give any direction with a view to determining in the present suit their mutual interests, in view of the illegality of the lease. I presume, therefore, that no direction on the subject in this suit is necessary or desired, if indeed it would be proper; and my decree will simply declare the lease void, and give to all parties their costs against the unsuccessful defendant.

Judgment.

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SEVERN v. MCLELLAN.

Registry law—Notice.

A registered purchaser buying with actual notice of an unregistered deed of an unascertained part of the land, takes subject to whatever the unregistered deed conveyed: and, if he chooses to complete his purchase without making proper inquiries as to the contents of the unregistered deed, his erroneous supposition as to the extent of land thereby conveyed, or his ignorance of the names of all the persons interested under the deed, does not vary the case.

Statement.

On the 5th of January, 1867, *George Richardson*, the registered owner of the east half of lot 17, in the 10th concession of Marmora, conveyed it to *W. Caldwell* and four others for mining purposes only. This deed was registered on the 8th of March following. On the 31st of October, 1867, *Richardson* conveyed the same property to *W. Caldwell* and his heirs absolutely. This conveyance was registered on the 5th of November following. On the 25th of March, 1868, *W. Caldwell* conveyed the property to the plaintiff and one *Wilson*, since deceased, in trust for the "Severn Mining Company;" and, by another deed of the same date, all the persons then interested under the mining deed entered into partnership with the plaintiff and *Wilson* for the purpose of mining on the lot, and of crushing quartz for themselves and others who might employ them. Neither of these deeds was registered until after the 16th of June, 1870. The Company erected a crushing mill on the land in question, and worked the mill. Afterwards, viz., on the 13th of June, 1870, *W. Caldwell* executed to the defendant *Archibald L. McLellan* a conveyance purporting to convey to him the same land, "save and except that portion thereof upon which a quartz crushing mill is erected on the south-east side of the road leading from the village of Malone to the village of Marmora." This deed was registered on the 16th of June, 1870. The consideration named in it was $1,300; the receipt of which was thereby acknowledged; but Mr. *McLellan*

explained, in his deposition, that the consideration had not been actually paid; that $50 of it was allowed in full of his account against *Caldwell;* that he (*McLellan*) was to pay $100 a year for three years, $200 in four years, $300 in five years, and $450 in six years, all without interest; and that for these sums he gave his promissory notes payable to *Boyd Caldwell*, a brother of the grantor. These notes were not negotiable notes.

The bill charged, that the defendant *McLellan*, at the time of his purchase, was well aware that the land in question had theretofore been conveyed to the plaintiff and *Wilson* in trust for the said "Severn Mining Company," and also that he had express and actual notice and knowledge of the execution of the said conveyance to the plaintiff and *Wilson.*" The defendant, in his answer, did not deny these charges specifically; but he denied that, at or before the execution of the conveyance to him, he had "any notice or knowledge that there existed any outstanding rights in the premises in favor of the plaintiff, or any person, other than the rights of *W. Caldwell, Joseph Ross, Samuel Parliament, James Nightingale*, and *James Powell*, under the said mineral deed of January, 1867, or that there existed any right of any kind of the said plaintiff in the premises." In a subsequent part of the answer he stated, that the Severn Mining Company was not an incorporated company, &c., "and so all the acts and deeds done under its name are void and null and of no effect as against" the defendant. In his examination, having been asked as to his purpose in buying, with reference to the company's power of sinking shafts, &c., he said, "I did not think they had rights enough to enable them to break the surface. Besides, the Company not being incorporated has no legal existence to exercise rights, if any, to sink shafts."

Statement.

The object of the suit was to have the deed to Mr.

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McLellan [illegible] aside as being void against the plaintiff and his *cestuis que* trust, and the question turned on the point of notice.

The cause came on for hearing at the sittings of the Court at Belleville in the spring of 1872.

Mr. *Moss*, for the plaintiff.

Mr. *English*, for the defendant.

June 26th.

MOWAT, V.C.—I assume that the defendant, at the time of his purchase, was not aware that the plaintiff had any right of any kind in the property. But I am satisfied, on the whole evidence, that he had notice that *Caldwell* had executed some unregistered instrument which was intended to convey the land, or part of it, to the mining company, or to some trustee for the mining company, who were interested under the deed of January, 1867, and which company it appears was sometimes called the *Caldwell* Mining Company, and sometimes the *Severn* Mining Company, and is said by the defendant to have been known to him by the former name only. He admits that he was aware that it was by this company that the crushing mill had been erected; it is clear that he knew it was by this company that the mill was carried on; and clear that he had notice that the mill stood on land conveyed by *Caldwell's* unregistered deed. These conclusions of fact are not inconsistent with the defendant's answer, the form of which is remarkable.

Judgment.

In view of what I thus find to be the facts, it does not matter whether the defendant bought under an erroneous impression as to the extent of land which the unregistered conveyance purported to convey, or from an erroneous opinion that, as the Company was not incorporated, the instrument gave no rights; but the latter appears to me from the whole evidence to be the

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more probable explanation. Assuming, however, the other to be the correct explanation, I think it clear that, the defendant having notice of a deed relating to, he did not know how much of, the land which he was buying, he could only take subject to what that deed in fact conveyed (*a*). His ignorance as to the name of the trustee, or as to the names of all the persons interested in the Company, is wholly unimportant (*b*).

If I were dealing independently of the registry law with such a case of notice as the present, I would say that the defendant had actual notice that the deed related to the land or part of it; I might assume in his favor that he did not know that the deed covered the whole land; but neither did he learn how much of the land was covered by the deed; all that he purchased or meant to purchase, or could honestly purchase, was so much of the land as the deed had not conveyed; and he was bound to ascertain by proper inquiries what such portion was. On his cross-examination upon his answer, he was asked what steps he took to find out the crusher premises? And this was his reply: "I inquired of *Caldwell*; he said it was on the corner cut off by the road leading through the lot. I only inquired of him." He was, according to this evidence, content to learn where the crusher stood, without ascertaining, if he did not ascertain, what land the builders and occupiers had procured or claimed in connection with it or otherwise. The effect of that course, in a case outside of our registry law, would be, that he would be held to have had constructive notice of all that the unregistered deed conveyed, viz., that it embraced the whole land; and the prior purchasers would be entitled to maintain their priority.

Judgment.

(*a*) See cases, Dart on Vendors, 4th ed., p. 794.
(*b*) See McLennan v. McDonald, 18 Gr. 502.

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The result under the registration law is the same. The 31 Vic., ch. 20, sec. 67, enacts, that "priority of registration shall in all cases prevail, unless before such prior registration there shall have been actual notice of the prior instrument, by the party claiming under the prior registration." I find that the defendant here had actual notice of the prior instrument; and, having had such actual notice, he is bound by the instrument according to its true purport and effect; unless his error arose from some cause which in law excuses him; and the evidence discloses no such cause.

Judgment.

The learned counsel for the plaintiff urged a number of other considerations to which, in view of the conclusion to which I have come without reference to these, it is unnecessary for me to allude.

I think that the plaintiff is entitled to a decree with costs.

JOHNSTON v. SOWDEN.

Sheriff's sale—Devisee's acts.

A deed by a devisee to defeat a creditor of his own, is void against the devisor's creditors also.

A mortgage by devisees subsequent to a writ, against the testators' lands in his executor's hands, being delivered to the sheriff, does not prevent the sheriff selling.

On the 19th of May, 1864, a creditor of *Thomas Johnston*, having recovered a judgment against his executors, issued and delivered to the sheriff a writ of *fieri facias* against his lands. He had died seized of certain parcels of land which were the subject of this suit. He devised the land to his wife for life with remainder in fee of one parcel to the plaintiff *Samuel*, and of another parcel to his daughter *Elizabeth*. Before the writ had been placed in the sheriff's hands, the plaintiff

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conveyed his interest to one *Kellatt*, taking back a bond for a reconveyance on payment of $100. The plaintiff swore that the value of the parcel devised to him was $1,000; and that the reason of the conveyance to *Kellatt* was this, "I put the land in *Kellatt's* hands to save it from a creditor of mine, I have settled the debt since." A few days after the writ was delivered to the sheriff, viz., on the 30th March, 1864, *Mary* and *Elizabeth Johnston* executed a mortgage of the property. *Mary* afterwards conveyed to the plaintiff; and *Elizabeth* died intestate, leaving the plaintiff and a defendant her co-heirs.

The sheriff sold the property under the *fi. fa.*; the defendant *Sowden* became the purchaser; and the sheriff executed a conveyance to him on the 20th of May, 1865. The bill alleged that this purchase was was made by *Sowden* as the agent of the devisees and that he held the property as trustee. The prayer was, amongst other things, that defendant might be restrained from selling or disposing of the property; that an account might be directed of his dealings therewith; and that he might be ordered to convey to the plaintiff, being ready and willing to pay any balance that might be found due to the defendant.

Statement.

The cause was heard at the sittings at Peterborough, in the spring of 1872.

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

Mr. *Armour*, Q.C., for defendant *Sowden*.

Mr. *S. Smith*, Q.C., and Mr. *Weller*, for the other parties.

June 26th.

MOWAT, V. C.—I think that the evidence fails to establish that *Sowden* bought as agent, or holds the property as trustee.

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The plaintiff's counsel argued however, that, by reason of the conveyance by the plaintiff and the subsequent mortgage by the other devisees the property was not saleable under the execution; and that the plaintiff was entitled to relief on that ground. This point does not in strictness appear to be open to the plaintiff, as his bill treats the sale as valid; and the relief prayed is on that footing. But, taking the facts as stated in the evidence, neither the conveyance nor the mortgage referred to would invalidate the sheriff's sale. The deed to *Kellatt* had for its purpose to defeat a creditor of the plaintiff, as the plaintiff swears; and that purpose, I apprehend, rendered the deed void, not against that creditor only but against all other creditors whether of himself directly or of his devisor; and did not stand in the way of the sheriff's selling. The mortgage, again, was subsequent to the delivery of the writ to the sheriff; and property subject to the writ when delivered to the sheriff cannot be withdrawn from its operation by the act of the debtor's devisees or other representatives.

Judgment.

I think that the bill must be dismissed with costs.

GILES v. CAMPBELL.

Riparian proprietor—Title—Road allowance.

A person had mills which were partly on a road allowance and partly on a public river, by the waters of which the mills were worked:

Held, that he had not such an interest as entitled him to complain of an obstruction to the river.

The plaintiff was the owner of four lots of land in the township of Burleigh, which were patented in 1868. Some years previously the plaintiff had built or assisted in building a grist mill, and saw mill, which the bill alleged to be on these lots. These mills were driven

by the water of the Eels River; and the bill complained that the defendants had obstructed the stream and prevented the plaintiff from using his mills. 1872. Giles v. Campbell.

The defendants by their answer denied that the mills were on the plaintiff's land, and denied that the defendants had obstructed the river to the plaintiff's injury.

Cause heard at Peterborough, Spring sittings, 1872.

Mr. *Bethune*, for the plaintiff.

Mr. *Moss*, for the defendant.

MOWAT, V. C.—On the second point the evidence is very conflicting. There probably has been some injury from the defendant's acts, though not to the extent which the plaintiff alleges, and the injury was not injury wantonly inflicted. June 26th. Judgment.

But the other defence (as to the plaintiff's want of title) has, I think, been so clearly made out, that I may confine my remaining observations to this part of the controversy between the parties.

It clearly appears, that the Crown surveyor laid out a road allowance along each bank of the stream; that each of the plaintiff's four lots is divided into two by means of the stream and these road allowances; that the mills stand partly on the stream and partly on the road allowance on one side of the stream. When built they are said to have been wholly on dry land; but the water has since washed away some of the land. The map and field notes in the Crown Lands Department, and the parol evidence, concur as to the locality of the lots with reference to the stream. On the map the side lines stop on reaching the road allowance. In view of the evidence, I see no principle on which I can hold

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that the plaintiff has the title which he asserts to the land occupied by the mills.

Then it was argued for the plaintiff, that the plaintiff's mere possession is sufficient to entitle him to relief against persons who make an unlawful use of the river to his prejudice. That ground of relief is not set up by the bill, I would be reluctant to exclude from consideration any right which I could perceive that the plaintiff has; but I have not been able to satisfy myself that mere possession would in this case entitle the plaintiff to relief. He has not only failed to shew a title to this land, but the land appears from the evidence to be such as no one has a right to erect mills upon. It is land which the Legislature has declared to be "a common and public highway" (*a*), the soil and freehold of which are vested in the Crown (*b*), subject thereto the highway itself is vested in the municipality (*c*), and the soil and road are subject for certain purposes to the jurisdiction of the municipality (*d*). All Her Majesty's subjects, including the defendants, have by law an interest in the land as a road allowance or public highway, and the occupation of the ground for any other purpose is in law a wrong to all. I have failed to perceive any legal principle on which I could hold that the wrongful possessor of such land can complain in Court that that wrongful possession has been rendered less profitable by the wrongful use of the stream by the defendants.

Judgment.

I was referred to the 335th section of the Municipal Act; but that section would help the plaintiff only if this allowance had been "enclosed by a lawful fence," or if another road had been established by law "in lieu thereof." It is not suggested that there is any fence enclosing this allowance, and the only road near was

(*a*) Munl. Act, 1856, sec. 315.
(*b*) Sec. 316.
(*c*) Sec. 338.
(*d*) Sec 317.

established long before this allowance was laid out, and could not therefore have been established in lieu of this allowance. 1872. Giles v. Campbell.

I think that the plaintiff's bill must be dismissed with costs.

Doner v. Ross.

Debtor dying insolvent—Judgment by default against executor.

Where a debtor died, leaving insufficient personal assets to pay his liabilities, and his executor, notwithstanding, allowed a creditor to recover a judgment against him by default:

Held, that the executor, on obtaining an administration order, was not entitled to an injunction against proceeding on the judgment.

Rehearing.

This was a proceeding in the matter of the estate of one *Richard Barry*, who died on the 2nd of September, 1870. Probate of his will was granted to *John Doner*, on the 14th of November, 1870. The executor soon afterwards sold all the property of the deceased, got in all the assets, and paid a number of debts in full. Late in the year 1871, *Charles H. Ross*, a creditor, brought an action against the executor; and, having recovered judgment therein in default of appearance, he, on the 25th of November, 1871, issued, and placed in the sheriff's hands, a writ *de bonis testatoris*. On the 7th of December, 1871, *Doner* obtained, under the Consolidated Orders (*a*), the usual order for the administration of the estate; and immediately afterwards he gave the creditor notice of the order. The creditor insisting that he had a right to proceed with his action, the executor served him with notice of motion for an injunction. Afterwards, and before the motion came on, the sheriff returned the writ *nulla bona*. Statement.

(*a*) No. 471.

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On the 19th of December, the motion was made before the Chancellor on affidavits alleging, among other things, that the assets were not sufficient to pay all the debts in full. On the 24th of January, 1872, his Lordship made an order granting the injunction, and ordering the creditor to pay all costs incurred after notice of the decree.

The creditor complained of this order; and the question on the rehearing was, whether the order was sustainable.

Mr. *McCarthy*, for the creditor.

Mr. *S. Blake*, contra.

June 29th.

Judgment.

MOWAT, V.C.—I concur in the opinion expressed by the Chancellor in his judgment below, that, apart from the Act of 1865 amending the law of Property and Trusts, the plaintiff at law could not be restrained from proceeding with his action for the purpose of recovering his debt from the executor personally. And the result of that, according to the latest English cases, is, that the Court cannot interfere at all at the instance of the executor. *Vincent* v. *Godson* (*a*), where that decision was arrived at, was decided after a full discussion of all the previous cases, these not having been uniform. In the subsequent case of *Fowler* v. *Roberts* (*b*), before the present Lord Chancellor (then a V.C.), it was held, that an administration decree not only did not prevent an execution going against an executor, but did not deprive the judgment creditor of his right to enforce his claim by garnishing a debt due to the estate.

The short interval which elapsed between the judgment and decree was relied on as affording a presumption, that judgment at law was unavoidably suffered

(*a*) 3 DeG. & S. 717. (*b*) 2 Giff. 226.

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before a decree could be obtained; and cases, of an earlier date than those which I have cited, were referred to as shewing that, under such circumstances, this Court would relieve against the implied admission of assets. But here the executor does not say, in his affidavits, that the fact was as we are thus asked to presume; and in the case of *Fowler* v. *Roberts* the interval between the judgment and administration order was shorter than in the present case, and yet the injunction was refused.

The next question is, whether the Act of 1865 (*a*) has changed this law?

Judgment.

I concur in the opinion, expressed by the Chancellor, in *Bank of British North America* v. *Mallory* (*b*), that the effect of the statute is, not merely to abolish the distinction between classes of debts, but, in case of a deficiency of assets, to make all the debts payable *pari passu;* and that an executor's former privileges of preference and retainer exist no longer. I concur also in the decision that, where a creditor of a deceased insolvent gets paid in full, by means of an execution against lands issued on a judgment against the personal representative, such creditor cannot retain this advantage, but may be called upon to recoup. It is by a fiction that lands are said to be in the executor's hands; he has, in fact, no control over them; and the execution against lands is issued on a mere formal suggestion, that the debtor left lands, if even such a suggestion is necessary (*c*). In the case of goods, for the right application of which the executor or administrator is personally responsible, it may be expedient to leave other creditors to their remedy against the executor in case he illegally prefers another creditor to them; but, in the case of lands

(*a*) See Imp. 33 Vic. ch. 46, sec. 1. (*b*) 17 Gr. 102.

(*c*) Mein v. Short, 9 U. C. C. P. 244: Mason v. Babington, 17 *ib.* at 155, 156.

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in this country, the only remedy of injured creditors would appear to be against the creditor who had got the advantage. I prefer to put my concurrence in the decision referred to, on this ground, because I find no authority for making a creditor recoup who has, by mistake or otherwise, been preferred by an executor out of his testator's goods. The question would arise, under the former law, wherever an executor paid a simple contract debt without leaving assets sufficient to pay specialty creditors; and yet I find no case in which any right to pursue the satisfied creditor has been affirmed or recognized. It is well settled that money may be followed into the hands of a legatee or next of kin (*a*); and in *Story's* Equity Pleadings (*b*) a creditor is put on the same footing; but the only cases cited are of legatees or next of kin (*c*). The absence of any judicial authority on such a point seems conclusive as to the creditor being under no liability to recoup. This policy, in the case of goods, of leaving other creditors (in the absence of positive fraud) to their personal remedy against the executor, has obviously no application to the case of land, for which the executor is not responsible.

Judgment.

It was argued, that, if the executor pays this creditor, he will be entitled to claim the whole amount from the estate. But an executor is not entitled to claim payments which he made wrongfully, or on judgments which he wrongfully permitted to be recovered against him. If he had not in his hands assets enough, applicable to this creditor's claim, to pay it in full, the executor should have pleaded the fact; and, having omitted to do so, it is not in the power of this

(*a*) Williams on Executors, 6th ed., pt. 3, bk. 3, ch. 4, sec. 10; p. 1343 *et seq.*

(*b*) Sec. 106.

(*c*) David v. Frowd, 1 M. & K. 200; Gillespie v. Alexander, 3 Russ. 130.

Court to relieve him, consistently with authorities which are binding on us. 1872.

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I think that the order must be reversed with costs; and that the application for injunction should have been refused with costs.

STRONG, V. C., concurred in the conclusion arrived at by the other members of the Court, but expressed a doubt as to whether an execution creditor who had already obtained payment of his debt could be compelled to refund any portion thereof for the purpose of distribution.

SPRAGGE, C.—I am not prepared to dissent from the conclusion at which my learned brothers have arrived. My doubt has been, what ought to be the effect of a judgment by default under the new law. Before the passing of the Act, its effect was an admission of the debt, and that the executor had sufficient assets to satisfy the plaintiff's debt. Since the Act it is, of course, still an admission of the debt; and, if still an admission of assets to satisfy the plaintiff's debt, it must impliedly be an admission of more than was admitted in the former state of the law, for the executor has not sufficient assets to satisfy the plaintiff's debt since the passing of the Act, unless he has sufficient to satisfy all the debts of the testator, inasmuch as all are to be paid *pro rata*. But the proper answer to this would seem to be, that, admitting the debt, he ought to shew why he does not pay it. The Act may make his position more difficult, for he might feel safe in allowing judgment to go by default before the Act, as the payment of the debt of the particular creditor, if not out of its order, would acquit him of assets *pro tanto*, while its effect under the new Act may fix him with liability for any excess beyond a ratable proportion. He may probably now have to plead a deficiency of assets to pay all debts, or come to this Court for administration in cases where, before the Act, he would have allowed judgment to go by default. Judgment.

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I incline to think that the weight of authority is against the Court interfering by injunction in favor of an executor who has, before decree or order for administration, allowed judgment to go by default, and who does not shew (as is not shewn in this case) that he did so with a view of coming to this Court.

With respect to what is *right* in a matter of this sort, I concur entirely with what fell from Lord *Langdale* in *Kirby* v. *Barton* (*a*). Noticing the argument urged on behalf of the judgment creditor, he says: "The plaintiffs at law say, 'why are we not to get the benefit of our judgment? We do not intend to go against the assets, but against the executor personally, after nominally proceeding against the assets.' I do not think that would be right." The fault and misfortune of the executor in this case is, that he was too slow in coming for his administration order; and he is paying a penalty from which, if I could, I would willingly relieve him; but the weight of authority is against him.

Judgment.

Scott v. Burnham.

Fraudulent conveyance—Contesting creditor's judgment—Parties—Non-resident defendant.

If one purpose of a sale and conveyance is to defeat a creditor, the sale is, in equity, void as to him.

A sale was made by a devisee to defeat the claim of a creditor of the testatrix; the creditor recovered judgment a few days after the sale and before the payment of the purchase money; and an unsuccessful application was afterwards made in the vendor's name to contest the amount due:

Held, in a suit by the creditor impeaching the sale, that the vendee had under the circumstances no equity to be allowed to contest the judgment.

To a bill to set aside a conveyance as void against the grantor's creditors, the grantor, to whom a small balance was due, and who resided in the United States, was *held* not to be a necessary party.

One Mrs. *Hill*, who died in August, 1868, by her will gave all her property, real and personal, to the defend-

(*a*) 8 Beav. 48.

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ant *Sophia Archer*, and appointed her executrix. Miss *Archer* afterwards proved the will. The plaintiff and defendant *Elias Burnham*, respectively, were creditors of Mrs. *Hill*. Her only assets consisted of a parcel of land in Ennismore, and another in Monaghan; both being subject to a mortgage to one *Bradburn*. The defendant *Burnham*, who was the professional adviser of Miss *Archer*, acquired the Ennismore land by purchase under the decree in *Archer* v. *Scott* (*a*), in consideration of a sum which paid the incumbrances on both lots and certain claims of Mr. *Burnham* against the testatrix. In July, 1870, Miss *Archer*, who was at this time a minor, sold and conveyed the Monaghan lot to *Burnham*. The consideration expressed in the deed was $1000; and the receipt thereof was thereby acknowledged, but the amount was not then paid. The true consideration was, certain other claims which *Burnham* had against Mrs. *Hill*; certain sums which he claimed against Miss *Archer* for costs and otherwise; $50 which he paid in cash at the time of the conveyance; and $300 which with interest he gave a bond or undertaking to pay on receiving a deed of confirmation after Miss *Archer* should come of age. In December, 1870, he sent to her address in the United States a deed of confirmation, which she executed there, she having in September attained the full age of twenty-one. During the interval between those two deeds, *Burnham* sent to Miss *Archer* $70; and the balance of the $300 he paid by small sums transmitted to her from time to time afterwards, as she wanted the money; the last sum was paid in the summer of 1871. The plaintiff's bill was filed 16th of June, 1871. It impeached the sale as intended to defraud the plaintiff, and on other grounds.

Statement.

The cause came on for hearing at the sittings at Peterborough.

(*a*) Ante Vol. xvii., page 247.

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Mr. *Moss*, for the plaintiff.

Mr. *J. Bethune*, for the defendants.

June 26.

MOWAT, V. C.—In *Zouch* v. *Parsons* (*a*) Lord *Mansfield's* judgment contains an elaborate examination of the authorities as to infants' deeds; and the correctness of the decision was expressly recognized and affirmed by Lord *St. Leonards*, when Lord Chancellor of Ireland, in *Allen* v. *Allen* (*b*). The Court in the former case laid it down that "all such gifts, grants, or deeds made by infants which do not take effect by delivery of his hand are void; but all gifts, grants, or deeds made by infants by matter in deed or in writing, which do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate." The latter rule, he afterwards intimates, is subject to certain qualifications, and would not be applicable if the deed involved a "breach of trust in respect of a third person;" the reason, which in other cases renders the infant's deed voidable only and not void, not applying to that case.

Judgment.

A devisee takes subject to the duty of paying the devisor's debts, so far as the devised property will go. In the present case the devisee sold with notice of the plaintiff's debt on the part of both the vendor and the vendee; she sold to one who had been for some time her professional adviser, and who for most purposes still was so, though he had discontinued taking out his certificate; the plaintiff's debt was a subject of conversation between the professional gentleman and his client during the negociations between them for the sale; both knew that the property in question was the only property out of which the plaintiff could obtain payment; the conveyance of July, 1870, falsely represented the whole consideration to have been satisfied; while, if it

(*a*) 3 Burr. 1087. (*b*) 1 Conn. & L. 427.

had disclosed the true bargain, the plaintiff might have procured payment out of the $300, without disturbing the transaction; and the deed of confirmation was equally reticent as to any part of the consideration money remaining unpaid. There had been considerable litigation with the plaintiff, and I have no doubt that there was considerable hostile feeling towards him. I have no doubt, that in the sale it was understood between both devisee and vendee that the plaintiff's debt was not to be paid, and that this object was kept in view throughout the dealings of the defendants with one another. Miss *Archer* was living in the United States; *Burnham* remitted the payments to her there; they were remitted to her in small sums "as she wanted them," and were evidently intended by both to be appropriated by her to her own personal needs. 1872. Scott v. Burnham.

The effect of the transaction, if valid, was to defeat the plaintiff's debt. I am satisfied that it does no injustice to the defendants to presume that that result was intended by both from the first; and that the form of the transaction and the mode of carrying it out were contrived in part with that object. The transaction, I do not question, was a real sale, and was so meant; but, one purpose having been to defeat the plaintiff's claim, the reality of the transaction as a sale is, according to the decisions in this Court, insufficient to maintain the validity of the transaction as against the plaintiff. Judgment.

The plaintiff recovered judgment for more than was due to him. He explains how this arose, and that he gave credit for certain omitted credits whenever his attention was called to the omission. The defendants say that the balance is not justly owing. But the plaintiff recovered a judgment nine days after the first deed between the defendants; an unsuccessful attempt was afterwards made to open the matter in the name of Miss

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Archer; and I think that under all the circumstances Mr. *Burnham* has no equity to be allowed a third opportunity of contesting the question. *Hill* v. *Thompson* (*a*) has no application to such a case. The balance, I believe, is $107.88 with interest from the date of the judgment. The decree will declare the deeds of July and December void against the plaintiff; will order payment of the amount by the defendants with the costs of this suit (lower scale), and in default a sale of the land. The decree will be declared to be without prejudice to any question between the co-defendants.

After judgment had been given in the case, it was suggested that the plaintiff should have his costs on the the higher scale, because Miss *Archer* was a necessary party to the suit, and resided out of the jurisdiction of the Court: *Lawrason* v. *Fitzgerald* (*b*) and *Munro* v. *Munro* (*c*) were referred to. On the other hand, it was contended that, having parted with her whole estate in the property, and claiming no further interest in it, the circumstance (not stated in the bill or answer) of a small balance of the purchase money having been due to her at the date of filing the bill, was immaterial for the purpose of relief on the ground on which the decree was made.

Judgment.

MOWAT, V. C.—I think that she was not a necessary party for the purpose of relief on the ground on which I proceeded.

(*a*) 17 Gr. 445.
(*b*) 9 Grant 371.
(*c*) 17 Gr. 205.

WARD v. HAYES. 1872.

Parol evidence—Statute of Frauds—Signature of agent.

Parol evidence was held admissible to identify a mortgage as the instrument enclosed in a letter mentioning it.

An agent's subsequent written recognition of a verbal contract, where such recognition was made in the performance of his duty in the carrying out of the contract, was *held* binding on the principal for the purpose of taking the case out of the Statute of Frauds.

Statement.

This was a suit for the specific performance of a contract for the sale of certain premises in L'Orignal. The defendant, who was the owner, made a verbal bargain with one *McMaster* for the sale of the premises to him on certain terms agreed upon between them. *McMaster* was in the employment of the plaintiff. He wanted the premises for a residence; but, he being an uncertificated insolvent, the sale had to be to the plaintiff, and there was a mutual understanding that *McMaster* should have the premises when he paid for them. After the sale had been agreed to, the defendant met Mr. *E. A. Johnson*, who practises in L'Orignal as a conveyancer, told him of the sale, and said that he would probably call on Mr. *Johnson* to draw the papers. Mr. *McMaster* communicated his purchase to Mr. *Lanigan*, the agent of the plaintiff; and thereupon Mr. *Lanigan* wrote a note to the defendant, dated the 26th of March, 1872, desiring him and *McMaster* to meet the writer at Calumet; which they did on the following day. There they repeated the terms of the contract. The defendant chose Mr. *Johnson* to prepare the papers for both parties, and *Lanigan*, on behalf of the plaintiff, agreed. *Lanigan* then wrote a letter to *Johnson* and read it to the defendant, who said it was correct. The letter was as follows:

"Calumet, 27th March, 1872.

"Dear Sir,—Mr. *Hayes* sells to *James Kewley Ward*, of Montreal, a property in L'Orignal for $800; $200

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payable on passing deed; and $200 per annum for three years with interest at 8 per cent. You will please see that the conveyance is done correctly, and the mortgage deed sent to Mr. *Ward* for signature, and returned to you. His address is Box No. 183, P. O., Montreal. I will pay $200 cash to Mr. *Hayes* when the deeds are signed, and you will insert a clause that the property is to be insured for $400 for three years by the purchaser. Of course, we expect a clear title. "Yours truly,

"R. LANIGAN."

The defendant took this letter to Mr. *Johnson*, and requested him to draw the papers at once—that he wished to send off the mortgage by the first mail. He said that the letter stated the bargain correctly; and he gave the title deeds to *Johnson* to enable him to fill in the description. *Johnson* prepared the papers accordingly, and sent the mortgage to the plaintiff by next morning's mail, accompanied with the following letter:

Statement.

"L'Orignal, March 28th, 1872.

"Dear Sir, — Pursuant to instructions, I have prepared deed and mortgage of Mr. *James Hayes's* premises of this place. The deed has been executed by Mr. *Hayes* and wife to you, and deposited with me with instructions to transmit the same to you on receiving back the mortgage, which I now enclose for the signature of yourself and wife, and the payment of $200 and the expense of this mortgage. Please have your wife's name inserted in the several blanks; that is, her Christian name. Execute the mortgage in the presence of a witness who will sign his name as witness, and go before a commissioner authorized to take affidavits to be used in the Province of Ontario. Please attend to this matter with as little delay as possible, as the parties are anxious to have the matter closed up. Return the mortgage back to me after execution, and I will attend to the registration of your deed," &c.

Mr. *Johnson* explained, in his evidence, that he said in the letter that the deed had been executed by the defendant, because it was to be executed that morning;

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but that the defendant afterwards refused to execute it until he should receive the money and mortgage. On the 8th of April, the defendant got *Johnson* to write the following telegram, which the defendant thereupon took to the telegraph office and transmitted, paying the charge himself: "To *James Kemley Ward*, Montreal. Mr. *Hayes* wishes to know if you intend carrying out the purchase of his property. If so, return the mortgage executed.—E. A. JOHNSON." The following reply came from the plaintiff next day:—"*E. A. Johnson*, L'Orignal.—Mortgages are completed. Will be sent to-morrow.—J. K. WARD." About this time the down payment of $200 was made by Mr. *Lanigan* to Mr. *Johnson* with money of the plaintiff; and a day or two afterwards the mortgage arrived duly executed. On the day of its arrival *Johnson* took the money and mortgage to the defendant, who, on the ground of the delay which had taken place, declined to accept them or to carry out his contract. The defendant persisting in his refusal, the bill was filed on the 13th of April, 1872.

The cause came on for hearing at the sittings of the Court at L'Orignal in the spring of 1872.

Mr. *Dartnell*, for the plaintiff.

Mr. *Peter O'Brian*, for the defendant.

June 26th.

Judgment.

MOWAT, V. C.—The bill proceeds on the ground of a verbal contract partly performed; but the acts of part performance proved in evidence are not sufficient to take the case out of the statute.

It was further contended, that there was on the papers sufficient written evidence; and the plaintiff's counsel asked leave, if necessary, to amend his bill by charging that the contract was in writing, signed by an agent duly authorized.

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The letter from Mr. *Johnson* to the plaintiff contains, in connection with the mortgage therewith enclosed, all the terms of the bargain. Parol evidence is admissible to identify the produced mortgage as that so enclosed (*a*); and it is clear from the evidence of *Johnson* (who had never previously done business for any of the parties) that he wrote the letter as agent for both parties, and was authorized to do so. He himself swore expressly that he was "acting for both parties;" the whole evidence indicates the same thing; and the defendant did not offer himself as a witness to the contrary. I may refer here to *Durrell v. Evans* (*b*) and *Maclean* v. *Dunn* (*c*).

The letter which Mr. *Johnson* wrote was a distinct recognition of the contract; and, as, in connection with the mortgage, it shewed all the terms agreed upon, and, as it was sent and signed by the defendant's duly authorized agent, acting therein in execution of his duty as such agent, the letter is binding on the defendant as a memorandum under the statute. *Norris* v. *Cooke* (*d*) is an express decision in the plaintiff's favor on this point.

Judgment.

There was plainly no such delay in carrying out the contract as entitled the defendant to refuse specific performance.

The decree will be for the plaintiff with costs. No actual amendment of the bill will be necessary.

(*a*) Morris v. Wilson, 5 Jur. N.S. 168; Ridgway v. Wharton, 6 H.L. 238.

(*b*) 1 H. & C. 174. (*c*) 4 Bing. 722. (*d*) 7 Irish Com. Law 37.

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ROACH V. LUNDY.

Equity of redemption—Abandonment—Confirmation.

On a bill to redeem, it appeared that plaintiff's ancestor had executed an absolute conveyance, under circumstances which entitled him to redeem: but that he had afterwards acquiesced in the grantee's claim of absolute ownership, and had thenceforward, and for ten years before his death, from time to time accepted from such grantee leases and paid him rents, making no claim of any other interest in the property:

Held, that the grantor must be taken to have abandoned his equity, and that his heirs were not entitled to redeem.

This was a suit to redeem by the heirs of *Maurice Roach*, who died in April, 1871.

On 15th May, 1851, *Roach* executed an absolute conveyance of 100 acres of land in Otonabee to the defendant *William Lundy;* the plaintiffs alleged that this conveyance, though absolute in form, was intended as a security only, for a sum of £105. The defendant alleged that the deed was executed in pursuance of an absolute sale for that sum; and he set up various subsequent dealings between the parties on that footing.

The cause was heard at Peterborough at the Spring Sittings of 1872.

Mr. *Bethune*, for the plaintiff.

Mr. *Moss*, for the defendant.

June 26th. Judgment.

MOWAT, V. C.—[After stating the nature of the case as above] I think that, if the bill had been brought before any of these subsequent dealings occurred, the Court on the evidence now before me would have treated the transaction of May, 1851, as a mortgage: considering the inequality between the parties—the defendant being a merchant, and money-lender of the neighborhood,

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and *Roach* an illiterate man, poor, and in need of money to pay off an incumbrance on the property; the inadequacy of the alleged price—which was but one-half the value, if so much as half; *Roach's* continued possession, paying no rent; the admissions and statements in the defendant's answer and depositions; and the fact that *Roach* had no independent adviser in the matter. The conveyance was drawn by the defendant's solicitor, a gentleman of the very highest respectability in every way, who would not have permitted an absolute conveyance to be taken if he had known that an absolute sale was not intended; but the circumstance of his having understood from the parties that the transaction was an absolute sale, is not sufficient to outweigh the considerations which lead on the whole evidence to an opposite conclusion as to the fact.

Judgment.

Of the subsequent dealings between the parties, the first is shewn by a receipt of the defendant, dated 17th November, 1856, whereby he acknowledges receiving £25 from *Roach* "on account of land purchase." It is admitted that this receipt had reference to the land in question; and the defendant's son, whose testimony I credit, deposes to having been present when the bargain was made to which the receipt refers; and also to having heard his father and *Roach* speaking of the sale afterwards. He deposes that the bargain was, that *Roach* should purchase the property for £225, of which the sum named in the receipt was part. The only other evidence of this bargain, or of there having been any further transactions between the parties with reference to the land for the next four years and-a-half, is the deposition of the defendant. During this period of four years and-a-half, *Roach* remained in undisturbed possession of the property, and made improvements on it (estimated at over $300); though he made no further payment to the defendant. I think that, if a bill had been filed at any time after the date of the receipt and

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before the 1st February, 1861, when the next transaction took place, the Court, in the absence of the evidence of either of the parties, would probably have held that *Roach* was entitled to relief on the footing either of a mortgagor or of a vendee. The learned counsel for the plaintiff expressed his willingness to take a decree now on the latter footing.

But there is a difficulty in the way of granting relief, arising from the dealings of the parties after that period; the further lapse of time (ten years) before the bringing of this suit; and *Roach's* death in the meantime.

On the 1st February, 1861, *Roach* accepted from the defendant a lease of the premises for three years, at a rental of $60 a year; on the 15th November, 1865, another lease was executed between them for five years at the like rent; and on the 12th January, 1871, a third lease for five years at $80 a year. I think that *Roach* understood that these documents were leases to the effect mentioned; he received a duplicate of the second and of the third, and probably of the first also, at the time of the execution thereof respectively, and he paid the rents accordingly. I think that he knew before the first lease was executed that the defendant considered himself the absolute owner; and I think he understood that the defendant was giving the leases as such owner. I think that *Roach* must be presumed to have acquiesced in that position of the defendant from the 1st February, 1861, if not earlier; and to have considered himself thenceforward as tenant only, and as having no other interest in the property. *Roach* was an illiterate man, but he appears to have had the average intelligence of his class; and he cannot be supposed to have been all this time ignorant of what was the meaning of being the defendant's tenant, and of paying him rent. I think he must be supposed to have had, in regard to the interest of the defendant and himself in this land

Judgment.

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during this period, the common notions which are entertained of the respective relations to the ownership of property which a lessor and lessee, or a landlord and tenant, usually occupy. There is no evidence that, from a date antecedent to the first of the leases, *Roach* claimed to have, or considered himself as having, any other right to the property than his interest as tenant under these leases, and according to the purport of them.

In connection with these facts it is to be remembered, that the defendant never had any bond, or other contract under which he could have sued *Roach* at law for the supposed mortgage money or purchase money; that for the first ten years after the execution of the deed *Roach* paid £25, and no more; and that for the second ten years he paid the stipulated rents and those only.

Judgment.

For these second ten years, he accepted the position of a mere tenant of the property, paying to the defendant as his landlord what are not denied to have been rack rents; and he made no claim in any way to a different position.

It has been declared by high authority (*a*) that an equity of redemption may be surrendered without any formal release; and I think that, though *Roach* never executed any document expressly giving up any equitable interest which he had after giving the deed of the 15th May, 1851, yet that I must hold, as the fair result of the evidence, that on or before the 1st February, 1861, he intentionally abandoned whatever interest he had before the last mentioned date; and that he confirmed that abandonment by successive acts afterwards, taking leases, and paying rents, for a period of ten years. There was during this period no confidential relation between the parties. During the first year or two, *Roach* worked for

(*a*) Priv. Council: Smyth v. Simpson, see 5 Gr. 104; Holmes v. Matthews, *Ib.* 108.

the defendant in the defendant's distillery; but, with that exception and the exception of the transactions in question, there was no connection between them of any kind to give the defendant influence over *Roach*. There was, no doubt, considerable inequality between them; *Roach* was illiterate; they dealt together without the intervention of any third person on *Roach's* part; understandings and stipulations important to *Roach* in the transactions of the first ten years were not put into writing; and in the transactions between them during that period *Roach* had the worse; but I am unable to say that the inequality between the parties, or its incidents, were such as to destroy the effect of *Roach's* acts of acquiescence and confirmation during the second ten years; especially when the inequality is viewed in the light of the decisions of the Court of Appeal in *Tyler* v. *Webb* and *McLeod* v. *Orton* (*a*).

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A further difficulty in the way of relief arises from the death of *Roach* and the loss of his testimony on the various facts in issue.

Judgment.

I have not come to a conclusion against the plaintiffs without some hesitation; for I do not like the complexion of the defendant's case in several respects; and in consequence I think it right, while dismissing the bill, to dismiss it without costs.

(*a*) These judgments of the Court of Appeal turned on the evidence, which was discussed at great length; and as they appeared to involve no question of law, they have not been reported.

1872.

ALLEN v. THE EDINBURGH LIFE ASSURANCE CO.

Sale of dower under execution.

The inchoate right of a married woman to dower is not saleable under executions against her.

The defendants claimed to own the premises in question, subject only to the inchoate right of dower of Mrs. *Allen*, wife of the creator of the trust mentioned in the case, reported *ante* vol. xviii., page 425. Under these circumstances, the Company had instituted proceedings in ejectment against *Allen* and his wife to obtain possession, and having recovered judgment had sued out execution for the costs, under which the sheriff was about to sell such right of Mrs. *Allen*. Thereupon the present suit was instituted, seeking to restrain the defendants from proceeding in the sale.

Argument.

Mr. *Hodgins*, for the plaintiff, moved for an injunction in the terms of the prayer of the bill, referring to *McAnnany* v. *Turnbull* (*a*).

Mr. *Leith*, contra, distinguished the present from the case cited, the interest of the wife here being a contingent one only, which in the terms of the act is made saleable under process. The words of the provision (section 5 of C. S. U. C. ch. 90) are, that "a contingent, an executory, and a future interest, and a possibility coupled with an interest in any land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained," are made liable to execution by the 11th section of the Act. Here the right is clearly contingent. It may be conceded that if the husband were dead the right of Mrs. *Allen* would no longer be contingent, and in such case the authority cited shews the interest could not be sold under process. It may

(*a*) 10 Gr. 298.

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be said that this is an anomalous state of the law, but the fact that it is an anomaly is not any answer to the position here taken by the Company. Other anomalies exist in the law in regard to real estate. One that may be suggested *is* that of a lease for three years, which may be by parol, and yet an assignment of such interest of the lessee can only be effected by writing.

He contended that the inchoate right of a woman to dower is a possibility coupled with an interest, and as such saleable under process.

Moffatt v. *Grover* (*a*), *Miller* v. *Wiley* (*b*), *Bank of Upper Canada* v. *Brough* (*c*), *Jones* on Uses, 61; *Smith* on Real Property, 692, 901 (5th ed.) were, amongst other authorities, referred to.

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Judgment.

SPRAGGE, C.—I think this case is not distinguishable in principle from that of *McAnnany* v. *Turnbull* (*d*) as decided on rehearing. The report of the case does not shew whether in that case the husband was still living or was dead, at the time of the issue of the *fi. fa.* against lands. If still living it is this case in circumstances as well as in principle. If he was dead, as I think he was, all the reasoning by which the learned counsel for the defendants seeks to bring this case within the statute would apply *a fortiori* to that case: and all the reasoning of the late Chancellor, by whom the judgment in that case was delivered, would apply *a fortiori* to this case, I cannot do better than quote it (p. 299):—

"It is clear that at common law such a right would not be saleable, nor would be under the statute 5 George II., providing for the sale of lands in the colonies. The widow has no estate in the land till the

(*a*) 4 U. C. C. P. 402.
(*b*) 16 U. C. C. P. 529; S. C. 17 *Ib.* 368.
(*c*) 2 E. & A. 101.
(*d*) 10 Gr. 298.

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dower is assigned to her. She has not even a right of entry. The freehold falls at once upon the heir, who holds it in its entirety till the dower is assigned. Until then the widow really has nothing in the land. She merely has a right to procure something, *i.e.*, dower. She cannot, until assignment, enter upon the land, or any portion of it, or assert any description of right in it, except by action to procure an assignment. She is a mere stranger to it, and like any other stranger, a trespasser, if she ventures upon it. This right she may never assert. She may not choose to disturb the heir or interfere with his freehold; and if she does not, who at law can do it for her? I asked on the argument if there was any instance to be found of an assignee of a dowress bringing a writ of dower in his own name. None such was shewn, and I am not aware of one. This being the position of a right to dower at common law, it is nevertheless contended that it may be sold under the 5th section of chapter 90, of the Consolidated Statutes of Upper Canada, as being a contingent, an executory, 'or a future interest, or a possibility coupled with an interest in the land.' We think not."

Judgment.

If I give effect to the argument for the defendants, I must hold that what the learned counsel contends is a contingent interest in lands is made saleable by the statute; although the same interest, vested, is not made saleable. The judgment in *McAnnany* v. *Turnbull* proceeds upon this, that before dower assigned a widow has nothing in the land: merely, in the words of the Chancellor "a right to procure something, *i. e.*, dower." If that be so, it must be so *a fortiori*, in the case of a wife whose right is inchoate.

1872.

FOSTER v. CHAPLIN.

Partnership—Single adventure—Sale of partnership assets.

Four persons who entered into a joint undertaking for the purchase of oil lands, for the purpose of re-sale, agreed to contribute and did contribute the necessary capital in certain proportions which were unequal. One of them (the plaintiff) subsequently acquired the interests of two of the co-partners. The lands having become greatly depreciated in value, the plaintiff, in whose name the conveyance of the lands had been taken for the joint benefit, filed a bill calling on the other party interested to make up the difference in money contributed by him and that paid in by the plaintiff and those whom he represented. A demurrer for want of equity was allowed with costs.

Demurrer for want of equity.

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

Mr. *Ferguson*, contra.

SPRAGGE, C.—A parcel of land, 100 acres, in Ennis- June 26th.
killen was conveyed to the plaintiff on the 14th of November, 1865, and by a declaration of trust bearing the same date, it was recited that of the purchase moneys, $1,000, were the proper moneys of the defendant *Chaplin;* and the residue, $1,930, were the proper moneys of the plaintiff, and of two others, *Fisken* and *Gordon;* that it was intended that the land should be sold in six months; and it was expected, as the recitals and provisions of the deed shew, that it would be sold at a very large profit. Judgment.

It was by this deed declared that the plaintiff should stand seised of the lands until the same should be sold; and of the profits arising therefrom when sold, in manner therein stated, *i. e.*, as to $1,000 and interest at ten per cent., such interest not to accrue till the expiration of six months; and as to a moiety of the profits arising from the intended sale in trust for *Chaplin:* and as to

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$1,930 and interest at the same rate, and accruing from the same time, and as to the other moiety of the profits in trust for the other three parties to the agreement. The land, it was stipulated, might, in certain events, be sold before the expiration of six months; and was to be sold after that time at the request of any of the parties. The land has not been sold at all; and the bill alleges that it has become greatly depreciated in value; the land being what is called oil lands; and its present market value is stated to be not more than $1,000: the plaintiff has acquired the interest of *Fisken* and *Gordon*.

The bill asks that the land may be sold by the Court: and the question raised is, whether the sums of $1,000 and $1,930 are to be treated as capital put in by partners into a partnership concern; or as advances made by partners to a partnership concern.

Judgment.

My opinion is, that these sums are to be treated as capital put into a trading concern by partners. Its being a single adventure makes no difference. The declaration of trust is explicit. The land was not intended to remain as land. It was a commodity to be converted into money; and upon conversion it was to be appropriated, as to part in one way, and as to another part in another way: as to the sums put in by the respective parties, the same amounts (with interest after six months) were to be be returned to them: while as to the profits, they were not to go in the same proportion as the moneys paid in, but to be divided into two equal parts: the party who had contributed $1,000 being entitled to the same proportion as the three parties who had together contributed nearly double that amount.

These moneys are not in any sense advances made by individual partners, to the firm of which they were members, but the agreed amounts that they were to put

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in respectively to purchase the commodity upon which they were to trade. If these moneys were not capital, the partnership had no capital; and it is apparent from the nature of the concern that this was not intended. If they were advances in the sense contended for by the plaintiff, they were loans, made upon the formation of a partnership, by individual partners, to a concern which had no capital. It does not appear to me that that was the nature of the transaction: but that these moneys were strictly and properly capital; that the land purchased was the "property" of the partnership; and the declaration of trust, in effect, the articles of partnership. That instrument explains the nature of the transaction and defines the rights of the parties. It is true that if these moneys were advances to a firm and not capital, and were stipulated for, their repayment *might* be provided for in the same manner as is provided by this instrument, but that would abridge what would otherwise be the rights of partners making advances, viz., to have contribution personally from other partners. This instrument seems impliedly to negative a right to contribution, inasmuch as it points to a particular fund —the proceeds of sale,—as the fund out of which these moneys were to be repaid.

Judgment.

I see nothing in the terms of the instrument or the nature of the dealings entered into, to indicate that these moneys were intended to be, not capital paid in, but advances, *i. e.*, loans made. I think that they were intended to be and were capital. I do not agree with Mr. *Ferguson's* contention, that the amount put in by the three partners, beyond that put in by *Chaplin*, was an advance to the firm. There is nothing to indicate this. If any of these moneys were capital they were all capital. The amounts being unequal is no indication to the contrary. The case of *Wood* v. *Scales* (*a*) before

(*a*) L. R. 1 Ch. App. 369

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the Lords Justices, shews the distinction between capital put into a partnership, and advances made by a partner to his firm, and points out the different natures as well as the different consequences of the two. I would refer also to Mr. *Lindley's* book on the Law of Partnership, (2nd ed.) at pages 614 and 790–1.

For the reasons that I have given I think the plaintiff wrong in his contention; and if he were right, I do not see that he has any sufficient ground for coming to this Court before executing his trust. He states no reason why he has not sold, or why he does not sell now, except the depreciation in the value of the land; and that he has not been requested to sell. It does not appear to me that these reasons are sufficient. The demurrer is allowed with costs.

Judgment.

CAMPBELL v. CAMPBELL.

Conversion of realty by statute.

One of several heirs of an intestate being lunatic, an Act of Parliament was procured authorizing the sale of the intestate's lands, and the investment of the lunatic's share in Government securities or mortgages for the benefit of the lunatic "and his representatives." The lunatic afterwards died, and in a proceeding to distribute the share of the lunatic, it was *Held*, that this share, for the purposes of distribution, retained the character of realty, and was to be divided between his real representatives and not his next of kin.

Hearing on bill and answer.

Mr. *Rae*, for the plaintiffs and the defendants, other than *Jane Campbell*.

Mr. *C. Moss*, for defendant *Jane Campbell*.

The only question involved in the suit was, whether the proceeds of the sale of the lands sold, under the Act of Parliament passed for the purpose, so far as the share of the deceased *John Campbell* was concerned, retained

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the character of realty, or had become personalty; the statute directing that his share should be invested in certain specific securities for his benefit, and that of "his representatives," and which defendant's counsel contended must be taken to mean personal representatives as distinguished from heirs-at-law; although it was true that if the sale had been in pursuance of a decree of this Court the proceeds of the sale, for the purposes of administration, would have retained the character of realty; but that here the sale having been effected in pursuance of an Act of Parliament, the proceeds of the lands must be taken to be personalty for the purposes of distribution. *Fletcher* v. *Ashburner* (*a*), *Cooke* v. *Dealey* (*b*), *In re Wharton* (*c*), were referred to.

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Judgment.

SPRAGGE, C.—*William Campbell* died in 1861 seized of lot 14, in the 3rd concession of Cavan (less 25 acres.) He died unmarried and intestate, leaving two brothers and two sisters; one of the brothers, *John*, being a lunatic, and who has since died. The other brother, *Thomas*, petitioned the Parliament of the late Province of Canada; and an Act was passed, vesting the estate of the heirs of *William Campbell* in his lands, in trustees for sale or division "for the benefit of the heirs of *William Campbell*, according to their several and respective shares:" and providing that the share of *John Campbell*, the lunatic, in the proceeds of the sale should be invested in government or mortgage securities "for the benefit of the said *John Campbell* and his representatives." The land has been sold, and the shares of the heirs of *William Campbell*, other than *John*, have, it is alleged, been paid to them. The share of *John* was invested by the trustees in pursuance of the Act. The question raised is, whether the share of *John* in the proceeds of the sale is real or personal estate.

(*a*) 1 B. C. C. 497, 1 W. & T. 741. (*b*) 22 Beav. 196.
(*c*) 5 D. M. & G. 33.

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It is conceded by Mr. *C. Moss*, (whose contention is, that the effect of the Act was to convert *John's* share into personalty), that if what was directed by the Act of the Legislature had been directed by the Court, the proceeds of the sale would have retained the same character as the land itself before sale: and this, I think, is fully established by the authorities. This case is clear of those cases in which, for the sake of the comfort and well-being of the lunatic, the Court has directed that which has changed realty into personalty, or personalty into realty; and therefore I do not go into the questions raised in those cases. They are clearly exceptional cases, and are founded upon the rule that the *first* care of the Court is the maintenance and comfort of the lunatic. To that the interests of those entitled in succession are subordinated. After that the rule is, that the property of the lunatic is not to be varied, so as to affect the right of succession to it.

Judgment.

In the case of *John Campbell*, there was nothing to take the succession of his property out of the ordinary general rule; no object to be served by doing so. There are, however, some reasons suggested why the Legislature must be taken to have intended it. It is, in fact, converted into personalty by the act of the Legislature; and the Act does not contain the provision that is sometimes contained in similar Acts, for preserving to the property in its converted shape, the character that it had before conversion: and the omission of such provision is relied upon, as evidencing an intent on the part of the Legislature that its converted shape should be its real shape for all intents and purposes. The argument is not without weight. But the phraseology of Acts of Parliament varies very much, even where the same thing is intended; and unnecessary provisions are often inserted from overcaution. It would not be safe to infer from the insertion of such a provision in one Act, and its omission in another, that a different effect was

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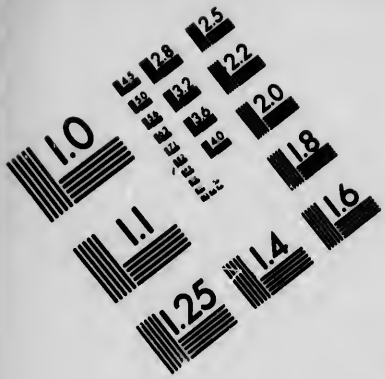
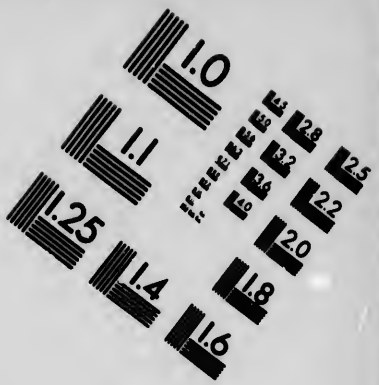
intended in regard to the devolution of the estate. It may be argued, I think, with at least equal reason, that the current of Legislative provision being to preserve the character of property, notwithstanding conversion, following in that respect the law of the Courts, the omission of a specific provision to that effect in any particular Act, is not to be taken as indicating a departure in the mind and intent of the Legislature from the usual course, unless, indeed, the context of the Act should indicate such intent. There is nothing in this Act to indicate such intent. The reason given in the recital is, that in consequence of the lunacy of *John Campbell* the estate of *William Campbell* cannot be divided without great loss to the petitioner and the other heirs. The object clearly was to make *John's* share available for his support by converting it into money and investing it; and in doing that, the whole object of the Act was accomplished; and that object was equally well served if upon the death of *John Campbell* his share devolved as realty, as if it devolved as personalty. To make it devolve as personalty would be a gratuitous departure from the principle, upon which the Courts and the Legislature itself, act in the like cases.

Judgment.

The use of the word "representatives" in the Act, it is contended, is an indication of the intent of the Legislature that the proceeds of the sale should descend as personalty: the investment is directed to be "for the benefit of the said *John Campbell* and his representatives." I do not think there is anything in this. If there was any definite intention on the point in the mind of the Legislature in the direction supposed, the words "personal representatives" would probably have been used. The general term used means an heir-at-law or devisee, as well and as much as a personal representative. I take the use of the general term rather to indicate an intent, that the annual proceeds of the investments should be for the benefit of the lunatic, and that the





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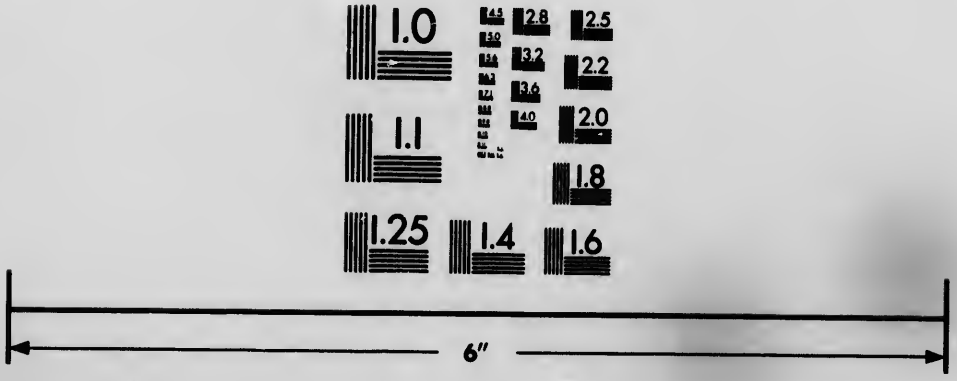

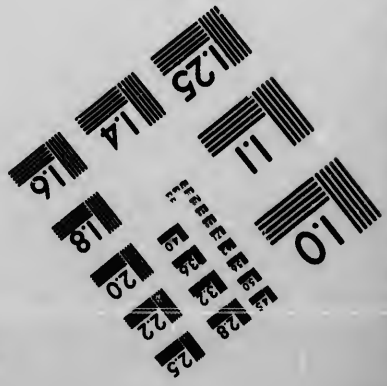

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corpus should go to those to whom the law would give it. I am referred to a decision of my brother *Strong* in a case of *Turnbull* v. *Turnbull*. The case is not reported, but I understand the facts to be, that land of a debtor was sold to satisfy a debt; that more than sufficient was realized; and that the surplus stood in Court to the credit of the debtor; who died without taking the money out of Court; and that it was held to be personalty. If in this case the fund were in Court the lunatic being dead, and his heirs in a position if entitled to take it out, and one of those heirs died, his estate would be in the same position as the estate of the debtor in *Turnbull* v. *Turnbull*, because in each case there would have been a party in a position to receive money, which he did not receive. As it is, the case does not seem to me to apply.

Judgment.

I am not prepared to say that this case is a very clear one: but in my opinion the plaintiff's contention is right in principle: and I do not see anything in the Act to take the case out of the general rule; and I do not think that the effect of the conversion being by Act of Parliament, and not by the Act of a Court does necessarily take it out of the general rule.

As to the dower of the widow of the lunatic, the bill concedes her right to dower, or to such sum in gross as may represent the value thereof. The widow in her answer claims the latter if the estate is adjudged to be realty. The point was not argued whether she is entitled to this. The justice of the case as to her would be satisfied by her having one-third of the proceeds of the investments—properly secured to her of course—during life. Her primary right to have an assignment of dower by metes and bounds is destroyed by the Act. That being gone, something must be substituted. Is it necessarily a sum in gross? I will hear counsel upon this point if they desire to speak to it.

I think in this case the costs should come out of the fund,

PERRIN v. PERRIN. 1872.

Surrogate Court—Demurrer—Jurisdiction.

A bill impeaching a will of which probate had been granted to the plaintiff by the Surrogate Court, stated that after the probate had been granted the plaintiff had discovered a subsequent will of the testator, and that this subsequent will was the deceased's last will: the wills disposed of both real and personal estate:

Held, that whether the will had been proved in common form or in solemn form, this Court had jurisdiction to try its validity.

Demurrer for want of equity.

The object of the bill appears from the head-note and judgment.

The ground relied on in support of the demurrer was, that this Court had not jurisdiction to entertain the suit, otherwise than on appeal from the Surrogate Court.

Mr. *V. McKenzie*, for the demurrer.

Mr. *Hodgins*, contra.

Gaines v. *Chew* (*a*), *O'Rielly* v. *Rose* (*b*), *Menzies* v. *White* (*c*), *Waterhouse* v. *Lee* (*d*), *Martin* v. *Martin* (*e*), *Zealley* v. *Veryard* (*f*), *Maclear* v. *Maclear* (*g*), *Allen* v. *McPherson* (*h*), were referred to.

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Judgment.

SPRAGGE, C.—This bill impeaches a will of the late *Thomas Perrin* disposing of real and personal estate. The plaintiff and another are named as executors, and the bill alleges that "probate of the said supposed will" was on the 15th of August, 1870, granted to the plaintiff by the Surrogate Court of Brant; and that the plaintiff took upon himself the trusts supposed to be created thereby. The bill then alleges that certain proceedings in relation to the will were taken in this

(*a*) 2 Howard, S. C. 619.
(*b*) 18 Gr. 33.
(*c*) 9 Gr. 574.
(*d*) 10 Gr. 176.
(*e*) 12 Gr. 500; 15 Gr. 586.
(*f*) L. R. 1, Pr. & D. 191.
(*g*) L. R. 1, Pr, & D. 604.
(*h*) 1 H. L. C. 191.

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Court; and that after they were instituted, certain facts which he sets out came to the plaintiff's knowledge which shew that the will admitted to probate was not duly executed; but that another will set out in the bill was the true last will of the testator.

The demurrer is on the ground that this Court has not jurisdiction, but the Surrogate Court only.

The defendant's contention is, that upon the plaintiff's bill it must be taken that the will of which probate was granted was proved in solemn form; that if proved in common form, it is to be assumed he would have alleged it to be so, as being most favourable to his case; and that if proved in solemn form it is *res judicata* by a Court of competent jurisdiction, that the will proved was the last will of the testator: that an appeal to this Court from the judgment of the Surrogate Court is given by the Surrogate Court Act; and that that is the plaintiff's proper remedy.

Judgment.

It was also contended that by the Surrogate Court Act, the same having been passed subsequently to the Act conferring jurisdiction upon this Court, in the matter of trying the validity of wills; the jurisdiction of this Court is superseded, and that whether the will was proved in solemn or in common form the Surrogate Court alone has jurisdiction to try its validity. I am satisfied that this argument is not tenable. The clause giving jurisdiction to this Court is explicit; and more comprehensive than the clause giving jurisdiction to the Surrogate Courts. It runs thus: "The Court shall have jurisdiction to try the validity of last wills and testaments whether the same refer to real or personal estate; and to pronounce such wills and testaments to be void for fraud and undue influence, or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments." It is re-enacted along with the Surrogate Court Act in

the Consolidated Statutes; and the most that can be said is, that as to part of the jurisdiction respecting wills conferred upon this Court, concurrent jurisdiction is given to the Surrogate Courts: and it has been held too often to be questioned now, that by jurisdiction being conferred upon another forum, over a subject matter of which this Court already had jurisdiction, the jurisdiction of this Court is not ousted. 1872. Perrin v. Perrin.

I assume upon the pleadings that probate was granted to the plaintiff upon his own application, but that, I apprehend, would not estop him from coming to this Court upon the ground upon which he files his bill. But the question is whether, if the paper admitted to probate was proved in solemn form, the *factum* that the paper so proved is the will of the testator is not *res judicata*. I confess I have felt some hesitation as to this; and if the question presented by this bill were the same as that assumed to be before the Surrogate Court, I should incline I think to agree with the defendant. But the plaintiff's case is not that the Surrogate Court was wrong upon the facts before it, in adjudging the paper propounded for probate to be the will of the testator; but that after discovered facts shew that it was not the will of the testator. These after-discovered facts would be or would not be a ground for an application to the Surrogate Court to revoke probate. If they would, it would be only that the Surrogate Court would have jurisdiction to set aside its own adjudication, and declare the paper admitted to probate invalid, upon the same grounds as this Court would pronounce it invalid: and if they would not be a ground for such application to the Surrogate Court, the reason would be all the stronger, would indeed be imperative, for the exercise by this Court of the jurisdiction conferred upon it by the clause that I have quoted. Judgment.

I think the demurrer should be overruled and with costs.

1872.

DOBBIE v. MCPHERSON.

Will, construction of.

A testator by his will devised certain lands to trustees for and on behalf of his two sons, W & J, "and any other son or sons to be hereafter lawfully begotten by me," with right of survivorship as between W & J, without providing for any such right as to an after born son in case of his dying. Another son was born to the testator, who died after his father, under age and without issue:

Held, as to the deceased son's share, that the brothers and sisters took equally as his heirs.

The testator directed these lands to be conveyed to his sons on their coming of age, but omitted to make any provision for the application of the rents and profits in the meanwhile:

Held, that the sons had vested estates from the death of their father, and were entitled to the rents and profits during their minority.

Hearing by way of motion for decree.

The points involved appear sufficiently in the head note and judgment.

Mr. *Ferguson*, for the plaintiff.

Mr. *C. S. Patterson*, Q. C., for *William Dobbie*.

Mr. *J. C. Hamilton*, for the infant defendant.

The bill was *pro confesso* against the defendant *McPherson*.

June 26th. Judgment. SPRAGGE, C.—This will is very badly drawn: and, interpreted as I think it must be interpreted, entails, consequences, which, it is very probable, were not at all foreseen or intended by the testator.

It would be going counter to a series of authorities to hold that the sons of the testator took other than a vested interest in lot 13, 5th concession Esquesing.

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Dobbie v. McPherson.

The devise is to trustees "for or on behalf of my two sons *William* and *James* and of any other son or sons to be hereafter lawfully begotten by me." Then follows a provision as to survivorship, which I will notice presently; and the will proceeds to direct that the land shall be conveyed to the testator's sons upon their coming of age, charged with the payment to each of his daughters whom he names, and to any other daughters who might be born, of the sum of £100. From *Boraston's* case (*a*) downwards there are a number of cases from which it is clear, I think, that the sons took an equitable fee vested at the death of the testator, the personal enjoyment only being postponed.

There is this peculiarity in this will, that no disposition is made of the rents and profits of the land in the meantime. It does not affect the question of the vesting of the land on the death of the testator; but it is contended on behalf of the daughters that they, equally with the sons, are entitled to them as undisposed of, and that the whole scheme of the will shews that this was intended. The provisions of the will in regard to the conveyance to the sons, and the charge in favor of the daughters are very peculiar; they run thus: "Second, that the said 200 acres shall be burdened and conveyed to my said boy or boys when they attain the age of 21 years, under the obligation of payment to each of my daughters (naming them), and of any other daughter or daughters lawfully begotten by me, of the sum of £100 lawful money, &c., to be paid out of the said 200 acres to each of my said daughters when they severally attain the full and complete age of 21 years." The will then proceeds: "Third, of payment to my beloved wife * * of a sum equivalent to her board, lodging, clothing, and support in a suitable manner as my widow." The testator puts the provision for his wife

Judgment

(*a*) 3 Rep. 19.

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after the charge in favor of his daughters; and it may well be contended that it could not have been his intention to postpone this provision for his wife until after his daughters or his sons should come of age, especially as his provision extended to after-born children; but that he must have intended that the provision for his wife should take effect presently after his decease; and, as that provision was put after that in favor of his daughters, the provision in their favor must also have been intended to take effect immediately. If the provision in favor of the daughters were less explicit, it might be possible so to interpret it; but the only provision here made for them is a legacy of £100 to each; and the payment to each is fixed upon her coming of age. There is nothing to give a present interest to them in either money or land beyond the vesting of the legacies and their being a charge upon the land. The provision that the legacies are "to be paid out of the said 200 acres," may mean that the trustees are to invest rents and profits, if there should be a surplus for that purpose, or it may mean only that the legacies shall be a charge on the land. The probability is, that, in this ill-drawn will, no definite meaning was attached to the words. It contains no intelligible scheme of provision for family, or disposition of property, so as to enable a Court to say that, upon any interpretation that may be put upon it, the intention of the testator will be carried out. The provision that I have quoted at length is an absurd and inconsistent one. The will contemplates that there may be after-born sons; the conveyance to the sons is to be of one piece of land *en bloc*, and to be made when they—which must be the youngest—come of age; the conveyance is to be made to them, "under the obligation of paying the legacies to the daughters" severally upon their coming of age, an event which would happen before the conveyance was to be made to the sons; for he had, when he made his will, four daughters, three of whom, at any rate, were older than his younger son.

Judgment.

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To return to the rents and profits of the land, I have not met with any case where provision is made by will for a conveyance on coming of age, or other provision for future enjoyment by a devisee, and where the will is wholly silent as to the application of rents and profits in the meantime. There are cases where provisions are made for their application which may not exhaust them. I apprehend that, in such a case, there being a vested interest in the land devised, the surplus of rents and profits must belong to the beneficial devisee; and that, for the like reason, where a will is silent as to rents and profits, the beneficial devisee having a vested interest is entitled to them. Such a devisee must, I conceive from the nature of his title, have everything in the land, as to which no other appropriation is made; and I may add that the language of this will rather indicates that such was the intention of the testator, for he devises the land in question to trustees "for or on behalf" of his sons.

Judg

No question is made as to the residuary estate. The whole is devised to trustees, and the will directs its equal division among the testator's children in equal shares "when all the other purposes of this trust shall have been fulfilled" and all shall have come of age. It may be that the testator supposed that the proceeds of his residuary estate would be sufficient for the maintenance of his family until the period of division.

A son was born to the testator after the making of his will, named *John*, and this son died after the testator under age and without issue, and a question is raised under this provision of the will, "providing that if the two boys now presently existing are those only left by me, and in case of the death of either without leaving lawful issue, his right and title therein shall fall and belong to the surviving boy exclusively." The contention is, that the testator has, by this pro-

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vision, manifested an intention that the 200 acres devised should go to his sons to the exclusion of his daughters; and that the share of the after-born son should go to his surviving brothers only. It may be that, if he had thought of the event which has happened, he would have provided for the case of survivorship, in that event, in favor of his two sons; but the provision he has made is for another contingency, and is very explicit. He had just before declared the trust to be in favor of his two sons *William* and *James*, "and of any other son or sons" that might be born; and then limits the survivorship to the contingency of the two then living surviving him. The words "now" and "only" exclude the event that has happened. In my opinion, the brothers and sisters of *John* took equally as his heirs.

Judgment.

A daughter, *Elizabeth*, one of the plaintiffs, was born to the testator after the making of his will; and two of the daughters have died since the testator and since the death of *John*, both of them without issue and after coming of age. There are now surviving three daughters and two sons, and they are entitled equally to the share of *John* in the 200 acres of land and to the shares of the deceased sisters in the legacies.

The bill contains charges against *McPherson* which, being confessed by him, the bill being taken *pro con* against him, are sufficient to entitle the plaintiffs to ask for his removal from the trusteeship; and, in virtue of their interest in *John's* share of the land, they are entitled to an account of his dealings with the land, and they are also entitled to an account of his dealings with the residuary estate.

The decree will direct the appointment of a new trustee, and further directions and costs will be reserved. The costs up to the hearing should be paid out of the estate. It is the ambiguities of the will, not the conduct of *McPherson*, that has occasioned the suit.

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LITTLE v. HAWKINS.

Champerty.

An heir-at-law being supposed to have a right to call trustees to account and to impeach sales made by them, such supposed right being considered very doubtful and being one which could only be reached through a suit in this Court, and the heir-at-law being himself unwilling to litigate the matters in question, he assigned his interest to a third person; and, by the agreement, the consideration for such assignment was only to be paid in case of success:

Held, that a merely speculative purchase of this kind cannot be enforced in equity.

Examination of witnesses and hearing at the sittings of the Court at Sandwich, in the spring of 1872.

Mr. *C. Moss*, for the plaintiff.

Mr. *S. Blake*, and Mr. *Alexander Cameron*, for the defendant.

SPRAGGE, C.—I decided at the hearing all the questions in the cause, except as to champerty and as to a sum of $400 paid to *William Little*—son and assignee of *John* the devisee, on the sale to *Park*—that sum being part of the purchase money of the land sold to *Park*, under a mistaken belief that the devise was good, overlooking the fact that the devisee was a witness to the will, and the law, that being so, it would invalidate his devise. June 26th Judgment.

George Little is the heir-at-law of the testator, and the plaintiff *Robert Little* is his assignee. If the heir-at-law himself were now plaintiff, it may be that his claim to this $400 could not be resisted; and possibly, if the only matter brought in question by this suit were this claim of $400, the assignee of the heir-at-law might be entitled to recover. But what was really

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assigned and what was really brought in question by this suit, was the right to impeach the dealings of the trustees with the estate of the testator for a period covering nearly thirty years. The investigation before me, which occupied nearly three days, satisfied me that the charges of improvidence and misconduct made by the bill were groundless; that the trustees had discharged their duty faithfully and carefully, and that the purchases from them were made in good faith and were not open to any of the objections made by the bill.

That the assignment to the plaintiff was only of a right to bring the trustees to account, and to impeach the sales made by them, and to fix the purchasers of the land in question with notice, is manifest from the frame of the bill and from all the circumstances; and that it was an assignment of what the parties to it themselves considered a very doubtful right, and one that could only be reached through a suit in this Court, is also manifest, for it was part of their agreement that it was only in the event of success that *anything* was to be paid; and, in that event, the sum was a small one compared to the value of the property in question; and there was this further element, that the heir-at-law was himself unwilling to litigate the matters in question; and it is only through this assignment and the more litigious and less scrupulous spirit of this plaintiff that they have come to be litigated at all. This was, in short, a merely speculative purchase; it was not in *substance* a purchase of land, but of a right to litigation through which land or its equivalent might be obtained.

Judgment.

Some of the observations of Lord *Abinger* in *Prosser* v. *Edmunds* (*a*) may be of less force now since the passing of the statute legalizing the sale of a right of

(*a*) 1 Y. & C. Ex.

entry (*a*) than when they were made. I allude to what he says at page 496, that the party assigning must have "some substantial possession, some capability of personal enjoyment." Still his observations upon the policy of the law to discourage maintenance and champerty, and dealings between parties which savour of either, are held as authority at the present day. His Lordship's remarks apply pointedly and forcibly to the case before me. He says, at page 497: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." The same principle has been affirmed in numerous cases, some of them before and some of them after *Prosser* v. *Edmunds*; and in none of them that I have seen has the doctrine enunciated by him been impugned. I will refer to only two of them, and I refer to them because they apply to the case of the $400 to which I have already alluded; one of them, *Muchall* v. *Banks* (*b*), was in our own Court, and was decided by the late Chancellor. The purpose of the bill sufficiently appears by the head-note to the case. His Lordship here read the head-note and the portions of the judgment as reported at pages 32, 33, and 34.

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Judgment.

The other case is *Hill* v. *Boyle* (*c*). There a tenant for life of a trust estate had mortgaged his estate with a power of sale, and, the mortgage being in arrear, it was sold by the mortgagee; and after the sale the purchaser and the mortgagee assigned to the tenant for life certain alleged arrears of interest and profits of part of the trust fund which the plaintiff alleged the trustees had made in excess of the interest for which they had accounted. Sir *John Stuart* said, "I can recollect no

(*a*) 14 & 15 Vic. ch. 7.
(*b*) 10 Gr. 25.
(*c*) L. R. 4 Eq. 260.

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case like the present. The plaintiff does not sue as assignee of the trust estate or of any part of it. He is assignee of nothing but of a right to sue the trustee for the chance of recovering from him interest or profits of part of the trust funds, which were, for a certain period, in his hands. In my opinion, such an interest is not assignable, nor a suit in respect of it maintainable in this Court. The *cestuis que* trust, declining themselves to institute proceedings for an alleged breach of trust, have, in consideration of five shillings, assigned the moneys recoverable in respect thereof to the plaintiff." That case was less open to objection than this. It would more resemble this if the assignment to this plaintiff had been only of the right to bring the trustees to account in respect of the $400 paid to *William Little*; whereas that is at most a secondary relief, only asked for in the event of the plaintiff failing to impeach successfully the dealings of the trustees with the estate.

Judgment.

The doctrine of the Court, that this Court will not entertain a suit savouring of maintenance or champerty, is as much the doctrine of the Court now as it was when *Prosser* v. *Edmunds* was decided, or the much older case of *Wallis* v. The Duke of *Portland* (*a*) before Lord *Loughborough*. That it is the present, as well as the ancient doctrine of the Court, I refer to the language of Lord Justice *Turner* in *De Hoghton* v. *Money* (*b*). His Lordship there remarked: "I do not say that what appears in this case amounts in strictness to champerty or maintenance, nor do I even say that there may not be cases in which a purchaser who has completed his contract may be well entitled to impeach a title founded upon fraud committed upon his vendor; but I do not hesitate to say that, in my opinion, the right to complain of a fraud is not a marketable com-

(*a*) 3 Ves. 494. (*b*) L. R. 2 Ch. App. at p. 169.

modity, and that if it appears that an agreement for purchase has been entered into for the purpose of acquiring such a right, the purchaser cannot call upon this Court to enforce specific performance of the agreement. Such a transaction, if not in strictness amounting to maintenance, savours of it too much for this Court to give its aid to enforce the agreement."

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I should have regretted very much if I had been obliged to make any decree against these defendants, for their conduct has been blameless; and it would have added to my regret that it would have been in favor of this plaintiff, who, as the case shews, having no claim whatever of his own, was an unscrupulous speculator upon the chance of putting money into his pocket at the expense of the trustees. His bill is dismissed with costs.

Judgment.

TAYLOR v. HARGRAVE.

Mortgage—Tenant by the courtesy—Interest for more than six years.

A mortgage had been created by a married woman upon her estate; after her death a suit was brought against her husband and her children; and the Court, in directing a sale of the mortgage property, refused to make the estate of the children liable to arrears of interest for more than six years; but, directed payment to the mortgagee out of any excess after payment of principal money, costs and six years' interest of so much of his balance as would represent the husband's interest as tenant by the courtesy in such balance.

This was a suit praying a sale of mortgage premises under the circumstances set forth in the head note and judgment, and was brought on by way of motion for decree against the infant defendants and *pro confesso* against the adult defendant their father.

Mr. *Holmested*, for the plaintiff, asked that the plaintiff should be declared entitled to the full amount of

1872. interest accrued due, upon the authority of *Carroll* v. *Robertson* (*a*).

Taylor v. Hargrave.

Mr. *Hoskin*, for the infant, distinguished this from the case referred to, as there the infant's estate was bound by the covenant of the ancestor, while here the estate of the mother had been incumbered for the benefit of her husband and the instrument creating such incumbrance contained only the covenant of the father.

Sept. 11th. SPRAGGE, C.—The mortgage in this case was made by husband and wife, and was of the real estate of the wife. The wife is since dead; and the bill is filed against the husband and the infant heirs of the wife.

The bill prays for foreclosure; but, at the hearing, the plaintiff asks, as he has a right to do, *ore tenus*, for a sale. He alleges that arrears of interest for more than six years are due, and claims that he ought not to be limited to the recovery of arrears for six years.

Judgment.

A case was before my brother *Mowat* (*b*) against the heirs of a mortgagor, and he held the mortgagee entitled to receive more than six years of arrears; and he put it upon this, that the mortgagee could, in an action at law to recover the mortgage debt, recover arrears of interest to any extent within twenty years; that the mortgaged lands descended to the infants is liable to satisfy the judgment recovered in such action; and that, to prevent multiplicity of suits, it was proper that the whole should be recoverable in one suit in this Court.

This was, perhaps, going somewhat further than Sir *Richard Kindersley* went, in *Edmonds* v. *Waugh* (*c*), which was followed in this Court on rehearing in *Ford* v. *Allen* (*d*), and on appeal. On the other hand, if

(*a*) 15 Gr. 173. (*b*) Carroll v. Robertson, 15 Gr. 173.
(*c*) L. R. 1 Eq. 418. (*d*) 15 Gr. 565.

these lands could be reached in the hands of the infant heirs for all arrears of interest (not exceeding twenty years), it would be worse than useless to waste the estate by requiring two suits to get at that which is recoverable by the mortgagee. 1872. Taylor v. Hargrave.

Suppose the lands to sell for sufficient to pay the mortgage debt and all arrears of interest, how should the surplus beyond what is sufficient to pay the mortgage debt and six years arrears be dealt with? If paid over or invested for the benefit of the infants where the infants' estate is in any shape liable, it would operate unfairly to the mortgagee, inasmuch as he would lose the benefit of getting the excess out of the lands by action at law, the lands having been sold in this Court.

If the moneys realized by sale were in Court, and the mortgagee and the infant heirs of the mortgagor contestants for the excess, and the mortgagee had no other means of realizing the excess, and if he could have recovered it by action at law, it is he that ought to receive it in this Court. Judgment.

This case differs from the one before my brother *Mowat* in this, that, in the case before him, there was the covenant of the ancestor to pay the mortgage debt, but here the ancestor is the mother, and the covenant is by the father only; so that there is nothing to charge the interest of the infants beyond the six years' arrears.

But I am asked to apply the principle of my learned brother's decision to the estate of the husband as tenant by the courtesy; and I am inclined to think that the principle applies; but there is nothing in the bill to inform any of the defendants that more than six years arrears of interest is sought against them, or any of them: there is no allegation to take the case out of the ordinary rule. Still, I think I ought not to conclude the mortgagee upon this point.

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Taylor v. Hargrave.

The property consists of 100 acres of land in Mulmer, and it is not suggested that it would be advisable to sell a part only to satisfy the mortgage debt. The plaintiff asks for an immediate sale. I see no reason for this; the sale will be in case of default at the usual time; and, in the event of more being realized than will be sufficient to pay the mortgage debt, interest for six years, and costs, the mortgagee can apply to have so much of the excess paid out to him as would represent the value of the estate of the tenant by the courtesy in such excess.

SMITH v. REDFORD.

Accounts stated—Principal and agent—Statute of Limitations.

Accounts were delivered in 1862 and 1865 by a trustee and agent to his principal, and the confidential relationship existed for upwards of two years after the latter account had been rendered:

Held, under the circumstances, that these accounts were not binding on the principal as stated accounts.

A deputy registrar did business for many years as a conveyancer, for his own benefit, with the knowledge of the registrar, and without objection by him:

Held, that the registrar could not afterwards claim the profits.

The deputy was said to have searched the title in these cases for the parties, and not to have given to the registrar credit for the search, or made any charge for it to the parties; the registrar not appearing to have been aware of this practice, the deputy was *held* chargeable with the ordinary search fee, as the registrar's share of the transaction.

It was said that the deputy had not charged other parties with all the fees which the law allowed; but the Court considered him not liable to the registrar for these fees where the omission to make the charge was not in view of any personal advantage to the deputy himself.

The Statute of Limitations was *held* to be no bar to the claims of the principal in respect of these and other transactions between them.

Hearing at Stratford.

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Smith v. Redford.

Mr. *Snelling* and Mr. *Wardrope*, for the plaintiff.

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

MOWAT, V. C.—The original bill in this cause was filed by *William Smith*, registrar of the County of Perth; and, he having afterwards died, the suit was revived by his widow, she being his devisee and executrix. The defendant was the deceased's deputy from 1853, to some time in 1867; the defendant managed the affairs of the registry office; and, with assistance of clerks paid by *Smith*, did all the work of the office, without *Smith's* personal interference; received all the fees for *Smith's* benefit; and was paid for these services by a salary. During all this period, *Smith* was greatly embarrassed in consequence of indorsations, and otherwise; and the defendant assisted him to a large extent in his difficulties by indorsing his paper; by advancing or raising money for him; and by attending to his financial affairs generally. In the course of these transactions, *Smith's* property became vested in the defendant; the defendant held also a number of judgments which had been recovered against *Smith*, and had been bought for his benefit by the defendant. By these means the defendant appears to have always been largely in advance for money paid for *Smith's* use. During the early years of their connection they used to have frequent settlements of their accounts, and to sign the accounts in testimony of their being settled. The last settlement of this kind was in 1858. Between that time and October, 1867, the defendant rendered accounts thrice, viz., in 1862, 1865, and 1867; and one question in the cause is, whether these were stated accounts. The last of them was rendered after the defendant had ceased to be deputy. In October, 1867, *Smith* executed a mortgage to the defendant, the consideration for which is another of the matters in question.

July 11th.

Judgment.

I think that the mortgage was given for the specific

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sums mentioned by *Smith* in one of his depositions; and that the whole of it was payable according to the tenor and effect of the mortgage. The judgments which the defendant had bought before decree in the Chancery suit of *Fieken* v. *Smith*, he must be taken to have bought for *Smith's* benefit; and he is entitled as against *Smith* to the sums which the defendant actually paid for these judgments with interest at eight per cent. The judgments bought subsequently, the defendant must be taken to have bought as any stranger might; and he is to be entitled to the sums due on them to the creditors.

Then as to the three accounts; I think it clear that the account rendered in 1867 was not accepted by *Smith* as correct; and never became binding on him as a stated account. As to the two preceding accounts, I have arrived at the same conclusion, after repeatedly perusing and comparing the defendant's answer (which is not technically evidence in his favour) and the depositions of *Smith*, which, for want of other evidence, the defendant has found himself obliged to put in as part of his own proofs. I have also carefully examined the exhibits which were put in. My conclusions may do injustice to the defendant, and they may not be such as I would have arrived at if the defendant had been at liberty by the rules of evidence to be a witness on his own behalf, instead of being obliged to rely to a large extent on the depositions of the opposite party, who is now dead; but this is a hardship which there is no avoiding.

Judgment.

Upon the materials which are before me, I think that I must infer, that these accounts were not prepared or rendered by the defendant as full or perfectly correct accounts; that they were made up in consequence of *Smith's* request for accounts; that they were given to *Smith* as containing a certain amount of information, subject to future examination,

correction, and settlement by both parties; and that some items were objected to by *Smith* at the time. The number or extent of the objections does not distinctly appear; and there is no independent evidence to support the defendant's allegation as to their subsequent abandonment. *Smith*, in making certain objections, did not, according to his own depositions, profess to be going, and did not consider himself as going, into every item which might in his view have needed explanation or correction; he stated in his depositions, that there were various omissions which he did not specify to the defendant, but which he thought he might complain of, and which he did not mean then to abandon, though he might abandon them ultimately. I do not feel at liberty in view of the whole case, to reject these statements; and I think that I ought to infer from the materials in evidence, that it was understood between the defendant and *Smith*, though not stated in so many words by either, that the accounts in question were to remain open to be adjusted when the parties should come to a settlement of them, as in 1858 and previous years; that when these accounts were delivered, they were not fully gone into, because of the confidential relations of the parties to one another, which were thought not to render it necessary that this should be done immediately; and because, in their relations to *Smith's* creditors, a conclusive and complete settlement of the accounts was thought to be difficult, and perhaps inexpedient; that no such settlement was come to afterwards; and that to hold, after the confidential relations of the parties had ceased, that the accounts rendered were stated accounts, and binding on *Smith* as such, would have been a surprise on him, and would not be in accordance with the mutual understanding and expectation of the parties theretofore.

Judgment.

While I have thus arrived at the conclusion that there has not been since 1858 what can technically be called a "stated account," it is proper to add that *Smith's*

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various depositions contain such admissions in regard to the substantial accuracy of the three accounts, that, in taking the account under the decree, the Master ought to regard the accounts, in connection with those admissions, as considerable evidence in the defendant's favor, except at all events in regard to the particulars which *Smith* expressly mentioned on oath to be wrong. The effect of so treating the accounts will not be very different from holding the accounts to have been stated, but to be subject to be surcharged and falsified by the plaintiff. I think that, on the evidence before me, neither party has any equity to a greater advantage than this way of viewing the matter will give him.

Some of the omissions and errors which *Smith* had mentioned in his examination were the subject of evidence and argument at the hearing. Thus, he had claimed the profits of certain agencies which the defendant had held while he was *Smith's* deputy; this claim the plaintiff's counsel abandoned at the hearing. The plaintiff claimed, also, the profits of conveyancing which the defendant did during the same period, and which amounted to a large sum; but I think that *Smith's* conduct amounted to such acquiescence in the defendant's doing this business for his own benefit, that the claim is not now maintainable. It was said that the defendant had searched the titles in these cases for the parties, but had given no credit for his searches, and had not made to the parties any charge for them. It does not appear that *Smith* was aware of this practice; and the defendant seems chargeable with the ordinary search fee as *Smith's* share of each transaction. If he received any fees for which he omitted to give credit, there is no reason why he should not be charged with these. As to fees chargeable but not collected or charged by the defendant, I do not think that the defendant should be charged with these where the omission had not in view any personal advantage to himself.

Judgment.

1872.

Smith v. Rodford.

There was also discussed a question as to the profit on a purchase made by the defendant of a lot in Stratford, which had belonged to *Smith*, and was bought by the defendant at a tax sale in September, 1866, and sold by him at a profit in January following. Considering the relations of the parties at the time of the purchase, their relations and dealings for thirteen years previously, and the subsequent admissions sworn to have been made by the defendant in reference to his purpose in this transaction, I think that he must be taken to be accountable for the profit made upon it.

The defendant's counsel argued that the Statute of Limitations was a bar to the plaintiff's claims, or some of them; but the cases cited for the plaintiff are sufficient to shew the contrary (*a*).

Judgment.

The decree will contain a declaration of my opinion as to the mortgages, judgments, agencies, conveyancing, and Stratford purchase; and that the accounts of 1862, 1865, and 1867, were not stated and settled accounts; and will direct that subject to these declarations an account be taken of the dealings and transactions between the parties since the last account stated in 1858; reserving further directions and costs.

(*a*) Burdick v. Garrick, L. R. 5 Chan. App. 233; Brittlebank v. Goodwin, L. R. 5 Eq. 545; Obee v. Bishopp, 1 DeG. F. & J. at 142.

1872.

LOVELL v. GIBSON.

Decree against personal representative—Rights of heirs.

For the purposes of an execution against lands, heirs are *prima facie* bound by a judgment against the executor or administrator of their ancestor in the same way as next of kin are bound; and, although they are not entitled as of course to have the issues tried over again, still it is open to them to shew, not only fraud and collusion, but that the judgment or decree, though proper against the defendant, was in respect of a matter for which the heirs were not liable.

The assets of a deceased person are not liable for debts incurred by an executor or administrator in continuing the trade or business of the deceased.

Heirs, being also next of kin, who had been parties to the continuing of the business of the deceased with his assets and those of his partner, were *held* precluded from objecting to payment by the estate of the losses incurred in continuing the business.

Statement.

This was a motion for an injunction, in a suit by the heirs of *James Lovell*, deceased, to stay execution against the lands of the deceased in the hands of his administratrix, *Anne Lovell*, to enforce payment of a sum found in *Gibson* v. *Lovell* to be due by Mrs. *Lovell* to Mrs. *Gibson*. The motion was rested on the ground, that the amount which *Anne Lovell* had been ordered to pay, consisted, in part, of a liability for which she alone was responsible, and with which it was argued that the real estate or the heirs could not be charged.

This liability was for the use of the plant of the partnership business of *Lovell & Gibson* after the death of the partner *James Lovell*. The property was in possession of the deceased at the time of his death, under an order of the Court, dated 20th January, 1868, authorising him to manage and carry on the business until a Receiver should be appointed by the Master. *Lovell* had offered to pay a rent, but the offer had not been accepted; and at the time of his death he was in possession, and was liable to account for all his receipts. He died

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intestate a few months after the making of the order; his widow took possession after his death, and she carried on the business in the name of *Anne Lovell & Co.*, for the exclusive benefit of herself and her family, as she intended and supposed; *Robert Lovell*, her eldest son, acted as her agent in this; and two of her other sons assisted in the business. *Robert* also attended on her behalf to the suit of *Gibson* v. *Lovell*; and he succeeded in effecting considerable delay in the appointment of a Receiver.

Mr. *Fitzgerald*, for the motion.

Mr. *Hodgins*, contra.

Judgment.

MOWAT, V. C.—Having reference to 27 Victoria, chapter 16, it must now be held, I think, that, for the purpose of an execution against lands, heirs are *prima facie* bound by a judgment against the executor or administrator of their ancestor, in the same way as next of kin are bound. After such a judgment, I think that heirs are not entitled as of course to have the issues tried over again; but I think it is open to them to shew, not only fraud and collusion, but that the judgment or decree, though proper against the executor or administrator, was in respect of a matter for which the heirs were not liable.

The assets of a deceased person are not liable for debts incurred by an executor or administrator in continuing the deceased's trade; and the present case seems identical in principle with those cases in which that doctrine has been held (*a*). So, if an executor or administrator were sued at law for the use of chattels by himself, the action would have to be against him personally, and a count for the like use of the same chattels by the testator or intestate in his lifetime could not, I apprehend, be joined in the action. *James Lovell's* whole

(*a*) See Williams on Executors, 6th ed. 1655 et seq. and cases there collected.

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estate is liable for his acts, and for the return of the chattels in proper condition; but not, so far as I can see, for any additional sum as the price of the use of them by the executor or administrator personally.

It was argued that three of the sons were so far parties to the continuing of the business by Mrs. *Lovell*, that they are bound. The case is much stronger in this respect against *Robert Lovell* than against any of the other plaintiffs. The chattels were the partnership property of the deceased and Mrs. *Gibson;* and if the business was carried on with the concurrence and aid of any of the heirs and next of kin while of age, the benefit of it perhaps being taken by themselves, as well as by the rest of the family, I do not see that, in a settlement between them and their mother of the personal assets, these children could say (except on some special ground) that her carrying on the business was wrongful; and if not able to take that ground as against their mother, I do not see that they can take it against Mrs. *Gibson* in the present case. This ground of defence does not apply to the infant plaintiffs.

Judgment.

I think that the conduct of the adults is proper for further investigation; and that an opportunity must be given to ascertain the amount by which the sum must be reduced as against the infant heirs, and as against all or any of the other plaintiffs. An injunction will therefore go until further order.

CRONK v. CRONK. 1872.

Alimony—Desertion—Right to vacate decree.

A husband, against whom his wife has obtained alimony, on the ground of desertion, is not entitled, as of right, to have the decree vacated or suspended, on his afterwards offering to receive and maintain her.

This was a suit for alimony. It was heard at Belleville, in October, 1871. Mr. *S. Blake* and Mr. *Dickson*, being counsel for the plaintiff, and Mr. *Wallbridge*, Q. C., for the defendant. Afterwards negotiations took place for a settlement of a separate maintenance, but these falling through, the Vice Chancellor (*Mowat*) on the 5th April, 1871, pronounced the following judgment:

MOWAT, V. C.—This is a suit for alimony. The bill charges the husband with cruelty and illtreatment of his wife, and with having at length deserted her in October, 1869. They were married in or about 1841, and have four children: two daughters who are married, and two sons, both, I believe, minors. The evidence shews that the parties have had a very unhappy married life; the husband is sober, intelligent, and industrious, and he has a faculty for accumulating property; but he is also morose, harsh, illtempered, jealous, and niggardly. He seems to have contracted early a dislike to his wife, and to have treated her with habitual unkindness, and occasionally with such cruelty as would have entitled her to a separate maintenance; but she continued to live with him notwithstanding his illtreatment; and may therefore be said to have condoned the acts of cruelty which are now brought forward. The alleged desertion was in October, 1869. In their early married life they had lived with their family in Belleville. In 1859 or 1860 they removed to a farm, the property of the husband, a few miles from town; and the farm was their family home until October, 1869. For some time before that date, how- Judgment.

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ever, most of the husband's time had been spent in Belleville; he went out to his family about once a week only; and, in case he stayed there overnight, he and his wife occupied separate bedrooms. In October the farm ceased to be even his nominal home; and from that time his answer admits that he has not cohabited with his wife. He says that this was her own act, that he had determined on living in Belleville, and that she refused to go with him. Of that refusal, however, there is no evidence. He made no preparation for her in town; and there is no proof that, until long after the filing of the bill, he ever communicated to her his wish or willingness that she should accompany him to a home there; on the other hand, there is reliable evidence that as late as June, 1870, after eight months of separation, he asserted to their son-in-law, who was endeavouring to adjust matters between them, that he never would live with her again. There is other evidence to the same effect. I have no doubt that the

Judgment.

determination which he so expressed was his fixed resolution at the time, and had been so since the previous October. The defendant makes by his answer some counter charges against the plaintiff, but he has established nothing which justifies his illtreatment of her while they lived together, or his desertion of her. He professes to be willing that she should now live with him again; but I have no doubt, in view of the whole evidence, that the profession is a pretence, the sole purpose of which is to avoid a decree for alimony: he does not profess to have any affection for her, or any desire for her society. After all that has occurred, if it were in my power to require them to live together, I do not think I would be justified in employing it to subject his wife to the misery which a compulsory renewal of cohabitation would put it in his power to inflict upon her. There will be the usual decree for alimony, with costs.

On the 2nd January, 1872, the Master made his report, against which the defendant appealed.

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The defendant also filed a petition stating that he was ready and willing and anxious to receive his wife, and to support and treat her as such; that he had got a house ready for them to occupy; and that the plaintiff refused to return to him. He prayed that the decree might therefore be set aside and vacated, or might be suspended as long as the plaintiff wrongfully refused to return to him.

The appeal and the petition came on for argument on the 26th June, 1872.

Mr. *Crooks*, A. G., and Mr. *S. Blake*, Q. C., for the appeal and in support of the petition.

Mr. *Moss*, Q. C., contra.

July 11th. Judgment.

MOWAT, V. C.—On the evidence filed for and against this petition, I am of the opinion which I expressed on the evidence given at the hearing of the cause, that, if it were in my power to compel the plaintiff to return to the defendant, I would not as a matter of discretion be justified in exercising the power. The affidavits now before me greatly strengthen the reasons for that conclusion. If the question were for the discretion of the Court, there would have to be considered, not merely the fact of desertion, but also the husband's previous conduct to his wife, including acts of cruelty which may have been condoned.

But it was argued by counsel for the petition, that the defendant has an absolute right to have the decree rescinded or suspended, now that he is willing to have his wife live with him again; that it is not even a matter for the discretion of the Court.

The right of a wife to alimony on the ground of desertion is not recognised in English law; alimony being

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granted in England as incident only to a decree obtained by her against her husband for a divorce. By the Chancery Act of 1837 the Court received the like jurisdiction, "in all cases of claims for alimony, that is exercised and possessed by any ecclesiastical or other Court in England;" and Vice Chancellor *Jameson* held that this enactment gave to the Court jurisdiction to decree alimony in certain cases in which there had been no divorce, and though the Court had no power to grant a divorce; and the Court, as afterwards reconstituted, held the doctrine so laid down and acted upon to have become binding on the Court (*a*). But the decree in this case was made under the authority of an enactment first introduced by 20th Victoria, chapter fifty-six, section two, and afterwards embodied in the Consolidated Statutes Upper Canada, chapter twelve, section twenty-nine. The section in the Consolidated Statute sets at rest the questions raised as to the construction of the enactment respecting alimony in the Act of 1837. Its terms are these: "The Court shall have jurisdiction to decree alimony to any wife who would be entitled to alimony by the law of England; or to any wife who would be entitled by the law of England to a divorce, and to alimony as incident thereto; or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights; and alimony when decreed shall continue until the further order of the Court."

Judgment.

Now alimony in cases of divorce for cruelty in England does not determine when the husband promises amendment, however sincere the Court may think the promise. In England when a wife has once become entitled to permanent (as distinguished from interim) alimony from her husband's estate, she retains the right

(*a*) See Soules v. Soules, 2 Gr. 299; Severn v. Severn, 3 Gr. 431.

to it until she surrenders it, or forfeits it by misconduct; and I perceive no reason of interpretation or policy for holding a different rule applicable to a case like the present. 1872. Cronk. v. Cronk.

The Legislature of this country has never thought fit to enable a husband or wife to obtain a decree for "restitution of conjugal rights;" and what the defendant would not be entitled to the process of the Court for compelling directly, I do not see on what principle he should be entitled to demand as of right an order for compelling indirectly. The policy of the Legislature here has been to leave a return to cohabitation to the influence of the natural and moral considerations which may affect the conduct of the parties.

If the defendant really wishes to be reconciled to his wife, for any other purpose than the contemptible one of getting rid of the small allowance which the Master has made to her (and which is a mere bagatelle to a man of the defendant's proved wealth), let him obtain his wife's consent to return to him; let him withdraw the foul aspersions which he has cast upon her, and did not attempt to prove; and let him offer to give a binding stipulation that her little allowance shall not be imperilled or lost by her acceding to his professed wishes, but shall be continued notwithstanding the renewal of cohabitation. But for the Court to attempt, after all that has passed between these parties, to compel the wife's return by vacating the decree which she has obtained, would be a gross injustice which I think that there is no law entitling the defendant to demand. Judgment.

With respect to the appeal from the report; the decree directed the Master to find what arrears were due; still, as it turned out that there had been no order for interim alimony, and as therefore, according to the authority of *Soules* v. *Soules* (*a*), there could be no

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arrears, the report, so far as it allowed arrears as from a date antecedent to decree, must be varied. The report is not clear as to whether the Master meant to give $850 until the further order of the Court; or $850 for two years only, and $650 afterwards, subject to the order of the Court. Having ascertained that the Master intended the latter, viz., $850 for two years only, and $650 afterwards, the order on the appeal will be so expressed. The evidence affords no reason for diminishing the very moderate annual sum which the Master intended.

The plaintiff is entitled to her costs of the petition and appeal as between solicitor and client.

MULHOLLAND v. MERRIAM.

Trustee and cestui que trust—Informal instrument creating trust—Parties.

J M, by an informal instrument purported to assign to his son-in-law all his estate real and personal, "with notes and accounts on condition that he pay his heirs in the manner following" and the instrument then proceeded to direct the payment to certain of the assignor's children and grand-children of the sum of $400 each; the instrument also contained an agreement on the part of the son-in-law in the following terms "the said *W M* hereby becomes bound to pay the above mentioned sums to the parties therein named at the time of the decease of the said *J M*, or as soon after as can conveniently be done."

Held, that the effect of these stipulations in the instrument was to entitle each of the beneficiaries to file a bill in his own name after the death of *J M* to enforce payment of the $400 coming to him; and that an objection taken at the hearing that a personal representation of *J M* was a necessary party to the suit, was not sustainable.

The instrument upon which the present suit was founded was in the following terms:

"Know all men by these presents that *William Merriam* is held and firmly bound unto *John Mulholland*

(*a*) 3 Gr. 113.

in the penal sum of four hundred dollars, of lawful money of Canada, to be paid to the said *John Mulholland*, or to *Joshua Mulholland*, of the township of North Norwich, and county of Oxford, his attorney; for which payment well and truly to be made, he hereby binds himself, his heirs, executors, and administrators, for ever. Sealed with his seal, dated this sixth day of November, in the year of our Lord one thousand eight hundred and sixty eight. 1872. Mulholland v. Merriam.

"The conditions of the above written bond or obligation are as follows: To wit—He, the said *John Mulholland*, hereby assigns his real estate and personal property, together with notes and accounts, to the said *William Merriam*, on condition that he pay his heirs in the manner following, namely: To his son *Joshua Mulholland*, the sum of four hundred dollars; to his son *John L. Mulholland*, the sum of four hundred dollars; to his son *William*, the sum of four hundred dollars; to his son *George B.*, the sum of four hundred dollars; to his daughter *Margaret*, the sum of four hundred dollars; to his daughter *Elizabeth*, the sum of four hundred dollars; to his daughter *Susan*, the sum of four hundred dollars; to *John Hilborn*, son of my daughter *Mary*, the sum of four hundred dollars; to the children of my daughter *Nancy*, deceased, the sum of four hundred dollars, equally divided between them; and to the children of my daughter *Jane* deceased, the sum of four hundred dollars, also equally divided. Statement.

"The said *William Merriam* hereby becomes bound to pay the above mentioned sums, to the parties herein named at the time of the decease of the said *John Mulholland*, or as soon after as can conveniently be done.

"He, the said *William Merriam*, hereby becomes bound to provide a comfortable maintenance for the said *John Mulholland* during his natural life; and to pay him the sum of twenty-five dollars per annum besides

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paying his doctor's bill, funeral, and all other reasonable expenses. Provided always, that should he, the said *John Mulholland*, choose to live with any of his other sons or daughters, he, the said *William Merriam*, hereby becomes bound to pay to the said son or daughter a reasonable amount, for his maintenance, and in case of any disagreement with regard to the same, it shall be decided by two disinterested parties, one of whom shall be chosen by the said son or daughter, and the other by the said *William Merriam*.

"The above agreement shall continue in full force, without any alteration or abatement whatsoever. Then the said bond or obligation to be void, otherwise to be and remain in full force."

The instrument was executed by both the parties, *Mulholland* and *Merriam*, and witnessed by *Philip Green* and *Wesley Merriam*.

The cause came on for the examination of witnesses and hearing, at the sittings of the Court at Brantford.

Mr. *A. Hardy*, for the plaintiff.

Mr. *E. B. Wood*, for the defendant.

Judgment.

STRONG, V. C.—About the 6th of November, 1868, *John Mulholland* being possessed of a considerable amount in money and securities, the proceeds of the sale of his farm and also of some other property, executed an instrument in a very peculiar form. This document, which was prepared by *Philip Green*, a schoolmaster, residing in the neighbourhood of the defendant, may be thus described. The first part of it purports to be a bond by the defendant to *John Mulholland* in the penal sum of $400. What is declared to be the condition is as follows: *John Mulholland* purports thereby to assign to the defendant "all his estate

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real and personal, with notes and accounts, to the said *William Merriam* on condition that he pay his heirs in the manner following, namely," and then follows a direction to pay to each of the living children of *John Mulholland* except the defendant's wife $400, and the like sum to the children of two deceased daughters. It then contains the following clause: "The said *William Merriam* hereby becomes bound to pay the above mentioned sums to the parties herein named at the time of the decease of the said *John Mulholland*, or as soon after as can conveniently be done." A covenant on the part of *Merriam* to provide a maintenance for *John Mulholland* during the remainder of his life, completes the document.

This bond or agreement was executed by sealing by both *John Mulholland* and his son-in-law, the defendant, *William Merriam*.

Judgment.

The bill is filed by *George B. Mulholland*, one of the sons of *John Mulholland*, to enforce payment of the $400, which by the instrument set forth was to be paid to him on his father's death, which took place in April, 1870. The defendant by his answer to the original bill alleges in paragraph 7 that he has "in all things fully performed the trusts and covenants in the said bond and agreement on his part to be performed."

At the hearing it was contended for the defendant, in the first place, that there was no jurisdiction; that no trust was created by the agreement, and that there was an absence of any privity, either at law or in equity, between the plaintiff and defendant, the proper remedy on the instrument being an action at law, to be brought by the personal representative of *John Mulholland*. And in the next place, that even if the plaintiff's portion was recoverable in equity, a conveyance executed by his father to the plaintiff on 23rd November, 1868, of a house and lot of land on which the plaintiff lived in the

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village of Branchton, was to be taken as a satisfaction to the extent of $200 of the $400 he was entitled to under the agreement of 6th November, 1868; and that a promissory note for $150, another note for $25, originally given to one *Rymal* as surety for the plaintiff by his father, and paid by the father; and a debt due by the plaintiff to his father consisting of two sums of $25 and $14, were all to be set off, and that the whole $400 would be thus more than counterbalanced.

As to the first point raised by the defendant. I have had much doubt and difficulty, for it seemed to me at first that the bond could be considered in legal effect as nothing more than a personal covenant by *Merriam* the defendant with *John Mulholland*, and that consequently the only remedy on it could have been action at law by the personal representative of the latter. More mature consideration has led me to think I was wrong in my first impression both as to the proper construction of the instrument, and also as to the consequence which I thought would have attached, if that construction had been correct.

Judgment.

In the first place, I am of opinion that a trust was created in favour of the children of *John Mulholland* by the nondescript instrument of the 6th November, 1868. I think it proper to consider what must have been the general intent of the settlor as apparent from the whole scope of this instrument. It undoubtedly was to execute a deed of gift which should be irrevocable, but which should have otherwise precisely the same effect as if he had died leaving his property disposed of by a will giving to his children, other than *Merriam's* wife, each $400, and making *Merriam* his executor and residuary legatee. To give the agreement this effect requires that *Merriam* should be considered as a trustee, whose duty as such it should be to pay these gifts, and not as merely covenanting with the settlor to do so. I think,

too, that the words of the instrument are sufficient for the purpose. The words are, that the property is assigned "on condition" that *Merriam* shall pay. Now the actual use of the word "trust" is not indispensable in order that a fiduciary obligation should be created, and I think these words are enough to indicate that the settlor used them in the same sense in which he would have used the words "upon trust;" and if he had employed the latter expression no question could have been raised. There can be no doubt but that if a will had been made and this property had been given to *Merriam*, followed by the words "on condition that he pay," as here, a trust or charge would have been created. Then the inconvenience of the contrary construction ought to weigh with me. If no trust at all was constituted, then according to the defendant's contention the only remedy would be an action at law by a personal representative of the settlor, who having recovered in an action on the covenant would have to be proceeded against in equity, in case he disputed the plaintiff's right to the money, or insisted on applying it in a course of administration. This never could have been contemplated, and the reasonable presumption is, that the settlor considered that he was creating a right in favour of his children which they should be able to enforce when the time for payment arrived; and this will be best carried into effect now by holding *Merriam* the defendant to be a trustee, which seems, from the admission contained in the 7th paragraph of his answer already stated, to be his own view of the character which he fills and the duties which he has undertaken to perform.

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Judgment.

But, even if *Merriam* is not a trustee, I think there could be no doubt but that a personal representative of the testator recovering this money in an action at law would be considered as a trustee for the plaintiff, and, if so, it would, I think, follow that the plaintiff can maintain this suit. I quite agree that, in the naked case,

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where there is a covenant by one person with another to pay a sum of money to a stranger, or do any act for the benefit of a stranger who is not a party to the instrument or agreement, the person to whom the money is to be paid, or who is to be benefited, cannot sue either at law or in equity, inasmuch as there is no privity of contract: *Colyear* v. *Lady Mulgrave* (*a*). There appears, it is true, to be an exception to this general rule recognized in some of the older cases, where it is laid down that the person to receive the benefit of the contract, though a stranger to it, may maintain an action upon it if he stand in such a relationship to the contracting party that it may be considered that the contract was made for his benefit, and in the very case of a contract made with a father to pay money to his son or daughter, it has been held upon this principle that the son or daughter might sue on the contract: *Bourne* v. *Mason* (*b*), *Dutton* v. *Poole* (*c*), *Martyn* v. *Hynd* (*d*), *Fry* on Sp. Per., p. 45.

Judgment.

This doctrine is not, however, now approved as regards courts of law, as appears from the late case of *Tweddle* v. *Atkinson* (*e*). This, however, in my opinion, only goes to shew the applicability to a case like the present of a remedy in this Court proceeding on a doctrine which I will endeavour to point out. There can be no doubt, as I have already said, that this $400, if recovered in an action at law by a personal representative of *John Mulholland*, would not be assets in his hands to be distributed by him according to the Statute of Distributions, but would be impressed with a trust in equity in favor of the plaintiff. This *must* be so, for the only other alternative is, that it was in the power of the defendant entirely to defeat any or all of the gifts which the settlor made to his children, by compelling the personal representative to bring an action, the fruits

(*a*) 2 Keen 98. (*b*) 1 Vent. 6. (*c*) 2 Lev. 210.
(*d*) Cowp. 437—443. (*e*) 1 B. & S. 393.

of which would be free from any trust and liable to be distributed amongst the next of kin; which would, of course, be absurd. 1872. Mulholland v. Merriam.

Then if the money, when recovered by the administrator, would be affected by a trust, it must also be, that the right of action which the personal representative has is also bound by a like trust; and, if this is so, there is the highest authority for saying that, even though the obligation of *Merriam* rests (as I have already determined it does not) merely on contract, and he should not be bound by any trust, yet, as the personal representative would be a trustee for the plaintiff, he and the plaintiff conjointly might maintain this bill. The authority which I refer to is the case of *Gregory* v. *Williams* (*a*), decided by a very great Judge (Sir *William Grant*, M. R.), and it is approved by Mr. *Spence*, who, in his treatise, 2 Equitable Jurisdiction, 286, thus states both the case and the principle which it establishes; he says: "There are instances where a third person has been expressly allowed to treat the party exacting the stipulation as his trustee, though such third person was a mere stranger to the parties. In the case of *Gregory* v. *Williams*, one *Parker*, who was in the possession of a farm belonging to the defendant *Williams*, was considerably indebted to *Williams*; he also owed a large debt to one *Gregory*. *Parker*, as *Williams* knew, was under apprehension that *Gregory* would arrest him; *Williams*, the landlord, and *Parker*, the tenant, entered into an agreement in writing, to which *Gregory*, the creditor, was neither party nor privy, to the following effect, namely: that, if *Parker* would make over to *Williams* all his stock and effects of every kind, he would pay the debt due to *Gregory*. *Gregory* subsequently was informed of this arrangement, and he and *Parker* filed their bill against *Williams* Judgment.

(*a*) 3 Merivale, 582.

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to enforce it. The stock and effects assigned to *Williams* by *Parker* had been sold at a loss; it was insisted by *Williams* that, if *Gregory* had any remedy, it was at law. Sir *W. Grant* considered it was at least doubtful whether *Gregory* could recover at law, for the engagement of *Williams* was not made directly to *Gregory*, but to *Parker* only, and the consideration was furnished by *Parker* only, for he alone did the act which constituted the consideration; *Gregory* was not a party to the contract: however, that learned Judge supported *Gregory's* right to sue in equity, saying "*Parker* acts as his trustee, and *Gregory* may derive an equitable right through the medium of *Parker's* agreement, though it was at least questionable whether he could have maintained an action at law; it was like the case where a man promised the widow that, if she would allow his name to be joined with hers in the administration, he would make up the deficiency of the assets for the payment of the testator's debts; which promise was held to be binding in favor of the creditors, though they could not sue at law, as the promise was not made to them; so here, *Gregory* had a right to insist upon the benefit of the promise made to *Parker* to the extent of £900, which *Parker* represented to be the amount of the debt."

Judgment.

This case which never appears to have been overruled or even doubted, lays down a reasonable and convenient doctrine applying directly to the present case, and shewing that the plaintiff has an equitable right to enforce the contract (if it is nothing more than a contract) which the defendant entered into with *John Mulholland*. It is true that in the case of *Gregory* v. *Williams* the *quasi* trustee, *Parker*, was a co-plaintiff, and it may be said that a personal representative of the settlor *John Mulholland* ought to be a party here. But there is no such representative in existence, and if one was constituted it would only be for the express purpose of this suit, since

all the property of the intestate was made over by this assignment to the defendant, and there are now no assets to administer or debts to pay; and such an administrator would be a mere formal party as a trustee having not the slightest interest. I am therefore perfectly justified in directing as I do under the Consolidated Order 56, that the suit may proceed in the absence of any person representing the estate of *John Mulholland* (*a*). 1872. Mulholland v. Merriam.

Therefore in my judgment the suit is maintainable, *first*, because the defendant is a trustee under the instrument of the 6th November, 1868, and the plaintiff is one of the *cestuis que* trusts; *second*, even though the defendant be not a trustee, and is liable on contract only, the plaintiff has nevertheless an equitable right of suit on the authority of the case referred to.

I am entirely against the defendant as to the satisfaction *pro tanto* which he sets up by the conveyance of the house and lot of land at Branchton. I received the parol evidence as to this, reserving all objections to it as I had not books at hand at the trial to refer to on the point, though I expressed myself strongly against its admissibility. I find on referring to authority that it was clearly illegal evidence. The deed of the 23rd November, 1868, by which the plaintiff's father conveyed to him the property at Branchton, does not contain any recital or declaration that it should be in part satisfaction, the only proof of that is the evidence of the defendant; of *Green* the schoolmaster, who prepared the document of the 6th November, and of *Joshua Mulholland*, all of which, so far as it proves parol declarations, must be rejected (*b*). Then no presumption of partial satisfaction can arise, since the house Judgment.

(*a*) See also Shaw v. Shaw, 17 Gr. 282; Hill v. Gomme, 5 M. & C. 250; Chamberlain's Case, Prec. Ch. 4; Touche v. The Metropolitan Railway Co., L. R. 6 Ch. App. 671.

(*b*) Ex parte Pye, 2 Wh. & T. L. C. (ed. 2) p. 329.

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and land were not *ejusdem generis* with money which is the subject of the gift (*a*). But even if the parol evidence was to be admitted, I place so much more confidence in the plaintiff's witnesses, who prove declarations of intention against satisfaction, than on the defendant and his witnesses that I should even in that case decide otherwise.

Judgment.

The consequence of this is, that the plaintiff is entitled to a decree for the payment of the $400, subject to such reduction by way of set-off, or otherwise, as the defendant may have established. The plaintiff's father at the time of the assignment to the defendant held the plaintiff's note for $150, which having been made on 26th July, 1867, payable twelve months after date, was then long past due. This note with all the other securities belonging to the old man were handed over to the defendant, who now produces the note and claims a right of set-off in respect of it which of course he is *prima facie* entitled to. The plaintiff, however, has given evidence of declarations by his father expressly waiving payment of the note, and promising to deliver it up to the plaintiff. If this waiver was before the transfer to the defendant, of course it would bind him, and the note could not now be enforced (*b*). If it occurred after the 6th of November, 1868, it would be ineffectual as regards the defendant. *Rymal's* note I think is proved not to constitute any debt between the present parties, and the other claims set up by the defendant were not proved. I think it right, however, to refer it to the Master to take an account of what is due in respect of the $400 and interest, in order that the precise date of the declarations as to the $150 note spoken of by the witnesses may be ascertained. The decree will declare the plaintiff entitled to the $400 and interest from his father's death, subject

(*a*) Eastwood v. Vinke, 2 P. W. 613.

(*b*) Foster v. Dawber, 6 Exch. at 851.

to the account, and it must also declare that the conveyance of 23rd November, 1868, was not a satisfaction either wholly or in part of the $400 payable to the plaintiff; and it will direct a reference to take the account as to the set-off of the $150 note. If the parties choose, however, as the amount is small, this account can be taken by the Deputy Registrar, at Brantford, and the result embodied in the decree. The plaintiff must be paid his costs up to and inclusive of the decree. The costs of taking the account must abide the result.

The Attorney-General v. Campbell.

Municipal corporations—By-law—Ultra vires.

By the Act relating to Municipal Institutions, the Corporation of Toronto was authorized to pass by-laws, among other things, to prevent the erection of wooden buildings within such parts of the City as the Corporation might define. The City Council accordingly passed a by-law defining what were termed the fire limits of the City, and prohibiting the erection of any building within such limits other than of stone, brick, iron or other material of an incombustible nature:

Held, that the by-law was void.

Statement

This information filed 18th of April, 1872 was by *The Attorney-General* for Ontario, at the relation of *William Henry Boulton*, against *Samuel Campbell*, setting forth that by an Act passed in 1866, and known as the Act respecting Municipal Institutions of Upper Canada, the City of Toronto was authorized to pass by-laws, among other things, to prevent the erection of wooden buildings within such parts of the corporate limits of the City as the Corporation might think fit; that on the 26th of November, 1869, the Corporation of said City duly passed a by-law whereby it was required that all buildings theretofore begun or which should thereafter be begun or built within certain limits in the said by-law specified, on new or old foundations, or on

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foundations partly new and partly old, should be erected and built of stone, brick, iron or other materials of an incombustible nature.

Statement.

The information then set forth the limits defined by the said by-law, and that any infraction of such by-law was punishable by fine not exceeding fifty dollars and costs: that on or about the first of January then last the defendant had, in violation of such by-law commenced to erect a building within the defined limits which was not made or constructed of stone, brick, iron, or other incombustible material, but made and constructed of wood; that on the 10th day of the said month of January, the defendant had been summoned before the Police Magistrate of the City, and fined five dollars, which was paid, and such conviction had never been quashed or set aside; that notwithstanding such conviction the defendant proceeded with the erection of such building although requested to desist therefrom by officers of the Corporation and sundry inhabitants of the City; whereupon the defendant, on the 8th day of April, was again summoned before the said Magistrate and on conviction by him was again fined for such infraction of the by-law, but such fine was not paid by the defendant; that the object and purpose of such by-law was to diminish the risk of fire within the prescribed limits, and having regard to the same and the Act of the Legislature the said building was and would continue to be a public nuisance, and ought to be abated by the decree of the Court; and prayed an injunction, and for other relief.

The defendant answered the information, denying that the building he had constructed was an infraction of the by-law; but that from the nature of its construction —being wood thickly plastered, with the shingles laid in mortar—was more secure against fire than ordinary brick buildings.

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Evidence was taken in the cause at the sittings of the Court in September, 1872, when it appeared that the house was at the extreme western boundary of the prescribed fire limits as defined by the by-law; and several witnesses testified that the building which the defendant had put up was less liable to fire than many brick houses in the City and within the limits.

Mr. *Downey* and Mr. *Ewart*, for the relator, contended that the house was a wooden building, in effect, and therefore a nuisance in virtue of the by-law.

Mr. *McGregor*, for the defendant, argued that the building was not within the by-law, being in fact built of incombustible materials. He further contended that, even if it had been erected in violation of the by-law, it was not in itself a nuisance, and a mere violation of a city by-law had never been held a ground for an injunction.

Judgment

STRONG, V. C.—This Court always interferes at the instance of the Attorney-General to restrain the continuance and compel the abatement of a public nuisance, and no circumstances of individual hardship are allowed to outweigh this public right.

It is, however, a question which need not now be decided, whether the infraction of a Municipal by-law, such as this, constitutes a nuisance.

It appears that this by-law is bad as being in excess of the Legislative powers conferred upon the City Council. By sub-section 6 of the 299th section of the Municipal Act of 1866 the Council was authorized to pass by-laws forbidding the erection of buildings of wood within certain limits. This by-law prohibiting the erection within the limits defined, of buildings other than those constructed of brick, stone, iron, or other incom-

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bustible materials assumes a much wider jurisdiction than the Act of Parliament has given to the Council. The Legislature has itself prescribed the species of incombustible material, the use of which within the fire limits may be rendered illegal. But the by-law prohibits not only buildings of wood, but those constructed of combustible materials other than wood, for which the Corporation had no legal warrant. The by-law being thus void on its face section 198 of the Municipal Act of 1866 does not apply, that provision being only applicable to by-laws, the illegality of which is not patent: *Sutherland* v. *Municipal Council of East Nissouri* (*a*).

Finding the by-law to be void it is impossible that I could make a decree against the defendant, although the objection to its validity has not been raised by the defendant's answer, or by his counsel at the bar.

Judgment.

Had the by-law followed the Statute, and been confined to an enactment against wooden buildings it is manifest that the defendant must have succeeded on this evidence.

The objection on which I determine the case might have been taken by demurrer, as it is apparent on the face of the bill. I therefore dismiss the bill, but with such costs only as the defendant would have been entitled to, if a demurrer had been allowed.

(*a*) 10 U. C. Q. B. 626.

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Quieting titles—Conveyancers' evidence—Lost deed—Dower—Disseisin

In examining a title under the Act for quieting titles, a memorial executed by the grantee is good secondary evidence where the possession has been in accordance with the title so claimed.

The weight of authority appears to be also that such evidence is admissible in ordinary suits.

A conveyance executed by a married woman and her husband in the year 1825 was lost:

Held, that the registration of the memorial was no evidence of the wife having been examined, or a certificate of the examination having been indorsed on the deed. Long possession in connection with other circumstances may entitle a Court or jury to presume the due examination and certificate, without express evidence of such examination and certificate.

Property owned by a married woman was in possession of her and her husband; *W* their second son lived with them: the wife died leaving her husband and *W* in possession: the husband afterwards left the premises, but *W* continued to reside there. After the death of their father, *J*, the eldest son of the original owner, conveyed in 1832 to *W*, who was still in sole possession; *J's* wife did not join in the conveyance:

Held, that there having been under these circumstances no disseisin, and *J* having conveyed before the passing of the Real Property Act, his widow was entitled to dower out of the property.

This was an appeal by Mrs. *Josette Higgins* from the finding of the Referee under the Quieting Titles Act.

Mr. *M. R.* [illegible]*koughnet* and Mr. *Maclennan*, for the appeal.

Mr. *McMichael*, Q. C., and Mr. *A. Hoskin*, contra.

The facts of the case and the points relied on by counsel are clearly stated in the judgment.

Strong, V. C.—The proceedings in this matter are instituted under the Act for Quieting Titles. The peti- Judgment.

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Re Higgins.

tion was originally presented by *William Higgins*, and it sought a declaration of his title to a parcel of land in the City of Toronto. *William Higgins*, the original petitioner, died whilst the petition was pending, and the proceedings have since been continued by his heirs-at-law. An adverse claim to dower has been set up under the 19th section of the Statute by *Josette Higgins*, the widow of *John Higgins*, the eldest son and heir-at-law of *John* and *Isabella Higgins*, who will be hereafter referred to, and the brother of the petitioner *William Higgins*. The contestant's title, so far as it depends on her marriage with *John Higgins* in 1817 and his death in 1868, is not disputed, but it is denied that *John Higgins* was ever seised of an estate of inheritance in the land in question entitling his widow to dower, and this is the question for decision.

Judgment

The Referee's judgment having been adverse to the contestant, she has appealed from the order dismissing her claim with costs. The facts established by the evidence may be stated as follows: The land in question, No. 3 on the north side of King Street, in the City of Toronto, was purchased by *Isabella Higgins* the wife of *John Higgins*, with moneys derived by her from a business which she carried on distinct from her husband, from *George Cary* in 1817, and was conveyed to her in fee by deed of 17th July, 1817. The property, upon which there appears to have been two dwelling houses, had been up to this time in the occupation of *Cary* or his tenants. Soon after the execution of the conveyance Mrs. *Higgins* and her husband with their family consisting of two sons,—*John*, who afterwards became the husband of the contestant, and *William* the original petitioner in this matter,—went to live on the property. Mr. and Mrs. *Higgins* and their son *William* continued to live together in one of the houses until the marriage

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of the latter in 1825. *John*, the claimant's husband seems to have lived with his father and mother but for a very short time after their removal, as he married in the same year, 1817, and the contestant states in her evidence that she and her husband did not live with his father and mother after their marriage. At or about the time of the marriage of *William Higgins* to Miss *Mary Ann Malloy*, and on the 6th of January, 1825, an indenture was executed, which for the present purpose of giving a statement of the facts I assume to be proved, though as will afterwards appear the proof of it is objected to by the claimant, in which *John* and *Isabella Higgins* being the granting parties, and *Jesse Ketchum* and *William Malloy* and *William Higgins* the grantees, the land in question was conveyed to *Ketchum* and *Malloy* and their heirs upon certain trusts material to to the present inquiry, and which are expressed in the deed as follows: "Upon trust that the said *John Higgins* and *Isabella* his wife or the survivor of them, the said parcel or tract of land and premises to their uses during their natural lives and during the natural life of the survivor of them may have, hold, occupy, possess and enjoy and the rents, issues, profits and proceeds arising and accruing from the said parcel or tract of land to their use and the use of the survivor of them may take and receive and that upon the death of the said *John Higgins* and *Isabella Higgins* or upon the death of the survivor of them the said *Jesse Ketchum* and *William Malloy* or the survivor of them or the heir of the survivor shall and will with all convenient speed convey the said parcel or tract of land and premises by a good and sufficient deed in fee simple to the said *William Higgins* his heirs and assigns to the only use and behoof of the said *William Higgins* his heirs and assigns forever." This deed was on the 28th of February, 1826, registered in the County Registry on a memorial signed by *Jesse Ketchum*, one of the trustees. It does not appear whether the marriage of *William Higgins* and

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Miss *Malloy* preceded or followed the execution of this deed, but I gather from the evidence that the date ascribed to the deed was about the time of the marriage. *William Higgins* upon his marriage took his wife to live with his father and mother on the property, and they all continued to live together until the death of *Isabella Higgins* in April, 1826. *John Higgins*, the father, survived his wife about three years dying in 1829. From the point which was made of it in the evidence it seems to have been considered important to establish where *John Higgins* lived after his wife's death. In the view which I take of the law I consider this fact to be of but little moment, but I think the evidence shews, as the Referee has found, that *John Higgins*, on his wife's death, removed from the house on the property, leaving his son *William* in sole possession of it, and went to live with a Mrs. *Malloy* in a house which belonged to *Higgins* himself on Duke Street. There is some contradiction in the testimony, but the preponderance of it is in favor of this conclusion, and, indeed, the contestant herself admits the fact to have been so, which ought to be conclusive, On the 18th of August, 1832 an indenture, to which, as appears from the memorial which now forms the only evidence of its contents, *John Higgins*, the contestant's husband, and *William Higgins* were the parties, was executed whereby for the nominal consideration of 5s. *John Higgins* conveyed the property to his brother *William* in fee. This deed was registered on the 15th of December, 1832, the memorial being signed by *William Higgins*, the grantee. The destruction by fire of all the three deeds, viz.: the purchase deed of July 17, 1817, whereby *Cary* conveyed to *Isabella Higgins;* of the settlement of the 6th of January, 1825, and of the deed of the 18th of August, 1832, has been established by evidence which the Referee has found satisfactory. Upon this state of facts three questions have arisen for decision. The first being whether the memorial of the deed of settlement of January, 1825, executed by

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Ketchum, one of the trustees, is admissible in evidence. The second, whether the deed of January, 1825, is proved to have been perfected by the examination of Mrs. *Higgins*, and an indorsement of the certificate required by the Statute. And the third and remaining question being, whether, in case the deed of 1825 should not be sufficiently proved, *John Higgins*, the contestant's husband, was ever seised in fee of this land. The Referee has determined the two last points against the contestant. With reference to the admissibility of a memorial executed by a grantee as evidence of the contents of the deed to which it refers, against persons not claiming under the grantee the authorities are not uniform. It has been decided that a memorial executed by a grantor in possession is evidence not only against those who claim in privity with him, but also against third persons, upon the obvious principle that it is in the nature of a declaration in disparagement of his own title: *Russell* v. *Fraser* (*a*). In *Gough* v. *McBride* (*b*), a memorial signed by the grantee in an alleged conveyance under which possession had never been taken, and which memorial had been registered upwards of fifty years before the bringing of the action in which it was tendered, was rejected. In giving judgment in that case *Hagarty*, J., says, "The solitary fact that fifty years ago a memorial appears duly registered by *Gough* the grantee, apparently proved by a witness as referring to a deed which he swears he saw executed by the grantee, shews to us that *Gough* then apparently asserted title to these premises. The land is not in any remote situation but in York Township, close to the capital of Upper Canada. Had the evidence shewn that possession was taken within any reasonable time after, and that *Gough* and his descendants acted as the owners of the land in apparent accordance with the title asserted in the Registry Office, and to the knowledge of the grantor who allowed long

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(*a*) 15 U. C. C. P. 375. (*b*) 10 U. C. C. P. 166.

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years to elapse without objection, the strong presumption might be raised that the title was as the memorial asserts."

This is the strongest authority to be found against the admissibility of the memorial. In *Sadleir* v. *Briggs* (*a*) (affirming a decision of the Irish Court of Chancery: *Briggs* v. *Sadleir*) (*b*) a case of the highest authority, a memorial signed by the grantee was admitted in evidence there having been a long possession consistent with the title which the party tendering the memorial sought to establish. And to the same effect are the two Irish cases of *Peyton* v. *McDermott* (*c*) and *Scully* v. *Scully* (*d*). In *Taylor* on Evidence (*e*), the result of the decisions is thus stated: "The memorial of a registered conveyance is also inadmissible as primary evidence against third persons to prove the contents of the deed, although against the party by whom the deed is registered, and those who claim under him it can certainly be received as secondary, if not as primary evidence, being considered in the light of an admission. On one or two occasions the memorial or even an examined copy of the Registry has been received as secondary evidence of the contents of an indenture, not only as against parties to the deed who have had no part in registering it, but also against third persons, but in all these cases the evidence has been admitted under special circumstances, as for instance where parties have been acting for a long period in obedience to the provisions of the supposed instrument or where the deed has been recited or referred to in other documents admissible in the cause."

Judgment.

In *Fields* v. *Livingston* (*f*) a memorial signed by the grantee was admitted. *A. Wilson*, J., in giving the judgment of the Court saying, "Possession was not taken

(*a*) 4 H. L. C. 460.
(*b*) 10 Ir. Eq. 532.
(*c*) 1 D. & W. 198.
(*d*) 10 Ir. Eq. 557.
(*e*) 3 Ed. p. 372.
(*f*) 17 U. C. C. P. 15.

under this supposed deed until about eighteen years after the making of it and about twenty-three years after the actual sale, but possession has been held within the last eighteen years under this alleged deed and the defendant now maintains his possession by virtue of it. I think upon these facts, and upon duly considering both the case of *Regina* v. *Fordingbridge* and *Gough* v. *McBride*, that this was good secondary evidence, and that it did establish in law the fact of the making such a deed."

In *Leith's* Real Property Statutes, at page 427, there is a full and useful review of all the authorities on this point and the learned editor comes to the conclusion that "a memorial, if executed by the grantor when not in possession or by the grantee, and not against the interest of the party executing it, is not in itself secondary evidence, but may with other circumstances form a link in the chain of circumstantial evidence, proving as secondary evidence, the existence of a deed." In *Peyton* v. *McDermott* (*a*) Lord *Plunkett* lays stress on the Act of Parliament authorizing the execution of a memorial by a grantee; he says, "with respect to the memorial not having been executed by *Hugh O'Rorke*, the grantor, this is not required by the Statute, it is sufficient if it is executed by the grantee." It is not easy to see what this consideration can have to do with the question. If the statute provided that the registry or memorial should be evidence of the contents of the deed, then it would of course be sufficient if the execution of the memorial conformed to the requirements of the Act; but no such provision is to be found.

Judgment.

The memorial in the present case was executed by one of the trustees; and the tenant for life, according to the deed which it is sought to prove, was in possession at the date of the registry, and the subsequent posses-

(*a*) 1 Dr. & Walsh 198.

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sion has also been consistent with the deed. If I had to decide on the admissibility of this memorial, as a question of judicial evidence, the authorities just referred to would be amply sufficient to warrant its reception; but I cannot help saying that there would be much difficulty in extracting from them any precise principle, consistent with the well established rules of evidence, on which to rest such a decision. There is much force in the suggestion of the writer already quoted, (*Leith's* R. P. Stats. p. 446) that the question having generally arisen in Courts of equity where the Judge has to determine on the weight of evidence the preliminary question of its admissibility on strict principles of law has been lost sight of in the consideration, that, if admitted, its effect, as a fact in proof, would be almost conclusive.

Judgment

I have not, however, to determine the point on the strict rules of legal evidence, as the 9th section of the statute under which this proceeding is taken authorizes the Court to proceed on conveyancers' evidence. Of this species of evidence it is said in a treatise of high authority (*a*), "In weighing the sufficiency of evidence the practice of conveyancers is more strict—in determining its admissibility—more lax than that of Courts of justice." As a question of conveyancers' evidence there could not be a doubt about the reception of this memorial, which being thirty years old, and produced from the proper custody, requires no proof of execution: *Doe Macklem* v. *Turnbull* (*b*). The memorial being therefore admitted, I think it sufficiently establishes the due execution by the signing, sealing and delivery by all the granting parties of the alleged deed of the 6th January, 1825, and that it contained the limitations and trusts which are set forth in the memorial. The execution of this deed having thus been proved, so far as regards the signing, sealing and

(*a*) Hubback on Succession, p. 62. (*b*) 5 U. C. Q. B. 129.

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delivery, the question which next arises is, was this execution by Mrs. *Higgins*, the principal granting party, duly perfected by her examination having been taken under the statutes then regulating the conveyance of real property by married women, and by a certificate of it being indorsed upon the instrument. The statutes which applied to this deed were the 43 Geo. III. ch. 5, and the 2nd Geo. IV. ch. 14. By the first of these acts, section 5, it is enacted that "No deed shall have any force or effect to bar such married woman or her husband, or her heirs, during the continuance of the coverture, or after the dissolution thereof, or shall have any force or effect whatever, unless such married woman shall appear in open Court, in the Court of King's Bench, or before any Judge thereof at his chambers, or before a Judge of Assize at the sittings of the Home District, or on his circuit, and shall be examined by such Judge touching her consent to alien and depart with such estate."

Judgment.

By the Statute of George IV., section 1, after reciting that much inconvenience had arisen from the provision of 43 George III., it was enacted that, from and after the passing of that Act, "it shall and may be lawful for any married woman having real estate in this Province, to appear before the General Quarter Sessions of the Peace * * * at any time within twelve months after her execution of the deed conveying away her real estate, and being examined by the Chairman of the Quarter Sessions in open Court, touching her consent to alien and depart with her real estate as in such deed may be mentioned, it shall and may be lawful for the said Chairman to certify the same."

Of this essential examination and certificate there is no evidence on which the petitioner can rely, except the memorial, and the presumption to be drawn from the fact of registration, the possession of the property and

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the other facts in proof. Some evidence as to an indorsement having been seen upon the deed was given by one of the witnesses examined before the referee, *John Higgins*, a son of the petitioner; but, as the referee has not thought fit to give effect to his evidence, it is impossible that I can do so. Moreover, admitting the correctness of the witness's statement, the writing on the back of the deed which he describes may have been the certificate of registry which was indorsed upon it. The Referee has dealt with the case, so far as depends on this deed, as resting altogether on the presumption to be drawn from the registration and the long possession of the petitioner; and I agree that this is the true way of regarding it, though I differ from the conclusion of the Referee. In the first place, I am of opinion that there does not here arise, from the registration of the deed alone, any presumption sufficient to supply the necessary proof of the examination of Mrs. *Higgins*. Had it been the duty of the Registrar not to have registered the instrument without the certificate of examination being indorsed, I should have thought the maxim "*omnia præsumuntur rite esse acta*" would have applied and would have warranted the Court in presuming that the deed had been duly perfected before it was registered; but the Registry Act (58 George III. cap. 8), which was in force in February, 1826, the date of the registration of this settlement, does not require this. There can be no doubt but that the deed could have been registered before any examination was taken, and it is reasonable to suppose that at that time it would in many cases be so registered, since it would not always have been practicable to have had the examination at the time of the execution, and a prudent purchaser or grantee would register the deed at once, the examination and certificate being good within six months after the date of the deed. All that the Registry Act required the registrar to do was, to see that the execution of the deed and memorial were duly proved, and that the

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memorial complied with the statute. The examination of a grantor who is a married woman is no part of the execution of the deed, which consists of signing, sealing, and delivery, but is an additional solemnity. In *Tiffany* v. *McCumber* (*a*) it was not even suggested that the registration by itself was sufficient to authorize the Court to presume that the certificate had been duly indorsed; but, even if it were otherwise, the registration would only warrant an inference which might be rebutted; and I should have thought that the same facts, which, as I shall hereafter state are, in my judgment, sufficient to neutralize the effect of the possession in this respect, would have also prevented any such conclusion being drawn from the fact of registry. 1872. Re Higgins.

If, therefore, the evidence is to be taken as sufficient to prove that the examination of Mrs. *Higgins* was duly taken under the statute, it must be on the ground that the long possession of the petitioner from the death of his father in 1829, authorizes the Court to draw that inference. It is laid down that presumptions derived from long enjoyment are of two classes, viz., those in which a Judge will direct a jury to presume in favor of title, and those in which the question is one entirely for the jury to determine upon the evidence (*b*). Judgment.

In the present case there could only be involved a presumption of the latter class. The inquiry, therefore, is entirely one of fact, which is to be determined on a view of all the circumstances in evidence. In *Tenny* v. *Jones* (*c*), a special case in which the Court was authorized to draw inferences of fact which a jury might have drawn, and where the question was whether a reconveyance might be presumed, *Park*, J., said: "It is true that, in cases of this nature, presumptions are

(*a*) 13 U. C. Q. B. 159. (*b*) Dart's V. & P., 4th ed. p. 803.
(*c*) 3 M. & S. 472., S. C. 10 Eing. 75.

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matters of fact for a jury; but in the statement before us we are called upon to decide as if we were in the situation of a jury. A direction of a Judge to a jury that, under certain circumstances, they are bound to presume a reconveyance would, no doubt, be incorrect; but they may be told that, from the circumstances before them, they are warranted in presuming such a reconveyance; and, considering myself as standing in the place of a juror, I am of opinion that, from the facts before us, a presumption fairly arises that, after the feoffment in 1779, the property was reconveyed by the feoffee to the feoffor;" and in the same case *Bosanquet*, J., says: "I do not form my opinion on the supposition of any presumption of law, for this is a mere question of fact. The Court is placed in the situation of a jury, and I think a jury, in the exercise of a sound discretion, would have drawn the conclusion that there was a reconveyance." What I have to decide therefore is, whether the possession of *William Higgins*, the original petitioner, is otherwise so unaccountable in its origin and continuance, that it must necessarily be attributed to the trust deed. I take it to be clear that, if the possession can be attributed to any other title, and did not depend altogether on the deed of 1825, then no case is made for presuming the validity of that deed. In *Attorney General* v. *Ewelme Hospital* (*a*), the Master of the Rolls says: "Undoubtedly, when a person or corporation is found possessed of, and in the enjoyment of, a right, the origin of which is not ascertained, the Court will protect the possessor in the enjoyment of that right, and will presume anything (including in some cases even an Act of Parliament) that may be necessary for that purpose; but when the origin of the right is clearly ascertained, and that origin negatives such presumption, I am not aware that the Court has ever made such an assumption, nor have I been referred to any case that establishes such a proposition: *Doe Fenwick* v. *Reed* (*b*) is to the same effect.

Judgment.

(*a*) 17 Beav. 390. (*b*) 5 B. & Ald. 232.

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The possession of *William Higgins* clearly did not originate in any assumption that he was acting under the deed of 1825, for he was in possession in his father's lifetime, and, according to the limitations of that deed, he was not entitled to an estate in possession until his father's death, which took place in 1829. Therefore, his possession up to that time must have been with his father's assent as a tenant at will or otherwise. I am far, however, from saying that his subsequent undisturbed possession for upwards of forty years, if otherwise unsupported by title, might not be attributed to that deed, so as to authorize the assumption that it was an efficacious instrument of title; but the evidence shews that *William Higgins* had never, but for the short space of time which intervened between the death of his father in 1829 and the month of August, 1832, a possession which could have been dependent on this trust deed, for, on the 18th of August, 1832, *John Higgins*, the contestant's husband, executed an indenture conveying the fee to his brother *William*, the original petitioner, and this deed is proved to have been in the possession of *William Higgins*, and appears to have been registered on the 13th of December, 1832, the memorial being signed by the grantee. *William Higgins* may not, it is true, have been estopped by this conveyance, or by the fact of his having acted upon it, but it is certainly sufficient to prevent the presumption from arising, which otherwise might have arisen, had the subsequent possession been attributable to no title but one derived under the settlement of 1825. Therefore, from 1832 downwards, the possession must clearly, on the principle stated by the Master of the Rolls, in the case of the *Attorney General* v. *Ewelme Hospital*, already quoted, be referred to this deed of August, 1832. Then another circumstance against imputing the possession to the deed of 1825 is this: under that instrument the trustees had the legal estate, and there was expressed in the deed an executory

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trust to convey to *William Higgins* on the death of his father and mother. But though the legal estate was at that time most important, considering the non-existence in the country of any jurisdiction which could give effect to equitable estates, no conveyance from the trustees was ever obtained. The want of such a conveyance from the trustees would, of course, make no difference on the question of dower, if the settlement had been proved to have sufficiently vested the fee in the trustees, and if there was no other origin of the title of *William Higgins* than the settlement a conveyance from the trustees might possibly have been presumed, as well as the performance of all acts required to complete the instrument. But I refer to the absence of any conveyance from the trustees as a fact which, taken in connection with the deed of 1832, tends to shew that this last mentioned instrument is that to which the title of *William Higgins* is to be attributed. I am therefore of opinion that the conveyance of the 18th August, 1832, precludes any presumption in favour of the validity of the trust deed arising from the possession subsequent to 1832. But I think the last mentioned instrument does even more than this, and warrants the inference that the deed of 1825 was never perfected. Everything is against the supposition that *William Higgins*, if the trust deed had been sufficient to pass the estate, would have clouded his registered title unnecessarily, as in that supposition he would have been doing, by taking and registering a conveyance from the heir-at-law of his father and mother. It must be assumed that the deed of the 18th August, 1832, was not executed except for some good reason; then what could that have been except to cure some defect in the deed of 1825? And if so, that defect must have been one not apparent on the face of the deed, as regards its operative parts, or in its execution by sealing and delivery, for the memorial and registry shew that all these were sufficient.

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If the deed of 1825 had not been registered, it might have been suggested that the taking of the deed of 1832 was a resort to the old device of superseding the first instrument by the prior registration of the later deed; but this hypothesis is excluded by the fact that the deed of 1825 was registered in February, 1826. Therefore the conclusion must be, that the deed of 18th August, 1832, was intended to remedy some fault in the earlier deed which is not disclosed by the very full memorial upon which it was registered, and this fault may fairly bepresumed to have been the want of the indorsement of the statutory certificate of Mrs. *Higgins's* examination. It is, however, true that there was a possession in *William Higgins* between the death of *John Higgins* the father, in 1829, and August, 1832, which cannot be accounted for by the deed of the latter date. But the subsequent possession being, as I have shewn, consequent on the deed of 1832, this enjoyment for the short period of three years would by itself be wholly insufficient on any recognized principle of evidence to authorize the presumption contended for. For this, two reasons may be given: *first*, the case is not as though *William Higgins* had for the first time entered on the possession immediately after his father's death, which might have implied an acting on the deed of 1825; for having been in the occupation of the property during the continuance of his father's life estate, his subsequent possession was a mere holding over, a continuance of the enjoyment which must have originated in a tenancy of some kind under his father; *secondly*, the time between 1829 and 1832, at the most a little over three years, was too short for such a purpose. In *Doe Wilkins* v. *The Marquis of Cleveland* (*a*), where it was sought to supply a defect in the proof of a title by feoffment (the deed having been admitted but no livery or seisin proved), by a presumption of this kind arising from a possession of sixteen

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(*a*) 9 B. & C. 864.

1872. years; *Littledale*, J., says "It seems to me that no possession for less than twenty-one years was sufficient to warrant the jury in presuming the fact of livery in this case."

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If in August, 1832, before executing the deed of that date, *John Higgins* had brought ejectment as the heir-at-law of his mother, and the deed of 1825 had then been lost, and there had been given precisely the same evidence of title and possession which we have here, can it be supposed that a jury would have been justified in finding a verdict for the defendant? And is not the question now offered for decision precisely identical with that which the jury would in the case put have had to determine?

Had it not been for the execution of the deed of 1832, the examination and certificate might possibly have been presumed; but as it is, I must determine that it is not proved that the deed of settlement of the 6th January, 1825, was ever perfected by the examination of Mrs. *Higgins* as required by the statute.

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In addition to the cases already referred to, I have in connection with this part of the case seen and considered the following authorities, viz., *Hillary* v. *Waller* (*a*), *Emery* v. *Grocock* (*b*), *Rees* v. *Lloyd* (*c*), *Cook* v. *Soltau* (*d*), *Rex* v. *Long Buckeby* (*e*), *Bullen* v. *Michel* (*f*), *Pooley* v. *Goodwin* (*g*), *Earl d. Goodwin* v. *Baxter* (*h*), *Doe Griffin* v. *Mason* (*i*), *Lewis* v. *Bingham* (*j*), *Keene* v. *Deardon* (*k*).

The remaining question is this: assuming that

(*a*) 12 Ves. 239.
(*b*) 6 Madd. 54.
(*c*) Wightwick 123.
(*d*) 2 Sim. & Stu. 154.
(*e*) 7 East 45.
(*f*) 4 Dow. at 324.
(*g*) 4 A. & E. 94.
(*h*) 2 W. Bl. 1228.
(*i*) 3 Camp. 7.
(*j*) 4 B. & Ald. 672.
(*k*) 8 East 248.

Isabella Higgins died entitled in fee, was *John Higgins*, the husband of the contestant and the heir-at-law of *Isabella*, ever *seised* of an estate of inheritance in this property? 1872. Re Higgins.

The Referee has determined that, at the time of the execution of the deed of 1832, *John Higgins* had only a mere right of entry in respect of this land, inasmuch as *William Higgins* had adverse possession from the time of his father's death up to the date of the relinquishment of all title by his brother *John* in August, 1832. If it be true that the interest of *John Higgins* during this interval of three years was nothing more than a mere right of entry, then certainly the contestant would not be entitled to dower, as her husband had ceased, by his own act, to have any right or title to the land before the passing of the Act (*a*), which first gave dower out of rights of entry (*b*). It is not necessary to point out that in order to entitle a widow to dower, actual seisin of the husband, such as it is required that the wife shall have to entitle the husband, as tenant by the courtesy, is not essential. Judgment.

It is sufficient if the husband's title has not been turned into a right of entry—in other words, if he has not been disseised. The question here therefore is, whether the possession of *William Higgins* of this piece of land from 1829 until 1832 was such as to amount to a disseisin of the contestant's husband. According to some of the authorities which I will refer to hereafter, there may have been a possession adverse for the purposes of the old Statute of Limitations (*c*), and yet not such as to amount to a disseisin. With this modified form of adverse possession we have nothing to do in the present case; the question here is, was there adverse possession in the sense of disseisin? What was required to constitute adverse

(*a*) 4 Wm. IV. cap. 1. (*b*) Park on Dower, p. 25.
(*c*) 21 Jac. I. cap. 16.

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possession amounting to a disseisin is pointed out by *Tindal*, C. J., in *Davies* v. *Lowndes* (*a*), and in some of the other authorities to which I will refer more fully. In *Anon.* case (*b*) it is said: "An entry on another without expulsion makes such a seisin, only that the law will adjudge him in possession only that hath the right." In *Williams*, lessee of *Hughes* v. *Thomas* (*c*) Lord *Ellenborough*, C. J., says: "All the definitions include an ouster of the tenant—a wrongful putting of him out; there lies your difficulty; there is an entry of the one party, but what ouster or putting out of the other is there?" In *Watkins* on Conveyancing, p. 27, there occurs the following passage: "It is true that entry alone will not create a disseisin or intrusion; it must be accompanied with some act which the law construes as an ouster of the freehold, such as claiming or taking the profits contrary to his title; but, where there is an entry which is not congeable, and a taking of profits, such entry is adverse."

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In *Ready* v. *Royston* (*d*) it is laid down, "Where two men are in possession together the law will adjudge it in him that hath the right." Applying the law to the facts proved, it is clear that there was no disseisin by *William Higgins* of his father and mother when, upon his marriage in 1825, he went with his wife to live in the same house with them on this property. The reasons for this are almost too plain to require pointing out, for it is obvious from the evidence that *William Higgins* acted thus with the consent of his father, who was at this time seised in right of his wife. There was, therefore, no pretence of a wrongful entry or expulsion. The seisin continued to be in *John Higgins*, the father, up to his wife's death, when he became tenant by the courtesy, and would, if the trust deed had been an operative instrument, have been tenant for life under

(*a*) 5 Bing. N. C. 173.
(*b*) Salk. 246.
(*c*) 12 East 152.
(*d*) Salk. 422.

its limitations. Up to this time *William Higgins* made no pretence of title, and the trust deed gave him no colour for such a pretence. 1872. Re Higgins.

Soon after the death of Mrs. *Higgins*, her husband appears to have removed to Duke Street, leaving *William* in undisturbed possession of the property; it is clear that this did not constitute *William Higgins* a disseisor, for he was thus left alone in possession with the acquiescence of his father the life-tenant, and moreover, it was but a continuance of the possession which he had originally taken with his father's assent. There was, therefore, neither the entry nor expulsion required to create disseisin, but the relationship of tenancy in some form must have subsisted between *William Higgins* and his father up to the death of the latter. Then, *William Higgins* never having been a disseisor up to the time of his father's death, it is clear that he did not become one by continuing in possession afterwards. Upon this point, as might be expected from what is said in plain language in Chief Justice *Tindal's* charge, in *Davies* v. *Loundes*, already cited, the authorities are very clear. In *Doe Souter* v. *Hall* (*a*) a testator, seised in fee, made his will and devised to his wife for life. The wife conveyed in fee by bargain and sale and the parties entered; after some time the wife died; the devisee of the heir-at-law of the testator, under a will made after his wife's death, brought ejectment against the devisees of the grantee in the bargain and sale. It was objected: *first*, that, at the time of the devise to the lessor of the plaintiff, his devisor had a mere right of entry, and therefore nothing passed by the devise; *second*, that, as the grantee in the bargain and sale had remained in adverse possession from the time of the widow's death, there was, on the grantee's death, a descent cast. It was held that both objections must Judgment.

(*a*) 2 D. & R. 38.

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fail, Lord *Tenterden*, C. J., and *Bayley*, J., both saying that there was no disseisin, as the grantee in the bargain and sale went in rightfully and held rightfully until the widow's death; he was therefore a rightful tenant holding over; a mere tenant at sufferance; "he did not take possession wrongfully; he only wrongfully continued in possession." *Bayley*, J., further says: "In order to bar the power of devising a right of entry, there must be an actual disseisin of the devisor; a mere adverse possession will not suffice; he must be completely ousted of the freehold. I know of no case in which it has been held that a mere adverse possession can operate as a disseisin to prevent the owner of the freehold from devising it." At the time of this judgment it was thought a right of entry was not devisable, though it was afterwards held otherwise; this, however, does not impair the authority of the case upon the point material here.

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In *Doe Parker* v. *Gregory* (*b*) a married woman tenant for life, being with her husband in possession, they together levied a fine; the wife died, and the husband remained in possession for upwards of twenty years. It was held that the husband holding over was not a disseisor, but that nevertheless he had an actual possession which was effectual under the Statute of James, and constituted a bar to an ejectment brought by the remainder-man. This case has been criticized in *Smith's* Leading Cases (*b*), as drawing an unwarrantable distinction between adverse possession at common law and under the Statute of James I.; for, as the learned editor contends, nothing short of a disseisin was sufficient to constitute an adverse possession for the purposes of the statute. Further, it is said that the husband, in the case just referred to, holding over was a disseisin, inasmuch as there is "a diversity between particular estates created

(*a*) 2 A. & E. 14.

(*b*) Vol. I, 4th ed. p. 537-538.

by the tenant, and particular estates created by act in law;" the continuance in possession in the latter case, though not in the former, amounting to a disseisin. However, both the case itself and the note upon it in *Smith's* Leading Cases establish all that is required here.

In *Doe Burrell* v. *Perkins* (*a*) it was held that the receipt of rents and profits by the defendant who was executor of tenant *pur auter vie* which tenant had held over after the death of *cestui que vie* without paying any rent, was no disseisin, and therefore that a fine levied by the defendant had no operation by non-claim.

This case has also been found fault with (*b*) on the ground that there was an actual entry by the defendant and not a mere continuance in possession, and therefore his possession was that species of disseisin called an intrusion; but the rule applicable to the present case on which the decision proceeded is not questioned by the editor, but receives the sanction of that high authority, who states it thus distinctly: "The result seems to be, that to constitute a disseisin there must be a wrongful entry, and that a wrongful continuance in possession is not sufficient." And this rule was not dependent on any technical or arbitrary principle, but was extremely convenient, since without it, in the days when tortious conveyances were effective, landlords would have been to a great extent at the mercy of their over holding tenants.

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The result is, that on the death of *John Higgins*, the father, in 1829, *John Higgins*, the husband of the contestant, became, as heir-at-law of his mother, seized in fee, and so continued until he executed the deed of the 18th of August, 1832.

The certificate must therefore be varied by declaring the claimant entitled to dower, and she must be paid her costs of the contest before the Referee, and also those of this appeal.

(*a*) 3 M. & S. 271. (*b*) Clark v. Pywel, 1 Wms. Notes to Saun. p. 540.

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Conveyance, setting aside—Consideration, evidence of.

The owner of land subject to mortgages past due and otherwise pressed for money, applied to a third person, who agreed after some discussion to purchase the real estate as also the chattel property thereon, for a sum amounting in all to about $6,800, which the purchaser arranged, and went into possession of the property. Sometime afterwards the vendor filed a bill seeking to impeach the sale, on the ground of undue influence and inadequacy of consideration; but the Court, being of opinion that the property was not worth more than $7,500; that the vendor had had ample time for deliberation between the verbal arrangement and the written agreement, which time he admitted he had employed in trying to do better with his property than by accepting the purchaser's offer; that the bargain made between the parties was as good a one as at the time and under the circumstances could have been obtained, dismissed the bill with costs.

The amount mentioned in a conveyance as the consideration money is not conclusive evidence of the true consideration in favor of the vendor, on a bill filed by him impeaching the transaction, on the ground of inadequacy of price.

Examination of witnesses and hearing at Whitby.

Mr. *S. Blake*, Q.C., for the plaintiff.

Mr. *Machar*, for the defendant.

June 26th. Judgment.

STRONG, V.C.—This bill is filed by *Abraham Shank* against *Walter Coulthard*, to set aside a sale made by the plaintiff to the defendant of certain lands in the township of Pickering, and also of some chattel property sold about the same time.

The circumstances of the transaction complained of were, as I find from the evidence, as follows: In the early part of December, 1870, the plaintiff was entitled to the equity of redemption of the land in question, the west half of lot 27, and the south half of lot 28, in the 3rd concession of Pickering, 200 acres, being the

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farm on which the plaintiff was then living, which was at that time subject to three mortgages, viz.: one to *William Bowman*, dated the 9th January, 1868, securing $4,500, payable five years after date, with interest yearly at ten per cent.; a second also to *Bowman*, dated 29th December, 1868, to secure $800, payable three years after date, with interest at the same rate; and a third mortgage to one *Pugh*, upon which, at the time of the sale, there was due about $126. The interest on *Bowman's* mortgages being in arrear, and the plaintiff finding himself unable to pay it, went in the beginning of December, 1870, to *Bowman*, and asked for an extension of time. *Bowman* however came to no terms with him, but said he would go up to the property, and after inspecting it and the chattel property which *Shank* had upon the farm, he would tell him what he would do. Accordingly, a few days afterwards, *Bowman* did go up to the plaintiff's farm, and spent some time there looking over the land and fall crops, and viewing the chattel property on the place. He left without telling *Shank* what he would do, and the next thing the plaintiff heard of the matter was some two days afterwards, when *Berkenshaw*, a bailiff, made his appearance with a distress warrant, issued under a clause in the mortgage deeds, authorizing him to distrain and sell the goods on the land for the arrears of interest. Under this warrant *Berkenshaw* accordingly made a seizure, and advertised the property seized for sale. After the distress the plaintiff again went to see *Bowman*, and endeavoured to get indulgence from him, but without effect; *Bowman*, as the plaintiff swears, harshly declaring that he would sell the plaintiff's goods, even "to the spoons upon the table," and turn the plaintiff out on the road in three days. However the sale was adjourned on two different occasions, the first having been at the instance of *Bowman* himself, who seems to have been induced to do it, not with any intention of shewing favour to the plaintiff, but to rectify a mistake in the advertisement which he appre-

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hended might have vitiated the sale. The plaintiff proves that on the occasion of his going to *Bowman* the second time, the latter recommended him to see Mr. *Cochrane*, at Whitby, who might, perhaps, be able to assist him; and it appears from the plaintiff's own statement that he did apply about the matter to Mr. *Cochrane*, who, he says, had acted as his solicitor in the matters of the mortgages to *Bowman*, and also in getting the title to this land put right. A few days after the first adjournment of the sale the plaintiff left home with the intention of going to Whitby to see Mr. *Cochrane* about the matter, but meeting Mr. *Cochrane* and the defendant on the road, he returned with them to the farm. The defendant and Mr. *Cochrane* then went over the place and saw the chattel property; and then after some bargaining it was agreed that the defendant should purchase the lands from the plaintiff, and should also purchase all the chattels at the sale, under the distress; and, in addition to allowing the plaintiff to retain his household furniture and a portion of the farm stock and implements, (which are specified accurately, I think, in the evidence of *Abraham Shank*) the defendant was to give the following consideration: he was to assume the mortgages to *Bowman*, and indemnify the defendant against those incumbrances, the principal and interest on which at this time amounted to $6,260; the defendant was also to pay off *Pugh's* mortgage, $186.90, to pay Mr. *Cochrane* a note of the plaintiff's which he held for $153, and to pay the costs of the distress $80, in all $6,679.90. After verbally concluding this bargain the defendant and Mr. *Cochrane* returned home without having taken from the plaintiff any written agreement, so that the plaintiff was in no way bound until the execution of the agreement afterwards mentioned. The plaintiff and defendant, after this meeting at the plaintiff's place, did not come together again for some ten days, when they accidentally met at Whitby, and the plaintiff then told the defendant that

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he expected to be able to raise money through Mr. *Agnew*, the agent for the Colonial Securities Company, who has been examined as a witness, and who proves that the plaintiff did unsuccessfully endeavour to obtain a loan through him. Then a few days after this again, making it a fortnight after the interview between the parties at the plaintiff's farm, and on the 30th December, 1870, the plaintiff went to the defendant, told him that Mr. *Agnew* had disappointed him, and that he could not get the money and that he wished to carry out the sale to defendant; and they then proceeded to *Cochrane's* office and executed an agreement comprising the terms already mentioned, and also at the same time a conveyance of the land to the defendant. Two days afterwards, however, the plaintiff returned to the defendant, and expressing dissatisfaction with his bargain, the latter told him that he was willing to cancel the agreement, and took him to Mr. *Cochrane's* office, and told Mr. *Cochrane* that *Shank* was dissatisfied, and that he could give him up the papers; and the defendant then went away, leaving *Shank* and Mr. *Cochrane* alone. The plaintiff did not, however, persevere in his wish to rescind the sale, for in a few days, and on the 3rd January, 1871, he and his wife and son went again to Mr. *Cochrane's* office, when after some discussion, and the defendant agreeing, in addition to the terms stated, to give the plaintiff a lease for two years of a house and four acres of land rent free, a memorandum of that lease was executed, and the plaintiff's wife then executed the conveyance. After this, the plaintiff being still discontented with his bargain, sought advice from Messrs. *Bell & Crowther*, of Toronto, and afterwards from Mr. *M. C. Cameron*, who referred him to Mr. *H. J. Macdonell*, of Whitby, and the latter spoke to the defendant about the matter, when the defendant said "he was perfectly willing to give all the property back to *Shank* upon payment of the amount he had paid and reasonable expenses for his time and trouble"; and Mr. *Macdonell*

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further states, "In answer to a question from me Mr. *Coulthard* said he would give *Shank* eight or ten days to get the money. I then sent *Shank* to *Coulthard*; this was in February, 1871." After this the plaintiff endeavoured to procure a Mr. *Major* to purchase the land for $7000; but the terms of payment which Mr. *Major* was willing to agree to were not such as would have enabled *Shanke* to have reinstated the defendant in his original position, and for this reason the defendant states that he refused his assent to that sale. No further negotiations appear to have taken place between the parties, and this bill was filed on the 6th of April, 1871. I should have stated that the defendant paid the costs of the distress, paid off *Pugh's* mortgage, and also retired and delivered up to the plaintiff the note for $153 which Mr. *Cochrane* held; and on the next day after the assignment was signed, that is, on the 31st of December, Mr. *Cochran* and the defendant went to *Bowman's* and agreed with him that the chattels should be sold under the distress, and that they (the defendant and *Cochrane*) would make good any deficiency in the amount of interest which the chattels were insufficient to satisfy; and that *Bowman* should receive payment from them of the amount of principal and interest secured by the mortgages, and thereupon assign the mortgages to them.

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It is explained by the defendant that, being himself a stranger to *Bowman*, who knew Mr. *Cochrane* well, the latter executed the agreement as a surety for the defendant; and the defendant most positively negatives the suggestion that Mr. *Cochrane* had any interest in the purchase. *Bowman*, in his evidence, says that the defendants agreed to become responsible to him for the mortgage moneys and interest. The chattels were, as arranged, sold under the distress, and *Coulthard* became the purchaser of nearly, if not quite, all of the articles sold. This sale, which I think must have been under-

stood by all the persons who attended it to have been made in pursuance of some concerted plan between the plaintiff, defendant, and *Bowman*, is the fact of the whole transaction, which is the least satisfactorily explained; but, although I should judge that the goods did not produce their full value, yet it could have made no difference to the plaintiff, whose bargain with the defendant was, that he should have the lands and all the goods except the furniture and other articles which the plaintiff got, in consideration of moneys to be paid and liabilities to be undertaken to the amount of $6,679.90, and the two years' lease, rent free, of the house and five acres, in all, as I make it up, about $6,800. Moreover, there can be no doubt but that it was with the acquiescence of the plaintiff and on an understanding with him that the goods were sold as they were. The reason for carrying out the agreement in this way appears to have been with the view of making the transaction more secure from impeachment by the creditors of *Shank*. The gross nominal price produced by the chattels so sold was $561.

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I have now stated what, in my judgment, the evidence establishes on all material points, except the question of the value of the land, which I will advert to hereafter. Both the plaintiff and defendant were examined before me. The plaintiff is an illiterate man, and his native tongue is German; but he is able to speak and understand English sufficiently for the purposes of transacting business, and he is not wanting in shrewdness; and I should say was quite able to take care of himself in any bargain. I was not so favorably impressed with the plaintiff's manner that I could place confidence in his evidence to the extent of acting upon it when unsupported by that of other witnesses. The defendant, on the other hand, appears to be a most respectable man, and gave his evidence with great fairness and propriety; and I think I am safe in considering his

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statement of the transactions in every respect a truthful one. There is one portion of the evidence to which I have not yet adverted, namely, that respecting the value of the land, which, as usual, is very conflicting, some of the plaintiff's witnesses putting it as high as $10,000, some of the defendant's under $7,000. At the hearing I thought the just valuation, and the one which it would be the most safe to adopt, was that fixed by Mr. *Gilchrist*, one of the defendant's witnesses, being $7,000. After having again read over the evidence, I remain of that conclusion. The fair value of the chattel property, including the stallion referred to in the evidence, I put at $750, allowing $300 for the horse, which is perhaps an excessive valuation. In all, I should think $7,750 to $8,000 the highest value which could fairly be put upon the property for which the defendant gave $6,800. The plaintiff, it must be remembered, was not idle during the ten days or upwards which intervened between the visit of the defendant and Mr. *Cochrane* to his farm, for he states, in his evidence, that he was active during this time, not only in endeavouring to procure the money by means of a loan through Mr. *Agnew*, but also in seeking a purchaser amongst his friends and the farming community of the neighbourhood.

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These being the facts of the case, the question arises, what equity do they shew the plaintiff entitled to? The bill makes a case of direct fraud by misrepresentation, the 5th and 6th paragraphs containing the substance of the plaintiff's case in this respect, and the allegation being that the defendant and Mr. *Cochrane* falsely represented to the plaintiff that "he could be put off the mortgaged premises in three days." After the statement I have given of the evidence, I need scarcely say that this case wholly fails in proof. Therefore, strictly, the bill should be dismissed; but, as the case was argued upon the evidence as making a case apart

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from that of fraudulent representation, I have thought it better to consider the facts in proof without confining the plaintiff to the precise case made by his bill more particularly, as all the facts attainable by either party appear to have been elicited.

In the first place, I may remark that the inadequacy of price being so small, as it manifestly is, if my conclusion that it consists in the difference between $6,800 and about $7,750 is correct, it would require a very strong case of fraud to entitle the plaintiff to a decree. In argument it was put by the learned counsel for the plaintiff, upon the ground of surprise, and he relied on *Evans* v. *Llewellin* (*a*), and cases of that class, as laying down the rule which applied in the plaintiff's favor. I cannot, however, see the least pretence for saying that there was here anything approaching surprise; indeed, had there been any reasonable ground for otherwise impeaching the sale, I should have thought the very ample time for deliberation allowed the plaintiff in the first instance between the verbal arrangement and the written agreement, time which the plaintiff admits he industriously employed in trying to do better with his property than by accepting the plaintiff's proposal, was a strong circumstance in favor of the *bona fides* of the transaction on the part of the defendant. But, however, not merely was there this opportunity given to the plaintiff of well considering the defendant's offer and doing better, if he could, before he became in any way bound, but even after he had executed the agreement he had at least two opportunities of rescinding the sale to the defendant, and on one occasion, that spoken of by Mr. *Madonnell*, he had reasonable time given him to look for a purchaser; and as it was, active as the plaintiff and his family were in endeavoring to find a purchaser, the only result of their exertions was

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(*a*) 1 Cox 333.

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the offer from Mr. *Major*, which the defendant could not, of course, accept, since it would not have put him in *statu quo*. On the whole, I am convinced that the bargain which the defendant made with the plaintiff was as good a one as he could, at the time and under the circumstances, have procured; but, even if the inadequacy had been very great, that by itself would, of course, have constituted no ground for equitable relief, and this was not disputed in the argument; but it was contended that, the grounds of fraud and surprise failing, there was still a third ground which, in connection with the inadequacy, constituted a title to a decree. It was said that Mr. *Cochrane*, who was acting in this matter as the solicitor of the plaintiff, was secretly interested with the defendant in the purchase. I think, however, that there is nothing in the evidence to shew that Mr. *Cochrane* had the slightest concern in the purchase, save in so far as he thereby received payment of his note for $153, which was well understood by all parties from the first. I should not say that he was acting as the plaintiff's solicitor; but, even if he was, I can see no objection to what he did.

Judgment.

His intervention in the agreement with *Bowman*, which at first struck me as strange, has received a full and satisfactory explanation from the defendant, who also denies most positively and unequivocally that Mr. *Cochrane* had any interest in the purchase. Mr. *Cochrane* could not be called as a witness himself, for he was at the time of the hearing dangerously ill; but his testimony was not needed, for the evidence which we have, shews that Mr. *Cochrane's* conduct from first to last was, in both a moral and professional point of view, strictly correct.

Then it was urged that the transaction, if it could not be impeached as to the land, was nevertheless one which should be avoided as to the chattels. The answer

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to this, in addition to that which has already been given, is that such a disposition of the case would be a partial rescission, as the sale of the land and chattels constituted one entire contract, and the Court never makes a decree for rescission without putting the parties in *statu quo* in all respects: *Farmer* v. *Farmer* (*a*).

It was lastly urged that the plaintiff was entitled to treat the price of the land as $8,000, that being the consideration money expressed in the deed, and to have the usual decree to enforce a vendor's lien in respect of the excess of that sum over the amount the defendant has paid.

This the plaintiff must also fail in. It is quite open to the defendant to shew what the true consideration was, and that the real purchase money was not $8,000. The plaintiff in a suit to enforce a vendor's lien introduces parol evidence to negative the release in the body of the deed, which warrants the defendant in also resorting to that species of evidence to shew what the true consideration was. This is well pointed out in *Winter* v. *Lord Anson* (*b*). Moreover there are many authorities to shew that a bill impeaching a transaction and seeking to have it set aside for fraud, or otherwise, the Court will not—the primary case failing—give secondary relief on the assumption that the contract was a valid one: *Ernest* v. *Vivian* (*c*), *Cawley* v. *Poole* (*d*). Judgment.

The result is, that the bill stands dismissed with costs.

(*a*) 1 H. L. C. 724.
(*b*) 3 Russ. 488.
(*c*) 12 W. R. 295.
(*d*) 1 H. & M. 50.

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CAMPBELL v. THE ROYAL CANADIAN BANK.

Mortgage—Sale under Order of Court—Setting aside act of Court—Dower.

The Court refused to set aside an Order of Court made on notice allowing a purchase, though it afterwards appeared that there were circumstances not known to the Court when making the order, it not appearing that the allowance was a wrong to those complaining of it; or was procured by any fraud or wrong practice on the part of those by whom or in whose interest the order was obtained.

A vendor of real estate took from the purchaser a mortgage for the whole amount of purchase money, in which his wife joined to bar her dower:

Held, the husband having died and the property having been sold, that the widow was entitled to dower in the excess, after payment of mortgage money and interest, but no more.

Statement.

The trustees of Mrs. *Elmsley* on the 16th October, 1852, sold to *Patrick Campbell* deceased the land in question; and to secure the purchase money, took from him a mortgage for £300, payable in instalments with interest, the last instalment being payable on 15th October, 1856. The mortgagor died leaving the whole of the principal money and a large sum for interest due upon the mortgage; and the holders of the mortgage filed a bill against *Joseph Campbell*, the infant heir-at-law, praying for a sale, and a decree for sale was made. The first sale under the decree proved abortive, and at a second sale the son of Mrs. *Elmsley* bid off the property, but in reality purchased for his mother. The widow of the mortgagor and his heir-at-law, however, were allowed to continue in possession without payment of rent or interest, until in the year 1870, Mrs. *Elmsley* entered into an agreement to sell the land to Mr. *Thompson* (who was Vice-President of, and acted as agent for, the Royal Canadian Bank) for £500, and she agreed to retain thereout simply the £300 principal due on the mortgage, and £90 for costs, thus throwing off all interest, and to allow the infant the balance of £110. Mr. *Elmsley* having purchased in the manner he did, it was necessary that

in order to carry into effect the sale to the Bank to apply to the Court for an order approving of the sale made to the Bank, which order was made and the £110 was paid into Court for the benefit of the infant. 1872. Campbell v. R. C. Bank.

Under these circumstances, Mrs. *Campbell* and her son instituted the present suit, seeking to have the sale to Mr. *Thompson* declared void, and the plaintiffs let in to redeem.

The other facts of the case and authorities relied on, appear in the judgment of the Court.

Mr. *Moss* and Mr. *D. M. Macdonald* for the plaintiffs.

Mr. *S. Blake* and Mr. *Bain*, for the defendants.

Sept. 11th. Judgment.

SPRAGGE, C.—The principal question in this case is, whether the order of the 16th March, 1871, made in the suit of *Sherwood* v. *Campbell*, was obtained under such circumstances that it ought not to be allowed to stand. The order allows *William Thompson* who then was, and still is, Vice President of the defendants, the Bank, as purchaser of the premises in question at the sum of $2,000. It is alleged that this sum was greatly below the value of the property; and that facts material in guiding the judgment of the Court, and enabling it to exercise a sound discretion were withheld from the knowledge of the Court; that the application was made in the interest of the Bank, and upon the suggestion of the Bank solicitor, though made by the solicitor of Mrs. *Elmsley*, who had become solely interested as mortgagee.

To take the last objection first. It is scarcely a substantial objection, unless it be intended that the application was in reality made by the Bank and not by Mrs. *Elmsley*; and this is not warranted by the facts. That

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the Bank whose agent *Thompson* was, and who had made a contract with Mrs. *Elmsley* for the purchase of the property, was desirous that the purchase should be allowed, appears to be the fact; and it also appears that the solicitor for Mrs. *Elmsley*, and the solicitor for the Bank, had interviews on the subject of the proposed sale, and agreed that the best course in order to carry it out would be an application to the Court to approve of a private sale: but this might very well be without collusion between the two solicitors; and certainly the evidence makes out no case of collusion. I have no reason to doubt that Mrs. *Elmsley's* solicitor made the application on her behalf, and in her interest, in order to recover for her, her mortgage debt, less a portion which she was willing to forego for the benefit of the infant heir of the mortgagor, and to carry out her wish in regard to that portion. It would have been better if the affidavits had been drawn by Mrs. *Elmsley's* solicitor, but he believed, and his client also, as he states in his evidence, that the sum offered, and stated in the affidavits to be the full value of the property, was in truth its full value.

Judgment.

It is objected that the Court ought to have been informed of the contract made on behalf of the Bank in the previous October; that instead of this, it was put as a primary offer by *Thompson*, and the Court was asked to approve of his becoming the purchaser; that it was material to the Court to know of this previous contract; and it is alleged that the guardian of the infant, while he knew of the contract, was ignorant of its date. I do not see that the position of *Thompson* was disingenuously put by him in his affidavit. He says "I am the purchaser of the lands and premises in the mortgage in this cause mentioned;" and in speaking of the value he speaks of it as the sum "which I have offered." It appears by the evidence of Mr. *Blake*, that it was mentioned to the Court on the application that

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the Bank had purchased, and were anxious to have the matter completed, in order to go on with their building; and it appears that the guardian saw the affidavits on which the application was made; and I must assume that knowing of the contract he knew at what date it was entered into. He seems to have made diligent inquiry into the circumstances of the case, and as to the value of the property, and to have been convinced that the offer made was a very beneficial one for the infant. Upon one point he may have been under some misapprehension. He seems to have thought that Mrs. *Elmsley* would, or at least might deal less liberally with the infant if the sale to the Bank were not carried out, than if it were; that she might exact her whole debt, principal and interest; and that there was no hope of obtaining so large an amount for the property. If indeed anything had been extracted from her by the bill filed against her she might possibly have deducted the amount from the excess that she had destined for the infant; but the bill filed could not have been sustained; and the guardian probably attached too much weight to the apparent desirableness of having the Bank for a purchaser: but the Bank had nothing to do with that mistake, if mistake it was, of the guardian; and there is no reason to believe that it operated practically to the detriment of the plaintiffs. There is no reason to believe that the Court was misled by the affidavits; that it was deceived into the belief that the proposed purchase was a new purchase. It could only be material in case there had been an increase in the value of the property between the date of the contract (the acceptance is dated 22nd October, 1870,) and the making of the affidavits, which are sworn 25th February, 1871, and they speak of the value at the time of their being made. I cannot assume that there was any increase in the market value of the property between those two periods. Witnesses giving their evidence in March, 1872, speak of an increase of value since October, 1870, but none speak of an

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What I am asked to do is, to set aside an act of the Court. It is a strong thing to do. I must see that this act of the Court is a wrong to those complaining of it; and that the Court was misled into doing this wrong by practices, themselves wrong, on the part of the Bank.

The presumption is, that the Court made every inquiry that was necessary to its being fully informed in every particular bearing upon the interest of the infant. The interest of the infant was watched also by a gentleman who is always careful that the interests of those of whom he is appointed guardian shall suffer no detriment through any default of his. And the plaintiff's solicitor had no interest in misleading the Court upon any point. If the Court thought further affidavits necessary, or that they should be more explicit upon any point, it was for the Court to say so. It is not for me to say so now. It would be making a dangerous precedent to set aside an act of the Court under which interests have been acquired, upon such grounds as have been made in this case. It would be wrong in itself, and would be against good policy.

Judgment.

I apprehend, too, that if it had been made out by evidence that the sale sanctioned by the Court had been made at an under-value, even at a considerable under-value, that would not *per se* be a ground for setting it aside. It is sufficient, however, to say in this case that I think it is not made out that the sale was not at a fair price. The estimate of value made by different witnesses differs widely, as is usually the case, where it is matter of opinion. It would never do to set aside a sale upon such evidence as has been given in this case.

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In the proceedings to which I have referred, the purchase by Mr. *Remigius Elmsley* on behalf of his mother Mrs. *Elmsley*, in May, 1865, was treated as of no validity, as indeed it was: and the contract of sale by Mrs. *Elmsley* to *Thompson* was also treated as invalid. Her application of March, 1871, assumed the invalidity of both. She came to the Court in the character of a mortgagee to realize her mortgage debt.

In all these proceedings the widow of the mortgagor was not a party to the record. The mortgagor was purchaser of the premises in question from the late Mr. *Elmsley* for the sum of £300. Mr. *Elmsley* made a conveyance to him of the property, and took from him a mortgage, in which his wife joined, for the whole of the purchase money. Her contention now is, that her husband having died equitably seised she was, and is, entitled to dower; and that her title to dower gives her a right to redeem.

Judgment.

This is resisted, first, on the ground that she has barred herself by acquiescence. The only acquiescence pointed at by the answer is in the decree made in 1857; that decree directed an immediate sale, without giving the usual six months to redeem; and there is evidence that upon the death of her husband she was desirous of returning to her native country, and wished that the property should be sold: and there was probably enough to bind her as an assenting party to that decree if the property had been sold under it as was contemplated; but for some reason the decree was not acted upon as intended, and no sale under it was made, until that at which Mr. *Remigius Elmsley* became the purchaser; and that sale took place in May, 1865, when he bought the property in, for £100. If she acquiesced in that sale as carrying the absolute right of property to Mrs. *Elmsley*, it was an acquiescence in ignorance of her rights, and so not binding upon her: and there was no

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acquiescence on her part in Mrs. *Elmsley's* contract of sale to *Thompson*, or in any of the subsequent legal proceedings. Her rights, whatever they are, are not in my opinion barred by acquiescence.

Then, if the widow's dower is not barred, but is still subsisting, what is her position and what are the rights of the Bank and of herself? By the purchase, and payment of the purchase money, the mortgage debt was paid off; the rights of the mortgagee and of the heir-at-law were extinguished; and the Bank became owner of the property, discharged of the mortgage, but still subject to the widow's dower. I may here observe that the bill does not make a case for the assignment of dower. The bill impeaches the sale under the order of the 16th of March, 1871, and prays that it may be set aside and the plaintiffs let in to redeem. The answer of the Bank refers to the widow's claim to redeem as dowress, and takes certain positions in regard to it which it is not material to notice. Some arguments, however, were addressed to me in relation to the widow's claim, and, as it may perhaps tend to prevent further litigation, I will give briefly my opinion upon it.

Judgment.

By the sale the purchaser stands in the place of the heir, and occupies, as to the widow, the same relative position that the heir had done. It is argued that he occupies also the position of mortgagee. I do not see how this can be. There was no actual or presumptive keeping alive of the mortgage as in *Heney* v. *Lowe* (*a*). The mortgage was simply paid off, and was intended to be so; there was no succeeding to the rights of Mrs. *Elmsley*. All that, indeed, is negatived by the terms of the order of March, 1871.

The question then is, of what is the widow dowable? —of one-third of the whole of the property, or of one-

(*a*) 9 Grant 265.

third of the equity of redemption? In *Sheppard* v. *Sheppard* (*a*), the question arose between the widow and creditors of the husband having no charge upon the land; and the late Chancellor held her dowable as of the whole value. In *Thorpe* v. *Richards* (*b*) the same learned Judge reconsidered the decision he had come to in the former case, and expressed doubt as to the soundness of the decision. In the latter case the question was between the widow and the executor of the mortgagor, who was assignee of the mortgage; and he held the widow dowable only of the value of the equity of redemption; and this was followed by my brother *Mowat*, in *White* v. *Bastedo* (*c*). I think it must now be taken as settled that, as between the widow and creditors, she is dowable only in respect of the value of the land in excess of the incumbrance, *i.e.*, of course, in a case where, as in this case, she is bound by the incumbrance. *Spyer* v. *Hyatt* (*d*), before Sir *John Romilly*, is, however, a decision the other way under the English Acts.

Judgment.

The question there arose as between the widow and the heir, under the English Dower Act, 3 & 4 Wm. IV., cap. 105, by which, among other things, the owner of land was enabled to sell it or charge it by his own act, and thereby defeat or otherwise affect his widow's right to dower. The question arose in *Jones* v. *Jones* (*e*), before the present Lord Chancellor (then Vice Chancellor). The husband had made a mortgage on the land after marriage; and it was contended for the widow that, as against the heir-at-law, she was entitled to dower out of the whole freehold lands of her husband before any provision being made for the payment of the mortgage debt; but Lord *Hatherley* said: "It appears to me that she has no such equity as against the heir;"

(*a*) 14 Gr. 174.
(*b*) 15 Gr. 403.
(*c*) 15 Gr. 546.
(*d*) 20 Beav. 621.
(*e*) 4 K. & J. 361.

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and he held that her right to dower was limited to one-third of the income of the clear surplus of the proceeds of the sale (there had been a sale in an administration suit), after deducting what was due upon the mortgage. The question was precisely the same as is raised in this case, and the only difference is, that there the husband created the mortgage by his own act, as the Dower Act enabled him to do, while here the wife joined in the mortgage. In the course of the argument, counsel for the widow observed that she would have been entitled to redeem. To this it was answered by the Court: "Suppose she had redeemed, she would have gained nothing by it against the heir. What she asks is to get from the heir something which, during her husband's lifetime, was alienated by him, *pro tanto*, to the extent of the mortgage debt." What the widow asks in this case is much less reasonable, for her husband never had the land free from the mortgage; and, though the instantaneous seisin of the husband would, it seems, give her a strict legal right to dower, still there is no reason in such a claim, and it may be doubted whether it would be enforced in this Court; but, however that may be, her joining in the mortgage to Mr. *Elmsley* puts an end to any question upon that point.

Judgment.

I really cannot see upon what reasonable ground dower can be claimed upon the footing of the whole value of the land. The widow is dowable out of land in which her husband has an equitable interest. She can be dowable only of the interest that her husband had, and the value of her dower must be measured by the value of his interest. This claim is based upon the husband having the whole title legal and equitable. He has the latter only. To accede to her claim would make her dowable not only of that of which her husband died seized, but of that the seisin in which is in another person. I think both reason and authority are against the claim.

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It would, moreover, operate most unjustly, indeed, absurdly. Take the case of a piece of property worth $4,000, subject to a mortgage for $3,000. Suppose it sold by the heir or by the Court for $4,000; of the purchase money $3,000 would be applied to pay off the mortgage; $1,000 would be the surplus, and would be the value of the equity of redemption. If the widow were held entitled to the interest of one-third of the whole value; it would absorb the income of the whole of the surplus, leaving nothing for the heir. It is plain that, by analogy to the rule which gives the heirs two-thirds of unincumbered lands, the widow should receive one-third only of the annual value of the equity of redemption in lands which are under mortgage. To give her what is claimed in this case would nulllify the rule.

That of which the widow is in this case dowable is, in my opinion, one-third of the value of the land beyond the incumbrance upon it. I cannot take the value of the land to be less than the sum for which it was sold by the Court, $2,000; and it was not sold free from the widow's dower. The whole value, therefore, must be something beyond that amount. I should take the whole value to approximate to $2,500. The equity of redemption was, *in strictness*, worth nothing; for the mortgage debt exceeded the whole value of the land; but the mortgagee chose to remit a portion of it, so that the mortgage debt claimed stood at $1,560, leaving $940 as the value of the equity of redemption.

Judgment.

It is urged that the rights of the dowress cannot be worked out without giving her the right to redeem; I have already said that in my view there is no mortgage subsisting, and therefore nothing to redeem; but that does not operate to the denial of the right of the dowress to have her dower.

If the land were of the frontage of seventy-five feet

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instead of twenty-six, and she were entitled to one-third of the whole, I do not see why she might not have her dower assigned by metes and bounds. But the frontage being only twenty-six feet, it seems to me to fall within the class enumerated in *Park* on Dower, page 115, and *Roper's* Husband and Wife, page 395, where by reason that the thing itself is of such a quality that no division can be made thereof, there is no assignment by metes and bounds. In this class is a mill: and a third of the profits "in compensation for dower, or in recompense of Dower," would appear to be the proper mode of allowing to the widow an equivalent for her dower. The word "quality" used in the books to which I have referred does not mean quality of estate, but the position of the land; this is evident from the context and from the instances enumerated.

Judgment.

If she were dowable of the whole frontage, a division by metes and bounds would give her a frontage of only between eight and nine feet. She is dowable of less than two-fifths, and a division by metes and bounds would give her a frontage of about four feet. Such an assignment of dower would be a practical absurdity. If, therefore, the widow had come to this Court directly, in terms, for an assignment of dower, the inclination of my opinion would be that she would not be entitled to an assignment by metes and bounds: what she is entitled to in my opinion is compensation by annual allowance, for life, computed upon one-third of the value of the land beyond the mortgage. It would come to a little less than $19, at six per cent.; $20 a year would be a fair and full allowance.

The bill fails in the object for which it is filed; and the defendants, the Bank and *Thompson*, are entitled to their costs, which costs the plaintiff, Mrs. *Campbell*, is bound to pay, for herself as a party, and for the infant as his next friend; and if she is willing to take what I

think she is entitled to in compensation for dower, it may be set against the costs. If capitalized there may perhaps be a surplus in her favor. I only suggest this, however, in order to avoid further litigation. Upon the bill as framed I do not think I can order it. If either party objects I can only direct a dismissal of the bill with costs.

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McKay v. McFarlane.

Mortgage—Provision not to incumber.

A mortgage, payable in ten years, contained a proviso that if the mortgagor, mortgaged or otherwise incumbered the premises, or suffered them to become liable to sale for taxes, the mortgage money should become immediately payable:

Held, that an assignment in insolvency, though voluntary, was not such an incumbering of the estate as entitled the mortgagee to call for payment of the mortgage money.

This was a foreclosure suit, and came on by way of motion for decree. The facts are clearly stated in the judgment.

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

Mr. *Moss*, for defendant.

Strong, V. C.—The plaintiff by his bill seeks the foreclosure of a mortgage dated the 25th of October, 1869, made by the defendant to the plaintiff to secure $600 the proviso in which is as follows: "Provided this mortgage to be void on payment of $600 in ten years from the 22nd day of October, 1869, payable without interest on the 22nd day of October, 1879. Provided that if the said mortgagor shall mortgage or otherwise suffer the said premises and lands to be mortgaged or incumbered or become liable to sale for taxes, then this

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mortgage shall immediately become due and payable." The bill alleges and the answer admits that on the 26th of February, 1870, the mortgagor made a voluntary assignment, pursuant to the Insolvency Act, to the defendant. Upon this admitted state of facts the question arises whether the assignment constitutes an incumbering within the meaning of the proviso for the acceleration of payment contained in the mortgage deed.

It has been contended on behalf of the plaintiff, that this assignment is to be considered as an incumbrance, inasmuch as by force of the Statute it operates to charge the equity of redemption with all the mortgagor's debts.

I have, however, after some doubt, and contrary to the opinion which I at first formed, come to the opposite conclusion.

Judgment

The word "incumbered," standing alone, and taken in its abstract meaning, would, no doubt, be a term large enough to include an assignment under the Insolvency Act; but, in the present case, it is associated with other words of like import, and a clue to its signification, as here used, is to be obtained from the context, as well as from the manifest and only reasonable object of the mortgagee in stipulating that the mortgagor should not incumber the equity of redemption.

The general word "incumbered," then, being thus used together with the specific word "mortgaged," must, on the principle of the well known maxim of interpretation, *noscitur a sociis*, be construed to apply to incumbrances of a like nature with mortgages.

Next the object of introducing this provision into the mortgage deed, could only have been to protect the mortgagee against the inconvenience, expense, and delay

of adding numerous parties, in case he should be compelled to resort to proceedings in this Court, to make his security effectual by a foreclosure or sale. 1872. McKay v. McFarlane.

Therefore the incumbrances which it was intended to guard against, must be taken to be such as would have the same effect as mortgages, as regards the parties to a foreclosure suit.

Then it cannot be said, that the assignment is in this respect similar to a mortgage. In one sense it is true that it may be regarded as an incumbrance, inasmuch as in the interval between the execution of the deed, and the performance of the trusts imposed upon the assignee by the Act of Parliament, the debts constitute statutory charges upon the equity of redemption. In the sense, however, in which the word "incumbered" is used in the mortgage, the equity of redemption is not affected by this assignment. The creditors do not become necessary parties to a suit for foreclosure, and the assignment as regards the mortgagor's interest in the land, is an absolute conveyance, and does no more than substitute the assignee for the mortgagor, as the owner of the equity of redemption, in the same manner as a conveyance to carry out an absolute sale would have done. Judgment.

That a sale by the mortgagor would clearly not be an infringement of the terms of this condition must be conceded.

Then, why should a conveyance in trust for sale, be within the proviso? It surely could not matter to the mortgagee whether the land is conveyed directly to a purchaser, or to a trustee to sell and convey for the behoof of the mortgagor.

And, if a conveyance in trust to sell, and pay over the proceeds to the mortgagor, is unobjectionable, a trust

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to sell for the benefit of the mortgagor's creditors, duly constituted *cestui que* trusts, cannot be less so. Under such a trust, though the creditors would have a charge on the proceeds of the sale, they would have no such interest in the equity of redemption, as would make them necessary parties to the mortgagee's bill to foreclose (*a*).

Judgment.

It follows that this assignment cannot be within the proviso, since it can make no difference that the trusts are annexed by the Statute, instead of being expressed by the parties; for there is to be found here a representation of the *cestuis que* trust, by the trustee, even more perfect than in the case of an ordinary trust for sale.

The result is, that the bill must be dismissed with costs.

LUTHER v. WOOD.

Municipality—Bonus to Railway Co.

By the Statute 31 Victoria, chapter 4, municipalities through, or near to which, railroads passed, were authorized to loan, guarantee, or give money as a bonus to such company; and in pursuance of such Act a municipality passed an Act, duly authorized by the ratepayers, granting a bonus to a railway company, upon the express condition that the debentures securing such sum should be deposited with the Treasurer of the Province as custodian for the company, but the same were not to be delivered to the company, unless and until the railway should within two years be fully completed and in running order, and regular trains have passed over the road, and the company have performed certain other stipulated works; in all of which the company made default. In a suit by the municipality seeking to restrain the Treasurer from delivering up the debentures to the company:

Held, that under the circumstances time must be taken to have been of the essence of the transaction, and that the company having, no matter from what cause, failed to complete the works in the manner stipulated for, the plaintiffs were entitled to receive back the debentures.

(*a*) Morley v. Morley, 25 Beav. 253.

Examination of witnesses and hearing at Guelph. 1872.

Luther v. Wood.

Mr. *Blake*, Q. C., Mr. *Proudfoot*, and Mr. *Guthrie*, for the plaintiffs.

Mr. *J. Hillyard Cameron*, Q. C., Mr. *Moss*, and Mr. *Lash*, for defendants.

STRONG, V.C.—This bill was filed by the Township of Luther against the Hon. *Edmund Burke Wood*, the Treasurer of the Province of Ontario, and the Toronto, Grey, and Bruce Railway Company. By the 9th section of the Act 31 Vic. cap. 40 (the Act incorporating the Toronto, Grey and Bruce Railway Company), it is enacted as follows: "It shall further be lawful for any municipality or municipalities, through any part of which or near which the railway or works of the Company shall pass or be situated, to aid and assist the said Company by loaning or guaranteeing, or giving money by way of bonus or other means, to the Company, or issuing municipal bonds to or in aid of the Company, and otherwise in such manner and to such extent as such municipalities, or any of them, shall think expedient: provided always, that no such aid, loan, bonus, or guarantee shall be given except after the passing of by-laws for the purpose and the adoption of such by-laws by the ratepayers as provided in the Railway Act." The aid of the plaintiffs having been invoked by the provisional directors of the defendant's Company, the Township Council passed, and the ratepayers duly ratified, a by-law by which the township, on certain terms and conditions clearly set forth in the by-law, granted a bonus of $20,000 payable in the debentures of the municipality in aid of the undertaking. This by-law, the first publication of which was on the 16th of April, 1869, contained the following provisions:—"That this by-law shall take effect on, from and after the 21st day of December, 1869: provided always, that the said deben-

Judgment.

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tures when made shall be deposited with the Treasurer of the Province of Ontario, to be held by him as custodian thereof, and to be delivered by him to the said railway company or the trustees under the Act of Incorporation, only subject to the conditions hereinafter contained,—1st, the said railway company shall not, nor shall the trustees under the said Act, nor shall any person or corporation claiming by, through, or under them be entitled to the said debentures, unless nor until the said Toronto, Grey, and Bruce Railway shall, within two years from the first publication of this by-law, have been fully completed, finished and in running order, and regular trains shall have passed over the road from the City of Toronto to within one mile and a quarter of Green's Hotel, in the village of Arthur; nor unless nor until there shall have been erected in and for the said railway, freight and passenger stations at the points following, one of such stations within the said distance of said hotel, and one such station on the point on the line of said railway where the same shall cross the town line between the Townships of Amaranth and Luther: nor until the Toronto, Grey, and Bruce Railway Company shall have given to the said Corporation of the Township of Luther a bond or obligation under its corporate seal to maintain the said stations at the points aforesaid. And it is hereby expressly declared that the said Provincial Treasurer shall not deliver the said debentures to the said railway company, or to any person or corporation claiming under or for it, nor shall the same be valid or collectable against the Corporation except upon the fulfilment of the conditions, provisions and matters aforesaid within two years from the first publication of the by-law, and that in default of such fulfilment within that time, the said Provincial Treasurer shall deliver to the Corporation of the Township of Luther all the said debentures and any interest accrued in his hands thereon, whereupon such debentures shall be cancelled, and the moneys raised under this by-law shall belong to the

Judgment.

said Corporation of the Township of Luther to be applied to its own purposes."

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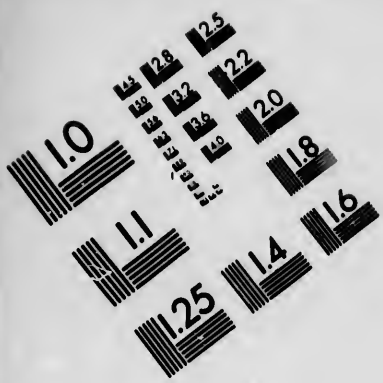
This by-law was finally passed on the 21st of December, 1869. In compliance with the requirements of the by-law the railway company gave the plaintiffs their bond, dated 18th of December, 1869, conditioned, in the event of the non-performance of the works within the stipulated time, for the payment of $500 to cover the expenses incidental to passing the by-law. The Township Council further required before passing the by-law a bond from certain individuals, conditioned for the payment of a sum to cover expenses in case of non-performance, which latter bond, dated the 21st December, 1869, was accordingly executed by Messrs. *Shanly*, *Gordon*, *Green*, and *O'Callaghan*. The debentures were executed, and on the 17th February, 1870, were deposited with the defendant the Treasurer of Ontario, who gave for them an acknowledgment in writing in the words following: "Received from the Corporation of the Township of Luther debentures of theirs to the amount of $20,000, in aid of the Toronto, Grey, and Bruce Railway, issued under and subject to the conditions of their by-law, numbered 54, a copy of which has with the said debentures been deposited with me, which debentures shall be held by me as custodian thereof under the said by-law, and shall only be delivered to the said railway company upon complete fulfilment of the conditions of the said by-law, to be witnessed by the Reeve and Clerk of the said Township, otherwise to be returned to the Corporation of Luther."

Judgment.

It is not and could not have been asserted by the defendants that the conditions of the by-law were complied with. On the contrary, two of the defendants' own witnesses, Mr. *Wragg*, the company's engineer, and Mr. *Laidlaw*, the projector and chief promoter of the undertaking, both prove that the road was not open for



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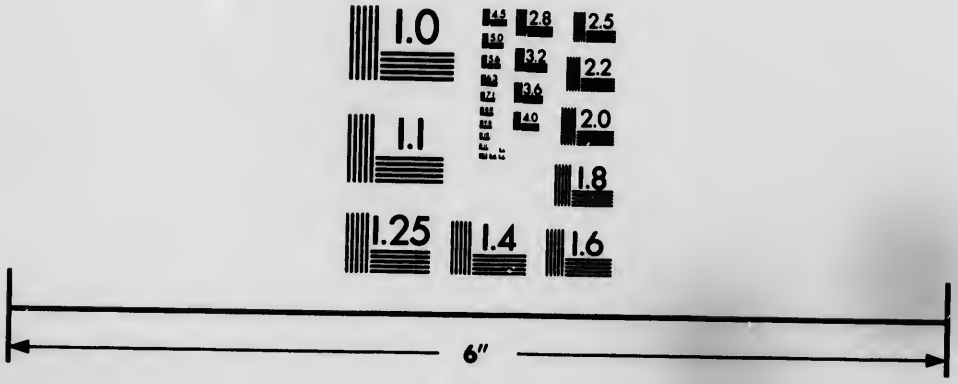

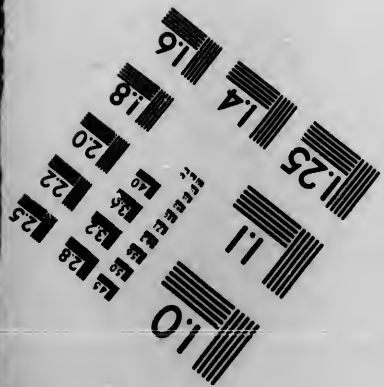

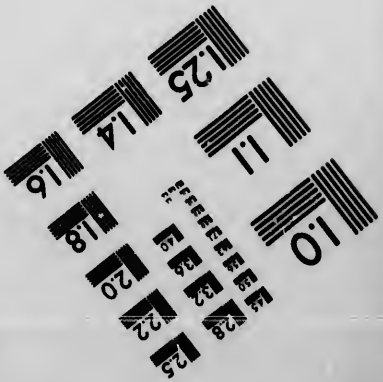

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traffic within the prescribed period of two years from the 16th April, 1869, nor until eight months afterwards, namely, in December, 1871; and that in other respects the conditions imposed by the Township, and set forth in their by-law, and referred to in the receipt they took from the Treasurer, were not complied with. This being so, the Municipality have filed this bill to compel the re-delivery to them of the debentures, in accordance with the terms of the Treasurer's undertaking, in order to their cancellation. The Railway Company in their defence, whilst admitting that they have not performed the conditions of the by-law as to time, set up that they had before the hearing completed a branch of their line to Arthur and built the required stations; and they contend that the by-law is to be considered as forming a contract between them and the Municipality for the performance of work on the one side, and the payment for that work on the other, of which contract time was not the essence. They have further given evidence with the view of shewing that they were prevented by unforseen accidents from completing the works within the limited time.

Judgment.

The least consideration will shew the futility of these defences.

In the first place, the by-law which under the 9th section of the defendants' Act of Incorporation the plaintiffs had undoubted power to pass, did not create any contract.

The plaintiffs were never in a position to have sued the Railway Company either at law or in equity for their failure to perform the work within the stipulated time. In other words, the Company were never bound to the plaintiffs. The defendants could at any time have abandoned the proposed line to Arthur altogether without incurring any other liability to the plaintiffs than

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that of paying the $500 for which they had given a bond to indemnify the Township against the expenses incidental to passing the by-law. The plaintiffs are not then to be considered as contracting with the defendants in consideration of the latter building a railway and stations, but as providing for a gift to the Company upon certain conditions. That this is the proper construction to be placed on the transaction is apparent as well from the testimony of Mr. *Shanly* and Mr. *Laidlaw* as from the documentary evidence. It must also be considered that a contract for the construction of a line of railway would have been *ultra vires* of the plaintiffs', whilst a gift, on such terms as they might think fit to impose, was expressly authorized by the Act of the Legislature.

The debentures being then intended to be delivered by way of gift or bonus, I know of no doctrine of equity, which would authorize this Court to treat the conditions as to time in which that gift was to take effect as immaterial. But even if the rights of the parties were to be adjudged on principles applicable to contracts it would make no difference, for the unilateral character of the contract, the performance or abandonment of it being optional with the defendants, would make it impossible to say that time was not essential. Moreover the materiality of time is expressed as strongly as possible in the several instruments in which the contract, if there were one, must be contained, and it is always optional to parties, even in cases in which as a general rule exact performance in point of time is not exacted by Courts of Equity, to make it essential by contract.

Judgment.

Again the evidence of Mr. *Laidlaw* and Mr. *Shanly*, both gentlemen being called as witnesses by the defendants, puts it beyond all question that the plaintiffs made it an indispensible condition to their giving aid to this railway, that their terms should be literally and exactly

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complied with. Mr. *Laidlaw* states that the gentlemen negotiating for the Company tried to get the bonus without conditions, but the best terms they could obtain were those in the bond. For these reasons I must determine that there is no pretence for saying that he time fixed by the by-law was immaterial.

It was next urged on behalf of the defendants, the Company, that having been delayed in the work of construction, by unforseen obstacles arising from the weather, the difficulty of the ground and the impossibility of procuring labour they are entitled in equity to be relieved from the performance, in point of time, on the ground of accident. I am of opinion that this defence also fails. Whether the Township is to be considered as having undertaken to pay the $20,000 in consideration of the Company's expenditure, or by way of a gift to take effect in certain contingencies, it can make no difference, if the exact performance within a fixed time was made an indispensable condition of their paying anything, that the defendants were prevented by accident inevitable or otherwise from strictly performing that condition. Taking the most favourable view for the defendants, regarding them not as recipients of bounty but as contractors for valuable consideration, they must nevertheless be considered to have taken into account the risk of all such obstructions to their works as they allege.

Judgment.

I have so far considered the case with reference to the defences set up by the railway company; but it was pressed in argument by the plaintiffs' counsel, that the proper view to take of the rights of the parties was to regard the plaintiffs as *cestuis que* trust seeking to enforce the execution of a trust against their trustee. I am of opinion that the true legal relation existing between the plaintiffs and the defendant the treasurer, was that of trust. I consider that the plaintiffs can

correctly say that they deposited these debentures in the hands of their trustee, to be delivered to the railway company only if certain conditions were complied with within a fixed time, otherwise to return them to the plaintiffs. It was surely within the powers of the plaintiffs to do this, and I do not see how such a trust as I have stated could have been more strongly expressed than it was in the voucher which the treasurer signed on receiving the debentures. The plaintiffs are now by this bill calling on their trustee to execute the trusts of which he has chosen to undertake the performance, by delivering up the debentures. In answer to this fair equitable demand of the plaintiffs, the defendant, the treasurer, has no right to set up the *jus tertii* of the railway company; and I can see no equity in the last named defendants which entitles them to intercept the plain right of the plaintiffs to this relief. I do not think the company were even necessary parties to this bill, as no trust for them has ever arisen; and, for the same reason, I think that no effect can be given to the objection that the statutory trustees of the company were necessary parties.

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Judgment.

There must be a decree for the plaintiffs with costs.

WATSON v. JAMES.

Redemption—Costs—Auction sale.

A party on a sale of land attended and stated that he was buying on behalf of his brother's family, the effect of which was to prevent competition at such sale, and he became the purchaser; but he subsequently refused to admit the right of the plaintiffs, his brother's family, to redeem the property in his hands: the Court declared the plaintiffs entitled to redeem, and ordered the defendant to pay all the costs of the suit.

Motion by defendant to vary the minutes.

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Watson v. James.

Mr. *Bethune*, for the motion.

Mr. *Ferguson*, contra.

SPRAGGE, C.—The plaintiffs placed their case at the hearing on two grounds: one, that the defendant agreed to attend at the sale and purchase on behalf of the plaintiffs; the other, that the defendant made such representations to intending purchasers particularly to Mr. *McDonald*, Mayor of Ingersoll, in regard to his own intention to purchase on behalf of his brother's family, as induced them to abstain from bidding.

I thought this second ground fully established by the evidence; and, it being in my judgment sufficient to entitle the plaintiffs to a decree, I did not, I think, make any adjudication upon the other ground. I am not quite certain as to this; and the memorandum I made at the time does not assist me. I may have expressed a doubt whether any *agreement* on the part of the defendant with the widow, or any one else acting for the plaintiffs to purchase on their behalf, was sufficiently proved, and so have rested my judgment upon the other ground; and I think that this was the tenor and substance of my judgment.

Judgment.

Taking this to be the course that the cause took at the hearing, and conceding the general rule to be that, where the right to redeem is disputed by the mortgagee, and the general costs of the cause are adjudged against him, he is still entitled to his costs as of an ordinary redemption suit; I still think I was right in adjudging the defendant to pay the whole costs, without any deduction. A mortgagee, or person occupying the position of mortgagee, may honestly question the right to redeem; but here the defendant obtained his position by a fraud—at least, by a legal fraud. He made a representation upon which others acted, and which operated to his own

advantage and to the detriment of the plaintiffs. Refusing after his purchase to make that representation good, it is to be assumed that from the first it was untrue, and that he never intended to make it good, and, if so, it was made fraudulently; and it was a fraud in him to hold the purchase for his own benefit. And, even if we can suppose that he really intended to purchase for the benefit of his brother's family, it was a fraud in him not to hold the purchase for their benefit, because the natural consequence of his declaration of intention was, that which was produced, the deterring of others from purchasing, and he must be taken to have intended that which was the natural consequence of his act.

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Watson v. James.

If my attention had been drawn at the hearing to the general rule in favor of mortgagees, I should not have held it to apply to this defendant; I should have held that his position and his conduct disentitled him to any costs.

Judgment.

The minutes, therefore, will not be varied; and the costs of this application must fall upon the defendant. It is suggested that, as money is payable to him under the decree against which the general costs of the cause are to be set off, the costs of this application may also be set against the money so payable. I think this is proper.

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CHARD v. MEYERS.

Appeal from the Master—Practice.

Although the rule is, that the Court will not readily interfere with the finding of the Master upon a question of fact; and that where there is a balance of evidence causing the determination of questions of fact to be determined altogether on the credit to be given to particular witnesses, it is almost impossible for the Court to overrule the decision of the Master; still, if the Court finds a balance of direct testimony, and the circumstances of the case point strongly against the conclusion at which the Master has arrived, there is no reason why the Court should not review the evidence and reverse the Master's finding.

Appeal from the Master at Belleville.

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

Mr. *J. H. Macdonald*, contra.

Judgment. STRONG, V. C.—This is an appeal from the report of the Master at Belleville, finding that the sum of $3,500 was paid by the defendant *Cooley* to the Trust and Loan Company. The defendant *Meyers*, who appeals, contends that the amount paid was only $2,665. The question arose in this way: *Meyers* had, through *Wilkinson* as his trustee, mortgaged certain lands to the Trust and Loan Company. Afterwards he sold the particular parcel of land in question in this cause to the plaintiff. Then default having been made in the payment of their mortgage, the Trust and Loan Company proceeded to exercise their power of sale. Upon this, as *Meyers* states, though *Cooley* does not admit it, *Meyers* applied to *Cooley* to buy in the mortgaged lands, with the object of enabling him to perfect the plaintiff's title. Accordingly at the sale on the 15th February, 1860, *Cooley*, accompanied by *Meyers* attended and bid for the land $3,500. $2,000 was paid at the time of the sale in cash by *Cooley* to Mr. *Paton*, the commissioner of the Trust and Loan Company. *Cooley* says

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that he also at the same time paid to Mr. *Wilkinson*, who, besides being the mortgagor for *Meyers's* behoof, was the solicitor of the Trust and Loan Company, $155 as the amount of the costs of the sale, for which he was refused a receipt. And it is not disputed that on the same day *Cooley* gave a promissory note, payable to Mr. *Paton*, one month after date, for $1,500. Then on 23rd February, 1860, a draft for the sum of $665.55 was purchased by *Cooley* at the Commercial Bank, at Belleville, and on the same day remitted to the Trust and Loan Company at Kingston. The contention of the defendant *Meyers* is, that the amount of this draft was the residue of the amount due to the Trust and Loan Company on their security, and was all that *Cooley* paid. *Cooley*, on the other hand, insists that this draft for $665 was a mere payment, on account of the note, and that he subsequently by the hands of *George Dean*, his son-in-law, paid the balance of the $1,500. This inquiry is under a decree made by consent by which *Cooley* is ordered to be redeemed, and the accounts are directed on the footing of an ordinary redemption decree. The Master has found in favour of the defendant *Cooley*, that the whole $1,500 was paid. This finding proceeds on the direct evidence of *Cooley* himself, and his son-in-law *George Dean*, and controverts the evidence equally positive of Mr. *Ireland*, the accountant of the Trust and Loan Company. In this conclusion I am of opinion that the Master has erred. I concede that when there is a balance of evidence causing the determination of a question of fact to be dependent altogether on the credit to be given to particular witnesses, it is almost impossible for the Court on such an appeal as this to overrule the decision of the Master in whose presence the witnesses have been examined. This is a rule which, according to the very highest authority, governs, or ought to govern, all appellate tribunals: *Reid* v. *Aberdeen, Newcastle and Hull Steamship Company* (*a*), *Gray* v. *Turnbull* (*b*),

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(*a*) L. R. 2 P. C. 245.

(*b*) L. R. 2 Sc. App. 53.

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The Julia (*a*). But if there is, as I find here, a balance of direct testimony, and the circumstances point strongly to one conclusion, and against the other, I know of no reason why the Court may not review the evidence and reverse the Master's finding. In the present case the circumstantial proof is, in my judgment, overwhelming in establishing that the only amount paid by *Cooley* subsequent to the day of the sale, was that which he remitted by means of the draft of the 23rd of February. In the first place Mr. *Ireland*, an officer of the Trust and Loan Company,—a corporation which could hardly be suspected of falsifying its books for the sake of such a sum as that in question here,—positively swears that the whole amount received by that Company was $2,655.55. This is the evidence of a witness free from interest, and is not given from memory alone, but from memory assisted by inspection of the entries recorded in the books of the Company.

Judgment.

Then the correspondence shews that it was not intended or understood by any of the parties, either by *Cooley*, *Meyers*, or the Company, that anything more was to be paid by *Cooley* than the amount actually due to the Company on their security. And that being conceded, which I do not understand to be denied by *Cooley*, namely, that the mortgage was made by *Wilkinson*, of *Meyer's* lands, and for *Meyer's* benefit, it is clear that the Company could not justly claim more from the purchaser than the amount due to them on the mortgage, since they were not in a position to claim the excess of the $3,500 beyond their debt for the benefit of *Wilkinson*, their own solicitor, who was but a trustee for *Meyers*; and they certainly would not insist on it for the benefit of *Meyers*, under the state of facts which the evidence discloses, and of course they could not honestly or reasonably claim it for themselves. Thus all the proba-

(*a*) 14 Moor P. C. C. 210.

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bilities were that the Company would only claim the balance actually due to them in respect of the mortgage and that the note for $1,500 was given on the understanding that it was to be reduced to the amount of the debt to be subsequently ascertained. Next, the correspondence confirms this view. On the 16th February, *Meyers*, in *Cooley's* name, and with *Cooley's* knowledge and assent, wrote to the Company the letter "K." *Cooley*, in his evidence, says, *Meyers* "wrote a letter and sent it, or gave it to me, and I sent it to the Company." The letter here referred to is this Exhibit (K), in which *Cooley* states that he wishes to pay the balance at once, and requests to be informed what it is; and says that *Wilkinson* will make an arrangement as to any overplus, and further asks, "how the money is to be sent." In answer to this letter Mr. *Paton*, on the 29th February, wrote as follows:—"Yours of 16th inst. came duly to hand, and I now enclose statement shewing amount of our claim against the property mortgaged by Mr. *R. M. Wilkinson*. Please remit to this office by draft of the Commercial Bank, which will be issued at par." The statement enclosed in this letter is not produced, and the non-production of it by *Cooley* at least justifies the presumption that it was in accordance with the books of the Trust and Loan Company, from which Exhibit "M" is an extract, verified by Mr. *Ireland*, shewing the exact state of the account at that date, and that the amount then due the Company was $655.55.

Judgment.

But it is quite sufficient for the purposes of the appellant to establish that a statement was sent, for that fact by itself warrants the inference that something less than the amount of the promissory note constituted the Company's claim. This letter of the 20th February having been sent to *Cooley*, he, on the 23rd February, obtained from the Commercial Bank, at Belleville, a draft on Kingston for $665.55, (exactly $10 more than the amount shewn by the books of the Company to have

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been then due to them); and this draft he on the same day remitted to Mr. *Paton*, enclosed in a letter written by Mr. *Thomson*, the Bank Manager, and signed by *Cooley* himself. This letter has been lost or destroyed, but secondary evidence of it is given by Mr. *Ireland*. Now *Cooley* having written on the 16th, asking for a statement; having before the 23rd received that statement, and having on the 23rd remitted in the manner directed by Mr. *Paton*, it is difficult to suppose that his remittance was anything less than the amount called for by the account sent, more especially as the amount of the draft so nearly accords with the balance which the books shewed to have been at that date in favor of the Company. On the 27th February *Cooley* wrote another letter to the Company, which is not produced, and which I infer was sent by the hands of *George Dean*, who, in my belief, went to Kingston, not for the purpose of paying money, but to get up the title deeds,

Judgment.

note, and other papers which the Company on payment had to deliver up to *Cooley*. On the 28th February Mr. *Paton* writes again to *Cooley*, acknowledging his two letters of the 23rd and 27th February, and saying that he had on that day, as Mr. *Ireland* proves, he in fact had, given the papers to *Dean*, and that the purchase deed was being prepared. And on the 1st of March Mr. *Paton* wrote again, enclosing the conveyance to *Cooley*. Mr. *Ireland* further swears that on the letter of the 23rd from *Cooley* to the Company, the letter written by Mr. *Thomson*, in which the draft was enclosed, there was indorsed a voucher signed by *George Dean* for the promissory note for $1,500, and that for the deeds a separate receipt was given, which I understand still to be in the possession of the Company. Now why these two receipts should have been given, and why the receipt for the note should have been endorsed upon the letter enclosing the draft, unless it was to connect the draft with the note as being in payment of it, it is hard to see. Again, why was any receipt given for the note if it was paid in full.

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A person discharging a negotiable instrument like a promissory note is generally content with the instrument itself as a voucher; but if a note has been delivered up on payment of less than its amount, in pursuance of some previous agreement, it would be natural and reasonable that the holder should take from the party paying some memorandum shewing the real amount paid. Then, in further confirmation of the strong circumstantial evidence in favour of the appeal which I have already noticed, Mr. *Ireland* proves that an order was given by Mr. *Wilkinson* to discharge *Cooley* from the surplus, and although this document, too, has been unfortunately lost or mislaid, Mr. *Ireland* distinctly and positively swears to having seen it. Against all this strong evidence, consisting of indubitable documents and the testimony of a disinterested witness, there is nothing but the evidence of *Cooley* and his son-in-law, *George Dean*. *Cooley* says he sent *Dean* to Kingston with a sum of money, the exact amount of which he cannot give, but sufficient to make up the residue of the note after deducting the amount of the draft, and *Dean* swears to the same fact, and that he paid this amount over to the Company at the time he got the papers. As to *Dean's* evidence, his memory seems to have been entirely at fault, until it was refreshed by hearing a letter read to him by *Cooley's* solicitor; and he is now unable to state the amount which was entrusted to him by his father-in-law. Then, in the deposition of *Cooley* I find that stated which must be false; he says, "They wrote back to me to pay my note, or I would be sued on it;" and again, "they wrote me to pay the note, or I would be crowded: they had the note, and I had to pay it." Now by this the defendant intends of course to convey the impression that he was compelled to pay, by pressure from the Company. But the untruthfulness of this is manifest. First, the letter of Mr. *Paton* which is produced, in which, in compliance with *Cooley's* request, he encloses a statement of the Company's claim, and does not demand

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payment of the note or make any allusion to it. Secondly. The note dated the 15th February, and payable a month after date, was not due, and payment of it could not have been called for until the 18th of March, and on the 1st of March all was closed, and the conveyance transmitted to *Cooley*. Then how can any one assume on such evidence as this that more was actually paid to the Trust and Loan Company than their officer swears was paid, and, as it appears from their books, was ever claimed or received? I have failed to notice another fact insisted on by *Cooley*, and which I think he must be correct in; he says that at the time of the sale he paid $155 to Mr. *Wilkinson* to cover the costs of the sale. I think I must conclude that this was paid, as otherwise the costs of the sale would not have been provided for, as the Company seem to have made no charge in respect of them. But taking this payment to have been made, it helps to shew that the $3,500 was a mere nominal sum, and that the amount really intended and agreed to be paid by *Cooley* was the amount due the Company, with the costs of the sale added. If the $3,500 had been the real price, it would have been unusual and unreasonable that the purchaser paying for his bargain more than was due to the vendor, should, in addition, bear the costs. On the other hand, if the transaction was such as it is represented by *Meyers* to have been, it would have been probable and reasonable that Mr. *Wilkinson* to whom, as the vendor's solicitor, these costs would have been payable, should have taken care of his own interests by stipulating for the payment of them by the purchaser.

Judgment.

There is still a minor point. The amount received by the Trust and Loan Company, as appears by their books by means of the draft, was $655.55, whilst the requisition for the draft shews the amount to have been $665.55. This difference of $10 between the credit entry and the face of the draft may be accounted for in two ways:

first, it may have been the charge for the deed which, it appears was furnished by the Company, and it may, as such, have been included in the statement which was sent by Mr. *Paton* on the 20th February, or it may have been a mistake in the entry. In the last view it would, however, be insufficient to discredit the books altogether, and get rid of the facts as I have stated them.

Evidence of documents not strictly admissible may have been received by the Master on this reference, but as it appears that no exception to the reception of such evidence was taken at the time, and as this has not been made a ground of appeal, or even raised in argument before me, I have taken all the evidence as it was before the Master, into consideration.

I think the Master was wrong in determining that more than the amount of the draft of the 23rd February, 1860, was paid by *Cooley* after the day of sale; and that the report must be referred back to be reviewed in accordance with this decision.

Judgment.

The defendant *Cooley* having tendered himself as a witness, and having, as I determine, given an incorrect account of the transaction, I must, in accordance with a principle which I have laid down in other cases, order him to pay the costs of this appeal.

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RE GOODHUE [IN APPEAL.]*
TOVEY V. GOODHUE.
GOODHUE. V. TOVEY

Jurisdiction of Local Legislature—Will, construction of—Vested and contingent interests—Domicile of party entitled.

The rule in respect to private Acts of Parliament is, that the interests of persons not expressly named in them are not affected by the provisions thereof.

A testator devised all his residuary estate, real and personal, to trustees to convert into money, and to accumulate during the lifetime of his widow; and, after the payment of certain anticipated claims thereon, in trust for all the testator's children who should be living at the decease of the widow in equal shares, and for the child and children of such of the testator's children as might then be dead, in equal shares; such grandchild or grandchildren, to be entitled to the share which his, her, or their father or mother would have been entitled to if living. *Held*, that the children of the testator took only contingent interests.

In such a case the widow and children of the testator by indenture, after reciting the will, and after other recitals as to the payment of annuities and legacies under the will, and that the residuary estate amounted to more than $300,000, and that it was desirable that each of such children of the testator should enter into possession of their shares respectively without waiting for the death of the widow, they thereby provided for the allotment to each of the testator's children of his and her respective shares. They also stipulated to apply to the Provincial Legislature to confirm the arrangement, and for all necessary and incidental powers. Application was accordingly made to the Legislature by petition, setting forth the will at length, and the names of all parties, infants as well as adults, interested thereunder, for an Act to confirm and validate the settlement which had been so made. Thereupon an Act (34 Victoria, ch. 99), was passed, enacting that the said deed should be confirmed and made valid; and the trustees under the will were authorized and required to carry into effect the provisions of the Act; and were thereby declared to be saved harmless and indemnified. On appeal it was *held* that the Provincial Legislature had power to pass such an Act; but that the infant grand-children of the testator, who were interested under the will, not having been expressly named in the Act, their interests remained unaffected thereby. [DRAPER, C. J., and SPRAGGE, C., dissenting.]

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*[*Present:* DRAPER, C. J., SPRAGGE, C., HAGARTY, C. J., MORRISON, J., WILSON, J., MOWAT, V. C., GWYNNE, J., GALT, J., and STRONG, V. C.]

And per STRONG, V. C., that the will having directed the whole estate to be converted into personalty, the testator's grandchildren domiciled without the Province of Ontario, could not be affected by any Act of the Legislature of this Province; the locality of all rights to personal or movable property being at the domicile of the person entitled to it; and that, therefore, the contingent interest of the grandchildren was not "property or a civil right" within the Province.

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The facts appearing in this case were, that the Hon. *George J. Goodhue*, on 11th January, 1870, died, seised and possessed of large real and personal estate, partly in this Province, part in England, and part in the United States. He left surviving him his wife, one son, and five daughters, all married; also the widow of a deceased son, a sister-in-law, as well as several infant grand-children. By his will, dated 8th December, 1869, he devised and bequeathed to *Henry C. R. Becher* and *Verschoyle Cronyn*, their heirs, executors, administrators, and assigns, all his estate and property (subject to some specific devises of real estate for the life of the respective devisees, and to certain annuities to his daughter-in-law and sister-in-law), in trust for conversion and collection, and for the investment of proceeds therof. He directed the trustees to pay his funeral and testamentary expenses, his debts, certain legacies, the said annuities, and the taxes and insurance premiums on a house and premises devised to his wife. He directed the surplus of the annual income and proceeds of his estate to be accumulated during the life of his widow, and that upon her death the trustees should hold all the trust premises then undisposed of and not otherwise disposed of by his will, in trust to make good any loss that might have arisen and been ascertained in the investment and control of certain moneys, which he had paid over to the said *Becher* and *Cronyn*, in trust for his (the testator's) children respectively, and which sums and the trusts thereof were more particularly described in six certain indentures of settlement, dated the 8th December, 1869, and respectively executed by the testator and the said *Becher* and *Cronyn*, and thereafter in trust for all the testator's children who should

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be living at the decease of his wife, in equal shares, and for the child and children of such of them as might then be dead, in equal shares, such grandchild or grandchildren to be entitled to the share which his, her, or their father or mother would have been entitled to if living.

By indenture made after the testator's death, and dated 26th September, 1870, his widow, his surviving son, and his five daughters and their respective husbands, after reciting the will, and after other recitals as to the annuities and legacies, and that the residuary estate amounted to more than $300,000, and that it was desirable that the children should respectively enter into possession and enjoyment without waiting for the death of the testator's widow, and that the several parties had agreed to execute the said indenture, in order to secure to each of the children of the testator the immediate possession of their respective shares in the residuary estate, exclusive of their reversionary interest under the will, they mutually covenanted and agreed that sufficient sums to pay the annuities and other charges created by the will should be set apart and held by the trustees to pay and satisfy the annuities and other charges mentioned in the will, after which they provided for the division of the residue of the trust estate into six parts, and for the allotment of one part to each of the children absolutely in severalty, the share allotted to each daughter being free from the control of her present or future husband. Similar provision was made for the division of the reserved sums as they might severally fall in, and they also agreed to apply to the Legislature of Ontario to confirm the arrangement, and for all necessary and incidental powers.

Statement.

By the Statute of Ontario, 34 Victoria, chapter 99, passed 15th February, 1871, it was, after reciting the will at length, and referring to the deed of 26th September, 1870, enacted that the said deed should be confirmed and made valid, and the trustees were authorized

and required to carry into effect the provisions thereof; and were, in so doing, saved harmless and indemnified. 1872. Re Goodhue.

Mr. *Becher*, one of the trustees named in the will, refused to carry out the arrangements contemplated by this deed, and confirmed by the statute. The other trustee expressed his readiness to do so.

Thereupon a petition was presented to the Court of Chancery, by the testator's six children, praying that the trustees might submit their accounts; that a referee might be appointed for making the allotment and distribution providde for by the indenture; that the trustees might be ordered to carry into effect such allotment and distribution, when made; and that all proper directions might be given, inquiries had, and accounts taken.

The Court made an order granting the prayer of the petition, against which Mr. *Becher* appealed. 1. Because it was beyond the power of the Legislature to pass this statute, and it ought not to have been acted upon by the Court. 2. Because it appeared that some of the parties prejudicially affected by the statute, were domiciled in Great Britain, and others in the United States of America, and never had their domicile in this Province. 3. Because a considerable portion of the testator's estate was not in this Province at the time of his death. 4. Because the order directs the appellant to commit a breach of trust, without affording him any protection. 5. (At the second argument, by permission of this Court,) that the Statute does not take away the rights of the infant grandchildren, or destroy the trusts in the will for their benefit, or authorize or direct the present division or distribution of any property real or personal wherein under the will they have a contingent or other estate or interest. Statement.

A suit was also instituted in the Court of Chancery in the names of three infant grandchildren of the testator,

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not living in the Province, and by Mr. *Becher*, against all the children of the testator, and against the several husbands of his daughters, and some of the testator's grandchildren. The bill, amongst other things, set forth, that by the Royal instructions, the Govenor General was directed to reserve for the Royal assent, or to disallow, any bill of an extraordinary nature and importance, whereby the rights and property of Her Majesty's subjects, not residing in the Dominion of Canada, might be prejudiced. That the petition above stated had not been served on the infant plaintiffs, or infant defendants in the respective suits, nor was any notice given them. And it prayed for an injunction against any act or thing, by virtue of the order of the Court, on the aforesaid petition, or the statute, or the indenture or deed of distribution, and that the indenture of distribution, statute, and order, might be declared void, and that the trusts of the will might be carried into effect.

Statement.

The testator's son, *Charles F. Goodhue*, demurred to so much of this bill as seeks relief in respect of the orders of the Court, as no case is made for relief by the bill, and as the matters thereinbefore specified were adjudicated on at the hearing of the petition.

Some of the other defendants also demurred to the amended bill, on the ground that it made no case for relief.

The Court allowed the first demurrer, giving leave to amend; and disallowed the second.

The plaintiffs appealed against the order allowing the demurrer; and the other demurring defendants appealed against the disallowance of their demurrer.

Mr. *Robinson*, Q.C., Mr. *C. S. Patterson*, Mr. *Anderson*, and Mr. *Moss* for *Becher*, the trustee, and the infant grandchildren, who appealed, contended that the case

might very properly be divided into two branches; first, as to the power of the Local Legislature to pass the Act in question; and second, as to the effect of the Act when passed; at the same time counsel did not desire to be considered as using every argument that could be used on the first point, as the majority of the Court have already expressed a clear opinion in favor of the power or right of the Legislature to pass such Act. 1872. Re Goodhue.

In the first place, when we speak of the Parliament or the Legislature of this Country, we speak of a body in no wise similar to the Parliament of England; there, the power is absolute and uncontrolled, both as to persons and as to matters. No Court in England would think of saying to the Parliament, we will not pay attention to your Act. Here, our Legislature acts under a written charter, and within the limits prescribed by that charter the Legislature is bound to keep. In England, on the other hand, there are no means of testing or resisting the power of the Legislature; but even there it is laid down that the Legislature has no right, whatever its power, to pass Acts contrary to natural justice (*a*). Argument.

The theory in England is, that all power is vested in the Parliament. In discussing this we must consider what the effect was of giving to the various Local Legislatures power to legislate in regard to civil rights. It would not be contended, for instance, that in giving to this Legislature power to deal with property and civil rights, it was ever intended that it should have the power of passing an Act punishing by imprisonment for life for no offence.

In short, certain powers are given by the English Parliament to the subordinate Parliament, and such powers must be subject to natural rights and justice.

(*a*) 1 Kent's Coms. 485 (11th ed.)

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Construing this charter or constitutional grant by this rule we must assume that unless power has been given in express words, this Legislature has no power to take one man's property, and give it to another without consideration.

One of the advantages, or objections it may be, of the English constitution is, that it changes to changing times and circumstances; when, as here, the Legislature acting under a written constitution cannot go beyond it. If, then, we have this restricted constitution, because it is in writing, we should have the corresponding advantage of having the power to keep the Legislature within it (*a*).

Argument.

By the Constitutional Act (sec. 91) power is given to the Local Legislature to make laws in respect of the various matters therein set forth; and the Legislature is given simply legislative, not judicial, powers: the Queen not being represented here, and no second Legislative Chamber being created, we must presume that the English Legislature did not intend to give any power other than to legislate, and certainly not power to do that which constitutional writers say even the English Parliament has not the right to do, that is, to deprive one man of his property and give it to another without an equivalent (*b*). The Legislature in this case, it may be admitted, has the power to pass an Act declaring what shall be the general law as to the tenure of property; but cannot pass an Act like this.

The will in this case gives to the children of the testator only a contingent, not a vested, interest; no persons are entitled until the event happens upon which the interests are to vest—the death of the widow (*c*): *Hanson*

(*a*) Sedg. 175.

(*b*) Sedg. 158, 175; Cooley, pp. 4, 85, 686; Broome's Constitutional Law, 795, note *a*.

(*c*) 1 Jarman on Wills (3rd ed.) pp. 810, 817; Smith's Real Property, 318; Tudor's L. C. R. P. 746.

v. *Graham* (*a*), *Festing* v. *Allen* (*b*). *Martin* v. *Holgate* (*c*), is a direct authority in favour of this construction, there the devise was to trustees to pay the proceeds to the wife of the testator for life, and "after her decease to distribute and divide the whole, &c., amongst such of my four nephews and nieces (naming them) as shall be living at the time of her decease; but if any or either of them should be dead, leaving issue, such issue shall be entitled to their father's or mother's share." Three of the nephews died in the lifetime of the widow, one of them having left a child, who also died before the widow, and it was held that the gift to the children was original, not substitutional, and that this child upon the father's death took a vested interest in the share which, if the father had survived, he would have taken. *Merry* v. *Hill* (*d*), *Re Hunter's* Trusts (*e*), *Re Payne* (*f*). In the last named case, although the will declared that the children should take vested interests at twenty-one, it was still held that the previous words of the will contracted this, and that only a contingent interest was given: *Read* v. *Gooding* (*g*), *Wood* v. *Wood* (*h*), *Bree* v. *Perfect* (*i*), *Phipps* v. *Ackers* (*j*), *Bythewood* vol. ii., p. 669, *Preston* on Estates, vol. i., p. 76.

Argument.

Assuming that this is a correct construction of the will, the next important point to be considered is, as to the rights of the grandchildren, and what is to become of their interests; for in the event of this Act being carried into effect, and the whole interests are now vested in the children, the grandchildren really take nothing, *Earl of Shrewsbury* v. *Scott* (*k*). And here it may be well to note the effect of an erroneous recital in the Act of Parliament, *Regina* v. *Haughton* (*l*), and *Lord*

(*a*) 6 Ves. at 248.
(*b*) 12 M. & W. 279.
(*c*) L. R. 1 L. H. 175.
(*d*) L. R. 8 Eq. 619.
(*e*) L. R. 1 Eq. 295.
(*f*) 25 Beav. 556.
(*g*) 21 Beav. 478.
(*h*) 35 Beav. 587.
(*i*) 1 Coll. 128.
(*j*) 3 Clk. & F. 702.
(*k*) 6 C. B. N [illegible] 222.
(*l*) E. & B. 501.

1872. Re Goodhue. *Cockburn*, at page 157 of the *Earl of Shrewsbury's* case, illustrates the effect of an Act of Parliament, and lays it down distinctly that it cannot affect the interests of parties not named in the Act.

The preamble of this Act, if our construction of the will is correct, contains an incorrect recital, in stating the petitioners' rights. Suppose a petition presented to the Legislature setting forth that the petitioners owned a certain lot, and desired to obtain partition of it; and that the Legislature passes an Act partitioning it amongst the parties; and it afterwards turns out that they really never had owned the lot, the Act could not have the effect of vesting the property in the petitioners.—*Lucy* v *Levington* (*a*); *Dwarris*, 651.

Argument. Then again, this Act professes to deal with personal estate, the property of these infants who are resident out of the Province. Now, the domicile of the parties interested governs, and not the *situs* of the property, and therefore this was clearly beyond the power of this Legislature; and any one of these infants may yet become entitled to the whole residuary estate.

The legatees in England might have obtained administration there, and in that case no portion of the property in England could have been brought here. This petition has never been served on these infants, and the trustees here cannot represent them; for even in a suit in Equity where the trust estate it assailed the trustees, it has been held, cannot represent the *cestuis que trust*, *Read* v. *Prest.* (*b*)

Mr. *J. Hillyard Cameron*, Q.C., and Mr. *Blake*, Q.C., for the defendants *Goodhue*, *Watson*, and others, contended that the matters in contest might be considered under

(*a*) 1 Vent. 175. (*b*) 1 K. & J. 183.

four distinct heads: the constitutionality of the Act—the rights of the children—the effect of the Statute on those rights; and the question of domicile of the parties, and of the property. 1872. Re Goodhue.

On the subject of the constitutionality of the Act there is no difference of opinion on the part of the Court; and on that point it will be accepted as settled law that our Legislature had the power to exercise the right to deal with the property of the testator in the manner that it had been dealt with by the Act in question.

In the several States of the Union each State acted under its own written Constitution, declaring distinctly the ext nt to which the legislative and judicial powers were to be exercised; this being so, it renders any decisions which have been come to in that conntry totally inapplicable either to England or Canada. In *Sedgwick* on Statutory and Constitutional Law, pp. 150-4; 157, 161-4: 172, 174, 177, 184 and 191, is pointed out the distinctions between the several Legislatures of the individual States; and the ground of distinction between the legislative and judicial powers. Argument

The 18th section of the Union Act confers on our Legislatures power as to certain subjects to the same extent as held by the English Parliament; and the only authority the judiciary of each Province have to act is, to declare any Act passed by the Legislature, not binding in consequence of the Local Legislature having gone beyond the powers so conferred; but there is no such separation of the judicial and the legislative functions as sometimes appears in the States of the Union. Here nothing is shewn that would justify the Court in saying that the Legislature went beyond their powers in passing the Act in question, and the Court will be guided by the same rules in construing a private, as govern them in construing a public Act.

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They contended that the language used in the latter part of the will gave to the children vested interests—though not vested in possession—subject to be defeated however, by the death of any of them before the death of the widow. Here nothing was kept back from the Legislature as the will is set forth at length in the petition to Parliament, as also the names of all persons interested under the will; the Act, therefore, did not deal with the rights of any one not known to them; and *Beckford* v. *Wade* (*a*), shews that infants will be included in, and bound by the words of a statute, if the language used is sufficiently extended to include them.

Here, assuming the construction to be that the statute had some effect, the Court might act in a summary way as was done. Notice was given to the infants by serving the trustee: he represented the infants in opposing the petition to the Legislature, and he represents them now in appealing from the order pronounced by the Court of Chancery. Although the judiciary of the country will properly take notice of any attempt to legislate beyond the written Constitution, and will decide that such attempt on the part of the Legislature is of no effect; still the distinction is clear as to the power of the Legislature within its recognized limits. Once determine that the Local Legislature had power to act in the matter, and the Court will not inquire as to the advisability or propriety of the particular Act.

Argument.

The Constitutional Act declares that our constitution is similar to that of England. There can be no doubt that the English Parliament would have had the power of passing the Act in question; before Confederation, that power was vested in the Legislature of the then Province of Canada, and being a matter respecting property and civil rights of a local character, is not

(*a*) 17 Ves. 87.

such as would belong to the Dominion Parliament, and unless the power to pass such an Act is vested in the Local Legislature it exists nowhere; and although it might have been prudent to have introduced a clause preventing the passing of *ex post facto* acts or the interference with vested rights, still, its not being there, affords no ground of argument for saying that the Legislature has not the power to deal with this matter in the manner it has. 1872. Re Goodhue.

It is contended by the other side, that the grandchildren are not bound by the Act: they not having been expressly mentioned in it. The Interpretation Act however shews that the Act must be construed in the manner we contend for; that is, that the property passes to the parties named; any other construction would be insensible.

The proposal of the appellants is to adopt a construction that will render the Act perfectly nugatory, The Court is bound to construe it *ut magis valeat quam pereat.* The Court is bound to adopt of two constructions that which will accomplish something, in preference to that which will accomplish nothing. Did the Legislature intend that a petition should not be presented, that a division should *not* take place? Surely the reverse; then the Act must be construed so as to allow of the partition and division. Argument.

As to the domicile, they contended that the domicile of the trustee would govern as to that, and he would sufficiently represent the persons interested therein to warrant proceedings being taken in respect of it. The argument of the other side would go to prove that a Statute of Limitations could not be passed where parties outside the jurisdiction were interested under it. This is clearly a civil right within this Province which the British North America Act gave the Legislature the

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right to deal with; the Legislature has dealt with it, and the Court is now called upon to decide as to the constitutionality of their action.

January 8th, 1873.*

DRAPER, C. J. OF APPEAL.—These three cases have been twice argued; once in June, 1871, before myself, the Chief Justice of Ontario, *Morrison* and *Wilson*, JJ., *Mowat*, V. C., and *Gwynne* and *Galt*, JJ. The Court met again in January, 1872, for the purpose of giving judgment. The Chief Justice of Ontario was then absent on leave on account of the state of his health. The other Judges who had heard the case stated the conclusions at which they had arrived, and it appeared they were equally divided in opinion. As neither the Chancellor, the Chief Justice of the Common Pleas, nor Mr. Vice Chancellor *Strong*, had heard the cause, it was, with the assent of all parties ordered that there should be a second argument on Monday, March 11th. On that day all the Judges of the Court attended, except the Chief Justice of Ontario. who was absent for the same cause as before. Counsel were then heard, and the case stood over for judgment. [Here His Lordship recapitulated the facts as above set forth.] The first question arises on the first reason of appeal against the order made upon the petition, viz., that it was beyond the power of the Legislature to pass this Statute. If the Act can be shewn to be a dead letter, the order founded upon its validity falls lifeless and inoperative. It required an Act of the Legislature to alter a will after the death of a testator, which will was at the time of its execution made in strict accordance with the law of the land, and in exercise of his rights and power; for it is not questioned that he had sufficient discretion to make a will, and that he exercised his own free will. He was under no legal incapacity, and it stands admitted that before this Act was passed the

Judgment.

* For the purpose of facilitating further proceedings, this case is reported before several others previously disposed of.

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the will was operative, the estates and interests created and given, vested in the trustees and in the beneficiaries named; and the very deed by which the children of the testator agree to defeat, as far as in them lies, the accumulation directed by the testator, as well as certain contingent interests given by him to his grandchildren, provides that it, the deed, shall be of none effect unless the Act desired is obtained from the Legislature. The life estate of the widow in the mansion and premises in which the testator resided rests on the will alone; for though the Act confirms the indenture of 26th September, 1870, it confirms nothing else, and the indenture does not profess to deal with the devise to her. And further, I cannot refrain from remarking, that to every owner of lands or goods in the Province of Quebec, who has a right to alienate the same in his lifetime, is given by the Statute of 14 George III., chapter 83, section 10, the right to devise or bequeath the same at his or her death; and that such right was virtually, though not in words, re-enacted and confirmed by the first statute of Upper Canada, which made the law of England the rule for the decision of all matters of controversy relative to property and civil rights. This right the testator had, and he exercised it in a legal manner.

Judgment.

The conduct of the children, beneficiaries under this will, is not marked with that deference and respect for the wishes and intentions of their deceased father, which he most probably anticipated and relied upon, and but for which reliance he might have made the disposition of his property in such form as to ensure effect being given to what he might express.

He was absolute owner of a large amount of property. By law, he, and he only, could transfer it, either by his acts while he lived, or by his will to take effect after his death; by which latter means he might either fulfil, or disappoint, or qualify the *spem successionis* which blood relationship or kindred might create.

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Now, whether by his will or by intestacy (leaving the disposition, regulated by law, to take effect), on his death, the rights which up to his death the owner of private property had, are transferred, and any one who prejudices such rights or interferes with their enjoyment, is a wrong-doer to the transferee, as by similar acts he would have been to the prior owner in his lifetime.

These are mere truisms, but they have their application to the present case.

The testator intended that his residuary estate should accumulate during the life of the widow. He intended, also, that the children of any of his children who died in the life-time of his widow should take their parents' share, and he provided for both these matters in language as clear as that used by him in making gifts to his children. But his intention evidently has met neither their wishes nor their expectations, and, therefore, the deed of 26th September, in which there are no other considerations suggested than these—because the residuary estate exceeds $300,000, because "it is desirable" that the children should get their shares immediately rather than that they should wait for the period fixed by the testator, and because they executed that deed to secure to each child such immediate possession by an immediate division of this large residue, they mutually agree on a mode of division which shall bind them; and because it was "doubtful" whether their arrangements could be legally assented to and carried out by the trustees, by reason of the coverture of several of the parties, and also from the insufficiency of the powers of the trustees under the will, they agree to apply to the Legislature to confirm *their* arrangements, and to compel the trustees to carry them out in place of those stated in the will; in other words, to abrogate the disposing power of the testator after he had unequivocally exercised it, and to take away the possibility which the

Judgment.

will had created in favor of grand-children; in short, to deprive him of powers which the law had given him. 1872. Re Goodhue.

The concurrence of the widow is really of no importance; for, in fact, the deed does not prejudice any of her interests arising under the will; on the contrary, it seems designed to secure them to the fullest extent. The promoters of the Act only sought to have their interest given to them in possession.

The Legislature have passed such an Act as the parties applying desired. They have, in effect, altered the testator's will—not to supply a defect, which rendered it difficult or impossible for his trustees to carry his intentions into effect, but—to substitute an intention contrary to what he has expressed, by rendering the accumulation impossible, and making the division immediate which he directed should await the death of his widow.

Judgment.

It would be indecorous to express what it would be fitting for a Court to express, if such changes had been procured in the testator's lifetime, by or through any fraud or imposition upon him. It is now, if a valid Act, the Act of the highest authority—an Act of our Legislature, which has received the assent of the head of the Local Executive on behalf of the Governor General. It cannot, however, be disrespectful to quote the language of Lord Tenterden: "It is said, the last will of a party is to be favorably construed, because the testator is *inops consilii*. That we cannot say of the Legislature; but we may say that it is '*magnas inter opes inops*'" (*a*).

No English authority has been cited, nor do I think there is any, which would warrant our denying the power to pass such an Act. There may be cases in

(*a*) Surtees v. Ellison, 9 B. & C. 751.

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which the decisions look in the direction of neutralizing the enactment by construction, or in which a long series of decisions have, as it were, fined away the force of the language used, so as apparently to disappoint the intention of its framers; but they do not apply here.

Among the classes of subjects with regard to which exclusive power is given to the Provincial Legislatures to make laws, we find "property and civil rights in the Province," and "generally all matters of a merely local or private nature in the Provinces." I cannot say that the present is not a matter belonging to one or other of these classes.

Nor do I think that we can derive any help from American authorities, though there is much to be found full of valuable suggestion to those who wield the Legislative power. For, as in England, it is a settled principle that the Legislature is the supreme power, so in this Province, I apprehend that within the limits marked out by the authority which gave us our present Constitution, the Legislature is the supreme power. It is on this principle that private Acts of Parliament are upheld as common modes of assurance, being founded upon the actual or implied assent of those whose interests are affected.

Judgment.

But this power of binding private rights by Acts of Parliament is, as Sir *W. Blackstone* suggests, to be used with due caution and upon special necessity: as to cure defects arising from the ingenuity or the blindness of conveyancers, or from the strictness of family settlements, or in settling an estate, as where the tenant of the estate is abridged of some reasonable power or to secure the estate against the claims of infants, or other persons under legal disabilities. In these or the like cases "the transcendent power of Parliament is called in to cut the Gordian knot." The restoration of Charles II. gave rise to a good deal of this private legislation, and at the close of the session

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(13 Ch. II, 1661) His Majesty observed on the unusual number of private bills, "But I pray you let this be done very rarely hereafter. The good old rules of the law are the best security. And let not men have too much cause to fear that the settlements that they make of their estates shall be too easily unsettled *when they are dead*, by the power of Parliaments."*

"As to what has been said as to a law not binding if it be contrary to reason, that can receive no countenance from any Court of Justice whatever. A Court of Justice cannot set itself above the Legislature. It must suppose that what the Legislature has enacted is reasonable; and all, therefore, that we can do, is to try to find out what the Legislature intended. If a literal translation or construction of the words would lead to an injustice or absurdity, another construction possibly might be put on them, but still it is a question of construction, and there is no power of dispensation from the words used." (*a*)

Judgment

Mr. *Sedgwick*, in his learned and admirable treatise upon Statutory and Constitutional Law, argues, and I think unanswerably, that the Judiciary have no right whatever to set aside, to arrest, or nullify a law passed in relation to a subject within the scope of legislative authority, on the ground that it conflicts with their notions of natural right, abstract justice, or sound morality." (*b*)

Again, Chancellor *Kent* (*c*) "Where it is said that a Statute is contrary to natural equity or reason, or repugnant, or impossible to be performed, the cases are understood to mean that the Court is to give them a reasonable construction. They will not, out of respect and duty to the lawgiver, presume that every unjust or absurd consequence was within the contemplation of the law; but if

(*a*) Per Lord Campbell, in Logan v. Burslem, 4 Moo. P.C. C. p. 296.
(*b*) P. 187.
(*c*) 1 Com. 408.
* Parl. Hist., vol. iv. p. 247.

1872. Re Goodhue. it should happen to be too palpable to meet with but one construction, there is no doubt in the English Law of the binding efficacy of the Statute."

A late British writer has remarked, it may be argued, that a second Chamber is considered a valuable element in the Constitution, (in the mother country), and that as to its importance he makes no dispute. "On the principle of a division of labour it is wanted for the despatch of business, and it is also required for the interposition of discussion and delay between the hasty introduction of bills and the final act of legislation."

In regard to the absence of a second chamber, it may be further observed, so far at least as estate or private bills are concerned, that as such bills involve ordinarily no mere party political considerations, all those whose interests are or may be touched have a right, in the first Judgment. place, to expect a careful examination of their contents on the part of the Provincial Executive—and a withholding of the Royal assent if it is found that the promoters of the bill are seeking advantages at the expense of others whose interests are as well grounded as their own. And further, if from oversight or any other cause, provisions should be inserted of an objectionable character, such as the deprivation of innocent parties of actual or even possible interests, by retroactive legislation, such bills are still subject to the consideration of the Governor General who, as the representative of the Sovereign, is entrusted with authority,—to which a corresponding duty attaches,—to disallow any law contrary to reason or to natural justice and equity. So that, while our legislation must unavoidably originate in the single chamber, and can only be openly discussed there, and once adopted there cannot be revised or amended by any other authority, it does not become law until the Lieutenant Governor announces his assent, after which it is subject to disallowance by the Governor General.

1872.

Re Goodhue.

I think nothing is to be gained by a theoretical distinction which has been suggested between the authority of the Legislature to pass laws upon certain subjects, and the right to exercise that power as they may deem fitting. Whether it be called a power or a right, it comes to the same thing; since though our Legislature is limited by the constitutional Act to certain defined subjects, the Act imposes no limit to the exercise of the power on those subjects. It does provide checks, for the Lieutenant Governor may withhold the necessary assent or the Governor General may disallow Acts to which his subordinate has assented; but if these powers are not exercised, however self-evident to other minds the propriety or duty of such exercise, and if the new law be within the class of subjects committed to the Provincial Legislature, I know of no authority in Provincial tribunals to refuse to give it effect, applying to its language the same rules of construction that are applicable to any other Statute passed by competent authority.

Judgment

It was observed during the argument that although the Imperial Parliament possessed an entire supremacy in making laws, still that exalted authority could pass no law which was contrary to natural justice. There are *dicta*, no doubt, which apparently sustain that proposition, as that of *Coke*, in Dr. *Bonham's* case; of *Hobart*, C. J., in *Day* v. *Savage;* and the remarks of *Holt*, C. J., in *The City of London* v. *Wood*. Sir *William Blackstone*, however, puts this construction upon them: "If the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it, and the examples usually alleged in support of this sense of the rule, do none of them prove that where the main object of a statute is unreasonable, the Judges are at liberty to reject it for that reason, for that were to assert the judicial power above that of the Legislature." The spirit of this passage applies to the present question.

1872.

Re Goodhue.

Very recently in the case of *Phillips* v. *Eyre* (*a*), Mr. Justice *Willes* says: "A confirmed Act of the Legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament" (*b*).

Again, in *Smith* v. *Brown* (*c*), *Blackburn*, J., observes: "My doubt, however, has been whether the words used by the Legislature were not such as to shew that the Legislature have enacted, in a way that I think rash and careless, but still have so enacted." I refer also to Lord Tenterden's remarks, in *Doe* v. *Brandling* (*d*).

Judgment.

Conceding to the fullest extent that the powers of the Legislature of Ontario are defined and limited by the British North America Act of 1867, I conceive that within those limitations, Acts passed in the mode described by that Statute are as to the Courts and people of this Province supreme. This Act is within its defined powers, for it is of a local and personal nature, and relates to property and civil rights.

We come secondly to the construction and effect of the Act.

It begins by reciting a petition in which the widow of the testator, his six children (being a son and five daughters), together with the husbands of the daughters and the son's wife join. In the petition the will is set out at length. The petition goes on to state that after payment of the legacies and due provision made

(*a*) L. R. 6 Q. B., p. 20.

(*b*) See Mr. Justice Boothby's case, in 2 Todd's Parly. Government, at p. 762.

(*c*) L. R. 6 Q. B. 729.

(*d*) 7 B. & C. 660.

for payment of the annuities, taxes, and premiums of insurance, and the purposes relative to the six indentures, the residuary estate amounts to more than $300,000; that it is desirable that the children should respectively enter into the possession and enjoyment of their respective shares, and that this should not be postponed until the decease of the testator's widow. That to secure to each of the children the immediate possession and enjoyment of their respective shares in the residuary estate, exclusive of their said reversionary interest in the lands specifically devised for life, and of the sums to be retained by the trustees, the petitioners had entered into a deed dated 26th September, 1870. A copy of that deed is set out in the schedule to the Act, and the prayer of the petition is, that an Act may be passed to confirm the indenture and the several provisions thereof, and to effectuate the same. 1872. Re Goodhue.

The indenture recites the death of the testator, and his will as above stated; that it is desirable that the testator's children should respectively enter into the possession and enjoyment of their shares, and that they have agreed to enter into and execute the indentures "in order to secure to each of the children of the said testator *the immediate possession and enjoyment of their respective shares* of the said residuary estate," and they mutually covenant, (1) to set apart a sum to secure the widow's annuity, (2) a sum to secure the annuity to the testator's brother's widow, (3) another sum to secure the payment of the taxes and insurance, (4) a sum to secure the provision in the will as to the six indentures, (5) that the residue of the estate shall be divided into six separate shares, settling a method to be pursued for this purpose, (6) that when the several allotments have been determined, the respective shares shall be duly conveyed and transferred unto each of the six children, their heirs, &c., (7) that a similar division of the sums reserved shall be made as soon as the objects of the Judgment.

1872.

Re Goodhue.

reservation have been attained; and (8) "inasmuch as it is doubtful whether the hereinbefore-agreed-upon arrangements for the settlement and distribution by the said widow and children of the said estate of the testator, can be legally assented to or carried into effect by reason of the coverture of several of the said parties hereto, and also from the insufficiency of the powers of the said trustees under the said will," they agreed to apply to the Legislature of this Province "for an Act to confirm these presents and for such power as may be incidental thereto or necessary in the premises, or for such Act in the premises of such a nature and containing such clauses, provisions, and conditions as to the Legislature may seem meet." Provided that the indenture should have no effect until such an Act is obtained.

Judgment.

Upon this petition, and with the will and indenture thus before them, the Legislature passed this Act. By the first clause it is enacted "the said indenture of 26th September, A.D. 1870, in the schedule to this Act set forth, and marked A, is hereby confirmed and declared to be valid, and the said trustees of the estate of the said (the testator), are hereby authorized and required to carry into effect the several provisions thereof, and in so doing are hereby saved harmless and indemnified in the premises." The third clause authorizes a summary application to the Court of Chancery "in respect of any matter for carrying into effect the *provisions of the said indenture* connected with the management of the trusts of the said will, or in the disposition of the proceeds of the said trust estate or of any part thereof." The Act however contains no clause saving any rights, though, as Mr. *Cruise* says (*a*), such a clause is usually inserted in a private Act.

I understand the appellants' contention to be, that the deed is framed upon an assumption that the testator's

(*a*) Vol. 5, sec. 43.

children take under the will an estate vested in interest, and that nothing but the distribution is postponed until the death of the widow. And this contention is (partly at least) founded on the absence of any indication in the deed of doubt, that the testator's children who survived him took a vested interest at his death. I should agree that this assumption is warranted by the deed, if there were added to it, that it was subject to be divested upon the contingency of the death of any one or more of the children in the lifetime of the testator's widow: a contingency which, with the consequence annexed in the will to its happening, could not possibly have escaped the notice of any reader of ordinary intelligence. And when the framers of the deed used the phrase, "the respective shares of the children," connected with their desire to obtain immediate possession, and not to defer it until the death of the widow, there is no reasonable doubt that they included all the children who survived the testator, and were living at the date of the deed. At the same time, the clearly expressed desire to have an immediate distribution, instead of awaiting the widow's death, leads to the conclusion that they understood that there was a contingency, which, if it happened, would destroy or divest the interest they supposed they did take during the life of the widow. Still their agreement and petition asked only that which the will would have given, if the widow had died before its date.

1872.

Re Goodhue.

Judgment.

It is further argued that both the deed and the petition were founded on a mistake; that the testator's children took nothing under the will until the contingency of the widow's death happened; that the statement in the deed and petition to the effect, "that the shares of the testator's children in the residuary estate are considerable," is untrue; and that the petition does not ask for more than the confirmation of the deed, and that the Act gives no more. That the Act vests nothing

1872.

Re Goodhue.

in the testator's children because the deed is based upon a false assumption, and the Act cannot make that assumption true. That the whole object of the deed and the effect of the Act in making it valid, was to remove the difficulty arising from the coverture of several of the parties to the deed, and from the insufficiency of the powers given to the trustees to enable them to transfer the estate to the parties assuming to be entitled, sooner than was permitted by the will. In other words, that the conveyancer who framed the deed of 26th September, 1870, made a mistake in stating the objects and purpose of the parties, in consequence of the false assumption of the interests of the children under the will, and the Act has no other effect than to make the deed (whatever may be its proper legal construction) a binding and valid instrument as to the parties to it who were under coverture, and to enable the trustees to convey the vested estate to the parties thereto. And that as this deed and Act would destroy the possible interests of the grandchildren if effectual, the deed is not made valid against the grandchildren because they were not parties to it, nor the Act because they are not mentioned in it as coming within its operation; although it should not be forgotten that there is no saving clause to protect their contingent interests.

Judgment.

Upon the absence of a saving clause I must refer to the case of *Stowell* v. Lord *Gouch* (*a*), where remarking on the Statute of Fines (*b*) it is said: Forasmuch as the Legislature had made the provision general, viz., "that the fine shall be a final end, and shall conclude as well privies and strangers: if the Act had stopped there it would have bound as well infants, *feme coverts*, and the others named in the exception as people of full age." In that Act, besides the exception, there was also a

(*a*) Plowd. 369. (*b*) 4 H. 7, ch. 24.

saving clause. Here the Statute makes the deed valid without exception or saving clause. 1872.

Re Goodhue.

It must be borne in mind that we are not now considering the power of the Legislature, but the effect of what the Legislature has done, and the construction of the deed which they have declared valid, and have confirmed.

There is no intermediate life or other interest interposed between the death of the testator and the period of distribution of the residue: the gift was to *all* his children, though the transfer was deferred until his widow's death. I stated, at the time the second argument was directed, my opinion that the words giving the residue of the estate not otherwise disposed of "in trust for all the testator's children who should be living at the death of his wife," was in effect an absolute gift, though there was a contingency which might defeat it. I will not now uselessly take up time in explaining the grounds on which I adopted that conclusion, nor examine the arguments with which Mr. *Cameron* vigorously supports it. I have gone through the numerous cases cited on both sides, as well as some that were not cited, and have arrived at the result that I cannot maintain my first opinion, but that the testator's children took only contingent interests, while I am still somewhat unsettled by the case of *Pell's* Trusts (*a*), which brought me to my first conclusion. See also *Penny* v. *Clarke* (*b*), which sustains my present view. To paraphrase the language of Sir *William Grant*, in *Skey* v. *Barnes* (*c*), the surviving the widow was "part of the description of the legatees, among whom the division was to be made;" only those who survived her were entitled to receive a share. *Martin* v. *Holgate* (*d*) is also

Judgment.

(*a*) 8 Jur. N. S. 207.
(*b*) 6 Jur. N. S. 307.
(*c*) 3 Mer. at p. 342.
(*d*) L. R. 1 H. of L. 175.

1872.

Re Goodhue.

an authority to shew that the interests of the children were contingent. The six indentures referred to in the will and deed were apparently intended to give an intermediate support and aid to the six children during the widow's life, and, having made that provision, the testator directed an accumulation of the residuary estate until her death consistent with the first declared trust in the will, that is, for conversion and collection, and for the investment of the proceeds.

The deed is next to be considered which recites the will, and that, after payment of the two legacies of $2,500 each and providing for the payment of the annuities and other specific charges, and for making good any loss that might arise in the widow's lifetime in regard to the moneys mentioned in the six indentures of the 8th of December, 1869; and that "the residuary estate is of large value, amounting to more than $300,

Judgment

000, and the respective shares of the testator's said children are considerable, and it is desirable that they should respectively enter into the possession and enjoyment of the same, and that this should not be postponed until the decease of the said widow of the testator," and that the several parties to the indenture have agreed to execute it "in order to secure to each of the children of the testator the immediate possession and beneficial enjoyment of their respective shares in the residuary estate," exclusive of their reversionary interests in certain lands specifically devised for life to testator's widow and sister-in-law, and of certain sums to be retained by the trustees (1) to secure payment of the annuity to the widow; (2) to secure the annuity to testator's sister-in-law; (3) to pay the taxes and insurance in respect of the mansion-house; (4) to provide against loss in respect of the six indentures; and they covenant with each other and their respective heirs, &c., that certain sums, part of the trust estate, shall be set aside and be held by the trustees for those purposes, and the

residue of the estate shall be divided into six shares specifying how such division shall be made, and that one share shall be allotted (providing how, if any difference arises between them); and, after such division and allotment, the respective shares shall be conveyed and transferred to each of the children in severalty, providing as the will provides that the share allotted to each daughter shall be free from the control of a present or future husband. They make a similar provision for allotment, division, and transfer, as to all or any of the sums which the trustees were to retain as above stated, as the occasion arises, and then comes paragraph No. 8: "Inasmuch as it is doubtful whether the hereinbefore-agreed-upon arrangements for the settlement and distribution, by the said widow and children of the said estate of the said testator, can be legally assented to or carried into effect by the said trustees by reason of the coverture of the said parties hereto, and also the insufficiency of the powers of the trustees under the said will, it is hereby further agreed that an application shall be made to the Legislature of the Province of Ontario for an Act to confirm these presents, and for such power as may be incidental thereto or necessary in the *premises*, or for such Act in the premises of such a nature and containing such clauses, provisions and conditions as to the Legislature may seem meet." The whole is subject to a proviso that the indenture shall be of no effect unless such an Act can be obtained.

1872.

Re Goodhue.

Judgment.

I think it quite probable that the parties to this deed did suppose that, subject to the legacies and other special dispositions contained in the will, the testator's six children had a vested interest in this residuary estate. I have understood they had the advice of eminent counsel to that effect; and, I have already said, I was of that opinion until after the second argument. In the Legislature at the time this Act was passed, there were many members of the legal profession, some of them of high standing

1872.

Re Goodhue.

and reputation, and I have not heard that any one of them noticed that the framers of the bill had treated the gift of the residue as being or conferring a vested interest, and not an interest contingent on surviving the widow. If such was the view adopted or assumed without reflection, all that was wanted to fulfil the desire of the six children was, in some form to annul the direction in the will, that the residue of the estate not otherwise charged or disposed of should be accumulated as long as the widow lived. An Act declaring that the contemplated division should be made without delay, with a saving as to the widow's estate and interest under the will, and saving all other interests given or provided for by the will in such of the testator's lands and property as were not intended by the will to form part of the residuary estate, and were to be secured or provided for under the indenture, would substantially have met and fulfilled the prayer of the petition.

Judgment.

Taking the indenture as a whole, I have no doubt that the leading object of the parties thereto was that an immediate division of the $300,000 or upwards, called the residue, should be made. The children who survived the widow would, under the will, take absolutely, and if all of them survived her, none of the grandchildren would take anything. The real obstacle to the immediate possession of the children is the positive direction in the will that the trustees should invest and accumulate the residue not otherwise disposed of by the will during the widow's life, and they desired to substitute immediate possession for an accumulation during that uncertain period. This was their motive for entering into the indenture, and the fifth paragraph of it, I think, conclusively shews this by providing for and by directing the immediate division of "the trust estate" into six shares, one of which should be allotted to each of the children. The two following paragraphs, as well as the first four, are ancillary or subordinate to the in-

tention to secure immediate possession and enjoyment. I do not think that intention was founded upon, or was meant to be limited by, any consideration whether the gift to them, as expressed in the will, was vested in interest liable to be divested or was contingent. The eighth paragraph contains a recital to the effect that, as some of the parties are *femes covertes*, they cannot confer valid authority on the trustees, nor legally bind themselves; and further, that the powers of the trustees derived from the will are insufficient to carry the intention of the parties into effect, and an agreement to apply to the Provincial Legislature for an Act "to confirm these presents, or for such power as may be incidental thereto or necessary in the premises, or for such an Act in the premises of such a nature and containing such clauses, provisions and conditions as to the Legislature may seem meet.

1872. Re Goodhue.

They did petition, and an Act was passed, reciting the petition that an Act might be passed "in order to confirm the said indenture, and the several provisions thereof, and to effectuate the same; that it was expedient to grant the prayer of the said petitioners," and enacting that the indenture in the schedule to the Act set forth was "confirmed and declared to be valid," and the trustees "are hereby authorized and required to carry into effect the several provisions thereof, and, in so doing, are hereby saved harmless and indemnified in the premises."

Judgment.

On behalf of the appellants, it is insisted that the petitioners took for granted that the interests of the testator's children under the will are vested, though they were not entitled to immediate possession, and that all they asked for was, to grant them such immediate possession and a corresponding transfer from the trustees, and to have a confirmation of their deed, by a removal of the doubts expressed in the introductory

1872.

Re Goodhue.

part of the eighth paragraph, as to the incapacity of some of the parties to covenant, and as to the power of the trustees. It was further argued that the Act has no other effect than to remove these doubts, because for any other purpose the parties considered the deed itself was sufficient. The object of the contention, if I understand it rightly, was to establish that the Act and deed together had, and on the true construction were meant to have, no effect except upon vested interests, and therefore, if no vested interests were created by the will, the six children were left in the same position as if neither deed nor Act existed.

Judgment.

Waiving any question as to the correctness of the assumption regarding vested interests, I have not been able to satisfy myself, that, whether the interests were vested or contingent, makes any real difference as to the question before us; if the former, the death of any of the children, living the widow, divested that interest; if the latter, the child so dying never acquired any interest. The one event, death in the lifetime of the widow, destroyed all possibility of beneficial enjoyment, while, if the widow died leaving all the children her surviving, each of them became *absolutely* entitled to an equal share The mistake in law as to vested interest would not affect the right of any child who survived the widow. Moreover, if neither of the daughters of the testator had been under the disability caused by marriage, or any other disability, and had executed the indenture, the object of the parties to it, viz., the entering into immediate possession and enjoyment without waiting for the event, which by the will was a condition precedent, would have been equally unattainable without the Act, or some Act of the Legislature.

It is argued, the children have got all they asked for, although they have not got secured to them "the immediate possession and enjoyment of their respective

shares of the residuary estate," exclusive of the lands specifically devised and of the sums of money retained, to fulfil some of the testator's behests. 1872. Re Goodhue.

The appellants' contention appears to me to involve the following points:—

1. That the indenture was based on an assumption that the interests of the six children under the will were vested interests.

2. That the Act was passed on this assumption, the Legislature intending only to give the children immediate possession of that which the will had vested in them, and that, for this purpose, they declare the deed valid, notwithstanding the coverture of some of the parties; and they authorized the trustees to divide the vested interests into equal shares, as the will directs.

Judgment

3. That the children took only contingent interests, and that such interests were neither in the contemplation of the parties to the indenture nor yet of the Act.

4. That the preamble of the Act, setting forth only the statements of the petitioners, refers to such interests as they erroneously assumed that the testator's children took under the will; and the enacting clauses go no further.

Therefore, the decree, which directs the division of the estate, is wrong, because it deals with, and disposes of interests which, under the will, were contingent, as if they came within the provisions of the Act which relate to vested interests only.

I cannot yield to this contention, although I have adopted the conclusion that the interests of the children

1872.

Re Goodhue.

under the will were contingent, and, even though they were advised to the contrary, I cannot find sufficient reason for holding that this mistaken view of the law had any great weight as a consideration for their mutual covenants. If they had reasoned thus, that their shares being actually vested interests, there was less objection to asking for immediate division and transfer, since the postponement was only for the purpose of accumulation, I should expect to find some reference to this as an excuse for their desire to change the character of the gift made to them by the testator, whereas the deed does not advance anything to lead to the construction that such a thought influenced them in entering into the covenant. My inference is, that they considered the children had, in the event of their surviving the widow, a gift subject to no limitation, though liable to be defeated by that contingency, which happening, there was an immediate absolute gift to the children of such children of the testator as it affected, so that they might as reasonably be trusted to make proper use of the "residue" before the widow's death as after, and were at least as capable as the testator could be of doing what was best for their own children. They felt it to be very tantalizing to wait for an indefinite period for the full enjoyment of this "considerable" sum, and strongly desired immediate absolute control over it to the prospect of the residue with accumulations. And I believe they executed the indenture and petitioned the Legislature mainly, if not exclusively, to get that control. The giving validity to the covenants of married women and the enlargement of the powers of the trustees, however indispensable, were only ancillary to this intention.

Judgment.

This plainly appears from the indenture itself. Concede that they thought the gifts to them were vested in interest, it is quite as certain that they knew they were not entitled to present possession under the will; nay, that some, or even all of them, might never obtain actual

possession. I cannot treat the recital in the eighth paragraph of the indenture, which in terms relates only to the invalidity of a married woman's covenant and to the insufficiency of the powers of the trustees under the will to defeat its express limitations, as sufficient to render nugatory the leading intention of the parties to the indenture. Such a construction appears to me at variance with the old canon, *Benigne sunt interpretationes faciendæ ut res magis valeat quam pereat et verba intentioni non e contra debent inservire.* This contention in support of the appeal seems directly to contravene the maxim. 1872. Re Goodhue.

What difference did it make to the petitioners for immediate possession and enjoyment, whether the will gave them a vested or a contingent interest? They wished to change the conditions attached to the gift. Both in the indenture and petition they stated the will as it was, and did not profess to construe it. Their prayer was, that the indenture might be confirmed. The Act, in the briefest terms, did confirm it, in its entirety, and authorized and required the trustees to carry into effect the several provisions thereof. Judgment.

I cannot construe the words, "the respective shares of the testator's children therein" as asking only to have the immediate possession and enjoyment of "shares vested in interest." Such a construction is, to my mind, giving a stone, when bread is asked for. I think they used the word "shares" in the sense in which the testator used it when he mentioned "equal shares" in creating the trust for their benefit. The word designates the portion of the residue each child was to have, not the time when the interest in such portion was legally to vest; other words regulate that. I cannot agree that the word "shares" is to be construed so that, if the shares were not vested the indenture and the Act would have no other operation than to transfer the residue from

1872. Re Goodhue. the hands of the trustees named in the will into those of the children, but upon the self-same trusts as are set forth in the will in relation to the residue.

I treat the word "shares" as meaning such a portion of the "residue" as the will would have given each child who survived the widow; they sought the beneficial enjoyment of those shares at once as if her death had happened.

Judgment. But it has also been urged that the established principles of construction, especially in respect to private Acts, are adverse to the opinion I have formed as to the effect of the indenture and the Act of the Legislature taken together; and that those principles forbid the Court from depriving the grandchildren by implication (as it is not to be denied, that they are not named in the indenture, and some of them are not before the Court), of the interests to which, on a given event, they would be entitled under the will, especially in the absence of any clearly expressed provision to that effect in the private Act. It is said, and I believe correctly, that no English case can be found in which such an interest as the will gave to the grand children has been held to be defeated without express words. But it might be probably said with equal truth that in modern times British legislation affords no Act altogether similar in the facts on which it is founded which could have raised before a Court the question which is now before us.

I think the proposition has been too broadly advanced. I fully agree that this Act, which interferes with private rights and private interests, should receive a strict construction so far as those rights and interests are concerned; *Hughes* v. *Chester and Holyhead Railway Company* (*a*), and that the construction must be "accord-

(*a*) 8 Jur. N. S. at p. 223.

ing to the principles of the Common Law," *Eton College* v. *Bishop of Winchester* (*a*). But suppose the Act under consideration had in words directed that the trustees should forthwith divide the residue into six equal parts, and make or pay over one part to each of the testator's six children absolutely to and for his or her sole use and benefit, the grandchildren's interest would be no more distinctly referred to than it is now; but would it be doubted that their interest would be destroyed? or will it be insisted, that because the children were in error as to their taking vested, instead of contingent interests, this error makes both the indenture and the Act inoperative?

Judgment

I have looked at many other cases in connection with this subject. In *Morris* v. *Mellin* (*b*) Lord *Tenterden* says it is a general rule in the interpretation of Acts of Parliament that an enactment the effect of which is to cut down, abridge, or restrain, any written instrument shall have a limited construction. In *Bennett* v. *Daniel* (*c*), *Parke*, J. says, it is a safe rule of construction to take words in their plain and ordinary sense, unless a different intention can clearly be collected from the other parts of an Act of Parliament. *Ward* v. *Scott* (*d*) determines that when a statute declares that a conveyance made in a particular mode shall be valid and effectual, it does not operate to cure a defect in the title of the party conveying. In *Lord Buckinghamshire* v. *Drury* (*e*) Sir *E. Wilmot* said, "Many cases have been put where the law implies an exception, and takes infants out of general words by what is called a virtual exception;" * * and he states this rule "Where the words of a law in their common and ordinary signification are sufficient to include infants, the virtual exception must be drawn from the intention of the Legislature

(*a*) 3 Wilson at p. 496.
(*b*) 6 B. & C. 446.
(*c*) 10 B. & C. 500.
(*d*) 3 Camp. 284.
(*e*) Wil. 177, 194.

1872.

Re Goodhue.

manifested by other parts of the law, from the general purpose and design of the law, and from the subject matter of it." Sir *G. J. Turner*, L. J., in *Hawkins* v. *Gathercole* (*a*), thus summarizes preceding decisions: "We have therefore to consider not merely the words of the Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made; from a comparison of its several parts and from foreign, that is, extraneous circumstances, so far as they can justly be considered to throw light upon it."

I have endeavoured to follow the view of Sir *G. J. Turner* as expressed in *Hughes* v. *Chester, &c., R. W. Co.* that the case ought to be decided upon the intention of the Legislature to be collected from the general purpose of the Act and from the provisions therein contained, rather than any general rule which may apply to cases of another and a different description.

Judgment.

Now, there is the testator's will, on the construction of which, except perhaps on the question of vested interests, there has, I think, been no important difference of opinion. The son and daughters of the testator, and the husbands of the daughters apparently dissatisfied with the disposition of the large residue (because he directs it to accumulate in trust for all his children who shall be living at the death of his wife, in equal shares; and the children of such of his children as may die during the life of his wife, in equal shares, the grandchildren taking their respective parent's share), come to an agreement. The indenture made in pursuance thereof, declares their object, viz: in order to secure to each of the testator's children the immediate possession of their respective shares in the residue. They petition the Legislature setting out their agreement and pray-

(*a*) 1 Jur. N. S. 481.

ing that an Act may be passed to confirm this indenture and the several provisions thereof, and to effectuate the same. And the Legislature passed an Act declaring the indenture to be valid, and authorizing and requiring the trustees, named in the will, to carry into effect the several provisions of the indenture. 1872. Re Goodhue.

Though I think it most probable that the promoters of this Act believed that the interests of the children under the will were vested subject to be divested as to such one or more of them as should die, living the widow, I find, neither in the indenture nor the petition, any sufficient reason for holding that this belief was the foundation of either the indenture or the petition. The indenture of which the petition, except in its precatory clause, is little more than an echo, put prominently forward, the desire to get immediate possession and enjoyment of a large sum of money—this is the ruling idea—the consideration for their mutual covenant, for which they petition for an Act to alter the testator's disposition of his property and to enable the trustees to carry that alteration into effect. This could not be done without, on certain contingencies, affecting interests created by the will in favor of the grandchildren. It could not have been overlooked, that if the six children survived the widow, they took the residue absolutely; nor that if they became entitled to "immediate possession and enjoyment," the contingency in favor of the grandchildren was destroyed; and if that be so, then the intention of the Legislature in making the indenture valid, is as palpable as the object of the petitioners in asking for it; and so I am compelled to hold. I have read the recent judgment of *Cockburn, C. J.*, in *May* v. *The Great Western Railway Company*, (*a*) but it does not appear to me to touch this case. Judgment.

It has been suggested that the order on the petition

(*a*) L. R. 7, Q. B. 381.

1872.

Re Goodhue.

was *ex parte ;* but that is not so, as the trustees were respondents, and Mr. *Becher* appeared by his counsel, and opposed the petition, in the interest of the grandchildren. The point, that all the grandchildren, though minors, should have been served with the petition and made parties to it, is not taken in the reasons of appeal, nor was it urged before us in argument. All who might be interested could not have been served ; as future born grandchildren would take equally with those *in esse* now: and to serve the infants now living with their parents, in order to give them an opportunity of opposing the petition of their parents, would obviously have been useless for any practical purpose. By the practice of the Court of Chancery, as regulated by the 61st Consolidated Order, and as decided in *King* v. *Keating*, (*a*) and other cases, trustees sufficiently represent their *cestuis que trust*, though the Court of Chancery, if it thinks fit, may order any of the *cestuis que trust* to be made parties also ; and it is plain, in the present case, that the Legislature did not mean that all should be served, for the Act, in express terms, left it to the Court to direct to whom notice of the petition should be given.

Judgment.

We are, however, of opinion that the Act does not affect real or personal property not being within this province. A majority of the Court are of opinion that this order is appealable. This being so, I am of opinion that it should be varied—by striking out the fifth section and inserting in lieu thereof, "that after such allotment and distribution, the said Master do convey and transfer the respective shares of each of the said petitioners, according to the respective natures of the several parts of such share, unto and to the use of each of the said petitioners, their respective heirs, executors, administrators, and assigns, absolutely in severalty, the shares

(*a*) 12 Grant 29.

of each of the said petitioners, being daughters of the said testator, being so conveyed and transferred for their respective separate use, free from the control of any present or future taken husband."

1872.
Re Goodhue.

I am further of opinion that Mr. *Becher* was doing no more than his strict duty in opposing this petition, and also in bringing before the Court by means of both appeals the very important question involved in this matter and the suits of *Tovey et al.* v. *Goodhue* and others, and that he should have all his costs, charges, and expenses in relation to the proceedings in both cases and the two appeals, to be deducted from that portion of the residuary estate which is to be distributed under the said order.

SPRAGGE C.—What is principally dealt with by the deed of arrangement, and by the act confirming it, is the residuary estate.

Judgment.

The deed assumes the coverture of the daughters of the testator to be the obstacle, to the carrying out of its provisions; and assumes by consequence that no interests other than those of the parties affected by it, are affected by it.

This is certainly at variance with the fact. The interests of the daughters are affected beneficially by the deed, inasmuch as it accelerates the enjoyment of their portions of the trust estate; while the interests of the grandchildren are, in the event of their parents predeceasing the testator's widow, prejudiced by the provisions of the deed. They are so even if it be assumed in favor of the children that the will gives them vested interests.

They are prejudiced both as to the corpus, and the income of the estate. First, as to the corpus. By the will it is preserved to the time of the death of the widow. By the deed it is placed at the immediate and absolute

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disposal of the son and daughters of the testator. Take the period of the death of the widow, and mark the distinction. By the will, the share of any deceased child, would then be forthcoming in favor of the issue of the deceased. Under the deed, that share may have been dissipated, and that without recourse against any one. Next, as to income of the estate. Under the will, the direction is that it shall be accumulated, and the corpus being preserved as contemplated by the will, the child of the deceased child would receive the accumulation with the surplus. On the other hand, the deed and the act both contemplate a user of the surplus, whether the corpus be preserved or not.

Judgment.

In short, the rights under the will, of the issue of the children predeceasing the testator's widow, are ignored by the deed; and annihilated by the act confirming it; and the one reason given for this, in the recital of the deed, has no application to the change proposed to be effected by it, as affecting the class which is affected by it. In fact, the whole deed proceeds upon the assumption that if the daughters of the testator were not under the disability of coverture, the deed of arrangement could be carried out without any enabling powers being granted by the Legislature; upon the assumption that what are called in the deed the "shares" of the children of the testator were theirs, absolutely, and not as in truth they were, contingently only: that the right was absolute; and the enjoyment only postponed by the will. In proof of this I need only refer to this recital "and the respective shares of the testator's said children are considerable, and it is desirable that they should respectively enter into the possession and enjoyment of the same; and that this should not be postponed until the decease of the said widow of the testator." All this proceeds upon an entirely erroneous assumption. It is, I apprehend, quite clear that if the disability, that of coverture, which is put forth as occasioning the necessity for Legislative sanc-

tion, had not existed, if all the parties to the deed had been *sui juris*, the deed would not have been effectual, to affect in the slightest degree, the interests of the class of grandchildren whose interests it was intended, with the sanction of the Legislature, to affect. 1872. Re Goodhue.

I have thus pointed out how great and serious are the changes that are effected by this Act, in the right of a certain class of beneficiaries under the will. It does no less, assuming full effect to be given to it, than abrogate those rights; and, as to that class, make a new will for the testator; and I agree thus far with my brother *Gwynne*, that I think that the Court must be able to see clearly that the Legislature really meant so great and serious an interference with private right, as is involved in the interpretation put upon the Act by the respondents, before we give effect to what is asked on their behalf. Beyond that I am unable to go.

Judgment.

It is I believe the opinion of some of my learned brothers, for whose opinion I entertain the greatest respect, that a private Act of Parliament affects only the rights of those who are parties to it or are expressly named in it; that this is in short a canon of construction.

The learned Chief Justice of the Common Pleas has been good enough to give me the perusal of the judgment which he has prepared in this case; and which contains a number of cases which in his judgment establish that principle. I have examined those cases very carefully, and am obliged to dissent from the conclusion of the learned Chief Justice that they establish any such rule. I do not propose to go through them *seriatim*, but I am safe in saying that in none of them have the Courts refused to give effect to the clearly expressed intention of the Legislature, on the ground that though clearly expressed, they affected the rights of persons not named in them. The general intendment, I concede is,

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Re Goodhue.

that the interests of persons not parties to the act, and not named in it, are not bound; but the reason of that I take to be, that the Courts will not presume that Parliament intended to affect the rights of strangers; and, if so, it becomes only a question of construction; and it has this qualification that the Act is or may be effectual as to those who are parties to it, a point which I will notice more fully presently.

Barrington's case, a leading case upon this point, is explicable upon this principle. The Act authorized the inclosure of certain commonable lands and it was sought to apply it to Commoners, Commoners not being named in it; and it was held not to apply to them. The principle of the decision is thus expressed by Sir Matthew *Hale* in *Lucy* v. *Levington* (*a*). "The matter of the act there directs it to be between the trustees and the proprietors of the soil; and therefore it shall not extend to the Commoners to take away their common."

Judgment.

There is no doubt, that language is attributed in reports to eminent Judges, which, taken by itself, lends countenance to the doctrine that is contended for; but I think there is no case in which the Judges do not profess to interpret the *intention* of the Legislature: they go no further than this, that they will not attribute to the Legislature an intention to interfere with private rights; unless they can see such intention very clearly; nor, as a general rule, unless the rights supposed to be interfered with, are expressly referred to.

It is impossible indeed that Judges should go further than this, without forgetting that they are *interpreters* of the law, and without assuming functions which do not belong to them.

The language of a very eminent Judge Sir *William*

(*a*) 1 Vent 176.

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Re Goodhue.

Grant in *Bullock* v. *Fladgate* (*a*) covers the whole ground. He says "By the Act the property is settled upon and vested in *Douglas* and *Cook* their heirs and assigns. There is nothing imperfect or ambiguous in that enactment, whatever mistake there might be with regard to the persons in whom the legal estate was before vested. The clear intention of the Legislature, and of the parties was that it should then be placed in these trustees. The clause does not take the estate out of this or that particular person; but vests it by general words, which must have their effect against all, and upon the estates of all, whose rights are not saved by the subsequent parts of the Act."

The great case of the *Earl of Shrewsbury* v. *Scott* (*b*), is referred to in the judgment of the Chief Justice of the Common Pleas. I do not think that it supports the position contended for, taking either the language of the Judges or the judgment itself. Even the language of the learned Chief Justice, Sir *A. Cockburn*, taken altogether, does not go that length; for, after saying that (*c*) "Provisions, however general in their terms, could not be held to affect the rights of parties who were not before Parliament, and whose rights were never intended to be affected, more especially where there is a saving clause which preserves the rights of all parties, save those excepted from it," he adds, "But if an Act of Parliament, in positive and express terms, professes to affect, and does affect the rights of parties named in it, and excepted from the saving clause, it is quite impossible, as it seems to me, to maintain that a court of law is not bound to give effect to the provisions of such an Act, although such parties may not have concurred in passing it." The Chief Justice, in this passage, uses the words "named in it;" but I do not understand from this

Judgment.

(*a*) 1 V. & B. 477.
(*b*) 6 C. B. N. S. 1.
(*c*) p. 157.

1872.

Re Goodhue.

that naming the parties was an *essential* to their being bound; for referring to *Barrington's* case, and quoting the reasons upon which the judgment in that case proceeded, he adds this observation of his own: "Therefore in that case the Act was held not to extend to dispossess the Commoners of their right of common; but if it had appeared by the preamble, or by the enactment of the Legislature, that the Commoners had been persons whose rights the Statute had been intended to affect and did affect, however prejudicially, a court of law could not have held itself warranted in limiting the operation of the clear and positive enactments of the Statute, although it was a private Act of Parliament." Take again the language of Mr. Justice *Williams* (*a*): "I take the law to be clear that the Legislature have the power to bind by a private Act, just as completely and stringently as by a public Act, all those estates and persons whom it plainly intends to bind." The lan-

Judgment.

guage of Mr. Justice *Byles* (*b*) is still more explicit. After referring to a position taken by counsel that a Private Estate Act under which the plaintiff claimed was but a contract between the parties to it, he said: "I do not at all agree to this view of the effect of a private Act of Parliament,—that it is necessary to be construed as a mere contract. The rule that it is to be construed as a contract or a conveyance is a mere rule of construction. You are, it is true, so to construe a private Act as to effectuate the intention of the parties and bind their interests, and theirs only, as they intended them to be bound, and so as not to prejudice or affect the interests of strangers." So far he goes with the contention of the appellants; "but," he goes on to say, "that is only if the Act admits of such a construction. The Legislature in passing a private Act is as omnipotent as in passing a public Act; and if the words of the Act do clearly and inevitably comprehend the estates or

(*a*) p. 184. (*b*) p. 157.

rights of strangers, a court of law must hold those estates or rights of strangers bound." And he adds emphatically, "Were the Statute a tyrant, yet its decree being clear, is irresistible." 1872. Re Goodhue.

Upon the appeal of the case to the Exchequer Chamber (*a*), Chief Baron *Pollock* took substantially the same view of the effect and construction of a private Act as Mr. Justice *Byles*. After referring to the recitals in the Act, he says, "We are of opinion that, although it was merely a private Act, it is, with reference to those persons, and those matters with which it professes to deal, and which are within the scope of its enactments, of as much force, and as binding as any public Act of the Legislature, relating to the most important interests of the community (*b*) * * *The governing instrument is the private Act of Parliament. It incorporates the two settlements (modifying the first); and they (controlled by the private Act) become part of the Parliamentary arrangement by the Legislature.*" Judgment.

The suit, as I gather from the report of the case, was between parties claiming under two settlements made some 150 years before, or rather the later of these two settlements sanctioned by private Acts of Parliament; and parties claiming under an Earl of *Shrewsbury* named *Bertram Arthur*.

It was contended that Earl *Bertram Arthur* had a title paramonnt, and so was not affected by the private Act; and as to that, the Chief Baron says that the private Act was the governing instrument. His language is: "We think this view of the case is an answer to the points first presented to our attention by the learned Attorney-General, as counsel for the appellants, viz., that *Bertram Arthur*, Earl of *Shrewsbury*, was tenant in tail under the settlement of 1700, and had a title

(*a*) 6 C. B. N. S. 221. (*b*) p. 222

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Re Goodhue.

paramount which was not affected, and could not be, by the settlement of 1718, and therefore not by the private Act of 6 George I., which confirmed it, and (as was argued) did not touch the settlement of 1700. To this claim of title paramount, the answer was, "The governing instrument is the private Act." And in relation to this same claim, he says, towards the conclusion of his judgment: "In our opinion, whether there was, under the settlement of 1700, a prior estate, and paramount to the estate which Earl *Bertram* might, but for the statute, have taken under the settlement of 1718, we think the positive enactments of the statute vest the manors, lands, &c., in the plaintiff as tenant in tail, not under either settlement, but by virtue of the provisions of the Act of Parliament."

Judgment.

The learned Chief Baron took also the same view as was taken by Sir *William Grant* in *Bullock* v. *Fladgate* (*a*). "Settlements and conveyances (he says) can affect the estates only which the parties to them possess * * But the Act of Parliament deals with the *lands* themselves, and not merely with the estates (real or imaginary) which may be carved out of the fee simple: and by the Act the lands, manors, &c., are to go to the plaintiff (below)."

The same idea, that the Legislature does in some cases deal with the land itself rather than with the estates that individuals may have in it, was enunciated by a former Chief Baron, in *Riddle* v. *White* (*b*). A private Act of Parliament authorized the sale of certain parcels of land, the proceeds of sale to be applied to the improvement of certain other lands, and it provided that the purchaser should hold the same discharged *inter alia* from the payment of tithes. The learned Chief Baron, after observing that, "in private Acts in general, the

(*a*) p. 222. (*b*) 4 Gwill. 1387; 5 Cruise's Dig. 19.

Legislature does nothing more than enable persons to enter into a contract who could not otherwise enter into it, and the persons who are parties to the Act are expressly named in it," proceeds thus: "But here the Legislature does a great deal more: it takes on itself to act on the land itself, to declare that it shall be discharged of tithes; accordingly, therefore, to the principles of the decided cases, and indeed of common sense, we think that the rector cannot claim his tithes against the express words of the Act of Parliament." I think, therefore, that, so far as appears from the English cases, there is no canon of construction or technical rule to the effect that, in order to persons or rights being affected by private legislation, they must be expressly named. 1872. Re Goodhue.

The provision in the Ontario Interpretation Act is strongly insisted upon as preventing any Court giving effect to this Act. The provision is that if an act be of the nature of a private act it shall not "affect the rights of any person, or of any body politic, corporate, or collegiate (such only excepted as are therein mentioned or referred to)." The Legislature had a right of course to be its own interpreter; and if the rights of the grandchildren of the testator Mr. *Goodhue* are not mentioned or referred to in this private estate Act we cannot, I agree, so construe the Act as to make it affect them. But it appears to me that the rights of the children and of the grandchidren of the testator are both mentioned and referred to in the Act. The recital to the Act is a very long one; it recites the will at length and in it the provisions conferring rights and interests upon the grandchildren as well as the children of the testator; and these same provisions are repeated in the schedule to the Act, which is a copy of the deed of settlement, to which the sanction of the Legislature was asked. The schedule is incorporated into the Act and made part of it. By the enacting clause it is "confirmed and declared to be Judgment.

1872.

Re Goodhue.

valid;" and the enacting clause proceeds "and the said trustees of the estate of the Hon. *George Jervis Goodhue*, deceased, are hereby authorized and required to carry into effect the several provisions thereof," &c.

Judgment.

In some of the cases to which I have referred, great importance was attached to the contents of the recitals to private acts. In the *Earl of Shrewsbury* v. *Scott* the Chief Baron (*a*) refers to the fact of the two settlements being recited in the private Act; and I think it is quite clear from his language that if those recitals had been followed by a short and simple enactment providing that they should be confirmed, that that would have been sufficient, because the Legislature must be taken to be dealing with those matters with which it professes to deal; and if it does so, by recitals, it does so as effectually as in any other way. In this Act it recites the petition which sets out the will; and making what is thus presented to it, the groundwork of legislation, it, of course, takes what is stated in the petition to be true. In this way the rights of all persons who had rights under Mr. *Goodhue's* will are referred to in the Act. To hold that the estates which passed under the will to the children and grandchildren of the testator, in other words their "rights," rights being the word used in the Interpretation Act, are not mentioned or referred to in the private Act, we must strike out nine-tenths of the Act. I humbly conceive that we are not warranted in striking out or in ignoring any part of it. The Legislature has not thought fit to prescribe in the Interpretation Act in what mode or in what particular part of a private Act the rights of persons or bodies must be mentioned or referred to, and therefore if mentioned or referred to in any part, the provision is complied with.

If this Private Estate Act had shortly recited the provisions of the will in relation to the residuary estate,

(*a*) page 322.

which defines the estates which pass under it to the children and grandchildren of the testator, and which occupies less than ten lines of the Act, and then had gone on to enact that the children of the testator should possess and enjoy them, pointing out how this was to be effected, could it be contended that the estates and rights of the children were not mentioned or referred to in the Act; and can it make any difference that not only this provision, but the whole of the will is recited in the Act. It is not necessary for the Legislature to say, in so many words, these are the rights of the grandchildren and we intend to, and hereby do vary them. What the Legislature has in effect said is, these are the estates and rights of the children and grandchildren, and a document being placed before us which does vary them, we give legislative sanction to that document. We cannot, as it appears to me, say that the rights of the grandchildren are not mentioned or referred to in this Act without saying that the preamble and recitals in an Act, and a schedule which is incorporated in an Act, form no part of it. 1872. Re Goodhue. Judgment.

It is hardly necessary to say that we are not entitled to attribute to the Legislature mistake or ignorance in regard to anything that is done by it; and it makes no difference in my mind whether the estate given to the children was vested or contingent—I incline to think it contingent. The Legislature had before it the very terms of the will, and chose to make a certain disposition which was professedly different from that made by the will. We may have reason to entertain doubt whether the Legislature would have gone so far as it has done, if it had appreciated all the rights of the grandchildren, and the great change made in those rights by the deed of settlement; but it is utterly out of the question to make such doubts a reason for refusing to carry out an enactment of the Legislature.

1872.

Re Goodhue.

The judgments of my learned brothers *Morrison* and *Gwynne*, proceed mainly upon this: that the interference which is professedly made by the Act with the rights of these grandchildren is so great, so violent, that the Legislature *could* not have intended it, and my learned brothers refuse to believe in such intention, and refuse to carry the Act into effect, because it does not contain an express and explicit enactment barring the rights of these infants, and specifically referring to them.

I must take leave to differ, very emphatically, from my learned brothers upon this point. We cannot, I apprehend, as judges, properly assume such a position. It amounts to this. The thing professed to be done by the Legislature is so flagrantly unjust, that I will refuse to carry it out unless its will, in regard to this matter is put in a different shape and expressed in different terms from the present enactment. This refusal is indeed put in the guise of feeling it impossible to believe that the Legislature could mean any such flagrant interference with private rights; but, I apprehend, we *must* believe it, if the Legislature has expressed its will with sufficient distinctness, even though it does not in express and explicit terms enact that the rights of these grandchildren shall be interfered with. I think the language of Mr. Justice *Byles*, which I have quoted, must be applied to this Act, and if the words of the Act do clearly and inevitably comprehend the estates or rights of these grandchildren, a court of law must hold those estates or rights bound.

Judgment.

It appears to me clear beyond question that the words of this Act "do clearly and inevitably comprehend" the estates and rights of these grandchildren; and I cannot refuse to believe that to be the *intention* of the Legislature which was the inevitable consequence of its enact-

ment. I *must* believe that the Legislature intended to do this, or believe that the Legislature intended to stultify itself by promulgating that which would be a mere *brutum fulmen;* for, if the Act has no effect on the rights of the grandchildren, it has really no effect at all. There is a case, which I am unable at present to lay my hand upon, in which such a consequence is given, as a reason for so construing a private Act as to give effect to it. 1872. Re Goodhue.

I have in the earlier part of my judgment pointed out that the Private Estate Act, in question, does interfere to a very great and serious extent with the estates and rights of these grandchildren under the will. I may have my private opinion, as every man has a right to have, in regard to this piece of legislation; and further, I may say, *as a Judge*, that the interference with private right is so extreme, that I think I ought to be free from doubt that the words of the Act do *clearly and inevitably* comprehend the rights of these grandchildren before giving effect to it, and I am free to say, that it is in this spirit that I approached the consideration of this question. Having given it every consideration that I could, it has seemed to me impossible to resist the conviction that the Legislature did intend to give to the children of the testator absolute and immediate estates; and, as the inevitable consequence of this was an interference with the rights of the grandchildren, and as I cannot, sitting as a Judge, attribute to the Legislature mistake or oversight, I must attribute to it an intention to interfere with the rights of grandchildren, to the extent to which they are necessarily interfered with, in order to give to the children the rights and estates which the Act does in terms confer upon them. Judgment.

It is made a question whether the passing of this Act by the Legislature of Ontario is not *ultra vires*. I have read the judgment of his lordship the Chief Justice of

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Re Goodhue.

this Court upon that point, given after the first argument of the case, and the observations which he has made since the last argument, and I so entirely agree with them that I do not think it necessary to add any observation of my own, except this that undoubtedly, as was well observed by Mr. *Blake*, this power existed before confederation; that under the confederation act it certainly is not given to the Dominion Legislature, and if it is not possessed by the Provincial Legislature it is a power taken away by implication. The true principle, I take shortly to be, that under the Confederation Act there has been a federal, not a legislative union; that to the Provincial Legislature is committed the power to legislate upon a range of subjects which is indeed limited, but that within the limits prescribed the right of legislation is absolute.

Judgment.

I have, I confess, come to a less decided opinion upon the question of domicile than upon any other question in the case. I incline to think that it is the domicile of the trustees that must govern. The view taken of the whole case by a majority of the Court renders it less necessary than it otherwise would be, that I should come to a decision upon that point. Upon the whole, I agree in the conclusion arrived at by the Chief Justice of the Court.

HAGARTY, C. J., C. P.—The case presented to the Legislature by the parties to the deed sought to be confirmed was, in my judgment, that the petitioners' estates under the will were vested in interest, and the object sought to be accomplished by legislation, was so far to interfere with the testator's expressed intention as to vest such estates in immediate possession, without and before the happening of the event of Mrs. *Goodhue's* death.

As I read the instrument the substantial interference is asked, not to destroy any existing or contingent

interest, but merely altering the will so as to accelerate the period of enjoyment. 1872.

Re Goodhue

The deed is silent as to the barring or destruction of any interests, and the statute of confirmation equally abstains from any such declaration.

I assume that we are to accept the Statute as binding on us, and do not propose to discuss that point; but I am clear that we should not assume that our Legislature, in the absence of express words, designed to destroy the rights which the testator conferred upon a number of infant grandchildren who were in no way represented before them, and who, by the success of the contention urged upon us, might be stripped of most valuable properties on certain contingencies.

My brother *Gwynne* has fully explained the peculiar wording of the instrument and of the confirming act. I take it therefore that the deed and the statute affect merely to accelerate the time of possession of the petitioners' interests. Judgment

It was urged to us that if there were no vested interests under the will, both deed and statute would be almost, if not wholly, inoperative.

I am not in any way concerned to answer this objection, as I do not consider it to bear upon the real point in issue, viz., whether the grandchildren are bound or affected.

It may be just like the case often put of a tenant for life obtaining power by statute to convey in fee simple; the remainderman is never bound, if he be no party to the Act or named in it, or excepted from the saving clause.

1872.

Re Goodhue.

Such a deed and such a statute would merely bind all the parties to it and those in privity with them, and no one else.

It was also urged that if the trustees and executors are directed to transfer the shares "unto and to the use of each of said children, their respective heirs, executors, administrators, and assigns, absolutely in severalty," there could not be such an estate passed or vested, unless we hold that all contingent interests be barred.

The answer is suggested at once by clear authority. The life tenant cannot vest a good estate in fee in his grantee, if the remainderman be not barred.

Judgment.

It seems analogous to the common case of a company authorized to buy or sell land with a statutable declaration that "such sales, conveyances, and assurances shall be valid and effectual in law to all intents and purposes whatever, any law statute, &c., notwithstanding." It was actually argued on this that the company's deed necessarily, under the statute, gave a complete title: *Ward* v. *Scott* (*a*). It was of course answered, that such words had no operation *upon the title* to the subject matter conveyed."

The case of *The Provost of Eton* v. *The Bishop of Winchester* (*b*) is also to the effect that, declaring a thing to be vested in a party for ever, gave no absolute title against a person excepted from its operation under the general saving clause.

So in *Hesse* v. *Stevenson* (*c*) an uncertificated bankrupt obtained an Act of Parliament enabling him to transfer and assign a patent right to any number of

(*a*) 3 Camp. 284.
(*b*) 3 Wils. 483.
(*c*) 3 B. & P. 565.

persons not exceeding sixty. One of his vendees sold with covenants for title, &c., and the assignees in bankruptcy claimed the whole, and the covenant was held broken. The Act was declared to be a public Act. The Court held that an Act of a private nature derived no additional weight or authority from such a proviso. * * "It is not possible to consider this Act as giving any title to *K.* (the patentee) which he had not at the time it was passed. Such has been the construction which has always been put upon Acts of Parliament of this nature." 1872. Re Goodhue.

Chapman v. *Brown* (*a*) is a curious instance of an Act reciting the nature of an estate to be different from what the Court held it to be. The Act recited that *A. B.* the applicant was tenant for life only, as his own petition for the Act stated his interest to be. Mr. Justice *Wilmot* says, that the will is recited in the Act different from what it really is, and held that he was tenant in tail.

Judgment.

The celebrated *Shrewsbury* cases (*b*) gives us the opinion of Sir *A. Cockburn* on the question of construction. It was argued that the tenant in tail, an infant, was not a party to the act, in fact he opposed it by his *prochein amie* before the Committee of the Lords. His rights were there fnlly discussed. Two of the Judges took all the evidence, and were fully acquainted with the infant's rights. The Chief Justice says: "After which, Parliament with a full knowledge of all the circumstances, deliberately and advisedly passed an Act *containing a provision that the rights of that infant as to alienation, should be for ever extinguished except upon a certain condition, * * and it specially excluded him from the operation of the saving clause.*

"We have been reminded, indeed, that a private Act of Parliament has been said, upon high authority, to be

(*a*) 3 Burr. 1631.

(*b*) Lord Shrewsbury v. Scott, 6 C.B. N.S. 1.

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Re Goodhue.

little more, if anything, than a private conveyance between those who are parties to it, and to a certain extent I agree in that proposition. Recitals, in a private act, could never be held to bind persons who were not parties to the Act. Provisions, however general in their terms, could not be held to bind persons who were not before Parliament, and whose rights were never intended to be affected, more especially when there is a saving clause which preserves the rights of all parties, save those excepted from it. Thus, if a tenant for life should obtain power to convey an estate in fee, no Court would hold that it could have been the intention of the Legislature to bind a remainderman who was not a party to the Act, or named in it, or excepted from the saving clause; but if an Act of Parliament in positive and express terms professes to affect, and does affect the rights of parties named in it, and excepted from the saving clause, it is quite impossible, as it seems to me, to maintain that a Court of Law is not bound to give effect to the provisions of such an Act, although such parties may not have concurred in passing in it."

Judgment.

He then comments on *Barrington's* (*a*) case, as to the rights of the Commoners: "If it had appeared by the preamble or by the enactment of the Legislature, that the Commoners had been persons whose rights the statute had been intended to affect and did affect however prejudicially, a Court of Law could not have held itself warranted in limiting the operation of the clear and positive enactments of the statute, although it was a private Act of Parliament."

He then quotes Lord *Campbell's* judgment in *The Edinburgh Railway Company* v. *Wauehope* (*b*), "that all that a Court of Justice can do, is to look at the Parliament roll, if proven that it appears that a bill had

(*a*) 8 C. Rep. 136; 5 Cruise Dig. sec. 31.
(*b*) 8 C. & F. 723.

passed both Houses, and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, or into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses."

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Sir *A. Cockburn* proceeds: "If an Act of Parliament by plain, unambiguous, positive enactment, affect the rights even of parties who were not before the House (these parties being clearly pointed out by the bill, and expressly excepted from the saving clause), it is not for a Court of Law to consider whether the forms of Parliament have been pursued, whether those provisions which the wisdom of either House has provided for the prevention of any deception on itself, or, of injury to the rights of absent parties have been followed, it is enough for us if the provisions of the Act are clear, express, and positive: if they are, we have only to carry the Act into effect."

Judgment.

Byles, J., at page 218, uses language substantially the same: "You are so to construe a private Act as to effectuate the intention of the parties, and bind their interests and theirs only as they intended them to be bound, and so as not to prejudice or affect the interests of strangers; but that is only if the Act admits of such a construction. The Legislature, in passing a private Act, is as omnipotent as in passing a public Act; and if the words of the Act do clearly and inevitably comprehend the estates or rights of strangers, a Court of Law must hold those estates or rights of strangers bound, * * were the statute a tyrant, yet its decree being clear, is irresistible."

The summary of cases in *Cruise* Digest, vol. v., Title 33, very fully shews the state of the law as to private Acts, up to its date, 1835.

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Sir *M. Hale's* words quoted from *Lucy* v. *Levington* (*a*), are peculiarly explicit :—"Every man is so far party to a private Act of Parliament as not to gainsay it, but not so as to give up his interest. It is the great question in *Barrington's* case, 8 Coke. * * Suppose an Act says, 'whereas there is a controversy concerning land between A and B, it is enacted that A shall enjoy it,—this does not bind others, though there be no saving clause, because it was only intended to end this difference between the two.'"

The text of Mr. *Cruise* (*b*) speaks thus: "With respect to the operations of a private Act of Parliament, it is as powerful and effective, if duly and properly obtained, in transferring the legal estate in lands from one person to another, and in binding all those who are intended to be bound by it, and whose rights are not saved, as a public one. But it has always been held that a private Act does not bind strangers, even before the general practice of inserting a saving clause in it was adopted."

Judgment.

The apparent exceptions to the rule in the case of tenant in tail, are fully stated. (Pages 10 and 11).

Where power was given by a private Act to tenant in tail to charge the estate with moneys, it was held that the right of those in remainder was and was meant to be barred by the Act (*c*); that there was no occasion to except their rights, as was done in other cases where the Act passes upon the application of a tenant for life; for being tenant in tail, he might have barred the remainder by a recovery.

Again, according to Mr. *Booth's* opinion (page 10): The rights of the persons in remainder were of no value, since, by a common recovery duly suffered, these rights could be annihilated in the next term.

(*a*) 1 Ventris 176. (*b*) page 7. (*c*) Westby v. Kiernan, Amb. 697.

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Bullock v. *Fladgate* (*a*) before Sir *William Grant*, may also be referred to on the general question as to private Acts, and where the effect of positive words as to the vesting of an estate in specified persons, and excepting of named persons from the operation of the saving clause is considered.

The point is also discussed how far the saving clauses can operate, if clearly repugnant to the enacting part, (p. 21) and in the case cited (*Riddle* v. *White* (*b*), the Chief Baron said: "In private Acts in general, the Legislature does nothing more than enable persons to enter into a contract who could not otherwise enter into it; and the persons who are parties to the Act, are expressly named in it; but here the Legislature does a great deal more, it takes on itself to act on the land itself, to declare that it should be discharged of tithes; accordingly, therefore, to the principles of the decided cases, and, indeed, of common sense, we think that the rector cannot claim his tithes against the express words of the Act of Parliament."

Judgment.

The reason of this decision seems very plain. The Legislature declared that the land should be discharged from tithes, and still to allow the rector to claim them would be to avoid this express enactment.

The law seems reasonably clear that the general proposition that the estates of persons not named in the Act, or necessarily within its operations, are not barred, does not depend on the presence or absence of a saving clause (*c*).

In the present case, we are told by our Interpretation Act of Ontario, 31 Victoria, chapter 1, that if an Act be of the nature of a private Act it shall

(*a*) 1 V. & B. 471. (*b*) 4 Gwill. 1387, Tithe cases.

(*c*) Blacks. Com. Kerr's ed, vol. 2, 346; 1 Stephen's Com. 624, and cases there cited.

1872. not affect the rights of any person or of any body politic, corporate, or collegiate, such only excepted as are therein mentioned or referred to.

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When the present Act was passed our legislation was, as regards Estates Bills, without any of the safeguards or precautions which long experience had proved to be indispensable in dealing with private rights by the Imperial Parliament.

The provision in our Interpretation Act, just referred to, cannot be disregarded. The rights of the infant grandchildren are neither "mentioned, or referred to" in the Act before us. The deed and the Statute seem alike to ignore the existence of any such rights. Although I am clearly of opinion that the rights of the infants would not be bound, even in the absence of a saving clause, it is a matter of satisfaction to me to find that the same Legislature that passed an Act interfering with the previously undoubted right of a fellow subject to dispose as he thought right of his estate, has also, on the very threshold of its legislative career, provided an antidote of universal application in the unmistakable language of the Interpretation Act.

Judgment.

I think we are bound to conclude, on the perusal of the deed and the Statute, that our Legislature did not mean to destroy—as I am quite satisfied they have not in law destroyed—the undoubted rights of a large number of infant children; and that had it been proposed to them to do so in express terms—as it may possibly have been the intention of the promoters of the Bill that they should have done—they would have shrunk from a course happily so unprecedented in modern English legislation.

They appear to me to have merely dealt with certain estates assumed to be vested in interest, and merely to

have accelerated the period of enjoyment and possession. But I think it right to add that my opinion does not depend on whether the interests are vested or contingent 1872. Re Goodhue.

I think the interests of the grandchildren remain as they were under the will, and that the demurrers to their petition should be overruled. I think the decision of this case necessarily decides the other case: *In re Goodhue.*

As we hold the grandchildren entitled to have their rights declared and protected, we must also, I think, refuse to compel the trustees under the will to distribute the assets and assign the estate to parties not now entitled thereto, as against the grandchildren, so long as the interests of the infants are to be protected.

MORRISON, J.—I entirely agree with so much of the full and able judgment of the learned Chief Justice of this Court, as applies to the power of the Legislature to pass the Statute in question, and I concur in the remarks of the Chief Justice made in reference thereto; but, with the greatest respect, I cannot acquiesce in the conclusion that the learned Chief Justice has arrived at. I am of opinion, after much consideration of the case, that the Order of the Court below should be reversed, for the reasons stated in the able judgment of my brother *Gwynne*, which I have carefully read and considered. In addition, I would observe that, on this second hearing of the appeal much more notice has been taken of what I think is the real matter in question —the rights of the infant appellants under the will of the testator, and the effect of the Statute upon those rights. It seems to me that to hold that the infant appellants are barred and deprived of their rights by virtue of the Statute—which in effect is the result of the Order of the Court below—would be saying that which the Judgment.

1872. Re Goodhue. Legislature has not said, and that which, in my opinion, the Legislature did not intend, and has not enacted or declared. In order to bar these infant appellants of their rights, and defeat the intention and object of the testator, the Statute, in my opinion, should contain an express and explicit enactment to that effect, specifically referring to the appellants. I find no such provision or declaration in the Act; and I will further add, that I think it is highly improbable that the Legislature had in their minds an intention to defeat the object and effect of the testator's will; and it is only reasonable to asssume that if the Legislature proposed violently to interfere and deprive the grandchildren of their rights, it would have expressly declared such to be one of the objects and purposes of the Statute.

Judgment. WILSON, J.—Since this case was last before the Court, a year ago, I have had the opportunity to consider it occasionally, but not with that degree of attention which its importance requires. I should have been glad to have had a longer time—I should more correctly say, a fitter opportunity of going over the facts in detail and of expressing my opinion in a form satisfactory to myself. If I thought that further time for reflection would lead me to a different conclusion than the one I have come to, I should be obliged to ask it; but as the other members of the Court are ready to pronounce a final judgment, and as the result cannot be affected in the least by my opinion, it would be unnecessary and unwise, considering the great interests involved, to postpone the decision any longer.

I expressed my opinion formerly in favour of the appeal by the trustee. I did so on perusing the very able judgment of my brother *Gwynne*, who has unquestionably hit the blot which vitiates the whole elaborate process resorted to for the purpose of making a will for the testator, which he certainly never made nor intended

to make. I have since read the opinions of the learned Chief Justice of the Common Pleas, and of my brother *Galt*, and I am quite willing to adopt the reasoning of these three judgments, and the result to which that reasoning leads, as my guide and judgment in this controversy. 1872. Re Goodhue.

GWYNNE, J.—What has been contended on the part of the defendants in the above suit is, that the Legislature, in the exercise of what is termed its paramount authority, has arbitrarily, by the Act alluded to (34 Vic. ch. 99), transferred to the testator's children the whole of the testator's residuary estate, although he had not by his will devised it to them, and has deprived the testator's grandchildren of their hopes of partaking in the testator's bounty, by stripping them of all possibility of enjoying estates which in a given event which may yet happen, the testator had devised to them.

Judgment.

Conceding that the Legislature has the power to commit such a palpable injustice, I cannot be persuaded that the Act in question has done so, unless I find such an intent plainly and unequivocally stated, in language so express as to admit of no possible misconception, and no shadow of a doubt.

It is always to be presumed that the Legislature, when it entertains an intention, will express it in clear and explicit terms: *Gas Company* v. *Clarke* (*a*). When an Act of Parliament interferes with, or when the contention is, that it interferes with private rights and private interests, it ought to receive a most strict construction in so far as those rights and interests are concerned; and so clearly is this the established doctrine of the Court, that Lord Justice Sir *G. Turner*, in *Huyhes* v. *Chester and Holyhead Railway Company* (*b*), said that

(*a*) 11 C. B. N. S. 827. (*b*) 8 Jur. N. S. 221

1879. "it is unnecessary to refer to any cases upon the point, and that they might be cited almost without end."

Re Goodhue.

In *Eton College* v. *Bishop of Winchester* (*a*), it is said, "The construction of a private Act is to be governed by the principles of common law, and applied to the subject in a manner analogously to the rules of interpretation of a private deed or conveyance." The Court knows nothing of the intention of an Act, except from the words in which it is expressed.

In *Edinburgh and Glasgow Railway Company* v. *The Magistrates of Linlithgow* (*b*), Lord *Truro*, C. J., says that a recital, even in an Act of Parliament, will not bind those who are not within its enacting part. And our own interpretation Act, Ontario Statute, 31 Victoria, chapter 1, section 31, enacts that if an Act of the Legislature of Ontario be of the nature of a private Act, *it shall not affect the rights of any persons, such only excepted as are therein mentioned and referred to.*

Judgment.

The whole frame of the deed which the Act confirms is based upon the assumption that the estate of the testator's residuary real and personal estate, is a vested estate, and that the period of distribution only is postponed until the decease of testator's widow.

The deed recites, among other things, as the occasion of the provisions of the deed, as follows: "And whereas, all the said testator's children have attained the full age of twenty one years; and whereas (after paying and providing for all out-goings) the residuary estate is of large value, amounting to more than $300,000, *and the respective shares of the testator's said children therein are* considerable, and it is desirable that they should

(*a*) Lofft. 401. (*b*) 3 Macqueen. H. of L. 704.

respectively enter into the possession and enjoyment *of the same, and that this should not be postponed until the decease of the said widow of the deceased;* and whereas the several parties hereto have respectively assented and agreed to enter into and execute these presents, in order to secure to each of the children of the testator *the immediate possession* and enjoyment *of their respective shares in the said residuary estate.*" The deed, for the reasons here recited, then proceeded to declare, among other things, as follows:

"Now these presents therefore witness, and it is hereby respectively covenanted and agreed upon by and between the said respective parties and their respective heirs, executors, and administrators, as follows:" Fifth. "That the residue of the said trust estate, other than is hereinbefore excepted, shall be divided into six separate shares or allotments, of equal value, or as nearly so as circumstances will permit, and such division into the said allotments shall be made as soon as conveniently may be by the said trustees: and in making such allotments, the trustees shall distribute the said trust estate *in specie, as the same may then happen to be,* and without converting or collecting, or assuming to convert or collect *the same, or any part of the said trust premises, and without making any equal partition of the said trust estate,* which consists of realty, but treating and considering the whole of the said residuary estate to be alloted as converted into personalty, and of the money value ascribed by the said trustees to each part and parcel thereof; and that in case the said trustees shall neglect or refuse to make such allotment or distribution, or in case they should differ about the same, or in case of the death or removal from this Province, or the resignation of either of them the said trustees, in any of such cases any of the parties to these presents, other than the party of the first part, (that is the widow), may apply to

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1872. Re Goodhue. the Court of Chancery or a Judge thereof, in a summary manner, *to appoint one or more Referee or Referees, by whom such allotment* may be *validly* made; and that in case of any difference as to which of the said several allotments *shall be taken by any of the said children, for his or her shares* respectively, the same shall be determined by lot or drawings by the said trustees, or Referee or Referees, in the presence of at least three of the said children.

6th. "When the said several allotments shall have been determined and the respective shares distributed or assigned to each of the said children, *then* the said respective shares to which the children are before said to be beneficially entitled in common, shall be duly conveyed and transferred according to the several natures of the respective parts of such shares, unto and to the use of each of the said children, their respective heirs, executors, administrators, and assigns, absolutely IN SEVERALTY."

Judgment.

Now, throughout the whole of this deed there is not a word to indicate that there was any doubt entertained as *to the vested* estate of the testator's children, living at his death, in the residuary trust estate; true, the will is recited, whereby it appears that the trusts of the will are "for all the testator's children who should be living at the decease of the testator's wife, in equal shares, and the children of such of them as might then be dead, such grandchild or grandchildren to be entitled to the share his, her or their father or mother would have been entitled to if living"; but the deed treats this as an estate vested in interest in the testator's children living at his death, with the period of possession only postponed until the widow's death, and regards the interest of the grandchildren as being no other than by way of transmission through their parents, the testator's children. The object of the deed, treating the estate of

the testator's children to be vested under the will, *is simply to expedite the period of possession, and to obtain a transfer to each, of his or her share* in specie; that, is whether real or personal estate, to be so conveyed as to pass according to the nature of the estate—if real, to each child's heirs—if personal, to his or her executors and administrators. These are the only deviations from the trust purposes declared by the testator as to his residuary real and personal estate by his will, which are professed and declared to be within the contemplation of the deed, and that this was the whole scope and contemplation of the deed appears clearly, as I think, from the eighth paragraph, viz.: "Inasmuch as it is doubtful whether the hereinbefore-agreed-upon arrangements for the settlement and distribution by the said widow and children of the said estate of the said testator can be legally assented to, or carried into effect by the trustees, BY REASON OF THE COVERTURE of several of the parties hereto, and also *from the insufficiency of the powers of the said trustees under the said will*, it is hereby agreed that an application shall be made to the Legislature of the Province of Ontario *for an Act to confirm* these presents, and for such power as may be incidental thereto, *or necessary in the premises.*"

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Re Goodhue.

Judgment.

The object of the deed, then, was to expedite the period of possession of estates claimed to be and treated as vested in interest in the testator's children, and to obtain an *immediate* transfer of such vested estates in both the real and personal estates as existing, instead of in personalty only, after conversion of the realty into personalty; and the declared object of the Act which was to be applied for was to *confirm that deed*, and effect those purposes, notwithstanding the doubts as to its validity by reason of some of the parties being *femmes couvertes*, and by reason of the insufficiency of the powers given to the trustees to enable them to transfer the estate to the parties to the deed (although entitled

1872. to such vested interests) sooner than was directed by the will.

Re Goodhue.

The Petition to the Legislature, as set forth in the Act as the reason for the passing of the Act, stated, among other things, the execution of the above deed, which was set out in full, and that the object of the deed *was to secure* to each of the children of the testator *the immediate* possession and *enjoyment of their respective shares* in the said residuary estate, without being postponed until the death of testator's widow, and it *therefore* prayed that an Act might be passed in order to confirm the said indenture and the several provisions thereof, and to effectuate the same. It was thereupon enacted, "That the said indenture of the 26th September, 1870, in the schedule of this Act set forth, is hereby confirmed and declared to be valid, *and the said trustees* of the estate of the said Honourable *George Jervis Goodhue*, deceased, *are hereby authorized and required to carry into effect the several provisions thereof*, and in so doing are hereby saved harmless and indemnified in the premises."

Judgment.

Now, in so far as the operation of the deed is concerned, all that the Act of the Legislature professes to do is, as it appears to me, to confirm it and make it valid, notwithstanding the doubts therein recited as to its being valid for the reasons therein stated, without an Act: to remove, in effect, simply the suggested doubts.

The Act then proposes to do no more than the deed itself purports to do, and as the deed itself suggests, it could have effectually done but for the doubts suggested. The removal of the doubts was all that was suggested to be necessary to give it complete validity. Now, under these circumstances, what is the effect of the enactment which declares the deed to be valid? A deed is said to be valid, I take it, when it is effectual to bind

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the parties thereto and their privies to the extent of the purposes, scope, and intent of the deed as declared therein. A deed *inter partes* has no validity or binding force upon any persons not parties thereto. To be bound thereby, a person must be a party thereto or in privity with a party. Infants and married women, although parties to and executing a deed, may not be bound by the deed by reason of their legal infirmity as infants or married women; but no one, whether infant or married woman, can be in any manner affected by a deed touching and concerning matters in which they have an interest, unless they are parties thereto, or unless in virtue of some *express provision* of an Act of Parliament, as for instance, the Act enabling tenants in tail to bar the estate tail and all remainders. The effect of the declaration in the Act is, as it appears to me, at most to declare and enact that the deed shall be valid and binding according to its tenor and effect, true intent and meaning, *upon the several parties* thereto, notwithstanding the doubts expressed as to married women who had signed it not being bound, and upon the trustees of the testator's estate, notwithstanding that they were not, in their character of trustees, parties assenting thereto, in so far as to authorize them to transfer to the parties to the deed in severalty such shares as were vested in them in interest by the will without waiting for the decease of testator's widow; but the Act does not profess to deprive, and therefore cannot be construed to have an effect so contrary to all our ideas of legislation and of natural justice as to deprive any persons, least of all infants, who are contingently made objects of the testator's bounty, of the prospective benefit of such bounty, nor does it profess to vest, and therefore we cannot construe it to have an effect so contrary to all our ideas of legislation and of natural justice, as to vest, in any persons, an estate and interest in the testator's estate, which the testator has not himself vested in such persons, but has made contingent upon an event yet in the future.

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Re Goodhue.

In the absence of an *express* legislative enactment, we cannot, I think, having regard to the recognized rules of construction of all instruments, hold that persons who, depending upon a contingency which has not yet happened, may be entitled to share in the testator's residuary estate, are deprived of such interest by a simple declaration that a deed, to which such persons are not parties, or in privity with any of the parties, and which treats the estate as one in which they never could have any interest, and as if all persons interested therein were parties executing the deed, *should be valid.* Then the Act authorizes and requires the trustees of the testator's estate to carry into effect the several provisions of the deed. Now, what are these provisions? This question involves the consideration of the construction of the deed, an inquiry as to what is its true intent and purpose, nature and effect. To ascertain this purpose we must look at all the recitals, and at the whole scope

Judgment.

and object of the deed as expressed therein, and doing so, we find it to be declared to be to expedite the personal possession and enjoyment of estates which *the deed treats as already vested in interest*, and to obtain a transfer of *such vested estates to each* of the parties entitled to the testator's residuary and personal estate, in realty and personalty as it exists, and not wholly in personalty after conversion of realty into personalty. The express object of the deed is declared to be "*to secure to each of the children* of the testator the immediate possession and enjoyment of *their respective shares* in the said residuary estate, instead of having the period of such possession and enjoyment postponed until the decease of the testator's widow." Such being the declared object, scope, and intent of the deed, the trustees are authorized and required to carry such object into effect, and the Act is declared to be their warrant for so doing. Such, then, being the provisions of the deed, according to the proper construction to be put upon it, it cannot be held that a clause in the Act autho-

rizing and requiring the trustees to carry such provisions into effect, notwithstanding that the testator's will had, as was suggested, directed them to defer the period of possession, should have the effect of requiring them to transfer the testator's estate to persons to whom he had not devised it, and of saving them harmless as against the claims of the parties to whom he had devised it, if they should make such a disposition of the estate of which they were made trustees.

Reading the Act by the light of the recitals contained therein as to the scope, object, and purpose of the deed, and as to the *necessity therein stated* for applying to the Legislature to confirm it, by reason of some of the parties being under coverture, and of doubts existing whether under those circumstances they were bound by the deed, we must, I think, hold that what the Act professes to authorize the trustees to do, is not to deprive the infant plaintiffs of the bounty which, in a given event, the testator devised to them, but to divide the residuary estate into six equal shares, and to transfer to the several parties to the deed the several shares *which were vested in them in interest*, if they were vested in them in interest, as the deed treated them to be, thus expediting only the period of enjoyment. Without the most unequivocal and express language, I cannot venture to assume that the Legislature contemplated such an injustice and such a departure from all the rules and principles governing Courts of Justice, as to deprive the testator's infant grandchildren of the estates devised to them by the testator's will, in the event of their parent, the testator's child, not surviving his widow. The intention of the Act, to be collected from its recitals and enacting clauses, is, as it appears to me, to authorize such shares in the testator's estate *as the parties to the deed had become entitled unto in interest by the will, as the deed treated them to have become*, to be transferred to them in possession, in anticipation of the time specified in the Will, and in specie as now existing.

Judgment.

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Re Goodhue.

It is, as it appears to me, an unwarrantable interpretation of the intent of the Legislature, and a strained construction of the language used, to hold that they contemplated by force of a Legislative Act to transfer to B an estate, which in a given event, which may yet happen, the testator had devised to others, and which he had not at all devised to B, otherwise than contingently upon the happening of an event which has not yet happened, and by possibility may never happen; nor does the Act authorize the Court, contrary to its ordinary course and practice, to administer the testator's estate upon a summary application, and in the course of such administration to transfer to B the immediate possession and absolute enjoyment of an estate which, under the terms of the testator's will, was not vested, and by possibility may never become vested, in interest in him, but which may become vested in others. The Act, in my judgment, gives no jurisdiction to the Court of Chancery to administer and distribute the testator's estate to the prejudice of parties who may become the sole parties interested under the will, or to deal with such interests in the absence of such persons, and without hearing them or notice given to them; nor do I find anything in the Act which can with propriety be said to divest the Court of Chancery of its high privilege of being the guardian of the rights of infants, or *to compel it* to dispose of those rights to others without suit and a deliberate judgment recorded, and in the absence of the infants. The third section of the Act authorizes any of the parties to the indenture, or their respective representatives, or the said trustees, or either of them, or their successors *under the trusts of the said will* of the said *G. J. Goodhue*, from time to time, to apply in a summary manner to the Court of Chancery, or to a Judge thereof in Chambers, upon notice to such other of the said parties as the said Court or Judge may direct—but for what purpose? The section in question says this summary application may be made only "in respect of any matter or thing for

Judgment.

carrying into effect the provisions of the said indenture *connected* with the management of the trusts of the said will, *or* in the disposition of the proceeds of the said trust estate, or of any part thereof, or in respect of any matter or thing connected therewith, or in respect of which the said *Court or Judge would have jurisdiction, in case a bill or other proceeding was instituted in the said Court*, and obtain the order and direction of the said Court or Judge thereupon; and such *order may*, amongst other things, require the said trustees to submit statements and accounts of the said trust estate and the management thereof, and may generally be to the purport and effect *which, in the discretion of the said Court or Judge*, shall seem meet. 1872. Re Goodhue.

Now, it is an undoubted principle of natural justice, that the rights of parties interested in property, or claiming so to be, shall not be adjudicated upon or disposed of by any Court of Justice in the absence of such parties, or without their being given an opportunity to assert their rights. To attribute to the Legislature an intent of subverting this universally recognized principle, is what I cannot permit myself to do; unless I shall find that intent expressed in such language as is incapable of being mistaken. If the language be doubtful, I must construe the doubtful language so as to maintain and support inviolate a principle so universally recognized, instead of to subvert it. Bearing in view this sacred principle, and seeing no intention expressed in the Act on the part of the Legislature to subvert it, this third section presents to my mind the clearest evidence that the Legislature were proceeding upon the basis adopted as the frame of the deed, and the assumption therein apparent, that all parties really interested were parties to the deed, when it provided that the notice of the proceedings in the Court was to be given only to the parties to the deed and the trustees. I cannot interpret the language of this third section as providing that the Judgment.

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interests, if any there be, of persons strangers to the deed shall be adjudicated upon or disposed of by the Court in their absence, or that any such adjudication shall, contrary to the principles of natural justice, be binding upon such strangers so kept in ignorance of all such proceedings. The language of the section seems to me to expressly confine and limit the jurisdiction of the Court and Judge to the jurisdiction which, according to the established and well-known principles of equity, the Court would have, in case a bill were filed for the like purpose, and if a bill were filed, all parties having an interest in the subject matter in respect of which the jurisdiction of the Court was invoked, should have to be brought before the Court; moreover, it is apparent from the words, "and may generally be to the purport or effect which *in the discretion* of the Court or Judge shall seem meet," that everything the Court or Judge shall do in the premises is left open to the inquiry and the adjudication of a superior tribunal, as the manner in which, in the given case, such discretion has been exercised; and I must say that an order made in the absence of infants claiming to be interested in a testator's estate, the effect of depriving the infants of the right to have the question of their asserted claims inquired into and adjudicated upon by the Court, upon a bill filed for that purpose, according to the practice of the Court, can in no sense, in my judgment, be said to be an order made in the exercise of a sound discretion, and can have no effect whatever so as to bind or bar the right of the infant claimants to have their claims entertained and adjudicated upon in a suit instituted on their behalf.

Judgment.

But this third section presents further evidence to my mind that it was not the intention of the Legislature to subvert the testator's will, by transferring to his children estates not vested in them in interest by the will, and which, by possibility, might become the property of his

grandchildren, and not of his children. but simply to expedite the enjoyment of estates assumed to be vested in interest; for the trusts of the will are, by the third section, regarded as still continuing in existence, and, as I read the Act, in all other respects than in so far as the authorizing the transfer of the immediate possession of estates vested in interest, is an interference with these trusts. It is in respect of the management of the trusts of the will, or the disposition of the proceeds of the trust estate, or in respect of any matter connected therewith, or in regard to which the Court would have jurisdiction in case a bill were instituted in the Court, that the summary proceeding is authorized. Now if the Court would not have, and it cannot be contended that *it would have*, irrespective of the Act, jurisdiction on a bill filed by the children against the trustees, to compel them to convey to the testator's children estates not devised to them, then the statute gives no jurisdiction to do so by the summary proceeding authorized, and an order directing such a transfer to be made is, in my opinion, an order beyond the jurisdiction of the Court to make.

1872.
Re Goodhue.
Judgment.

But whatever may be the decision of the Court upon the hearing of the cause instituted by the infants and the trustee, Mr. *Becher*, who in the discharge of the trust reposed in him by the testator appears to have been in duty bound to invoke by bill the interference of the Court, whatever may be the proper construction to put upon the statute; whether or not it shall be found that its operation is absolutely to deprive the testator's grandchildren of the benefit of the testator's bounty, although they, and they only, by reason of all their parents, the testator's children, dying in the lifetime of his widow, should prove to be the persons entitled as devisees of the whole of the testator's residuary estate, the infant plaintiffs and their trustees have, in my judgment, an undoubted right to have the adjudication of the Court by a decree upon that subject, before the infants, who

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Re Goodhue.

are no parties to the deed to which the statute relates, and who are not mentioned or referred to in the statute, can be said to be barred of rights which, if any they have, exist wholly independently of the deed, and not by privity with any of the parties thereto.

In so far as the bill and demurrers thereto are concerned, the case, as it seems to me, may be thus stated. That certain of the testator's grandchildren, who may become entitled under the trusts of the will to certain estates thereby devised, and one of the trustees of the will, who is not acting in concert with the testator's children, file their bill, in effect alleging that the testator's children, claiming to be, and alleging that they are beneficially seized of estates vested in interest (with period of enjoyment postponed) in the testator's residuary estate, have caused to be prepared a deed which they have executed, whereby, reciting that *they are* entitled to estates vested in interest in the testator's residuary estate, with the period of entering into possession and enjoyment only postponed, it is agreed among themselves that they shall enter into immediate possession of such estates vested in interest in them, without waiting for the arrival of the period named in the testator's will for that purpose, and that they should apply to the Legislature to confirm the deed, upon the representation that the confirmation of the deed by the Legislature would be necessary for the reason only of some of the parties to the deed being *femmes covertes*, and of the *insufficiency* of the powers conferred by the will upon the trustees, and upon the further representation that all that was desired to be done was to secure the immediate possession of estates already vested in interest in testator's children, that by such representations they had applied to the Legislature for and upon the faith of the representations procured an Act of the Legislature, which, after reciting the scope, object, and purpose of the deed to be as above, and the alleged infirmity in the

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1872.

Re Goodhue.

deed which occasioned the sole necessity for applying to the Legislature, enacts and declares that the said deed, which is set out in the Act, with all its recitals therein contained, shall be valid; that testator's children thereupon, (still representing their estates under the will to be vested in interest), by summary application upon petition, without notice to the infant plaintiffs, and without making them parties to the proceeding, applied for and obtained from the Court what the infant plaintiffs allege and insist was an *ex parte* order, whereby it is ordered that the testator's residuary estate shall be divided into six parts, that is, as many parts as there are children of the testator, and that the trustees of the will shall immediately transfer and convey one of such parts to each of testator's children absolutely in severalty; that the infant plaintiffs and the trustee, *Becher*, contend that the testator's children have not, under the testator's will, an estate vested in interest in his residuary estate, or in any part thereof; and that they may never have any such or any estate therein; and that such residuary estate may, under the will, devolve wholly upon the infant plaintiffs and others, the testator's grandchildren; that if the trustees should obey the order of the Court they would be guilty of a breach of the trust reposed in them by the will, and would wholly subvert the testator's will; that the defendants, while admitting that the testator's children have in reality no estate vested in interest in the testator's residuary estate, insist that the operation and effect of the Act of the Legislature so obtained is to give them such an estate, although before they had none, and to deprive the infant plaintiffs of all prospect of enjoying any benefit from the testator's bounty, and they insist that the order of the Court of Chancery is authorized and required by the Act, whereas the infant plaintiffs and the trustee, *Becher*, insist the contrary, and contend that the Legislature had no power to pass an Act having such effect as is contended for by the defendants; and (although they

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Re Goodhue.

do not in express terms contend, yet they allege sufficient to raise the point) that the proper construction to put upon the deed and the Act is, that the Legislature has only authorized to be conveyed to the testator's six children the estates, if any, which, as they alleged, were vested in them, and that the testator's grandchildren, not being named in the Act, are not affected thereby; and that the order of the Court of Chancery, being made in their absence, and without their being made parties to the proceeding and without any notice to them, and contrary to the course and practice of the Court, without suit, is wholly inoperative to bar their rights. They pray, therefore, that the order of the Court of Chancery so obtained may be reversed; that a proper construction may be put upon the deed executed under such circumstances, and the Act of the Legislature so obtained; and that it may be declared that the infant plaintiffs are not thereby deprived of the benefit of the testator's will; that the trusts of his will in their favor shall be adhered to, their rights and interests protected, and the defendants restrained from proceeding upon the *ex parte* order so obtained, so as to affect or prejudice any rights, estates and interests devised by the will to the infants.

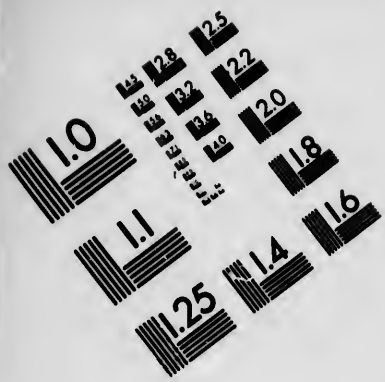
Judgment.

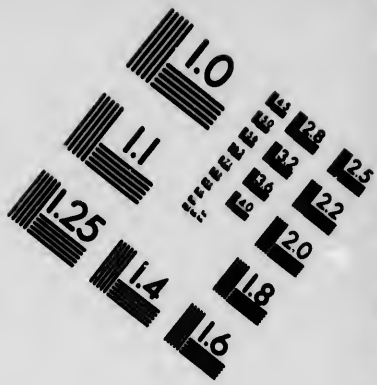
To drive these plaintiffs from the threshold of the Court by allowing a demurrer for want of Equity, upon the ground that they have no *locus standi* in Equity, because their own bill shows that the operation of the deed, Act of the Legislature, and order of the Court, although they were never named in, or made parties to, or had an opportunity of contesting any one of such proceedings, and upon which deed, Act of the Legislature, and order, they ask the Court by bill to put a construction, has been to deprive them of all interest under the testator's will, seems, I must confess, to me to be a mockery of justice. I am of opinion, therefore, that the demurrers should be wholly disallowed, that the order made by the Court of Chancery is inoperative as affects any of the rights and

interests of the infants, and that what these rights and interests are, must be declared in a decree to be made in the suit, and that in the meantime all proceedings upon the order in Chancery should be stayed. 1872. Re Goodhue.

As to the appeal of the trustee, *Becher*, against the order itself. His is certainly a very critical position. If the testator's grandchildren, or any of them, should become entitled, as they may, to demand and receive from him the estate devised to them by their grandfather's will, he would according to the ordinary recognized doctrine of the Court, be liable, as for a breach of trust, if he should not have the estate forthcoming. Now the statute does not in terms direct him to transfer to the testator's children any estate in which the testator's grandchildren are, or may become, interested; it is only by a strained inference, if at all, that the Act can have that effect. Whether it has or not that effect, can only be determined in a suit whereto all parties claiming under the testator's will are made parties, and by a *decree* in such suit. Now the Statute does not profess to fetter the Court in the exercise of its discretion; it does not *direct* the Court *peremptorily* to proceed according to a course which would be subversive of the ordinary established doctrine of the Court, that is to say, in the absence of parties interested or claiming to be interested, or to convey or cause to be conveyed to one set of persons estates not devised to them, and which may in terms of the will devolve upon and become the property of others, some of whom may not yet be in being. The Court is left in the unfettered exercise of its sound discretion as to what, according to the particular circumstances arising, it shall order, and as to how it shall proceed. Judgment.

It is worthy of notice that the petition which invokes the interference of the Court proceeds upon the same assertion that the Act of the Legislature proceeded,





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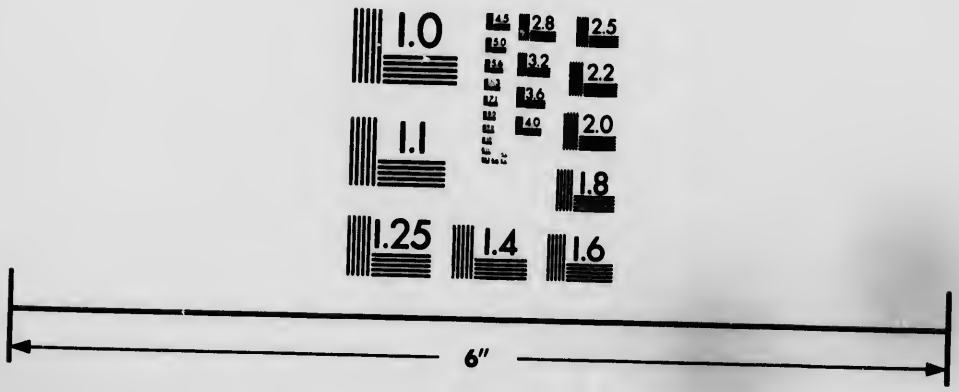

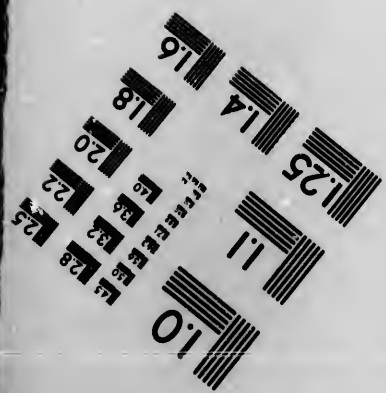

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namely, that the estates devised to the testator's children by the will are vested in interest, with the period of enjoyment only postponed. If that be clearly so, then no evil could ensue from the Court proceeding upon a summary petition, on notice to the other parties to the deed; but if strangers to that deed contend that no estate, vested in interest, is at all devised to the testator's children, and that to deal with the estate upon the basis claimed by the children may work a manifest fraud to the testator's infant grandchildren, then, as it seems to me, the proper course for the Court to adopt is to decline to lend its aid to anything prejudicial to such infants in their absence, or otherwise than upon a bill and by a decree of the Court finally determining and adjudicating, according to its ordinary course of proceeding, upon the rights of all parties interested under the will, and by putting a decretal construction upon the deed and the Act of the Legislature, which are claimed to have an effect so subversive of all the most acknowledged principles of justice. It was argued, upon the authority of *In re Freeman* (*a*), that no appeal lies from an order made upon a petition, as the order appealed from here was; but that decision does not, in my judgment, govern this case. There the proper proceeding to lead to the order was a petition, and the subject matter of the petition was not appealable matter. Here what is complained of is, that the taking any proceeding upon the petition without notice to all parties interested, and affecting to bind the interests of absent parties, and to deprive them of their estates, was, as far as these parties are concerned, contrary to natural justice, and that an order made upon such a petition, which is prejudicial to the testator's grandchildren, was an improper proceeding, and under the circumstances not warranted. *In re Freeman* is, in my judgment, no authority for contending that an appeal does not lie in

Judgment.

(*a*) 2 Er. & App. 109.

such a case. I entertain no doubt that it does, and I am of opinion that, in *Re Goodhue*, the appeal should be allowed; and that the order of the Court of Chancery, of the 3rd of May, 1871, should be annulled; and, in the cause of *Tovey* v. *Goodhue*, that the appeal against the order of the Court of Chancery, allowing the demurrer of *Charles Frederick Goodhue* should be allowed; and that such demurrer be overruled with costs in the Court below; and that the appeal against the order of the Court of Chancery of the 5th of June, 1871, overruling the demurrer of the defendants *Watson* and others, should be dismissed with costs. 1872. Re Goodhue.

GALT, J.—The late Mr. *Goodhue* by his will having bequeathed certain legacies which are not affected by the litigation before us, devised and bequeathed the whole of his real and personal estate unto and to the use of *Henry C. R. Becher* and *Verschoyle Cronyn*, their heirs, executors, administrators, and assigns, in trust for conversion and collection, and for the investment of the proceeds thereof, and directed that the said trustees should make certain payments thereon, that is to say, (among others):—The taxes and insurance premiums payable upon and in respect of the family mansion and premises specially devised as aforesaid to the said *Louisa Goodhue*, (the wife of the testator) and the said testator directed any surplus of the annual income and proceeds of his said estate to be accumulated during the lifetime of his said widow, the said *Louisa Goodhue*, and upon her death the testator directed that the said trustees should hold all the said trust premises, rest, and residue of his estate then undisposed of, and not otherwise disposed of by his said will in trust for the testator's children who should be living at the decease of his said wife in equal shares, and the child or children of such of them as might be dead in equal shares, such grandchild or grandchildren to be entitled to the share his, her, or their father or mother would Judgment.

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have been entitled to if living, the shares going to the testator's daughters, to be for their separate use respectively, free from the control of their then present or after-taken husbands. From a statement of the facts of the case, it appears that the residuary estate thus disposed of was of very considerable value, and also that at the decease of the testator each of his children was married, and all, with one exception, had children. There can be no doubt the testator intended that his residuary estate should not be divided until after the death of his widow, and also that in the meantime the interest, rents, issues, and profits should be allowed to accumulate and be added to the principal. After the testator's death, his children executed a deed whereby they agreed among themselves that the residuary estate should at once be divided between them in equal shares, and that each should have immediate possession and enjoyment of their respective shares. It is to be observed that in this deed no reference is made to the existence of any grandchildren of the testator. As it was not in the power of the children to give effect to this agreement without the power of the Legislature, they applied to Parliament to confirm this deed, &c.

Judgment.

Act was passed on the 15th of February, 1871, which enacts that the said indenture of the 25th day of September, 1870, is thereby confirmed and declared to be valid, and the said trustees of the said Honorable *George Jervis Goodhue* are authorized to carry into effect the several provisions thereof. No reference is made in this act to the existence of any grandchildren. By the 7th section of the Interpretation Act, sub-section 31, it is expressly enacted that no provision or enactment in any act shall affect in any manner or way whatever the rights of Her Majesty, her heirs or successors, except it is expressly stated therein that Her Majesty shall be bound thereby, nor if such Act be of the nature of a private Act, shall it affect the rights of any person or of any body politic, corporate, or collegiate, such only excepted as are therein mentioned or referred to. There

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can be no question that the act relating to Mr. *Goodhue's* will is of the nature of a private act, and consequently if the interests of the testator's grandchildren are affected thereby, then they are not bound by the provisions contained in it. By the testator's will the residuary estate was to be allowed to accumulate during the life-time of his widow, and, at her death, was to be divided equally among his children who might then be living, and in case of the death of any of them then the child or children of the child so dying is or are to take the share of the deceased parent. In this event the grandchildren would take directly under the will of their grandfather, and would be entitled, not only to the share of the principal as it stood at the death of the testator, but also to the accumulated profits. By giving effect to the contention of the children as to the construction of the deed, and the act confirming it, not only would the grandchildren be deprived (in the event of their parents dying in the life-time of Mrs. *Goodhue*) of any share of the accumulated profits, but it would rest entirely with the parents whether they should receive any portion of the principal. It appears to me impossible to say that the interests of the grandchildren would not be affected by distributing the residuary estate during the life of Mrs. *Goodhue*, and depriving them of rights contingent on their parents dying during her life and consequently that the order in this case cannot be supported, because it is based on an Act of the Legislature which does not profess to interfere with their interests.

Judgment.

STRONG, V. C.—I agree in every respect with the judgment of the learned Chief Justice of the Common Pleas. I think this Act of the Legislature fails to extinguish the rights of the infant grandchildren of the testator who are plaintiffs in this suit. A definition which seems to me to be correct and exact, of the requirements of every private Act of Parliament in order that it should have the effect of extinguishing or transferring

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any private right of property is given by Mr. Justice *Morrison* in his judgment, in the following words: "In order to bar the infant appellants of their rights, and defeat the intention and object of the testator, the statute should contain an express and explicit enactment to that effect specifically referring to the appellants."

This rule, which, as the cases cited in the judgment of the Chief Justice of the Common Pleas shew, has been for two centuries a well settled principle of construction, has received an express sanction from the Legislature of this Province in the 31st sub-section of section 7 of the Interpretation Act, 31 Victoria, chapter 1, which is this: "No provisionor enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby, nor if such Act shall be of the nature of a private Act shall it affect the rights of any person or of any body politic, corporate, or collegiate, such only excepted as are therein mentioned and referred to."

Judgment.

This section would by itself, in my judgment, have been quite sufficient to prevent the unjust effect which the orders appealed against impute to the statute in question.

In addition to the authorities already cited by the learned Judges who have preceded me, I would call attention to one or two others. In the New York case of *Jackson* v. *Catlin* (*a*), the interest of one *Croghan* in lands had been sold by the sheriff under execution and purchased by *Thomas Jones;* afterwards *Jones* was attainted, and a private Act of the Legislature was subsequently passed authorizing the Surveyor General to sell the lands purchased by *Jones*, and pay the money upon

(*a*) 2 John Rep. 248; 8 John 520, (in Error).

sheriff's sales which had been arrested by the war. It was held that the Act could have no effect upon the rights of *Croghan's* heirs who were not named in it. The Court, of which Chancellor *Kent* was then a member, saying: "It is a private Act and liable to the rule of construction applicable to such statutes. In England a general saving clause is now always added, at the close of every private Act, of the rights and interests of all persons except those whose consent is obtained, and before this practice of inserting the saving clause it was held that a private Act did not bind strangers." At this time, Mr. *Sedgwick* says, the Constitution of New York had no provision against legislative interference with private property. I also refer to *Sedgwick* on Statutory and Constitutional Law, p. 679, and to first *Kent's* Commentaries (*a*). The doctrine, as I read the authorities, is inflexible, and is not satisfied by any implication however strong; the intention must be actually expressed in order that the Act can have any effect to divest a private right of property. And no rule can be more just and reasonable than this, requiring as it does that the Legislature should shew on the face of the statute that they duly considered the rights of a party whose property is taken from him by the operation of a private law.

Judgment.

That the interest of the children of the testator is not a vested but an executory or contingent interest, is, to my mind, extremely clear; though I think it can have little or no bearing on the question we have to decide. It is, as I understand the cases, a well settled principle of construction that where there is a gift to a class to be ascertained at the death of a tenant for life, no vesting takes place until the period of distribution arrives, when the subject of the gift vests in those who then compose the class—in the present case, the surviving children of the testator and the children of deceased children—

(*a*) 8th ed. p. 150.

1872. to the total exclusion of the representatives of deceased children who may have died without issue.

Re Goodhue.

But even had the plaintiffs been expressly named in the Act, I should still upon another and distinct ground have come to the conclusion that they were not bound.

By section 92, of the tish North America Act the exclusive power to legislate is, amongst other matters, conferred on the local Legislatures as regards "Property and civil rights in the Province, and generally in respect of all matters of a merely local and private nature in the Province." It must be from one or the other of these sources that the power to pass private Acts of Parliament affecting private property is derived. That the Legislature have that power in all cases where the property and rights sought to be affected are "in the Province," to the same unlimited extent that the Imperial Parliament have in the United Kingdom, I have not the slightest doubt.

Judgment.

In the distribution of the legislative powers just referred to, it must have been intended to confer the right of legislation in private matters and in matters of property and civil rights theretofore exercised by the Legislature of Canada, either on the Parliament of the Dominion or on the Provincial Legislatures, and there is nothing in the Act shewing an intention to give any part of it to the Parliament. But the laws to be made by the Provincial Legislatures are confined to property, civil rights, and matters of a local and private nature *in the Province*, so that, although no limitation is imposed as regards the extent to which the Legislature may in their discretion affect private rights within their jurisdiction, they are limited to dealing with rights and property within the Province. Where limited legislative powers are conferred, it must always be the duty of every judicature, when called upon to expound and apply Statutes made in the

exercise of such an authority, to inquire whether or not the bounds set by the sovereign Legislature have been exceeded. 1872. Re Goodhue.

To put a plain case, I will suppose that a Provincial Legislature should assume to confer on a Justice of the Peace out of sessions power to try summarily a charge of felony. It cannot be doubted but that it would be the duty of the tribunal, although the lowest in the scale of jurisdiction, to treat the Act as a nullity.

This has been already so determined in this Province in reference to criminal legislation; and in the case of *Tully* v. *The Principal Officers of Ordnance* (*a*) the late Sir *John Robinson*, C. J., seems to have inclined to the opinion that a statute of the late Province of Canada was void as being beyond the competence of the Provincial Legislature who had assumed to deal with certian rights of property vested in the Imperial Government. Judgment.

It has then been objected that inasmuch as the plaintiffs, the infant children of Mrs. *Tovey*, one of the testator's daughters are, and were when the Act was passed, domiciled in England it was beyond the competence of this Legislature to extinguish their rights in the trust fund created by this will. It will be observed that the will directs an absolute and immediate conversion of all the testator's estate into personalty, and it is to be retained invested and ultimately divided as personalty. The trust estate therefore, whether actually converted or not, is to be considered as money, movable property, or personalty from the date of the testator's death; and the rights of the beneficiaries must consequently be determined as though all had been left by the testator in the state of personalty, and the interests conferred by the will had been ordinary pecuniary legacies.

(*a*) 5 U. C. Q. B. 6.

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Re Goodhue.

What then is the locality of the right which the plaintiffs have of being substituted for their mother, in case she should be dead at the time of distribution? Does this right differ in any material respect from the right to recover a legal debt? That the money which may constitute the plaintiff's share, is only payable in a certain contingency, and that the payment of it could only be enforced in a Court of Equity, cannot on any principle which I can discover, constitute any difference between this right of the plaintiffs and an ordinary legal debt, as regards the question of locality. Then it has been determined in the English Courts by decisions never reversed, and which must, as I conceive, give the rule to us, however much foreign jurists and writers on International Law have differed on the point, that the locality of a debt is at the domicile of the creditor. *Sills* v. *Worswick* (*a*). Such is also the determination of the Supreme Court of the United States, which has held that statutes of bankruptcy do not bind foreign creditors. *Wharton*'s Conflict of Laws, sec. 528; 2 *Kent's* Commentaries; (*b*) *Baldwin* v. *Hale*. (*c*)

Judgment.

Then if the Legislature of the domicile of the debtor has no power to declare that the foreign creditor's debt shall be extinguished on the creditor being paid his fair proportion of the debtor's whole estate, it surely has not the power to declare that the creditor's right shall be absolutely extinguished without even partial satisfaction.

If the trustees, instead of having taken the wise course which they have followed, had acted on the petitioners' view of this Statute, and had dealt with the estate accordingly, what would have been their position if, after the death of the testator's widow and the mother of the plaintiffs, they had been called to account in the

(*a*) 1 H. Bl. 690.
(*b*) 9 Ed. p. 503.
(*c*) 1 Wallace 222

English Court of Chancery. The jurisdiction of that Court, at least as regards any of the trustees who might have been served with process in England, could not have been questioned. 1872. Re Goodhue.

It would therefore have been incumbent on the trustees so sued, to have shewn in their defence, that the interests of the children, at the date of the passing of the Act, constituted property or civil rights within this Province; and this, I am of opinion, on the authorities which I have referred to, and which seem to me to be directly applicable, it would have been beyond their power to do.

The result is, that both the orders, as well that made on the petition as that in the cause, ought to be discharged. Judgment.

Appeal allowed.

DUNDAS v. HAMILTON AND MILTON ROAD COMPANY.

Practice—Appeal to Privy Council—Stay of proceedings.

By an order of the Court of Error and Appeal the Hamilton and Milton Road Company were ordered to remove a bridge constructed by them which impeded the navigation of the Desjardins Canal, against which the Road Company appealed to the Queen in Council: *Held*, that under the Statute the circumstance of the Road Company having perfected the security required by the orders of the Privy Council, was a sufficient answer to a motion for sequestration for non-compliance with the order requiring the removal of the bridge: and the Road Company having applied to this Court for a stay of proceedings under the order of the Court of Error and Appeal, pending their appeal to the Privy Council both motions were refused, but under the circumstances without costs to either party.

This was an application by the plaintiffs and a cross-application by the defendants, the *Hamilton and Milton*

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Road Company, for a sequestration against the Road Company, and by the Company for an order to stay proceedings under the order of the Court of Error and Appeal during the pendency of an appeal to Her Majesty in Council.

Mr. *Crooks*, Q. C., and Mr. *Hoskin*, for the plaintiff.

Mr. *S. Blake*, contra.

SPRAGGE, C.—In this case there are cross-applications, one by the plaintiff, for a sequestration against the defendants, for not obeying the decree of the Court of Appeal, which directed the removal of a bridge which obstructs the navigation of the Desjardins Canal; the other by the defendants *The Road Company* for stay of proceedings pending an appeal to the Privy Council; and it was at the same time contended by the defendants that the pendency of the appeal, security having been perfected, operated as a stay of proceedings. At the close of the argument, I intimated that the inclination of my opinion was, that the application to stay proceedings should be made either to the Court of Appeal here or to the Privy Council; and I still think so. This Court is neither the Court appealed from, nor the Court appealed to, and has not, in my opinion, jurisdiction to stay proceedings directed by the Court of Appeal. Nor have I, as a Judge of the Court of Appeal, such jurisdiction. The Court of Appeal Act authorizes a Judge of the Court to do certain acts, but this is not one of them.

Judgment.

The contention of the defendants, that the perfecting of security on the appeal to the Privy Council operates to stay proceedings, would not, I apprehend, be a proper ground for a substantive application; but, if such be the effect given to it by the Act, it is a good answer to the plaintiff's application for sequestration.

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Dundas v. Hamilton and Milton Road Co.

The words of the Act (sec. 60) are, "Upon the perfecting of such security execution shall be stayed in the original cause." What is directed by the Court of Appeal in this cause does not fall within the exceptions enumerated in the 16th and referred to in the 61st section of the Act. The only question therefore is, whether the process applied for by the plaintiff—a sequestration—is an execution within the meaning of the Act.

In this case it is the process of the Court to enforce a decree against a corporate body, and so is final process. But it should not be held to be a process of "execution" unless the process by which a like decree is enforced against an individual party would be an execution within the meaning of the Act. The process against an individual party would be an order to commit, and this may still be followed by attachment and sequestration.

Judgment.

In the case of *Gamble* v. *Howland* (*a*) I quoted the definition of an execution by *Bacon*, that it is "the obtaining actual possession of a thing recovered by judgment of law;" and, by *Coke*, that it is "*fructus finis et effectus legis.*" Both of these are speaking of common law executions; but it is evident that, in our Court of Appeal Act, the word execution is applied in the same sense to decrees of this Court. The exceptions enumerated in section 16 shew this conclusively. I do not see how I can hold that process by which a decree is enforced which directs the removal of a bridge is less an "execution" than the like process to enforce a decree directing the assignment or delivery of documents or personal property; or a decree directing the execution of a conveyance or other instrument; or a decree directing the sale or delivery of real property or chattels real.

(*a*) 3 Gr. 308.

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It may be that it would have been well to have added to the list of exceptions the case of injunctions, mandatory or otherwise. But injunctions are applied to such an infinite variety of circumstances, that such an exception could probably only be worked out by leaving the question of staying proceedings in each case to the discretion of the Court. In *Gamble* v. *Howland*, I pointed out what appeared to me to be the very serious inconveniences that would result from an appeal being *ipso facto* a stay of proceedings in injunction cases. That was the case of an injunction before decree; but the like consequences might follow in the case of injunction ordered by decree. At any rate, as the matter stands, I see no escape from the conclusion, that the process applied for is an execution; that it is not within the exceptions made by section 16, applied by section 61 to appeals to the Privy Council; and therefore that, by the perfecting of security for appeal, the execution is *ipso facto* stayed. The plaintiff's application for sequestration is refused; and the defendants' application for stay of proceedings pending appeal is also refused. I give no costs to either party.

Judgment.

Barry v. Barry.

Administration suit—Costs.

Although the Court has the power of protecting the estate of a testator by charging the executor with the costs of a suit for administration unnecessarily brought by him, it will, where on the first application to the Court it is not shewn that any good ground exists for instituting proceedings for the administration of the estate, by the Court, refuse the application.

This was an application to the Judge in Chambers for an order to administer the estate of the late *Charles Barry*, by his widow and executrix. It appeared in the case that the plaintiff, who alone proved the will, had in writing agreed with her son, the defendant, that

1872.

Barry v. Barry.

he should occupy and work the farm of the deceased, which he had devised to his widow for life, together with all his chattel property, and after her death to the defendant, subject to the payment of certain legacies to the other members of the family; that defendant in pursuance of such agreement had entered upon and worked the farm, and the plaintiff alleged that the defendant in his conduct of the affairs of the estate which the plaintiff on account of her great age, had allowed him the entire management of, had possessed himself of a sum of money belonging to the estate which he refused to give any account of, and had applied the same to his own use. This appeared to be the only ground for seeking the interposition of the Court in administering the estate.

Mr. *E. B. Wood*, for the plaintiff.

Mr. *W. Cassels*, contra.

Judgment.

BLAKE, V. C.—This is an application on behalf of *Mary Barry*, the widow and executrix of the late *Charles Barry*, for the administration of his estate, real and personal. The widow claims under the will in question an interest for life in the real and personal estate of the deceased; and this she enjoyed for some time after his death, and until she made the arrangement of the 27th of November, 1871, with her son, the defendant *Charles Barry*. The position of a creditor or legatee who has not the power of administering the estate differs from that of the person who has the right to dispose thereof in the manner the executrix has; and while the former are entitled, almost as of course, to the usual order for administration the latter is bound to shew some sufficient cause for the interference of the Court before an order will be made in her favor. Whatever doubt there may have previously existed upon this point, it was set at rest by the decision in *White* v.

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Cummins (*a*), where *Esten*, V. C., says: "I think an executor or administrator has no right to file a bill merely to obtain an indemnity by passing his accounts under the decree of the Court; there must be some real question to submit to the Court, or some dispute requiring its interposition;" and, in *Cole* v. *Glover* (*b*), we find Chancellor *VanKoughnet* expressing the same rule in the following words: "It is time to put a stop to the practice of rushing into this Court with trust estates, unless for some good reason entitling the trustee to protection here. In *Story's* Equity Jurisprudence, *Spence's* Equity Jurisprudence, and *Toller* on Executors, it is said, that an executor or administrator may seek the aid of this Court where there is difficulty in distributing the assets, disputes among creditors, legates, &c.; but it is nowhere said that this Court is to do deputy for him. Our orders make no difference in this respect. An order should not go at the instance of the administrator without some reason being given. The right of a legatee or *cestui que trust* is subject to different considerations." The tendency of the legislation of the day is to enlarge the powers of executors, administrators, and trustees, and to protect them in the fulfilment of their duties, and this Court would be defeating such legislation if, in place of allowing persons occupying these positions to work out the estates entrusted to them, it still interfered and applied its machinery to effect that which can be accomplished without it. With the Act 29 Victoria, chapter 28, section 27, providing for the distribution of the assets of an estate, the Act 32 Victoria, (Ontario) chapter 37, allowing executors to pay debts upon any evidence they may think fit, to accept compositions to compound debts, to refer to arbitration without being responsible for any loss occasioned thereby, and the Act 32 Victoria, chapter 17, giving executors and administrators the power to

Judgment.

(*a*) 3 Gr. 602. (*b*) 16 Gr. 392.

deal with the realty, the cases in which they would be justified in coming to this Court for administration of the estate represented by them are fewer than formerly existed. Here it appears to me the applicant comes to the Court not to ask for the construction of the will, nor to have any point disposed of for the benefit of the estate, but in order, through the instrumentality of these proceedings, to obtain some relief personal to herself alone against her son the defendant. The rule of Court under which she applies is not imperative; it says the "Court may make the usual order for administration" in her favor. It is true that if the suit turns out to be unnecessary the Court may on further directions visit the plaintiff with the costs of the litigation, and to this extent protect the estate, but I think it will be better to stay proceedings on the threshhold whenever a sufficient cause for the interference of the Court is not shewn, and therefore I refuse the present application. The defendants are entitled to the costs of the application if they choose to ask them against their mother, the plaintiff.

1872.

Barry v. Barry.

Judgment.

VIVIAN v. WESTBROOKE.

Practice—Administration.

An application for an administration order was made within a year from the death of the testator, by a legatee who claimed to be also a creditor of the estate; but whose claim, as such, had always been disputed by the executors and was only supported by the uncorroborated affidavit of the claimant: the Court, under the circumstances, refused the application with costs.

This was an application in Chambers by one Mrs. *Vivian* as a legatee, and an alleged creditor of *Robert Vanderlip*, who died on the 6th of February, 1872, for an administration order.

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

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Vivian v. Westbrooke.

Mr. *Hodgins*, contra.

MOWAT, V. C.—As a legatee the applicant has no right to an administration order for a year after the testator's death (*a*).

Assuming that a creditor may have such an order within the year, he must, in order to obtain the order, shew by affidavit the nature of the debt (*b*); and Mrs. *Vivian's* affidavit does not do so, and is in that respect insufficient.

Further, the executors have always disputed her claim from the time it was presented; and have urged her to establish it by an action at law, which she has not chosen to do, and though knowing that her claim was disputed the only evidence of it she has put in is her own uncorroborated affidavit; while she has left unanswered a number of specific statements in the executors' affidavits which, if true, would shew her claim as a creditor to be unfounded.

Judgment.

Now, when a case is made for an administration order, it is by the terms of the consolidated order (*c*) discretionary with the Court whether or not to grant the order; and an order has been refused in England where the debt depended on a disputed question as to the validity of a release (*d*). In the present case, considering that the application fails so far as it is made by Mrs. *Vivian* in the character of a legatee; that her affidavit in support of the application as a creditor is insufficient in connection with the other considerations which I have mentioned, I think that the proper course will be to dismiss the motion with costs.

(*a*) Slater v. Slater, 3 Chamb. 1. (*b*) Morgan's Forms, No. 1149.
(*c*) No. 469. (*d*) Acaster v. Anderson, 19 Beav. 161.

FOSTER v. FOSTER. 1872.

dministration suit—Affidavit as to amount of stock.

In answer to a motion for an administration order, one of the executors swore that the personal estate had not exceeded $50. The Court, before it would make the order, required the applicant to file an affidavit stating that he had reason to believe and did believe that the result of the proceedings would shew a substantial balance of personal estate to be divided among the legatees.

This was an application in Chambers on behalf of *James Foster* who claimed to be one of the next of kin and devisees of *Thomas Foster*, deceased. The application was for an order for the administration of the estate real and personal of the testator. The affidavits in support of the application were by the applicant and by *Thomas Foster*, who claimed to be another devisee and a creditor of the deceased.

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

Mr. *Grahame*, contra.

Judgment.

MOWAT, V. C.—It appears by the will that neither *James* nor *Thomas Foster* is a devisee. *James* has no right therefore to call for the administration of the real estate. He appears, however, to be interested in the residuary personal estate as one of the legatees. One of the executors swears that the personal estate of the testator did not exceed $50. An affidavit of *Thomas Foster*, filed in reply, appears to dispute that statement. I think that, in the exercise of the discretion which belongs to the Court on applications of this kind, it will be proper, before making the order, to require from the applicant (treating the application as made by him as a legatee), an affidavit stating, that he has reason to believe, and does believe, that there is, and will appear by the result of the proceedings to be, a substantial balance of perso-

1872.

Foster v. Foster.

nal estate to be divided among the legatees; and that the application is made in good faith to ascertain and secure such balance. If the applicant cannot make such an affidavit, there must be an affidavit shewing some just ground of excuse for not so deposing; for I think it the duty of the Court to see that its orders are not made use of for illegitimate purposes.

The application will stand over to afford an opportunity of producing this affidavit.

HENDERSON v. HENDERSON.

Alimony—Decree—Subsequent desertion, &c.

A woman filed a bill for alimony on the ground of adultery, and desertion, which suit was ultimately arranged by the husband agreeing to pay a sum of money which the plaintiff accepted in payment of all past or future claims for alimony; and a decree was drawn up stating this arrangement, and that it was agreed to dismiss the bill; and that such dismissal should be treated as a dismissal on the merits:

Held, that such decree furnished no defence to a bill afterwards filed by the wife for alimony on the ground of subsequent desertion and adultery.

Statement.

This was a suit brought by *Madge Henderson* against her husband to obtain alimony. The bill alleged that they were married in 1849; that about twelve years ago the defendant left the plaintiff, and had never since lived with or supported her. The bill also alleged that the defendant had been, since he left the plaintiff and was still, living in adultery with one *Bridget Buskins;* that about 1866 the plaintiff went to the tavern carried on by the defendant, and that he turned her out of the house.

After an order had been obtained to take the bill *pro confesso* the defendant was allowed to file an answer setting up a decree which had been made in a former suit

brought by the plaintiff against the defendant. That decree had been made by consent, and it was contended that such decree was a bar to any further suit for alimony. 1872. Henderson v. Henderson.

The question was, whether this decree so made was a bar to the present bill.

Mr. *A. Hoskin*, for the plaintiff.

Mr. *Grahame*, for the defendant.

Hagarty v. *Hagarty* (*a*), *Gracey* v. *Gracey* (*b*), *Dixon* v. *Hurrell* (*c*), *Hooper* v. *Hooper* (*d*), *Thomas* v. *Thomas* (*e*), *Shelford* on M. & Div. 625, 542–3, were referred to.

SPRAGGE, C.—What is set up in the answer of the defendant, which is in the nature of a plea in bar, is not in my opinion a good answer to the plaintiff's bill. The bill, which is for alimony, was filed on the 28th of February last, and alleges the plaintiff's marriage with the defendant; and states the commission by the defendant of acts of adultery with one *Bridget Buskins*, commencing, as the bill puts it, "some thirteen or fourteen years ago." It alleges frequent adulterous intercourse, renewed from time to time and at different places, with the same woman; and then goes on to state, that "for several years past" her husband and *Bridget Buskins* have lived together as man and wife; that he has several children by her; and that they still live together, she passing as his wife. Judgment.

The answer sets up that the plaintiff commenced legal proceedings in this Court for the same alleged causes of suit in 1864; and that a consent decree was made in

(*a*) 11 Gr. 562.
(*b*) 17 Gr. 113.
(*c*) 8 C. & P. 717.
(*d*) 3 Swa. & Tri. 251.
(*e*) 2 Swa. & T. 113.

1872.

Henderson v. Henderson.

that suit, which is set out in the answer. The date of this decree I find to be 13th June, 1864, and it is in the following terms: "This cause coming on this present day to be heard before this Court in the presence of counsel for both parties, upon opening of the matter and upon hearing read the draft minutes, and both parties by their counsel consenting thereto; and it appearing that the defendant had paid to, and the plaintiff had accepted the further sum of $50 in addition to the moneys already paid in discharge of the said plaintiff's claim for alimony past and future, and the further sum of $20 in full discharge of the said plaintiff's claim for costs in this suit, the said moneys being paid by way of compromise and without admission or waiver of any rights or defence herein: this Court doth order and decree that the bill of complaint of the said plaintiff be and the same is hereby dismissed out of this Court; and this Court doth further order that the said plaintiff be for ever barred by this decree from any further claims in respect of the matters and things which form the subject matter of this suit, and the dismissal of the said bill is to all intents and purposes to be considered a dismissal on the merits."

Judgment.

This decree, which is not impeached on any ground in this suit, was, I apprehend, a condonation of the alleged previous adultery. But the bill in this suit alleges adulterous intercourse since the decree, and alleges also, that "about six years ago," which would also be since the decree, "the plaintiff applied to her husband to maintain her, going to a tavern which he kept for that purpose, when he turned her out of doors." Upon this argument I must take the allegations of the bill to be true.

For aught that appears upon the face of the decree made in the former suit, the parties to it may have intended thenceforward to live harmoniously together,

1872.

Henderson v. Henderson.

There is a studious guarding against the admission of any rights, or of any wrongs. Its language is consistent with its being a compromise for the sake of peace, of a suit brought by a woman, who had no rights at all as a wife; or, on the other hand, of a burying by husband and wife of past dissensions; and a forgiveness by the wife of previous unfaithfulness, in the hope of amendment for the future. It may have been either: but inasmuch as there was no admission of previous adulterous intercourse with any one, there could be no sanction of such intercourse in the future. In this respect it differs altogether from the case of *Thomas* v. *Thomas* (*a*), cited by Mr. *Grahame*. In fact, it does not deal with the future in any respect whatever.

This being the case, it can be no answer to the adultery and desertion alleged, by the present bill, to have been committed by the defendant, since the decree, which he sets up as a bar.

Judgment.

The costs of this hearing should be costs in the cause.

In re Spencer and McDonald, Solicitors.

Married woman—Next friend, when required—Solicitor and client—Bill of costs when delivered not revocable.

Married women joined with their husbands in an application for taxation of costs. *Held*, that notwithstanding the late Act (35 Victoria, chapter 16), the married women must in such case have a next friend.

Solicitors delivered bills of costs indorsing on each, "in the event of taxation we reserve to ourselves the right of delivering another and more complete bill." *Held*, an absolute delivery.—*Re Pender*, 8 Beavan; *Re Chambers*, 34 Beavan considered.

This was an appeal to the Judge in Chambers from the ruling of Mr. *Taylor*, Referee.

(*a*) 2 Sw. & T. 113.

1872.

In re Spencer and McDonald.

The application to the Referee was made on the petition of the widow, heirs, and heiresses of the late *Joseph Clarke*, for the taxation of costs of suits brought in the winding up of his estate.

Two of the petitioners were married women, who joined with their husbands, but without any next friend.

The bills served had indorsed on each of them the words set forth in the head note, and evidence was adduced to shew that an absolute delivery was not intended by the solicitors. This was disputed by the petitioners.

The Referee held, that since the recent Act, it was not necessary to name a next friend for married women when suing. He also held that there had been an absolute delivery and made the usual order for taxation, adding the words "without prejudice to any application by the said solicitors to amend their said bills or any of them."

Statement.

Mr. *Spencer*, for the solicitors, moved on appeal to discharge the order, alleging the above grounds, and referring to *Daniell's* Chy. Pr., 4th Ed. 109; *Re Wallis* (*a*), *Pierce* v. *Cole* (*b*).

As to the late Act he argued that though, when suing alone the married woman need not now have a next friend, yet when joined with her husband, he is *dominus litus*, and a next friend is still required.

Mr. *J. C. Hamilton* contra, cited *Re Carven* (*c*), *Re Chambers* (*d*), *Re Pender* (*e*), *Butler* v. *Church* (*f*),

(*a*) 15 Beav. 508.
(*b*) 11 Jur. 214.
(*c*) 8 Beav. 486.
(*d*) 34 Beav. 177.
(*e*) 8 Beav. 299, and 2 Phillips 69, in Appeal.
(*f*) 18 Gr. 190.

Hancock v. *McIlroy* (*a*), *Re Carroll* (*b*), and *Taylor's* Con. Orders, 52. 1872.

In re Spencer and McDonald.

SPRAGGE, C.—I think the first objection must prevail. The rule is, that when husband and wife join in any pleading or proceeding, the husband is considered to be *dominus litis*, and the wife is not bound; so if in this case there were a taxation upon this potition it would be nominally at the instance of two married women, together with their husbands and others, but it would not prevent the married women having another taxation. The Act of last session does not appear to me to touch that question. It enables married women, in certain cases, to sue alone. In this case the potition joins husbands and wives as having a joint interest—as a fact the married women are not suing alone. I cannot assume that this is a case in which they can do so. I am asked by the petitioners to strike out the names of the husbands. The interests of the parties are not so before me that I can say that the husbands are not properly and necessarily joined, and I certainly ought not to do what is asked upon this appeal. Judgment.

Upon the second point, I consider that it is a matter of policy to bind solicitors by bills which they deliver; the bill delivered is subject to taxation, and the solicitor is not at liberty to withdraw it, or to substitute another bill for it, at any rate after order for taxation without leave of the Court, which is granted only upon special grounds. It is contended that here, there was no absolute delivery of a bill but that a bill of items was sent to the clients with an express reservation that if not accepted, and if taxation were desired by the clients, the solicitors reserved to themselves the right to make out and deliver other bills (a reason for this is given in the affidavits of Mr. *McDonald*). The question is, whether

(*a*) 18 Gr. 209.

(*b*) 2 Chan. R. 305.

1872.

In re Spencer and McDonald.

it is competent to a solicitor to reserve such a right upon the delivery of a bill. There are some reasons against it. If he can do so in one case he can so in all, and of course if one solicitor can do this all may do it; and thus the rule that a solicitor is bound by his bill delivered might be virtually abrogated. On the other hand it is convenient sometimes that a solicitor should be at liberty to deliver what may be called an approximate bill. His client may desire to be informed approximately of how he and his solictor stand, and the solicitor might deliver it with an intimation that if paid without taxation he would be content to receive the amount, but if taxation were desired he would deliver another and a fuller bill. I think this is open to some serious objections. It operates to discourage taxation, the solicitor offers a premium to his client to abstain from the exercise of that right. It is asking the client to decide blindfold, for in ninety-nine cases out of one hundred the client cannot know whether the bill is correct or not. It places the client in an unfairly difficult position. He is asked to pay a demand, of the justice of which he can know little or nothing, upon pain of having the demand increased if it is not paid; and the client rather than run such a risk may be induced to pay a bill which is really more than he ought to pay. As a matter of policy, ought not a solicitor to be prevented from placing his client in such a position? It may be answered that the client should refuse to receive a bill thus delivered; but, a client is seldom aware of his rights; and the rules in relation to the delivery and taxation of bills between solicitor and client are framed mainly for the protection of the latter. The observations of Lord [illegible] in *re Pender* are not inapposite to the case before me. A solicitor had delivered bills not signed, or inclosed in, or accompanied by a letter signed by the solicitor, so that he was not in a position to sue for their recovery and the client having obtained an order for their taxation the solicitor moved to set it aside, on the

Judgment.

ground that it was not within the Solicitor's Act 6 and 7 Victoria. The Master of the Rolls held the bills within the Act and added these observations, "but if a bill delivered without being signed is not taxable, the solicitor may charge what he pleases with impunity; he may, in the first instance, deliver a bill not signed to an amount far beyond what he is entitled to, and take his chance of obtaining payment without taxation, in which he will in most cases succeed; but if he should fail, which may possibly happen, and his bill, according to the hypothesis, is not to be taxed, he will say, as has been said, 'it was not delivered with a view either to an action or to taxation, but for the purpose of amicable discussion and arrangement.'" Certainly much of the evil pointed out by Lord *Langdale* might result from the delivery of bills by solicitors which they were at liberty to withhold, upon any ground, from taxation. His Lordship proceeded upon the construction of the Act, adding "It ought to be observed that any other construction of the Act would facilitate the practice of great fraud and oppression" and he then proceeded to point out how this would be in the language that I have quoted.

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In re Spencer and McDonald.

Judgment.

It is not contended on behalf of the solicitors in this case that the bills delivered were not taxable under our statute, unless saved from taxation by the reservation made by the solicitors who delivered them.

There is language of the same learned Judge in another case, *In re Carven*, which applies with more or less force to this case according to the sense in which certain words were used. He says, "I must take leave to say that if a solicitor has delivered his bill he is bound by it, and the taxation must be on that bill; he is not entitled as of course to reduce his demand, or to reserve the power of delivering a bill containing other charges. I conceive that a most improper object." If by the words 'reserve

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the power' is meant that he cannot expressly reserve the power, that is this case. If by the words is meant 'he cannot have the power in reserve' it is not a direct authority against an express reservation of the power, but it is an authority against the policy of allowing such a power to be reserved.

What was done by the solicitors in this case was to append to the foot of each bill this memorandum "In the event of a taxation being applied for in this case we reserve to ourselves the right of delivering another and more complete bill," and underneath is written the partnership name of the solicitors; and the solicitors' agent at Woodstock says, that before delivering the bills to the two clients to whom, or to one of whom, he delivered them, he said that the solicitors reserved to themseves the right of making up and delivering more full and complete bills of costs. The solicitors now put it that there was no absolute delivery to the clients of the bills of costs; but only a qualified or conditional delivery, and that the clients should have objected to receive them if they were not content so to receive them. I inclined at first to agree with the solicitors, but upon examining the exact terms of the memorandum and of what was said by the agent to the clients, the delivery of the bill does not appear to me to have been a conditional one; the memorandum treats the delivery as an actual delivery of a bill of costs and speaks of another delivery of another bill; and the message of the agent to the clients was to the same effect. The question now is, whether solicitors can in this way take themselves out of the general rule. They have delivered bills, asserting a right at the same time, which they said they reserved, to deliver other bills. They had in fact no such right as they so claimed to have. How is such a delivery of bills of costs to be regarded? It was not a delivery for the purpose of taxation. Can the clients use it for the purpose of taxation, because it is a bill delivered, and the statute enacts

Judgment.

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In re Spencer and McDonald.

that bills delivered shall be taxable? Apart from the policy of the law, and if this were a transaction not connected with bills of costs, I should hold the parties to whom these papers were delivered not entitled to use them for any purpose, from which they were in terms restricted from using them. But the subject matter being bills of costs and the policy of the law being in my judgment against the delivery of them with the restriction which the solicitors have attempted to put upon their delivery, the question presents other considerations. Is there any way of carrying out the policy of the law, and preventing the mischiefs pointed out by Lord *Langdale*, and others to which I have referred, except by holding the solicitors' attempted restriction upon the ordinary right of the client upon delivery of a bill of Costs, to be inoperative? I confess I think it is necessary to go that length. I found myself entirely upon the policy of the law, which could in any case be defeated, if solicitors were to be at liberty to annex to the delivery of their bills of costs, such a restriction as has been attempted in this case.

Judgment.

There is no hardship upon solicitors in this. If there is any good reason why they should not be bound by bills delivered by them, the Court will in a proper case relieve them, and allow them to deliver other bills, or to amend those already delivered. That would be a matter in the discretion of the Court. What has been attempted here has been to substitute for the discretion of the Court, under the name of reserving a right, the act of the solicitor himself. I think it right to meet this attempted innovation at the threshhold and to say at once that it cannot be.

Since writing the foregoing I have referred to the case of *In re Chambers*. A bill of costs had been delivered and after some objections and some discussion, the solicitor delivered a new bill of costs, giving notice that he

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abandoned the first bill and substituted the second. The client then took out on order to tax the first bill, the solicitors moved against it, and the question was whether the solicitor could substitute the second bill and have that bill taxed; and the Master of the Rolls held that he might. That case differed from the one before me in this, that here there have been no bills but the one set delivered, and that there has been an order for taxation, while in that case there was no order to tax until after the delivery of the second bill. The language of the Master of the Rolls in giving judgment is against the solicitors in this case: "I am of opinion that a solicitor cannot deliver his bill with items of overcharge, and say I do not intend this to be my bill, but if objected to I intend to deliver another." This is precisely what the solicitors in this case have done. He goes on to say, "nor after a bill has been once referred for taxation, when he finds that items in it will be struck off, can he deliver another bill of costs. But the circumstances of this case are different, for the substituted bill was delivered before the service of, or notice of the order to tax * * * Lord *Langdale* held, and I have also held, that a solicitor cannot substitute as a matter of course a second bill for the first, but I have not held that you never can do it." Looking at the previous part of the judgment that "a solicitor cannot deliver a bill and say I do not intend this to be my bill, but if objected to I intend to deliver another," I should say that his Lordship would not have held that an attempted reservation of right to substitute another bill for the one delivered would not be a ground for creating an exception. I cannot help thinking that *In re Chambers* itself created a dangerous precedent. It is, however, distinguishable from the case before me in the particulars that I have pointed out.

Judgment.

It is no matter of doubtful policy that a solicitor should be held to the bill that he has once delivered unless he gets the leave of the Court to alter it. There can be no

better authority than Lord *Langdale* upon questions of this nature; and in *Re Pender* he has explained the policy of the law and the reason for it very clearly. I think that solicitors ought not to be allowed, by any device, or in any shape or way, to contravene this policy of the law. 1872. In re Spencer and McDonald.

I shall, of course, be understood as not imputing any intentional impropriety to the solicitors in this case; I have every reason to believe that they meant no wrong.

The order made by the learned Referee in Chambers does not conclude the solicitors. It is made without prejudice to any application they may make for leave to deliver substituted bills of costs. The learned Referee only held that they could not as a matter of right of their own motion, without leave, substitute other bills for those delivered, and in that, I think, for the reasons I have given, that he is right. As to the costs of this application each party succeeds as to one point. I think there shonld be no costs. Judgment.

The petitioners afterwards named a next friend, and, on application in Chambers, the petition and order for taxation were amended by inserting his name.

1872.

The Merchants' Bank v. Macdonald.

Post-nuptial settlement—Fraudulent conveyance—Costs.

A post-nuptial settlement was executed by a person in insolvent circumstances, but the trustee was ignorant of the fact of his indebtedness. The Court, on a bill filed impeaching the settlement as fraudulent against creditors, set the same aside with costs as against the settlor; but ordered the trustee to receive his costs out of any residue of the fund, after payment in full of the claims of the creditors, with costs.

Hearing at Stratford.

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

Mr. *R. Smith*, Mr. *Idington*, and Mr. *McCulloch*, for the defendants.

Judgment.

Strong, V. C.—This was a case in which the bill was filed to set aside a post nuptial settlement as being fraudulent against creditors. I made a decree at the hearing, setting aside the settlement, with costs against the debtor; but I reserved the question of the costs of the trustee, for further consideration. I find the fact to be that Mr. *Grant*, the trustee, was entirely innocent of any participation in the fraud, and had no notice when he accepted the trusts that the settlor was indebted in such a way as to render the settlement impeachable by creditors. This seemed to be quite sufficient to exempt the trustee from any liability to pay costs; and I find that I am so far fully borne out by the authorities. I thought, however, it might be possible to give him his costs, which were pressed for. On looking into the authorities, I find that this cannot be done. In *Elsey* v. *Cox* (*a*), the point arose before the Master of the Rolls, who decided against it, saying that as the trustees, although innocent themselves, took under a person

(*a*) 26 Beav. 95.

who had committed a fraud, the utmost the Court could say was, that they were not to pay costs. In *Goldsmith* v. *Russell* (*a*), it is true that the costs of the trustee were ordered to be paid out of the estate, but there the estate was more than sufficient to pay all the debts as well as the costs. 1872. Merchants' Bank v. Macdonald.

In *Adames* v. *Hallett* (*b*), the trustees also had their costs, but I gather from the report of the case, that they were so given that the creditors had priority of payment out of the fund. I understand that it is conceded that the estate here will be insufficient to pay all the creditors; but the trustee is entitled to a direction for the payment of his costs out of any residue which may remain after payment of all the debts and the creditors' costs. Judgment.

CAMPBELL v. THE ROYAL CANADIAN BANK.

Practice—Mandatory injunction.

Where a writ of *habere facias possessionem* was executed before an injunction restraining such proceeding could be served, but the plaintiffs in the ejectment suit had been informed of the intention to apply for the injunction; the Court, under the circumstances, granted a mandatory injunction requiring the possession to be redelivered to the defendants in that suit, pending an appeal to the Court of Error and Appeal against a decree dismissing a bill filed by them to redeem.

The bill in this case was dismissed at the hearing (*c*), and the plaintiffs had taken the necessary steps to carry the case to the Court of Error and Appeal.

Mr. *Snelling*, for the plaintiffs, moved *ex parte* for an injunction to restrain the defendants from further pro-

(*a*) 5 D. M. & G. 556. (*b*) L. R. 6 Eq. 468.
(*c*) Ante p. 334.

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ceeding under a writ of *habere facias possessionem*, issued in the action of ejectment referred to in the bill; he obtained an interim injunction with leave to move to continue it. Before the order was served, however, the sheriff had executed the writ of *habere*.

Mr. *Snelling* then moved to continue the injunction in pursuance of leave, and for a mandatory injunction requiring the defendants to restore and yield up possession of the premises to the plaintiffs, notwithstanding the execution of the writ. He contended that the Court would compel the defendants to restore the plaintiffs to their former possession, pending the proceedings in appeal; that although the jurisdiction of the Court to grant a mandatory injunction in a case like the present had been questioned, its existence must be admitted beyond all doubt. The injury to the plaintiffs in this case is of so serious and material a character that the restoring things to their former condition, was the only remedy which could meet the requirements of the case—the act complained of was committed within a few minutes before the order for the interim injunction was served—and the mandatory injunction restoring possession pending the decision of the Court of Error and Appeal ought to issue, even although it might be urged that it was greatly to the inconvenience of the defendants that it should do so. The policy of the Error and Appeal Court Act is to keep things in *statu quo* until the cause is finally determined. He referred to *Isenberg* v. *East India House, &c., Company* (*a*), *Durell* v. *Pritchard* (*b*).

Judgment.

Mr. *Bain*, contra, urged that the writ of *habere* had been executed; that the decree dismissing the bill entitled the defendants to possession of the property; that they had no knowledge of the interim injunction, when

(*a*) 33 L. T. Chan. 392. (*b*) L. R. 1 Chan. App. 244.

the possession was given by the sheriff under the writ of *habere*, and that restoring the possession would be a great inconvenience to the defendants, who required to use the property at once for building purposes.

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SPRAGGE, C.—The plaintiffs' case is, that they are entitled to redeem. Ejectment had been brought by the defendants, and an injunction was obtained restraining proceedings in that action, upon, as I believe, the usual terms.

The decree negatived the plaintiffs' right to redeem; and they have appealed to the Court of Error and Appeal.

The policy of the Court of Appeal Act is, that upon appeal, effect shall not be given to the decree or judgment of the Court appealed from until the determination of the question in appeal. I thought it right therefore to grant an injunction restraining the execution of the writ of *habere*, but it appears that before the injunction was served, the writ of *habere* had been executed, and I am now asked to grant a mandatory injunction, the effect of which will be to restore possession. I think, upon consideration, that I ought to grant it. There is no substantial reason for granting an injunction restraining change of possession, which does not apply to an injunction for restoring possession; at all events in cases like this, where the subject matter is a small house upon a small piece of ground, and the possession changed but a few days ago. I think that by granting such injunction the policy of the Act will be best carried out. I believe from the affidavits that the defendants will be put to inconvenience and loss by not having possession of the premises, but on the other hand the plaintiffs were living in these premises, and they may be entitled eventually to retain possession against the defendants.

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The effect of the statute virtually is to treat a judgment or decree as only a stage in litigation, and leave matters in *statu quo*—in some cases upon certain conditions—until the final determination in appeal of the question between the parties.

I think, therefore, that a mandatory injunction should issue in this case, but that it should be upon the same terms as are prescribed by the fifth order of the Court of Appeal; the party retaining possession, contrary to a judgment, to give security in double the annual rentable value.

MORRISON V. ROBINSON.

Mortgage—Collateral security—Parol agreement—Appeal from Master—Conflict of evidence.

A mortgage was given, by the maker of certain promissory notes, as collateral security to an accommodation indorser, which notes were duly retired by the maker. Subsequently the mortgagor gave other notes to the mortgagee, when it was verbally agreed that the mortgage should be retained by the indorser as an indemnity for such subsequent notes:

Held, that the indorser was entitled to retain such security to the exclusion of other creditors of the mortgagor.

Although the rule is, that if the decision of a question of fact depends altogether on the credit to be given to direct testimony of conflicting witnesses, the Court, as a rule, will adopt the finding of the Master; still, where the evidence of the mortgagor and mortgagee as to an arrangement that a mortgage, which had been satisfied, should be allowed to continue as a collateral security for subsequent indorsements and other notes held by the mortgagee, and the mortgage deed had been allowed to remain in the hands of the mortgagee undischarged, and the mortgagee had also retained possession of the title-deeds, the Court considered these circumstances as strongly confirming the direct evidence of the mortgagee, and reversed the decision of the Master, who had found against the fact of such an agreement having been made between the parties.

This was an appeal, on behalf of *John Ham Perry*, from the report of the Master at Belleville.

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In the year 1860 the firm of *Davy & Peterson*, of Napanee, purchased from Messrs. *Gillespie, Moffatt & Co.*, of Montreal, a vessel, in part payment of which *Davy & Peterson* were to give indorsed notes. *Davy* applied to *Perry* to indorse certain of the notes, which *Perry* agreed to do upon being secured. *Davy* thereupon executed and delivered to *Perry* a mortgage upon the land in question, dated June, 14th, 1860; and at the same time he delivered to *Perry* his deed of the land. The mortgage on the face of it did not shew the transaction, but was made to secure $2,000, payable in four equal semi-annual instalments. *Perry* indorsed four notes, each dated June, 14th, 1860, and for $412.50, and interest at seven per cent. The notes were payable in six, twelve, eighteen, and twenty-four months, respectively. *Perry* afterwards indorsed other notes for *Davy & Peterson*, upon a verbal agreement that the mortgage should stand as security for these indorsements also.

Statement.

Davy & Peterson were personally indebted to *Perry*, and in 1865 they had a settlement of accounts, when it was found that *Davy & Peterson* were indebted to *Perry* to the extent of $2,000, and on the 10th August, 1865, *Davy & Peterson* gave to *Perry* their four notes for the sum, with interest. *Perry* alleged that *Davy* had verbally agreed that the mortgage should stand as a security for these four notes.

Some time in June, 1867, all the notes which *Perry* had indorsed for *Davy & Peterson* had been retired, but the mortgage and deed still remained in *Perry's* possession.

In March, 1868, *Davy* made an assignment under the Insolvency Act to the defendant *Robinson*.

In the latter part of 1870 *Robinson*, as assignee of *Davy*, filed a bill against *Perry*, alleging that the mort-

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gage had been made to secure *Perry* against the notes of June 14th, 1860; that these notes had been paid, and praying that *Perry* might be ordered to discharge the mortgage. *Perry* put in an answer, setting up that it had been agreed between him and *Davy* that the mortgage should stand as security for the subsequent indorsements and also for the four notes of August 10th, 1865. A replication was filed, but the plaintiff omitted to go down for examination and hearing at the proper term, and the defendant set the cause down for hearing at Toronto. When the cause came on the Court adjourned the hearing to enable the plaintiff to move to open publication, but not availing himself of this, the Court on the 23rd August, 1871, made a decree dismissing the bill with costs.

Statement.

The plaintiff in this case held a prior mortgage, and filed his bill to foreclose his mortgage. The usual foreclosure decree was made, and it was referred to the Master at Belleville to make the usual inquiries. The Master made *Perry* and *George H. Stevenson*, who was a judgment creditor of *Davy*, parties. *Perry* brought in a claim upon the four notes of August 10th, 1865, and *Stevenson* also brought in a claim upon the judgment. *Stevenson* disputed the claim of *Perry*, and evidence was taken before the Master. *Perry* and *Davy* were the only witnesses examined. *Perry* put in the pleadings and decree in the other suit, and swore to the facts as stated above. *Davy* swore that "to the best of his recollection" he had never made any such arrangement, but his recollection and statements were contradictory.

The Master disallowed the claims of both *Perry* and *Stevenson*.

Perry gave notice of appeal, and as *Robinson* was the owner of the equity of redemption, served him with

notice. *Robinson* appeared on the hearing of the appeal, but his counsel stated that the appeal was opposed on behalf of *Stevenson* and the other creditors of *Davy*.

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Mr. *Alfred Hoskin*, on behalf of *Perry*, contended that as to *Robinson* the matter was *res judicata*; that he was barred by the decree made in the suit brought by him, and could not now set up the same facts against *Perry's* claim. He cited *Taylor's* Con. Orders, page 210; *Daniel's* Ch. Pra. 608; *Jones* v. *Nixon* (*a*), *Kinsey* v. *Kinsey* (*b*).

He also contended that *Robinson* was the representative of *Davy's* creditors, and that the latter were as much bound as *Robinson* by the decree. He also contended, that such an arrangement could be supported, though depending on parol evidence, citing *Brownlee* v. *Cunningham* (*c*), *Inglis* v. *Gilchrist* (*d*).

Statement.

He also contended that the weight of evidence in the Master's office was in favor of *Perry's* contention, and that *Davy's* statements were so contradictory that they could not be relied on.

Mr. *G. M. Macdonald*, on behalf of *Robinson*, contended that the creditors were not barred by the decree; that such an agreement could not be supported by parol testimony, and that the matter depending on conflicting evidence, the Court would not disturb the Master's finding, who had had the advantage of hearing the several witnesses and parties give their evidence, and observing their demeanour while under examination; and that unless it was very clear the Master had erred, the Court would not disturb his report: *Day* v. *Brown* (*e*).

(*a*) You. 359.
(*b*) 2 Ves. 577.
(*c*) 13 Gr. 586.
(*d*) 10 Grant 301.
(*e*) 18 Gr. 681.

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STRONG, V.C.—This is a foreclosure suit, instituted by *John Morrow* against *William L. Robinson*, the assignee in insolvency of the mortgagor *William H. Davy*. The usual decree ordering an inquiry as to subsequent incumbrancers having been made, the Master at Belleville, to whom the cause was referred, directed *John Ham Perry* to be made a party in his office as being an incumbrancer on the lands in mortgage to the plaintiff by virtue of a mortgage deed which appeared on the registry subsequent in date to the plaintiff's mortgage, which is by indenture bearing date the 14th of June, 1860, made by the insolvent *W. H. Davy*, to the defendant *John Ham Perry*, and which purports upon its face to be a security for $2,000, with interest at seven per cent.; the condition is as follows: "The said principal sum of $2,000, to become due and payable in four equal semi-annual instalments of $500, the first instalment thereof to become due and payable on the 14th December, 1860, with interest from the date hereof on each instalment as the same becomes due." The principal title deed of the property was handed over by *Davy* to *Perry* at the time of the execution of this mortgage. It was proved in the Master's office, both by Mr. *Perry* and *W. H. Davy*, that the mortgage was never intended to secure the sum of $2,000, a debt due from the mortgagor to the mortgagee; but that the original transaction in pursuance of which it was given was this: *Davy* and his partner *Peterson*, appear to have been, in the Spring of 1860, in treaty for the purchase of a vessel from Messrs. *Gillespie, Moffatt & Co.*, of Montreal, and *Davy* applied to *Perry* to indorse the notes to be given for the purchase money, which *Perry* agreed to do and did, to the amount of $1,800; whereupon this mortgage was given to him as a counter security for his indorsements. So far there is no dispute. In the next place, *Perry* alleges that the notes to *Gillespie, Moffatt & Co.* having been paid, *Perry* became an indorser on other notes of *Davy* and *Peterson*,

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which were discounted by the Bank of Montreal at its Kingston Agency, and there can be no doubt of this; but *Perry* further insists that it was agreed that this mortgage, which had been originally given as a security for the notes to *Gillespie, Moffatt & Co.*, should stand as a security for the accommodation indorsements of *Perry* on the notes discounted by the Bank of Montreal. This *Davy* denies—but I think there can be no doubt but that the fact is as *Perry* states it. Then these last notes also being paid; on the 10th of August, another transaction took place between *Davy* and *Peterson*, and Mr. *Perry*. It appears that Mr. *Perry* was a creditor of the estate of *B. F. Davy* who had become insolvent; and *Davy* and *Peterson* were also creditors of *B. F. Davy*; but that there were reasons why they should indemnify Mr. *Perry* in respect of his debt; it was accordingly agreed that Mr. *Perry* should abandon a portion of his claim, reducing it to $2,000; and that *Davy* and *Peterson* should give him their notes for this residue and interest. This was done: *Davy* and *Peterson* giving Mr. *Perry* their four promissory notes, dated 10th of August, 1865, payable respectively at two, three, four, and five years' date, for $560, $590, $620, and $650; the interest at six per cent. being added in each note. Mr. *Perry* asserts that there was contemporaneously with the giving of these notes, another agreement that the mortgage should be held as collateral security for their payment; and he claims now to be a mortgagee in respect of these notes which still remain unpaid in the hands of a holder, to whom *Perry* has transferred them, he being liable upon them as indorser. Mr. *Davy* says, he does not recollect any such agreement; for though, at first, he denies that any such agreement was made, on being pressed, he merely says he does not recollect it. Previously to the decree in this cause being made, a bill had been filed in this Court by the defendant *Robinson*, as the assignee of *Perry*, alleging that the mortgage was satisfied, and praying that *Perry*

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might be ordered to discharge it. To this bill, *Perry* put in an answer, setting up the parol agreement just mentioned, insisting that he was entitled to hold the mortgage as a collateral security for the four outstanding promissory notes of the 10th of August, 1865: precisely the same contention which he set up in support of his claim before the Master in this cause. The cause of *Robinson* v. *Perry*, was duly set down for hearing, and on the 23rd of August, 1871, a decree was made dismissing the bill with costs. Both *Perry* and *Davy* were examined in the Master's office, in this cause, and *Perry* there produced the mortgage deed and also the title deed, which was delivered to him when he received the mortgage; both of which instruments have always remained in his hands. The Master found against Mr. *Perry's* claim; and this appeal is now brought from his report. In support of the appeal it was contended, First, that the question was *res judicata* between the parties by reason of the decree in the suit of *Robinson* v. *Perry*. Secondly, that parol evidence was admissible to prove the agreement that the mortgage should be kept on foot as a security for the notes of August, 1865; and, Thirdly, that such evidence being admissible, the agreement was sufficiently established in point of fact. I am of opinion that the appeal must be allowed. I can see no possible answer to the objection to the report founded on the decree in *Robinson* v. *Perry*. The very same question was most distinctly put in issue in that cause, and the parties were the same. *Robinson* sued there in the same character as he defends here, namely, as a trustee representing Mr. *Stevenson* and all the other creditors of the insolvent. The decree was insisted upon in the only way in which it could have been put forward by Mr. *Perry* in this suit, namely, at the hearing of the reference in the Master's office. It is true, that the decree appears to have been pronounced after an adjournment to give the plaintiff, *Robinson*, an opportunity to apply to open publication, and in default

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of the plaintiff's appearance. But this can make no difference, it was a decree pronounced at the hearing of the cause, and is therefore a bar to the right of the plaintiff again to raise the same contention. 1872. Morrison v. Robinson.

This alone would be a sufficient ground for an order that the Master should review his report. I have, however, also come to the conclusion that parol evidence was admissible to prove the agreement, which the defendant *Perry* claims the benefit of, for keeping the mortgage on foot as a security for the unpaid notes. I think the cases of *Brownlee* v. *Cunningham* (*a*), *Inglis* v. *Gilchrist* (*b*), and *Penn* v. *Lockwood* (*c*), are sufficient authorities for this proposition, which indeed seems to be necessarily deducible from the principle of the numerous cases which have determined that parol evidence is admissible to shew an absolute deed to be a mortgage. In deciding this point, I proceed altogether on the authorities; but for them I should have thought it very difficult to maintain such a doctrine. Then the evidence being admissible, I have been unable to agree with the Master as to the effect which ought to be given to it. It is true that the Master had the opportunity of seeing the witnesses and of observing their demeanour; therefore, if the decision of the question of fact depended altogether on the credit to be given to direct testimony of conflicting witnesses, I should, on the principle laid down in *Day* v. *Brown*, unhesitatingly adopt the Master's finding. But it must be remembered that that rule only applies where the evidence being directly contradictory there are no circumstances pointing to the probability of one statement rather than to that of others. Now, I find in the present case, a circumstance which, in my judgment, would be quite sufficient to outweigh in favour of the evidence of *Perry* Judgment.

(*a*) 13 Grant 586.
(*b*) 10 Grant 301.
(*c*) 1 Grant 547.

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the statement of Mr. *Davy*, even if his memory were clear, and his denial explicit, neither of which, however, is the case. That most important fact is the conduct of Mr. *Davy* in allowing Mr. *Perry* to continue to hold this mortgage undischarged long after the notes to *Gillespie, Moffatt & Co.*, were paid; and also to retain the title deed. There is a letter of March, 1865, in evidence which shews that it was by no means a matter of indifference to Mr. *Perry* since *Davy* states that all the firm had was mortgaged. It is true this was before their notes were given; but at this time some of the Bank of Montreal notes were still unpaid. Between this time and the insolvency, it is fair to assume that Mr. *Davy's* affairs grew worse, rather than better; and yet there never was anything in the nature of a demand for the discharge of this mortgage or the delivery of the deed; although the security must have been one which Mr. *Davy* would have been able to turn to account, could he have put himself in a position to make use of it. The circumstantial evidence, therefore, strongly confirms the direct testimony of Mr. *Perry*, and there is nothing to oppose to it but the statement of Mr. *Davy*, who speaks distrustfully of his own memory, and gives no satisfactory reason for not calling for the discharge of the mortgage and the delivery up of the title deed.

Judgment.

The appeal must therefore be allowed with costs. The order to be drawn up may declare Mr. *Perry* to be an incumbrancer in respect of the mortgage and to be entitled to hold it as a security for the due payment of the four promissory notes of the 10th August, 1865, and the report must be altered accordingly.

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SHAW v. THOMAS.

Will, construction of—Tenants in common—Partition—Pleading—Practice—Mandeville's case considered.

A testator devised his estate, upon trust *inter alia* as follows: "To pay my debts and funeral expenses, and manage the said premises so given, granted, demised, and conveyed to the said executors, in whatever manner they consider most advantageous for my wife and my issue, who I will and declare to be entitled to receive the benefit of any and every portion of the aforesaid lands, goods," &c.: *Held*, that under these words the widow and children of the testator took as tenants in common.

A defendant being entitled to certain relief, to obtain which a partition of the whole estate was essential, and the defendant not having asked for such partition by way of cross-relief in his answer, liberty was given him to file a supplemental answer to supply the omission.

Hearing at Woodstock.

Mr. *Moss*, Q.C., and Mr. *Richardson*, for the plaintiff.

Mr. *Ashton Fletcher*, for the defendants.

Judgment.

STRONG, V.C.—This is a suit for a partition. *Ithama Shaw* being seised in fee of 100 acres of land, the south half of lot 26 in the third concession of North Howick, on the 1st of July, 1852, mortgaged it to *Andrew Martin* to secure $1,200 and interest. On the 1st October, 1853, *Ithama Shaw* died, having first made his will, whereby, after having appointed certain persons to be his executors, he made the following devise and bequests: "And I hereby give, grant, demise, and convey to the said executors, and to the survivors of them and to the survivor of them, and to the executor of such survivor, all my lands, goods, chattels, effects, rights, claims, and property of every description, to have and to hold the same to them their heirs and assigns forever; upon trust that they will carry out all agreements, contracts, and stipulations made by me with any person or persons

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respecting the same or any part thereof; pay my debts and funeral expenses and *manage* the said premises so given, granted demised, and conveyed to the said executors in whatever manner they consider most advantageous *for my wife and my issue, who I will and declare to be entitled to receive the benefit of any and every portion of the aforesaid lands*, goods, chattels, effects, rights, claims, and property which shall not be sold or otherwise disposed of by the said executors or executor, or the survivors or the survivor of them, or otherwise howsoever, and to whatever portion of the proceeds of the portion thereof which shall be over and above what is required to carry out the several trusts above expressed." The concluding part of the will is immaterial. The testator left surviving him his widow, the defendant *Magdalene Shaw*, and seven children, all of whom are parties to this suit. The executors renounced probate, and administration with the will annexed was granted to the widow. On the 19th February, 1856, *Andrew Martin*, the mortgagee, by deed-poll transferred the mortgage to one *Francis Moore*. On the 16th March, 1858, *Magdalene Shaw* the testator's widow, executed an indenture by which she assumed to convey the equity of redemption in the whole 100 acres to *Francis Moore*, the assignee of the mortgage. Mrs. *Shaw* has been examined as a witness, and it appears from her evidence that *Moore* was threatening to foreclose, and having no means with which to redeem, she agreed to sell the equity of redemption to him, and executed the deed just referred to, to carry out the sale, taking promissory notes for the purchase money. These notes she afterwards gave up in consideration of the conveyance by *Moore* to *Thomas Shaw*, her eldest son, of twenty-five acres described as the eastern part of the south half of the lot. This conveyance was in the first place effected by a deed of the 7th October, 1858; but the parties not

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being satisfied with that, a further instrument was executed, dated the 1st February, 1861. On the 28th April, 1863, *Thomas Shaw*, by deed of that date, conveyed to *Simon Simmons*, who paid a valuable consideration. On the 17th November, 1864, *Simon Simmons* conveyed to the defendant *Richard Thomas*, also for valuable consideration. The defendant *Thomas* immediately took possession, and has since remained in possession, and has made improvements. *Moore* having died, his executors on 12th April, 1864, transferred the mortgage to *Thomas Tims*. The first question which it is necessary to decide is, the proper construction of the will. Very little was said in argument on this point, though it is involved in some difficulty. At the hearing I was, as I stated, under the impression that there was authority which would compel me to determine that the widow took a life estate with a remainder in tail to the eldest son. The case, which I then referred to, was *Mandeville's* case stated in *Co. Litt.* 266, which is said to be the leading case for the doctrine that a gift to the heirs of the body of the testator or of another, confers an estate tail. The devise in the present case is to "my wife and my issue;" and, assuming that the word "issue" is to be read convertibly with "heirs of the body," it would be almost impossible to distinguish the present from *Mandeville's* case. Where a life estate is given to the ancestor, "issue," it seems now to be settled, is *primâ facie* to be construed "heirs of the body": *Roddy* v. *Fitzgerald* (*a*). And I have had much doubt before arriving at the conclusion that I am at liberty to adopt a different rule here, where the gift is not to the issue as issue of the wife, but as issue of the testator himself, making the word, in any event, as far as the first takers are concerned, one of purchase, not of limitation. Influenced, however, by the consideration that to apply the rule of *Mandeville's* case to this informal

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(*a*) 6 H. L. C. 833.

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will, by holding the eldest son to take an estate tail subject to a life estate in his mother, would be to impute to the testator's language a meaning he never contemplated ; that the bequest of the residuary personalty, including only surplus money in the hands of the executors arising from the sale of realty, was in the same words as the gift of the land, and that the construction which I adopt has also authority in its favour, I have determined that the less technical construction contended for by the plaintiffs is the proper one, and I therefore hold that the word "issue" in the will is to be read "children" or "descendants," and that the widow and the children took the land in question as tenants in common in fee. It is clear that this is the proper construction as regards the personal estate : 2 *Jarman* on Wills, ed. 2 p. 81 ; *Davenport* v. *Hanbury* (*a*), *Leigh* v. *Norbury* (*b*), and *Freeman* v. *Parsley* (*c*). Then there is nothing which I can find which requires me upon this point, as in some other questions of construction, to adopt the inconvenient and unreasonable course of attaching a different meaning to the same words as applied to different qualities of property comprised in the same gift. There is, moreover, at least one case where this interpretation was adopted as regards realty, *Cook* v. *Cook* (*d*), ; and Mr. *Jarman*, at page 81, of volume ii., thus states his views : "It will be perceived that in all the preceding cases the subject of gift was personal estate or (which is identical for this purpose) the produce of realty. Probably, however, the construction of the word 'issue' would not be varied when applied to real estate. It is true, indeed, that the word 'issue' when preceded by an estate for life in the ancestor, is frequently construed as synonymous with 'heirs of the body,' and as such conferring an estate tail on the ground that this is the only mode in which the testator's bounty can be made to reach the whole class of descendants, born and unborn ;

Judgment.

(*a*) 3 Ves. 257.
(*b*) 13 Ves. 340.
(*c*) 3 Ves. 421.
(*d*) 2 Vern. 545.

and it must be confessed that the same reasoning applies, to a certain extent, in the case now under consideration; for, to adopt any other interpretation narrows the range of objects by confining the devise to issue living at a given period, and thereby excluding, it may be, an unlimited succession of unborn descendants on whom an estate tail would, if not barred, devolve (as in *Mandeville's* case). But whatever may be the plausibility or the force of such analogical reasoning, it has received but little countenance from the cases, there being, it is believed, no direct adjudication in favour of such a construction, while positive authority may be quoted against it, as in the case of *Cook* v. *Cook*, where under a devise to the issue of *J. S.*, the children and grandchildren took concurrently an estate in fee." Reading the word "issue" as children, it follows, according to the later authorities, that the widow and the children must be held to take equally and concurrently. There have been cases which indicated a different construction, namely, that the widow took an estate for life with remainder to the children; but the latest authority—that of *Newill* v. *Newill* (*a*) is in favour of a tenancy in common. Holding, therefore, that the widow and children take as tenants in common, the share of each in this land, was an undivided eighth, and consequently Mrs. *Shaw's* conveyance of the equity of redemption by the deed of the 16th March, 1858, although of course inoperative to pass all that it assumed to convey, must nevertheless be held to operate on her own interest. Then *Moore's* conveyances to *Thomas Shaw*, of October, 1858, and February, 1861, althongh professing to deal with a specific portion of the land—25 acres—must nevertheless, if possible, be made to operate to the extent of Mrs. *Shaw's* one-eighth by so arranging the partition, if it can be done without prejudice to the rights of the other co-tenants,

Judgment

(*a*) L. R. 7 Ch. 253.

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that Mrs. *Shaw's* share may be allotted in severalty out of this twenty-five acres. Then the share of *Thomas Shaw* must be dealt with in the same manner. He must be considered as intending to deal with his interest in the land by the conveyance to *Simmons*, and the allotment must be such that his share may, if possible, be also allotted out of this twenty-five acres. This will have the effect of giving the defendant *Richard Thomas* in severalty the shares of Mrs. *Shaw* and *Thomas Shaw*: *Hiscott* v. *Berringer* (*a*). The partition sought by the bill, is of the twenty-five acres only, being the portion of the land which is no longer charged with the mortgage debt. The defendant *Richard Thomas*, however, sets up by his answer that he is entitled to the shares of Mrs. *Shaw* and *Thomas Shaw*, and as I have just stated, I am of opinion that he is right in that contention; but in order that he should get that relief, it is essential that there should

Judgment.

be a partition, not merely of the twenty-five acres, but of the whole one hundred acres. This, however, is not asked for by the answer, by way of cross relief; but I think I may give leave to file a short supplemental answer supplying the omission; and I do so accordingly. The mortgage being still an incumbrance on the seventy-five acres, and on the shares of the owners of the equity of redemption who have not procured a release, can make no difference, as partition can always be made subject to the paramount rights of a mortgagee: *Swan* v. *Swan* (*b*). Should the land allotted to the defendant *Richard Thomas*, as the shares originally belonging to Mrs. *Shaw* and *Thomas Shaw*, not comprise all the improvements he or *Simmons* have made, I consider he will, under the peculiar circumstances of the case, be entitled to a lien for such improvements: *Parkinson* v. *Hanbury* (*c*), *Gummerson* v. *Banting* (*d*). Construing the will as I have, I must hold on the author-

(*a*) 4 Gr. 296.
(*b*) 8 Pr. 518.
(*c*) L. R. 2 E. & I. App. p. 1.
(*d*) 18 Grant 516.

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ity of *Chalmers* v. *Storil* (*a*), a case, which although much criticised, has never been overruled; that the widow was bound to elect between the devise and her dower; and that having been so bound, she must, by her dealings with the land, be taken to have declared her election to take under the will; since it would now be inequitable to disturb the estates derived under her conveyance; *Tibbitts* v. *Tibbitts* (*b*). The decree must declare the construction of the will, and that the defendant *Richard Thomas*, is entitled to the undivided shares of Mrs. *Shaw* and *Thomas Shaw*: and it must direct partition to be made accordingly, with a direction that the partition be so made that the twenty-five acres, or a sufficient portion, be allotted as the share of the defendant *Thomas*, if that can be done without prejudice to the other co-tenants. *Thomas* is also to have the amount of any improvements not included in his share as already mentioned. The costs will be those of an ordinary partition suit. The defendant *Thomas* did not make a perfect defence, it was only by granting him the indulgence of filing a supplemental answer, that he has been enabled to make out his right to the relief the decree gives him, and therefore I do not give him costs.

Judgment.

(*a*) 2 V. & B. 222.

(*b*) 19 Ves. 656.

1872.

SHAW v. TIMS.

Mortgage—Sale of equity of redemption—Improvements.

An estate, subject to mortgage, was devised to several parties, and after the death of the testator the party entitled to the mortgage money procured the land to be sold under execution at law:

Held, [following the case of *Heward* v. *Wolfenden*, *ante* vol. xiv. page 188], that the Act authorizing the sale of equities of redemption did not apply; that the sale under execution was inoperative, and that the parties entitled to the equity of redemption had a right to redeem; but, that under the circumstances, the person representing the mortgagee was entitled to be allowed for improvements.

Hearing at Woodstock.

Mr. *Moss*, Q.C., and Mr. *Richardson*, for the plaintiffs.

Mr. *Ashton Fletcher*, for the defendants.

Judgment. STRONG, V. C.—This case arises out of the same state of facts as that of the preceding case of *Shaw* v. *Thomas*. The defendant *Tims* is the assignee of the mortgage, under a transfer from the executors of *Moore*, and the bill is for redemption. The defence set up by the answer is that the defendant *Tims* having recovered a judgment in the name of *Martin* for the mortgage debt, he procured the equity of redemption in the seventy-five acres—which is all that now remains subject to the mortgage; since the twenty-five acres, as far as the legal estate is concerned, are now vested in *Richard Thomas*, a *bonâ fide* purchaser for value—to be sold under an execution issued on the judgment. This is clearly no defence. Such a sale was entirely inoperative. The statute which authorizes sales of equities of redemption under execution does not apply to it: *Heward* v. *Wolfenden* (*a*), *VanNorman* v. *McCarty* (*b*).

(*a*) 14 Grant. 185. (*b*) 20 U. C. C. P. 42.

The plaintiffs are therefore entitled to redeem the seventy-five acres, which are now charged with a sum bearing the same proportion to the original mortgage debt as the seventy-five acres bear to the whole 108 acres originally mortgaged. 1872. Shaw v. Tims.

Mr. *Moss*, at the hearing, admitted that *Parkinson* v. *Hanbury* (*a*), was conclusive as to the right of a mortgagee in the position of this defendant to an allowance for improvements.

There must be the usual decree for redemption, and the mortgagee must have his costs, and also a declaration as to the improvements. Judgment.

KEITH v. LYNCH.

Discovery—Protection from answering—Criminal prosecution—Statute 32 & 33 Victoria, chapter 20.

In a proceeding charging that the mother, in concert with the other two defendants, had abducted and kept in concealment the children of the plaintiff, the two defendants refused to answer certain questions put to them respecting the children on the ground that their answers would tend to render them liable to criminal prosecution under the "Act respecting offences against the person" (32 & 33 Victoria, chapter 20):

Held, that under these circumstances, the defendants were not bound to answer.

This was an application on behalf of the plaintiff for an order to compel the defendants Archbishop *Lynch* and the Reverend Mr. *Jamot*, to attend before the special examiner, and answer certain questions which they had refused to answer when previously before that officer. The point involved in the present motion is clearly stated in the judgment of the Court.

(*a*) L. R. 2 E. & I. App. 1.

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Keith v. Lynch.

Mr. *Maclennan*, for the plaintiffs.

Mr. *Moss*, Q.C., contra.

Judgment.

SPRAGGE, C.—The plaintiffs are three children of *David S. Keith* and *Jessie E. Keith* his wife; the eldest of the three children being eleven years of age. The father of the children is a Protestant, the mother a Roman Catholic. The defendants are, the Roman Catholic Archbishop of Toronto, the Rev. Mr. *Jamot*, Vicar General of Toronto, and the mother of the children. The short substance of the bill is, that the mother has always desired and endeavoured to instruct and bring up the children as Roman Catholics against the will of their father; that in order to effect and carry out this wish of the mother, the other two defendants conspired together with her, and formed the plan of carrying them away from the care and custody of their father, and concealing them in some Roman Catholic establishment or house, in order to their being brought up as Roman Catholics: and the bill charges various acts of the three defendants in pursuance of this alleged conspiracy; the substance of them being, that they caused the children to be carried away from their father's house without his knowledge or consent and against his will; and placed in some Roman Catholic institution or house in the neigborhood of Toronto; and that they have ever since been, and still are, there secretly kept and detained; and brought up in the Roman Catholic religion against the will of their father; that the place of their detention is kept concealed from their father; and that the defendants refuse to disclose it, or to deliver the children to him.

The Archbishop and the Vicar General have put in their answers separately. Each denies his own complicity in the alleged abduction of the children; and each denies knowledge of where they now are. The Arch-

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bishop also denies complicity in the alleged detention and concealment of the children. The answer of the Vicar General is silent upon that point.

Both of these defendants were examined before the special examiner, the point of the examintion being to prove out of their own mouths facts which would shew, or tend to shew, that they had conspired with Mrs. *Keith* in the manner and for the purposes alleged in the bill. The issue between the parties is agreed by counsel to be, whether these two defendants and the mother of the children were in league together for the purpose, and in the act of carrying away these children from the care and control of their father, and in keeping and detaining them from him. To prove the affirmative of this issue, or rather issues, for the alleged taking away of the children is one act, and the detention another, a number of questions were put to each of these gentlemen which they declined to answer. Their refusal was not put upon any special ground, with one exception, a ground taken by Mr. *Jamot*, which I will notice presently. Upon this refusal application is made to me for the usual order to compel these gentlemen to answer. There are two applications, one against each.

Judgment.

To take first the case of the Archbishop. I have read the examiner's note of the depositions, of the questions asked, and of the refusal to answer several of them. The questions appear to me to have been proper ones, for the plaintiffs had a right to have an answer to every question as to any fact which might tend, even remotely, to establish the affirmative of the issues which it was upon them to sustain; and I see no question which can be designated as not pertinent to those issues, or one of th[illegible] The same remarks apply to the questions put to Mr. *Jamot*, who also refused to answer several of the questions put to him.

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Upon these applications before me, a new ground is taken, viz., that the defendants apprehend that answers to these questions will tend to criminate them, to subject them to criminal prosecution, under the 57th section of the "Act respecting offences against the person," (32-33 Victoria, chapter 20.) Regularly, this objection could not be taken at this stage of the proceedings. The plaintiffs were entitled to require that the parties examined should each pledge his oath that he believed that his answer to any question asked, to which he objected (that question being pertinent to the issue) would tend to criminate him. Mr. *Maclennan* has, however, consented to waive this right, and to assume that each of these gentlemen would state upon oath his belief, that the answers to the questions, which he has objected to answer, would tend to criminate him; Mr. *Moss* for these defendants stating before me—under instructions of course—that each of these gentlemen would, if re-examined, state upon oath that such was his belief.

Judgment.

It is agreed by counsel for all parties that the father has a right to the custody of these children.

The 57th section of the Act runs thus: "Whosoever unlawfully either by force or fraud leads or takes away, or decoys or entices away; or detains any child under the age of fourteen years with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child of the possession of such child; or with intent to steal any article," &c., "and whosoever with any such intent receives or harbours any such child knowing the same to have been by force, or fraud, led, taken, decoyed, enticed away, or detained as in this section before mentioned, is guilty of felony;" then, after prescribing the punishment, follows a proviso, which Mr. *McLennan* contends prevents the statute applying to these defendants: "Provided that no person who has claimed any right to the possession of such child, or is the mother, or

has claimed to be the father, of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof."

Mr. *Maclennan's* point is, that the mother exempted from prosecution by this proviso, is the mother of any child legitimate or illegitimate; that what is charged by the bill against these two gentlemen is, that they have been and are assisting the mother in taking away and harbouring these children; and that inasmuch as the mother is not within the michief of the Act, so neither are they who assisted her. The bill does not put the acts complained of in the way suggested by Mr. *Maclennan*, as if the mother were the principal and the other defendants accessories to what has been done; but treats them as joint conspirators, naming in the acts alleged to have been committed, the Archbishop first, the Vicar General second, and the mother last: but the question is not, how the bill puts the matter, but whether the answers to the questions put upon examination, tend to criminate the examinants. It may be conceded that Mr. *Maclennan* is right, that the mother of a legitimate child is exempted from prosecution under the Act, but it is only that she is exempted from prosecution: her act is not a lawful act. If the father is entitled to the custody of the child, the taking away or harboring of the child is an unlawful act, on the part of the mother, as well as on the part of strangers. Strangers acting with her are principals in the commission of an unlawful act. Her personal exemption from criminal prosecution does not in the least alter the character of the act, beyond her own personal exemption. As to others, whether acting in concert with her, or independently of her, the act is an unlawful one; and is a criminal offence within the statute. It has been argued as if it were a case of conspiracy. It is not so. The Act deals with the case

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of a single offender. His offence is complete if he comes within the Act. Another person may do the like act, or may join with him in doing the same act: and that other person may be excused on personal grounds, but unless those personal grounds apply to him, they can form no reason for his being excused. He remains an offender against the law simply without any excuse. It is not necessary indeed that I should go so far as to pronounce any very decided opinion upon the point. If only the inclination of my opinion were that the fact of acting in concert with the mother of a child makes no difference in the character of the act, except as regards the mother herself, I ought not to compel an answer. I have, however,—as I have expressed,—a strong opinion upon the point.

Judgment.

It is next contended that these defendants, having put in their answers to the plaintiffs' bill, are too late in taking their objections. I do not think so. The answer under our present rules of pleading is not a discovery, but in the words of General Order 122 is to "consist of a clear and concise statement of such defences as the defendant desires to make." The examination before the examiner stands in the place of the old discovery by answer; and as a defendant could in his answer protect himself from answering any interrogatory on the ground of its tendency to criminate him, so he may upon his oral examination, protect himself, orally, from answering any question, the answer to which will, in his belief, have that tendency: otherwise, our change in pleading and mode of discovery would abridge the protection which in that respect defendants had previously enjoyed.

Lord *Langdale* in *Lee* v. *Read* (*a*) states the rule as to protection and the mode in which a defendant may protect himself in language which is apposite to our

(*a*) 5 Beav. 385.

procedure: "A defendant is not called upon to discover the principal fact, or any one of a long series or chain of facts which may contribute to establish a criminal charge against himself. He may protect himself by demurrer, plea, ar answer, *or in any way in which he can bring the matter fairly under the consideration of the Court.*" And, in reference to an agreement which had been entered into in that case that a limit to an extension of time to put in an answer should be peremptory, he added: "It being a right to protection given to him by the law, I apprehend he cannot by any agreement deprive himself of the benefit of it."

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It is true that the Archbishop has by his answer made a general denial of the allegations of the bill; and now demurs to answering questions tending to establish those allegations, on the ground that in his belief his answers to those questions will tend to criminate him. He might have taken, in his answer, the objection that he takes now, and it would have been better and more consistent if he had: but his position is, I apprehend now, the same as if the denials in his answer were made upon his oral examination: and upon being pressed with questions as to particular circumstances he had claimed the protection which he claims now. Mr. *Taylor*, in his book on the Law of Evidence (*a*), states the rule, in which he is borne out by the authorities, thus: "At one time it was thought that if a witness chose to reply, in part he might be compelled to answer anything relative to the transaction; but this doctrine has been overruled by a majority of the fifteen Judges; and it is now finally determined that after a witness has been sworn, he may claim his protection at any stage of the inquiry; and if he do so, he cannot be forced to answer any additional questions tending to criminate him. In short he cannot be carried further than he chooses to go himself." The reasoning

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(*a*) 5th ed. sec. 1319.

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upon which the rule is founded as to an ordinary witness, applies of course to a party under examination, who is entitled to the same protection.

The same remarks apply to the denials by the Rev. Mr. *Jamot* of the allegations in the bill, so far as he has denied them. His denials are, however, as I have already observed, less comprehensive than those of the Archbishop.

The only effect of my decision of course is, that the defendants taking the ground they do take, upon this application, the plaintiffs are disabled from obtaining out of the mouths of these defendants such evidence in support of their case as they might otherwise obtain. They are put to prove their case, if they can prove it, by the evidence of those who cannot plead such a protection.

Judgment.

It is manifest that in a case like this, the concealment from the father of his children by those taking away, or harbouring them is the great difficulty under which he labors; and, where such concealment and harboring constitute a criminal offence, that his undoubted right to the care and custody of his children is very apt to be defeated by refusals to answer, upon the ground that has been taken in this case. It is peculiarly in such a case, more perhaps than in any other, that the fact of the harboring of these children, being a criminal offence, interposes immense difficulties in the way of the assertion by the father of his civil rights.

The objection being made by these defendants, I cannot do otherwise than give effect to it, very reluctantly, I confess: not that I desire the punishment of these gentlemen as criminals; that is no concern of mine; but it is a grievous wrong to the father of these children, and to themselves, that the avenues of information should be

closed in regard to them, his inquiries baffled; his and their rights frustrated; strangers interposed between a father and his young children; and the law practically set at naught, by means of such an objection as is made in this case. 1872 Keith v. Lynch.

I cannot help expressing my strong conviction that the law is not upon a sound footing in this respect; and that it would be in furtherance of justice that the rule with us should be the same as it has been made by statute in some cases in England, that parties and witnesses should be compellable to answer, but that their answers should not be admissible as evidence in any criminal proceedings that might thereafter be instituted against them.

Mr. *Moss* took some further points in relation to the answers of the Rev. Mr. *Jamot*. As the objection upon which I am in his favor covers the whole ground, I have not thought it necessary to examine these other points. I only notice them to say that the reasons given by Mr. *Jamot* for his refusal to answer appear to me to be untenable. Judgment.

I refuse this application, but without costs. It is sufficient to say upon the question of costs, that upon every thing that appears to have been before the examiner, the defendants were in my judgment in the wrong; and it is only by the courtesy of Mr. *Maclennan* that they have been enabled to raise before me the question upon which they have succeeded.

The motion was subsequently re-heard before the full Court [SPRAGGE, C., MOWAT and STRONG, V.CC.], and the order above pronounced was affirmed with costs.

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GREAT WESTERN RAILWAY COMPANY v. WARNER.

Railway Act—Award—Damages.

Arbitrators appointed to assess the damages sustained by land owners whose lands have been taken for railway purposes, have a right to take into consideration matters other than the value of the mere quantity of land taken; where, therefore, arbitrators allowed a sum "for depreciation to farm generally by the permanent occupation of the land as a railway," the award was *held* valid.

Hearing at *St. Catharines*.

Mr. *Irving*, Q.C., and Mr. *Bethune*, for the plaintiffs.

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

STRONG, V. C.—This suit is instituted to set aside an award purporting to have been made under "the Railway Act," chapter 66, of the Consolidated Statutes of Canada.

Judgment.

In constructing a new branch line of railway the plaintiffs required a piece of land belonging to the defendant, containing six acres and ninety-nine-one-hundreths of an acre, part of lots Nos. 43 and 44, first concession, North Cayuga, which was used as a farm, and was in the occupation of the defendant himself, they accordingly entered upon the land and proceeded to carry their works across it: they immediately gave the statutory notice to arbitrate as to compensation and damages, and appointed Mr. *A. W. Thompson* their arbitrator. The defendant then nominated Mr. *John Ker* his arbitrator, and sheriff *Woodruff*, of St. Catharines, was selected as the third arbitrator. After viewing the land and hearing the solicitors of both parties, sheriff *Woodruff* and Mr. *Ker* made an award for $2,500, in which Mr. *Thompson* declined to join. The evidence of the three arbitrators, all of whom were examined as

witnesses, does not agree as to the way in which the sum awarded was made up, but Mr. *Woodruff* says that the statement as to this, contained in a letter written by him to Mr. *Æmelius Irving*, the plaintiff's solicitor, under date of the 12th of July, 1871, shews correctly how the amount was arrived at. I think, therefore, that the $2,500 consisted of damages estimated as follows: 1872. G. W. Railway Co. v. Warner.

Damages for removing barns, sheds, driving house and stables	$1,000
Damages for depreciation to farm generally by the permanent occupation of the land as a railway	1,050
Land taken, and crops	450
	$2,500

The plaintiffs have filed this bill to set aside the award, upon the ground that it was *ultra vires*, the arbitrators having, as the plaintiffs allege, included matters over which they had no jurisdiction. The defendant objected to the admissibility of the evidence of the arbitrators to prove this, but this objection I overruled upon the authority of *The Duke of Buccleuch* v. *The Metropolitan Commissioners* (*a*), and *Re Dare Valley Railway Company* (*b*), in both of which cases the precise point was determined. Judgment.

It was also objected by the defendant that this Court had no jurisdiction to set aside an award under the Railway Act upon the ground of an excess of powers by the arbitrators. I think this objection must also be adjudged against the defendant. There can be no doubt that long before the statute of William III. the Court of Chancery exercised a general jurisdiction in the matter of awards, which jurisdiction must still subsist wherever it is not excluded by Act of Parliament.

The cases of *Hamilton* v. *Bankin* (*c*) and the judgment of Lord Justice *Turner* in *Smith* v. *Whitmore* (*d*)

(*a*) L. R. 5 Ex. 221.
(*b*) L. R. 6 Eq. 435.
(*c*) 3 DeG. & S. 782.
(*d*) 2 DeG. J. & S. 297.

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shew this conclusively. Then, if the Court can set aside an award in an ordinary case, I can see no reason why it should not also do so in the case of a statutory award like the present. It is true that it is a circumstance to be observed upon, that no instance of the exercise of such a jurisdiction by a Court of Equity is to be found in the English Reports, for no such case was cited, and I have been unable to discover any. However, in this Court, the jurisdiction seems to have been entertained in the case of *Gillam* v. *Cleghorn* (*a*), and also in several cases relating to awards made under the provisions of the Toronto Esplanade Acts, and these authorities I am bound to follow.

Judgment.

The preliminary points being thus disposed of the remaining and important question is, as to the validity of the award. It would appear that the 4th and 11th sections of the Railway Act, cap. 66, of the Consolidated Statutes of Canada must receive the same construction as the 68th section of the Imperial Statute, the Lands Clauses Consolidation Act of 1845. This I understand to have been in effect the opinion of the Court of Appeal in the case of *Widder* v. *The Buffalo and Lake Huron Railway Co.* (*b*). This award, therefore, like one under the Imperial Act referred to, is to be confined to the subjects for compensation mentioned in the statute, and the arbitrators are restricted to estimating the amount of damages; the land owner's only remedy upon the award being by an action in which it is open to the Railway Company to shew that the arbitrators have exceeded their powers.

The plaintiffs insist that there was an erroneous assumption of jurisdiction by the arbitrators in the present case in taking into account that head of damage which Mr. *Woodruff* has stated in his letter, (Exhibit

(*a*) 7 Grant 83.

(*b*) 27 U. C. Q. B. 425.

D,) as "damages for depreciation to the farm generally by the permanent occupation of the land as a railway." The contention being, that the arbitrators were limited to give compensation for the land actually taken, buildings destroyed, or removed, and legal injury to any other property, either corporeal or incorporeal belonging to the defendant in respect of which the defendant could at common law, irrespective of the statute altogether, have maintained an action against the Railway Company.

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I think there can be no doubt of the correctness of this position, for this precise question has lately undergone much discussion in England in cases of the highest authority.

In *Ricket* v. *The Metropolitan Railway Co.* (*a*) it was determined that the lessee of a public house who had suffered loss in his busines by reason of the obstruction to streets adjacent, caused by railway works, was not entitled to recover, as he had not been injuriously affected, the interruption to his business being "*damnum sine injuria.*" From this judgment Lord *Westbury* dissented. In *The Hammersmith Railway Co.* v. *Brand* (*b*) it was decided that a person whose property has been depreciated in value by the vibration caused by the passing trains on an adjacent railway, but whose land has not been taken for the purposes of the railway, cannot be said to be "injuriously affected" so as to entitle him to damages under the English statutory provisions analogous to our Railway Act. From this judgment Lord *Cairns* dissented, and all the learned Judges who advised the House, except Mr. Justice *Blackburn*, were of the like opinion.

Judgmen

It will be seen from these two cases that, with a very formidable array of opinion against it, it had neverthe-

(*a*) L. R. 2 H. L, C. 175. (*b*) L. R. 4 H. L. C. 171.

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less been settled that unless the injury to the property of a landowner was such, in any case in which no land was taken, that he could but for the statute have maintained an action at law, he had no remedy by proceeding under the statute.

A case of *Re Stockport, &c. Railway Co.* (*a*) did, however, give colour to the view that where, as in the present case, lands had actually been taken, the damages to the adjoining land might be taken into consideration in an arbitration proceeding under the statute, although such damage was not connected with the taking of the land actually severed. However in the case of *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (*b*) the Exchequer Chamber settled the law on this point the other way. In the judgment of Mr. Justice *Blackburn* in that case all the authorities up to the time of its delivery, two years ago, were reviewed. It was there distinctly decided that general damage to adjoining land was not a proper subject for compensation. I refer generally to that case without quoting any passage from the judgment, for every word of it is applicable here.

Judgment.

That the award here included compensation for the general depreciation in value of the adjoining land, is proved in so many words by Mr. *Ker*, the arbitrator appointed by the defendant, by whom he was called as a witness at the trial; he says, "I was one of the arbitrators who made this award. In awarding damage for general depreciation we did not take into account anything but the diminution of the selling value of the farm which would be caused by the construction of the railway through the land: we did not take into account the damage caused by the passing and re-passing of the trains, nor the damage caused by the owner's loss of prospect. The diminution of the value I referred to, was

(*a*) 33 L. J. (Q.B.) 251. (*b*) L. R. 5 Ex. 221.

that caused by the railway running across the farm, and the general damage to the farm caused by the railway cutting it up." This and the specifications contained in Mr. *Woodruff's* letter of the 12th July, 1871, already quoted, and verified by him in evidence, seem to me to shew clearly that the arbitrators included general damage expected to arise from the railway works, beyond that arising from the severance of the land taken, and that according to the case of *The Duke of Buccleuch* v. *The Metropolitan Board of Works*, the assessment of damages has proceeded on an unauthorized principle. 1872. G. W. Railway Co. v. Warner.

I should have been glad to have been able to decide otherwise, for I confess that the opinions of Lord *Westbury*, Lord *Cairns*, and Mr. Justice *Willes* and those who agreed with them, commend themselves much more strongly to my understanding than that of the Exchequer Chamber in *The Duke of Buccleuch's* case, which I feel bound to follow as authority, but which seems to me to proceed on narrow technical reasoning, and to lead to unjust results. Judgment

The damages on the face of the award being found generally, the portion in which there has been an excess of jurisdiction cannot be separated. This would be so at law, *Beckett* v. *The Midland Railway Co.* (*a*) and must also be so here.

There must be a decree for the plaintiffs declaring the award bad, and setting it aside with costs.

The cause was subsequently re-heard before the full Court.

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

Mr. *Bethune*, for the plaintiffs.

(*a*) L. R. 1 C. P. 241.

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G. W. Railway Co. v. Warner.

Per Curiam.—Since judgment was given in the present case, it appears that the decision of the Exchequer Chamber in the case of *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (*a*), has been reversed in the House of Lords (*b*).

This decree, therefore, which proceeded entirely on the authority of the case in the Exchequer Chamber, should also be reversed; and the bill dismissed with costs.

WIGLE v. SEITERINGTON.

Registry—Unregistered equity—Notice—Champerty—Maintenance.

The Registry Act of 1865 does not avoid a prior equity against a subsequent registered deed, where the latter was taken with notice of the adverse claim.

W mortgaged his land to *S*, and afterwards sold and conveyed the equity of redemption to *A*; but by mutual mistake the land was so described in the conveyance to *A* as to comprise part only: *A* sold and conveyed to *S* by the same description. The plaintiff afterwards discovered the omission, procurred *W* to sell and convey the omitted portion to him, and filed a bill against *S* for a conveyance thereof. It was proved that before the sale to the plaintiff *W* had sold all he purchased to *A*:

Held, that this was sufficient proof of that actual notice which is requisite in this class of cases.

The plaintiff admitted himself to have been a mere speculative purchaser, buying for less than one-sixth of its value a piece of land which he knew to be in the occupation of another person who claimed to be the owner, from a vendor whom he sought out, and who did not pretend to be the owner of the subject of the purchase; whom the plaintiff agreed to indemnify against the costs of the litigation which both anticipated, and who was to share in the fruits of the contemplated law suit:

Held, that this contract savoured of maintenance and champerty, and was not that honest *bona fide* purchase which alone the Registry Law was intended to protect.

(*a*) L. R. 5 Ex. 221. (*b*) L. R. 5 E. & I. App. 418.

Hearing at Sandwich.

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Wigle v. Setterington

Mr. *S. Blake*, Q.C., and Mr. *A. Cameron*, for plaintiff.

Mr. *Bain* for defendant.

STRONG, V. C.—In this cause, which was heard before me at Sandwich, I disposed, at the hearing, of all the questions which were raised, excepting only that respecting the Registry laws, the benefit of which the plaintiff claimed, though he had not pleaded them.

The facts of the case are as follows: *Francis Wilkinson*, being seised in fee of lot No. 5, in the first concession of the township of Mersea, with the exception of fifty acres, part of the east half of the easterly half of the lot, which had been previously sold to one *Phelps*, on the 6th of March, 1863, made a mortgage to the defendant to secure $700 and interest.

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Subsequently the defendant having executed a bond to the sheriff as a surety for *Wilkinson*, took from him a second mortgage on the land by way of indemnity, against his liability on the bond.

The description of the land contained in these two mortgages was as follows: "Being composed of the west half of lot No. 5, in the first concession of the said township of Mersea; also, the west half of the east half of the said lot No. 5, containing together by admeasurement 150 acres more or less."

On the 28th January, 1864, *Wilkinson* sold his equity of redemption to *John Avis*—the indemnity mortgage having then become a satisfied security by reason of the cancellation of the bond to the sheriff, the mortgage for $700 was the sole incumbrance. Accordingly by indenture, dated the 28th January, 1864, *Wilkinson*

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conveyed to *Avis* for valuable consideration, part of which was that *Avis* was to pay off the mortgage to the defendant. Afterwards, on the 31st August, 1865, by deed of that date, *Avis* sold and conveyed to the defendant, part of the price consisting of the outstanding mortgage for $700. The description contained in these two last deeds, was as follows: "One hundred and fifty acres more or less, being composed of part of lot No. 5, in the 1st concession of the township of Mersea, which said parcel or tract of land may be better known as follows, that is to say, commencing seven chains forty-five links west of the south east angle of said lot, then north sixty-seven chains and forty links; then west twenty-two chains thirty-five links; then south sixty-seven chains forty links; then east twenty-two chains thirty-five links along the water's edge, to the place of beginning." In this description the whole of the lot No. 5, less the portion sold to *Phelps*, was not contained; twenty-seven and a half acres, as it now appears, having been omitted. The lot contains 177½ acres in addition to *Phelp's* fifty and the descriptions in the deeds contain 150 acres. It was proved to my entire satisfaction, and I determined, at the conclusion of the hearing, that this omission arose from the mutual mistake of the parties to these two deeds; and that *Wilkinson* intended to convey, and *Avis* to purchase from *Wilkinson*, the whole 177½ acres; that *Avis*, in turn, agreed to sell, and the defendant to purchase the same land; and that it was intended to carry such sales into effect by these deeds; and it was supposed by all parties that the deeds had that effect.

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The mortgage for $700 was credited to the defendant, and thus satisfied, in a somewhat complicated account which the defendant settled with *Avis* on occasion of the purchase, but the defendant retained the legal estate which he had obtained by means of that mortgage. Shortly after the defendant's purchase, he got *Wilkin-*

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son to point out the boundaries of the lot to him, which *Wilkinson* did, shewing to the defendant as his property all that remained of the lot after deducting the fifty acres previously sold. The defendant went into possession of that portion of the land which was cleared and used as a farm; and he exercised acts of ownership over the northern part of the lot which was in wood, by cutting timber upon it. Sometime in the winter of last year, the defendant entered into negotiations for the sale of the land to one *Harris*, who had been in the occupation of it as his tenant; and *Harris*, in order to raise the purchase money, applied for a loan to the plaintiff's father, who agreed to advance the money; and the defendant then gave *Harris* the deed from *Avis* to the defendant, in order that he might have a conveyance and mortgage prepared. This deed from *Avis* was taken by *Harris* to the plaintiff's store, and given either to the plaintiff or to his clerk, *Bee*, in order that the latter might draw the deeds, and the plaintiff from it discovered that it did not comprise the whole of the lot, less the fifty acres sold to *Phelps*. The plaintiff then proposed to *Wilkinson* that he should convey to the plaintiff the portion of land which had been omitted from these conveyances. What took place between the parties, will be best described by quoting from the evidence. *Wilkinson* says, "I did not know I had any land there until Mr. *Wigle* sent for me. *Wigle* said to me, Captain, do you know you have not sold all your land? He said, there was a small strip." He says, further, "it was my intention to convey to *Avis* all my right to this lot. I did not think I owned any land on part of this lot 5, until Mr. *Wigle* came to me." And, again: "Mr. *Wigle* said he would give me $100 and run all the risk, and would give me more, if he got it. *Wigle* told me, I think, that he had found out I still had this land at the Registry office. I told *Wigle* that I thought I had no land there, that I had sold all to *Avis*." In another part of his evidence, this same witness says,

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"*Wigle* was to give me $100 for the twenty acres, and if there was more than the twenty acres, then he was to give me more. The twenty-seven acres would have been worth $500." I believed the statement of this witness in all respects, and acted on it in deciding those questions which I have already determined. Indeed the plaintiff's own account does not differ very much from *Wilkinson*. He says, "I said to him, Mr. *Wilkinson*, have you any land up on the ridge? or asked him if he knew he had land on the ridge, he said he didn't know exactly, that it had never been surveyed. I said, how much do you hink you have; he said he did not know; that he had quite a little calf pasture there; he said he had six or seven acres there, or perhaps a little more — that it had never been surveyed, and that he could not tell exactly. I said to him, Captain, if I find that you have any land there, will you sell it me? He said, yes, I would just as lief sell it to you as to any person else. This was all that passed between us at this time. Shortly afterwards, I had business at Windsor, and I then searched the Registry office and found that the title from *Wilkinson* to *Avis*, was just as he told me; and that the deed from *Avis* to *Setterington*, was just the same, the descriptions corresponded." Some time after this, *Wilkinson* again came to the plaintiff's store, and the plaintiff states that the following then occurred: "I said, what would he take and call it twenty acres, and I would run the risk and guarantee him from all expense in case of a law suit." The bargain as concluded between *Wilkinson* and the plaintiff, is stated by the latter, as follows: "*Wilkinson* said what will you give me for it; I said I would give him $100, and that if there was more than twenty acres, I wonld make it right with him, and in case of a law suit with Mr. *Setterington*, I would pay all expenses. He agreed to this proposition."

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The evidence of *Bee*, the plaintiff's book-keeper, accords with the plaintiff's; and it will be observed that

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they do not differ much from *Wilkinson*, except that they say that *Wilkinson* admitted he had some land left; whilst *Wilkinson* himself says, that he told *Wigle* that he had sold all to *Avis*. I prefer to believe *Wilkinson's* statement. The sum of it is, that the plaintiff having ascertained from the deed which the defendant had lent to *Harris* and from the registry, that the description did not include all, applied to *Wilkinson* to sell him whatever he might have, calling it twenty acres; and that *Wilkinson*, though not pretending to be the real owner of the land, agreed for the price of $100, to sell the plaintiff his title to this piece of land, which, as he told the plaintiff, he had intended to sell to *Avis*, and he thought the defendant had purchased; the plaintiff further agreeing to indemnify *Wilkinson* against the costs of the law suit with *Setterington*, which was forseen by him, and to pay *Wilkinson* proportionally for any land he might recover over the twenty acres. The twenty-seven and a half acres of land is proved by the plaintiff and *Wilkinson* to have been worth $500 to $600, and by the defendant to have been worth $1,000. I have no doubt it was worth considerably more than the $600, which the plaintiff states to be its value. The $100 was paid, one half in cash and the remainder in goods from the plaintiff's store. The plaintiff admits he knew before his purchase, that *Setterington* claimed to own this part of the lot; and that he had seen him cutting timber upon it. The plaintiff procured his conveyance from *Wilkinson*, on the 18th of February, 1872, and registered it within a few days afterwards, and he filed his bill in this cause, on the 19th of March. By this bill, the plaintiff set up that the mortgage for $700 had been satisfied, and he sought a re-conveyance of the legal estate in the twenty-seven and a half acres he had purchased from *Wilkinson*. The defendant by his answer insists upon his superior equity by reason of the mistake; he also disputes the plaintiff's title, insisting that the deeds from *Wilkinson* to *Avis*, and from *Avis*

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to himself comprised the twenty-seven and a half acres; and he claims that the mortgage title is still subsisting. The answer prays by way of cross-relief founded on the mistake in the descriptions, that the plaintiff may be decreed to execute a release to the defendant, of the twenty-seven and a half acres. The plaintiff has not, in answer to this prayer for cross-relief, pleaded by an amendment to his bill, either purchase for valuable consideration without notice or the Registry laws. I apprehend that under the practice of this Court, which permits a defendant to make a case which formerly he could only have made by filing either a cross-bill or an original bill—a plaintiff called upon to meet such a cross claim, is bound by all the rules of pleading applicable to an ordinary defence by answer; and that therefore the plaintiff here should have put in issue by amendment, the grounds on which he relied as avoiding the defendant's equity founded on the mistake.

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The defendant's counsel as a preliminary defence, objected to the plaintiff's title, insisting that from the description contained in the deed from *Wilkinson* to *Avis*, it appeared that the overplus of twenty-seven and a half acres, lay to the south instead of to the north of the 150 acres conveyed; and that, therefore, the land comprised in the plaintiff's deed, was included in the deed to *Avis*. For reasons which I need not here repeat, I decided this contention against the defendant. I further determined that the mutual mistake which the evidence had so clearly established, entitled the defendant to a rectification; and that this could not be avoided by the plaintiff, on the ground that he was a purchaser for value. Firstly, because he had not pleaded that case. Secondly, because he had not obtained the legal estate which was outstanding in the defendant, having passed to him under the first mortgage deed for $700, and that this was therefore a contest between equities only.

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Phillips v. *Phillips* (*a*). Thirdly, for the reason that the plaintiff had notice sufficient to disentitle him to set up such a defence, inasmuch as he admitted in his evidence that he knew the defendant claimed the land in dispute, and had been exercising acts of ownership upon it by cutting timber; and, also, because *Wilkinson* had told him that he had intended to sell and convey it all to *Avis*; and, lastly, on the ground that such a defence cannot be permitted to be used as a shield by a purchaser such as the plaintiff shews himself to have been; a mere speculator, buying a lawsuit rather than a parcel of land, and doing so with the avowed object of cutting out the real equitable owner. *Goff* v. *Lister*; (*b*) *McLennan* v. *McDonald*. (*c*).

Judgment

I reserved judgment, however, on the question as to the Registry Act. Further consideration has convinced me that not only ought I not to give any indulgence to a litigant whose conduct has been such as the plaintiff's has been in the matter of this purchase, but that the Registry laws, if pleaded, would not help him Under the former law, this equity of the defendant's could not have been intercepted by a subsequent registered deed, however innocent the grantee taking under it might have been. *McMaster* v. *Phipps* (*d*). But the 68th section of the Registry Act of 1868, alters the law in this respect, and expressly enacts that as well as a prior unregistered deed, an "equitable lien charge, or interest," shall be invalidated by a subsequent registered deed. I had some doubts how far the former rule, as to notice, would apply to a purchaser claiming under a registered deed, especially as the sixty-seventh section makes provision for the case of notice of a prior unregistered instrument, but says nothing as to notice of an equity, such as that of the defendant, in the present case, not depending on any written instrument.

(*a*) 8 Jurist N. S. 145.
(*b*) 14 Gr. 456.
(*c*) 18 Gr. 502.
(*d*) 5 Grant 253.

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I am glad, however, to find that this point was very fully considered by Vice Chancellor *Mowat*, in the case of *Forrester* v. *Campbell* (*a*), who there came to the conclusion that notice of such an equity must still prevail against registration, a decision in which I entirely concur. Then I think I must hold that the admission of the plaintiff that he bought, with the expectation of being obliged to have a law suit with *Setterington*, in order to make his title effectual, implies that he had notice of the defendant's equity. At all events, *Wilkinson*, whose evidence I believe, told the plaintiff that he had sold all to *Avis*; and the plaintiff well knew and could see from the registry which he searched, that *Avis* had sold all he had purchased to the defendant; and this, I should say, was complete proof of that actual notice which is requisite in this class of cases. But upon a ground distinct altogether from that of notice, it appears to me that this plaintiff could not be entitled to the protection of the Registry law. Taking the plaintiff's own evidence, he admits himself to have been a mere speculative purchaser, buying for less than one sixth of its value a piece of land which he knew to be in the occupation of another man who claimed to be its owner—from a vendor whom he sought out, and who did not pretend to be the owner of the subject of the purchase, whom he agreed to indemnify against the costs of the litigation which both anticipated, and who was to share in the fruits of the contemplated lawsuit. If any contract ever could be said to have a savour of maintenance and champerty, the bargain between the plaintiff and *Wilkinson* deserves that character. The Registry laws are intended for the protection of honest purchasers, and not as a cover to such transactions as that which the plaintiff claims title under here. Were I to say that the plaintiff's purchase by reason of the registration of his conveyance, cut out the defendant's equity in this case, I should be contro-

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(*a*) 17 Grant. 379.

verting the whole policy of these most salutary laws, and making a decree in conflict with authorities which have determined that registration is only a defence to a purchaser who has bought in good faith as well as for value. As Vice Chancellor *Mowat* lays it down, in *McLennan* v. *Macdonald*, already quoted, except in the case of an honest "*bona fide* purchaser, the defence of a purchase for value is not valid, either under the Registry law or otherwise, and the further question of notice of the particular claimant's title does not arise." *Vide* also *Goff* v. *Lister* (*a*), *Rice* v. *O'Connor* (*b*).

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The plaintiff's case would therefore have entirely failed, even if it had been properly pleaded; and the defendant is consequently entitled to a decree for the cross relief which he asks for, and which had better be given in the form of a vesting order. As to the costs, I was under an impression at the hearing, that the defendant had set up by his answer, that the mortgage for $700, had not been paid or satisfied, as I hold it was, in the transaction between the defendant and *Avis*. I find, however, on reading the answer, that the defendant's statement is, that the mortgage was not discharged, which I take to mean, that it was not discharged on the registry so as to effect a re-conveyance of the legal estate; and that the defendant, therefore, held it as he had a perfect right to do, and was prudent in doing, as one of his title deeds. All ground is therefore removed for withholding from the defendant his costs. The decree will direct that the twenty-seven and a half acres be vested in the defendant, and that the plaintiff pay the costs of the cause.

Judgment.

(*a*) 14 Grant 451.

(*b*) 12 Ir. Chy. 424.

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HENRY v. SIMPSON.

Conversion—Charge of debts—Exemption.

A testator after directing that his debts should be paid by his executors, gave to his wife during her life all the rents and interest of the property for her sole use; and then willed that his property should be divided into three equal portions, one to his wife, one to his daughter *M*, and one to his daughter *E*, on condition that his wife should have power to bequeath her portion as she pleased; that *M* should have her portion after her mother's death, and should invest it for the benefit of her children; that *E* should have one half of her portion in absolute control, and the other half to receive the interest as long as she should live, and that then this half should go to *M's* children; but further if *E* had a child or children at her death, the remaining half should go to such child or children:

Held, that the real estate could not be sold during the lifetime of the wife, the tenant for life, even with her consent.

Held, also, that the direction for payment of debts by the executors did not affect the devises of the real estate.

This cause came on by way of motion for decree for the purpose of obtaining a declaration of the proper construction of the will of the late *John Henry*.

Mr. *Fenton*, for the widow, the plaintiff.

Mr. *Proudfoot*, Q. C., for the defendants.

Judgment. STRONG, V. C.—The bill in this cause is filed to have a declaration of the proper construction of the will of *John Henry* which is as follows: "I will and direct that all my just debts and funeral and testamentary expenses be paid by my executors hereinafter named as soon as possible after my decease. Then I will and bequeath to my wife *Eliza Jane Henry* during her natural life all the rents and interest of my property for her sole use. Next I will that the property be divided into three portions equally, one to my wife the said *Eliza Jane Henry*, one to my elder daughter *Margaret Henry Simpson*,

and one to my younger daughter *Eliza Jane Henry Traver* on conditions, that my said wife have full power to bequeath her portion as she pleases; that my daughter *Margaret* shall have her portion immediately after the death of her mother with the desire that she invest it in the way she thinks best for the benefit of her children; that my daughter *Eliza Jane* shall have one half of her portion in absolute control and the other half to receive the interest as long as she shall live, and then that the said half go to the children of my said daughter *Margaret*; but further, in the event of my said daughter *Eliza Jane* having a living child or living children at her death, then the remaining half share shall go to her own child or children." And the testator appointed his wife and daughters to be executrices of his will. The testator left both real and personal estate.

The first question which is raised is, as to the conversion of the real property of which it is contended there ought to be an immediate sale. It will be observed that there is no express trust or power of sale contained in the will; consequently, if an authority to convert is to be implied it must be derived from the direction to divide the property into three shares, one of which is to be at the absolute disposal of the testator's wife, and one is given to each of his daughters for the interests which will be afterwards pointed out, or it must be implied from the direction that Mrs. *Simpson's* share shall be invested by her for the benefit of her children. Two cases were cited as authorities to shew that a trust to convert must be implied: *Cornick* v. *Pearce* (*a*) and *Mower* v. *Orr* (*b*). In *Cornick* v. *Pearce* there was a direction by the testator to his executors to divide the whole of his estate and effects into two equal moieties upon his youngest daughter attaining twenty-one, one moiety to be divided between the daughters equally, and the other moiety to be invested

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(*a*) 7 Hare 477.

(*b*) 7 Hare, 473.

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in the funds or on real securities; the income to be paid to the daughters during their lives, and on the death of the daughters "upon trust to divide the moneys and effects" among their children absolutely. It was contended that the whole real estate ought to be sold, but it was determined that a conversion was only to be implied as to the half which was directed to be invested and of which the remaining interest was given to the daughters' children, the Vice Chancellor saying that "there was no direction which required a conversion except as to the moiety to be settled. The words applied only to a moiety after a division had been made." In *Mower* v. *Orr* the will contained a direction to divide copyholds and personal properties of different sorts into twenty shares, with a gift of a certain number of shares to each of four persons, though there was no direction to invest; and this was held to operate as an implied direction to sell the copyholds, and the Vice Chancellor distinguished the case from that of *Cornick* v. *Pearce* upon the ground that in the latter case the division of the whole estate into two shares could be effected without a conversion.

Judgment.

These cases are in my judgment, authorities against, rather than in favor of, a conversion in the present case. In *Cornick* v. *Pearce* it was expressly denied that there was any implication of a trust for sale to be found in the direction to divide the estate into two shares, and such a trust was only deduced as to the moiety to be settled, from the trustees being required to invest that half in government or real securities, and the trust to divide the "*moneys* and *effects*" among the daughters' children when the time for distribution should arrive. This case is therefore a distinct authority against any such implication as is contended for, being raised by a direction to divide into two shares; and the implication, as to the moiety of which the daughters were only to be tenants for life, was so strong by reason of the direction for investment as money and division as money, as almost to

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be irresistible, but as the Vice Chancellor said this applied only to the moiety after the division. In *Mower* v. *Orr* there was no trust for investment and the testator's intention to create a trust for sale of the copyholds was assumed, from the mere direction to divide into twenty shares with the gift of a certain number of shares to each of four persons. As the same judge had in the previous case of *Cornick* v. *Pearce* decided that a conversion was not to be implied from a gift in two shares, his decision in *Mower* v. *Orr* must have proceeded on the number of the shares which would have made a division in specie highly inconvenient if not actually impossible. Therefore *Mower* v. *Orr* cannot be considered as an authority for the proposition that every direction in a will to divide real property, into two or three shares, impliedly requires or authorizes the trustee to sell. Mr. *Jarman* makes the following observations on the case of *Mower* v. *Orr*; the Vice-Chancellor "distinguished *Cornick* v. *Pearce* on the ground that the purposes of the will would in the circumstances of that case be effected without a conversion of the whole estate. But the purposes of the will in the case of *Mower* v. *Orr* could have been equally effected without a conversion, unless we admit that because the number of shares is large and consequently a division otherwise than through the medium of conversion inconvenient, therefore a trust for conversion must be implied from words, which, had the number of shares been small would have given rise to no such implication; a construction which would lead to very inconvenient results. The case of *Mower* v. *Orr* seems to go little short of deciding that every direction to divide implies also a direction to convert into money, for the purpose of rendering the division more easy." I have been unable to find any later case extending the principle of *Mower* v. *Orr* or indeed any case where it was applied under like circumstances. Then to apply the rules to be deduced from these cases to this will; I must hold that the testator's

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declaration that the property is to be divided into three shares does not imply any trust or direction to sell; there being nothing to make a division of real property into three equal shares impossible or even inconvenient, and there being nothing indicating that the shares are to be divided as money, and not in specie. Then I find no such intention shewn by the manner in which the shares are directed to be dealt with. The widow who is to have one share absolutely, but to be tenant for life of the whole, has power given her to bequeath her portion. This, however, does not help the contention, for she can as well dispose by will of her share in specie as if it came to her as money, and the argument that the use of the word "bequeath," a term of art usually applied to personalty, indicates that she is to deal with her share as personalty is, I need scarcely say, of no weight.

Judgment.

It was, however, strongly argued that the mode in which Mrs. *Simpson's* share was disposed of, shewed that there must necessarily be an immediate sale of the whole estate. It will be remembered that that share was directed to be settled, the words of the will being as follows "That my daughter *Margaret* shall have her portion immediately after the decease of her mother, with the desire that she invest it in the way she thinks best for the benefit of her children." There can be no doubt but that this gift creates a trust for the children of Mrs. *Simpson* to take effect in possession either immediately upon the death of the tenant for life, or subject to a life interest in their mother, which it is I need not now decide: *Cruwys* v. *Colman* (*a*), 1 *Jarman* on *Wills*, (Ed. 3,) pages 357, 8. It may be a question whether the naked expression, "invest," is sufficient without more to call for conversion. But assuming that it is, there is nothing in it to require a conversion of the whole before a division into the three

(*a*) 9 Ves. 319.

shares. As Vice Chancellor *Wigram* said in *Cornick* v. *Pearce* the word applies only to a share after a division shall have been made. Of the portion allotted to the testator's daughter Mrs. *Traver*, one half is to be taken absolutely; the other half she has only a life estate in, the reversionary interest being given to her own children if she have any, and to her sister's if she should have none; for as I stated at the argument I must construe the words "remaining half share" as meaning the half share other than that given to Mrs. *Traver* herself absolutely.

So far from there being anything in this will pointing to a conversion during the lifetime of the tenant for life, the testator's widow, I think there is an indication of a contrary intention in the gift to the widow during her natural life of all the "rents and interest." Now the word "rents," although, by force of the context, it has sometimes been interpreted as income; yet when it is used in a gift of realty and personalty in conjunction with the word, "interest," it goes far to shew that an enjoyment of the realty in specie was intended. And this has even been so held where the subject of a devise being wasting property, such as leaseholds, and the gift being of successive estates, conversion is always held imperative in the absence of a contrary intention, without anything being required to warrant its implication beyond the bare gift of such interests in a perishable subject: *Cafe* v. *Bent* (*a*). Judgment.

I am, therefore, of opinion, that this will does not require, or even authorize, any sale of the real estate devised during the lifetime of the tenant for life.

It was, however, said at the hearing, that the widow and all other parties consented to a sale being directed, and that it would be the most beneficial course for all

(*a*) 5 Hare. 34.

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who are interested in the estate. It would be impossible to act on such concurrence of the tenant for life, for as the testator has given contingent reversionary interests to the children of his daughters, in their respective shares, those portions of the estate must remain in specie, until the interests become vested, unless it should appear, at the proper time for raising such a question, that the direction to invest Mrs. *Simpson's* share warrants a sale. It must have been the intention of the testator that no sale should take place, at least during the lifetime of the widow, and that being so, there can be no anticipation of the time when such a disposition may be permitted, founded on any consent or concurrence of the party to whom the enjoyment in specie is given, however beneficial a sale may be shewn to be: *Lewin* on Trusts, 419; Dart's V. & P. (Ed. 4), p. 1083; *Johnson* v. *Baber* (*a*), *Bristow* v. *Skirrow* (*b*). I need scarcely say that the testator's widow is at liberty at once to dispose as she may think fit of the one-third share which is given to her absolutely.

Judgment.

It was lastly suggested, that as the will contained a direction for the payment of debts by the executors, this constituted a charge of the testator's debts on the interest in land devised to the widow and daughters, and that they had therefore an implied power of sale. I am of opinion that this is not so; even assuming that there is nothing in our law of real assets to create any difference in this respect, between the effect of such a direction in this country and in England. It is well known that, according to the English law, a charge would be in this manner created; and the executors would take a power of sale by implication. If, however, the direction is, that the debts are to be paid by the executor, the charge on the lands does not arise, except as to estates which are devised to the executor. These propositions are so well

(*a*) 8 Beav. 233. (*b*) 27 Beav. 590.

established, that I need scarcely mention any authority in their support. I may, however, refer to 2 *Jarman* on Wills (2nd ed.), p. 495 *et seq.* 1872. Henry v. Simpson.

Where, however, there is a devise of a distinct estate to one of several executors (even of an estate in fee), the lands so devised are not charged: *Warren* v. *Davies* (*a*), *Wasse* v. *Heslington* (*b*); 2 *Jarman* (2nd ed.) p. 511. This applies in the present case to exempt the estates given to the widow, who, as I have already decided, takes an absolute estate in fee in an undivided third of the lands. And it also applies in like manner to the one-half of the one-third portion which Mrs. *Traver* also takes absolutely.

The authorities also shew that the widow's life estate in her daughters' shares; and the limited estates taken by Mrs. *Traver* in the moiety of her share which is given over at her death, and by Mrs. *Simpson* in the one-third which she is to take at her mother's death, subject to the trust for her children, are not affected by any charge, the exception being even more strongly marked in the case of a limited estate given to one of several executors, than in that of a fee so given. *Harris* v. *Watkins* (*c*), *Keeling* v. *Brown* (*d*), *Jarman* on Wills, *ubi supra*. Judgment.

Even if there had been sufficient in this will to constitute a charge of debts, and so give the executors an implied power of sale, according to the English law, I should still have doubted much whether it would have the same effect here, since such a charge by the testator would be no more than the law, as now regulated by the statute, which prescribes the mode of administering assets, and makes all assets legal, effects by its own force. In England such a charge would make the lands charged

(*a*) 2 M. & K. 49.
(*b*) 3 M & K. 495.
(*c*) Kay 438.
(*d*) 5 Ves. 359.

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equitable assets. Here it could not do so: *Turner* v. *Cox* (*a*). It is not necessary, however, to decide this point at present, and I venture to express no opinion upon it. The same doubt was expressed by the full Court here, some years ago, in an unreported case of *Allen* v. *Goodhue*.

There must be a declaration in accordance with this judgment. There is to be liberty to apply, and the decree is so to direct, and the costs of all parties are to be paid out of the estate.

NEWENHAM v. MOUNTCASHEL.

Voluntary bonds—Priority.

A gave a voluntary bond to *B* for £5,000, and a few days afterwards a like bond to *C*; neither was given for any fraudulent purpose. *C* recovered judgment on the second bond; and the obligor had not property enough to pay both bonds:

Held, that *B*, whose bond was prior in date, had no equity to restrain proceedings by *C* to enforce the judgment recovered; nor to set aside a conveyance made by *M* of land of less value than the judgment, and which *C* had accepted in discharge thereof.

Examination of witnesses and hearing at the sittings in London.

Mr. *S. Blake*, Q. C., for the plaintiffs.

Mr. *Maclennan* and Mr. *G. Kirkpatrick*, for the defendants.

Judgment.

STRONG, V. C.—The facts of this case as they appear in evidence are as follows: On or previously to the 28th of February, 1855, *Lord Mountcashel* executed a volun-

(*a*) 8 Moore P. C. 288.

tary bond conditioned for the payment of £5000 stg., which was accompanied by a warrant of attorney to confess judgment in favor of his daughter *Lady Jane Moore*. This bond was executed in Dublin, and was forwarded by mail on the 28th of February, 1855, to Mr. *Kirkpatrick*, of Kingston, in this Province, for the purpose, as *Lord Mountcashel* states, of being registered. About the same time, the exact date does not appear, though, from an entry in the Earl's diary which is produced, it may have been as early as the 21st of February, 1855, *Lord Mountcashel* executed a bond for the like sum of £5000 stg., with a warrant of attorney to confess judgment, or he sent instructions to Mr. *Kirkpatrick* to give judgment for that amount, in favor of the plaintiffs as trustees under the marriage settlement of the Rev. *Edward Newenham*, and *Lady Helena*, his wife; the latter being another daughter of *Lord Mountcashel's*. This last bond was also voluntary, it having, as I gather from the evidence, been given under these circumstances: *Lord Mountcashel* had, upon the marriage of his daughter, settled upon her a sum of £5000, charged on certain lands in Antrim, which were afterwards sold in the Incumbered Estates Court in Ireland, when the proceeds of the sale were exhausted by prior incumbrances. This £5000 appears to have been a mere charge, and *Lord Mountcashel* was, it is proved, under no personal obligation in respect of it; although, however, under no personal legal obligation to make good this sum of money, the failure of the charge in the way I have mentioned was the inducement which led *Lord Mountcashel* to give the plaintiffs their bond. The bond given to the trustees, the plaintiffs, and the judgment authorized to be entered up, were therefore like the bond and warrant given to *Lady Jane Moore*, purely voluntary, both bonds being executed within a few days of each other, and both being intended by way of advancement. On the 6th of March, 1855, *Lord Mountcashel* also charged all his lands in the County of

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Middlesex, in this Province, with a sum of £3000 stg., in favor of his then solicitor in Dublin, Mr. *John Tew Armstrong*, to secure a debt which he then owed Mr. *Armstrong* for costs and which is proved to have exceeded the amount of the charge. This charge was afterwards on the 22nd December, 1856, purchased from Mr. *Armstrong* by *Lady Jane Moore*, the purchase money being raised by mortgage of her own lands in Ireland, and on 25th August, 1858, Mr. *Armstrong* executed an assignment. Both bonds were sent to Canada with instructions to proceed upon them, and judgments were recovered on both by confession. The judgment of the plaintiffs was signed on the 24th March, 1855, but the judgment in favor of *Lady Jane Moore* is admitted to have been first in order of priority, and it is also admitted that having registered it, and having thus obtained a charge prior to the plaintiffs, *Lady Jane* filed a bill to enforce it, and obtained the usual decree on the 27th August, 1861. In May, 1862, *Lord Mountcashel* conveyed all his lands in Middlesex to *Lady Jane Moore*, in satisfaction as well of her judgment as of *Armstrong's* mortgage which had been transferred to her. Subsequently, and in 1866, a transaction took place as to a small parcel of land in the Village of Warwick, in the County of Lambton, which was not included either in the charge given to *Armstrong* or in the deed of 1862. This piece of land was the property of Mr. *Boyes* who had been *Lord Mountcashel's* agent, and who several years before 1866 had erected on it a building which was used as a tavern. This house *Lord Mountcashel* alleged was built with his money, and he threatened Mr. *Boyes* with proceedings to make him accountable. No suit was, however, instituted; but an arrangement was come to through Mr. *Becher*, in pursuance of which, and in consideration of £200,—the insurance money of a house in London in this Province, which was included in *Armstrong's* charge, and had been conveyed to *Lady Jane Moore* in 1862, and was afterwards destroyed by

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fire,—*Boyes* conveyed this Warwick property to *Lady Jane*. These two conveyances of 1862 and 1866 are now impeached by the plaintiffs, who, as already mentioned, recovered a judgment subsequent in priority to that of *Lady Jane Moore*, and who now have executions against lands in the hands of the sheriffs of Middlesex and Lambton.

The bill alleges that *Lady Jane* has sold all the lands except four parcels, namely that in Warwick, the lot in London, lot number 14, in the second concession of Adelaide, and lot number 42, in the first concession of Westminister; and it prays that the deeds of 1862 and 1866 may be declared fraudulent and void as against them, and that these remaining lands may be sold in satisfaction of their judgment. Both the defendants were examined under a commission at Cork, and one witness Mr. *Thomas Partridge* was called by the plaintiffs at the hearing with reference to the Warwick lands. No evidence was given as to the value of the land comprised in the impeached conveyances, and the plaintiffs have not attempted to prove their allegation contained in paragraph 10*d*. of their bill, namely, that the lands were worth four times the amount charged on them by *Armstrong*.

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I am of opinion that the plaintiffs have failed to establish a case for relief. There is nothing to shew that the bond given to *Lady Jane*, though voluntary, was designed to defeat the prior voluntary bond given to the plaintiffs. There can, I take it, be no doubt that a voluntary bond or covenant is not by itself fraudulent against a prior voluntary bond or covenant. In order that it should be so it must be shewn to have been given with the design of defeating the prior voluntary creditor. The evidence in the present case entirely clears the defendants from any such imputation. The object of *Lord Mountcashel* was to make a provision for his daughters of equal

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amonnt; and he does not seem to have done anything with a view to give *Lady Jane* priority over her sister. Then there being these two voluntary bonds the obligee under that last in date recovers judgment first. Once granting that the bond on which the judgment was recovered was not given with any fraudulent intent, it follows that the subsequent obligee had the right to recover the judgment, and having recovered it to avail herself of the priority obtained by means of it. To say that a man cannot give, at successive periods of time, bonds to two of his children, and that the holder of the later bond, cannot in the absence of evidence shewing his debt to have been created in fraud of the prior volunteer, legally obtain priority by judgment over the first, would be to controvert very plain principles of law. The case just put is precisely that which is presented for decision in this suit. To sustain the plaintiffs' case so far as it seeks to impeach the bond given to *Lady Jane* and the

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judgment upon it, it would be necessary to hold that the second of two voluntary bonds, given by the same obligor, must be presumed to be in fraud of the prior volunteer. I do not understand that to be the law. In such a case, fraud must be proved either directly or by circumstances warranting its inference, and I find no such proof here. Then the judgment recovered being free from any taint of fraud, the volunteer becomes, by means of it, a creditor, and as such as much entitled to satisfaction as if the judgment had been recovered in respect of a debt for valuable consideration: *Adams* v. *Hallett* (*a*).

Therefore *Lady Jane Moore* was on the 15th May, 1862, a creditor for £5000 stg., in respect of her judgment which she was then endeavoring to enforce as a registered charge by means of a suit in this Court, and she had, as such judgment creditor, a perfect right, instead of prosecuting her decree to a sale, to take a conveyance

(*a*) L. R. 6 Eq. 468.

of the lands bound, by her judgment, which are proved to have been in value very much less than the amount of the debt. 1872. Newenhem v. Mountcashel

But this conveyance of the 15th of May, 1862, can be supported on another ground. There can be no question on the evidence of the validity of the charge executed by *Lord Mountcashel* on the 6th March, 1855, in favor of Mr. *John Tew Armstrong* his solicitor. The only evidence as to it is that of the Earl himself, who proves that, on the day it was given, he was indebted to Mr. *Armstrong* in an amount greatly in excess of the sum it was given to secure,—£3000 stg.

This charge being valid it would of course make no difference whether it was assigned to *Lady Jane Moore* for value or not, but it is in fact proved to have been purchased by her from Mr. *Armstrong* for a valuable consideration paid out of her own moneys. This debt of £3000 stg. therefore charged on all the lands now in question, excepting only the Warwick tavern, was of itself a sufficient consideration for the conveyance of May, 1862. Judgment.

The equity of redemption conveyed was worth nothing to *Lord Mountcashel* or his creditors since the lands were a grossly inadequate security for the £3000 stg. The transaction was indeed a beneficial one for the mortgagor, since the effect of it was to satisfy a debt of £3000 by means of lands not nearly worth that sum. The suit is therefore entirely without foundation, as regards the lands included in the first deed: that of May, 1862.

It is, however, said, that the deed of 1866 of the land and house in the village of Warwick must be void, inasmuch as it is argued that the judgment debt and *Armstrong's* mortgage debt for the £3000 having been satisfied by the conveyance of May, 1862, there could have

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been no consideration to support this latter deed and it must therefore necessarily have been a mere gratuitous conveyance. I am not clear that the evidence does not shew that it was the intention of the parties to convey all the lands bound by the judgment by the deed of 1862. If that were the intent, any equitable interest which *Lord Mountcashel* had in this Warwick land ought to have been conveyed, and the deed of 1866 was therefore properly executed to supplement the former transfer.

But, be this as it may, it does not appear that *Lord Mountcashel* had any interest in this Warwick property which could at the date of the deed of 1866 have been made available either by legal or equitable execution to satisfy the plaintiffs' jndgment.

The facts alleged respecting the claim against *Boyes* have been already stated and I apprehend they only shew that *Lord Mountcashel* might, if he could have proved them, have obtained a decree establishing an equitable lien on the land for the amount of his money which *Boyes* had expended upon it. Such a litigious right or equity, even if it could have been the subject of an equitable charge by means of a registered judgment under the old law, which is doubtful, could not certainly have been sold under either legal or equitable execution. Therefore, even if the deed executed by *Boyes* had been purely voluntary, it could not have been said to have defeated the plaintiffs' execution, since it abstracted no property liable to that execution.

Judgment.

But if I understand *Partridge's* evidence rightly, *Lady Jane Moore* was actually a purchaser for value from *Boyes*, since the conveyance was made in consideration of £200;—the proceeds of the fire policy on the house in London which had passed under the deed of 1862;—and this is a conclusive answer to the plaintiffs' contention on this part of their case.

The plaintiffs therefore shew no title to relief as to any of the lands; and their bill must be dismissed with costs. 1872. Newenham v. Mountcashel

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Baker v. Casey.

Ships—Part owners—Repairs.

Part owners of a ship are tenants in common of the ship; and partners in the earnings only.

One part owner of a ship having taken possession of it, and expended in repairs more than the ship's earnings.

Held, that the other part owner was not bound to contribute to the payment of the difference.

Appeal from the Master at Belleville. The case on a motion for a receiver is reported *ante* volume xvii. page 195.

Mr. *Moss*, Q. C., for the defendant, who appeals.

Mr. *Wells*, contra.

Strong, V.C.—The bill in this case was filed by the plaintiff claiming to be part owner with the defendant of the Schooner "Alma," and seeking to enforce his rights as such part owner, both as regards the future and past use of the vessel. Judgment.

By the decree it was declared that the plaintiff and defendant were co-owners each entitled to $\frac{32}{64}$th shares; and it enjoined the defendant from sending the vessel on any voyage against the plaintiff's consent without having first given the proper security for the plaintiff's shares; and it directed the following accounts to be taken: an account of the earnings whilst the schooner was under the exclusive control of the defendant; an account of money during that time paid by the defen-

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dant for outfit, repairs, and expenses "properly chargeable against the said schooner," during the same time; and an account of the clear profits during that period, and "the share of each of the parties" therein. The Master to whom the cause was referred, finds that there were no earnings, and that the defendant expended the sum of $2,893.96, for outfit and repairs, which were necessary for the working of the schooner, but that the plaintiff should not pay or be chargeable with any part of that sum. From this report, the defendant has appealed upon two grounds: First, that the plaintiff ought to have been charged with a share of the sum expended in repairs; and, secondly, that at all events he ought to have been made to contribute towards the loss incurred in navigating the vessel whilst she was in the hands of the defendant and certain persons, named *Dewey*, who had contracted to purchase from the plaintiff. I am of opinion that the Master was perfectly right in refusing to charge the plaintiff with any portion of the money expended for repairs, which the evidence shews to have been an expenditure upon the hull of the vessel.

Judgment.

Ever since the case of *Doddington* v. *Hallett* (*a*), was overruled by Lord *Eldon*, in *Ex parte Young* (*b*), and *Ex parte Harrison* (*c*), the legal relationship of part owners of a ship has been established, according to English law, to be that of tenants in common of a chattel, and not that of partners; but as to the earnings of the ship, whether freight or otherwise, the case is wholly different; and as to that, the rights of the part owners *inter se*, are to be measured by the ordinary law of partnership. To put it shortly, they are co-owners of the chattel, but partners in the profits; see *Lindley* on Partnership.

This distinction is most clearly pointed out by Sir

(*a*) 1 Ves. Sen. 497. (*b*) 2 Rose 78. (*c*) 2 Rose 76.

James Wigram in his luminous judgment in the case of *Green* v. *Briggs* (*a*). 1872.

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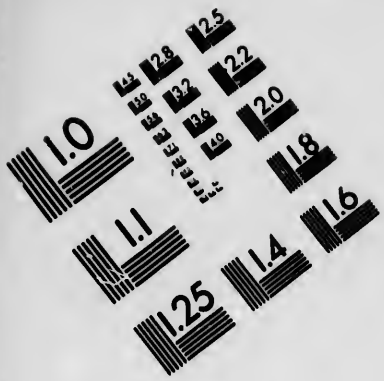
Holderness v. *Shackell* (*b*), and *Ex parte Hill* (*c*), *Maude* and *Pollock* on Shipping, p. are also authorities to the same effect. Then there being in the present case no earnings out of which the repairs and other expenditure on the vessel can be deducted, there is nothing out of which the defendant can be reimbursed for his expenditure on the footing of partnership; and he is compelled to rely on whatever his rights and the plaintiff's liability may be in respect of the part ownership of the ship, which can of course be no greater in this cause, than they would be in a suit in which the present defendant was a plaintiff seeking contribution. This, I have already said, are those of a tenant in common, and that one tenant in common, cannot compel his co-owner to contribute towards expenditure upon the subject owned in common, whether land or chattels, is a proposition scarcely calling for any reference to authority. See, however, *Kay* v. *Johnson* (*d*), *Ex parte Young* and *Ex parte Harrison*, already cited. In *Lindley* on Partnership (*e*), it is thus laid down: "One co-owner has no lien on the thing owned in common for outlays or expenses, or for what may be due from the others as their share of a common debt;" and whatever the American authorities, following the case of *Doddington* v. *Hallett*, may shew to the contrary, this is now undoubtedly the law of England, applicable to ships, as is apparent from the case of *Green* v. *Briggs* already cited.

Judgment.

Upon this part of the case, I have also seen and considered the cases of *Alexander* v. *Simms* (*f*); and

(*a*) 6 Hare. 395.
(*b*) 8 B & C. 612.
(*c*) 1 Madd. 61.
(*d*) 21 Beav. 536.
(*e*) Ed. 1, p. 32.
(*f*) 18 Beav. 80 S. C. 5 DeG. M. & G. 57.



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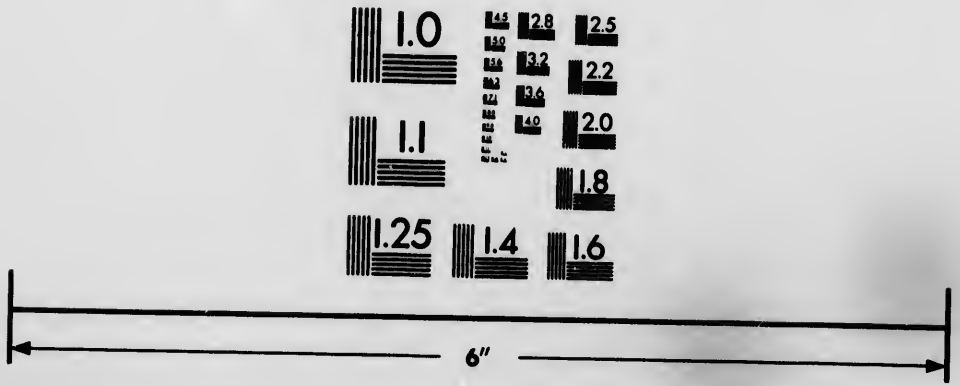

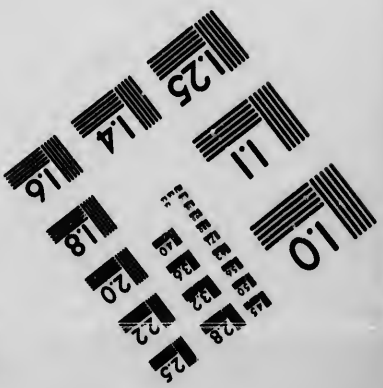

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Lindsay v. *Gibbs* (*a*). The result is, that I must hold the Master rightly declined to charge the plaintiff with any portion of the amount which he finds to have been expended for repairs.

Then the second ground of appeal, I think, also fails. The Master finds that the schooner was "run" from the time of the purchase by the *Dewey's* up to the time of the sheriff's sale, at a loss of $298.71. The *Deweys* were purchasers from the plaintiff, and having failed to pay their purchase money, the plaintiff either by selling under the execution, or by otherwise asserting his title, put an end to their interest. The decree does not direct any account of profits against the defendant during this period. The account is in respect of profits whilst the defendant alone had the possession and control of the vessel; and in respect of this, it is not found that any loss was incurred. There was nothing in the decree which could have warranted the Master in charging the plaintiff in respect of losses incurred by the defendant in conjunction with the *Deweys*, and it is only in respect of this time, that it appears from the report that there was any loss.

Judgment.

The appeal is dismissed with costs.

(*a*) 22 Beav. 522, S. C. 2 De G. & Jones 690.

1872.

MEYERS v. MEYERS.

Judgment creditors—Sequestration—Leases—Practice.

B was a registered judgment creditor of *M*, after whose death *T* obtained a decree for a debt due by *M*; *T* issued a sequestration for this debt; under the sequestration lands were seized, and let under the authority of the Court to tenants:

Held, that *B's* charge having priority over *T's*, *B* was entitled to set aside the leases on paying the tenants for their labour, in putting in fall crops, and preparing the land for fall and spring crops; and to have the land sold free from the leases.

Mr. *S. G. Wood*, for the defendants, *The Bank of British North America*, moved, on notice, for an order to set aside the sequestration issued by the defendant *Turley*, to enforce payment of an amount due his testator *Charles Harris*, in the suit of *Meyers* v. *Harris*, the Bank in this suit claiming a right to sell free from the writ of sequestration.

Mr. *S. Blake*, Q. C., for *Turley*, contra.

Mr. *Bain*, for the plaintiff.

Mr. *Charles Moss*, for certain of the tenants under leases granted by the sequestrator.

Mr. *Hodgins* and Mr. *Meyers*, for other parties served with notice of appeal.

The grounds of the appeal appear fully in the head-note and judgment.

STRONG, V. C.—This is a suit to administer the estate of the late *Elijah W. Meyers*, who died intestate. The Bank of British North America are judgment creditors, having a specific charge by virtue of the registration of their judgment under the old law. *Charles Harris* was a creditor under a decree of this Court, a balance hav- Judgment.

1872. Meyers v. Meyers.

ing been found due to him on the taking of a mortgage account in a redemption suit instituted by him against the intestate. *Harris* having died, the suit just mentioned was revived by *Turley*, his executor. All parties having submitted to have their priorites determined in the administration suit, the Master has made a separate report whereby he finds that the Bank is prior to *Turley*. In the suit of *Harris* v. *Meyers*, a writ of sequestration to compel the payment of the money found due, was issued; and the sequestrator having taken lands belonging to the intestate's estate, an order was made in Chambers authorizing the sequestrator to let the lands, and he accordingly made leases for short terms, still unexpired, to several persons who have been served with notice of this motion. The Bank of British North America now move to discharge the sequestration, and to have the leases delivered up to be cancelled, in order that the lands may be sold free from them, under the decree in the administration suit. It was argued by Mr. *Charles Moss* for the lessees, that the leases ought not to be interfered with; and that the right of the Bank of British North America was limited to having the rents paid to them. Had this been the case of a lease made by a receiver or sequestrator, obtained by a single creditor representing a body of creditors having equal rights and priorites, no doubt that argument would prevail; but here the sequestration was substantially a writ of execution issued by the plaintiff in *Harris* v. *Meyers*, for the exclusive purpose of enforcing his own debt. The writ itself and all that has been done under it is, therefore, subject to the paramount rights of those who may have prior charges; and the Bank are prior judgment creditors having, by reason of the sequestration, a specific lien. Then in what form is this priority to be asserted? Certainly, not by discharging the writ of sequestration, as the notice of motion asks; for the plaintiff, in *Turley* v. *Meyers*, is entitled to keep the writ in force so long as he does not, by means of it, prejudice the rights of

Judgment.

prior creditors. If the priorities had not already been ascertained by the Master in the administration suit, a proceeding under the general orders, in lieu of the old mode of procedure, by an examination *pro interesse suo*, might have been necessary. But there is now no necessity for that, since the proceedings in the Master's office, which resulted in the separate report already mentioned, have been in the presence of all parties save the lessees, as to whom a reference is unnecessary, as the evidence now produced in support of this motion, is ample to shew that it would be useless for the lessees to contest the priority of the Bank, since it has been established by the Master.

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Meyers v. Meyers.

The proper order to make will, therefore, be that the Master be at liberty to sell the lands free from the leases, which are to be brought into the Master's office to be cancelled, upon the Bank indemnifying (as they very fairly submit to do), the tenants in respect of their labour in putting in fall crops, and in preparing the land for fall and spring crops; the amount of such indemnity to be determined by the Master in case the parties differ; and that upon payment, the tenants deliver up possession to the purchaser or purchasers under the decree. The notice of motion having asked to have the sequestration set aside, which the Bank were not entitled to demand, the plaintiff, in *Turley* v. *Meyers* was right in appearing to oppose this part of the motion, and he must have his costs. Mr. *Hodgins*' client was improperly served, and he must have his costs. I give no further costs, but the tenants may retain theirs out of unpaid rents due to the sequestrator, if any. The order to be drawn up, should be entitled in the two causes of *Meyers* v. *Meyers* and *Turley* v. *Meyers*.

Judgment.

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ROSE v. EDSALL.

Will—Construction of.

A testator made his will in the following words:—"I therefore will unto my beloved wife *Anna Maria*, for the benefit of herself and children jointly, two life policies for each $1,000, and their premium dividends (said life policies are effected with the New York Mutual Life Insurance Company, New York City) to have and to hold for their joint and mutual benefit, and to be by her spent in the most judicious and beneficial manner for all; also whatever interest I may have in the business of *Edsall & Wilson*, and, in the arranging of it, I trust much to my long and well tried porter *Andrew Wilson*, in giving a just return to my heirs, for long and faithful services rendered by me in the business, there being no written agreement of the partnership."

Held, that the widow and children took jointly both the policies and the testator's interest in the partnership, and shared the same equally; that the widow was entitled, during the minorities of the children, to receive the income of their shares in trust, to apply the same as one fund, as she might think most beneficial for the maintenance and education of the whole family: and that each child on attaining twenty-one was entitled to receive his or her share.

Hearing on motion for decree.

Mr. *Maclennan*, for the plaintiffs.

Mr. *S. Blake*, Q. C., for the executors.

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

Judgment. STRONG, V. C.—The sole question in this case is, as to the proper construction of the will of *Samuel Edsall*. The only portion of the instrument which gives rise to any difficulty is that contained in the words, "I therefore will unto my beloved wife *Anna Maria*, for the benefit of herself and children jointly, two life policies for each $1,000, and their premium dividends, (said life policies are effected with the New York Mutual Life Insurance Company, New York City) to have and to hold for their joint and mutual benefit and to be by

her spent in the most judicious and beneficial manner for all; also whatever interest I may have in the business of *Edsall & Wilson*, and, in the arranging of it, I trust much to my long and well tried partner *Andrew Wilson*, in giving a just return to my heirs, for long and faithful services rendered by me in the business, there being no written agreement of partnership."

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Rose v. Edsall.

This will was not attested as the law requires in order to pass realty.

The testator died on the 17th of May, 1870, leaving surviving him his widow, the defendant *Anna Maria Edsall*, and four children, viz., *Florence Ellen* the wife of *Lucien Allen Smith*, *Andrew Wilson Edsall*, *Samuel Schuyler Edsall*, and *Frances Anna Edsall*, the three last being infants. This bill is filed by the executors, *Harvey N. Rose* and *Donald McLennan*, against the widow and children, and Mr. *Smith*, the husband of the eldest daughter to have the construction of the bequest, which has been stated, declared.

Judgment.

It was contended on behalf of the widow that she took the absolute interest. I am clearly of opinion that this is not so. Independently of the plain meaning of the words, "for the benefit of herself and her children jointly," which is, *prima facie* at least, that the widow and children take conc[illegible]nt and equal interests, there are numerous autho[illegible] against a construction which would exclude the child[illegible] from taking interests, and leave them to receive benefits or not, according to the uncontrolled discretion of their mother. Of these it will be sufficient to mention four, *De Witte* v. *De Witte* (*a*), *Raikes* v. *Ward* (*b*), *Crockett* v. *Crockett* (*c*), and *Newill* v. *Newill* (*d*).

(*a*) 11 Sim. 41.
(*b*) 1 Hare, 445.
(*c*) 2 Ph. 553.
(*d*) L. R. 7 Ch. App. 273.

1872.

Rose v. Edsall.

Equally untenable is the contention on the part of the learned counsel for the infants that this gift does not include the testator's interest in the partnership property. The word "also" makes the prior gift applicable to the partnership property, no violence is done to language in so holding, but on the contrary it is the plain grammatical construction, and a contrary decision would leave the testator intestate as to the great bulk of his estate.

Then, it being clear that the widow and children all take beneficially, the question arises as to how they are to take. In cases similar to the present two alternative modes of construction present themselves. It may be either held that the widow takes a life interest with a power of disposition in favor of the children, or that the mother and children take concurrently, the widow, having as a trustee for the children, a wide discretion in the disposition of their shares. In some cases it is said that the Court will favour the first construction, which gives the widow a life estate. But according to the last authority on the point, the case of *Newill* v. *Newill* already quoted, this can only be where there is something to be found in the will indicating the intention that the mother and children should not take jointly. Lord *Hatherly* there says—speaking of a construction which would give a life estate to the wife—"That such a rule does not exist as an absolute rule of construction independently of other expressions in the will, which may assist in the construction of the gift, is proved by the case of *De Witte* v. *De Witte*, before Vice Chancellor *Shadwell*, a case which was approved of, at all events mentioned without disapproval, by Lord *Cottenham* in the case of *Crockett* v. *Crockett*. Lord *Cottenham* there seems to say that generally in a gift to a wife and children, the ordinary rule of joint tenancy must prevail, but he adds, 'that the Court has laid hold of very slight circumstances to lead to the other conclusion.'" These obser-

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vations were made in a judgment reversing the decision of Vice Chancellor *Malins*, who had held that the widow took a life estate. *Crockett* v. *Crockett*, cited above, had been supposed to lay down the rule that a gift to wife and children, without more, meant a life estate to the widow, with remainder to the children. But Mr. *Jarman* says, of *Crockett* v. *Crockett*, "In that case however, Lord *Cottenham* expressly distinguishes a simple gift to the mother and her children from one, where there is an indication, however slight, of an intention that the children should not take jointly with the mother, and throughout his lordship's judgment it appears to be assumed, that in the absence of all indications of such an intention, concurrent interests would be created." (*a*) Now, in the will before me, so far from there being any indication of intention that there should not be a joint tenancy; the testator expressly declares that the mother and children are to take jointly; thus the gift is to the wife for "the benefit of herself and children, *jointly*," and she is "to have and to hold for their *joint* and mutual benefit." There cannot be a question, therefore, but that the mother and children take as joint tenants, subject to a wide discretion in the widow in the management of the shares of the children as a trustee for them. To define the nature of this trust with precision is not easy. The decided cases give but little help here. The best opinion I can form, however, is, that the trust of the children's shares is to continue only during minority. I found this not only upon the decision of Lord *Hatherley* in *Newill* v. *Newill*, already quoted, where the gift was to the wife to the use of herself, and all the testator's children, which, the Lord Chancellor held, made the widow and children joint tenants, with a trust for the children during minority, each child's share to be paid over on the attainment of full age; but also upon the expression of

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(*a*) Vol. II. p. 376.

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the testator in the introductory part of his will when he declares his anxious desire to be, to make provision for his family. I think there is equal reason for holding, as in *Newill* v. *Newill*, that the trust ceases at twenty-one, and that the shares are then to be paid over. I understand the testator here to mean that the widow shall retain the control of the shares of the children whilst they belong to her family, which they cease to do in a certain sense when on attaining twenty-one they become emancipated from her control. The words, "to be by her spent in the most judicious manner for all," I consider as applying to the income, and not to the *corpus*, and as limited to the minorities. I think the widow is therefore a trustee to the extent I have indicated, having the right to apply the income of the minor children as one fund—in what she may judge to be the most beneficial manner for the maintenance and education of the whole family. This discretion will only be controlled by the Court in case of a misapplication or other abuse. The daughter, Mrs. *Smith*, who has attained her age, is entitled to have her share paid over at once, and each child will have the same right on reaching majority. The decree will declare the construction of the will accordingly. The costs of all parties must be paid out of the estate.

Judgment.

BIGELOW v. BIGELOW. 1872.

Will—Construction of.

A testator devised as follows:—"My will is that *J B*, my son, shall have the homestead, and that the property be divided in the following manner: First, that all my just debts be paid out of the personal property, and then two-thirds of the whole to be given equally among my six boys as they come of age, and the other third to be equally divided among my seven girls as they come of age or marry, or as it can be raised from the estate; that the property be appraised after my death. My will is that my wife, *E B*, so long as she remains my widow, shall have two cows kept for her maintain, with meat and flour, and wool, and every other necessary for her age and maintenance, and a girl, should her have one left her, and doctor if necessary. The family to be maintained on the place with every necessary thing for their use. That the younger branch of the family receive a common education equal with the rest of the family."

The evidence shewed that the property of which the testator was seized in fee at the time of his death consisted of the north-easterly fifty acres of lot number twelve, in the second concession of the township of East Flamborough, and of 150 acres, part of lot thirteen in the same concession. The testator lived on the last-mentioned farm; appurtenant to, and, used with his dwelling house, there were a yard, garden, orchard, carriage house, and lane, containing in all about four acres of land.

Held, that the son, *J B*, was entitled to four acres only, not the 150 acres on which the dwelling house was situated.

Held, also, that the testator's children took vested interests in the real estate on the the death of the father.

Hearing at Hamilton.

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

Mr. *E. Martin* and Mr. *Lemon*, for defendant, *Joab Bigelow*.

Mr. *Lemon* for the other defendants.

STRONG, V. C.—*James Bigelow*, the husband of the plaintiff, died in 1847, having made his will as follows: "I make this my last will and testament in manner following, that is to say: my will is, that *Josiah Bigelow*, my son, shall have the homestead, and that the property be divided in the following manner: First. That all my Judgment.

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just debts be paid out of the personal property, and then two-thirds of the whole to be given equally among my six boys as they come of age, and the other third to be equally divided among my seven girls as they come of age or marry, or as it can be raised from the estate: that the property be appraised after my death. My will is that my wife *Eunice Bigelow*, so long as she remains my widow, shall have two cows kept for her maintain with meat and flour, and wool, and every other necessary for her age and maintenance, and a girl should her have one left her, and doctor if necessary. The family to be maintained on the place with every necessary thing for their use. That the younger branch of the family receive a common education equal with the rest of the family." And the testator appointed his wife, the plaintiff, and one *Israel Allen*, to be his executors, and directed that they should be paid for their services. The plaintiff and *Allen* proved the will. *Allen* never acted in the trusts of the will, and is long since dead. The property of which the testator was seised in fee at the time of his death consisted of the north-easterly 50 acres of lot number 12, in the 2nd concession of the Township of East Flamborough, and of 150 acres, part of lot 13, in the same concession. The testator lived on the last-mentioned farm, and appurtenant to and used with his dwelling house there were a yard, garden, orchard, carriage house, and lane, containing in all about four acres of land. The testator's children who survived him were six sons and seven daughters. Of these *Josiah*, the eldest son and heir-at-law, died in September, 1849, after having attained the age of twenty-one years without ever having been married, and leaving a will which I shall have occasion to refer to hereafter, and whereby he assumed to give all his property to the plaintiff. In January, 1850, two other of the testator's sons, *James* and *David*, died, both under twenty-one and unmarried, leaving their eldest surviving brother, the defendant *Joab Bigelow*, their heir-at-law. In January, 1865,

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Keziah Helen Bigelow, a daughter of the testator, died after having attained twenty-one, intestate and unmarried, and leaving her mother as tenant for life and her surviving brothers and sisters as entitled to the remainder in fee, her heirs-at-law. And in May, 1869, *Sarah Olivia*, another daughter of the testator, died having reached the age of twenty-one, and being married to the defendant, the Rev. *Richard Potter*, leaving the infant defendant *Thomas Potter* her heir-at-law. The bill is filed by the testator's widow against the surviving children, consisting of three sons *Joab*, *John Jonathan*, and *Richard Oliver*, and five daughters, and the husbands of the daughters, and the husband and child of Mrs. *Potter*, a deceased daughter. The plaintiff asks for a declaration as to the construction of the will of the testator *James Bigelow*, and as to what proportion of his estate passed to her under the will of her son *Josiah Bigelow*. Further, that it may be declared that certain conveyances executed by her, purporting to convey to the defendants, her daughters, and to her son *John Jonathan* certain portions of the testator's lands, may be declared void, as having been executed by mistake and improvidently, and may be delivered up to be cancelled; and that the interests of the several parties to the suit may be declared, and partition made accordingly, regard being had to the improvements of those of the defendants who have built upon the premises. The bill has been taken *pro confesso* against *John J. Bigelow*, and the daughters have answered admitting the equity on which the plaintiff relies to have the conveyances set aside, and submitting their rights to the Court.

Judgment

The defendant *Joab Bigelow* by his answer has set up an equitable claim to a certain portion of the lands, fifty acres, which he alleges the plaintiff put him in possession of in December, 1868, contemporaneously with the execution of her will, whereby she devised the same land to him, under a parol agreement that he

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should have the particular fifty acres as his share of the testator's estate; and that by reason of this agreement and the plaintiff's conduct in encouraging him to incur expenditure in building and otherwise, he is now entitled to be considered the absolute owner of these fifty acres. Evidence was given by both the plaintiff and defendant *Joab Bigelow* upon the case raised by the answer of the last named defendant; but, in the view which I take, a decision of that question is uncalled for. The argument of counsel at the hearing was addressed to the effect of the evidence, and to the construction of the will of *James Bigelow*. The opinion which I have formed upon the latter subject will enable me to decide the case. The word "property" in the will of *James Bigelow* was sufficient to pass realty. There is nothing in the context shewing an intention to restrain the generality of the word, and the direction to pay debts out of personalty, aids the construction: *Nichols* v. *Butcher* (*a*), *Roe d. Shell* v. *Patteson* (*b*), 2 *Jarman* on Wills (ed. 2) p. 233, *Hawkins* on Wills, p. 133. Next, I do not construe the devises contained in the words "and then two-thirds of the whole to be given equally among my six boys as they come of age, and the other third to be equally divided among my seven girls as they come of age or marry," as gifts to a class of sons and a class of daughters, but as being by reason of the specification by the testator of the number of his children of each sex, a devise to the children individually, precisely as though the testator had named each child. This was the opinion I formed at the hearing, and I find it borne out by authority, if any is required for so obvious a construction. In *Havergal* v. *Harrison* (*c*) the gift was to brothers and sisters of *A*, who at the date of the will had several brothers and only one sister, it was held to be as particular a description as if each

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(*a*) 18 Ves. 193. (*b*) 16 East 221. (*c*) 7 Beav. 49.

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had been mentioned by name. In *Bain* v. *Lescher* (*a*) the bequest was to the children of *A*, namely, *B*, *C*, and *D*, and the same construction was adopted. In *Leach* v. *Leach* (*b*) there was a gift to *E* the eldest son of *J S* and the other children of *J S*, he then having three other children, it was held that the terms "children," "brothers," &c., were to be understood as confined to those living at the date of the will. Further authorities on this head are *Clark* v. *Philips* (*c*), *Barber* v. *Barber* (*d*), *Cooper* v. *Cooper* (*e*), 1 *Jarman* on Wills (ed. 2) pp. 216, 279, 28[illegible] vol. ii., p. 126, *Hawk.* on Wills, pp. 69, 234. The consequence of this construction is, that if any of the children had predeceased the testator, their shares would have lapsed, and we now are relieved from any inquiry as to the date at which a class is to be ascertained. The children then taking as individual devisees, the next consideration is, as to the period at which their shares became vested in interest, which is in truth the only question of difficulty to which this will gives rise. Before proceeding to consider this I will, however, notice shortly a point which was made in argument as to the effect of the gift of the homestead to *Josiah*. I am of opinion that this was confined to the testator's dwelling-house and the outbuildings, yard, garden, and orchard adjoining, said to be all comprised in less than four acres, and did not, as was contended on the part of the plaintiff, comprise the whole 150 acres of lot No. 13, that portion of the testator's farm on which the dwelling-house was situated. I base this conclusion on the meaning of the word "homestead," which is said to be "the place of a mansion house, the enclosures immediately connected with it," as well as upon the extreme unreasonableness of a construction which would give, by a will in which the testator has indicated an intention to treat all his sons with equality,

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(*a*) 11 Sim. 397.
(*b*) 2 Y. & C. C. C. 495.
(*c*) 17 Jur. 886.
(*d*) 3 M. & C. 688.
(*e*) 29 Beav. 229.

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150 acres to the eldest, and only fifty acres to be divided amongst the six sons and seven daughters. Moreover the testator by directing that "two-thirds of the *whole* be given equally," has himself expressly declared that the division was to be an equal one, and has shewn, as I hold, the proper interpretation of his will to be, that his reference to the homestead at all was merely to direct that the share of the land in which the house and appurtenances would be comprised, should be allotted to the eldest son, whose portion, with this exception, should not be greater than that of his other sons.

Then, with reference to the vesting, I am prepared to determine that the children took vested interests on the testator's death. It must be borne in mind that the interpretation of this will is only required as regards freehold lands, as to which different principles of construction are applicable than those which govern

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bequests of personalty.

In devises of realty there is a greater tendency to favour a vesting than in the case of legacies. All the authorities from *Boraston's* case (*a*) downwards establish this, which is to be accounted for by the consideration that the rules applicable to each class of property have been drawn from very different sources. It never has been expressly decided that a devise to *A* when he shall attain twenty-one standing isolated, without any gift over, or any disposition of an intermediate estate or interest, would confer a mere contingent interest, but on principle, and from what is to be found stated by text writers of authority, it must be assumed that that would be the proper conclusion: 1 *Jarman* on Wills (ed. 2), p. 688; *Tudor's* L. C. R. P. p. 682; *Hawk.* p. 240; *Fearne's* Opinions, 191. But it is well established that if there is either a gift over, or a gift of an intermediate

(*a*) 3 Rep. 19 a.

estate or interest co-equal with the period which must intervene between the testator's death and the vesting in enjoyment, the interest is vested and transmissible from the first. In *James* v. *Lord Wynford* (*a*) it is said, "The principle of *Boraston's* case is, that an intermediate estate carved out does not prevent the vesting, whether it be so carved out for the benefit of the devisee or of any other person, and whether it exhausts the whole intermediate rents and profits, or only a part. And see also *Boraston's* case, *ubi. sup.*, *Doe CaDogan* v. *Ewart* (*b*), *Doe Wheedon* v. *Lea* (*c*), *Jarman*, vol. i. p. 688 (ed. 2) and cases there cited, *Tudor's* L. C. R. P. p. 682, *Hawkins* on Wills, p. 239. 1872. Bigelow v. Bigelow.

To apply this doctrine to the present case. Whilst it is clear that there is no gift over, there is, I think, a sufficient gift of an intermediate interest to bring this will within the rule just stated. I find this in the words "the family to be maintained on the place with every necessary thing for their use." This undoubtedly amounts to a gift of maintenance out of the rents and profits of the estate to each child until the attainment of majority, and a right to the personal enjoyment of that maintenance on the land itself. The context shews that the word "family" here means "children." And like every gift of maintenance this must be taken to mean maintenance during minority. There is therefore an intermediate interest given here commensurate with the minority of the youngest child. This is quite sufficient on the authorities just quoted to satisfy the rule referred to, which I take to depend on this, "that where the testator shews a reason for postponing the possession, it is evident that nothing but the enjoyment was intended to be postponed," which is the reason given by Sir *William Grant* in *Hanson* v. *Graham* (*d*). In this Judgment.

(*a*) 1 Sm. & Giff. 40.
(*b*) 7 A. & E. 636.
(*c*) 3 T. R. 41.
(*d*) 6 Ves 239.

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will the testator shews the best of reasons for postponing the enjoyment, namely, that a maintenance may be reserved to each child during minority. It may be well here to advert to the distinction between wills of personalty and realty, and to point out that the doctrine which I have just applied stands clear of the line of authority which has determined that in the case of personalty a gift of maintenance out of income does not vest the principal, which rule, together with the reason on which it is founded, is clearly laid down by Sir *William Grant*, in *Hanson* v. *Graham*, above cited.

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There is, however, an additional reason for holding the interests here to be vested. It will be observed that the devise of the homestead to *Josiah* stands alone, preceding the directions to divide, and that it is contained in these words of absolute gift: "My will is, that my son *Josiah* shall have the homestead." Clearly *Josiah* took a vested interest in the homestead, even on the strict principle applicable to personalty, that where there is a gift independently of the direction to pay, the direction for payment does not create a contingency. Now I have already pointed out that the homestead must be considered as comprised in *Josiah's* share of the "whole;" therefore as he is to take in the homestead a vested interest, by force of the unequivocal words just quoted, it must be assumed that he is to take the whole of his allotment in the same manner. And if this is so as to *Josiah*, it surely is not straining too much the language of this informal will in favour of construing an interest to be vested, to hold that the like interest which the testator intended to give to his eldest son he meant to give to all his children, the gift to all being included in the same words. For these reasons I am of opinion that the testator's sons and daughters took vested interests, which were devisable, and which upon the death of any under twenty-one, devolved upon their heirs-at-law.

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Then the operative part of the will of *Josiah* made in 1849, is in these words: "I give and bequeath to my beloved mother all that I have and hold, and also all my rights and claims, and all I bequeath to my beloved mother, all that I am worth for her to do and act as she please with."

The authorities shew that this is sufficient to pass *Josiah's* interest in the lands devised by his father's will.

In *Huxtep* v. *Brooman* (*a*) the words "all I am worth" were held sufficient to pass realty; and this case was approved in *Doe d. Bunny* v. *Rout* (*b*), and also in *Davenport* v. *Coltman* (*c*). In *Phillips* v. *Beal* (*d*) there was a devise of "all I die possessed of," and freehold lands were held to pass. In *Doe Morgan* v. *Morgan* (*e*) *Bayley*, J., speaking of the will there in question, says: "It is much the same thing as if he had said, 'all I have and all I am worth,' and it is quite clear that real estate would have passed under those words." *Wilce* v. *Wilce* (*f*), and *Warner* v. *Warner* (*g*) are to the same effect. The plaintiff therefore took, under *Josiah's* will, his share, which includes the homestead. On the death of *James* and *David* in January, 1850, (under age and unmarried) their shares being vested, devolved upon their heir-at-law, who was then their eldest brother, the defendant *Joab*.

Judgment

The share of *Kesiah Helen* who died unmarried, after having reached twenty-one, in 1865, vested under the present law in her mother for life with remainder to her surviving brothers and sisters in fee. Mrs. *Potter's* share goes to her son the infant defendant as her heir-at-law, subject to the life estate of his father as tenant by the curtesy.

(*a*) 1 B. C. C. 437.
(*b*) 7 Taunt. 79.
(*c*) 9 M. & W. 481.
(*d*) 25 Beav. 25.
(*e*) 6 B. & C. 518.
(*f*) 7 Bing. 664.
(*g*) 15 Jur. 141.

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The result is, that the defendant *Joab* is entitled to more than the fifty acres which he has in possession, his share being now three-sixths or one-half of the two-thirds originally given to the sons, the remaining three-sixths belonging to the plaintiff and her two sons *Richard* and *John* in equal shares, the share to be allotted to the plaintiff to include the homestead. As to the one-third of the whole given by the testator to his daughters, the four surviving daughters are each entitled to one-seventh of that one-third. Mrs. *Potter's* one-seventh share, as already indicated, goes to her husband for life, remainder in fee to her son. The share of *Kesiah Helen* belongs to the plaintiff for life, with remainder in fee to the surviving brothers and sisters and the infant defendant as representing his mother. This being the conclusion at which I have arrived, I need not enter upon the case set up by the defendant *Joab*, and I express no opinion concerning it, beyond saying that my view of the evidence is such that I shall neither order him to pay nor to receive costs. I take it that the defendant *Joab Bigelow* does not insist upon an administration of the personalty, which would now serve no useful purpose, and for which he only asks in the event of a decision adverse to him.

Judgment.

The decree must declare the construction of the will and the interests of the parties as I have stated them. It must declare void the conveyances of 1867 to the daughters, and that of December, 1868, to *John;* and order them to be delivered up to be cancelled. And there must be the usual decree for partition to be made according to the declaration as to the rights and respective interests of the parties, regard being had to the possession and expenditure of such of the defendants as have built upon or otherwise improved the premises, whose enjoyment should only be disturbed so far as it is absolutely necessary in order to make a just partition.

WIGHTMAN v. FIELDS. 1872.

Injunction against trespass—Judgment in ejectment—Mortgage for 1000 *years.*

An injunction against cutting timber may be granted (since the Canadian Statute 20 Victoria, chapter 56) without proof of spoil, trespass and injury to the extent or of the character which might be necessary in England.

A judgment in ejectment is evidence of the title of the party in whose favor it was given; but whether it is conclusive, and may be pleaded by way of estoppel, has not been determined.

Before equities of redemption were, by statute, made saleable under execution, a sheriff might sell a debtor's reversionary interest in the fee, subject to a lease for 1000 years.

Statement.

The bill in this case was filed by *George Wightman* and *John A. Paterson*, against *Nathan Fields*, and, as amended, alleged that *Paterson*, being seized in fee of the south-easterly half of part of lot 17 in the Township of Harwich, on the River Thames, had contracted to sell and since the filing of the bill had conveyed the said lands to the plaintiff *Wightman*; that valuable white oak, pine, and other timber, was growing and standing on the lands; that the defendant, who occupied land adjoining, had, through the land in his occupation, entered upon the plaintiff's said land, and cut and was continuing to cut and take away divers trees of the said timber, and threatened and intended to continue to do so; that defendant sometimes pretended that he was owner of the land under an alleged will of one *Nathan Fields*, the patentee thereof; but that even if such will were in existence, the defendant was not entitled to any estate in the premises by virtue thereof, inasmuch as all the estate and interest of the said patentee had, under a writ of execution against his lands upon a certain judgment against him, been sold by the sheriff of Kent and conveyed by him to one *William McCrea*, whose title was vested in the plaintiffs; that the defendant sometimes claimed to be entitled to the said land by length

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Wightman v. Fields.

of possession, but the plaintiffs alleged that they and those through whom they claimed had been in undisturbed and continuous possession for more than twenty years; that the defendant sometimes pretended to have recovered judgment in an action of ejectment brought to recover possession of the lands; but the plaintiffs alleged that no such action was brought against *Paterson*, who was at the date of the alleged recovery seised of, and in possession of the said lands, and that if as defendant sometimes pretended, he was placed in possession under color of such pretended judgment, such taking of possession was wholly fictitious and colorable.

The bill prayed an injunction against the cutting and removal of timber, an account, and further relief.

Statement.

The answer denied the right of the plaintiffs to the lands; alleged that the defendant was entitled to the lands under the will of his father *Nathan Fields*, the patentee of the Crown; that when the sale under the execution on the judgment against the patentee took place (in 1824) there was a mortgage outstanding and unpaid upon the said lands; that the said sale being of an equity of redemption, which was not then saleable at law under an execution against the mortgagor, the said sheriff's deed conveyed no interest; that the defendant had been, before the filing of the bill, and still was in possession of the lands and premises in question, having been placed in possession by the Sheriff of the County of Kent under a writ of *hab. fac. poss.* issued in an action of ejectment brought by the defendant to recover possession of the lands; and the defendant claimed title by length of possession by himself and those through whom he claimed.

Issue was joined; and the cause came on for examination of witnesses and hearing before the Chancellor, during the sittings at Chatham.

The execution of the deeds forming the plaintiffs' paper title was admitted, saving all exceptions to the validity of the title created by the said deeds. 1872. Wightman v. Fields.

The plaintiffs admitted the execution of the will of *Nathan Fields*, the father of the defendant, and also the execution of various deeds from the brothers and sisters of the defendant to him. They also admitted that an action of ejectment was brought by the defendant against one *Cornelius*, a brother-in-law of the defendant, who was alleged to be in possession of the lands, and that a writ of *habere facias possessionem* had issued therein, which was subsequently lost.

The defendant admitted that previous to the issue of the writ of *habere* in the action of ejectment an order had been obtained in that action, allowing the plaintiff *Wightman* to defend as landlord, and that an order had been made staying the proceedings in the said action as to the part defended for, until the plaintiff therein (the defendant in this suit) gave security for costs. Statement.

Evidence was gone into on both sides upon the question of possession.

The defendant gave evidence of a search amongst the papers of the mortgagee for the mortgage from *Nathan Fields* the elder, said to have been on the lands at the time of the sheriff's sale to *McCrea*, and produced a certified copy of the memorial thereof.

It was objected by counsel for the plaintiffs (1) that no sufficient search for the original mortgage had been proved; (2) that even if proper or sufficient search was shewn, so as to entitle the defendant to give secondary evidence of the mortgage, it appeared that the mortgage money was payable in February, 1812, and that the sale by the sh[illegible] was in 1824; that therefore the pre-

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sumption ought to be that the mortgage was paid off at the time of sale, as no proof was given of its then being unpaid, save the fact of its remaining undischarged in the registry office; (3) that the absence of the mortgage from among the papers of the mortgagee raised a presumption that it had been paid off and handed back to the mortgagor; (4) that the defendant could not now insist upon the invalidity of the sheriff's sale, inasmuch as the question of the validity of that sale had been raised and determined in favor of the plaintiff *Wightman*, in the case of *Fields* v. *Wightman* (*a*); (5) that even if the question was open, and secondary evidence of the mortgage was admissible, the copy of the memorial produced shewed the mortgage to be for a term of ninety-nine years, and not a conveyance of the fee simple.

Statement.

With reference to the fourth objection, counsel for the plaintiff asked to be allowed to amend the bill by setting up the *res judicata*, and the Chancellor allowed the amendment to be made, though expressing his opinion to be against the plaintiffs' contention as to the effect of the judgment in *Fields* v. *Wightman*.

Counsel for the defendant objected (1) that the Court had no jurisdiction, inasmuch as it appeared that the defendant claimed by an adverse legal title and was in possession, and that the extent of the cutting and removal of timber was not shewn to be very great; (2) that the sale by the sheriff to *McCrea* was invalid by reason of the existence of the mortgage.

Mr. *C. Moss*, for the plaintiffs.

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

(*a*) 17 U. C. C. P. 15.

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The following cases were referred to by counsel: *Doe dem. Jarvis* v. *Cumming* (*a*), *Doe dem. Cameron* v. *Robinson* (*b*), *Lundy* v. *Maloney* (*c*), *Thompson* v. *Hall* (*d*), *Asher* v. *Whitlock* (*e*).

SPRAGGE, C.—The point first for decision is that raised by Mr. *Douglas* at the opening of the plaintiffs' case, viz.: whether the Court will grant an injunction to restrain such a cutting of timber as is charged in the bill and proved in evidence. It may be conceded that in England an injunction would not be granted in such a case, but that it would be necessary to make out a case of spoil, trespass, and injury, to an extent, and of a character which is not charged or proved in this case. The *Earl of Talbot* v. *Hope Scott* (*f*) is a leading authority upon this point, and the cases cited by Lord *Hatherley*, no doubt, fully bear out his Lordship's position. But the Canada Chancery Amendment Act (*g*), passed since the case of *Attorney General* v. *McLaughlin* (*h*), contains this provision: "The said Court may grant an injunction to stay waste in a proper case, notwithstanding that the party in possession claims by an adverse legal title." This Court is thus left to exercise its discretion in each case, as it arises, as to whether it is a proper case for granting an injunction; and the Court would probably interfere more readily in favor of, than against a party in possession.

Judgment.

In this case I incline to think that possession of the land in question was actually delivered to the defendant by the sheriff in 1866, and that what has been done by the plaintiff *Paterson* since, has been of the character rather of a disturbance of the defendant's possession, than of a change of possession, transferring it from the defend-

(*a*) 4 U. C. Q. B. 390.
(*b*) 7 U. C. Q. B. 385.
(*c*) 11 C. P. U. C. 143.
(*d*) 31 U. C. Q. B. 367.
(*e*) L. R. 1 Q. B. 1.
(*f*) 4 K. & J. 96.
(*g*) 20 Vic. ch. 56.
(*h*) 1 Gr. 34.

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ant to the plaintiff. The possession obtained by the defendant in 1866 was, however, obtained, as appears by the evidence, by a collusive recovery in ejectment, to which the defendant and his brother-in-law *Cornelius*, the defendant in ejectment, were parties; *Cornelius* not having been in fact in possession of the land in question at the time the action of ejectment was brought. There is no reason why the Court should regard in favor of the defendant a possession so obtained, the previous possession having for a number of years been in *Paterson* and those under whom he claims. As to the cutting of the timber I think it has been such as to warrant the interference of the Court in favor of the rightful owner.

Then, as to the question of title, which is raised between the parties. Without saying that there may not be cases in which it would be proper to put a plaintiff to prove his legal title in a court of law, I am not of opinion that this is such a case. The same title, and virtually between the same parties, has already in the case of *Fields* v. *Livingston* (*a*) been adjudicated upon by a court of law, and decided in favor of the title under which the plaintiffs in this case claim.

Judgment.

Mr. *Charles Moss*, for the plaintiffs, contends now that the judgment in that case is conclusive; that the question of title is *res judicata* to the same extent that it would be if the question had been decided in an action of ejectment or trespass. There may not be any very good reason, apart from authority, why such judgment should not be conclusive as to the right to possession *at the time to which it relates*: but the weight of authority appears to be the other way; and *Thompson* v. *Hall* (*b*), the latest case in our courts, goes no further than this, that a judgment in ejectment is *evidence* in favor of the party in whose favor it is given. Whether it could be

(*a*) 17 U. C. C. P. 15. (*b*) 31 U. C. Q. B. 367

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pleaded by way of estoppel now that the form of the action is changed, and the parties are real not nominal parties has not, I believe, been determined.

The question of title raised in this case differs from the question raised in *Fields* v. *Livingston* in this, that the title of the defendant as a purchaser at sheriff's sale under *fi. fa.* was in that case upheld; while in this case a fact appears, which did not appear in that case, viz.: that the execution debtor was a mortgagor, and it is contended that it was his equity of redemption that was sold, and the sale having been in 1824 that nothing passed to the purchaser by such sale. The evidence that it was the estate of a mortgagor that was sold is the production by the Registrar of the County, of a memorial of a mortgage dated 14th February, 1808, and purporting to be made by *Nathan Fields*, the father and devisor of the plaintiff, to *Thomas McCrea* and *Matthew Dolsen*, to secure payment of the sum of £178 8*s.* 2*d*; the mortgage being of the whole lot, 200 acres, of which the 50 acres in question is a portion. The mortgage is made to the mortgagees, their executors, administrators, and assigns, and is for the term of ninety-nine years. The mortgage being for a term of years differs it from the case of a mortgage in fee, and *fi. fa.* against the lands of the mortgagor. In that case there is nothing in the execution debtor but an equitable estate, and so nothing that was saleable under legal process, until the passing of the statute making equities of redemption saleable at common law. But when the mortgage is for a term of years there is a legal estate, the reversion, which was always saleable by legal process. That was the point in *Chisholm* v. *Sheldon* (*a*) in this Court, which was carried to the Court of Appeal (*b*). The term in that case was for one thousand years; and it was held on appeal that the reversion was saleable by legal process, and carried with

Judgment.

(*a*) 2 Gr. 178.

(*b*) 3 Gr. 655.

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it the right to redeem the term. It results from that decision that a mortgagor for years, whose reversion has been sold by the sheriff, has nothing in him, what estate he had having passed to the purchaser.

The sheriff's sale in this case was in December, 1824, and the sheriff's deed to the purchaser *William McCrea* was made in December, 1830, the execution debtor having died in the meantime, and in *Fields* v. *Livingston* that was held good. The plaintiffs trace title from *William McCrea*. At the time of the sheriff's sale *Nathan Fields*, the mortgagor, was in possession, occupying a house with about thirty acres of cleared land on the front or northerly part of the lot. This occupation was continued until his death, and the like occupation was continued by his widow (her son, the present plaintiff being with her) until 1848 or 1849, when they were put out of possession by *McCrea*. It would appear by the evidence given in *Fields* v. *Livingston* that there had been a much earlier eviction, viz., about 1825, but possession was probably resumed. From 1848 or 1849 up to 1866, at any rate, the possession was in *McCrea* and those claiming under him, with the exception of a portion of the southerly part of the lot comprising the fifty acres in question, which I will notice presently.

Judgment.

As between the plaintiffs and the defendant in this suit there seems to me to be no serious question of documentary title. There is no evidence whether the mortgage debt has been paid or not, and it seems to me quite immaterial. At the worst the plaintiffs have to pay it. Since the sheriff's sale *Fields*, the mortgagor, and those claiming under him are mere strangers, and, assuming the mortgage debt not paid, and still payable, the case is that of the owner of land subject to a mortgage coming to this Court to enjoin a stranger from committing depredations upon it.

The possession of the fifty acres in question appears

to have been for some years in strangers, from about 1841 for some eleven or more years, not exceeding fourteen, under a mistake as to boundaries, when the then owner of the whole lot took possession, and retained it at any rate to 1866. 1872. Wightman v. Fields.

It was contended for the plaintiffs that the existence of a mortgage by *Nathan Fields*, the father, was not proved. The mortgage itself was not produced, and the evidence of search so as to let in secondary evidence was not perfect. If there was no mortgage the question as to a sale of the equity of redemption would not arise. If there had been a mortgage in fee it would be very material. I have assumed, to put the defendants case as high as possible, that a mortgage in the terms described in the memorial was proved, but without deciding that there was such proof given, as to let in secondary evidence.

I have not thought it necessary to determine the question whether or not the plaintiffs acquired title by possession. Judgment.

The plaintiffs are entitled to a decree continuing and making perpetual the injunction granted and for an account, and the defendant must pays the costs.

1872.

MITCHELL v. WEIR.

The statute 22 Victoria, chapter 73, (Consol. Stat. U. C.) does not authorize a married woman, who has any child or children, to devise or bequeath her property otherwise than to or among such child or children: any disposition of her property in favor either of her husband or other parties is void, and as to the portion attempted to be so disposed of, there is an intestacy.

Motion for decree declaring the rights of parties under the will of one *Elizabeth Mitchell*, deceased.

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

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

Statement.

Mr. *Lash*, for the residuary legatees, contended that the property of the testratrix here being entirely personalty, the question is, had Mrs. *Mitchell* power to make the will, leaving part of the property away from her child. At Common Law, the husband might empower the wife to make a will of *personalty*, because the personalty belonged to him, and he could waive his right to dispose of it: *Scammel* v. *Wilkinson* (*a*), *Roper*, *H. W.* (*b*). The husband consented to this will, and at Common Law it would be valid; and special consent is not necessary, as it may be implied from circumstances: *Brooke* v. *Turner* (*c*). Independently of any statute a married woman could dispose of her *separate* estate by will: *Fittyplace* v. *Georges* (*d*), recognized in *Rich* v. *Cockell* (*e*), *Wagstaff* v. *Smith* (*f*), *Sturgis* v. *Corp* (*g*), *Taylor* v. *Meads* (*h*). The property here was either Mrs. *Mitchell's separate* estate, or belonged to her husband by the marriage; if her separate estate, then she had power to bequeath it, if her husband's, then his consent makes the will good. Section one of chapter seventy-three, Con-

(*a*) 2 East. 552. (*b*) Vol. 1, 170. (*c*) 2 Mod. 170.
(*d*) 1 Ves. Jr. 46. (*e*) 9 Ves 369. (*f*) 9 Ves. 520.
(*g*) 13 Ves. 190. (*h*) 11 Jurist. N. S. 167.

solidated Statutes, U. C., makes it her separate estate, and section sixteen should not be construed as limiting the wife's power, but must be taken to be cumulative, and if so taken, then the will is good. 1872. Mitchell v. Weir.

From *Kramer* v. *Glass* (*a*), it would seem that under this statute, both husband and wife had an interest in the wife's estate; if so, this will would still be good as the husband consents to it.

Lett v. *Commercial Bank*, (*b*) seems to recognize the wife's *jus disponendi*, and the judgment of *A. Wilson*, J., in *Wright* v. *Garden* (*c*), shews that the statute makes a difference between real and personal estate.

The Royal Canadian Bank v. *Mitchell* (*d*), appears to be rather against the right of disposition by the wife, but that case related to real estate only, and there is good reason for the distinction taken by *A. Wilson*, J., between realty and personalty. Judgment.

Leys v. *McPherson* (*e*), gives the act the effect of a marriage settlement, and if a marriage settlement contained the words of the first section, it would clearly make the property separate estate, and so carry with it the *jus disponendi*.

The act was passed for the benefit of the wife, and to enlarge her common law rights, and should be liberally construed to carry out that purpose; *McCargar* v. *McKinnon* (*f*).

STRONG, V.C.—This bill is filed to obtain a declaration as to the validity of certain bequests contained in the will of *Elizabeth Mitchell*, who died on the 9th day of June,

(*a*) 10 U. C. C. P. 475.
(*b*) 24 U. C. Q. B. 552.
(*c*) 28 U. C. Q. B. 609.
(*d*) 14 Grant 412.
(*e*) 17 U. C. C. P. 266.
(*f*) 15 Grant 361.

1872. Mitchell v. Weir.

1870, having been married in the year 1869. The bill is filed by the husband and executor of the testratix, who left surviving her one child, the infant defendant, *Mary Georgina Mitchell.* The testatrix who was entitled to considerable personal estate under the will of her father, devised and bequeathed all her estate, real and personal, to her husband, the plaintiff, (who alone has proved the will), and certain other trustees and executors, who have all renounced, upon trust to convert the same forthwith, and out of the proceeds after paying in the first place a legacy of $10,000 to her child, the infant defendant; she gave $10,000 to her husband, the plaintiff, and certain other legacies to persons named, and then the ultimate residue to be divided amongst the defendants, her brothers and sisters. The will does not upon its face purport to have been authorized by the testatrix's husband, nor is there any evidence that it was so authorized, although the plaintiff has proved it in the Surrogate Court.

Judgment.

It has been argued before me on behalf of the infant defendant, that this will, so far as it gives legacies to persons other than this infant daughter of the testatrix, is void, inasmuch as the testatrix had no power to bequeath personalty, otherwise than in the manner prescribed by section 16 of Consol. Stats. of U. C. 22 Vict., ch. 73, which authorizes a married woman to make a will leaving her property to her child or children, and in default of issue to her husband, or as she may see fit, as if she was sole and unmarried. I think the construction of this clause leaves no room for doubt that the right to devise or bequeath to the husband or otherwise, only arose in default of issue; "failing such issue," as the words are. Any other construction would completely silence these words just quoted. This being so it could not be contended that separate property under this act in the face of the direct enactment contained in the clause referred to, could as at common law, be at the

free disposal of a married woman by a will executed with the assent of her husband; and, although the contrary was very properly and ably argued by Mr. *Lash* for the residuary legatees, I think it equally clear that a married woman in respect of separate property under this Act, has no authority to deal with her personalty by will, as she may with personalty so settled as to be her separate estate in equity. The property of the wife under this Act is altogether the creature of the statute; and the married woman's power of disposition in respect of this parliamentary property must be ascertained from the statute itself, and the common law can in no way apply, except where the statute is silent. Further, there is no analogy between the power of disposition of a woman under this statute and a married woman having separate estate in equity, with no fetter on her power of alienation, for here, as I construe section 16, there is an express restriction of the power of bequeathing, and if a like limitation were contained in a declaration of trust to the separate use of a *feme covert*, it would have a like effect.

1872.

Mitchell v. Weir.

Judgment.

I find no cases decided bearing on this point, which I confess, although a case of the first impression, seems to me so clear as to require no authority. The cases on the other clauses of the Act have not much bearing on this question. The principle to be followed in construing the statute is, however, very clearly put by high authority in the case of *Kramer* v. *Glass* (*a*), where *Draper*, C. J., says:—"Every provision for these purposes is a departure from the common law, and so far as it is necessary to give these provisions full effect we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief and benefit the Act was intended to give."

I am of opinion, therefore, that the will, in so far as

(*a*) 10 C. P. U. C. 475.

1872.

Mitchell v. Weir.

it dealt with the residue left, after deducting the $10,000 bequeathed to the infant defendant, is absolutely void, and that this residue therefore falls to be distributed under the provisions of section 17, which provides that it shall be divided betweeen the husband and child, in the proportion of one-third to the husband and two-thirds to the child.

It is however argued that the husband has dissentitled himself to insist on his rights under section 17, by reason of his having proved the will.

I am also against this contention in support of which *Ex parte Fane* (*b*) was cited. I do not regard that case as an authority for the proposition of the residuary legatees. There the husband taking probate was held to have placed himself in the same position as if he had authorized the will *a priori*, in which case the will would have been good ; but in the present case no assent of the husband could have authorized this will. So far as it relates to the bequests of residue, it was a disposition which the married woman was positively forbidden to make by Act of Parliament, and being a nullity from the beginning, is not susceptible of confirmation. Therefore *Ex parte Fane* does not apply, and there is no pretence for saying, and it is not argued, that the husband was bound to elect, or that he has by conduct given the legatees any equity against him.

Judgment.

I must therefore declare the will void as to all dispositions contained in it, *ultra* the legacy to the infant, and that the residue is to be distributed as on an intestacy.

The point is a new one, and I think I may give the costs of all parties out of the estate.

(*b*) 16 Sim, 406.

WILLIS v. WILLIS. 1872.

Judgment against executors—Heirs.

The opinion acted upon by Vice Chancellor *Mowat*, in *Lovell* v. *Gibson*, 19 Grant, 280, (having reference to 27 Victoria, chapter 15,) that for the purpose of an execution against lands, heirs are now *prima facie* bound by a judgment against the executor, was followed by *Strong*, V. C., with an intimation that, but for that case, he (V. C. *Strong*) would not have arrived at the same conclusion.

Appeal from the Master at Goderich.

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

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

STRONG, V. C.—This was an appeal from the report of the Master at Goderich, finding that the appellants *Jane Holland* and *Mary Ross* had not proved any claim against the estate of *Castor Willis* under the decree in this cause. It appears that *William McConnell* made his will, and appointed *George McConnell* and *Castor Willis* his executors, and devised to them upon trust for the payment of debts and legacies a large quantity of land. The executors accepted the trust, and proceeded to carry it into execution. After having made large sales of the lands, both the executors died intestate. *John Robert McConnell* then obtained letters of administration to the estate of *George McConnell*, and *John Willis* obtained administration to the estate of *Castor Willis*. Then a bill was filed by Mrs. *Holland* and Mrs. *Ross*, the present appellants, as daughters and legatees of the late *William McConnell*, against *John Robert McConnell* and *John Willis*, the administrators of the executors, seeking to make the estates of the executors liable for breaches of trust in respect of their dealings with the lands devised to be sold. By the decree made in the cause of *Holland* v. *McConnell* it was declared that the estate of *William McConnell* was

Judgment.

1872.

Willis v. Willis.

the primary fund for the payment of his debts and legacies, and it directed that the accounts of the estate of *William McConnell* should be taken, and it further directed an account of the dealings of the executors in their capacity of trustees with the lands devised to them upon trust by *William McConnell*. I may say, in passing, that this decree seems to have been made *per in curiam*, as a personal representative was not a party to the suit.

Under this decree the Master took the accounts directed, and found that the personal and real estate of *William McConnell* was exhausted, and that the respective estates of *George McConnell* and *Castor Willis* the executors were liable to the plaintiffs in the sum of $5,794.80. Subsequently separate administration decrees were procured by creditors or next of kin of the estates of both *Castor Willis* and *George McConnell*, and in the suit of *Willis* v. *Willis*, the decree in which was for the administration of the estate of *Castor Willis*, and to which his personal representative was originally the only party, the heirs-at-law having been added in the Master's office, the appellants sought, pursuant to an order made in Chambers permitting them so to do, to prove their claim by putting in the decree on further directions in the suit of *Holland* v. *McConnell*, the Master's report, and an affidavit negativing payment. This they contended was sufficient *prima facie* evidence of their equitable debt due by the estate of *Castor Willis* even against the heirs-at-law, although the latter were not parties to the suit of *Holland* v. *McConnell* in which that demand was established. The heirs-at-law on the other hand contend that they are not in any way bound by the proceedings in *Holland* v. *McConnell*; that the report and decree on further directions in that suit does not constitute *res judicata* as to them, and that the appellants are bound to make out their claim against them *de novo* without deriving any aid in doing so from these proceedings.

Judgment.

1872.

Willis v. Willis.

The Master who has stated his opinion in a clear and able judgment, which I have found of considerable assistance, rejected the evidence, and found against the claim of the appellants, and they now appeal from that finding.

Were it not for the authority which I will hereafter refer to, I should be of the same opinion as the Master. Notwithstanding the case of *Gardiner* v. *Gardiner* (*a*) had, long before the establishment of this Court, determined that lands, although not assets in the hands of the administrator or executor, could yet be sold in the hands of the heir, under a judgment to which he was not a party, this Court had never acted on analogy to that decision so far as to hold the heir bound here by the result of an account taken against the executor in an administration suit to which he was not a party. It had declined to do so, even to the extent of holding the account taken against the personal representative to be *prima facie* evidence against the heir. This, which is the law in England (*b*), is established also to be the law here by the case of *Norris* v. *Bell* (*c*) where it appears from an extract from the Registrar's book, with which I have been furnished, that his Lordship, the present Chancellor, made the following order: "Ordered, that the accounts be taken anew if the said guardian should think that the same will be for the interests of the said children, but not otherwise;" thus clearly recognizing the right of the heir to have the whole case proved against him over again. Some doubt which was cast on the case of *Gardiner* v. *Gardiner* by the decision of the Judicial Committee of the Privy Council in the case of *Bullen* v. *A'Beckett* (*d*), an appeal from New South Wales, led to the passing of the Act 27 Victoria, chapter 15, by the

Judgment.

(*a*) 2 U. C. Q. B. Rep. (O. S.) p. 520.
(*b*) Wilson v. Leonard, 3 Beav. 3 73.
(*c*) 9 Grant 23. (*d*) 9 Jurist N. S. 973

1872.

Willis v. Willis.

first section of which it was enacted that "under the Imperial Statute (*a*) the title and interest of a testator or intestate in real estate in Upper Canada, might be and hereafter may be seized and sold under a judgment, and execution recovered by a creditor of the testator or intestate against his executor or administrator in the same manner and under the same process that the same could be sold under a judgment and execution against the deceased if living." If the question was *res integra* I should have held that the former practice of this Court was in no way affected by this Act of Parliament. I should have said that as this Court had previous to the Act, though recognizing the case of *Gardiner* v. *Gardiner* as laying down a binding rule of law, nevertheless held the heir not bound here by proceedings against the executor, it would still continue to follow the same course, although the same rule at law which previously had depended on an authoritative judicial decision, had received a Parliamentary sanction. In other words I should have thought the first section of the statute as in the nature of a declaratory Act establishing the rule of *Gardiner* v. *Gardiner* as the correct interpretation of the Imperial Act, 5 Geo., 2 cap. 7. And there being nothing in the enactment applying to proceedings in equity, I should have thought a decree against the personal representative inadmissible against the heir. I am, however, precluded from giving effect to such a view by the judgment of Vice Chancellor *Mowat*, in the case of *Lovell* v. *Gibson* (*b*), decided in the present year, the proof sheets of which have been handed to me. There this very point arose for adjudication, and the Vice Chancellor thus stated his opinion: "Having reference to 27 Victoria, chapter 15, it must now be held, I think, that for the purpose of an execution against lands, heirs are *prima facie* bound by a judgment against the executor or administrator of their ancestor in the same way as the next of kin are

Judgment.

(*a*) 5 Geo. II. cap. (*b*) 19 Grant, 280.

bound. After such a judgment I think that the heirs are not entitled as of course to have the issues tried over again, but I think it is open to them to shew not only fraud and collusion, but that the judgment and decree though proper against the executor or administrator was in respect of a matter for which the heirs were not liable." Although the learned Vice Chancellor here speaks of the heir being bound by a judgment against the executor, the case with which he was dealing was one in which a demand, in an administration suit in this Court, had been established against the executor, which his Honour held to be binding upon the heir. 1872. Willis v. Willis.

I am bound by that case, and I must follow it; although, with great respect for the opinion of the learned Judge, I must say that I should not have arrived at the same conclusion.

Since writing the above I have been referred to the case of *Harvey* v. *Wilde* (*a*), which is decidedly in favour of this appeal. Judgment.

The appeal must be allowed with costs.

(*a*) L. R. 14 Eq. 488.

1872.

DALGLISH v. MCCARTHY.

Conveyance.

A conveyance made between a debtor and a third party *bona fide*, and for valuable consideration, when the property was intended to pass and the consideration money paid, *held* valid under 13 Eliz., ch. 5, notwithstanding that the intent of the parties to the transaction was to defeat a creditor who had obtained judgment.

Held, also, that a *bona fide* purchaser from a grantee who had given no consideration, and who had taken a conveyance fraudulent against creditors under Stat. 13 Eliz., was valid notwithstanding such *bona fide* purchaser had notice of the former fraud, and purchased the property with a view of carrying out the intent to defeat creditors. [SPRAGGE, C., dissenting.]

Statement.

The bill in this suit was filed prior to the passing of the Act 35 Vic., (Ont.) ch. 11, and consequently came under the exception contained in clause 2 of that Act. The plaintiff, by the bill, sought to set aside three conveyances—(1st. Conveyance from defendant *McCarthy* to defendant *Bratton*, bearing date the 29th October, 1870. 2nd. Conveyance from defendant *Bratton* to defendant *John Cook*, bearing date the 29th October, 1870. 3rd. Conveyance from *John Cook* to *George Cook*, made subsequent to the filing of the bill)—as fraudulent and void, as being made with intent to defeat the plaintiff and other creditors of the defendant *McCarthy* in recovering their debts.

The suit came on for hearing at the Spring Sittings of 1872, at Owen Sound, before his Honour Vice Chancellor *Strong*.

Mr. *W. Barrett*, for the plaintiff.

Mr. *Kennedy* for defendants *McCarthy* and *Bratton*.

Mr. *McFayden* for defendants *Cook*.

The following cases were cited for the plaintiff: *Moffat* v. *Smith* (*a*), Insolvency Act of 1869. For the defendants, *Wood* v. *Dixie* (*b*), *Totten* v. *Douglas* (*c*), *Morewood* v. *South Yorkshire Railway Company* (*d*), *George* v. *Millbanks* (*e*), *Smith's* Equity Cases, pp. 20 and 21.

His Honour found, on the evidence, that the deed, from *McCarthy* to *Bratton* was made without consideration, and was fraudulent and void: that the deed from *Bratton* to *Cook* was made with intent to defeat creditors, but that the sale was *bonâ fide*, and intended to pass the property, and that full consideration actually passed, and that it was really a sale, though made with intent to defeat creditors. His Honour intimated at the hearing that the deed, *Cook* to *Cook*, was also fraudulent and void, and without consideration: that in his own judgment the authorities were in favor of upholding the deed from *Bratton* to *Cook*, but that as his Lordship the Chancellor, in *Wood* v. *Irwin* (*f*), and his Honour Vice Chancellor *Mowat*, in *Carradice* v. *Currie*, had taken a different view of the authorities, he felt bound to concur in their judgments, and granted a decree in favor of the plaintiff. Statement.

The suit came on for rehearing at the instance of the defendants *Cook*.

Mr. *Bain*, for the plaintiff.

Mr. *Blake*, Q.C., and Mr. *Kennedy*, for defendants.

As to the Court, on rehearing, considering the evidence, the following cases were cited by Mr. *Blake*:

(*a*) 28 U. C. Q. B. 586.
(*b*) 7 Q. B. 892.
(*c*) 18 Gr. 341.
(*d*) 3 H. & N. 798.
(*e*) 9 Ves. 901.
(*f*) 16 Gr. p. 398.

1872.

Dalglish v. McCarthy.

Northwood v. *Keating* (*a*), *Orton* v. *McLeod* (*b*), *Monro* v. *Watson* (*c*).

On the question of the construction of the Statute of Elizabeth the following cases were cited: *Wood* v. *Irwin* (*d*), *Carradice* v. *Currie* (*e*), *Attorney General* v. *Harmer* (*f*), *Alton* v. *Harrison* (*g*), *Gottwalls* v. *Mulholland* (*h*).

SPRAGGE, C.—My learned brothers hold the law upon the Statute 13 Elizabeth differently from what it was held by me in *Smith* v. *Moffatt* (*i*), and in *Wood* v. *Irwin* (*j*), and by the late Vice Chancellor *Mowat* in the *Merchants' Bank* v. *Clark* (*k*), not, as I understand, that they would be prepared to put a different construction upon the Statute of Elizabeth if the question were *res integra*; but, as they read the English authorities, that a different construction has been put upon the statute by the English Courts.

Judgment.

They are of opinion that in this case the conveyance from *Bratton* to *John Cook* was a real transaction, not merely colorable; and that it was for valuable consideration, and that although it may have been with notice that the conveyance from *McCarthy* to *Bratton* was in order to defeat creditors, and although it may have been in aid of that design, it is not under the English authorities, and under *Totten* v. *Douglas* (*l*), decided in our Court of Appeal, impeachable under the Statute. The late learned Vice Chancellor gave his reasons at large in the *Merchants' Bank* v. *Clark*, for coming to a different conclusion upon the effect of the English cases; and I had previously given mine in *Smith* v.

(*a*) 18 Gr. 643.
(*b*) 17 Gr. 84.
(*c*) 6 Gr. 385.
(*d*) 16 Gr. 398.
(*e*) ante 108.
(*f*) 16 Gr. 533.
(*g*) L. R. 4 Chy. App. 622.
(*h*) 3 U. C. E. & A. 194.
(*i*) 28 U. C. 486.
(*j*) 16 Gr. 398.
(*k*) 18 Gr. 841.
(*l*) 18 Gr. 594.

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Moffatt and *Wood* v. *Irwin*. In *Totten* v. *Douglas* the judgment was delivered by Mr. Justice *Gwynne*. His own opinion undoubtedly was, that where the transaction was real, the Statute does not apply; but there were other grounds in that case for holding the statute not to apply. The property sought to be affected had passed into the hands of one *Nesbitt*, a purchaser from a Dr. *Cook* without notice; Dr. *Cook* himself having purchased from the debtor: and further, Dr. *Cook* himself having been a creditor of the debtor, from whom he purchased; and the case in that aspect being one of a debtor preferring his creditor.

In the two cases in which I gave judgment, I gave the question every consideration; and though my learned brothers may probably be right in their reading of the English authorities, I am unable to come to the same conclusion. To give the grounds of my opinion would be only to reiterate the reasons given by me in those cases, fortified by the reasoning of the late Vice Chancellor in the *Merchants' Bank* v. *Clark*.

Judgment.

It would be unprofitable to enter into a critical examination of the facts of this case, inasmuch as whether I agree or disagree with my brother *Strong* as to the facts, the result will be the same.

STRONG, V. C.—I have read the judgment of my brother *Blake*, and I concur in the statement of the law which he there gives. I had always, until a short time before the hearing of this cause, acted on this view of the authorities, and had made several decrees in accordance with it. The cases of *Wood* v. *Irwin* (*a*), and the *Merchants' Bank* v. *Clark* (*b*), having, however, shewn that a majority of the members of the Court entertained a different opinion, I thought it my duty in the present

(*a*) 16 Gr. 398. (*b*) 17 Gr. 594.

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case to follow them, rather than to set up my own opinion, which I, at the hearing, expressed to be as I have now stated it, of the result of the decisions both in England and in our own Courts of Common Law and Appeal.

I am now, however, bound to act on my own judgment, which compels me to say that I think this decree should be reversed as being against the weight of authority.

Whilst I say this I cannot forbear from adding that the true construction of the Statute 13 Elizabeth, chapter 5, has always appeared to me to be that which Lord *Mansfield* attributed to it in the case of *Worseley* v. *Demattos* (*a*), where he says: "If a man knowing that a creditor has obtained judgment against his debtor, buys the debtor's goods for a full price to enable him to defeat the creditor's execution, it is fraudulent."

Judgment.

This effect being now ascribed to the Act, by the Declaratory Statute 35 Victoria, chapter 11, which has brought the law back to the state in which it was in the time of Lord *Mansfield*, such questions as the present will seldom arise in the future.

It is not material, in the view which I take, to discuss the questions arising on the evidence which were fully argued on the rehearing. I may say, however, that I proceeded, as regards the facts, on the ground that the first transaction, that between *McCarthy* and *Bratton*, was fraudulent, and without consideration, as was also that between *John Cook* and *George Cook*. The intermediate sale, that between *McCarthy* or *Bratton* and *John Cook*, was clearly proved to have been for value, though I thought it equally clear that it was the design of the parties, by means of it, to defeat the

(*a*) 1 Burr. 467.

present plaintiff. This, however, according to the authorities by which this case must, in my opinion, be adjudged, and which are stated by my brother *Blake*, does not invalidate the conveyance. 1872. Dalglish v. McCarthy.

Upon the question of costs I have had some doubts, but on the whole I think the sounder rule is that which is stated in the judgment of the Vice Chancellor, and which was indeed acted upon in this Court in a stronger case than the present, that of the *Great Western Railway Company* v. *Warner* (*a*). There the plaintiffs having filed their bill, and obtained a decree on the authority of a case in the Exchequer Chamber, the decree was reversed, and the bill dismissed with costs; upon the decree of the Exchequer Chamber being afterwards reversed in the House of Lords, although no report of the reversal had been received in this country when the decree was made.

I think the decree should be reversed, and the bill dismissed with costs. Judgment.

BLAKE, V. C.—The Vice Chancellor before whom the witnesses were examined and the cause was heard, finds the transaction between *McCarthy*, *Bratton*, and *John Cook*, to be one in which it was intended that the property in question should pass—and that there was an actual sale and an actual satisfaction of the purchase money which was the full value of the interest of *McCarthy* in the premises. After a perusal of the evidence, I concur in this finding; and, doing so, in the view I take of the case, it is not necessary to consider the first transaction between *McCarthy* and *Bratton*, or the subsequent one between *John* and *George Cook*.

My own view on the statute under which this trans-

(*a*) Ante p. 506.

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action is impeached, is, that although there may be an actual sale with the intent to pass the property in question, and a satisfaction of the purchase money agreed to be paid therefor, yet, notwithstanding this, if there be the intention, in the parties to the transaction impeached, of defeating, hindering, or delaying, the creditors of the grantor, it is fraudulent and liable to be impeached under this statute. I should have preferred coming to the conclusion that the authorities warranted this reading of the Act; but it is not now a question of what may be the view of an individual member of this Court, upon the construction of the statute itself, but rather what construction has been placed upon it by the decisions which conclude us—for, whether in the judgment of a Judge, these cases may be right or wrong, still we are bound to follow them (*a*).

Judgment.

In such a case as the present, there is no principle peculiar to this Court which can be invoked in aid of the plaintiff in attacking the transaction objected to by the bill. The claim of the plaintiff is the assertion of a Common Law right confirmed by the statute; and, in discussing this right, the decisions at Common Law are entitled to the same consideration as those in Equity; and are equally binding upon us. In *Totten* v. *Douglas* (*b*), Mr. Justice *Gwynne*, who delivered the judgment of the Court of Error and Appeal, thus remarks upon this subject:—"It has been often said that the statute of 13 Elizabeth, chapter five, is but declaratory of the Common Law, and that no deed can be avoided under the statute, which could not equally have been avoided under the Common Law without the statute; when, then, a credi- or wishes to avoid a deed as fraudulent against him, it is to the principles of the Common Law that he appeals; and although a Court of Equity has concurrent jurisdiction with the Courts of Common Law, to set aside such a

(*a*) Merry v. Nickalls, L. R. 7 Ch. Ap. 750. (*b*) 18 Grant at 345.

deed, still the principles of decision in both Courts must be the same. The common law being the rule of decision, the deed cannot be avoided in a Court of Equity, or dealt with there upon any other principle than that upon which it would be avoided in the Court of Common Law —namely, the principles governing fraud in the eye of the common law and of the statute; all rules and doctrines which are peculiar creatures of the Court of Equity, in the admidistration of purely equitable principles, must, of necessity, be excluded, and can have no place whatever in an inquiry whether or not a deed is void, as fraudulent, upon the principles of the common law, or in the eye of a statute declaratory of the common law." I refer at length to this passage, as it furnishes the ground upon which I conclude, we are not at liberty to attach any less weight to the decisions at common law upon the statute, than to those in equity.

Judgment.

It is said on the finding of the Vice Chancellor upon the facts, that the cause is disposed of by the oft cited case of *Wood* v. *Dixie*. For the reasons I have given, this is an authority that would be binding upon a court of co-ordinate jurisdiction, and one we would be bound to follow, unless it must be considered as overruled, or so far weakened by counter authorities as to justify a Court in following these latter, rather than the authority to which I am referring. There appears then to be two matters to be determined: First, the effect of *Wood* v. *Dixie*; and, Second, is the law as there laid down to be taken as our rule. The head note to that case is, "a sale of property for good consideration, is not, either at common law or under statute 13 Elizabeth, chapter five, fraudulent and void, merely because it is made with the intention to defeat the expected execution of a judgment creditor." I think this is a correct result of the judgment.

The Chief Justice says, "The jury were given to understand that, although the conveyance was made *bona*

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fide, and with a full intention that the property should be parted with, it would yet be fraudulent if made with intent to defeat the execution. Such a motive does not defeat the assignment. We are clearly safe in going so far as to say that a mere intent, to defeat a particular creditor, does not constitute a fraud."

Williams, Justice, concludes with, "I think Mr. *Humphrey* has not overstated the law, when he said it had been long settled that the mere intention to defeat an execution creditor, did not, in itself, constitute a fraud."

Coleridge, Justice, finds fault with the Judge's charge to the jury, because he "told them that assuming the fact of payment, and the reality of the transaction, still if the intent was to defeat the execution creditor, the transaction was void;" and he also adds, "that I think was going too far." This case, *Darvill* v. *Terry* (*a*), and *Hale* v. *The Saloon Omnibus Company* (*b*), are cited by the text writers on the subject, as the authorities that lay down the law as accepted in England; and this is done notwithstanding *Bott* v. *Smith*, (*c*) and other cases referred to as apparently in conflict with them. I quote from the following—*Coote* on Mortgages, 3rd edition, page 241—"But otherwise independently of the Bankrupt and Insolvent Acts, an assignment for the benefit of all the creditors, or of a particular creditor is valid, and, a security given to a particular creditor, is valid though executed with the intent to defeat the execution of another creditor": *Sugden's*, V. & P., 14th edition, page 706, note J., "A sale for good consideration is not void; though it was made for the purpose of defeating an execution creditor or judgment creditor."

Judgment.

Smith's Leading Cases, page 19, 6th edition, "It is broadly laid down in *Wood* v. *Dixie*, that a sale of pro-

(*a*) 6 H. & N. 807. (*b*) 4 Drew 492. (*c*) 21 Beav. 511.

perty for good consideration, is not, either at common law, or under the statute void, merely because it is made with intent to defeat the expected execution of a judgment creditor." 1872. Dalgliah v. McCarthy.

Addison on Contracts, pages 150 and 151, 6th edition. "The mere intention to defeat an execution creditor, does not, in itself, constitute a fraud; the question is, whether there was a *bona fide* intention on the part of both parties to buy or sell in reality, or whether the transaction was only colourable, and it was secretly intended that the grantor should preserve his dominion over the property, using the bill of sale as a mere pretext to keep off an execution. What is meant by a bill of sale being fraudulent, is, that the parties never intended it to have operation as a real instrument according to its apparent character and effect."

May on Fraudulent Alienations, page 83. "But it has long been settled beyond dispute, that a sale of property for good consideration, is not either by the common law, or by the statute of Elizabeth, fraudulent against creditors, merely because it was made with the intention of defeating a particular creditor; up to the day of the delivery of the writ of execution, the debtor may sell his property, provided it is not a mere trick, or the consideration a sham. This was expressly decided in the case of *Wood* v. *Dixie*, where the point was, whether, where a debtor executes a bill of sale by way of conveyance of his goods as a security for money lent, if the object be to defeat an expected execution, the bill of sale is void. *Coltman*, J., told the jury that if the intention of the transaction was to defeat the execution creditor, the conveyance was void as against him; and the Court of Queen's Bench held that direction wrong. The principle, however, is much older than that case, and much more extensive. There the consideration was money lent at the time; but it applies equally when the Judgment.

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consideration is an antecendent debt, for there is no rule of law which prevents a man from preferring one *bona fide* creditor to another; and a debt due, is a good and valuable consideration; and it seems clear that the doctrine on this point, is the same in equity as at law, and a deed executed honestly for the purpose of giving a security to the creditor, and not being a contrivance resorted to for the benefit of the debtor himself, will be valid."

Kerr on Frauds, page 155. "The fact that an assignment may have been expressly made with the intent to defeat the claims of a particular creditor, is of no consequence either at common law or under the statute of Elizabeth, if the consideration be adequate."

We are, therefore, I maintain, forced to the conclusion that the case of *Wood* v. *Dixie*, lays down the rule that an instrument cannot be impeached under the statute in question, if it is otherwise unimpeachable, simply because the parties intended to defeat, thereby, the execution of a judgment creditor.

Judgment.

The rule in equity, does not seem to differ from that laid down by the Courts of Common Law. In the case of *Alton* v. *Harrison* (*a*), Sir *G. M. Giffard* says, in his judgment, "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."

There is no case expressly overruling the authorities, to which I have referred, and which I submit, correctly express the views held now by the Courts in England, although there are some authorities which it is difficult to reconcile with them; and, as the question has not been disposed of by any higher tribunal in England, than the Courts which I have mentioned, and it has

(*a*) L. R. 4 Ch. Ap. 622.

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been brought before the Court of Error and Appeal in this country, we have further to consider which class of cases has been here followed. It is not necessary to refer at length to the English decisions, as they are all collected and commented upon in the authorities in this country, from which I am about to quote. It would not be necessary to cite so largely from the decisions in our Court of Error and Appeal, were it not for the cases of *Wood* v. *Irwin* (*a*), and *The Merchants' Bank* v. *Clark* (*b*) which question the effect of these authorities.

In *Crawford* v. *Meldrum* (*c*) it was held that the consideration was inadequate, and therefore the Court relieved the plaintiff.

In *Gottwalls* v. *Mulholland* (*d*), at page 200, there occurs the following passage, which apparently sustains the position of the defendants; "as the law stands, the charge would more clearly have expressed our views if it had been to the effect, that although the sale may have been *bona fide* with the intention to pass the property; yet, if made with intent by vendor and purchaser to defeat and delay creditors, it would be void against the defendants; but if made as the facts in this case shew, to dispose of the proceeds ratably among all his creditors, it is valid." But it is to be observed in answer to this case as an authority for the plaintiff: Firstly, that the statement of the law thus laid down, was not necessary to the disposition of the question in that suit. Secondly, that this expression of opinion, was in respect of the rights of the parties under Consolidated Statutes U. C., chapter 26, and not under the statute of Elizabeth. Thirdly, that when the same Judge, the Chief Justice of the Court of Error and Appeal, came to deal with the proper construction of this latter

Judgment.

(*a*) 16 Gr. 398.
(*b*) 18 Gr. 594.
(*c*) 3 Gr. E. & A. 101.
(*d*) 3 U. C. E. & A. 194.

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statute, as he does in *Smith* v. *Moffatt* (*a*); he says, "I have again and again considered the case of *Wood* v. *Dixie*, and in the first instance, because I had, very shortly, before I had an opportunity of seeing it, laid down the law to a jury, to the same effect as Mr. Justice *Coltman* had done in that case. I think that case is a sound exposition of the law. It has been often discussed, but never overruled." Mr. Justice *Adam Wilson* and Mr. Justice *Morrison*, concurred in the judgment of the Chief Justice of the Court. The Chief Justice of the Common Pleas, adhered to his judgment in the Court below; and Chancellor *VanKoughnet* agreed with the judgment in the Court below. Mr. Justice *Gwynne* in his judgment, referring to *Wood* v. *Dixie*, says, "we must be governed by that case, the principle of which is now, I think I may say, universally adopted by all the Courts of Law and Equity in England." He then proceeds to deal with the authorities which, it was argued were wholly at variance with that case, in these words, "as to those prior to it, I shall not refer to them, further than to say, that such of them as may be either manifestly or apparently at variance with it, must now be treated as overruled by it, but as to those contemporaneous with, or subsequent to the case, I do not think they are open to the imputation." After reviewing these decisions, the learned Judge concludes his judgment as follows: "Upon a review then of all the cases, it appears to me that the principle of *Wood* v. *Dixie*, is recognized as undoubted law at the present day, in all the Courts both of Law and Equity." There can be no doubt then of the view of Mr. Justice *Gwynne* upon the point in question. Mr. *Mowat*, in *Merchants' Bank* v. *Clark*, says, "it is distinctly and unequivocally opposed to what had been laid down in *Gottwalls* v. *Mulholland*." I admit that the case of *Smith* v. *Moffatt*, is not a satisfactory authority, and that from it, there would be a

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(*a*) 28 U. C. Q. B. 486.

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difficulty in determining the true view of the Court, although I should be inclined to the opinion, looking at the Judge's charge as set out in the Appeal book, and after a careful perusual of the judgments given by the various members of the Court, that the majority disapproved of the ruling of Mr. Justice *Coltman* in *Wood* v. *Dixie*, and approved of the reversal of it by the full Court. I think it well, however, to refer to it at the length I have, because the same Judge whose views were so well known through his judgment in that case, a couple of years afterwards delivered the judgment of the same Court upon the same question, in which all, but one member, agreed, and there we find, not only that *Wood* v. *Dixie* is followed, but that it was the intention of the Court to recognize and follow it in *Smith* v. *Moffatt*. At page 349 of the report, we read: "In the view which I take, it is a matter of no importance what was the motive or consideration for the father making the assignment to the son, for it is upon the assumption that there was no consideration which could have supported it, standing alone and consistently with *Cook's* belief, that it had been executed in June with an intent fraudulent as against creditors, that I hold, in accordance with the principles laid down in *Morewood* v. *The South Yorkshire Railway Company*, and with the other cases quoted above; and with *Wood* v. *Dixie*, and all the cases of that class, down to *Alton* v. *Harrison*, the subsequent transaction between *Alexander* and *James Douglass* on the one part, and *Cook* on the other, to be unassailable under the 13 Elizabeth, although as I have said, it may be assailable under the provisions of the Insolvent Act." Again, at page 351: "I cannot see wherein this case differs from *Wood* v. *Dixie*, and that class of cases which holds that a security given for an actual advance made, or partly for an advance made, and partly to prefer a creditor for an old debt, where there is no secret trust in favor of the grantor is unassailable under the statute of 13 Elizabeth." And, at page

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352: "Nor do I see how we can deprive *Cook* of the benefit which he has obtained without overruling the authority of *Wood* v. *Dixie*, so recently confirmed in this Court, in *Smith* v. *Moffatt*, and in the Court of Appeal in Chancery, in England, in *Alton* v. *Harrison*, wherein it was held as settled beyond doubt, as this Court had also held, that the *bona fides* referred to in the statute, means an execution of the instrument for the actual purpose of passing the estate honestly to the vendee or mortgagee, claiming under it; and not as a mere cloak for retaining a benefit to the grantor."

The case of *Totten* v. *Douglas* was not decided when the Chancellor disposed of *Wood* v. *Irwin*; and it is not referred to in *Merchants' Bank* v. *Clark*. As in the present case, it has been established there was an actual sale to *John Cook*, and a conveyance executed for the purpose of actually passing the property, and not as a mere cloak for the purpose of retaining a benefit for the grantor, I must hold that the transaction is not within the statute, under which it is sought to be impeached, though the parties to it may have been aware of the claim of the plaintiff, and desired to prevent his execution attaching upon the premises, the subject of the agreement. This construction of the statute, opens the door to such obvious frauds, that we cannot but see with much satisfaction, the passing of the Act 35 Victoria, chapter 11, which I humbly submit, lays down that which should always have been declared to be the true construction of the act, and which, in the future, will prevent much of the dishonesty that might otherwise be practised upon creditors.

Judgment.

I think the appeal of the defendants should be allowed; and that the bill should be dismissed with costs. I say with costs, advisedly, for if they were disallowed, the costs to be borne by the *Cooks* and *Bratton*, who, I find, were justified under the rule of law, as it then stood in

what they did, would amount to such a sum as that it would have been better for them in the first instance to have paid the plaintiff's claim, rather than have defended the suit. I cannot think this a just termination of the litigatian; and I desire in every case, so far as possible, to follow the more modern rule of the Court as laid down in *Bartlett* v. *Wood* (*a*), where Lord *Westbury* says: "I have had occasion to observe upon the general rule, and it is one from which most undoubtedly, so far as I am concerned, I shall seldom depart—namely, that in contentious cases, the costs of the litigation must be considered as following the result of it."

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THE EDINBURGH LIFE ASSURANCE COMPANY v. ALLEN.

Pleading—Practice—Administration.

Where a bill is filed against the estate of an intestate, alleging that letters of administration have been granted to the defendant of the estate of the deceased; such allegation is sufficiently established by shewing, that at the hearing of the case, the defendant has obtained letters of administration; although the grant thereof may have been made subsequently to the filing of the bill and the putting in of the answer; and although the defendant has taken the objection by way of defence in answer.

Statement.

The plaintiffs, *The Edinburgh Life Assurance Co.* and *John W. Gamble*, in September, 1871, filed their bill against the defendant to have an account taken of the dealings of the plaintiff *Gamble* under a certain trust deed dated in the year 1855, made by one *James Allen* (who died in 1869) to the plaintiff *Gamble*, and to have the trusts of the deed carried into effect under the direction of the Court. The bill alleged that the defendant, who was the daughter of *James Allen*, had taken out letters of administration to the estate of her father, and was administratrix to his estate.

(*a*) 9 W. R. 817.

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The defendant by her answer set up that she was not administratrix as alleged in the bill, but had only taken out limited letters of administration to her father's estate as regards the subject matter of the suit as one of the next of kin, and that she did not represent any other or further interest, and that consequently the suit was defective, as the estate of her father was not fully represented.

Subsequently, and in November, 1872, she obtained further letters of administration constituting her administratrix of the whole estate of her father.

The plaintiffs then set the cause down to be heard by way of motion for decree.

Mr. *Moss*, Q. C., and Mr. *Kennedy*, for the plaintiffs.

Mr. *Hodgins*, for the defendant.

Judgment.

BLAKE, V. C.—In this cause I gave judgment at the hearing upon all the points raised by the counsel for the defendant, except the one, whether the suit was properly constituted. The litigation affects the personal estate of the late *James Allen*. Limited letters of administration issued to one of his daughters, the defendant *Victoria Allen*, but these letters were not of a scope wide enough to cause her sufficiently to represent the estate of her deceased father for the purposes of this litigation. The father died in November, 1869, intestate. Limited letters of administration issued to *Victoria Allen* in January, 1871, the present bill was filed in September, 1871, and general letters of administration issued to *Victoria Allen* in November, 1872. It is admitted that the allegation in the bill as to the letters issuing to *Victoria Allen* is sufficient; but it is contended that this statement is untrue; that as a fact at the time of the filing of the bill the only letters granted were

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limited to matters other than those involved in this suit; that the general letters did not issue until after bill filed; that these did not relate back to the period of the filing of the bill, and therefore the suit was defective, and the bill should be dismissed. The plaintiffs, on the other hand, while admitting the insufficiency of the limited letters for the purposes of this suit, contended that it was not necessary that general letters of administration should issue until the hearing of the cause, and that when produced they related back to the death of the intestate, and gave the plaintiffs the right of suit. At the close of the argument I expressed my opinion that the letters had this retrospective effect, and that the suit was so constituted as to entitle the plaintiffs to the decree they asked; but in deference to the argument of counsel for the defence, I reserved my judgment to look into the practice. Further consideration, and an examination of the authorities, have convinced me that the plaintiffs' contention is correct. In *Williams* on Executors, vol. i., p. 389, the rule is laid down as follows: "Thus, though an executor may commence an action before proving the will, and it is sufficient if he has probate in time for his declaration, the letters of administration must issue before the commencement of a suit at law by an administrator; for he has no right of action until he has obtained them. He may, however, file a bill in Chancery before he has taken out letters of administration, and it will be sufficient to have them at the hearing; but the bill must allege that they are already obtained;" and the authorities prove Sir *Edward Williams* to be as correct on this point as he would seem to be in the other matters treated upon by him in the work from which I have quoted. Without referring to *Cleland* v. *Cleland* (*a*), which having carried the rule clearly too far, is weakened as an authority, we proceed to *Fell* v. *Lutwidge* (*b*), which was a bill that could not be sustained without the

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(*a*) Prec. Chan. 63.

(*b*) 2 Atk. 120.

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presence of a personal representative of one *John Fell*, deceased, and upon the cause being brought on for hearing, an exception was first of all taken that the plaintiff had not procured administration to her husband, *John Fell*, until after the filing of the bill, and therefore that the bill was brought too early. Whereupon Lord *Hardwicke* held that "it was very true that this would be an exception in an action at law, but that it was not so to a bill brought in this Court, accordingly the exception was overruled."

In the case of *Humphreys* v. *Humphreys* (*a*), to a bill filed by a beneficiary under the will of one *Lancashire* deceased, there being no executor or administrator of the estate sought to be administered, a demurrer was filed and allowed, because the bill demanded an account of the personal estate of *Lancashire*, and no personal representative was before the Court. Afterwards the plaintiff took out letters of administration to the estate of *Lancashire*, and amended the bill, charging the fact. To this the defendant pleaded that the taking out of the letters was subsequent to the institution of the suit, and that consequently the bill was filed before the right to sue commenced. The Chancellor, however, overruled the plea, observing that "it was sufficient that the plaintiff had now taken out letters of administration, which, when granted, related to the time of the death of the intestate, like the case where an executor, before his proving the will, brings a bill, yet his subsequently proving the will makes such bill a good one, though the probate be after the filing thereof."

Judgment.

In *Moses* v. *Levi* (*b*), it was submitted that the bill was not sustainable, having been filed by the plaintiff as the administrator of his wife, before he had taken out administration, and thereby clothed himself with the

(*a*) 3 P. Wm. 351. (*b*) 3 Y. & C. 359.

legal character of administrator. Whereupon Baron *Alderson*, who, as a Common Law Judge, would have the rule of his Court in his mind, answers, that "it appears from the case cited from *Peere Williams*, that the administration, when granted, relates back to the time of the death of the intestate, which was before the filing of the bill. Therefore I think, in this respect, that the bill is well founded, and that the objection cannot be sustained."

In *Horner* v. *Horner* (*a*), a bill was filed to administer the estate of *Anthony Horner*, deceased. His executor had died, and there was no personal representative to the estate. The plaintiffs in their bill alleged that letters of administration had been granted to two of the plaintiffs in the original bill. By plea, two of the defendants objected, that as a matter of fact no such administation had been taken out. Whereupon Vice Chancellor *Kindersley* says, "The only question I have to decide is, whether this is a good plea. It is said that the defendants must sustain the character of administrators when the bill is filed against them. By the same rule it would be necessary that a plaintiff, if he were the person to take out letters of administration, must sustain the character of administrator before he can file his bill; but that is not the case; and it would be quite sufficient for the plaintiff to obtain the letters before the case comes on for hearing to give him a right of suit. Here the case is just the reverse, and the bill is filed against the parties who were about to take out administration, and they put in a plea saying they were not administrators when the bill was filed. That is no plea in bar. It does not prevent relief being granted if the administration is taken out before the hearing of the cause. The plea amonnts to this, that because at a particular moment the administration was not granted,

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(*a*) 23 L. J. Ch. 10.

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the plaintiff can have no relief, although when the suit comes to a hearing, the administration will have been granted,—my opinion is, that this is a useless plea, and is not tenable." *Perry* v. *Watts* (*a*), *Creasor* v. *Robinson* (*b*), *Bradmore* v. *Gregory* (*c*), the other cases cited on the argument and the text writers on the subject, are to the same effect as the authorities from which I have quoted, and some of them shew that where a personal representative is necessary to the plaintiff's suit and is not in existence, the Court, so far from treating the bill as one improperly filed, will allow the cause to stand over, in order that the defect may be remedied. None of the cases lay down the rule as contended for by the defendants; nor is it restricted, as Mr. *Hodgins* argued to a case where the unrepresented estate is only incidentally affected; but I find that it applies to a case such as the present, and that where the sole object of the bill is to administer an estate, the rule of pleading and practice will be complied with, if you allege the existence of a duly constituted personal representative, and make that person a party to the suit, although he may not actually be clothed with the office of administrator until the hearing of the cause. The decree may, therefore, issue in the terms noted by the Registrar.

Judgment.

(*a*) 2 Ph. 164. (*b*) 14 Beav. 589.
(*c*) 34 L. J. Ch. 892.

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COLLVER v. SHAW.

Reforming deed—Insolvency—Registration.

Where there was a contract for the sale of a reversion and the deed purported to relinquish and quit claim the property, and contained no other words of transfer, the Court *held* that in order to remove any doubt, the vendee was entitled to have the deed reformed and proper technical words introduced.

An assignee in Insolvency cannot acquire priority over a prior vendee of the Insolvent by prior registration of the instrument appointing such assignee.

The plaintiff, in 1863, contracted for the purchase from one *A. W. Kelly*, of the reversionary interest of the vendor in fourteen acres of land in the township of Gainsborough in which the mother of the vendor had a life estate. The price was $175, which the plaintiff duly paid. The *bona fides* of the transaction was admitted.

Statement.

In pursuance of the purchase a deed was executed in 1863 by the vendor. This deed purported to be made in pursuance of the act for the conveyance of real property, and thereby for the consideration aforesaid the vendor relinquished and forever quitted claim the property to the plaintiff, his heirs and assigns, to his and their own use forever; but contained no covenants. The vendor afterwards became insolvent and the defendant was duly appointed his assignee. The instrument under which the appointment of the defendant as such assignee was effected, was registered before the deed to the plaintiff and the defendant claimed the property on the ground (1) that the deed was inoperative; and (2) that the prior registration gave priority of title.

The cause came on by consent by way of motion for decree before his honour Vice Chancellor *Strong*.

Mr. *Mowat*, Attorney General, for the plaintiff.

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Collver v. Shaw.

Mr. *Crooks*, Q. C., for defendant.

Reference was made to *Fraser* v. *Sutherland* (*a*); *Nicholson* v. *Dillabaugh* (*b*); *Acre* v. *Livingstone* (*c*); *Cameron* v. *Gunn* (*d*); the Insolvent Act of 1869, sections 10 and 12, and the Registry Act, Consolidated Statutes of Upper Canada, chapter 89.

STRONG, V. C., did not concur in the decisions reported in the 25th and 26th volumes of the Upper Canada Queen's Bench reports; and although those judgments were by a majority only of the Judges of that Court, and were opposed to the unanimous judgment reported in the 21st volume of those reports his Honour doubted if he was at liberty to disregard them; he therefore preferred deciding the case on the ground that if the deed was inoperative the plaintiff was entitled to have it reformed in Equity in order to give effect to the contract of purchase which all parties admitted had been entered into in the most perfect good faith.

Judgment.

The Vice-Chancellor was of opinion, also, that the Registry Act did not entitle the assignee to claim, on the ground of prior registration, property which the Insolvent had parted with long before his insolvency.

(*a*) 2 Gr. 442.
(*b*) 21 U. C. Q. B. 591.
(*c*) 26 U. C. Q. B. 282
(*d*) 25 U. C. Q. B. 77.

TYLEE v. DEAL. 1873.

Will, construction of—Right heirs.

A testator, who owned lands in England and Ontario in fee simple, devised the same to his wife for life and after her decease gave and devised them unto his "right heirs for ever:"

Held, that the Act 14 & 15 Victoria, ch. 6, (Con. Stat. U. C. ch. 82,) under which the defendants claimed to share in the property, did not apply, and therefore the eldest son took the estates here as in England:

Held also, that, even if the Act did apply, the common law heir was the party to take the estates under this residuary devise.

The facts of this case are set forth in the judgment. The question between the parties was, whether the descents or passing of the estate in Upper Canada, subject to the life estate of the widow of *Henry By*, was or was not affected or controlled by 14 & 15 Victoria, (Con. Stat. U. C. ch. 82,) the Act abolishing primogeniture in this Province.

Statement.

Mr. *Blake*, Q. C., for the plaintiffs, contended that the statute did not apply; (1) because *Henry By* died after the 1st January, 1852, having devised his real estate; (2) because there is a devise to testator's own "right heirs," and that the heir at common law of England was entitled; (3) because by reason of this devise, and by virtue of sec. 5, Con. Stat. U. C. ch. 82, the same person who would have been entitled before the passing of the Act is still entitled notwithstanding the passing of that Act, and he acquired the land by *devise* and not by *descent*. And referred to *Thorpe* v. *Owen* (*a*), *Sladen* v. *Sladen* (*b*), Con. Stat. U. C. ch. 82, secs. 5, 33, and 41.

Mr. *Snelling* (with him Mr. *Wardrop*) for the defendants, contended that even admitting that *Charles Wm.*

(*a*) 2 Sm. & G. 90. (*b*) 2 J. & H. 369; 8 Jur. N. S. 1075.

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By was, as far as English lands are concerned, the heir-at-law of *Henry By*, the question arose did the words, "*my right heirs*," mean to denote the person who would be his heir general at Common Law, or did they designate such persons as, according to the different laws and customs governing the several lands, would be entitled thereto in case he had died intestate. The difficulty is to get over the fact that there is a devise—to get over the circumstance which is claimed by the plaintiffs, that *Henry By* did not die, following the words of Sec. 23, "*without having lawfully devised.*" The laws should be interpreted according to their spirit, and our Courts should strain a point to give them effect. Here the will speaks from the death, March, 1852; when it was actually made is of no consequence, therefore, and it speaks in Ontario in March, 1852. Our Legislature, had declared two months previously, that it was the policy of the country to abolish primogeniture, and make all deceased's children his heirs. Had deceased made no will, no question that the law would declare *Charles Wm. By* and *Mrs. Deal* to be his "right heirs;" but he made a will, and thereby devised to his "right heirs;" and the question now is, who are they? Counsel contended it was those to whom, had there been no will, the law would give the property; and that the Court should read the will as devising to those parties whom the law of Ontario declared to be his heirs.

Statement.

Or suppose the will confined to estates in Canada only, who then would this Court say were the "right heirs?" The heir at Common Law, as in England, or the heir by our statute? Clearly the latter.

The object of the law was to abolish primogeniture, and to regulate succession consequent on its abolition. It still reserved to the owner the right to devise to whom he pleased, but he must lawfully devise it,—that is,

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according to the laws of Ontario,—and when *Henry By* devised to "his right heirs," what other can it technically mean than those heirs whom the law declares to be "his right heirs." In the case of the present will, *Henry By* died *quasi intestate*, that is, the law will declare his right heirs to be those that the law points out in case of intestacy; giving those heirs the benefit of the statute of 1834, as to taking by purchase and not by descent.

It was also argued on behalf of the defendants that before the 5th sec. of Con. Stat., cap. 82, came into force, a devise of lands of free and commom socage tenure to the "right heirs" of the testator was of no avail, and that the "right heirs" took by descent as if there had been no devise; that the heirs, according to law of gavelkind in England in a similar case, would likewise take by descent, as if there had been no devise; and also, that if both gavelkind and free and common socage lands were included in the same devise, the gavelkind lands would go to the heirs according to the law of gavelkind, and the free and common socage land to the heirs at Common Law. What was the change introduced by the Statute (Con. Stat. c. 82, s. 5)? Simply that those who formerly took by descent in the cases above stated, would now take as purchasers, that is, they would, for the purpose of tracing descent, be considered as the root or stock, not that the devolution of the estate was thereby altered. As to the words in the 23rd section, "without having lawfully devised the same:" Suppose a person seised of lands in Ontario made a will, and devised them to his "right heirs," who are to take? His right heirs. Who are his right heirs? Those whom the law would call to the succession in case the owner of the lands had died intestate. And those are the persons pointed out under the 23rd section.

Judgment.

As to the 41st section: It might as well be said

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that a limitation to A. and his heirs, or to the heirs of A., is within the section, as to say that a limitation to the right heirs of the testator is. That the heirs under the Con. Stat. C. 82, s. 23, would be preferred in this Province, as the Common Law heir is preferred in England.

BLAKE, V. C.—The facts of this case, as set out in the bill, and admitted by the answers of the defendants, are as follows: *Henry By* died in England in March, 1852, having, while domiciled there, made his last will and testament, bearing date the 28th day of November, 1851. The testator died seised for an estate in fee simple, in possession of real estate in England and in the Province of Ontario, and the will, after specifically devising certain lands in the county of Sussex, in England, proceeded as follows:—"I give and devise all and singular the remainder of my real estate unto and to the use of my said dear wife, *Frances Ann By*, for and during the term of her natural life, and from and after her decease I give and devise the same unto my right heirs for ever." The testator's widow died in 1862. In a suit instituted in the Court of Chancery in England, for the administration of the testator's estate, it was declared that *Charles William By*, who is now represented by the above plaintiffs, was, at the time of the testator's death, his right heir, so far as the English estates are concerned, which passed under the residuary clause above set forth. *Charles William By* had a sister, *Elizabeth By*, now represented by the defendants to this suit, and they claim that their ancestor took, under the above devise, a share of the Canadian estate, to which, as representing her, they are now entitled.

Judgment.

The question submitted for the judgment of the Court is, whether the devolution of the real estate in Canada, belonging to the testator, is affected by the Act 14 & 15 Victoria cap. 6. If it is not affected by this Act, then, it is

admitted that the plaintiffs, as representatives of *Charles William By*, take here as in England. If, on the other hand, it is held that this act applies, it is contended, that the defendants are entitled to share these estates with the plaintiffs. The Act in question was passed on the 2nd day of August, 1851, and came into force on the first day of the January following. It is to be found as a portion of cap. 82 of the Consolidated Statutes of Upper Canada. In construing the statute in question, it is necessary to bear in mind section 5 of the consolidated Act: "When any land shall have been devised by any testator, who shall die after the 1st day of July, 1834, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent." So that, as the testator died subsequent to July, 1834, under this clause *Charles William By*, the heir, (apart from our Primogeniture Act), must be taken to have acquired this land as devisee. We have, therefore, before the Act under consideration came into force, the devise above set forth to one who, section 5 says, takes as devisee. Following, then, the finding of the English Court, we would have *Charles Wm. By* the devisee of these premises, and the question is, whether our Primogeniture Act has altered this position, or whether such a case as the present is excepted from its effect. In my judgment there can be but little, if any, doubt upon this point. The alteration in the law of descent begins with sec. 23 of the above mentioned Act, which is as follows.—"Whenever, on or after the 1st day of January, in the year of our Lord, 1852, any person shall die seised in fee simple, or for the life of another, of any real estate in Upper Canada, *without having lawfully devised the same*, such real estate shall descend or pass, by way of succession, in manner following, that is to say:" and then we find the sections under which the defendants claim title to a share in the lands in Canada. But it seems to me clear that it is impossible to hold the sections following the 23rd

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can apply to the present case, for they only affect real estate where the person entitled thereto shall die "without having lawfully devised the same." Here the will, under which the plaintiffs claim, brings them within the exception in this clause. The 41st section seems also plainly to shew that it was not the intention of the Legislature to interfere in these sections with this branch of the law, except in cases of intestacy. After providing that certain estates "shall not be affected by any of the provisions of the last preceding nineteen sections" of the Act, it goes on to add, "nor shall the same affect any limitation of any estate by deed or will, * * * *but all such estates shall remain, pass, and descend, as if the last* 19 *sections of this Act, numbered from* 22 *to* 40, *both included, had not been passed.*" I cannot come to the conclusion that the Act affects the devise in question; and I therefore find that *Charles William By*, who, it is admitted, but for this Act, would take the Canadian estates, is, notwithstanding, entitled thereto.

Judgment.

I think also that there is much to be said in favor of the position taken by the plaintiffs, that under the words "my right heirs forever," the Common Law heir (who would be here Mr. *Charles William By*) would take. In 2 Jarman on Wills, p. 71, the rule is laid down as follows: "If the subject of disposition be real estate of the tenure of gavelkind or borough English, or copy-hold lands, held of a manor, in which a course of descent different from that of the Common Law prevails, it becomes a question whether, under a disposition to the testator's heir as purchaser, the intended object of gift is the heir general at Common Law, or his heir *quoad* the particular property which is the subject of the devise, and the authorities at a very early period, established the claim of the Common Law heir—supposing, of course, that there is nothing in the context to oppose the construction."

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In *Thorpe* v. *Owen* (*a*), the Vice Chancellor says, "It has been long settled that where a testator devises lands to his heir male, he must be held to mean his heir male at Common Law." The word heir is used as *persona designata*, and not as the person that may be heir according to the law of the land where the property is situate, or according to the particular nature of the estate the subject of the devise.

See further on this point, *Wright* v. *Atkyns* (*b*), *Gwynne* v. *Muddock* (*c*), *Connden* v. *Clarke* (*d*), *Roberts* v. *Dixwell* (*e*), *DeBeauvoir* v. *DeBeauvoir* (*f*), *Sladen* v. *Sladen* (*g*). I think also it may fairly be said, considering the will, the date of its execution, the period of the passing of the Act, the place of residence of the testator, and looking at all the surrounding circumstances which a Judge is bound to take into consideration in endeavoring to ascertain the intention of a testator, that here it was not desired that a class of persons should take the Canadian estates differing from those to whom the English ones are devised. However, I base my decision upon the first ground to which I have referred; and for the reasons set forth in dealing with it, I declare that, according to the true construction of the will, the lands of the testator in Canada passed to *Charles William Ely*.

Judgment.

As the question arises on the construction of the will, the costs of all parties to the suit will be, as is usual in such cases, borne by the estate.

(*a*) 2 Sm. & Giff. 90.
(*b*) 19 Ves. 299.
(*c*) 14 Ves. 489.
(*d*) Hobart 29.
(*e*) 1 Atk. 607.
(*f*) 15 Sim. 163.
(*g*) 2 John. & Hem. 369.

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LAPP v. LAPP.

Dower—Election.

A testator at the time of making his will and of his death had real estate to the value of $7,600, and personal estate to the value of $305, of which realty to the amount of about $3,805 he disposed of by his will during his wife's life; and he left legacies to the amount of $3,100. To his wife he left a life interest in his homestead farm and a legacy of $1,000. The other real estate he directed to be sold. The residue he divided; but there would be no residue if the widow was to have her dower:

Held, that this was such a disposition of his estate as evidenced an intention that his widow should be put to elect between the provision made for her by the will and her dower.

The facts giving rise to this suit are fully stated in the judgment reported *ante* volume xvi. page 159.

In pursuance of the decree then pronounced the Master at Cobourg made his report, the effect of which is sufficiently stated in the judgment, and the cause was brought on for further directions.

Mr. *S. Blake*, Q.C., for the plaintiff.

Mr. *Moss*, Q.C., for the defendants.

Judgment. SPRAGGE, C.—Upon the hearing of the cause a principal question was, whether the widow was put to her election between the provision made for her by her husband's will, and her dower. I disposed of the other questions, and expressed my opinion that there should be an inquiry as to the value of the husband's estate. The decree in reference to this question declares that there is nothing on the face of the testator's will against the right of the widow to have her dower in the property, called in the pleadings the mill property, as well as the provision made for her benefit by the will, and the decree proceeds thus: "but the defendants alleging that

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the value of the testator's estate at the time of the making of the will, and at his death, was such as to indicate an intention on his part that his wife should not have both her dower and the provision made for her by the said will; this Court doth order that it be referred to the Master of this Court at Cobourg, to inquire and report as to the value of the said testator's estate, real and personal, at the said respective dates, and as to the annual value thereof;" and the question whether the widow was bound to elect was reserved till after the Master should have made his report; and now, with the information furnished by the report, the question comes before me on further directions.

Counsel agree, and I concur with them, that it is the state and value of the testator's estate at the date of his will; not at the date of his death, that is material upon this point. It must be so; for the Court is, as far as it can, by means of extrinsic evidence, to place itself in the situation of the testator. The directions in the will, as to a division of a residue before his wife's death; and a division of what he had devised to her, after her death are material, inasmuch as they shew that the testator contemplated that there would be a residue to be divided independently of what he had devised to his wife.

Judgment.

After giving legacies to his wife and daughters (referred to in my former judgment) amounting in the aggregate to $3,100, he proceeds thus, "the above sums to be levied out of my estate, together with all my household goods, debts, and movable effects; and whatever shall be left, after the above sums are paid, shall be equally divided among my children by my executors." The will then goes on to say, "and what I have above deeded to my wife," which I have interpreted as meaning the homestead farm, and a town lot in Cobourg; "shall, after her death, (the Cobourg

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lot excepted, it being devised to her absolutely,) be also equally divided between my children." We have, therefore, to take out of the property divisable among the children, during the life of the widow, the homestead farm and Cobourg lot, and the life estate of the testator's father-in-law in another Cobourg lot, which lot is valued by the Master at only $100.

The whole value of the real estate at the date of the will is placed by the Master at.....$7,600
And the value of the personalty at 305

$7,965

Take from this as not presently divisable the value of the homestead farm..... $3,600
Of the lot in Cobourg devised to the wife 160
Judgment. Of the other Cobourg lot, subject to life estate, say..... 45

$3,805

$4,160

Against this are chargeable the legacies..... 3,100

This would leave a surplus apart from dower of 1,060 that is, assuming that the testator owed no debts at the time of making his will. I observe that the Master does not state the item of debts either at that date or at the death of the testator, but he credits the executor with the amount of $3,213 23 for debts paid by him. If the testator was indebted when he made his will to one-third of the amount that he was indebted at the time of his death there would be no surplus to divide, even putting dower out of the case.

The real estate comprised, besides the homestead, and the two lots in Cobourg to which I have referred,

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a mill property valued at $3,000, and other properties valued at $800, (one of these a tannery valued at $400), so that the widow, if entitled to dower, would be dowable in $3,800 worth of land. The provisions of the will involve a direction to sell these properties, and, as no day is named for the payment of the legacies, an early sale must have been contemplated, and a sale for cash. The question is, could the testator, looking at the nature and the value of his property and the provisions of his will, have contemplated a sale of this property, subject to his wife's dower; must he not have contemplated a sale free from dower. The primary right of the wife is to have her dower set off by metes and bounds: and it probably was not at that date generally known among laymen, that there were exceptions to this rule: judging of the testator by his will, it may well be doubted whether he was aware of any exceptions. But assuming that he knew that the mill and tannery would be exceptions to this rule, still the rule of that day applying to property of that description was onerous enough, to affect most seriously its market value; for the purchaser would have to take it, with the liability to account to the dowress for one-third of his profits. The property, I apprehend, could not be expected to realize, as much by at least one-fourth, subject to dower, as would be its saleable value if free from dower.

Judgment.

These several things are material upon the question of intention as appearing upon this will and the surrounding circumstances—the provision made for the widow—the direction to sell that not given to the widow, and the direction as to the disposition of an expected surplus. The provision for the widow was a life estate in the homestead farm, upon which the testator and his family were, as I gather from the will, living; a lot in Cobourg, in fee, valued at $160, and a legacy of $1,000. The then actual value of the homestead is stated by the Master at $3,600, ($600 more than the

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value of the mill property,) and its annual value at $150. The provision for the widow was liberal under the circumstances, even assuming that she was to take that provision in lieu of dower.

The direction to sell is also material as indicating the mind of the testator. If there were no direction to sell, it might with some reason be assumed that he meant his property to remain as it was, and incident to any rights which would accrue upon his death. But when he directs a sale, the question of the effect of a sale upon his wife's rights would be more likely to present itself to his mind; if he did not conceive that he had provided for her otherwise.

The direction as to the disposition of a surplus, after payment of legacies, is also material. The will assumes that there will be a surplus, "whatever shall be left after the above sums are paid shall be divided equally among my children by my executors." This surplus would be utterly insignificant (perhaps about $100), if not absolutely *nil*, if the sale were made subject to the widow's dower; while the testator might reckon upon a surplus if not subject to her dower. In the one case this provision of the will would be defeated; in the other it would have the operation intended.

Judgment.

It comes to this: can the Court, placing itself in the situation of the testator, see with sufficient distinctness, that "the testator intended to dispose of his property in a manner inconsistent with the wife's right to dower?" Per Lord *Cranworth* in *Parker* v. *Sowerby* (*a*).

This case is, I suppose, not so strong as some that have been referred to, less strong, I think, than *Becker* v. *Hammond* (*b*); but the provisions of the will, and the

(*a*) 4 D. M. & G. at 325. (*b*) 12 Gr. 485.

situation of the testator leave, upon my mind, a very strong impression that it was his intention that his widow should have the provision he made for her, and that only. I do not mean to say that it is a case which admits of no doubt, but I am able to say that I have no doubt that such was the intention of the testator.

The Master reports that since 1869 the defendant *Henry Lapp*, has been in possession of nineteen acres of the homestead farm, he reports only the bare fact, without stating how *Lapp* came to occupy, or the value of the occupation. He reports also, that payments have been made by *Henry Lapp* to the widow as on account of her dower. In one part of the report the amount is stated at $307. In another part payments are stated which amount in the aggregate to $250. I think it just, under all the circumstances of the case, that no charge should be allowed in respect of either of these matters. The dower paid would probably exceed the value of the occupation, but in making payments on that account to the widow, *Henry Lapp* was acquiesing in her right to dower. Her style of living would probably be based upon the amount so paid being part of her proper income; and it would be hard now to compel her to refund. I make no order of payment on either of these two accounts. The Master reports that *Henry Lapp* claims that he and the plaintiff are the only parties interested in the testator's estate.

Judgment.

I think this is not a case in which costs should be given to any party except *Weir*, who is entitled to his costs from the plaintiff. In *Becker* v. *Hammond*, I thought it proper to give no costs.

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GOODENOW v. FARQUHAR.

Tenants in common—Stone quarry—Account of profits.

One of two tenants in common of land, leased part of it as a stone quarry:

Held, that the other tenant in common was entitled to an injunction against further quarrying, and to an account against the lessee for one moiety of what had been already quarried.

One of two tenants in common made a lease of a portion of the joint estate for the purposes of a quarry. On a bill filed by the co-tenant against the lessor and lessee, alleging that the lessee had quarried stone outside the limits as well as within the limits of the lands demised, the lessee by his answer insisted on his right to quarry where he had, the limits of the acre really agreed to be demised being different from those mentioned in the lease, but did not submit to account for the stone quarried. At the hearing the Court made a decree for an account with costs against the lessee.

Statement.

The plaintiff, an infant, and the defendant *L. W. Goodenow*, were tenants in common as devisees of a lot of land of which the parcel in question formed a part. The defendant, *L. W. Goodenow*, was acting executor, and leased the land in question, an acre, to his co-defendant *Farquhar* for the term of five years, ending 1st July, 1872, for the purpose of a stone quarry, it being useless for any other purpose, with a covenant to renew as to his (*Goodenow's*) interest.

The plaintiff charged the defendant *Farquhar* with quarrying stones, both before and since the 1st July, 1872, outside the acre demised, and with quarrying stone since that date within such acre, and prayed that *Farquhar* might be restrained from so quarrying, and also for an account and payment of the value of the stone quarried outside the acre; and of one half the value of the stone quarried within the acre, since the said 1st July.

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An interim injunction had been granted to the hearing, and on the cause being brought on for hearing, the defendant submitted to account to the plaintiff for his share of the profits.

Mr. *Hoskin*, for the plaintiff.

Mr. *Murray* for defendant *Farquhar*.

SPRAGGE, C.—An injunction until the hearing was granted in this case by my brother *Strong*. At the hearing, counsel differed as to whether my learned brother had granted the injunction simply to preserve the property *in medio*, and without expressing any decided opinion upon the question involved; or had considered the question; and had held upon the law of the case that the plaintiff was entitled to an injunction.

Judgment.

I find that my learned brother did consider the law of the case, and held it governed by cases in this Court; particularly the case of *Dougall* v. *Foster*. (*a*) That was the case of a tenant in common using the land for the making of bricks, and using and consuming the land itself for the porpose. *Proudfoot* v. *Bush* (*b*), was a case upon the same point. The land held in common was mill property, consisting of a saw mill, with land said to be of no value except for its timber, and I thought it came within the same rule.

The land in question in this case is a quarry of freestone; and I said at the hearing, that if the law of the case was with the plaintiff, he would be entitled to an injunction, and to an account as prayed. I must hold him so entitled; and that his decree must be with costs.

Mr. *Murray* subsequently moved to vary the minutes

(*a*) 4 Gr. 319. (*b*) 7 Gr. 531.

1873. of decree by striking out the direction as to payment of costs by the defendant *Farquhar*.

Goodenow v. Farquhar.

Mr. *Hoskin*, contra.

SPRAGGE, C.—Upon speaking to minutes, counsel for the defendant *Farquhar* contend that costs should not be adjudged against him; on the ground that the locality of the acre agreed to be leased to him by *Lafayette W. Goodenow*, his co-defendant, was not that described in the bill, and in the lease, but that described in the answer, or rather that the limits varied. I am inclined to think that *Farquhar* is right upon that point; and I doubt if it is proved that he quarried outside of the limits really agreed upon, but that is quite a subordinate point. The bill is by an infant tenant in common, and he sets out the demise as he finds it; and he complains that *Farquhar* quarried stone on the premises demised; and also outside the limits of those premises, and as a fact he did quarry outside of those limits, though I do not think it is proved that he quarried outside the real limits. Since the expiry of the lease it is admitted that he has not quarried outside of the limits defined in the written lease.

Judgment.

If *Farquhar*, instead of setting up that the lease from his co-defendant gave him a right to quarry, had submitted to account to the plaintiff for a moiety of the value of the stone quarried; and if the plaintiff had then gone on with the suit upon the question of boundary, there would have been some ground for exempting the defendant *Farquhar* from the costs of the hearing; but he chose to stand upon his rights, or what, I suppose, he was advised were his rights. In that he has failed. He continued to quarry in despite of a warning from the plaintiff, and I do not see upon what ground I can exempt him from the payment of costs.

JARDINE v. WOOD. 1873.

Executor—Statute of Limitations—Judgment by collusion.

Where a judgment is successfully impeached on the ground of fraud and collusion between the creditor and the executor of the debtor, it is open to the parties interested in the estate of the deceased to set up the Statute of Limitations to the claim of the creditor, which the executor had omitted or neglected to plead.

Hearing at Ottawa.

Statement.

The evidence shewed that on the 23rd June, 1867, one *Jonas Wood* died intestate, leaving him surviving his daughter, the plaintiff *Sarah Ann Jardine*, wife of the defendant *Andrew Jardine*, his sole heiress-at-law and next of kin. *Jonas Wood* at the time of his death was seised of real estate and possessed of considerable personal property. Letters of administration to his estate and effects were, on the 12th day of July, 1867, granted to the defendant *Mary Wood*, who alleged that she was the second wife of *Jonas Wood*. On or about the 13th of February, 1869, one *William Dixon Wood*, brother of *Jonas Wood*, commenced an action against the defendant *Mary Wood*, to recover payment of a debt alleged to be due from *Jonas Wood* to *William D. Wood*. The action having been undefended, judgment was entered on the 15th of March, 1869, and execution issued. The plaintiff charged that that judgment had been obtained by fraud and collusion between *William D. Wood* and *Mary Wood*. The bill was filed against *Mary Wood* and *C. H. Wood*, the executor of *William D. Wood* and *Andrew Jardine*. The bill prayed (amongst other things) an account of the dealings between *William D. Wood* and *Jonas Wood*, and that further proceedings upon the judgment might be stayed.

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

Mr. *Maclennan* (Cornwall), for the defendants *Mary Wood* and *C. H. Wood*.

1873.

Jardine v. Wood.

SPRAGGE, C.—At the hearing, I held the judgment recovered by *William Dixon Wood* against *Mary Wood*, as administratrix of the estate of *Jonas Wood*, successfully impeached.

I reserved one point—whether it was competent to the plaintiff, who is heiress-at-law and next of kin of *Jonas Wood*, upon the inquiry directed before the Master, as to what, if anything, was really due to *William D. Wood*, by the estate of *Jonas*, to set up the Statute of Limitations.

I am satisfied that it is open to her to set up the Statute: *Shewen* v. *Vanderhorst* (*a*), *Moodie* v. *Bannister* (*b*), *Fuller* v. *Redman* (*c*). In the last case Lord *Romilly*, while affirming the principle that it was competent to other creditors, or to any person interested in the estate, to set up the Statute against the claim of any creditor, (with the exception of that of the creditor who is plaintiff in an administration suit,) though the executor should neglect or decline to do so: adds, "It is a different thing when judgment has been obtained against the executor, or where he has known nothing of the objection; and has paid the debt." This cannot apply to the case of a judgment successfully impeached.

Judgment.

I agree, however, with the argument of Mr. *Maclennan* to this extent: that it is competent to the plaintiff only to set up the Statute where it might have been set up in answer to the action at law, or to any of the items for the recovery of which that action was brought, and that the time which has elapsed since the commencement of that action, is not to run against the creditor. Taking the account upon that footing, there will be allowed against the estate all that the estate was then liable to pay, and only that which the estate was then liable to pay.

(*a*) 1 R. & M. 347. (*b*) 4 Drewry 432,
(*c*) 26 Beav. 614.

I disposed of the costs up to the hearing by directing that they should be paid by the defendants *Mary Wood* and *C. H. Wood*. Further directions and subsequent costs to be reserved.

1873.
Jardine v. Wood.

ANDERSON v. TROTT.

Vendor's lien.

Where a vendor on the sale of land takes a mortgage thereon for part of the price agreed to be paid, he loses his lien for such portion as remains unsecured.

The bill alleged that the plaintiff sold land to the defendant on the terms that a portion of the purchase money should be paid in two weeks after the completion of the purchase, and the residue should be secured by mortgage; that the purchase was accordingly completed by the execution of a conveyance, containing in it the usual receipt for purchase money, as well as having the common receipt indorsed; that, contemporaneously with this deed, the defendant executed a mortgage for the part of the price which had been agreed to be secured; that the defendant refused to pay the sum which he had agreed to pay two weeks after completion, and that to an action which had been brought against him for the recovery of that money, he had pleaded the release as to the whole purchase money contained in the deed. The prayer of the bill was that the plaintiff might be declared entitled to a lien in respect of the unsecured purchase money, and that he might be restrained from setting up the release in the action.

Statement.

To so much of the bill as sought to have a lien established, the defendant demurred for want of equity.

Mr. *Bird*, for the demurrer.

Mr. *Ashton Fletcher*, contra.

1879.

Anderson v. Troit.

Judgment.

STRONG, V. C.—It seems clear, both on authority and principle, that a vendor who completes the sale, and takes a mortgage for part of the purchase money, disentitles himself to a lien for the residue remaining unpaid and unsecured: *Bond* v. *Kent* (*a*), *Hughes* v. *Karney* (*b*), *Galt* v. *Erie and Niagara Railway* (*c*), *Sugden's* V. & P. (ed. xiv.), 675; *Fisher* on Mortgages (ed. ii.), p. 814; *Dart's* V. & P. (ed. iv.), p. 671.

The demurrer must be allowed with costs.

O'DONNELL v. BLACK.

Vendor and purchaser—Specific performance—Damages.

An intending purchaser attended an auction sale of lands and bid off the property, but no memorandum or agreement was signed evidencing the contract, and the vendor having refused to complete the sale, the purchaser filed a bill for specific performance:

Held, that this was not a case in which the Court would, on refusing specific performance, direct an inquiry as to damages under the statute 28 Victoria, ch. 17, and that the plaintiff should pay the costs of the suit.

Statement.

This was a bill for specific performance of a contract alleged to have been entered into between the parties. It appeared that the premises in question had been advertised for sale by auction, and that the plaintiff, with others, attended at the auction, when he bid off the property and was declared the purchaser thereof. The defendant having refused to carry out the sale, the plaintiff instituted the present suit.

The cause came on for hearing before His Lordship the Chancellor, at the Sittings at Guelph.

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

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

(*a*) 2 Vern. 281. (*b*) 1 Sch. & Lef. 132.
(*c*) 15 Grant 567.

1873.

O'Donnell v. Black.

SPRAGGE, C.—[After briefly stating the facts of the case, remarked to the effect that] The principal question raised at the hearing of this cause was, whether there existed a sufficient contract in writing under the Statute of Frauds to entitle the plaintiff to a decree for specific performance. I held not. A question was then raised as to whether I should direct a reference as to damages, and I was referred to *How* v. *Hunt* (*a*), as being a case strongly in favor of the plaintiff's contention.

I have referred to the case, but fail to find anything in it to warrant me in directing the inquiry here sought.

Judgment.

In that case, the defendant, by his agent, had in September, 1861, entered into an agreement in writing to lease to the plaintiff the ground floor of certain premises for a term of seven years, at a rental of £300 a year, which agreement provided that certain alterations and improvements should be made by the plaintiff at his own expense; the plaintiff paid a year's rent in advance, entered into possession and commenced making the alterations. Within a month afterwards notice was given to the plaintiff that the premises had been mortgaged to secure £1,200, and he was informed that the mortgagor had no power to rent the premises; and that an action of ejectment had been brought to recover possession of the whole estate. The mortgagees having refused to concur in the lease, the plaintiff stopped the works. Afterwards he was called upon to restore the premises, which he did, and retired from the possession. In February, 1862, the plaintiff filed his bill praying for specific performance of the agreement for lease, and that defendant might be ordered to pay off the mortgage in order that a good title could be made to the plaintiff; and for an inquiry as to the damages sustained by the plaintiff by

(*a*) 31 Beav. 420.

1873.

O'Donnell v. Black.

reason of the defendant's breach of the agreement. The defendant answered the bill, alleging that he was unable to redeem the mortgage; and that when he entered into the agreement, he had no reason to believe the mortgagees would object to the lease, or to the alterations, and submitted that the plaintiff could not obtain a specific performance.

At the hearing of the cause, counsel for the plaintiff asked for a decree as prayed, or in the alterative, for an inquiry as to damages, under Sir *Hugh Cairns'* Act, (*a*) and referred to the case of *Soames* v. *Edge* (*b*). For the defendant it was contended that the plaintiff must be left to his remedy at law, as the Court would not make a decree for specific performance, where it involved an order for redemption; and that, therefore, the case did not come within the provisions of the act; and that as the plaintiff, when he instituted the suit, had full notice of the facts, and was fully aware that he was not entitled to a decree, the bill ought to be dismissed with costs. The Master of the Rolls in giving judgment, expressed considerable doubt about the case, but stated a clear opinion that Sir *Hugh Cairns'* Act was never meant simply to transfer the jurisdiction from a Court of Law to a Court of Equity. I confess my own feeling is that, in that case the plaintiff should not have come into a Court of Equity at all; but the Master of the Rolls goes on to say, "In a *bona fide* case where the Court, at the hearing, has thought that the contract could not be specifically performed, the Court is enabled, 'if it shall think fit, to award damages to the party injured.' I am disposed to think that if the plaintiff did not know he had good reason for believing, that this Court could not give specific performance of this contract; and that if the mortgagees refused to join in the demise, he could do nothing but recover damages at law. But, considering the way the defendants entered into this contract, I

Judgment.

(*a*) 21 & 22 Vic. ch. 27, sec. 2. (*b*) John 669.

1873.

O'Donnell v. Black.

am not disposed, in this instance, to send the case to law, and I will make an order to assess the damages sustained by the plaintiff; and I shall give no costs up to and including the hearing; the plaintiff will get all subsequent costs. The reason why I do not dismiss the bill is, that it is a new case, and I do not think it right under the peculiar circumstances of the case, to put the plaintiff to his action at law, to recover the damages which he has sustained."

The case as decided, appears to me, to break through a general rule, and was treated as an exceptional case, owing to the special circumstances existing in it, and the Master of the Rolls says, that he had some difficulty in coming to the conclusion that he arrived at; and with all respect, I hardly think his premises warrant his conclusion; at all events it can hardly be considered as an authority in this case, where no such special circumstances exist. Here, there was simply an auction, at which the plaintiff with other parties attended, and he bid off the property; but no contract whatever was signed, and he has incurred no expense whatever; and, as I remarked at the hearing, a bill should never have been filed at all. I do not think the present comes within the case in *Beavan*, and unless it did so clearly, in such a way as to make that case of binding authority, I should not be disposed to follow it.

Judgment.

I am therefore of opinion that the bill should be dismissed.

Then as to costs: It was contended before me, that if even the bill were dismissed, costs should not be given against the plaintiff. The modern rule, it must be admitted, is, that costs follow the result; and, I must say, I consider this a salutary rule, as under it, parties will naturally be led to consider beforehand what their rights are, and weigh them carefully before embarking

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in a kind of speculative litigation, where, should they fail, they may still be exempted from payment of costs on the ground of some peculiar circumstances existing in the case, rendering it an exception to the general rule.

In *Millington* v. *Fox* (*a*), Lord *Cottenham* says, "The question of costs in Chancery is left to the discretion of the Court. That discretion ought to be exercised, as far as possible, according to some principle, and I am very much disposed as a general rule to make the costs follow the result; because, however doubtful the title may be, or however proper it may be to dispute it, it is but fair that the party who really has the right should be reimbursed, as far as giving him the costs of the suit can reimburse him. But then there is another object the Court must keep in view, namely, to repress unnecessary litigation, and to keep litigation within those bounds which are essential to enable the parties to vindicate and establish their rights."

Judgment.

In *Bartlett* v. *Wood* (*b*), Lord *Westbury*, in speaking of the question of costs, says, "From my long experience in this Court, I have observed that nothing requires to be more carefully directed or attended to than the mode in which the costs of litigation should be dealt with by this Court in ordinary cases. Nor is there anything which opens the doors of the Court so widely, and induces persons to come up with unfounded litigation more than the unfortunate degree of uncertainty which exists upon the subject of the payment of costs. I have had occasion to observe upon the general rule, and it is one from which most undoubtedly, as far as I am concerned, I shall seldom depart, namely, that in contentious cases the costs of the litigation must be considered as following the result of it."

(*a*) 3 M. & C. at p. 352. (*b*) 9 W. R. at p. 817.

1873.

O'Donnell v. Black.

There is, therefore, not only the authority of these two eminent judges, but also the current of modern decision against the views expressed by some learned judges as to the question of costs not following the result.

I was also referred to *Houck* v. *The Town of Whitby* (*a*,) before the late Vice Chancellor *Mowat*, a case for specific performance against a corporation, which could not be enforced, because of the fact that the defendants were a corporate body, although, as the Vice Chancellor says, that sufficient had occurred to entitle the plaintiff to relief against a private individual or an unincorporated company; and there, on dismissing the bill, the Vice Chancellor merely says, "It is not a case for costs."

Judgment.

Jackson v. *Oglander* (*b*) was also cited, not as a case in which the bill was dismissed without costs, but as a case which the plaintiff here relies on as an authority in his favor from the language used by Sir *W. Page Wood*, on dismissing the bill with costs. In that case the agent of Sir *Henry Oglander* had promised to give a lease of certain lands in the Isle of Wight to the plaintiff for 1000 years at a ground rent, in pursuance whereof the agent had prepared a draft of the lease to be executed, and sent it, with certain plans of the property, to the plaintiff, and who, in conjunction with the surveyor of the defendant, measured and plugged off the land comprised in the lease. Afterwards Sir *Henry Oglander* declined to grant the lease, and in the letter communicating that fact, Sir *Henry's* solicitor offered to pay the plaintiff's solicitor all his costs. The contract, it would seem, had been broken off by Sir *Henry* in a fit of petulance, because the plaintiff had employed a solicitor to act for him in the matter. The offer, contained in this letter declining to grant the lease, to pay expenses, is what drew forth the observation of

(*a*) 14 Gr. 671. (*b*) 2 H. & M. 465.

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the Vice Chancellor, that "Sir *Henry* having offered, at the time when he declined to grant the lease, to pay all the costs of the plaintiff up to that time, and that offer having been declined, I dismiss this bill, with costs But for that offer I should have dismissed it without costs."

What the Vice Chancellor did say, however, was a mere dictum, he only said what he would have done, if certain circumstances were before him; and I cannot help thinking such dictum to be rather in conflict with the decisions of the two Lord Chancellors which I have referred to, as well as the current of modern decisions. In the case of *Jackson* v. *Oglander*, there were certain acts done which might have been thought to have created a contract, and expenses were incurred in pursuance thereof; while here, there is no contract whatever, merely that one of an audience attending an auction sale bids off the property, but no expense whatever has been incurred by the purchaser.

Judgment.

I do not think, therefore, that the case is one where there is any circumstance to take it out of the general rule with regard to costs, which I think is also a salutary one, and that parties should not come into Court unless they are prepared to do so at the risk of costs in case of failure. I therefore dismiss the bill with costs, and without any inquiry as to damages.

REYNOLDS v. COPPIN. 1873.

Administration suit—Trivial claim

The Court refused to make a decree for the administration of an estate, at the instance of a legatee whose claim, including interest on his legacy, amounted to only $28; and that although it was alleged there were other legacies remaining unpaid, amounting in the aggregate to a considerable sum.

Hearing *pro confesso*.

Mr. *Arnoldi*, for the plaintiff, asked for the usual decree for administration of the estate of the testator *Thomas Coppin*.

[BLAKE, V.C.—From the statements in your bill, it appears your client is a legatee for only five pounds: it seems hard at this late day to burthen the estate with all the costs of an administration suit to enforce payment of this small sum.]

Mr. *Arnoldi*. It is shewn that there are several other legatees whose legacies are all, it is alleged, unpaid; some of them of considerable amounts, and amounting in the whole to a large sum of money.

After looking into the authorities—

BLAKE, V. C.—This cause comes on to be heard *pro confesso* against all the defendants. The bill alleges that one *Thomas Coppin*, deceased, died seised of the east half, containing 100 acres, and of the east half of the west half, containing 50 acres of lot 37 in the second concession of Osnabruck. By his will, dated the 2nd of January, 1854, the deceased devised 90 acres of the aforesaid lands to his son, the defendant *Thomas*, and the remaining 60 acres to his son, the defendant *William*. He bequeathed to the plaintiff a legacy of £5, which he charged upon these lands. The defendants accepted the devises in their favor, and went into possession of the Judgment.

1873.

Reynolds v. Coppin.

premises given to them. The legacy to the plaintiff has not been paid, and this bill is filed against these devisees, claiming payment of this legacy, and in default a sale of so much of the lands as may be necessary for its satisfaction. The amount now due in respect of this legacy would be, with interest, about $28. Our General Orders do not limit a plaintiff as to the amount of his claim in order to entitle him to relief in this Court. Under section 25 of "An Act respecting the Court of Chancery," being chapter 12 of the Consolidated Statutes of Upper Canada, it is provided that "the rules of decision in the Court shall, except when otherwise provided, be the same as governed the Court of Chancery in England in like cases on the 4th day of March, 1837." We have therefore to look at the rule in force at this date in England for our guidance. It is to be found at page 60 of *Cox's* Chancery Orders, and is as follows: "Every suit, the subject matter of which

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is under the value of £10, shall be dismissed, unless it be instituted to establish a general right, or unless there shall be some other special circumstance, which, in the opinion of the Court, shall make it reasonable that such suit should be retained." Mr. *Story*, in his work on Equity Pleading, at section 502, says, "a similar rule seems to prevail in the Courts of Equity in America, or at least in those Courts which have been called upon to express any opinion upon the subject. In New York this was the established rule at an early period of its Equity jurisprudence; and the amount has been recently increased by the Legislature to the sum of $100." At section 500, in speaking of demurrers, it is stated that "one of the objections, which may thus be taken, is, that the value of the subject of the suit is too trivial to justify the Court in taking cognizance of it; or, as the phrase usually is, that the suit is unworthy the dignity of the Court. The true ground of this objection is, that the entertainment of suits of small value has a tendency, not only to promote expensive and mischievous litigation, but

also to consume the time of the Court in unimportant and frivolous controversies to the manifest injury of other suitors, and to the subversion of the public policy of the land. Courts of Equity sit to administer justice in matters of grave interest to the parties, and not to gratify their passions, or their curiosity, or their spirit of vexatious litigation."

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Reynolds v. Coppin

I am of opinion that the Court is bound by the English Order in the matter in question, and that this suit cannot be entertained, as the amount involved does not exceed $28, and it does not come within any of the exceptions referred to.

Judgment.

After writing the above, I ascertained that this question had already been disposed of; and I find that the case of *Gilbert* v. *Braithwaite* (*a*), following *Westbrooke* v. *Browett* (*b*), shows that the plaintiff is not entitled to a decree in this suit for the reasons above given.

HESSIN v. COPPIN.

Patent of invention—Use of machine before patent granted.

The inventor of a new machine, before taking out a patent, erected and sold a machine embodying his invention, and the purchaser had it in use for three years before the inventor procured a patent. The machine so sold was not put up for the purpose of experimenting but was sold as a complete machine, and was placed in the premises of the purchaser in order that he might reap the profits expected from its use:

Held, that the inventor had lost his right to a patent.

Motion for injunction, under the circumstances stated in the head note of judgment.

Mr. *Moss*, Q.C., for the motion.

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

(*a*) 3 Chan. Cham. Rep. p. 412. (*b*) 17 Grant 557.

1873.

Hessin v. Coppin.

The points relied on by counsel appear sufficiently in the judgment.

BLAKE, V. C.—The plaintiff *Damant* claims to be the inventor of two machines, the one for the preparation of the paste from which lozenges are made; the other, an improved machine for the cutting this paste into the forms in which they are usually sold by confectioners. These two machines can be used together, and are so worked by the plaintiffs; and, in fact, they form one complete machine. Patents for both of them have been issued in the United States of America to the plaintiffs. The former machine alone has been patented in Canada. The plaintiff *Hessin* is interested, with his co-plaintiff, in the Canadian patent, which was issued on the 27th November, 1872, to the plaintiff *Damant*. Before the machine was patented, and, as early as July, 1869, *Hessin* purchased one of the paste-preparing and lozenge-cutting machines, complete, from *Damant*, and erected it in his workshop in this city, where it has been from that time hitherto continuously used. Subsequently, and, towards the end of 1872, the defendant *Chilman* desired to purchase such a machine, and employed his co-defendant, who has procured it for him. The defendant *Coppin* was, it is alleged, in the employment of the plaintiff *Hessin*, when the machine was introduced into and used in his establishment; and, having acquired the knowledge which enabled him to construct it while a servant there, he obtained his information, it is said, under circumstances, which bound him to secrecy; and therefore it is contended he should be restrained from disclosing the same. The plaintiffs further contend that the acts of the defendants are an invasion of their rights under their patent; and that therefore the court should enjoin the defendants. The machine ordered by *Chilman* has been completed at a considerable expense, and it is now ready to be put up in his store, and is required for immediate use. I stated upon the argument of the

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1873.

Hessin. v. Coppin.

motion, that whatever might be the relief to which the plaintiffs may ultimately be found entitled against the defendants, I did not think it right to interfere in their favor on an interlocutory motion, upon the ground that *Coppin* should not use the information acquired in the manner alleged by the plaintiffs; that, as *Chilman* might, the next day, go into the market and procure a machine to be made by some person, other than *Coppin*, I could not grant the injunction asked for by the plaintiffs, unless they shewed themselves entitled thereto under their patent. To this the learned counsel for the plaintiffs assented, and therefore, I do not now further consider what, owing to circumstances peculiar to *Coppin's* position, the rights of the plaintiffs as against *Coppin* may be. I should have preferred the motion to have stood over until the Spring Sittings, when the whole matter could have been disposed of, but the plaintiffs would not undertake to go down, and so I proposed the examination of the plaintiff *Damant*, before the Court: and this having taken place, I proceed, as best I can, with the information before me, to dispose of the motion. The defendants resist the application principally upon three grounds:— They say the plaintiffs are not in a position to claim protection under the patent they procured in Canada: Firstly, owing to the dealings of the plaintiffs with the machine in question before it was patented. Secondly, owing to the want of novelty in the so-called invention. Thirdly, on account of the insufficiency of the specifications which accompanied the application. In order to consider the first of these objections, it is necessary to look at the true position of the plaintiffs in respect of the machine in question; and one benefit of the examination of *Damant* is, that we have the statement of one of the plaintiffs as to what really passed between him and his co-plaintiff, upon the negotiation connected with its procurement. I do not prejudice the case of the plaintiffs, by acting upon this evidence. *Damant* says, "This machine is *Hessin's*. There is an agreement between us

Judgment.

1872. Hessin v. Coppin. —Mr. *Hessin* and myself. Mr. *Hessin* had the machine built. It belonged to him. It never belonged to me. It was so agreed. I have no interest in this machine; my interest lies in the patent—not in this machine. I helped to put up this machine in Toronto—the one that came over in 1869. The paste-preparing and cutting machine have both been working successfully since. The profits or losses made by the machine belong to *Hessin*. I have nothing to do with them." Again, "The paste-preparing machine was not an experiment when sold to *Hessin*, then at work successfully for two years;" and, "But the moment it was put up, there was no doubt about it, and then it was worked for gain in the course of his business." The evidence then shews clearly that the machine which it is said the defendants have not the right to copy, was "constructed" in 1869—"purchased" by *Hessin* from *Damant* about July of the same year; erected at once and used for over three years "before the application for a patent therefor." It is equally clear that the machine was complete when it was erected, and that no improvement has been made upon it from that period up to the time when the patent was granted. It was not put up for the purpose of experimenting upon, but as a perfected machine, in order to reap the gains and profits expected from its use; and which have been made. The first question is, whether the plaintiffs can, upon such a state of facts, uphold this patent.—Apart from authority, I would not have thought the plaintiffs came within the spirit of the laws as to patents. I take it that the intention of the legislature is, while protecting the inventor, at the same time, to encourage the making public that which may prove beneficial to the community. While a patentee is encouraged in the use of his inventive faculties, this encouragement is given to a great extent, in order that thereby the public may be benefited. The intention of parliament is, on the one hand, to protect the inventor; on the other, to gain an advantage for the world at large. The price that is

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paid by the inventor for the protection given by law to him, is the immediate disclosure of the result of his labours. If he does not choose to pay this price for his limited monopoly, he does not come within that class of persons that the legisla[illegible] thinks deserving of protection. It is not reasona[illegible] that a man should derive the immense advantage which may arise from a ten years' first user of his invention, and then, when he finds it impossible longer to preserve his secret, or he has reaped all the benefit he pleases from a sole use of the article, be allowed to come and claim, the same protection as is given to one, who, from the first, shares with others the benefit of his discovery.

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Hessin v. Coppin.

The "public use," with the consent or allowance, of the inventor of the article to be patented, for more than one year previous to his application, was made a bar to the granting of the patent; but there was much difficulty in ascertaining what constituted a "public use." This difficulty is, to a great extent, removed by "the Patent Act of 1872," and its wording leads to the conclusion that it is becoming more a matter of moment than formerly, to require of the patentee an immediate application for his patent, if he desire to be held entitled thereto. Section 48 of this Act lays it down that a patent for a machine shall not be invalid in certain cases, "unless the same was purchased, constructed, acquired, or used for a longer period than one year before the application for a patent therefor, which circumstance would then have the effect of making the invention one, having become public, and in public use." In section 6 we have the expression "in public use," and in section 40 "in the possession of the public;" but we have not, until section 48, a definition of what will constitute a "public use," or "the possession of the public." It is under section 6 the plaintiffs claim the rights they insist on, and the material words of this clause are, "any person having invented any new and useful art, machine,

Judgment.

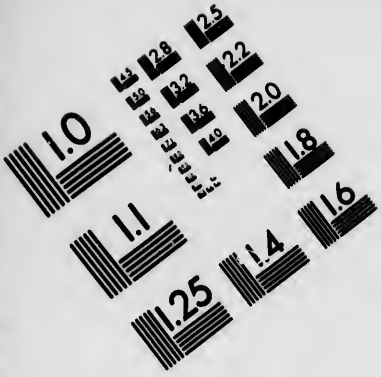
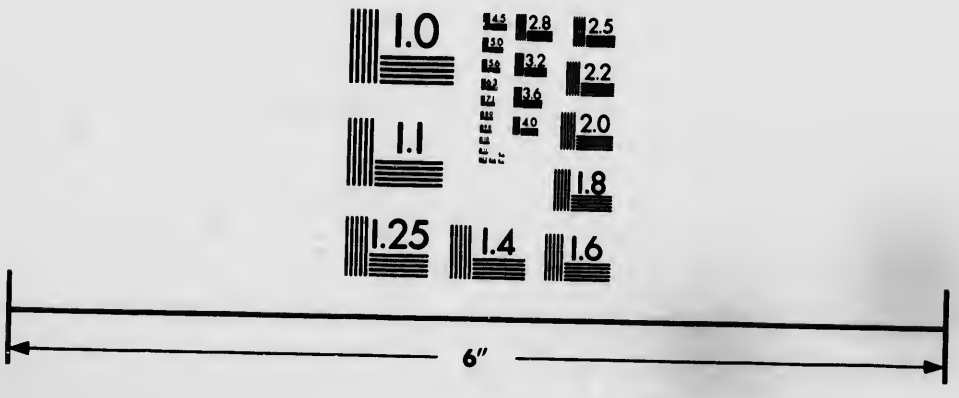


IMAGE EVALUATION TEST TARGET (MT-3)



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manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others, before his invention thereof, and *not being in public use* or on sale before his invention thereof, *and not being in public use or on sale for more than one year previous to his application in Canada, with the consent or allowance of the inventor thereof may, &c.*" If then this machine had been "in public use" for more than a year previous to the application for a patent with the consent or allowance of the inventor, the plaintiffs are not entitled to the patent they claim. But section 48 declares a machine to be "in public use" if for a longer period than one year before the application for a patent therefor it has been purchased, constructed, acquired, or used; and *Damant* in his evidence proves conclusively that the machine was purchased, constructed and used for more than a year before the application for the patent, under which protection is claimed by the plaintiffs. I am therefore of opinion that the patent in question is, for this reason, invalid. I do not think there are any facts which could throw much further light upon this branch of the case, and I do not feel the same difficulty in disposing of it that arises frequently where the case rests, not upon a question of law, but on one of fact. The injunction asked for, would prevent the defendant *Chilman* from using the machine in question for the next six months; he has already been restrained for the past three months, and I do not think I could, even did I feel some doubt upon the question, when the plaintiffs refuse to have the cause disposed of at an early sittings, further delay the defendant's action.

Judgment.

I have somewhat considered the other two points raised, and although I would not like upon them to dispose of this motion, as the oral examinations and explanations which would be given at the hearing, may materially alter my present conclusions, I shall state

them shortly for what they may be worth. *Damant* says, "In *Hassock's* machine there was a covering apron; but it could not be used continuously unless you placed the cylinders under the rollers, the lifting for dusting would be obviated by the cylinders; but the cylinders are not attached to all the rollers—there is not anything to prevent these cylinders from being attached to all the rollers—the paste is carried on successively until we come to the rollers to which the cylinders are not attached * * the cylinders in the *Hassock* machine are covered with bolting cloth * * the cylinders are placed from one to two feet from the rollers—the dust would come out unevenly even if the cylinders were placed near the roller—the machine I have been describing is not what I now use in *Christie's*. About five years I have used, at Christie's, the same machine I am using to-day. The rolling machine I am using to-day is the same as *Hessin's*." 1873. Hessin v. Coppin.

"There could not be any difficulty in applying these boxes to *Hassock's* machine; my invention is in putting the starch box in contact with the aprons. * * I tried a good many experiments before I got the machine ready to work. It is a combination of the two that makes the benefit; * * there is not anything to shew how high the boxes should be; * * the specifications would enable a mechanic to construct a machine, except as to the rate of speed at which it is to be worked. * * The different pairs of rollers are worked at different rates of speed If this is not attended to, the paste will be torn. There is a fixed rule about this. It is not generally known. I never knew a case in which this was applied; the machine would be useless, it could not make the paste in a continuous stream without this knowledge. It is a valuable part of the machine; the public could get this from me; it took me some time to find it out, and is an important part of my invention." In his specification *Damant* claims as follows: "1st. The combination with each other of two or more pairs of aprons, with Judgment.

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gradually diminishing spaces between every succeeding pair, substantially as and for the purpose herein shewn and described. 2nd. The combination of the starch boxes, D. D., with the conveying and flattening aprons, A1, A2, A3, A4, substantially as herein shewn and described." And upon this the patent issued for a machine which, it is stated, consists, "1st, in the combination with each other of two or more pairs of aprons, with gradually diminishing spaces between every succeeding pair. 2nd, in the combination of the starch boxes D.D., with the conveying and flattening aprons A1, A2, A3, A4."

Judgment.

It appears to me, that, looking at *Hassock's* machine as described by *Damant*, and then reading the patent of the plaintiffs', and the specifications upon which it issued, there is no such novelty shewn in the specifications and patent as would be protected by our patent laws. In the *Hassock* machine we have a paste roller: an endless apron; a pressure between this endless apron and a metal roller; and a box from which the starch is cast upon the apron and the roller. A great deal of stress has been laid upon the fact, that the machine in question has two endless aprons, and against these the paste is pressed, and that there is a continuous carrying on of the paste. The introduction of the endless apron above as well as below, cannot be said to be a novelty. The endless apron has for years been used in the manufacture of paper and of biscuits, and I do not think, looking at the case of *Abell v. McPherson* (*a*), that even if we had nothing more than this, it could be possible to support this patent. It would come within the rule there laid down as vitiating a patent, for it is an old and well-known contrivance, applied to an analagous purpose. But the matter seems to be ended when we remember that in the very machine itself, there was always the one endless apron, and, all that is done here, is to insert in the

(*a*) 17 Gr.; 23 Affd. in Appeal, 18 Gr. 437.

machine. in place of the upper roller formerly used, a second endless apron. The spaces in the old machine between the roller and the endless apron diminished, and here the spaces between the endless aprons diminish In the old machine the conveying apron would, another cylinder being placed, (as to which *Damant* says there is neither novelty nor difficulty), continuously carry the paste: so that the first branch of the specification when compared with the *Hassock* machine, does not seem to afford us any such novelty as to entitle the plaintiffs to a patent. Then in the *Hassock* machine there were the double starch boxes, the one over the covering apron, and the other over the roller; the patent and the specifications do not shew that in the plaintiffs' machine there is to be the alteration in their position, which is now adopted by them, and which, it is contended, makes the great difference in the machines. I do not think the patent and specifications shew any such novelty as the patent laws require. The plaintiffs may have made some trifling alteration or improvement, but they cannot, under cover of this, which is not patentable, seek to cover a mass of matter to which they have no peculiar right. Even if the patent should be granted, the specification is clearly insufficient. *Damant* tells us, amongst other things, that the putting the starch boxes in contact with the aprons and the working the pairs of rollers at particular and different rates of speed are valuable and important parts of his invention,—that without the knowledge of these matters the machine is useless, and that before he arrived at the required information he made a good many experiments. These are in fact, the main points upon which, in his evidence, he sought to support his patent; but there is not anything in the patent or the specification to call our attention to or enlighten us upon these matters; on the contrary, the specification leads to the conclusion that the machine may be effective when used simply with a box having a perforated bottom, whereas *Damant* shews us this is not

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so, and that the bolting cloth must be used and brought in contact with the apron. The full and ample disclosure needed is not to be found in this patent or specification. In *Simpson v. Holliday* (*a*), the patent thus described the process: "I mix aniline with dry arsenic acid, and allow the mixture to stand for some time; or, I accelerate the operation by heating it to, or near to its boiling point, until it assumes a rich purple colour." There it was admitted that without the application of heat the colour could not be produced, and it was shewn that a competent workman would apply heat; it was held, however, that this specification was bad, and the patent founded thereon was invalid. In *Neilson* v. *Betts* (*b*), Lord *Colonsay* says (*c*), "I think it is not enough that there has been in a former patent a general disclosure of the object to be attained, unless there was a sufficient specification pointing out the mode of obtaining it." In *Parkes* v. *Stevens* (*d*), Lord Justice *James* thus remarks upon the requirements of a specification: "It is obvious that a patentee does not comply, as he ought to do, with the condition of his grant, if the improvement is only to be found like a piece of gold, mixed up with a great quantity of alloy, and if a person desiring to find out what was new, and what was claimed as new, would have to get rid of a large portion of the specification by eliminating from it all that was old and common place, all that was the subject of other patents, or of other improvements, bringing to the subject, not only the knowledge of an ordinary skilled artizan, but of a patent, lawyer, or agent." See also upon the question of novelty and the nature and requirements of the specification: *Cannington* v. *Nuttall* (*e*), *Murray* v. *Clayton & Upton* (*f*). Upon the first ground taken by the defendants I refuse the injunction.

Judgment.

(*a*) L. R., 1 E., and I., Ap. 315. (*b*) L. R. 5, E. & I Ap. 1; (*c*) at p. 24.
(*d*) L. R. 6 Ch. Ap. 36. (*e*) L. R. 5 H. L. 205.
(*f*) L. R. 7 Ch. Ap. 570.

HOOD v. DODDS. 1873.

Insolvent—Petition of appeal from County Court Judge—Notice of appeal—Bond on appeal—Discharge from arrest—Final certificate.

The decision of a County Court Judge on an application by an insolvent for his discharge from imprisonment, is appealable.

A petition of appeal from the decision of a County Court Judge, acting in insolvency, need not set out all the evidence, documents, and materials used before the Judge. What is needed is, that either the petition, or the notice accompanying it, should shew to the opposite party the objection which is taken to the proceeding appealed from, and the materials to be used on the argument of the appeal.

An order in insolvency was made on the 24th day of December. The fifth day thereafter fell on a Sunday:
Held, that service of notice of appeal on the Monday following was in time.

It is not necessary that the security to be given on an appeal in insolvency should be executed in presence of a Judge.

An insolvent may be entitled to his discharge from arrest, though his conduct in trade may have been such as to disentitle him to a certificate of discharge from his debts.

The absence of any satisfactory statement how it came that a credit balance of $15,000 a short time before the insolvency was turned into a debit balance of nearly $13,000; the loan of $17,000 by the insolvent to his brother, to carry on a business which failed, and which was carried on without capital; the receipt of $1,250 by the insolvent a few months before his insolvency without any reasonable account of what had become of it, were considered to be circumstances which shewed that the insolvent was not entitled to his final certificate.

Where creditors are called upon to accept a composition from their debtor, they are entitled to know where the goods and money entrusted to the debtor are gone, and to what causes the loss is to be attributed.

Statement.

This was a petition, by way of appeal from the ruling of the County Judge of Waterloo, filed by *George Hood*, of Guelph, cattle-dealer, setting forth that the respondent *George Dodds* had been arrested on the 13th of September, 1872, on a writ of *ca. re.*, at the

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suit of the petitioner; and that special bail was in due course put in to the action; whereupon *Dodds* was liberated by the sheriff; and that he subsequently made an assignment in insolvency to one *Jackson*, who at a meeting of creditors was appointed assignee; and that on an application to the Judge of the County Court *Dodds* was, under the provisions of section 145 of the Insolvent Act of 1868, discharged from arrest.

Statement.

The petition set forth several grounds of appeal from this order of the Judge—(1.) That no schedule, as required by the third section of the said Act, was prepared or submitted at the first meeting of creditors of the insolvent. (2.) That from the evidence adduced before the Judge it did not and could not properly appear that the debtor had *bonâ fide* made an assignment, as required by said section; or that the debtor had not been guilty of any fraudulent disposal, concealment, or retention of his estate, but had acted fraudulently, first, in having secreted part of his estate in order to defeat his creditors generally and the petitioner in particular: secondly, in having fraudulently and improperly procured the indorsement of the petitioner on several notes of the insolvent, and had fraudulently obtained large sums of money from the petitioner: third, that he had kept no proper books of account; and that his attempted explanations in respect of his books and accounts were unsatisfactory and insufficient, and were not of such a nature as to justify his discharge.

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

Mr. *Bowlby* (Berlin), contra.

The other points relied on by counsel appear in the head-note and judgment.

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Head v. Dodds

BLAKE, V. C.—This is an appeal from the order of the County Court Judge of the County of Waterloo, made on the 24th of December, 1872, whereby he discharged from arrest, the defendant, an insolvent under the Act of 1869.

The defendant was arrested under a *ca. re.* on the 13th of September, 1872, and shortly afterwards he gave bail in the action. On the 9th of November following, he made a voluntary assignment under the provisions of the Insolvent Act of 1869. On the 29th of the same month an official assignee was duly appointed. On the 30th of the same month the defendant was rendered, and remained in close custody until discharged as above mentioned, under section 145 of the Insolvent Act.

Upon the argument of the petition Mr. *Bowlby* made four objections to its being heard, before proceeding with the main ground of his opposition to the appeal; and these were, first, that the matter in question is one as to which the judgment of the County Court Judge is final. Judgment.

The section upon which the appellant bases his right is number eighty-three, and it says, "If any of the parties to any appeal, contestation, matter, or thing, upon which a Judge has made any final order or judgment, are dissatisfied with *such* order or judgment * * they may appeal therefrom * * * to the Court of Chancery." This section gives larger powers than that conferred by the Act of 1864: in words it embraces applications such as the present; and I can see *no reason* why the question of the granting or refusing the discharge from arrest should be a matter in which the judgment of the County Court Judge is to be final.

I therefore think this objection must be overruled; the next objection taken is, that the petition is defective

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because it does not comply with section eight-four, which says the appeal shall not be permitted, unless the party desiring to appeal causes to be served upon the opposite party and his assignee "an application in appeal setting forth the proceeding before the Judge, and his decision thereon."

Here a petition has been presented and served, also a notice of the application and a copy of the Judge's decision, but it is said all the evidence, documents and materials used before the Judge must be set out in the petition. I do not think this is necessary. What is needed is, to shew the opposite party the objection you take to the proceeding against which you move, and the material you purpose using in the argument of the appeal. The notice given refers to the proceedings before the Judge upon which the appellant relies for a reversal of his order, and it states that these will be read on the application. Order 345 of the General Orders of the Court of Chancery requires an application for an order to amend to be made "upon motion, the notice of which is to state the required amendment," but it has been held that this order is satisfied where the notice of motion refers to an affidavit proving an exhibit which sets forth the proposed amendment. No doubt the object of the Legislature here is to require a reasonable notice of the matter appealed from, the grounds upon which the appeal is based, and the materials which support it; and it is for the Court to say whether there has been a misleading of the respondent, or a failure to supply him with all that is needed to enable him to prepare to answer the application. It is not pretended there is anything of the kind here, and I overrule this objection.

Judgment.

The next ground is, that the appellant did not serve his petition within five days from the day on which the order or judgment is rendered. The order was made on the twenty-fourth of December, the fifth or last day would

apparently fall on the twenty-ninth, but as this, the last day, is a Sunday, the appellant would have the whole of the day following to perform the required act; the petition was served on the thirtieth, which was therefore in time. Independently of this general rule or practice, section 143 of the Act provides that the word day shall mean a judicial day; this being so, Christmas day and Sunday, which intervened, must be excluded, and this notice would therefore not be too late. 1873. Hood v. Dodds.

The fourth objection is, that the section which requires security to be given as a condition precedent to the hearing the appeal has not been complied with. The words of the section (84) are, that the appeal shall not be permitted unless the party desiring to appeal within the said period of five days causes security to be given before the Judge by two sufficient sureties. Here the bond was duly executed by the parties in the town of Guelph and transmitted to and received by the Judge in the town of Berlin where he resides, and it is said, although no exception is taken to the form of the bond, or the sufficiency of the bondsmen, that the Act is not complied with as the security was not given "before" the Judge. Judgment.

I do not think it necessary to consider whether or not there is anything in this objection, as I am of opinion it is one that should have been taken before the Judge of the Insolvent Court: the point is disposed of in *re Owens* (*a*).

It was under section 145 of the Act in question that the defendant obtained his discharge; and the portions of that section material to the present application are "if on such examination it shall appear to the satisfaction of the Judge that the said debtor has *bona fide*

(*a*) 12 Gr. 564.

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made an assignment as required by the tenth section of this Act, and has not been guilty of any fraudulent disposal, concealment, or retention of his estate, or any part thereof, or of his books and accounts or any material portion thereof, or otherwise in any way contravened the provisions of this Act, such Judge shall by his order on motion discharge the debtor from confinement or imprisonment." It was argued that as the defendant possessed nothing to assign, he having before his assignment parted with or encumbered all his estate to its full value, it could not be said that he had *bona fide* made an assignment. It is not shewn that there was such a fraudulent parting with, or encumbering of the estate of the debtor as would, taken in connection with the other facts of the case, justify the Court in the conclusion, that the insolvent did not in good faith, make his assignment: *Re Thomas* (*a*) shews that the absence of property on the part of the insolvent is no bar to his obtaining the benefit of the Act.

Judgment.

Even if one principal object of the insolvent was to obtain his discharge from arrest by means of these insolvency proceedings, I do not think this material, so long as the object of the Act, in so far as the creditors are concerned, is attained by procuring whatever portion of the debtor's estate they may be entitled to for the satisfaction of their debts. I think the debtor comes within the section referred to in this respect, that he has *bona fide* made an assignment under the 10th section of the Act.

It was further argued that the insolvent had not fulfilled the requirements of section 3 of the Act in not filing the declaration therein referred to. But at the meeting held he was not asked to do so: the schedule and statements which he was to verify by

(*a*) 16 Gr. 196.

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his declaration, were not prepared. I take it that when the *assignee* has not prepared these statements and schedules, and the creditors do not ask for them, and there is in fact nothing for the insolvent to verify, the Court will scarcely detain him in jail on the ground that this is a contravention of the Act. In *Re Thomas* it was held that the default of the assignee was no ground for refusing an insolvent his final discharge, and I must conclude it to be *a fortiori* in favor of the insolvent where his application is for discharge from arrest. Besides, here the creditors and assignee have nothing in reality to complain of on this head, as the insolvent has submitted to a lengthened examination, and furnished them, apparently, with all the information in his power: *In re Barwick* (*a*).

Judgment

The most difficult question for consideration is, whether the debtor has, apart from the matters disposed of, shewn himself entitled to his discharge. This difficulty arises upon the true construction of the words, "or otherwise in any way contravened the provisions of this Act." In sub-section 2 of section 145, the preceding words are, "if on such examination it shall appear to the satisfaction of the Judge that the said debtor has *bona fide* made an assignment as required by the 10th section of this Act, and has not been guilty of any fraudulent disposal, concealment, or retention of his estate, or any part thereof, or of his books and accounts, or any material portion thereof." If the words "or otherwise in any way contravened the provisions of this Act," are intended to embrace all the provisions, conditions, and stipulations to be observed by the insolvent for all purposes, then I do not think he can claim his discharge from arrest, for I am of opinion he cannot claim his discharge as an insolvent. He is not entitled to a discharge, which is equivalent to a certificate that throughout his business he has conducted himself in such a manner as that the mercantile commu-

(*a*) 5 L. T. N. S. 238.

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nity are warranted in giving him credit, and dealing with him as an honest and upright trader, and one whose business capacity and knowledge of trade render it safe to have dealings with. The absence of books: the absence of any satisfactory statement as to how it comes that a credit balance of $15,000, a short time before the insolvency, is, within a few months, turned into a debit balance of nearly $30,000: the loaning to his brother a sum of $17,000 to carry on a business in which he failed, and which was being carried on without capital: the Hamilton debt of $12,000 unsecured, and incurred under the circumstances set forth by the insolvent: the receipt of $1,250 from the plaintiff by the insolvent a few months before his insolvency, and not a word of explanation as to what has become of it; all go to shew that the defendant is not entitled to an order of the Court which has the effect I have above stated. Where creditors are called upon to accept a composition from their debtor, the least satisfaction they may demand is to know where the goods or money entrusted to the debtor have gone, and to what cause the loss is to be attributed, in order that they may learn whether for the future it is the insolvent trader they are to avoid, as one incapable of carrying on that which he has undertaken; or, the class of business in which he has been engaged, as one apt to lead to bankruptcy.

Judgment.

It is necessary to impress this upon those who desire to take advantage of this Act, as they seem for the most part, to consider there is but one object to be served by it, and that is the procuring for all debtors an absolute discharge from their debts.

Although a debtor may fail to shew himself entitled to his discharge as an insolvent, it may reasonably be said that it does not follow he is disentitled to his discharge from arrest. If the Legislature intended to lay down the rule that the discharge from arrest was to de-

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pend upon the same facts and circumstances as the ordinary discharge, section 145, in place of setting forth in the manner in which it does the requirements to be demanded of the debtor, would probably have simply stated that any debtor shall be entitled to his discharge from arrest, who shews that which would entitle him to his discharge as an insolvent. It seems to me obvious, looking at the present law of arrest, and the length the Legislature have gone in abolishing imprisonment for debt, that the conditions of discharge in the one case, should not be so severe as in the other. It is reasonable enough to say: "you must keep books if you are to obtain a discharge as an insolvent; but, although you may have omitted this duty, we will not detain you in jail on that account."

Judgment.

I am of opinion that the words, "or otherwise, in any way contravened the provisions in this Act," cannot be read in so wide a sense as to include all the requirements and conditions necessary to be observed in order to procure the general discharge of the insolvent, but that they must be limited to those provisions required to be performed by the insolvent prior to his application, such as the assisting in the preparation of statements, the attending the meetings of creditors, submitting to examinations, and such like. These may be termed, the direct requirements or provisions of the Act, as distinguished from those which are mere conditions to be fulfilled, if the insolvent desires to procure his certificate. Another reason that leads me to this conclusion is, that in this section we have repeated what appears in section 101 as to the effect of the fraudulent disposal, concealment, or retention of the estate or books of the insolvent. The other minor matters referred to in section 101 are not repeated in section 145, but this important one which is considered sufficient to disentitle the debtor to any discharge, appears in both sections. If it was the intention of the Legislature to require the whole of this section to

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be observed, I think it would have been referred to in unmistakable language: and I am also of opinion that if all that is laid down in sections 103, 147, and sections 86 to 94 was to be observed, then, in place of selecting some matters therein set forth, and omitting the others, the Act would have referred to these sections specifically, or set out the matters in full. The best opinion I can form on the subject is, that if the debtor submits to an examination, and upon such examination it appears that the debtor has made a *bona fide* assignment as required by the 10th section of the Act, and has not been guilty of any fraudulent disposal, concealment, or retention of his estate, or any part thereof, or of his books and accounts, or any material portion thereof, and has not contravened the provisions of the Act, meaning thereby, not those conditions which are set forth, as being the terms upon which the final discharge is obtained, but those direct provisions required to be performed up to the time the discharge from arrest is sought, that the debtor is entitled to his discharge from arrest. I think the insolvent has complied with section 145, explained in the above manner, that he is entitled to his discharge, and that the Judge of the County Court was right in granting it, I therefore dismiss the appeal;—but I do so without costs. I do not think it at all unreasonable that the creditors feel it a hardship that the debtor should give so poor an account of his dealings with his estate, and I think it reasonable that wherever a debtor gives as little and as unsatisfactory information as we find here, about that in which his creditors are entitled to look for a full and satisfactory statement upon an application for his final discharge, or for his discharge from arrest, there should be the fullest discussion upon the matters of the estate: in *In Re Smith* (*a*), *In Re Lamb* (*b*).

Judgment.

(*a*) 4 Practice Reports, 89. (*b*) 4 Practice Reports, 16.

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TO THE

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ABANDONMENT.

See "Equity of Redemption."

ABORTIVE HEARING.

At the hearing of a cause the plaintiff was held entitled to a decree on the pleadings as they stood; the defendant had omitted to set up a defence of the registry law; and the plaintiff had for that and other reasons not attempted to prove notice: under these circumstances, she defendant was afterwards allowed to set up the new defence, on terms of paying the costs of the former hearing.

Forrester v. Campbell, 143.

ACCOUNT OF PROFITS.

See "Tenants in Common."

ACCOUNT STATED.

See "Principal and Agent," 2.

ADDING PARTIES IN THE MASTER'S OFFICE.

A registered judgment creditor had filed a bill impeaching a conveyance made by his debtor, which was ultimately declared void, and, in proceeding to take the account in the Master's office, the plaintiff obtained and served an order from the Master, making a prior incumbrancer a party:

that although it was alleged there were other legacies remaining unpaid, amounting in the aggregate to a considerable sum.

Reynolds v. Coppin, 627.

See also "Practice," 4.

AFFIDAVIT AS TO AMOUNT OF ESTATE.

See "Administration Suit." 4.

AGENT, SIGNATURE OF.

See "Statute of Frauds."

ALIMONY.

1. A husband, against whom his wife has obtained alimony, on the ground of desertion, is not entitled, as of right, to have the decree vacated or suspended, on his afterwards offering to receive and maintain her.

Cronk v. Cronk, 283.

2. A woman filed a bill for alimony on the ground of adultery, and desertion, which suit was ultimately arranged by the husband agreeing to pay a sum of money which the plaintiff accepted in payment of all past or future claims for alimony; and a decree was drawn up stating this arrangement, and that it was agreed to dismiss the bill; and that such dismissal should be treated as a dismissal on the merits:

Held, that such decree furnished no defence to a bill afterwards filed by the wife for alimony on the ground of subsequent desertion and adultery.

Henderson v. Henderson, 464.

AMENDING PLEADINGS, COSTS OF.

See "Abortive Hearing."

APPEAL FROM COUNTY COURT JUDGE.

See "Insolvency," 2 3, 4, 5.

APPEAL FROM THE MASTER.

See "Conflict of Evidence."
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APPEAL ORDER.

Where the Court of Appeal orders payment of money, and says nothing as to any antecedent interest thereon, such interest cannot afterwards be added by the Court of Chancery; at all events, in cases in which, though interest is usually given, it was not a matter of strict legal right but of discretion.

Box v. The Provincial Insurance Co., 48.

APPEAL TO PRIVY COUNCIL.

See "Practice," 3.

ARBITRATION.

1. Where at the commencement of a reference, *L* the arbitrator for one side, conferred privately with the parties who nominated him on the matters in question, and on the evidence to be offered; and continued this course to the end, it was *held* that the impropriety was not cured by shewing that after the reference had made some progress, the other arbitrator acted with similar irregularity on the other side.

In re Lawson and Hutchinson, 84.

2. The reference was to two arbitrators, with power for the arbitrators to appoint an umpire, who was to make an award if the two arbitrators disagreed; an umpire was accordingly appointed; and, the arbitrators differing the umpire made an award:

Held, that each party was entitled to the free judgment of the two arbitrators on the matters in difference, as a condition precedent to the umpire's authority coming into force; as well as their free judgment in the appointment of the umpire; and that the irregularity of the arbitrator *L's* course in holding private conferences with one of the parties was sufficient to avoid the award of the umpire. *Ib.*

3. After the two arbitrators had finally differed, the umpire had a private conversation on the subject of the reference with the arbitrator *L* in the absence of the other arbitrator and of the parties: *Held*, that as *L* had acted as the agent for one side, private conversation with him was as injurious and objectionable as private conversation with the principals would have been. *Ib.*

4. The Court allowed the party prejudiced, to serve a supplementary notice embodying the objection as to the course of

the umpire and arbitrator *L*, the same having come to light on cross-examination, and there being strong reason for apprehending that the award was not a fair award. *Ib.*

5. It is no objection to a motion to set aside an award, that the award has been made an order of Court. *Ib.*

ARBITRATORS, IRREGULAR CONDUCT OF.

See "Arbitration," 1, 2, 3.

ARREST, DISCHARGE FROM.

See "Insolvency," 6.

AUCTION SALE.

See "Redemption," 1.

AWARD.

See "Arbitration," 2.
"Railway Act."

BILL OF COSTS.

[WHEN DELIVERED NOT REVOCABLE.]

See "Practice," 5.

BOND ON APPEAL.

See "Insolvency," 5.

BONUS TO RAILWAY COMPANY.

See "Municipality."

BUSINESS CONTINUED BY EXECUTOR.

See "Personal Representative," 2.

BY-LAW.

See "Municipal Corporations."

CHAMPERTY.

1. An heir-at-law being supposed to have a right to call trustees to account and to impeach sales made by them, such supposed right being considered very doubtful and being one which could only be reached through a suit in this Court, and the heir-at-law being himself unwilling to litigate the matters in question, he assigned his interest to a third person; and, by the agreement, the consideration for such assignment was only to be paid in case of success.

Held, that a merely speculative purchase of this kind cannot be enforced in equity.

Little v. Hawkins, 267.

2. The plaintiff admitted himself to have been a mere speculative purchaser, buying for less than one-sixth of its value a piece of land which he knew to be in the occupation of another person who claimed to be the owner, from a vendor whom he sought out, and who did not pretend to be the owner of the subject of the purchase; whom the plaintiff agreed to indemify against the costs of the litigation which both anticipated, and who was to share in the fruits of the contemplated law suit:

Held, that this contract savoured of maintenance and champerty, and was not that honest *bona fide* purchase which alone the Registry Law was intended to protect.

Wigle v. Setterington, 512.

CHARGE OF DEBTS.

See "Conversion."

CHATTELS, SALE OF, FOR TAXES.

See "Tax Sale of Chattels."

CLERICAL ERROR.

A mortgage and memorial were executed on the 26th of February, 1855, but by a clerical error the date in the mortgage was written as 1851: The memorial stated the date of the mortgage as 1855:

Held, that the error did not vitiate the registration.

Harty v. Appleby, 205.

COLLATERAL SECURITY.

See "Mortgage," &c., 7.

COLLUSION, JUDGMENT BY.

See "Limitations, Statute of."

COMMISSION.

See "Partnership," 3.

CONFIRMATION.

See "Equity of Redemption," 1.

CONFLICTING EVIDENCE.

Although the rule is, that if the decision of a question of fact depends altogether on the credit to be given to direct testimony of conflicting witnesses, the Court will adopt the finding of the Master; still, where the evidence of the mortgagor and mortgagee as to an arrangement that a mortgage, which had been satisfied, should be allowed to continue as a collateral security for subsequent indorsements and other notes held by the mortgagee, and the mortgage deed had been allowed to remain in the hands of the mortgagee undischarged, and the mortgagee had retained possession of the title-deeds, the Court considered these circumstances as strongly confirming the direct evidence of the mortgagee, and reversed the decision of the Master, who had found against the fact of such an agreement having been made between the parties.

Morrison v. Robinson, 480

CONSIDERATION, EVIDENCE OF.

The amount mentioned in a conveyance as the consideration money is not conclusive evidence of the true consideration in favor of the vendor, on a bill filed by him impeaching the transaction, on the ground of inadequacy of price.

Shank v. Coulthard, 324.

CONTESTING CREDITOR'S JUDGMENT.

See "Fraudulent Conveyance," 3.

CONTRACT FOR WORK PARTLY PERFORMED.

See "Lease" 1.

CONVERSION.

A testator after directing that his debts should be paid by his executors, gave to his wife during her life all the rents and interest of the property for her sole use; and then willed that his property should be divided into three equal portions, one to his wife, one to his daughter *M*, and one to his daughter *E*, on condition that his wife should have power to bequeath her portion as she pleased; that *M* should have her portion after her mother's death, and should invest it for the benefit of her children; that *E* should have one half of her portion in absolute control, and the other half to receive the interest as long as she should live, and that then this half should go to *M*'s children; but further if *E* had a child or children at her death, the remaining half should go to such child or children:

Held, that the real estate could not be sold during the lifetime of the wife, the tenant for life, even with her consent.

Held, also, that the direction for payment of debts by the executors did not affect the devises of the real estate.

Henry v. Simpson, 522.

CONVERSION OF REALTY.

[BY STATUTE.]

One of several heirs of an intestate being lunatic, an Act of Parliament was procured authorizing the sale of the intestate's lands, and the investment of the lunatic's share in Government securities or mortgages for the benefit of the lunatic "and his representatives." The lunatic afterwards died, and in a proceeding to distribute the share of the lunatic, it was *Held*, that this share, for the purposes of distribution, retained the character of realty, and was to be divided between his real representatives and not his next of kin.

Campbell v. Campbell, 254.

CONVEYANCE, SETTING ASIDE.

The owner of land subject to mortgages past due and otherwise pressed for money, spplied to a third person, who agreed after some discussion to purchase the real estate as also the chattel property thereon, for a sum amounting in all to about $6,800, which the purchaser arranged, and went into posses-

sion of the property. Sometime afterwards the vendor filed a bill seeking to impeach the sale, on the ground of undue influence and inadequacy of consideration; but the Court being of opinion that the property was not worth more than $7,500; that the vendor had had ample time for deliberation between the verbal arrangement and the written agreement, which time he admitted he had employed in trying to do better with his property than by accepting the purchaser's offer; that the bargain made between the parties was as good a one as at the time and under the circumstances could have been obtained, dismissed the bill with costs.

Shank v. Coulthard, 324.

CONVEYANCE TO DEFEAT CREDITORS.

A conveyance made (prior to 35th Victoria, ch. 11) between a debtor and a third party *bona fide*, and for valuable consideration, when the property was intended to pass and the consideration money paid, *held* valid under 13 Eliz., ch. 5, notwithstanding that the intent of the parties to the transaction was to defeat a creditor who had obtained judgment.

Held, also, that a *bona fide* purchaser from a grantee who had given no consideration, and who had taken a conveyance fraudulent against creditors under Stat. 13 Eliz., was valid notwithstanding such *bona fide* purchaser had notice of the former fraud, and purchased the property with a view of carrying out the intent to defeat the creditors. [SPRAGGE, C., dissenting.]

Dalglish v. McCarthy, 578.

CONVEYANCERS' EVIDENCE.

1. In examining a title under the Act for quieting titles, a memorial executed by the grantee is good secondary evidence where the possession has been in accordance with the title so claimed.

Re Higgins. 303.

2. The weight of authority appears to be also that such evidence is admissible in ordinary suits. *Ib.*

COSTS.

See "Adding Parties in Master's Office."
"Administration Suit," 2, 3.
"Post Nuptial Settlement."
"Redemption."

DESERTION.

See "Alimony," 1.

[SUBSEQUENT TO DECREE.]

See "Alimony," 2.

DEVISEE'S ACTS.

1. A deed by a devisee to defeat a creditor of his own, is void against the devisor's creditors also.

Johnston v. Sowden, 224.

2. A mortgage by devisees subsequent to a writ, against the testator's lands in his executor's hands, being delivered to the sheriff, does not prevent the sheriff selling. *Ib.*

DISCHARGE FROM ARREST.

See "Insolvency," 6.

DISCOVERY.

In a proceeding charging that the mother, in concert with the other two defendants, had abducted and kept in concealment the children of the plaintiff, the two defendants refused to answer certain questions put to them respecting the children on the ground that their answers would tend to render them liable to criminal prosecution under the "Act respecting offences against the person" (32 & 33 Victoria, chapter 20):

Held, that under these circumstances, the defendants were not bound to answer.

Keith v. Lynch, 497.

DISCRETION.

See "Will," 2.

DISSEISIN.

Property owned by a married woman was in possession of her and her husband; *W* their second son lived with them: the wife died leaving her husband and *W* in possession: the husband afterwards left the premises, but *W* continued to reside there. After the death of their father, *J*, the eldest son of the original owner, conveyed in 1832 to *W*, who was still in sole possession; *J's* wife did not join in the conveyance:

Held, that there having been under these circumstances no disseisin, and *J* having conveyed before the passing of the Real Property Act, his widow was entitled to dower out of the property.

Re Higgins, 303.

DOMICILE OF PARTY INTERESTED.

See "Local Legislature," 2.

DOWER.

1. Where a wife joins in a mortgage, and, on the death of her husband, there are not sufficient assets for the payment of all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors.

Baker v. Dawbarn, 113.

2. A vendor of real estate took from the purchaser a mortgage for the whole amount of purchase money, in which his wife joined to bar her dower:

Held, the husband having died and the property having been sold, that the widow was entitled to dower in the excess, after payment of mortgage money and interest, but no more.

Campbell v. The Royal Canadian Bank, 334.

3. The inchoate right of a married woman to dower is not saleable under executions against her.

Allen v. The Edinburgh Life Ass. Co., 248.

4. A testator at the time of making his will and of his death had real estate to the value of $7,600, and personal estate to the value of $305, of which realty to the amount of about $3,805 he disposed of by his will during his wife's life; and he left legacies to the amount of $3,100. To his wife he left a life interest in his homestead farm and a legacy of $1,000. The other real estate he directed to be sold. The residue he divided; but there would be no residue if the widow was to have her dower:

Held, that this was such a disposition of his estate as evidenced an intention that his widow should be put to elect between the provision made for her by the will and her dower.

Lapp v. Lapp, 608.

See also "Disseisin."

EJECTMENT, JUDGMENT IN.

A judgment in ejectment is evidence of the title of the party in whose favor it was given; but whether it is conclusive, and may be pleaded by way of estoppel, has not been determined.

Wightman v. Fields, 559.

ELECTION.

See "Dower," 4.

EQUITABLE ASSIGNMENT.

1. It is no objection to an assignment, in equity, of a claim against a third person, that the work upon which the claim is to arise has yet to be performed.

Buntin v. Georgen, 167.

2. A printer, being about to execute a contract of printing for a customer, applied to a paper maker for a supply of paper, but which he refused to supply unless secured therefor: thereupon a memorandum was signed, with the printer's name, by one, with the cognizance of the other, of two persons having the general management of the printer's business, agreeing to hand over to the manufacturer a draft upon their customer for the amount of the account, payable at three months from the date of completing the work:

Held, that such document was a sufficient assignment of the claim in equity, and that the giving thereof was within the scope of the general authority of the managers of the business. *Ib.*

3. The customer, after having been notified of this arrangement paid the amount to the printer:

Held, that such payment was made in his own wrong; and he was ordered to pay the amount to the plaintiff, the assignee. *Ib.*

EQUITY OF REDEMPTION.

On a bill to redeem, it appeared that plaintiff's ancestor had executed an absolute conveyance, under circumstances which entitled him to redeem; but that he had afterwards acquiesced in the grantee's claim of ownership, and had thenceforward, and for ten years before his death, from time to time accepted from such grantee leases and paid him rents, making no claim of any other interest in the property:

EXEMPTION.

See "Conversion."

FATHER AND SON.

See "Trustee," &c., 1.

FINAL CERTIFICATE.

See "Insolvency," 6, 7.

FRAUD.

[ON CO-PARTNERS.]

See "Partnership," 5, 6.

FRAUDS, STATUTE OF.

See "Statute of Frauds."

FRAUDULENT ASSIGNMENT.

1. In January, 1860, a debtor assigned to certain creditors his interest in land under a contract of purchase: the assignment was made absolute in form so as to deceive and defraud other creditors; but the purpose as between the parties was merely to secure the debt due to the assignees: Shortly afterwards the assignees, with the debtor's consent, had an arbitration with the vendor in respect of the contract, obtained an award of $1,600 in lieu of the land, and received the money. In 1871 a bill was filed by another creditor against the debtor's administrator and the assignees, for payment out of the $1,600, and it was

Held, that the plaintiff was entitled to such payment; that in view of the fraud and trust, the lapse of time was no defence. and that a bill against the assignes by the creditor, instead of by the administrator, was proper.

Gillies v. How, 32.

2. In a suit by a creditor *A* and his assignee *B*, to enforce payment of a debt due by *C* out of the proceeds of certain property assigned by *C* to *D*, it had been declared that the assignments were fraudulent and void against the plaintiffs in the suit:

Held, in another suit by *B* and his assignee against *D* and *C's* representatives in respect of another debt due by *C* to *B*, that, notwithstanding the difference of parties, the decree in the first suit was binding in the second on the question of fraud.

Gillies v. How, 32.

See also "Devisees's Acts."

FRAUDULENT CONVEYANCE.

1. Adequacy of consideration is not necessary to maintain a transaction under the 13th Elizabeth; though in some cases the inadequacy may afford some evidence of guilty knowledge. But a conveyance, by a father to his son, in consideration of an annuity of less value than the property conveyed, does not suggest the son's guilty knowledge of a fraud by his father in the same way that a conveyance for an inadequate price to a stranger sometimes does.

Carradice v. Currie, 1 8.

2. If one purpose of a sale and conveyance is to defeat a creditor, the sale is, in equity, void as to him.

Scott v. Burnham, 234.

3. A sale was made by a devisee to defeat the claim of a creditor of the testatrix; the creditor recovered judgment a few days after the sale and before the payment of the purchase money; and an unsuccessful application was afterwards made in the vendor's name to contest the amount due:

Held, in a suit by the creditor impeaching the sale, that the vendee had under the circumstances no equity to be allowed to contest the judgment. *Ib.*

4. To a bill to set aside a conveyance as void against the grantor's creditors, the grantor, to whom a small balance was due, and who resided in the United States, was *held* not to be a necessary party. *Ib.*

See also "Post Nuptial Settlement."

FUTURE CLAIM.

See "Equitable Assignment," 1.

HEIRS, RIGHTS OF.

1. Heirs, being also next of kin, who had been parties to the continuing of the business of the deceased with his assets

and those of his partner, were *held* precluded from objecting to payment by the estate of the losses incurred in continuing the business.

Lovell v. Gibson, 280.

2. The opinion acted upon by Vice-Chancellor *Mowat*, in *Lovell* v. *Gibson*, 19 Grant, 280, (having reference to 27 Victoria, chapter 15,) that for the purpose of an execution against lands, heirs are now *prima facie* bound by a judgment against the executor, was followed by *Strong*, V. C., with an intimation that, but for that case, he (V. C. *Strong*) would not have arrived at the same conclusion.

Willis v. Willis, 573.

HUSBAND AND WIFE.

See "Separation Deed."

IMPROVEMENTS.

See "Mortgage," &c., 8.

INCUMBERING.

[PROVISION AGAINST.]

See "Mortgage," &c., 6.

INFANTS.

1. It is for the discretion of the Court, in view of the circumstances, whether to allow for past maintenance out of the *corpus* of an infant's estate not intended by a testator to be so applied.

Edwards v. Durgen, 101.

2. A farmer, by his will, gave to his widow his goods and chattels absolutely; also an annuity; and the use of his homestead and other real estate during her widowhood; she married again and claimed to be paid for the past maintenance of the testator's children from the time of his death, out of the *corpus* of the estate devised to them at twenty-one and otherwise. The Court, on further directions, refused to allow the claim.

Ib.

INFORMAL INSTRUMENT CREATING TRUST.

See "Trustee," &c., 2.

INJUNCTION.

See "Practice," 6.
"Trespass."

INSOLVENCY.

1. An assignee in Insolvency cannot acquire priority over a prior vendee of the Insolvent by prior registration of the instrument appointing such assignee.

Collver v. Shaw, 499.

2. The decision of a County Court Judge on an application by an insolvent for his discharge from imprisonment, is appealable.

Hood v. Dodds, 639.

3. A petition of appeal from the decision of a County Court Judge, acting in insolvency, need not set out all the evidence, documents, and materials used before the Judge. What is needed is, that either the petition, or the notice accompanying it, should shew to the opposite party the objection which is taken to the proceeding appealed from, and the materials to be used on the argument of the appeal. *Ib.*

4. An order in insolvency was made on the 24th day of December. The fifth day thereafter fell on a Sunday.

Held, that service of notice of appeal on the Monday following was in time. *Ib.*

5. It is not necsesary that the security to be given on an appeal in insolvency should be executed in presence of a Judge. *Ib.*

6. An insolvent may be entitled to his discharge from arrest, though his conduct in trade may have been such as to disentitle him to a certificate of discharge from his debts *Ib.*

7. The absence of any satisfactory statement how it came that a *credit* balance of $15,000 a short time before the insolvency was turned into a debit balance of nearly $13,000; the loan of $17,000 by the insolvent to his brother, to carry on a business which failed, and which was carried on without capital; the receipt of $1,250 by the insolvent a few months before his insolvency without any reasonable account of what had become of it, were considered to be circumstances which shewed that the insolvent was not entitled to his final certificate. *Ib.*

8. Where creditors are called upon to accept a composition from their debtor, they are entitled to know where the goods and money entrusted to the debtor are gone, and to what cause the loss is to be attributed.

Hood v. Dodds, 639.

INSOLVENT DEBTOR'S DEATH.

1. In case of a debtor dying leaving insufficient assets to pay all his debts, execution creditors whose writs are in the sheriff's hands do not lose their priority; nor does a creditor who has a sequestration in the hands of the sequestrators loose the advantage of it.

Meyers v. Meyers, 185.

2. Where a debtor died, leaving insufficient personal assets to pay his liabilities, and his executor, notwithstanding, allowed a creditor to recover a judgment against him by default:

Held, that the executor, on obtaining an administration order was not entitled to an injunction against proceeding on the judgment.

Doner v. Ross, 229.

INSURANCE.

One of several devisees, being in exclusive possession, and claiming to be solely entitled, insured the buildings on the property: the buildings were afterwards burnt down; the insurance money was recovered on the policies, and new buildings were erected:

Held, that the premiums should be presumed to have been paid out of the rents; and that the party should account for the insurance money, and receive credit for his expenditure on the new buildings.

McIntosh v. The Ontario Bank, 155.

[Varied on re-hearing, see post vol. xx., page 24.]

INTEREST.

See "Appeal Order."
"Execution Creditor."
"Mortgage," &c., 4.
"Partnership," 1, 2.
"Principal and Agent," 1.

[FOR MORE THAN SIX YEARS.]

See "Mortgage," &c., 5.

INTEREST TO SUE.

Parties who for many years had the chief use of a canal, and had always resisted payment of tolls demanded by the lessee, were held to have such an interest as entitled them to maintain a bill (to which the Attorney-General was a defendant) to have the lease declared void.

Hinckley v. Gildersleeve, 212.

JUDGMENT BY COLLUSION.

See "Limitations, Statute of."

JUDGMENT BY DEFAULT.

[AGAINST EXECUTORS.]

See "Insolvent Debtor's Death," 2.

JUDGMENT CREDITORS.

B was a registered judgment creditor of *M*, after whose death *T* obtained a decree for a debt due by *M*; *T* issued a sequestration for this debt; under the sequestration lands were seized, and let under the authority of the Court to tenants:

Held, that *B's* charge having priority over *T's*, *B* was entitled to set aside the leases on paying the tenants for their labour in putting in fall crops, and preparing the land for fall and spring crops; and to have the land sold free from the leases.

Meyers v. Meyers, 541.

JURISDICTION.

See "Surrogate Court."

[OF LOCAL LEGISLATURE.]

See "Local Legislature."

LAPSE OF TIME.

See "Fraudulent Assignment," 1.

LEASE.

1. A bill alleged that the plaintiff contracted with the defendants to lease to them certain lands, and to erect thereon for their use a stone building of a specified size according to plans and specifications furnished by the defendants; that accordingly the plaintiff had expended $4000 on the building, under the superintendence of the defendants, and according to plans furnished by them; that he had done everything for which the defendants had given directions; and that the defendants had accepted the building and taken possession of part of it; but it appeared that the machinery was not completed in all respects:

Held, that the allegations of the bill, if proved, would entitle the plaintiff to relief.—[STRONG, V.C., dissenting].

Colton v. Rookledge, 121.

2. Before equities of redemption were, by statute, made saleable under execution, a sheriff might sell a debtor's reversionary interest in t' e fee, subject to a lease for 1000 years.

Wightman v. Fields, 559.

See also "Judgment Creditors."
"Railway Company," 3.

LETTERS OF ADMINISTRATION,

[RELATION TO.]

A person intending to take out letters of administration executed a power of attorney to a creditor of the intestate, authorizing him to receive all moneys due the intestate: the power was given upon an agreement that the attorney should pay himself out of any money he should receive: the appointor afterwards revoked the power, and then took out letters of administration:

Held, [reversing the decree of the Court below] that the power was not valid against the administrator, and that payments made to the attorney by a debtor after administration granted and with notice of the revocation were unauthorized payments, and did not discharge the debtor. [SPRAGGE, C., dissenting.]

Sinclair v. Dewar, 59.

LIMITATIONS, STATUTE OF.

Where a judgment is successfully impeached on the ground of fraud and collusion between the creditor and the executor

of the debtor, it is open to the parties interested in the estate of the deceased to set up the Statute of Limitations to the claim of the creditor, which the executor had omitted or neglected to plead.

Jardine v. Wood, 617.

See also "Principal and Agent," 6.

LOCAL LEGISLATURE.

[JURISDICTION OF.]

1. By his will a testator gave to his children contingent interests only, and the widow and children of the testator by the indenture, after reciting the will, and after other recitals as to payment of annuities and legacies under the will, and that the residuary estate amounted to more than $300,000, and that it was desirable that each of such children of the testator should enter into possession of their shares respectively without waiting for the death of the widow, they thereby provided for the allotment to each of the testator's children of his and her respective shares. They also stipulated to apply to the Provincial Legislature to confirm the arrangement, and for all necessary and incidental powers. Application was accordingly made to the Legislature by petition, setting forth the will at length, and the names of all parties, infants as well as adults, interested thereunder, for an Act to confirm and validate the settlement which had been so made. Thereupon an Act (34 Victoria, chapter 99,) was passed, enacting that the said deed should be confirmed and made valid; and the trustees under the will were authorized and required to carry into effect the provisions of the Act; and were thereby declared to be saved harmless and indemnified. On appeal, it was *held*, that the Provincial Legislature had power to pass such an Act; but that the infant grandchildren of the testator, who were interested under the will, not having been expressly named in the Act, their interests remained unaffected thereby. [DRAPER, C. J., and SPRAGGE, C., dissenting.]

In re Goodhue, Tovey v. Goodhue, &c., 366.

2. And per STRONG, V. C., that the will having directed the whole estate to be converted into personalty, the testator's grandchildrden domiciled without the Province of Ontario, could not be affected by any Act of the Legislature of this Province; the locality of all rights to personal or movable property being at the domicile of the person entitled to it; and that, therefore, the contingent interest of the grandchildren was not "property or a civil right" within the Province. *Ib.*

LOST DEED.

A conveyance executed by a married woman and her husband in the year 1825 was lost:

Held, that the registration of the memorial was no evidence of the wife having been examined, or a certificate of the examination having been indorsed on the deed. Long possession, in connection with other circumstances, may entitle a Court or jury to presume the due examination and certificate, without express evidence of such examination and certificate.

Re Higgins, 303.

MAINTENANCE.

See "Champerty."
"Will," 2.

———————, PAST.

See "Infants."

MANDATORY INJUNCTION.

See "Practice," 6.

MARRIED WOMAN.

1. Married women joined with their husbands in an application for taxation of costs. *Held*, that notwithstanding the late Act (35 Victoria, chapter 16,) the married women must in such cases have a next friend.

In re Spencer and McDonald, 467.

2. The statute 22 Victoria, chapter 73, (Consol. Stat. U. C.) does not authorize a married woman, who has any child or children, to devise or bequeath her property otherwise than to or among such child or children: any disposition of her property in favor either of her husband or other parties is void, and as to the portion attempted to be so disposed of, there is an intestacy.

Mitchel v. Weir, 569.

MASTER'S REPORT.

A decree was made against a trustee for an account, with a direction to allow him any moneys expended by him on cer-

tain specified accounts, to the extent of such moneys as had been received by him in respect of the trust estate. In taking the accounts, the trustee desired the Master to report, as a special circumstance, the fact that he had properly expended, in respect of taxes and otherwise, moneys exceeding the amount received:

Held, on appeal, that the Master had acted properly in refusing to enter into such items of account.

Braun v. Aumond, 172.

MISTAKE, PAROL EVIDENCE OF.

See "Mortgage," &c., 2.

MORTGAGE, MORTGAGEE, MORTGAGOR.

1. Two mortgages were successively taken by distinct creditors which omitted, by mistake, a piece of ground which the mortgagor held under a contract of purchase only: the second mortgage was afterwards assigned for value, without notice of the first mortgage; the mortgagor died insolvent; one of the heirs, out of his own money, paid the balance of purchase money due on the omitted lot, and obtained from the vendor's heirs a conveyance of that lot to himself. Afterwards the mortgagees respectively discovered the mistake in their mortgages, and each filed a bill to have his mortgage rectified, taking no notice of the other mortgage, and not making the holder of it a defendent; the second mortgagee obtained his decree first, and thereby the estate was vested in him; and the defendant (the heir of the mortgagor) was ordered to pay the costs and to receive credit for what he had paid for his conveyance; the holders of the first mortgage then filed a bill against the plaintiff in the other suit, claiming a prior equity in respect of the omitted parcel:

Held, on rehearing, reversing the decision of Vice-Chancellor *Mowat*, reported *ante* Vol. XVIII, page 382, that the defendant (the holder of the second mortgage) could not avail himself of the legal estate in such a case; and that the plaintiff was entitled to the relief prayed. [MOWAT, V. C., dissenting.]

The Merchants' Bank of Canada v. Morrison, 1.

2. Parol evidence is admissible to reform a mortgage which omitted land shewn by the morgagor to the mortgagees as part of the property to be mortgaged. *Ib.*

3. *W*, claiming as heir-at-law of his father, mortgaged to a bank certain lands which he alleged had descended to him as heir-at-law. In fact, the father had executed a will, whereby the mortgaged property, with other estate of the ancestor, was devised to his five sons, to be equally divided amongst them. The officer of the bank through whom the mortgage was taken was aware that the father had made a will, but understood that the mortgage estate had been devised to *W*:

Held, that there was sufficient notice to put the party on inquiry as to the estate devised to *W*, and that the bank had a claim on the interest of *W* only.

McIntosh v. The Ontario Bank, 155.

4. The owner of land made a conveyance thereof to the grantee, his heirs and assigns, which was intended at a security for repayment of a sum advanced, with interest, and, after the same was fully paid and satisfied, the deed was expressed to be to the use of *E B*, wife of the grantor, for life; and, after her decease, to the use of the children of the grantor and the said *E B* in fee; no time being specified for payment of the money. Upon the execution of this deed, the grantor put the grantee into possession of the estate, which he continued to occupy for some time. Subsequently the grantee allowed the grantor to resume possession of the property, and afterwards assigned his interest to his sister *E G*, who took no step to recover possession or interfere with the occupation of the grantor or those claiming under him:

On a bill subsequently filed by the children of the grantor, alleging that the moneys secured by such deed had been fully paid and satisfied:

Held that, under the circumstances, *E G* was not liable for the rents and profits.

Rice v. George, 174.

5. A mortgage had been created by a married woman upon her estate; after her death a suit was brought against her husband and her children; and the Court, in directing a sale of the mortgage property, refused to make the estate of the children liable to arrears of interest for more than six years; but directed payment to the mortgagee out of any excess after payment of principal money, costs and six years' interest of so much of his balance as would represent the husband's interest as tenant by the courtesy in such balance.

Taylor v. Hargrave, 271.

6. A mortgage, payable in ten years, contained a proviso that if the mortgagor, mortgaged or otherwise incumbered the premises, or suffered them to become liable to sale for taxes, the mortgage money should become immediately payable:

Held, that an assignment in insolvency, though voluntary, was not such an incumbering of the estate as entitled the mortgagee to call for payment of the mortgage money.

McKay v. McFarlane, 345.

7. A mortgage was given, by the maker of certain promissory notes, as collateral security to an accommodation indorser, which notes were duly retired by the maker. Subsequently the mortgagor gave other notes to the mortgagee, when it was verbally agreed that the mortgage should be retained by the indorser as an indemnity for such subsequent notes.

Held, that the indorser was entitled to retain such security to the exclusion of other creditors of the mortgagor,

Morrison v. Robinson, 480.

8. An estate, subject to mortgage, was devised to several parties, and after the death of the testator the party entitled to the mortgage money procured the land to be sold under execution at law:

Held, [following the case of *Heward* v. *Wolfenden*, *ante* Vol. XIV., page 188], that the Act authorizing the sale of equities of redemption did not apply; that the sale under execution was inoperative, and that the parties entitled to the equity of redemption had a right to redeem; but, that under the circumstances, the person representing the mortgagee was entitled to be allowed for improvements.

Shaw v. Tims, 496.

See also "Dower," 4.
"Rents."

MUNICIPAL CORPORATIONS.

By the Act relating to Municipal Institutions, the Corporation of Toronto was authorized to pass by-laws, among other things, to prevent the erection of wooden buildings within such parts of the City as the Corporation might define. The City Council accordingly passed a by-law defining what were termed the fire limits of the City, and prohibiting the erection of any building within such limits other than of stone, brick, iron, or other material of an incombustible nature:

Held, that the by-law was void.

The Attorney-General v. Campbell, 299.

MUNICIPALITY.

By the Statute 31 Victoria, chapter 4, municipalities through or near to which, railroads passed, were authorized to loan, guarantee, or give money as a bonus to such company; and in pursuance of such Act a municipality passed an Act, duly authorized by the ratepayers, granting a bonus to a railway company, upon the express condition that the debentures securing such sum should be deposited with the Treasurer of the Province as custodian for the company, but the same were not to be delivered to the company unless and until the railway should within two years be fully completed and in running order, and regular trains have passed over the road, and the company have performed certain other stipulated works; in all of which the company made default. In a suit by the municipality seeking to restrain the Treasurer from delivering up the debentures to the company:

Held, that under the circumstanees time must be taken to have been of the essence of the transaction, and that the company having, no matter from what cause, failed to complete the works in the manner stipulated for, the plaintiffs were entitled to receive back the debentures.

Luther v. Wood, 348.

NEXT FRIEND.

See "Administration Suit, 2."
"Married Woman."

NON RESIDENT DEFENDANT.

See "Frandulent Conveyance," 4

NOTICE.

W mortgaged his land to *S*, and afterwards sold and conveyed the equity of redeption to *A;* but by mutual mistake the land was so described in the conveyance to *A* as to comprise part only: *A* sold and conveyed to *S* by the same description. The plaintiff afterwards discovered the omission, procured *W* to sell and convey the omitted portion to him, and filed a bill against *S* for a conveyance thereof. It was proved that before the sale to the plaintiff *W* had sold all he purchased to *A:*

Held, that this was sufficient proof of that actual notice which is requisite in this class of cases.

Wigle v. Setterington, 512.

See also "Equitable Assignment," 3
"Mortgage," &c., 3.
"Registry Laws," 1, 2.

NOTICE OF APPEAL.

See "Insolvency," 4.

OFFENCES AGAINST THE PERSON.

[STATUTE 32 & 33 VICTORIA, CHAPTER 20.]

See "Discovery."

PAROL AGREEMENT.

See "Partnership," 7.
"Mortgage," &c., 7.

PAROL EVIDENCE.

Parol evidence was held admissible to identify a mortgage as the instrument enclosed in a letter mentioning it.

Ward v. Hayes, 239.

———, OF MISTAKE.

See "Mortgage," &c., 2.

PARTIES.

See "Fraudulent Conveyance," 4.
"Trustee," &c., 2.

PARTITION.

See "Practice," 7.

PARTNERSHIP.

1. In the absence of a special custom or an agreement, interest is not usually allowable to a partner on advances of capital made by him to the partnership, or for partnership purposes,

Jardine v. Hope, 76.

2. Where parties entered into an agreement that they should purchase goods on joint account, and at the joint risk, and that one of the parties should furnish the funds in the first instance, it was *held* that interest could not be charged on the funds so furnished.

Jardine v. Hope, 76.

3. In such a case a firm in Canada was to advance the funds, and the goods were to be consigned for sale to their firm in Liverpool, which went by a different name: *Held*, that they could not charge commission on their sales. *Ib.*

4. Three months before the filing of a bill respecting the partnership, accounts had been furnished in which interest and commission were charged, and none of the partners had before suit suggested their objections to those charges: *Held*, that they were not precluded by this delay from objecting thereto in the suit. *Ib.*

5. The rule in Equity, as well as in Bankruptcy, is, that the separate estate of a partner is to be applied first in discharge of his debts; and, in applying this rule, money paid by co-partners on a liability created by the fraud of the partner towards them, is treated as a separate debt, provable and payable *pari passu* with the other separate creditors of such partner, in case of his death insolvent.

Baker v. Dawbarn, 113.

6. The mere liability so fraudulently created cannot be proved against the separate estate as a debt until the liability is paid, or until something equivalent to payment takes place. Where the fraud was in the use of the partnership name on bills, the other partners becoming insolvent, the holders of the bills proved them against the partnership estate; the assignee, in a suit for administering the separate estate of the guilty partner, claimed to prove the amount against the separate estate; but the master restricted the proof to the expected dividend from the partnership estate and the separate estate of the surviving partners; and the Court *held* that the assignee was not entitled to prove for a larger sum. *Ib.*

7. Two partners dissolved partnership: on a bill afterwards filed by one for exclusion, the defendant justified the exclusion on the ground of a parol agreement, which the other denied, and it was not otherwise proved:

Held, that the plaintiff was entitled to a receiver for his security until the hearing.

Steele v. Grossmith, 141.

8. Four persons who entered into a joint undertaking for the purchase of oil lands, for the purpose of re-sale, agreed to contribute and did contribute the necessary capital in certain proportions which were unequal. One of them (the plaintiff) subsequently acquired the interests of two of the co-partners. The lands having become greatly depreciated in value, the plaintiff in whose name the conveyance of the lands had been taken for the joint benefit, filed a bill calling on the other party interested to make up the difference in money contributed by him and that paid in by the plaintiff and those whom he represented. A demurrer for want of equity was allowed with costs,

Foster v. Chaplin, 251.

PART OWNERS.

One part owner of a ship having taken possession of it, and expended in repairs more than the ship's earnings.

Held, that the other part owner was not bound to contribute to the payment of the difference.

Baker v. Casey, 537.

PAST MAINTENANCE.

See "Infants."

PATENT OF INVENTION.

The inventor of a new machine, before taking out a patent erected and sold a machine embodying his invention, and the purchaser had it in use for three years before the inventor procured a patent. The machine so sold was not put up for the purpose of experimenting, but was sold as a complete machine, and was placed in the premises of the purchaser in order that he might reap the profits expected from its use:

Held, that the inventor had lost his right to a patent.

Hessin v. Coppin, 629.

PERSON, OFFENCES AGAINST THE—

[STATUTE 32 & 33 VICTORIA, CHAPTER 20.]

See "Discovery."

PERSONAL REPRESENTATIVE.

[DECREE AGAINST.]

1. For the purpose of an execution against lands, heirs are *prima facie* bound by a judgment against the executor or administrator of their ancestor in the same way as next of kin are bound; and, although they are not entitled as of course to have the issues tried over again, still it is open to them to shew, not only fraud and collusion, but that the judgment or decree, though proper against the defendant, was in respect of a matter for which the heirs were not liable.

Lovell v. Gibson, 280.

2. The assets of a deceased person are not liable for debts incurred by an executor or administrator in continuing the trade or business of the deceased.

Ib.

PLEADING.

Where a bill is filed against the estate of an intestate, alleging that letters of administration have been granted to the defendant of the estate of the deceased; such allegation is sufficiently established by shewing, that at the hearing of the case the defendant has obtained letters of administration; although the grant thereof may have been made subsequently to the filing of the bill and the putting in of the answer; and although the defendant has taken the objection by way of defence in answer.

The Edinburgh Life Assurance Co., v. Allen.

See also "Practice," 7.

POST NUPTIAL SETTLEMENT.

A post-nuptial settlement was executed by a person in insolvent circumstances, but the trustee was ignorant of the fact of his indebtedness. The Court, on a bill filed impeaching the settlement as fraudulent against creditors, set the same aside with costs as against the settlor; but ordered the trustee to receive his costs out of any residue of the fund, after payment in full of the claims of the creditors, with costs.

The Merchants' Bank v. McDonald, 476.

PREFERENCES.

1. The statute 22 Vict. ch. 26, sec. 18, against preferences does not apply to a conveyance of real estate sold by the debtor before his insolvency, but not paid for.

Carradice v. Currie, 108.

PRACTICE.

6. Where a writ of *habere facies possessionem* was executed before an injunction restraining such proceeding could be served, but the plaintiffs in the ejectment suit had been informed of the intention to apply for the injunction; the Court, under the circumstances, granted a mandatory injunction requiring the possession to be redelivered to the defendants in that suit, pending an appeal to the Court of Error and Appeal against a decree dismissing a bill filed by them to redeem.

Campbell v. The Royal Canadian Bank, 477.

7. A defendant, being entitled to certain relief, to obtain which a partition of the whole estate was essential, and the defendant not having asked for such partition by way of cross-relief in his answer, liberty was given him to file a supplemental answer to supply the omission.

Shaw v. Thomas, 489.

See also "Adding Parties in Master's Office."
"Arbitration," 4, 5.
"Decree—Petition to Amend."
"Judgment Auditors."
"Pleading."

PRINCIPAL AND AGENT.

1. Where a principal was found indebted to his agent, on the taking of accounts in this Court, the Court in exercise of its discretion allowed interest on the amount from the time of filing the declaration, which contained a count for interest, in an action at law brought by the agent and to restrain which the bill in this Court was filed. [MOWAT, V. C., dissenting.]

Ridley v. Sexton, 146.

2. Accounts were delivered in 1862 and 1865 by a trustee and agent to his principal, and confidential relations existed for upwards of two years after the latter account had been rendered:

Held, under the circumstances, that these accounts were not binding on the principal as stated accounts.

Smith v. Redford, 274.

3. A deputy registrar did business for many years as a conveyancer, for his own benefit, with the knowledge of the registrar, and without objection by him:

PRIVY COUNCIL.

See "Practice" 3

PROBATE.

1. *L* appointed *M* and *K* executors and trustees of his will for the management of his property thereby bequeathed (which was personalty) and the payment of the legacies; and he afterwards added and signed a memorandum as follows: "If anything should happen to the trustees, I appoint *R* to be one of the trustees." *M* proved the will; after his death *K* renounced: *Held*, that *M's* executor did not represent the testator *L*; and that *R* was entitled to probate.

In re DeLaronde, 119.

PROFITS, ACCOUNT OF.

See "Tenants in Common."

PROTECTION FROM ANSWERING.

See "Discovery."

PROVISION NOT TO INCUMBER.

See "Mortgage," &c.

PURCHASE.

[BY TRUSTEE FOR CESTUI QUE TRUST.]

See "Trustee," &c., 1.

QUIETING TITLES.

1. In examining a title under the Act for Quieting Titles, a memorial executed by the grantee is good secondary evidence where the possession has been in accordance with the title so claimed.

Re Higgins, 303.

2. The weight of authority appears to be also that such evidence is admissible in ordinary suits. *Ib.*

RAILWAY ACT.

Arbitrators appointed to assess the damages sustained by land owners whose lands have been taken for railway purposes have a right to take into consideration matters other than the value of the mere quantity of land taken: where, therefore, arbitrators allowed a sum "for depreciation to farm generally by the permanent occupation of the land as a railway," the award was *held* valid.

The Great Western Railway Co. v. Warner, 506.

RAILWAY COMPANY.

1. The rule that railway companies, when acting in good faith, are the best judges of what lands &c., are required for the railway, does not apply in a proceeding by a creditor against the company; in such a case the Court is the proper authority to determine that point.

Erie & Niagara Railway Co. v. Great Western Railway Co., 43.

2. The Court in such a case ordered a reference to the Master to inquire whether the company held any lands which were superfluous or not necessary for the use of the company; but the company were declared entitled to retain for their use a gravel pit, obtained under the compulsory powers in their Act, with necessary approaches thereto; and also to sufficient land for the erection of offices for the management of the business of the company. *Ib.*

3. The Registry Law is binding on railway companies. Where it appeared that after an owner of land had contracted with the Grank Trunk Railway Company for the conveyance of parts of the land for a roadway and station ground, he mortgaged the same land to a creditor without notice; and the mortgage was registered before the conveyances to the railway company: it was *held*, that the mortgagee was entitled to priority, and that the company was entitled under its special Act to retain the land on paying to the mortgagee its value at the time the company became entitled to it.

Harty v. Appleby, 205.

4. A railway or canal company cannot lease the concern or delegate its powers for a specified term without the sanction of the Legislature. This principle was held applicable to a railway company which had no power of taking land compulsorily, but had other special powers and privileges under its Act of incorporation.

Hinckley v. Gildersleeve, 212.

REALTY.

[CONVERSION OF BY STATUTE.]

See "Conversion of Realty."

RECEIVER.

See "Partnership," 7.
"Tax Sale of Chattels."

REDEMPTION.

A party on a sale of land attended and stated that he was buying on behalf of his brother's family, the effect of which was to prevent competition at such sale, and he became the purchaser; but he subsequently refused to admit the right of the plaintiffs, his brother's family, to redeem the property in his hands: the Court declared the plaintiffs entitled to redeem, and ordered the defendant to pay all the costs of the suit.

Watson v. James, 355.

REFORMING DEED.

Where there was a contract for the sale of a reversion and the deed purported to relinquish and quit claim the property, and contained no other words of transfer, the Court *held* that in order to remove any doubt, the vendee was entitled to have the deed reformed and proper technical words introduced.

Collver v. Shaw, 599.

REGISTRATION.

See "Insolvency," 1.

REGISTRY LAWS.

1. A registered purchaser buying with actual notice of an unregistered deed of an unascertained part of the land, takes subject to whatever the unregistered deed conveyed: and, if he chooses to complete his purchase without making proper inquiries as to the contents of the unregistered deed, his erroneous supposition as to the extent of land thereby conveyed, or his ignorance of the names of all the persons interested under the deed, does not vary the case.

Severn v. McLellan, 220.

RENDERED ACCOUNTS.

RENUNCIATION.

RENTS, &c.

REPAIRS.

RIGHT HEIRS.

RIPARIAN PROPRIETOR.

ROAD ALLOWANCE.

See "Riparian Proprietor."

SALE OF EQUITY OF REDEMPTION.

See "Mortgage," &c., 8.

[OF DOWER UNDER EXECUTION.]

See "Dower," 3.

[OF PARTNERSHIP ASSETS.]

See "Partnership," 8.

SALE UNDER ORDER OF COURT.

The Court refused to set aside an Order of Court made on notice allowing a purchase, though it afterwards appeared that there were circumstances not known to the Court when making the order, it not appearing that the allowance was a wrong to those complaining of it; or was procured by any fraud or wrong practice on the part of those by whom or in whose interest the order was obtained.

Campbell v. The Royal Canadian Bank, 334.

SEPARATE ESTATE.

See "Married Woman," 2.
"Partnership," 5, 6.

SEPARATION DEED.

An unqualified covenant in a separation deed for payment of an annuity to the wife for her life, is not avoided by the subsequent reconciliation of the parties; or by the wife's leaving her husband afterwards without cause.

Walker v. Walker, 37.

SEQUESTRATION.

The effect of a sequestration in regard to lands considered.

Meyers v. Meyers, 185.

See also "Insolvent Debtor's death," 1.
"Judgment Creditors."

SETTING ASIDE ACT OF COURT.

See "Sale under Order of Court."

SETTING ASIDE CONVEYANCE.

See "Conveyance."

SHERIFF'S SALE.

See "Devisee's Acts."
"Dower," 3.

SHIPS.

Part owners of a ship are tenants in common of the ship; and partners in the earnings only.

Baker v. Casey, 537.

See also "Part Owners."

SINGLE ADVENTURE.

See "Partnership," 8.

SOLICITOR AND CLIENT.

See "Practice," 5.

SPECIAL CIRCUMSTANCES.

See "Master's Report."

SPECIFIC PERFORMANCE.

1. This Court will not entertain a bill for the specific performance of a contract for a lease of real estate for a year; and where a tenant in possession contracted to assign his possession and with it his right to a renewal of his term for a year, the Court refused to specifically perform the agreement; the remedy at law being sufficient.

Mara v. Fitzgerald, 52.

2. The plaintiffs contracted with the defendant that he should clear for them, in a husbandman-like manner, certain swamp lands which they owned, and that he should take the timber as

compensation. The defendant cut down and removed the timber accordingly, but he did not clear up the land, and the plaintiffs thereupon filed a bill for specific performance. A demurrer thereto was allowed, the work in question being the sole object of the suit, and the remedy at law being adequate.

Ashton v. Pryne, 56.

3. Equity now-a-days, does not, as a general rule, enforce specifically a contract between a landholder and a builder for the erection of a house or the like; but specific performance of agreements to execute work is enforced in cases where the plaintiff shews, what the Court considers to be, a sufficient ground of equity to entitle him to that relief.

Colton v. Rookledge, 121.

See also "Lease," 1.
"Vendor and Purchaser."

STATED ACCOUNTS.

See "Principal and Agent," 2.

STATUTE OF FRAUDS.

An agent's subsequent written recognition of a verbal contract where such recognition was made in the performance of his duty in the carrying out of the contract, was *held* binding on the principal for the purpose of taking the case out of the Statute of Frauds.

Ward v. Hayes, 239.

STATUTE OF LIMITATIONS.

See "Limitations, Statute of."
"Principal and Agent," 6.

STAY OF PROCEEDINGS

See "Practice," 3.

STONE QUARRY.

See "Tenants in Common."

SUBSTITUTED EXECUTOR.

See "Probate."

SUIT, RIGHT OF.

See "Interest to Sue."

SUPERFLUOUS LANDS.

See "Railway Company."

SURROGATE COURT.

A bill impeaching a will of which probate had been granted to the plaintiff by the Surrogate Court, stated that after the probate had been granted the plaintiff had discovered a subsequent will of the testator, and that this subsequent will was the deceased's last will: the wills disposed of both real and personal estate:

Held, that whether the will had been proved in common form or in solemn form, this Court had jurisdiction to try its validity.

Perrin v. Perrin, 259.

TAX SALE OF CHATTELS.

1. In case of a sale of chattels for taxes, it is not necessary for the purchaser, in order to the maintenance of his title, to be able to shew a strict and literal compliance by the bailiff with the directions of the Assessment Act (29 & 30 Victoria, chapter 53, section 99.)

Gibson v. Lovell, 197.

2. A sale for city taxes was objected to on the allegation that the public places where the advertisement of the sale was posted were not within the ward where the sale took place; it appeared that the chattels were seized and sold on the premises of the owners with the knowledge of the parties in charge, and without fraud, and without objection by any one:

Held, that the sale was valid. *Ib.*

3. Chattels in the possession of a receiver were seized and sold by a bailiff for municipal taxes; neither the bailiff nor the purchaser was aware, until after the completion of the sale, that the property was in the receiver's possession, or was intended to be affected by the order appointing the receiver; and both had been informed to the contrary in good faith by the party in charge: the Court refused to hold the sale void. *Ib.*

4. The establishment in which these chattels were, being afterwards sold by the order of the Court in one lot as a going concern, it was *held* that the purchaser of such chattels at the tax sale was entitled to a corresponding part of the purchase money realised at the Chancery sale.

Gibson v. Lovell, 197.

TENDER, ABSOLUTE OR CONDITIONAL.

1. A tender of mortgage money with a statement that the party tendering did not consider that the amount tendered was due, and that the other would thereafter be compelled to repay the excess, was held not to have been invalidated by the statement.

Peers v. Allen, 98.

2. A tender to the holder of a mortgage (who claimed a larger sum) with a condition that the mortgage, on the sum tendered being accepted, should be given up, was held bad, as being a conditional tender. *Ib.*

TENANT BY THE COURTESY.

See "Mortgage," &c., 5.

TENANT FOR A YEAR.

See "Specific Performance," 1.

TENANTS IN COMMON.

1. One of two tenants in common of land, leased part of it as a stone quarry.

Held, that the other tenant in common was entitled to an injunction against further quarrying, and to an account against lessee for one moiety of what had been already quarried.

Goodenow v. Farquhar, 614.

2. One of two tenants in common made a lease of a portion of the joint estate for the purpose of a quarry, On a bill filed by the co-tenant against the lessor and lessee, alleging that the lessee had quarried stone outside of the limits as well as within the limits of the lands demised, the lessee by his answer insisted on his right to quarry where he had, the limits of the acre really agreed to be demised being different from

TIME OF THE ESSENCE OF THE CONTRACT.

TRESPASS, INJUNCTION AGAINST.

An injunction against cutting timber may be granted (since the Canadian Statute 20 Victoria, chapter 56) without proof of spoil, trespass and injury to the extent or of the character which might be necessary in England.

Wightman v. Fields, 559.

TRIVIAL CLAIM.

TRUSTEE AND CESTUI QUE TRUST.

1. The defendant had received from the plaintiff, his father, money to buy land; the defendant accordingly bought a party's interest in an unpatented lot, and took an assignment in his own name; when the father afterwards came to this country with his wife and the other members of his family, they all settled on the lot; the mother died five years afterwards, and a few days after her death, and while the plaintiff was in a state of mental depression, the defendant with the assistance of another son, in whom the father had confidence, induced the father to consent to the defendant's retaining the lot so bought, in consideration among other things, of the defendant's agreeing to pay for another lot which had been bought, and of his procuring a deed of half this lot to the father and of the other half to the son who was acting for the father; this consideration was not adequate: the transaction was otherwise an improvident one for the father; and there was considerable doubt whether the father had understood the bargain to be as stated by the defendant:

Held, not binding in equity, and that the plaintiff was entitled to a conveyance on payment of the sums which the defendant had paid in pursuance of the alleged contract.

Johnston v. Johnston, 133.

2. *J M*, by an informal instrument, purported to assign to his son-in-law all his estate real and personal, "with notes and accounts on condition that he pay his heirs in the manner following" and the instrument then proceeded to direct the payment to certain of the assignor's children and grand-children of the sum of $400 each; the instrument also contained an agreement on the part of the son-in-law in the following terms "the said *W M* hereby becomes bound to pay the above mentioned sums to the parties therein named at the time of the decease of the said *J M*, or as soon after as can conveniently be done."

Held, that the effect of these stipulations in the instrument was to entitle each of the beneficiaries to file a bill in his own name after the death of *J M*, to enforce payment of the $400 coming to him; and that an objection taken at the hearing that a personal representative of *J M*, was a necessary party to the suit, was not sustainable.

Mulholland v. Merriam, 288.

ULTRA VIRES.

See "Municipal Corporations."

USE OF PATENT MACHINE BEFORE PATENT GRANTED.

See "Patent of Invention."

VACATING DECREE.

See "Alimony." 1.

VENDOR AND PURCHASER.

An intending purchaser attended an auction sale of land, and bid off the property, but no memorandum or agreement was signed evidencing the contract, and the vendor having refused to complete the sale, the purchaser filed a bill for specific performance:

Held, that this was not a case in which the Court would, on refusing specific performance, direct an inquiry as to damages under the statute 28 Victoria, ch. 17, and that the plaintiff should pay the costs of the suit.

O'Donnell v. Black, 620.

VENDOR'S LIEN.

Where a vendor on the sale of land takes a mortgage thereon for part of the price agreed to be paid, he loses his lien for such portion as remains unsecured.

Anderson v. Trott, 619.

[PRIORITY AMONG ASSIGNESS OF PORTIONS OF.]

1. The Vendor on the sale of land took promissory notes for the purchase money, indorsed and sold some of them, and was liable on these in case of non-payment by the makers:

Held, that on the sale of the property these were entitled to priority of payment over the notes retained by the vendor.

O'Donoghue v. Hembroff, 95.

2. In such a case notes indorsed without recourse are payable *pari passu* with the retained notes. *Ib.*

VESTED AND CONTINGENT INTERESTS.

See "Will, construction of," 5.

VOLUNTARY BONDS.

A gave a voluntary bond to *B* for £5,000, and a few days afterwards a like bond to *C;* neither was given for any fraudulent purpose. *C* recovered judgment on the second bond; and he obligor had not property enough to pay both bonds:

Held, that *B*, whose bond was prior in date, had no equity to restrain proceedings by *C* to enforce the judgment recovered; nor to set aside a conveyance made by *M* of land of less value than the judgment, and which *C* had accepted in discharge thereof.

Newenham v. Mountcashel, 530.

WIFE.

[COVENANT FOR PAYMENT OF ANNUITY TO.]

See "Separation Deed,"

WILFUL DEFAULT.

See "Mortgage" &c., 4.

WILL, CONSTRUCTION OF.

1. A testator, by his will, devised as follows: "All and singular the rest, residue, and remainder of the estate and effects, real and personal, which I shall die possessed of, or to which at the time of my decease I shall be entitled, I do devise, bequeath, and order to be equally divided amongst my five sons above mentioned." One of the sons (*A*) died during the lifetime of the father without issue:

Held, that the devise of the residue was not a devise to a class; and that by the decease of *A*, his share lapsed and descended to *W*, as heir-at-law of the ancestor.

McIntosh v. The Ontario Bank, 155.

2. A discretion given to executors to apply the interest of a legacy to the maintenance and education of the legatees, nephews and niece of the testator, is not subject to the control of the Court where there is no charge of frand, or the like against the executors.

Foreman v. McGill, 210.

3. A testator by his will devised certain lands to trustees for and on behalf of his two sons, W & J, "and any other son or sons to be hereafter lawfully begotten by me," with right of survivorship as between *W* & J, without providing for any such right as to an after born son in case of his dying. Another son was born to the testator, who died after his father, under age and without issue:

Held, as to the deceased son's share, that the brothers and sisters took equally as his heirs.

Dobbie v. McPherson, 262.

4. The testator directed these lands to be conveyed to his sons on their coming of age, but omitted to make any provision for the application of the rents and profits in the meanwhile:

Held, that the sons had vested estates from the death of their father, and were entitled to the rents and profits during their minority.

Ib.

5. A testator devised all his residuary estate, real and personal, to trustees to convert into money, and to accumulate during the lifetime of his widow; and, after the payment of certain anticipated claims thereon, in trust for all the testator's children who should be living at the decease of the widow in equal shares, and for the child and children of such of the testator's children as might then be dead, in equal shares;

such grandchild or grandchildren, to be entitled to the share which his, her, or their father or mother would have been entitled to if living. *Held*, that the children of the testator took only contingent interests.

In re Goodhue, Tovey v. Goodhue, 366.

6. A testator devised his estate, upon trust *inter alia* as follows: "To pay my debts and funeral expenses, and manage the said premises so given, granted, demised, and conveyed to the said executors, in whatever manner they consider most advantageous for my wife and my issue, who I will and declare to be entitled to receive the benefit of any and every portion of the aforesaid lands, goods," &c.:

Held, that under these words the widow and children of the testator took as tenants in common.

Shaw v. Thomas, 489.

7. A testator made his will in the following words:—"I therefore will unto my beloved wife *Anna Maria*, for the benefit of herself and children jointly, two life policies for each $1,000 and their premium dividends (said life policies are affected with the New York Mutual Life Insurance Company, New York City) to have and to hold for their joint and mutual benefit, and to be by her spent in the most judicious and beneficial manner for all; also whatever interest I may have in the business of *Edsall & Wilson*, and in the arranging of it, I trust much to my long and well tried partner *Andrew Wilson*, in giving a just return to my heirs, for long and faithful services rendered by me in the business, there being no written agreement of the partnership."

Held, that the widow and children took jointly both the policies and the testator's interest in the partnership, and shared the same equally; that the widow was entitled, during the minorities of the children, to receive the income of their shares in trust, to apply the same as one fund, as she might think most beneficial for the maintenance and education of the whole family: and that each child on attaining twenty-one was entitled to receive his or her share.

Rose v. Edsall, 544.

8. A testator devised as follows:—"My will is that *J B*, my son, shall have the homestead, and that the property be divided in the following manner: First, that all my just debts be paid out of the personal property, and then two-thirds of the whole to be given equally among my six boys as they come of age, and the other third to be equally divided among my seven girls as they come of age or marry, or as it can be raised from

the estate; that the property be appraised after my death. My will is that my wife, *E B*, so long as she remains my widow, shall have two cows kept for her maintain, with meat and flour, and wool, and every other necessary for her age and maintainance, and a girl, should her have one left her, and doctor if necessary. The family to be maintained on the place with every necessary thing for their use. That the younger branch of the family receive a common education equal with the rest of the family."

The evidence shewed that the property of which the testator was seised in fee at the time of his death consisted of the north-easterly fifty acres of lot number twelve, in the second concession of the township of East Flamborough, and of 150 acres, part of lot thirteen in the same concession. The testator lived on the last mentioned farm; appurtenant to, and, used with his dwelling house, there were a yard, garden, orchard, carriage house, and lane, containing in all about four acres of land.

Held, that the son, *J B*, was entitled to four acres only, not the 150 acres on which the dwelling house was situated.

Held, also, that the testator's children took vested interests in the real estate on the death of the father.

Bigelow v. Bigelow, 549.

9. A testator who owned lands in England and Ontario in fee simple, devised the same to his wife for life and after her decease gave and devised them unto his "right heirs for ever:"

Held, that the Act 14 & 15 Victoria, ch. 6, (Con. Stat., U. C., ch. 82,) under which the defendants claimed to share in the property, did not apply, and therefore the eldest son took the estates here as in England:

Held also, that even if the Act did apply, the common law heir was the party to take the estates under this residuary devise.

Tylee v. Deal, 601.