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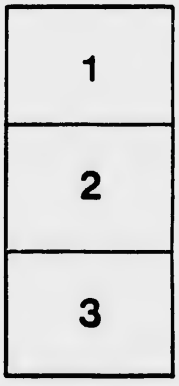

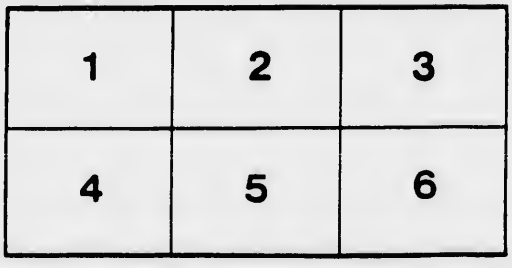

REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

ONTARIO,

BY

ALEXANDER GRANT, BARRISTER,
REPORTER TO THE COURT.

VOLUME XXVI.

TORONTO:
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1879.

ROWSELL AND HUTCHISON, LAW PRINTERS, TORONTO.

THE HON. JOHN GODFREY SPRAGGE, *Chancellor.*

" SAMUEL HUME BLAKE, } *Vice-Chancellors.*
" WILLIAM PROUDFOOT, }

" OLIVER MOWAT, Q. C., *Attorney-General.*

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OF

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY,

OF

ONTARIO,

DURING PORTIONS OF THE YEARS 1878 AND 1879.

CURRY V. CURRY.

Statute of Frauds—Parol evidence.

The father of the plaintiffs and the defendant were brothers, and the defendant obtained a deed in his own name of 100 acres of land, in which it was alleged his brother was jointly interested. It was shewn distinctly that the defendant had at one time made a deed to his brother of some land, although the defendant, after his brother's death, denied having given any deed, but on the hearing he admitted giving a deed of an adjoining property for which no patent had issued, although the defendant's name had been entered in the books of the Crown Lands Department as an applicant for purchase. It was shewn that a box containing the deeds in reference to the property had been stolen, and the contents had never been seen since. The Court, under the circumstances, notwithstanding the denial of the defendant whose evidence was not consistent:

Held, that the plaintiffs were entitled to an account of the purchase money received by the defendant upon a sale of the property, and ordered the defendant to pay the costs to the hearing.

Statement.

The plaintiffs were daughters and next of kin of *Philip Curry*, who died suddenly (he was killed by accident), in July, 1875. The defendant *Christopher Curry*, a brother of the deceased, was administrator of his estate,

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and the principal object of the bill was to call him to account for the purchase money of lot 18, 1st concession, Kitley, which lot, in April or May of the same year, had been sold to one *Ferguson* for $1,500. Of the purchase money, $950 was paid in hand to *Christopher*, and the balance had been paid to him since. The plaintiffs' claim was, that their father was entitled to one-half of the purchase money—one-half of the land having it was alleged been conveyed to him many years before, probably about the year 1850. The lot contained 100 acres, and had been patented 10th November, 1824, to *Abigail Campbell*. *Christopher*, who was about ten years older than *Philip*, purchased the land of one *Waters* in 1840, *Philip* being then a lad of about thirteen. Adjoining lot 18, was a clergy reserve, lot No. 17. A clearing of about thirty acres had been made before *Christopher* purchased, about 8 of which had been made by mistake, as was supposed, in a long strip on lot 17. Upon the faith of this, *Christopher* had his name put down as a proposed purchaser from the proper public department of lot 17.

It was shewn in evidence that in the year 1850, *Christopher* left the farm in order to become a Methodist minister, leaving *Philip*, who had worked with him upon the place, in possession.

The cause came on for the examination of witnesses and hearing at the Sittings of the Court at Goderich, in the Spring of 1878.

Mr. *Garrow*, for the plaintiffs.
Mr. *Maclennan*, Q.C., for the defendant.

The facts proved and points relied on by Counsel appear in the judgment.

Sept. 4th.
Judgment.

SPRAGGE, C.—[After stating the facts as above set forth proceeded.]

I think the proper result of the evidence is, that defendant did at some time, probably on the occasion of

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his leaving, make to *Philip* a deed of some of this land. His own evidence upon the point has been anything but consistent; and his account to others has varied from time to time, and he has denied since his brother's death that he made him a deed of any land. At the hearing he said that he gave him a deed to enable him to vote, that it was of lot 17, or the east-half of the whole place which he said was called lot 18, and it may be, he says, that the deed was of the east-half of lot 18; that he meant to convey lot 17, which, though it was a swamp, was of some value.

In July, 1866, a trunk belonging to *Philip*, containing papers, some money, and trinkets, was lost, supposed to have been stolen. *Christopher* says he had given his title deeds of lot 18, to *Philip* for safe-keeping, as his duties called him from place to place, and he infers that they were in the trunk when stolen. *Philip* made a solemn statutory declaration that such was the case, and there is every reason to believe that the deed from defendant to *Philip* was among the missing papers. *Christopher*, in his evidence, says he believes that it was.

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In 1855, an action for seduction was brought, and a verdict rendered against *Philip*; and this was the occasion of two letters from the defendant to *Philip*, the existence of which has been recently discovered, passages in which are relied upon by the plaintiffs in support of their case. The letters are of great length, and point out with much unction how it behoved *Philip* to comport himself under the circumstances, and how he could so dispose of his property as to place it beyond the reach of legal process. The letters evince considerable legal acumen, and knowledge of branches of legal practice, beyond what might be looked for in a man of his calling, with abundance of cunning, worldly wisdom, and unscrupulousnesss.

The first letter is dated 18th August, 1855, and contains this passage: "I suppose you have been to some lawyer

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by this time who has informed you how to proceed towards securing your property * * As you say that you did not record your deed, I think you will have nothing to fear respecting the land." The other letter, dated 19th November, 1855, has, among many others, the following pasage: "The way for you to manage is, to call a sale and sell off all your stock, in my name if you like. * * As soon as you get rid of your property there will be an end of the case. The lawyers will not work for nothing. The place can be rented, if we cannot sell to advantage."

About August, 1856, *Christopher* was in the township of Kitley, and there met *Elijah Freyne*, a brother-in-law of *Philip*, at the house of *Freyne's* father-in-law. *Freyne's* wife and *Philip* himself were also present. *Freyne* gives evidence of what passed on that occasion; that *Christopher* spoke of *Freyne* having assisted *Philip* in his law difficulty, and said that *Philip* had a deed of

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fifty acres of the land he was living on, and that it was a mercy it was not registered, or he would loose it to those "*Mac.'s*"; that as it was he could keep it for himself and his family. Mrs. *Freyne* confirms this: she says, that *Christopher* said it was a blessing that *Philip* had not the deed registered; that she understood what deed was meant; she thinks the number of the lot was not mentioned, as they all knew what it was. She says she saw the deed—or, as I understand, had seen it—but was unable to say what was in it. She says this conversation occurred while they were all sitting round the table at her father's house. This was before the loss of the trunk containing deeds, money, &c.

After the loss of the trunk, and after the death of *Philip*, *Christopher* denied having made any deed to *Philip*, and when it was put to him that it was in the trunk that was lost, he denied it, and said that *Philip* had only the deed to defendant himself of lot 18, which he had left with him for safe keeping. After the discovery by *Eliza Anne Curry* of the two letters to which

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I have referred, he appears no longer to have denied that he had given a deed of some land to *Philip*, indeed a denial in the face of those letters would have been useless, but he denied that the deed he gave was of half of lot 18. *Freyne* and his wife appeared to me to be intelligent and truthful witnesses, as did also *Eliza Anne Curry;* and *Armstrong*, while giving his evidence in a less connected shape, appeared to give it truthfully. *Christopher's* present theory is, that whatever deed he made to *Philip*, and of whatever land it may have been, it was not of any part of lot 18. In his answer, he states that he made a conveyance of lot 17, and that it was without consideration.

Under the circumstances that I have detailed, I can attach no weight to the denials of the defendant by answer, or, such as they are in his evidence, of his having made a deed of half of lot 18 to *Philip*. It is established that he made a deed, but it is to be established affirmatively that it was of lot 18.

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The letters afford some evidence upon that point. In the earlier one, the defendant refers to a deed of land which *Philip* might have, but fortunately had not, registered. It is not questioned that this was a deed from himself. If it was not a deed of part of lot 18, it was a deed of lot 17, but defendant had no deed of lot 17, his title (if it can be called title) consisted in his name having been put down in the Government books as a proposed purchaser; and a deed from him, no patent having issued, was incapable of registration. It is said for him that he may have supposed it capable of registration. This is possible, but with his astuteness and knowledge of law, I think it very doubtful.

Again, his account is that his object in making the deed was to give *Philip* a vote. But a question would arise as to whether he would have a vote.

Again, he esteemed it a matter of great importance that the land of which *Philip* had an unregistered deed should be preserved, so that he might keep it for himself

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and his family. If the deed was of half of lot 18, there was reason in this; if of lot 17, there was none. Defendant himself called it sometimes a swamp, sometimes swampy, and it was accounted of so little value that neither of them seems to have cared to pay the small sum due to the Crown upon it, and it became forfeited, and was sold by the Crown in 1866.

The second letter contains this passage: "The place can be rented if we cannot sell to advantage." This indicates a more substantial interest in *Philip* than an assignment of the defendant's interest in lot 17, and which would be subject to the payments to be made to the Crown. Defendant's explanation in his evidence that by the words "if we cannot sell," he meant if he and his wife could not sell I look upon as simply absurd. Further, if the paper witnessed by *Graham* in 1850, and which *Graham* from the look of it took to be a deed, was in fact an assignment of the defendant's interest in lot 17, it is strange that it was not carried to

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the Crown Lands Agent to have it transferred to the name of *Philip*, a course perfectly well understood in the country. We find that lot 17 continued to stand in the name of the defendant.

To come now to the evidence of the *Freynes*—the husband says, that the defendant spoke of the unregistered deed that *Philip* had as of fifty acres of the land he was living on, and *Freyne* says he was living on lot 18. If he is correct as to the defendant speaking of the fifty acres, it must have been of lot 18, even without his speaking of its being land he was living on, for fifty acres was half of lot 18, and the defendant's position is, that the deed was of lot 17, and that lot contained 120 acres. It is clear from the evidence of both *Freyne* and his wife, that their understanding of the land referred to by defendant was the half of lot 18.

On the other hand, there are some things that militate somewhat against the plaintiffs' claim. Among these, there is put forward a settlement of some accounts

between *Philip* and the defendant in 1868 or 1869; *Philip* had before that removed from Kitley, and was living in the county of Huron, near to *Christopher*, as I understand. He had not yet got over his law difficulties, and was pressed by the sheriff. He claimed that something was due to him from the defendant in respect of the farm in Kitley, and produced papers shewing his claim. One item was for shingling a barn. The result was, that the defendant paid him some money, about $70, or, as it is put in some of the evidence, lent it to him. *Philip* said that he had heard that the clergy reserve lot had been sold, and that he should not be voting on it any more; and that he rose and put some paper, a dirty paper, in the fire. This is spoken of by the defendant and his two sons, who, as it appeared, had talked the matter over between the examination of the father in the morning and his sons' in the afternoon. The evidence of one of the sons, *Luther*, I considered not to be entitled to much weight, that of his father to none; and the other had just been tutored with what result it is impossible to say. But after all there is very little in what they say. There is no inconsistency in *Philip* having items of charge against the defendant, if he had a deed of half of lot 18. The shingling may have been of a barn on the half of the lot retained by the defendant, and the other items of charge may have been in respect of the same part of the lot, or at any rate may have been items properly chargeable by *Philip* against the defendant, assuming that each was entitled to one half of the lot. All that is necessary is, to see that they are capable of explanation consistently with that theory; one of the parties to the transaction being dead.

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It is put in the evidence as if *Philip's* observation about the clergy reserve lot being sold, and his not voting any more, and his burning of a piece of paper were all connected, and as if the paper burned were probably the deed or some other paper connected with the clergy lot. This was a mode of giving the evidence

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that looked to me like the result of art. I am by no means convinced that the circumstances were connected in fact as they were connected in evidence. As to the paper burned, it is scarcely possible that it could have been a deed of lot 17, or of any lot, for the evidence is, that *Philip* kept his deeds, and his brother's also, in the trunk that had been lost some two or three years before, and this is assumed by *Christopher* in his evidence.

There is also evidence of one *William Thompson*, who says he knew *Philip* well, and had frequent conversations with him; that he said he had come from Kitley where he had worked a farm. The witness asked him if he had paid any rent, and that *Philip* said he had not, but that he had given a horse for it. This conversation was probably twenty years, and may have been more, before the witness was called to give evidence of it. It is especially open, after so great a lapse of time, to all the observations that are made upon evidence of conversations; but supposing the witness correct in his recollection of what passed, it appears to have been at a time, so far as the time is fixed by what passed, shortly after *Philip* had come from Kitley, and when he was still pressed by the sheriff. He would not be likely to be communicative at such a time, and would be apt to give such answers as would put his interrogator off the scent, rather than any that might possibly lead the sheriff to find property that he might seize. I think that this conversation ought to have no weight as a piece of evidence.

Judgment.

There are one or two other circumstances. One is, the statutory declaration made by *Philip* as to the loss of the trunk and deeds on the occasion of the sale of lot 18 to *Ferguson* in the spring of 1875. He states his possession and the loss of "all the title deeds herein of this lot (18, 1st concession, Kitley), from *Abigail Campbell* to my brother *Christopher Curry* * * that on or about four years afterwards, the said trunk was found, but none of the said deeds were ever recovered, either

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by myself or by the said *Christopher Curry*, to whom they belonged, and whose property they were." There is really nothing in this. The declaration was made for a purpose, in order to carry out the sale to *Ferguson*. It was probably drawn by the conveyancer, not by *Philip*; and it was on an occasion not calling for an assertion by *Philip* in that document of his having title or interest in the land or the title deeds. It does not, as suggested, contain an admission that the land was the property of *Christopher*, only that the lost title deeds down to the conveyance to *Christopher* himself were so; and in fact they were so in the ordinary sense of the term; for, assuming a conveyance to *Philip* of one half of the lot, *Christopher* retaining the other half, he would with that other half retain the title deeds, and all that *Philip* would be entitled to, would be a covenant for their production.

The conduct and dealings of the parties are also pressed upon me as evidence against the fact of there having been a conveyance of half of the lot to *Philip*. $950 was paid in hand by the purchaser to *Christopher*, of this $50 was handed by him to *Philip*, *Christopher* says by way of a loan; $100 was retained by *Christopher* in his own hands, and he paid $800 into a bank in his own name. Notes were given for the balance, and one for $97 fell due 9th July. *Philip* was killed late in the same month, and it was after that that the balance of the purchase money was paid. If the whole had been paid in hand, or had been paid before the death of *Philip*, it would have been stronger evidence in favour of *Christopher*. As it is, it stands thus: there was a conveyance of the whole lot to *Christopher*, any conveyance from him to *Philip* of part of the lot, if there was any, was assumed, as was assumed of all the lost deeds to have been, in the language of the statutory declaration, destroyed and no longer in existence, title being traced to *Christopher* of the whole lot, a conveyance from him would be assumed, in the absence of

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evidence of any conveyance from him of a part, to give a perfect title to the purchaser. Such would be the assumption of the parties, and would be so of non-professional conveyancers in the country.

We have no evidence but that of *Christopher* that the $50 was handed to *Philip* as a loan. *Christopher* being the vendor, the conveyance being from him, the purchase money paid would naturally be paid to him, and it was his act that it was paid into a bank in his name. The $50 handed to *Philip*, and the $100 retained by *Christopher* may have been to answer their present occasions, leaving the bulk of the purchase money to be apportioned between them when the balance should be paid or at some future time. It cannot be said that if *Philip* was entitled to a portion of the purchase money he would certainly have pressed for its payment. He was a man of means, his personalty alone, according to the account of *Christopher* himself, his administrator, amounting to about $1,600.

Judgment.

I do not mean to say that these circumstances are of no weight: they are however to be considered with reference to explanations of which they may be reasonably susceptible; and the question is, whether they outweigh the evidence in support of the plaintiffs' case. One thing has great weight with me; it is, that the defendant has told such different and inconsistent stories in relation to a conveyance from himself to *Philip*, at one time denying that he had made a conveyance to him of any land; the proof being now beyond a question, and even by his own admission, that he had made a conveyance of some land. At another time saying that the conveyance that he had made was of lot 17; at another time making an admission, at another a half admission that it was of part of lot 18, and when confronted by the presence of *Freyne* and his wife, who had given evidence before the Master, and were about to give evidence at the hearing, that he did not recollect saying to *Freyne* that *Philip* had a deed of fifty acres of the land, but could not swear that

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he did not say so, or that he did not say it was a blessing it was not registered. If in truth the conveyance (for there certainly was a conveyance) was of lot 17, there was one plain statement to make without any possible motive, that I can see, to vary from it; then what is the proper inference to be drawn from these varying statements? None, that I can see, except that the conveyance was not of lot 17, and if not of lot 17 of what but of fifty acres of lot 18. It is not only that it has made it impossible for me to give credence to his statement that it was of lot 17, but I must scan and test his motives for these varying statements, and see, if possible, how he has come to make them. I come unwillingly to the conclusion that his statements have varied from time to time according to his belief of the existence or non-existence of evidence by which their truth could be tested.

These varying statements are then in my opinion cogent evidence against the defendant, but they are not the only evidence; his letters of October and November, 1855, and his statement in the presence of the *Freynes* read by the light of each other, and the other circumstances to which I have adverted, together with his own evidence, do, in my judgment, quite outweigh the circumstances relied on by the defendant. Judgment.

I must hold the defendant bound to account for one half of the purchase money received by him, and for half of rents received, the account of the latter being limited to the last six years.

The plaintiffs are entitled to their costs up to the hearing.

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McDONALD v. McKINNON.

Corroborative evidence—Statute of Frauds—Specific performance—Part performance.

The provision under the statute that requires corroborative evidence to be adduced, where one of the parties to an alleged contract is dead, is not that the evidence of the party setting up the claim must be corroborated in every particular; it is sufficient if independent support is given to the party's statements in so many instances that it raises in the mind of the Court the conviction that such statements may be depended on even in respect of those matters in which there is no corroboration.

C. the owner of real estate promised his brother *A.* that if he would abandon his intention of leaving this province and remain and support their mother and sister he (C.) would convey him a portion of the land on which *A.* was then residing and assisting in their support. In consequence of such request and promise *A.* did remain and assumed the whole charge of the support of his mother and sister:

Held, overruling the decision of the Master, that this was a sufficient part performance to take the case out of the Statute of Frauds.

This was an appeal from the Master disallowing the claim of *Archibald McKinnon* to 50 acres of land in the township of Lochiel, under the circumstances detailed in the judgment.

Mr. *Cattanach*, for the appeal.

Mr. *Hoskin*, Q.C., for the infant defendant, and Mr. *W. Cassels*, for the plaintiff, *contra*.

Orr v. *Orr* (*a*); *Nunn* v. *Fabian* (*b*); *Craig* v. *Craig* in Appeal, 30th March, 1878, were referred to.

Judgment. Sept. 4.

SPRAGGE, C.—*Charles McKinnon*, the father of the infant defendant, was the owner of 176 acres of land in the township of Lochiel. About the year 1859, he went to Pennsylvania, and lived there principally, paying occasional visits to his previous home in Canada.

(*a*) 21 Gr. 397. (*b*) L. R. 1 Ch. 35.

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Sixteen years ago there were living on the place in Lochiel, the father and mother, and a sister of *Charles*, and a brother *Archibald*, who has made a claim in the Master's office to the south 50 acres of the west half of lot 8, being a portion of the above 176 acres.

Archibald founds his claim principally upon an agreement made, as he says, fourteen years before giving his evidence, which would place it in 1864, his evidence being given in December, 1877. He says that *Charles* was then at the place in Lochiel, and was about returning to Pennsylvania; and *Archibald* himself also intended to leave for Pennsylvania, the father was then dead, when *Charles* proposed that he should abandon his idea of going to Pennsylvania and remain in Lochiel and work and improve the farm and support the mother and sister; and that if he would agree to do this he would give him fifty acres of the land. *Archibald's* case is, that he agreed to this; that he remained on the farm and cultivated and improved it, and has supported his mother and sister ever since, the sister having been an invalid for the last six years; that *Charles* subsequently reiterated his promise as to the fifty acres; he was killed on the 1st of July, 1872 or 1873, and on the 1st of May previously, *Archibald* being then also in Pennsylvania, *Charles* pressed him to return home sooner than he had intended to do, and promised that he would himself return to Canada in July, and make him a conveyance of the land in question.

Judgment.

This is *Archibald's* case, and if it is sustained in evidence, I am of opinion that he is entitled to succeed. The principle established by the case of *Loffus* v. *Maw*(a,) and others of that class is, that if a party change his position upon the faith of a promise by another party that he will do some certain specified act, the party promising is bound to perform that promise; a principle that has been acted upon by this Court in several cases. It is not necessary that a party should come from a distance

(a) 3 Giff. 603.

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and assume new duties, to bring himself within the principle, though in most instances this has been the case; and where it is so, it is the more readily susceptible of proof. In *Cannan* v. *Zeran*, which was before the Court on rehearing in February last, such change was held not to be necessary. It is a change of position, if a party who is really about to engage in a new pursuit abandons it, and agrees to continue in the occupation in which he is already engaged, and more emphatically is it so, where he takes upon himself a new duty and responsibility at the instance of the party making the promise, and upon the faith of the promise.

The change of position in this case (assuming it proved) was not a nominal but a real one. The like obligation rested upon the two brothers, and a third brother, *James*, to support their mother. *James*, as I gather from the evidence, had left; and the other two, and as it would seem, *Charles* particularly, felt it to be their duty to provide for the support of their mother and sister, their sister probably for the sake of their mother, then a widow about sixty years old. *Charles* was about to return to Pennsylvania where he had been for several years before, and *Archibald* intended also to go there. *Charles* proposed to *Archibald* an arrangement by which he, *Charles*, was enabled to discharge his duty to his mother, and was relieved of the charge of her support, and *Archibald*, on his part, abandoned a change and pursuit in life that he had contemplated, and assumed the entire charge of the support of his mother and sister, when before he had only shared it with *Charles*. This appears to me to be very clearly a change of position on the part of *Archibald*.

Judgment.

The points to be proved were the fact of such change of position; that it was the result of the alleged promise by *Charles*; and that *Archibald* has performed his part of the agreement. All these points are proved distinctly enough by the evidence of *Archibald* himself; but *Charles* being dead, the next question is, whether it is "corroborated by some other material evidence."

The evidence of the mother by way of corroboration appears not to relate to the same occasion as that to which the evidence of *Archibald* himself is most distinctly directed, that being in 1864, after the death of the father; while the mother speaks of an occasion when her husband was present. Her evidence is, "that *Charles* said *Archibald* was to get the fifty acres if he would stop with the family, as the old man was getting feeble. *Charles* said *Archibald* was to get the fifty acres the house was on for staying to take care of us." She says her husband lived a year or two after this. This does not contradict the evidence of *Archibald*, for he speaks of a conversation with *Charles* on the subject two years before the agreement made in 1864. He says, "he spoke of giving me the land two years before that. I was not satisfied to stay there and spend my life for nothing." *Archibald*, no doubt, was then speaking of the same conversation as is spoken of by his mother in her evidence. She adds, "If *Charles* and *Archy* went away, there was no one left to work the farm. * * When *Charles* was last at home he was satisfied with the way in which *Archy* performed his agreement and supported me and my daughter. I heard *Charles* say the last time he was at home, that the next time he would come he would give *Archy* the deed, and my daughter asked *Charles* to give the deed." The mother was seventy-four when she gave her evidence, it was through an interpreter, as she spoke Gaelic only. She may have forgotten the conversation of 1864, or confounded it, or part of it with the earlier one to which she deposes. Her evidence is corroborative to some extent of that of *Archibald's*; and what difference there is between them indicates the absence of collusion.

Judgment.

There is further corroboration in the evidence of *James McKinnon*. He speaks of the conversation in Lochiel, which he places, as he does his own leaving, about twelve years before giving his evidence. I take it to be the same occasion as that spoken of by *Archibald*, and it is corroborative of his evidence; and further, *James* says

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this: "*Charles* told me that *Archy* was to have the south half of the west half; he told me this often; he told me that if he had not promised *Archy* this, he would have left the place." This is corroborative of the whole case that is made by *Archibald*.

With regard to corroborative evidence under the statute, I do not agree that the evidence of a party claiming must be corroborated in every particular. If it were so, it would be requiring the party to establish his whole case by independent evidence. The observation of Sir *James Hannen*, in the case of Lord *St. Leonards'* Will,—*Sugden* v. Lord *St. Leonards* (*a*), are apposite to this point. "Let me observe, however, with regard to this corroborative evidence, it is not necessary that I should find corroboration in every particular, and to the full extent of what Miss *Sugden* has said, before I give credit to her statements. Because that would be, in other words, to say that I ought not to use any evidence standing in need of corroboration unless there were proof enabling me to dispense altogether with the evidence to be corroborated. It is sufficient if I find that independent support is given to Miss *Sugden's* statements in so many instances that it raises in my mind the conviction that she is to be depended upon even in those matters in which I do not find corroboration elsewhere." I feel less hesitation in differing from the learned Master in this case, as he had only the same means as I have of judging of the value of the evidence, the question being raised upon petition, and the evidence being upon affidavit, and the cross-examination of witnesses not taken before the Master to whom the case stood referred, but at Cornwall.

Judgment.

The appeal from the report is allowed, with costs.

(*a*) 1 Pro. Div. 179.

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Sale for taxes—Registration.

One *H.*, being indebted to a bank, mortgaged his lands thereto as security for his indebtedness, and the bank subsequently foreclosed his interest, but continued to allow *H.* to negotiate sales of the lands, and consulted him respecting sales effected by the bank. Some of the lands were specifically pledged to indemnify a certain indorser, and the notes upon which his name appeared had all been retired. One of the lots so mortgaged was afterwards sold for taxes, but the purchaser omitted to register his deed for more than eighteen months after the sale, as prescribed by the Statute 31 Vic., ch, 20, sec. 28, O. Meanwhile *H.*, the mortgagor, sold and conveyed the land to a *bonâ fide* purchaser, without notice, which sale was subsequently ratified and confirmed by the bank, and the conveyance duly registered, before the purchaser at the tax sale registered his deed.

Held, that the purchaser at the tax sale had thus lost his priority; and a bill filed by him impeaching the sale by the mortgagor was dismissed, with costs.

Statement.

The bill in this case was filed the 20th of February, 1872, by *John B. Smith* against *John McLandress*, setting forth that on the 20th of December, 1867, the plaintiff became the purchaser, at a public sale of lands for taxes, of the east half of lot No. 26, in the first concession of the Township of Essa, containing one hundred acres, and the same on the 21st of December following was duly conveyed to him by deed poll under the hands of the warden and treasurer, and seal of the county, and countersigned by the clerk of the municipality, and thereupon entered into possession of the land, and cut a small portion of the wood and timber thereon, but in consequence of the lot being wild and merely timber land he did not remain in actual occupation thereof; and that it was solely for the sake of acquiring the timber thereon that the plaintiff had purchased the land.

The bill further alleged, that by virtue of a pretended deed from *Thomas L. Helliwell*, the defendant had recently entered upon the land, and on or about the 14th of February, 1872, by himself, his servants and work-

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men, had cut down and carried large quantities of valuable timber from off the lot; that plaintiff notified the defendant to desist from such cutting, but he refused to desist therefrom; charged that defendant had notice of plaintiff's title before obtaining the deed from *Helliwell* who had formerly owned the property, but whose estate and interest therein had been absolutely foreclosed by the decree and order of this Court, made on the 27th day of October, 1862, in a suit brought by the Niagara District Bank.

The bill charged that the defendant had contrived to have the deed to himself from *Helliwelll* registered before the tax deed to plaintiff, and the said deed was procured and so registered for the purpose of defeating the plaintiff's title, and conveyed no interest in the land, but the same formed a cloud on the title of the plaintiff, who had caused an action of ejectment to be brought against the defendant; but before the same could be tried irremediable injury would be done to the premises, unless the defendant was restrained from further committing waste thereon.

Statement.

The prayer of the bill was, for an injunction to restrain further cutting, or other injury to the property; an account of the timber cut, and a declaration that the deed from *Helliwell* conveyed no estate or interest in the land to the defendant.

The defendant answered the bill denying all knowledge of the plaintiff's title until after the deed to defendant from *Helliwell* had been registered, to whom he had paid the sum of $300 in cash for said land, which was a good and valuable consideration therefor, and which purchase was made in good faith, believing that he was acquiring a title in fee thereto, and not until after he had made such purchase had defendant become aware that *Helliwell* was merely the equitable owner of said lot, and that the legal estate was vested in the Niagara District Bank under the foreclosure proceedings; and submitted that the deed to the plaintiff in pursuance of

such tax sale was void as against the conveyance by *Helliwell* to defendant under and by virtue of the registry laws: that plaintiff's alleged tax deed formed a cloud on defendant's title, and prayed to have the same removed; and that plaintiff might be restrained from further prosecuting the action of ejectment against defendant. 1878. Smith v. McLandress.

The abstract from the registry office shewed that on the 5th January, 1863, a vesting order of 27th October, 1862, in favour of the Niagara District Bank, was registered; that on the 16th of October, 1871, the deed from *Helliwell* to defendant, dated 25th July, 1871, was registered; and that the tax deed in favour of the plaintiff was registered on the 5th December, 1871.

The other facts adduced in evidence, material to the matters in question, are clearly stated in the judgment.

The cause came on for the examination of witnesses at Barrie, in the spring of 1872, and for hearing at the Sittings of the Court at Toronto, in the spring of 1876.

Mr. *Maclennan*, Q. C., and Mr. *S. G. Wood*, for the plaintiff, contended that at the time of the tax sale, the final order of foreclosure, and the order vesting the interest of all parties concerned in the bank had been obtained, the effect of which was to extinguish the title of *Helliwell*, so that when he executed the deed to the defendant, no title was vested in him legal or equitable; and by the tax sale deed the plaintiff obtained a perfect title both at law and in equity; and the relief sought by this bill could now be obtained under the provisions of the Administration of Justice Act. The defendant has not, and cannot make it appear that the final order for foreclosure has been opened up so as to render *Helliwell* even an equitable owner of the property; and the fact that the bank has since made a deed of confirmation to the defendant, cannot possibly better his position. And even if *Helliwell* were entitled to any relief in this Court, that fact would Argument.

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not better the case for the defendant. Here the plaintiff has the legal title, and the question simply is, can this legal title of the plaintiff be cut out by a conveyance from one having no apparent title whatever. And besides plaintiff was in possession, *Helliwell* was not; in such case his highest right would have been to have made an application for relief in this Court; and the final order is expressed to be made by consent of *Helliwell*, so that any one seeing that document registered, would never dream of inquiring whether or not he had assumed to convey the land. And apart from the question under the registry laws, the plaintiff here has not only the legal title, but also the better equity. They referred, amongst other authorities, to Doe *Major* v. *Reynolds* (*a*), *Rice* v. *O'Connor* (*b*), *Waters* v. *Shade* (*c*), *Hunter* v. *Kennedy* (*d*), *Dart*, V. & P., 782, and the cases there cited.

Mr. *D. McCarthy*, Q. C., and Mr. *Moss*, for the defendant.

Argument.

The debt appearing due to the bank for which the mortgage was given, and that for which judgment was recovered, was one and the same, and it is apparent from the evidence of the officers of the bank that after the final order of foreclosure and the vesting order were obtained, the account of *Helliwell* with the bank was continued just as it had been before; notes were continued to be renewed with the same indorsers as sureties. In reality the paper was, and continued to be the principal debt, the mortgage, judgment and execution were a security merely. *Helliwell* had a legal title in this Court on which the judgment of the bank formed a charge until his title was divested by the vesting order, and the subsequent sale for taxes operated upon the legal estate then vested in the bank, and the equitable interest remaining in *Helliwell*. And a purchaser from the bank or from *Helliwell*, if made in good faith, and

(*a*) 2 U. C. R. 311.
(*b*) J. & Eq. 510,
(*c*) 2 Gr. 457.
(*d*) 1 Ib. 146.

registering his deed before the purchaser at the tax sale, after the expiry of the period allowed by the statute, would obtain priority over him. 1878. Smith v. McLandress.

Here it is shewn that the defendant went to the bank to inquire as to this lot, and was there referred to *Helliwell*, this would estop the bank from impugning the title of *Helliwell* and asserting title in itself; besides the registry shewed the title vested in the bank, and being referred to *Helliwell*, he was thus lulled into security and effected a purchase which he never would have made if the plaintiff's tax title had been, as it should have been placed on the books of the registry office. The purchaser at the tax sale occupies a very different position, he is not interested in ascertaining who, by the books of the office, appears to be the owner; his title, should he ever acquire one by conveyance, is paramount to all; to preserve this, however, he is bound to register, or as in this case be subject to have his title defeated by the prior registration of a deed from the owner—and who for that purpose need not appear by the registry as the owner.

Mr. *Maclennan*, in reply.

Cripps v. *Jee* (*a*), *Ross* v. *Scott* (*b*), *Warburton* v. *Loveland* (*c*), *McCabe* v. *Thompson* (*d*), Doe *Spafford* v. *Breakenridge* (*e*), *Bruyere* v. *Knox* (*f*), were also referred to.

SPRAGGE, C.—This is a bill to restrain the cutting of timber on the east half of lot 26, 1st concession of Essa. The question in issue is the title to the land. Judgment. Sept. 4th.

The plaintiff claims title under a deed from the warden and treasurer of the county of Simcoe, dated 21st December, 1868, made in pursuance of a sale for taxes of 20th December, 1867, at which the plaintiff was purchaser. The deed was registered 5th December, 1871.

The defendant claims title under a conveyance from

(*a*) 4 Br. C. C. 472.
(*b*) 22 Gr. 219,
(*c*) 2 Dow, & Cl 480.
(*d*) 6 Gr. 175.
(*e*) 1 U. C. P. 492.
(*f*) 8 U. C. P. 520.

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Thomas Lees Helliwell, dated 25th July, 1871, and registered on the 16th October, same year. The original title of *Helliwell* was by a conveyance from one *Wright*, dated 3rd March, 1857, registered the following day.

In order to the purchaser at the tax sale preserving his priority as against a purchaser in good faith with prior registration, it was necessary under 31 Vict. ch. 20, sec. 59, that he should have registered his tax sale deed within one year from the passing of that Act. The year expired on the 4th March, 1869, and the defendant by his prior registration, cut out the tax sale deed; provided he was a purchaser in good faith, and *Helliwell* had title to convey.

There is no room to question that the purchase by the defendant from *Helliwell*, was in good faith, if made without actual notice of the purchase by the plaintiff at the tax sale. The evidence does not establish that he had such notice, and indeed it is not contended that he had. The real question then is, whether *Helliwell* had title to convey. The plaintiff's contention is, that he had not.

Judgment.

On the 30th of August, 1858, *Helliwell* was indebted to the Niagara District Bank in the sum of $13,291. On that day he made a conveyance to the bank of certain lands, but not comprising the land in question. On the same day *Helliwell* gave a confession of judgment to the bank for the same debt, upon which judgment was entered up on the same day, and on the same day also the bank executed a declaration of trust stating that the conveyance and confession were given by way of collateral security for the debt. Subsequently the bank filed their bill upon these securities, and a Master's report was made dated 25th of February, 1862, finding *inter alia*, the land in question in this suit bound by the judgment and its registration. On the 27th of October, in the same year, an order of Court was made with the consent of counsel for *Helliwell*, foreclosing him, as well to the lands comprised in the mortgage as those affected

by the judgment, and by the same order vesting them in the bank. 1878.

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The defendant's contention is, that this foreclosure was opened by the subsequent dealings between the bank and *Helliwell*. It was obtained with a purpose which is thus explained in the evidence of the then president of the bank, Mr. *Benson*. "The object of the foreclosure was to cut off Mr. *Helliwell's* right in the lands altogether, in order to enable us to sell. Our object in getting the foreclosure was to get the property under the control of the bank, because we were not satisfied with the way *Helliwell* was managing his business * * it was because he was indebted to other parties that we wanted to get the exclusive control of the properties for the benefit of the bank, and for Mr. *Helliwell's* benefit." It appears by the evidence of the same gentleman that the bank account with *Helliwell* was carried on as if the bank had no security but the notes, which continued to be renewed from time to time; being reduced from time to time by the proceeds of sales of lands comprised in the order, made sometimes by *Helliwell*, sometimes by the bank, and by payments made on account by *Helliwell*. Further that no sale was made by the bank without *Helliwell's* concurrence: that the bank looked upon him as having the beneficial interest in the properties. "I remember, (he says) as a fact, in all cases asking *Helliwell* for his concurrence in the sales; if the bank made the sale, the bank applied to *Helliwell* for his concurrence; if *Helliwell* made the sale, he would apply to the bank for their concurrence.

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Upon cross-examination by the plaintiff's counsel, Mr. *Benson* said he was not aware of any arrangement between the bank and *Helliwell*, after the foreclosure, that he should be entitled to a reconveyance of the lands upon payment of his debt: that the foreclosure was not a sham: that the bank could have applied the proceeds of sales to their own benefit—this last answer being, I may observe, a conclusion of law. He says in the same

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connection "I believe that *Helliwell* understood that he could at any time get the lands back upon payment of his indebtedness."

Besides the general course of dealing, a particular arrangement was made in regard to the land in question in this suit, and certain other lots. A Mr. *McGivern* was indorser of paper of *Helliwell* at the bank to the amount of about $2,500, and Mr. *Benson* thus states the arrangement made in regard to it; and his view of *Helliwell's* position thereupon. "I and Mr. *McGivern*, who was indorser for *Helliwell*, arranged that the lot in question and some others should be held as security for that portion of the indebtedness of *Helliwell*, upon which *McGivern* was liable, and upon this portion of the indebtedness being paid, this lot and the others were to be given up. This portion of the debt was paid previous to 1867; and upon payment *Helliwell* became entitled to have this lot and the others reconveyed to him at any time he should have asked for it; and since the payment of that portion of the debt, we took no further trouble about this part of the property—the bank considered that *Helliwell* should manage his own business and look after it. *Helliwell* had never asked for a reconveyance of the lot in question previous to the sale in July, 1871, nor, that I recollect, at any time since. He could have got it at any time after the payment of that portion of his debt, had he applied for it * * the property appropriated to *McGivern's* liability has never been sold by the bank." It would appear to have been in accordance with this arrangement and this view of the rights of *Helliwell* after payment of the *McGivern* notes, that upon application to the bank in July, 1871, by the son of the defendant with a view to the purchase of this lot by his father, he was told that *Helliwell* owned the lot, and was referred to him—this was in anwer to an inquiry, if the bank was in possession of the land and owned it. The bank has since, and since the commencement of this suit, made a deed of confirmation to

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the defendant; and inasmuch as upon *Helliwell's* indebtedness to the bank there still remained a balance due, this deed of confirmation may be taken to have been made in pursuance of the arrangement as to the land in question, spoken of by Mr. *Benson*.

It may be, that some of the dealings of the bank with *Helliwell* after the order of foreclosure may be attributed to a desire on the part of the bank to realize their debt without opening their foreclosure, procuring for that purpose the consent of their debtor to a sale of certain of the lands, but the evidence to which I have referred shews I think conclusively, that the ruling purpose was, to get rid of the other creditors of *Helliwell*, who, having charges upon his lands, might embarrass the arrangement which the bank and *Helliwell* desired to make between themselves, and that having accomplished that purpose, the well understood footing upon which they stood was, that *Helliwell* should continue the beneficial owner of the lands subject to his debt to the bank, which was to be gradually liquidated by the sale of the lands aided by payments from himself. The bank receiving these payments from *Helliwell*, is itself a fact that I incline to think operates to open the foreclosure. If the bank had sued for the debt, that would have been the effect; their receiving payments on account of the debt would, it appears to me, have the same effect. I refer to the judgment of Lord *Langdale* in *Loekhart* v. *Hardy* (*a*). I referred to some passages bearing upon this point in *Munsen* v. *Haw* (*b*), and therefore do not repeat them here. But, not this receiving of payment on account only, but the whole course of dealing points to the parties being upon the footing that I have indicated; the revival if not the continuance of the right to redeem, in other words the existence of the equity of redemption.

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If by the course of dealing which prevailed between the parties, the whole debt had been wiped off, leaving

(*a*) 9 Beav. 349.

(*b*) 2 Gr. 284.

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some parcels of land unsold, I can have no doubt that as between the bank and *Helliwell*, they would in equity be the property of *Helliwell*, and *pari ratione* when the portion of the debt was paid for which alone it was agreed that this, with certain other parcels of land, should thenceforward stand as security, the same consequence would follow. In each case the debtor, entitled to redeem, would actually have redeemed, the land could no longer stand charged with the debt when the debt was paid, and the position of the bank would be that of a dry trustee of the legal estate. I do not discuss the authority of the president of the bank to make the agreement he did make in regard to this and certain other parcels, because his authority has not been questioned in argument. I apprehend that he had such authority. Among the cases upon that point is *South of Ireland Colliery* v. *Waddle* (*a*).

It would appear from the evidence that at the date of the sale by *Helliwell* to the defendant, the position of the bank was that of a dry trustee of the legal estate for *Helliwell*; but it is not necessary to go so far. It is sufficient if he had some title legal or equitable; for his title, whatever it was, passed to his grantee, upon his conveyance to the defendant: Rev. Stats. O., ch. 102, sec. 4. And if he had an equity of redemption, as in my opinion he had, the defendant took it as *Helliwell* had it, whether much or little was due upon the land, or nothing at all was due. In short, once establish that there was an equity of redemption subsisting in *Helliwell*, and there is an end of the case, for it can hardly be necessary at this late day to quote authority to shew that an equity of redemption is an equitable estate, I will do no more than refer to, without repeating authorities quoted upon that point by my brother *Proudfoot*, in a late case on rehearing *Robertson* v. *Robertson* (*b*); and it is clear that any conveyance affecting lands in

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(*a*) L. R. 3 C. P. 463, reported in Appeal 4 Ib. 617.

(*b*) 25 Gr. 504.

equity as well as in law, are within the Registry Act 31 Vict. ch. 20, sec. 33.

My conclusion therefore is, that the defendant has title; and that the plaintiff by his neglect to register his tax sale deed within the period prescribed by law, lost the priority which he otherwise would have had; the defendant after the expiration of that period having registered his conveyance from *Helliwell* prior to the registration of the plaintiff's tax sale deed.

The bill is dismissed, with costs.

WILSON v. OWENS.

Fraudulent conveyance—Parol evidence—Resulting trust—Trustee by operation of law.

A suit for alimony having been instituted against the plaintiff, he, for the purpose of protecting his lands from process, conveyed the same to his solicitor for a money consideration, and the solicitor afterwards made a conveyance of the same lands back to him, but which the solicitor retained in his own possession and subsequently by desire of the plaintiff struck out his name as the grantee, and inserted as such the name of the sister of the plaintiff, the consideration money being paid by the plaintiff. The Court, being of opinion that this had not the effect of divesting the title which had been reconveyed to the plaintiff, and that even if it had had that effect there would have been a resulting trust in favour of the plaintiff, decreed relief accordingly, but under the circumstances, without costs.

And *Semble*, that if in the circumstances stated no consideration money had passed between the parties, there would have been a trust by operation of law in favour of the plaintiff.

Examination of witnesses and hearing at the Spring Sittings, 1878, in Goderich.

The facts are clearly stated in the judgment.

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

Mr. *Garrow*, for the defendant.

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Haig v. *Kay* (*a*), *McConnell* v. *McConnell* (*b*), *Ryder* v. *Kudder* (*c*), *Deacon* v. *Colquhoun* (*d*), *Garrick* v. *Taylor* (*e*), *Wheeler* v. *Smith* (*f*), *Childers* v. *Childers* (*g*), *Groves* v. *Groves* (*h*), *Wilkins* v. *Stevens* (*i*), were referred to.

Judgment. Sept. 4th.

SPRAGGE, C.—The plaintiff files his bill as entitled to the land in question by way of resulting trust. The land had belonged to the plaintiff. By conveyance of the 12th of March, 1874. he conveyed it to *Samuel G. McCaughey*, a solicitor of this Court. There is a conveyance dated the 17th of the same month from *McCaughey* to the defendant, which was not registered till 16th of January following. The latter is what is called a quit claim deed, but with sufficient words to operate as a conveyance The consideration expressed is one dollar. The defendant is a sister of the plaintiff. The transaction as between the plaintiff and *McCaughey*, is represented by both of them as a sale and repurchase, and they both state that consideration money was paid by *McCaughey* to the plaintiff, and on the conveyance from *McCaughey*, by the plaintiff to him.

Primâ facie there would be upon the conveyance to the defendant, a resulting trust. The rule and the reason for it are fully and clearly stated by Judge *Story* (*j*). "The clear result of all the cases, without a single exception, is (as has been well said by an eminent Judge,) that the trust of the legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the name of others, without the purchaser; whether in one name or several; whether jointly or successively (*successive*) results to the man who advances the purchase money.

(*a*) L. R. 7 Chy. 469.
(*b*) 15 Gr. 20.
(*c*) 10 Ves. 360.
(*d*) 2 Dru. 21.
(*e*) 29 Beav. 79.
(*f*) 1 Giff. 300.
(*g*) 1 D. & J. 482.
(*h*) 3 Y. & J. 163.
(*i*) 1 Y. & C. C. C. 431.
(*j*) E. J. sec. 1201.

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This is a general proposition, supported by all the cases; and there is nothing to contradict it. And it goes on a strict analogy to the rule of the Common Law, that, where a feoffment is made without consideration, the use results to the feoffor. In truth, it has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than for that of another; and that the conveyance in the name of the latter is a matter of convenience and arrangement between the parties for other collateral purposes." And in *Groves* v. *Groves*, a case cited by the defendant, the rule is thus stated by the Chief Baron. "There can be no doubt that where one man pays for an estate, and has it conveyed to another, that the grantee who has the legal estate is a trustee by operation of law for the purchaser." There was no question but that upon the resale the purchase money was paid by the plaintiff, and I therefore held at the hearing that it was for the defendant to take the case out of the general rule.

Judgment

The defendant by her answer set up that the conveyance from the plaintiff to *McCaughey* was made in order to prevent the land in question being reached by process in a suit for alimony, then pending against the plaintiff, but she did not set up that the conveyance to herself was made with the same object. There is a good deal of evidence tending to shew that that was the object of the plaintiff in both conveyances.

The defendant further sets up that she was induced to come to Canada from Ireland by the representations of the plaintiff, but that is not sustained as a defence. She further sets up that which is her real ground of defence, by way of rebutting the presumption that the purchase was for the benefit of the party supplying the money, that it was intended as a gift to her. There is parol evidence and correspondence between the parties upon this point. In my opinion they do not sufficiently shew an intention to make a gift. They shew an in-

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tention that the defendant should appear to be the owner, but not that she should really be so; and this appears to me to have been fully understood by the defendant. Among the letters are several, written by *Wilson Owens*, a son of the defendant, with her authority. In one of them dated the 12th of January, 1875, occurs this passage, "Can we have any of the fallen timber should we want it." This is significant enough. It is intelligible if the plaintiff was holding the place for the plaintiff, but not if she was its absolute owner.

There are also these circumstances, that the land was under lease to one *Pollard*, and the rent was received by the plaintiff, or what is stronger, by the defendant for the plaintiff; and this, that the plaintiff had four children and had no other property. Two of the children were living with the defendant, and the other two occasionally.

It was a benefit to the defendant to have this land, even not as her own, for she was to occupy it beneficially after the expiry of *Pollard's* term, and she did not expect that the plaintiff would return to it. The alimony suit was settled in November 1874, by an arrangement for the plaintiff and his wife living separately; but the plaintiff, instead of returning or proposing to return to his farm, lived in service in Toronto under an assumed name for about three years.

Judgment.

Upon the whole my conclusion is, that the presumption of a resulting trust is not rebutted by the evidence.

There is a peculiarity in the case which came out upon the evidence, and from which it appears that the suit has been brought, or at least that the bill has been framed, under a misapprehension.

It appeared that the instrument registered as a conveyance from Mr. *McCaughey* to the defendant was not really such a conveyance, but that there was a perfect execution of the paper as a conveyance from *McCaughey* to the plaintiff himself; that the plaintiff desired *McCaughey* then to keep it for him in his safe;

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and to keep the fact of its execution secret; and this was done. The deed from *Wilson* to *McCaughey* was registered promptly the 16th of March, 1874, and on the same day *McCaughey* gave to the plaintiff a written undertaking that he would on receiving the deed from the Registry Office, give to him a quit claim deed of the lot. The transaction is a strange one; one would not expect to find that purchase money had actually passed between the parties. If none had passed it would have only made this difference, that there would have been a trust by operation of law in favour of the plaintiff.

However that may have been there was a conveyance on the 17th of March, which vested the title in the plaintiff; and nothing has occured since to divest it. The striking out of the name of the grantee and inserting another name, though the grantee assented, could not have that effect. *McCaughey* was the only party executing the instrument. It was some considerable time afterwards that the name of the plaintiff was struck out and that of the defendant inserted; it does not appear when, it may have been shortly before registration.

Judgment.

It thus appears that this is not a case of resulting trust at all, and I so stated at the hearing upon Mr. *McCaughey* disclosing the facts in relation to the execution of the conveyance by him. I allowed the case to proceed, however, so as, if possible, to avoid further litigation.

The question now is, how the case should be dealt with. As the facts now appear it is a question of legal title; and the bill, if amended according to the facts, would be an ejectment bill. It would be a suit that before the Administration of Justice Act could not be entertained by this Court, unless indeed put upon the ground that the registration in the name of the defendant was a cloud upon the plaintiff's title.

The case then stands thus: I may dismiss the plaintiff's bill on the ground that the case made by it is not sustained by the evidence; or, I may allow the plaintiff

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to amend. If I dismiss the bill there will be nothing to prevent the plaintiff from proceeding to recover in ejectment upon his legal title. The defendant has no legal defence to such a suit, nor do I see that she would have any equitable defence. It would be no answer to such a suit that the plaintiff *intended* that the deed from *McCaughey* should be a gift to her even if the evidence would support it, which I incline to think, the present evidence would not. Then suppose it pleaded by way of equitable defence, that this intended, but not effectual gift was a device to place the land beyond the reach of execution in the alimony suit, would it be a good defence? Assuming that it would be so in case there had been a conveyance which vested the legal title, would it be so where there was no legal title in the way, and where on the contrary the legal title was in the plaintiff? The defence would be that the plaintiff had attempted, ineffectually, to deal with the land in question in a way that was against the policy of the law, and therefore his legal title should not prevail against the defendant who had herself no title, legal or equitable, to set up. In my opinion that would not be a good equitable plea.

Judgment.

I think it will be in furtherance of justice to allow the plaintiff to amend in accordance with the facts proved in relation to the conveyance from *McCaughey* converting this in substance into an ejectment bill; and thereupon in the decree to declare the instrument purporting to be a conveyance from *McCaughey* to the defendant, and registered as such, to be ineffectual to convey any estate to the defendant; to declare the legal title to be in the plaintiff, and to decree the delivery of possession by the defendant to the plaintiff.

This is perhaps going rather far in the way of amendment, but it would not unfairly prejudice the defendant, and may save further litigation.

The decree will be without costs. I give none to the plaintiff, as his bill is not properly framed; nor to the defendant, as she fails in her defence.

1878.

In re Kennedy—Wigle v. Kennedy.

Mortgage—Covenant—Title.

The purchaser of land gave back a mortgage to secure part of the purchase money, with absolute covenants for payment, &c. In fact a part of the land had been sold for taxes accrued before the vendor acquired title, and the time for redemption had elapsed at the time of the sale. *Held*, no answer to a claim for the full amount secured by the mortgage, although the conveyance by the vendor contained covenants limited to his own acts only.

Harry v *Anderson* (13 U. C. C. P. 576) followed though doubted: *Cockenour* v. *Bullock* (ante vol. xii. p. 138) doubted.

This was an administration suit, and a claim had been brought into the Master's office by *Charles H. Fox* on a covenant in a mortgage given for the balance of purchase money due upon the sale of land.

The sale was by one *Rushloe* to *Kennedy* of the east half of the lot, the consideration being $1,100; $100 paid in cash, on the conveyance being executed on the 23rd of November, 1874; and a mortgage given on the same date for $1,000. The covenants in the conveyance, which was in the short form, were the usual qualified covenants: those in the mortgage were absolute. Statement.

The north half of the land sold had been sold to one *Cameron* for taxes on the 11th of November, 1873, being for taxes accrued in 1870, 1871, and 1872. At the date of the conveyance and mortgage, therefore, the time for redemption had expired. The conveyance by the Warden and Treasurer under the sale was made on the 24th of November, 1874; the above conveyance from *Rushloe* to *Kennedy*, and the mortgage back were registered on 4th of December, 1874, the conveyance to *Cameron* on the 12th of December, 1874, within eighteen months of the tax sale, and so his priority was preserved. The consequence was, that at the date of the conveyance of *Rushloe* to *Kennedy*, *Rushloe* had no title to the parcel sold for taxes. *Rushloe* acquired title by conveyance to him of 31st of October, 1874, registered the 4th of December, 1874.

1878. In the Master's office *Fox*, the assignee of *Rushloe* claimed for the whole mortgage debt. The Master had disallowed so much of it as was due in respect of purchase money of the parcel sold for taxes, and from the disallowance of this *Fox* appealed.

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Mr. *Ewart*, for the appeal, contended that there was no failure of title, but even if there were it could make no difference as to *Fox's* right to be paid, as the vendor's covenants were limited to his own acts. Here the taxes had accrued due before *Rushloe* purchased, and it was by no default of his that the land was forfeited. His position was the same in reality as in the case of a pre-existing mortgage. *Rawle* on Covenants, 96-7.

Mr. *Roskin*, Q. C., and Mr. *Caswell*, contra. *Rushloe* could have paid the taxes after obtaining his conveyance at any time before 11th November, 1874, and was therefore bound by the terms of his covenant.

In addition to the authorities mentioned in the judgment counsel referred to *Smart* v. *McEwan* (*a*), *Ryckman* v. *The Canada Life Assurance Co.* (*b*), *Parker* v. *Clark* (*c*), *Fisher* on Mortgages, vol. 2, p. 696, sec. 1266.

Judgment. Sept. 4.

SPRAGGE, C.—The question is, does an action at law lie upon *Rushloe's* covenant, and, if so, does it affect his assignee, *Fox?*

The taxes for which the land was sold accrued due before *Rushloe* acquired title. *Harry* v. *Anderson* (*d*) was an action on covenant for taxes paid by the grantee. The covenant there was designated as "supplementary to the covenant for quiet enjoyment" but the action was held not maintainable, because the taxes were not alleged to have accrued due before he acquired title. I rather doubt the soundness of this decision, but it is so decided. In *Cockenour* v. *Bullock* (*e*),

(*a*) 18 Gr. 623. (*b*) 17 Gr. 550. (*c*) 30 Beav. 54.
(*d*) 13 U. C. C. P. 476. (*e*) 12 Gr. 138.

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Re Kennedy, Wiggle v. Kennedy.

there was a failure of title to part of the land sold, and it was held that a partial failure of consideration was no answer to a bill of foreclosure, and that the mortgagor's remedy was by cross-bill or action on the covenant.

This was followed reluctantly by the late Chancellor, in *Hamilton* v. *Banting* (*a*). I am not sure that *Cockenour* v. *Bullock* was rightly decided. Under it the mortgagor could redeem that for which the grantor had title, only by paying the purchase money of that also for which he had not title.

An inquiry might have been directed as to how much of the purchase money was attributable to that to which the vendor and mortgagee had good title. Probably the cross-relief was not asked for, if it could be.

Here the whole question is open, so far as the pleadings could make it, the claim being in the Master's office for a mortgage debt, and if there is any answer, legal or equitable, it is open to the purchaser, the mortgagor. But the rights of vendor and purchaser are not the same after conveyance as before. Before conveyance the purchaser is not bound to pay purchase money unless a good title is shewn. After conveyance must he not rely then upon the covenants from the grantor?

Judgment.

The mortgagee claims the amount the mortgagor has covenanted to pay. He takes the covenant which is to pay so much money. It is contained in a mortgage, and that mortgage is for purchase money, but does that make any difference unless the covenantor has some equity to deal with the purchase money in a particular way, as in *Henderson* v. *Brown*? (*b*).

In this case he has no such equity; then how does he stand? The question being raised as it is, he has any remedies that law or equity may give him, but that is all; his rights are not enlarged, and it comes after all to the question what are his rights to be relieved from his covenant to pay so much money? Has he any right outside of the covenant by the grantor.

(*a*) 13 Gr. 481. (*b*) 18 Gr. 79.

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Re Kennedy, Wigle v. Kennedy.

Suppose the simple case of one parcel of land conveyed, and an absolute covenant by the grantor that he had good title; and suppose it shewn that he had no title. It may be assumed that this would be an answer to the purchaser's covenant to pay purchase money.

But, suppose instead of such covenant the purchaser had no covenant from the grantor, where would be his defence to his covenant to pay purchase money? He had a conveyance and such title as the vendor had, but no covenant by the vendor that his title was a good one; and he must pay his purchase money for what he got.

Suppose a third case, a conveyance and qualified covenants in the conveyance from the vendor, the rights of the purchaser must be measured and bounded by the extent of the covenants.

These positions are not new, but incontrovertible.

This covenant amplified is that the covenantee shall hold the land conveyed free and clear, *inter alia*, from any and every "judgment, execution, extent, rent, annuity, forfeiture, re-entry, and every other estate, title, charge, trouble, and incumbrance whatsoever, made, executed, occasioned or suffered by the said covenantor or his heirs," &c.; and the question comes to this, whether there being a charge and incumbrance upon the land, while in the ownership of the covenantor, which he had it in his power to discharge, but which he suffered to ripen into a forfeiture, his suffering this is not a breach of the covenant from which I have quoted.

Judgment.

If the question were *res integra*, I should incline to the opinion that it is, but that question was decided adversely to the covenantee in *Harry* v. *Anderson*, and it is proper that I should follow that decision, being by a Court of competent jurisdiction, in preference to any opinion I might be supposed to entertain.

Shortly then my view of the case is, that the representatives of the purchaser have only such rights as the conveyance, deed, and mortgage give them; and that following *Harry* v. *Anderson* in the Common Pleas,

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Re Kennedy, Wigle v. Kennedy.

the purchaser *Kennedy* could not, under the circumstances, recover upon his covenant against the vendor, and that his representatives have no remedy outside of the vendor's covenant in this Court, and consequently that the appeal must be allowed, and with costs.

I regret to have to come to this conclusion. I do so in deference to the decision in the Common Pleas.

MUNRO v. SMART.

Married Women—Wills' Act.

Quære, whether a married woman, under the R.S.O. ch. 106 sec. 6, can devise or bequeath her separate property to one of several children to the exclusion of the others,

Statement.

This was a suit for partition by *Margaret Ramsay Munro* and others, against *William Lynn Smart*, and his three infant children, the pleadings in which set forth that *Mary Crooks*, late of Hamilton, widow, died on the 21st of May, 1862, leaving, amongst other children, *Catharine McGill Crooks*, who afterwards married the defendant *William L. Smart*, and died on the 23rd of March, 1870, leaving the three infant defendants her children, she being entitled under the will of her said mother to an undivided fourth part of the estate of her mother; and that by her will she, the said *Catharine McGill Crooks*, gave and bequeathed all her right and interest "already acquired, or to be acquired," in such estate to one of the infant defendants, and appointed her husband executor of her will.

The cause originally came on by way of motion for decree, but *Proudfoot*, V. C., before whom it was heard,

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on the 12th of January, 1876, declined to make the decree, and directed the case to stand over in order that the infants might sever in their defence, and have an opportunity of discussing the will of Mrs. *Smart*, reserving the costs of that application. The cause subsequently came on for hearing at Toronto.

Mr. *Cattanach*, for the plaintiffs.

Mr. *Smart*, in person.

Mr. *Boyd*, Q. C., and Mr. *Moss*, for the other defendants.

Judgment.

Sept. 4.

SPRAGGE, C.—The bill is for partition. The plaintiffs are *cestuis que trust* under the will of *Mary Crooks*, who was their mother, with the exception of one daughter, *Augusta Anna McKay*. The defendants are the husband and children of another daughter of the testatrix who intermarried with the defendant *Smart*, and who is now dead.

The testatrix left five daughters, all of whom, with the exception of Mrs. *Smart* who is dead, are widows.

By the will of the testatrix all were to become upon the death or marriage of *Catharine McGill Crooks*, afterwards Mrs. *Smart*, equally entitled to their mother's estate. The estate, as I gather from the evidence, consisted of personalty, and the testatrix directed that upon the marriage of her daughter *Catharine McGill* (her only unmarried daughter) her estate and property should be equally divided among her five daughters; and in order to carry out the provisions of her will she empowered her executors to invest the property and estate "in such securities, or in such manner" as they might deem most advantageous, with power to vary securities and investments; and she appointed three executors, all of whom have since died.

An instrument dated the 17th of July, 1866, was executed by all the daughters except Mrs. *Logie*, her

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signature being, as she says in evidence, omitted by mistake. The property is recited as consisting of shares in the Hamilton Gaslight Company, money due on a mortgage made by one *Snider*, money due from the estate of *James D. McKay & Co.*, and two dwelling houses in the City of Hamilton. And the parties thereby agreed that the Gas Company stock should be assigned as the separate property of Mrs. *McKay*, she releasing to the other beneficiaries her interest in the dwelling houses; and she agreed, her husband joining with her, that the dwelling houses and the rents should belong and be held for, and be divided among her four sisters. The mortgage money, and the money due from the estate of *McKay & Co.*, to be equally divided among the five sisters.

The object and effect of this instrument I take to have been merely to allot the gas stock to Mrs. *McKay* in severalty, she purchasing the shares of the others therein by releasing to them her share in the dwelling houses. No other change is made in the position of the estate, or in the relation of the trustees to the estate or to the *cestuis que trust*.

Judgment.

In 1870 Mrs. *Smart* died, leaving her surviving her husband and three infant children. She left a will bequeathing all her interest, present and prospective, under the will of her mother to one daughter, and appointing her husband executor of her will.

It is made a question whether the dwelling houses, which after the death of the testatrix, Mrs. *Crooks*, became part of her estate, are realty or personalty. I incline to think that they are realty, acquired by the trustees under the power conferred by the will to invest in such securities, "or in such manner," as they might deem advantageous; but I do not see that it is material to any question arising in this case which they are. It is contended that if personalty there should be a personal representative of the estate of Mrs. *Smart*. But *cui bono* appoint a personal representative? This Court

1878, Munro v. Smart. can appoint one if necessary, or can dispense with the appointment of any. It is not suggested that if one were appointed he would have any duty to discharge. There are duties to be discharged under the will of Mrs. *Crooks*, for which trustees may be appointed by this Court, or this Court through the Master may execute what remains to be performed. Whatever the character of these dwelling houses they devolve in the same way under the will of Mrs. *Crooks*.

The devisee under the will of Mrs. *Smart*, and her other children are not represented before me by different counsel, although different guardians were assigned to them by reason of their conflicting interests. The question is, whether under our Wills Act and Married Woman's Act, a married woman can devise or bequeath her separate property to one of several children to the exclusion of the rest. She may—Rev. Stat. O., ch. 106, sec. 6—devise or bequeath "to or among her child or children issue of any marriage." I am not referred to any case upon the point, and the language is not very clear; it may be read to her child or among her children, or to her child or children, or among her children, Either way it seems to be implied where the word child is used that it is an only child, it is not *a* child or children issue of any marriage, but to *her* child. I do not think the point by any means clear.

Judgment.

The plaintiffs, however, are not interested in the determination of this point, and it would not be fair to them to postpone the partition or sale prayed for till after its determination. Mr. *Smart*, the father of the infant defendants, disclaims any interest in the estate in question. It is well, therefore, that the point should be decided at an early date, in order that the property may be dealt with as the property of the three children, or of the one to whom it is given by the will.

The infants, by their answer, claim that they have a reversionary interest in the share of the plaintiff Mrs. *Munro*, under the following clause in the will of Mrs.

Crooks, "And in case of the death of any of my daughters without leaving any children or child surviving, then the share of such daughter so dying childless shall be divided among my surviving daughters and the children of any who may be deceased, *per stirpes* and not *per capita*, as aforesaid." The answer states that Mrs. *Munro* is childless. This claim is at least premature, for she may not *die* childless. 1878. Munro v. Smart.

I should infer from the nature of the property in respect of which this bill is filed, two dwelling houses, that a sale will be more proper than a partition into four portions, and the decree will be accordingly. Costs as usual in partition suits.

There is also personal property to be divided, and as the trustees are dead, and there are infants interested, it can only be done through the intervention of this Court. Judgment.

1878.

ASTON v. INNIS.

Tax sale—Registration—Registered plan—Description of land—Priority—Costs.

The provision of the Statute 31 Vict. ch. 20, sec. 58, O, as to the registering of a deed given upon a sale for taxes, applies as well between several purchasers at successive sales for taxes, as between a purchaser thereat and the vendee of the owner.

The plan of a survey of a portion of a town plot, was registered in the proper registry office, but without being properly authenticated in the manner required by the Statute, (R. S. O., ch. 111,) not being duly certified by a surveyor:

Held, notwithstanding this irregularity, that the municipality had the right to assess these lots, and levy the taxes assessed by sale in the usual way.

In such survey the land was divided into blocks, with streets running through them, and the blocks were sub-divided into lots, which were numbered in all from 1 to 174, inclusive:

Held, that a sale of any such lots by their numbers only, would be a sufficient description, and that if named incorrectly as being on one of the streets, it would not vitiate a private sale, as anything beyond the numbers in such sub-division would be surplusage; and the same would apply to a tax sale.

Under the circumstances stated, the municipal authorities at first assessed some of the lots as lying on Thomas street, sold them for non-payment, and conveyed upon non-redemption by that description. Upon their again becoming liable to sale for arrears of taxes, the authorities made a change designating the lots as being on Side road, without any By-law authorizing such change, or anything to shew that it was made otherwise than upon the assessment rolls and other documents in relation to the collection of taxes:

Held, that the owner of such lots was bound to pay the taxes upon them by whatever designation they were entered on the roll, and it was at his peril if he omitted to pay.

A purchaser at a sale of land for taxes after the time for redeeming, went into possession and improved the property, but omitted to register his deed within the period prescribed by the Statute, and the owner sold the same to a *bonâ fide* purchaser, who registered and filed a bill to set aside the tax sale deed as a cloud on title:

Held, that under the circumstances the defendant was entitled to be paid for his improvements, which the Court, in order to prevent further litigation, settled at $200; but in the event of the plaintiff preferring that the defendant should retain the land paying him the value thereof, a reference was directed to ascertain its value.

On a sale of two adjoining town lots for taxes, the Treasurer sold the easterly seven-eighths of the westerly lot and the westerly seven-eighths of the easterly lot:

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Held, a sufficient description to enable the parties to ascertain and define the land sold.

In a suit by the owner of land impeaching a tax sale deed as a cloud on title, the defendant disputed the right of the plaintiff which was decided in his favour. The Court ordered the defendant to pay the costs of the suit notwithstanding the amount to which the defendant was found entitled as compensation for improvements was estimated at double the value of the land, and which the Court ordered the plaintiff to pay in the event of his preferring to take back the land rather than allow the defendant to retain it, paying its value; although had the defendant submitted on the question of title, and claimed only compensation under the statute, the costs would have been apportioned.

This bill was by *John W. Aston* against *John Innis*, an infant, stating that plaintiff was seized in fee of lots 13 and 14 on the south side of Thomas Street in the town of Collingwood, shewn on a plan thereof made for one *John S. Wallace* by a duly authorized provincial land surveyor and registered in the proper registry office for the county; that the plaintiff had become entitled to these premises under and by virtue of a deed of conveyance from one *John Swayze* to one *Ann Aston*, the mother of the plaintiff, made for a valuable consideration, dated 13th April, 1872, and registered on the 16th of the same month; and by virtue of another deed dated 13th of April, 1873, whereby the said *Ann Aston* for a valuable consideration conveyed the same to the plaintiff in fee, and which deed was also registered on the 29th of September following; and that by virtue of these conveyances the plaintiff on the registry thereof became entitled to the benefit of the registry laws of the province.

Statement.

The bill further alleged that all the taxes assessed or accrued due on these lands were duly paid up to the end of December, 1871, but by some error or mistake of the officer whose duty it was in that behalf to cause lands to be sold for arrears of taxes, the municipal corporation of the town of Collingwood caused these lands to be exposed for sale and sufficient thereof to be sold to satisfy taxes unpaid and in arrear on or about the 27th of October, 1871, alleging that such lots were offered for

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sale to be sold for taxes due and unpaid for certain years previous amounting to $5.14, and certain portions of said lots were then sold to one *Robert Gordon*, who subsequently assigned the same to the defendant; and that on the 17th of February, 1873, and 11th of April, 1874, conveyances to the defendant were made in pursuance of such tax sale, and by virtue thereof the defendant claimed title to said lands and had placed a person in possession thereof and claimed to be the owner thereof; but the deeds so made on such sale for taxes were not registered until the 15th of October, 1875.

The plaintiff submitted that the sale and conveyances for taxes were void and ought to be set aside on the grounds (1) that the taxes for which the same were sold had all been paid; (2) that the lots were not properly described in the advertisement for sale or in the conveyances thereof, as the lots were lots on the south side of Thomas street, and were not lots on the Side road or Side street in the said town of Collingwood, and there

Statement.

was no plan registered to shew or to authorize their being so described; and (3) that the deeds in pursuance of such tax sale were not registered within 18 months from the sale thereof as required by the statute in that behalf, and therefore were void as against the plaintiff.

The bill further stated that the plaintiff had applied to defendant, but that he refused to give plaintiff any satisfaction whatever in the premises; and prayed that the sale and deeds might be declared void and set aside, and the deeds delivered up to be cancelled, and the defendant ordered to convey to the plaintiff and deliver up possession to him, and for an account of rents and profits.

The defendant, by his guardian, answered the bill, setting up substantially that the tax sale and conveyances thereunder were all regular; and that since then he the defendant had, in good faith, expended large sums of money in erecting permanent buildings, and making lasting improvements under the belief that the lands were his own; and that if the plaintiff should be held

upon them by whatever designation they may have been entitled to succeed, the defendant submitted that he was entitled to be re-paid all moneys paid by himself or those under whom he claimed. 1878. Aston v. Innis.

The cause came on for examination of witnesses and hearing at the sittings of the Court at Barrie, in the spring of 1878.

Mr. *Fitzgerald*, Q. C., and Mr. *Ault* for the plaintiff.
Mr. *McCarthy*, Q. C., for the defendant.

Bell v. *Walker* (*a*), *Brower* v. *The Canada Permanent Building Association* (*b*), *Knaggs* v. *Ledyard* (*c*), *Austin* v. *Ledyard* (*d*), *Booth* v. *Girwood* (*e*), were referred to.

SPRAGGE, C.—This is rather a peculiar case. The plaintiff and defendant derive title each through a sale of land in the town of Collingwood, for non-payment of taxes; and the whole difficulty appears to have arisen from irregularities or changes in regard to a sub-division, upon the survey for one *Wallace*, of a part of the town. A copy of this map, the original of which is in the office of the town clerk of Collingwood, is before me. The map appears to be registered in the proper registry office, but without being properly authenticated in the manner required by the Statute, not being duly certified by a surveyor as required by the Act. See Revis. Stats. O., ch. 111, sec. 82, sub.-sec. 2. I should think, however, that this irregularity does not affect the right of assessment by the municipality, or of levying the taxes assessed by sale in the usual way. See Revis. Stats. O., ch. 150, sec. 12, and sub.-secs., and sec. 28 and sub-secs. I think, therefore, that the sale to *Swayze*, under which sale the plaintiff claims, was a valid sale. Judgment. Sept. 4.

(*a*) 20 Gr. 558.
(*b*) 24 Gr. 509.
(*c*) 12 Gr. 320.
(*d* 28 U. C. P. 47.
(*e*) 32 U. C. R.

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The registered map of this survey divides the land into blocks, which are traversed by streets bearing certain names, the most southerly one being called "Side road," and the street running parallel to the north of it, "Thomas Street." The blocks are sub-divided into lots and these lots are numbered throughout the sub-division from 1 to 174, inclusive. The range of lots between Side road and Thomas Street are numbered from 1 to 29, inclusive. The lots in question are numbered 13 and 14.

A sale by these numbers alone, without describing them as being upon any road or street, would be sufficient. It would clearly be so upon a private sale, and I see no reason why it should not be so upon a tax sale. So a deed describing them as on Side road, or as on Thomas Street, or as between the two, would not be erroneous; anything beyond the numbers in such a sub-division would be surplusage, but would not vitiate.

The defendant claims under a sale for taxes accrued due after the taxes realized by the sale under which the plaintiff claims. At the earlier of the two sales the lands were advertised as lots 13 and 14 on Thomas street; at the second sale they were described as lots 13 and 14 on the Side road. Neither description was inaccurate. The latter, if anything, was more explicit, as lots in the sub-division are on only one side of Side road, while they are on both sides of Thomas street.

Judgment.

The authorities of the corporation seem at first to have considered this range of lots as lying on Thomas street so far as assessing them for taxes and selling them for non-payment, and conveying them upon non-redemption by that description. Upon their again becoming liable to sale for arrears of taxes, they made a change designating them as on Side road. It does not appear that there was any by-law making a change, or that it was made otherwise than upon the assessment rolls, and in documents in relation to the collection of taxes.

The owner of these lots was bound to pay the taxes

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entered upon the roll; and if there was a change formally or informally made in the designation of the lots, it could not *per se* relieve him from the payment of taxes. It would only be a designating of the same land by a different addition, but not an improper one, to the number of the lots, and it would be at his peril if he omitted to pay the taxes.

As a fact the taxes accruing due after the first sale were not paid; and the two lots in question, or rather portions of them were sold for non-payment in December, 1871. After this sale, and as the plaintiff says, in the Autumn of 1873, he took some steps with a view to the payment of these taxes.

His evidence upon this point is thus taken by the stenographer:—

Q. Do you know anything about these taxes? A. Yes; I wrote a letter to *Port*, in Collingwood, in 1873, asking what were the taxes; this was after the sale, this was in the fall of 1873. Q. You applied to whom? A. To *Port*, who wrote me a letter saying that the land was not assessed; there were no taxes to pay. Q. Have you the letter? A. No, I have not the letter, I have lost it. Q. Did you go to see him? A. Yes, in 1874. Q. See whom? A. I saw Mr. *Port*. Q. And what did he tell you? A. He told me they were not assessed; that there were no taxes to pay, and he said it was all the better for me as I would not have to pay the taxes; he said that they were not assessed, that the assessor had missed them. Q. You told him what lots? A. Yes, and I took a copy of the deed with me; he said that they were not assessed, that the assessor had missed them, and said it was all the better for me that I did not have to pay them as they were not assessed; I wanted to pay them.

Judgment.

By Mr. *McCarthy*.—Did you not send some money to pay the taxes? A. No. Q. And you only sent a letter to find out what the taxes were? A. Yes. Q. And that was the answer you got that there was no such land on Thomas street? A. No, he wrote us that it was not assessed, and there were no taxes to pay.

It is not very satisfactory, the letter not being produced, and Mr. *Port*, the treasurer, not being called.

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Aston v. Imils.

If the witness is accurate, it exhibits great carelessness on the part of the treasurer, for he had the evidence in his own office that the only lots 13 and 14 in the sub-division had been assessed for taxes, and had been sold for non-payment; and a reference to the map would have shewn the identity of the lots described in the deed made on the first sale, and which deed, the plaintiff says, he produced to the treasurer, with the lots 13 and 14 which were sold in December, 1871. The most cursory glance at the map would have shewn this; and upon seeing this the treasurer would have seen that the land had been sold, and that the time for redemption was passed, instead of telling the plaintiff contrary to the fact, that the assessor had omitted these lots from the assessment.

It cannot be that this piece of information could affect the sale. The sale itself was valid, the land was not afterwards redeemed, and in due course the official deed issued to an innocent purchaser.

Judgment.

At the hearing I inclined to think that the provision in the statute for the registration of the conveyance within eighteen months after the sale does not apply to this case, but upon examining the Act more particularly, I think the provision does apply. The provision of the statute (sec. 76) is, that unless the deed from the treasurer be registered within that time, parties claiming under it "shall not be deemed to have preserved their priority as against a purchaser in good faith who has registered his deed prior to the registration of such deed from the treasurer." It is the case in this instance that the deed from the treasurer was not registered within the eighteen months—it was registered 15th October, 1875. The conveyance from *Swayze* to *Ann Aston*, was made 13th April, 1872, and was registered the 16th of the same month; and the conveyance from *Ann Aston* to the plaintiff was made 13th April, 1873. There may be some doubt as to its proper date, but at any rate it was registered 29th September, 1873.

1878.

Aston v. Innis.

The conveyance to *Ann Aston* was after the sale for taxes, and the conveyance from her to the plaintiff was after the time for redemption had expired.

If the plaintiff had been owner of the land as far back as the advertisement of sale for taxes, I should, I think, hold him not to be a purchaser in good faith within the meaning of the Act; but he was not then owner, and did not become so until April, 1873, when it was in fact too late for him to redeem. It does not appear, however, that he had actual notice that there had been any sale for taxes, and consequently he had no notice that the title of *Ann Aston* had been extinguished by the expiry of the time for redemption, and the deed of the treasurer to the purchaser. The plaintiff is the son of *Ann Aston*, but in law he is as to this purchase, a stranger. It was the duty of *Swayze* to pay the taxes; the like duty devolved upon *Ann Aston*, and it was in her power for some eight months after her purchase to redeem. When the land came to the plaintiff it was too late for her to redeem—it was conveyed to him by the person who had been owner, and who, it appears, believed she was so still; and so far as appears the plaintiff received it, took his conveyance and paid valuable consideration, believing that she was owner, and in ignorance of the facts that affected her title; and registered his deed more than eighteen months after the sale, and before the registration of the deed from the treasurer, and that appears to be such a case as is contemplated by the Act, and consequently the priority which the defendant had up to the expiry of eighteen months from the sale, was lost by the registration of the deed from *Ann Aston* to the plaintiff.

Judgment.

With regard to compensation for improvements as made under mistake of title, the evidence leads me to believe that they were made under the honest belief that the land was the property of the defendant. I do not agree in the contention that *Innis*, the father, had notice of any claim by Mrs. *Aston;* he was told that she had

1878.

Aston v. Imrie.

foolishly purchased after the sale for taxes, at which he was a purchaser, without searching the title. When he was informed of this, the time for redemption had expired; and if it had not, it would have made no difference, he would only have learned that she was entitled to redeem, and when she failed to do so, there was no reason why he should not complete his purchase and make such use of the land as he might think fit. His great mistake [illegible] omission to register within the time limited by the statute to preserve his priority.

The provision of the Revis. Stats. O., ch. 95, sec. 54, is in the alternative. It gives a lien to the extent that the land is enhanced in value; or, the Court may direct that the party making improvements shall retain the land "making compensation" for the land if retained, as the Court may direct.

The right to the land itself is in the plaintiff, and there is no reason why he should not have it, making compensation for improvements and re-paying the taxes paid by the defendant; those due before the sale, at ten per cent. interest, and taxes paid since at six per cent. I think the amount of compensation may fairly be taken at $200, *i. e.*, taking into account the value of the occupation, and deducting it from the sum by which the land is enhanced in value. I name this sum to prevent further litigation, but if either party is dissatisfied with the amount, he may take a reference, but it will be at his peril as to costs.

Judgment.

On the other hand, it may be that the improvements are not such as the plaintiff would himself have made; he may consider them unsuitable to the place, and may prefer that the defendant should keep the place and pay him the value of the land. In that case there must be a reference. The plaintiff, according to his own evidence, paid $110 for it; according to other evidence it is worth very much less, and there is no reason why the defendant should pay more than its real value. If the plaintiff elects this alternative, he is to make his election

within a month, otherwise the defendant to be entitled to compensation. 1878.

Aston v. Innis.

A point was made by Mr. *Fitzgerald* that the land sold at the second sale was not described with sufficient accuracy. I have not before me the treasurer's certificate which may have defined, by a sufficient description, the land. The evidence of the treasurer is, that seven-eighths of each lot were sold, the westerly portion of the easterly lot, and the easterly portion of the westerly lot. I should not think that there would be such difficulty in ascertaining and defining the land sold as the learned Vice Chancellor who decided *Knaggs* v. *Ledyard* (*a*) conceived there was in that case. The point is, however, not very material, as if I agreed with Mr. *Fitzgerald* upon it, I should still think the defendant entitled to compensation for improvements.

As to costs. Upon the whole, the plaintiff is the successful party upon the principal question in contest, the title to the land. If the defendant had submitted upon the question of title, and had contented himself with claiming compensation under the statute, I should have apportioned the costs. As it is, I must hold the plaintiff entitled to the general costs of the cause. Judgment.

As to compensation under the Assessment Act in certain cases, I have, in considering another case, come across a provision in the Assessment Act to which I was not referred: Rev. Stat. O., p. 1863, sec. 159.*

(*a*) 12 Gr. 320.

*The words of the section here referred to are, "In all cases * * * where lands having been legally assessed for taxes, are sold as for arrears of taxes, and such sale, or the conveyance or agreement thereon is invalid by reason of uncertain or insufficient designation or description of the lands assessed, sold or conveyed, and the right and title of the tax purchaser is not valid, and the tax purchaser has entered on the lands so liable to assessment, and has improved the same, then in case an action of ejectment is brought against such tax purchaser, and he is liable to be ejected by reason of the invalidity of such sale or conveyance, the Judge of assize before whom the case is tried, shall direct the jury to assess, or shall himself (if the case be tried without a jury) assess damages for the defendant for the amount of the purchase money at such sale and interest thereon, and of all taxes paid in

1878.

Aston v. Innis.

This case does not, *in terms*, come within the cases provided for by the Act, but it shews the mind of the Legislature that even in cases where the tax sale cannot be upheld, the purchaser should, in an honest case, be entitled to be compensated for improvements.

MELVILLE v. STRATHERNE.

Family settlement—Enforcing agreement to abide by a will not yet read—Infant signing agreement—Specific performance—Mutuality.

The owner of land, by a letter written to his mother, directed that she should have the power to dispose of his property, and she by her will devised portions thereof to some, to the exclusion of others of her children. *Before reading this will*, the executors named therein called her several heirs together, and suggested that they should sign an agreement to submit to and acquiesce in the provisions of such will, and which they did sign.

Held, that this being in the nature of a family agreement or settlement, the parties to it were bound thereby, and would be compelled to carry out the provisions of the will.

One of the parties executing this agreement was, to the knowledge of all interested, under age at the time of the agreement.

Held, no answer to a bill by the infant after attaining twenty-one, against parties who had obtained the benefits of the will intended for them, notwithstanding the want of mutuality at the time of the agreement.

Statement.

The bill in this case was filed by *John Stratherne Melville* against *George Stratherne*, setting forth that *Ellen Rogers Stratherne* was at the time of her death (3rd April, 1863), seized of the lands in question in the cause, and had duly made and published her will, dated 21st July, 1859, whereby she devised the same in fee to

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respect of the lands, since the sale, by the tax purchaser, and interest thereon, and of any loss to be sustained in consequence of any improvements made before the commencement of such action by the defendant; and all persons through or under whom he claims, less all just allowances for the nett value of any timber sold off the lands; and all other just allowances to the plaintiff, and shall assess the value of the land to be recovered.

her daughters *Betsy Stratherne*, *Jane Stratherne*, and *Christina Stratherne*, and to the plaintiff, to be divided among them equally: that the plaintiff was in possession of this land by virtue of his right to an undivided fourth share as tenant in common with the three other devisees from the time he attained twenty-one until in or about 1874, when he went to reside elsewhere; and that defendant then or soon afterwards wrongfully took possession and claimed some title or interest therein by length of possession or otherwise; that the defendant sometimes denied the right of the testatrix *Ellen Rogers Stratherne* to devise the said lands: that defendant did on the 8th day of April, 1863, join in an instrument in writing (*a*) signed by him and by the other heirs of the testatrix and of her son *John Stratherne*, whereby the parties agreed to abide by the said will; whereby also the plaintiff submitted that the defendant is estopped from denying the right and title of the testatrix, and submitted that the plaintiff was entitled to have the defendant ejected from the said land. The prayer was that defendant might be ordered to give up possession of the land to plaintiff, and that a writ or other process might issue to put plaintiff in possession thereof, and for further relief. Statement.

The defendant answered the bill, denying the fact of plaintiff being in possession as stated in the bill for ten years and upwards before the filing of the bill, and claimed that if the plaintiff ever had any title in the lands in question it was barred before the filing of the bill by the Act of Ontario, 38 Vic. ch. 16, the Real Property Limitation Amendments Act, 1874, and asserted that he, defendant, had been in actual and undisturbed possession of the premises for more than ten years continuously before the commencement of this suit, and objected that the co-devisees of the plaintiff were necessary parties.

(*a*) The writing here referred to is set out in the judgment.

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The cause came on for the examination of witnesses at the Sittings at Barrie, in the Spring of 1878. The other facts sufficiently appear in the judgment.

Mr. *McCarthy*, Q.C., and Mr. *Rye*, for the plaintiff. This is in effect an ejectment bill, which before the Administration of Justice Act could not have been maintained in this Court, but it is conceded on all hands that since that enactment it may be brought here; and this perhaps is a case calling especially for its determination in this Court, for it is possible the defendant may be able to shew that he has effectually acquired some title as against some one of the other three tenants in common, in which case a decree enjoining him from interfering in any way with the rights or possession of the plaintiff would probably be more correct than a recovery in ejectment, the effect of which would be to turn the defendant out of possession. There is nothing in the objection of want of parties, the interests of the other tenants in common are not assailed or affected in any degree; and if the defendant is now ejected the other co-tenants cannot again eject him. The case would be different if the plaintiff here were seeking an account of rents and profits, as they all would be entitled to share in the profits. It is clearly to the interest of all parties that the agreement of April, 1863, should be held valid and binding upon all those who became parties to it, and it is clearly established in the evidence to have been duly signed by all those whose names are set to it as parties.

Argument.

Mr. *Fitzgerald*, Q.C., and Mr. *McCosh*, for defendant. The will and the agreement are not binding on the defendant. Without the agreement the bill would have been a mere nullity; and if the suit is founded on the agreement then it is one for specific performance, and in that case parol evidence would be admissible to shew that it is not the true agreement as understood by the

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parties. The will being utterly void the case is one of election; in that view it is necessary that the parties should have been aware of and advised as to their rights; but suppose that the agreement is held binding, then plaintiff is barred by the Statute of Limitations. The plaintiff cannot claim as tenant in common on this bill, and if allowed to amend it must be such an amendment as will not render it inconsistent with the case already made: *Coleman* v. *Coleman* (*a*), *Holmes* v. *Holmes* (*b*), *Fraser* v. *Fraser* (*c*), *White* v. *Haight* (*d*), *McKinnon* v. *McDonald* (*e*), *Orr* v. *Orr* (*f*), *McArthur* v. *McArthur* (*g*), *Heyse* v. *Powell* (*h*).

Judgment.

SPRAGGE, C.—This bill is in substance an ejectment bill for the recovery of the south half of lot 21, in the 13th concession of the township of Mara. The plaintiff claims title on two grounds, one under an agreement of 8th April, 1863, entered into between the executors of *John Stratherne*, to abide by the will of *Ellen Rogers Stratherne*, the mother of *Ann Stratherne*, of whom the plaintiff is the only child, and who was the mother also of the defendant and of the other parties to the agreement, and of *John Stratherne*. The other ground on which he claims title is as tenant in common with the defendant, and the brothers and sisters of his mother as co-heirs of the reversion, by descent from *John Stratherne*, after the death of his mother *Ellen Rogers Stratherne*. In the latter case his claim would be as tenant in common with the defendant and the brothers and sisters of the defendant. This claim is put forward in the event of the agreement of April, 1863, not being established. The plaintiff, by his bill, claims under a devise in the will of *Ellen Rogers Stratherne*, to her daughters *Betsey*, *Jane*, and *Christina*, and to the plaintiff of the lot in

(*a*) 18 Gr. 42.
(*b*) 17 Gr. 610.
(*c*) 14 U. C. C. P. 70.
(*d*) 11 Gr. 420.
(*e*) 11 Gr. 432.
(*f*) 31 U. C. R. 18.
(*g*) 14 U. C. R. 544.
(*h*) 2 E. & B. 132.

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question as tenant in common. It is conceded, however, that the whole case is before me, and I should allow whatever amendment may be necessary in accordance with the evidence.

The half lot in question, and the half lot No. 22, were purchased by *John Stratherne* from different vendors, and the whole of the purchase money of both lots was paid by him, not in one sum but by payments from time to time; and the conveyances were made to him. He resided chiefly out of Canada, and appears to have been a man of energy and enterprise, and of more education than the other members of his family. He was not the eldest brother, but seems to have taken upon himself the management of the affairs of the family, and to have been their disinterested benefactor; his letters, which were to his mother, and indeed the whole of the evidence shew this. His mother was a widow; he and the defendant were unmarried.

Judgment.

In the will made by his mother she assumed to dispose of the property of *John*, real and personal, in the same terms as if it were her own, but the evidence shews that she did this in assumed pursuance of authority conveyed to her in letters from *John*. One dated 7th March, 1849, is the most direct upon that point. After referring to payments made, and payments yet to be made on the land, and to his private affairs and intentions, he goes on to say: "I have given you an account of all how I stand, so that happen what may, you know all if anything should happen me; all the land and rights and papers connected with it is to be given to my mother, and by her used as her own all her life time, and bequeathed at her death as it may seem proper; all my books and other personal property is to be equally divided among my brothers and sisters, my mother to be divider, and her word to be law amongst you in all cases, and this letter to be her authority. *George* shall receive in addition to the same share of the rest all the live stock of the farm, and his own tool chest and tools, that is the small chest

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that was taken up when you and me went up. Now, happen what may, I hope you will all agree, and work together to each other's hands. I will write *James* to try if possible to assist you as far as he can; if either him, or *George*, or *David* pay any of the land, they will be entitled to the share they do pay, as the unpaid part of the land is not mine to give to my mother, so if they pay it it will be theirs, but I hope to live to pay all myself yet."

His naming his mother in the third person in a letter addressed to herself may be accounted for by the evident intention of the writer that it should be for the eyes of the other members of the family as well as her own.

This and other letters indicate that he felt uncertain as to his living to complete his payments for the land. He did, however, complete those payments, his last remittance on that account exceeding by about $150 the balance due on the land, and being used for the purposes of the family; these last payments on the land were made by the hands of the defendant.

Judgment.

In all the letters from *John*, he writes as having full control over and disposition of the land, and in fact as an owner of the land would naturally write. It is in evidence that these letters were seen by the defendant, and their contents known to him.

John continued to reside abroad, and died—it was believed in the family that he was drowned in California, in 1854. The mother made her will in 1859, and died on the 3rd of April, 1863. The will in the meantime was in the hands of Mr. *Hewitt*, one of the executors named in it, and by whom it was drawn; and its contents were not disclosed to any of the family. *Hewitt* and the other executor have since died.

The members of the family were asked to assemble on the 8th of the same month, in order to the will being read to them, and they did so. It was then suggested, that before the will should be read the parties

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interested should bind themselves by a written agreement to abide by the contents of the will. It was under these circumstances that the paper of the 8th of April, 1863 was drawn up by Mr. *Hewitt*, and executed. It is in these terms:

"We the undersigned parties interested in the disposition of the property bequeathed by the late Mrs. *Helen Roger Stratherne*, in furtherance of a letter of *John Stratherne*, deceased, directed to said Mrs. *Helen Roger Stratherne*, and dated New York, March 7th, 1849, by which he directs that all the land, his property and all papers and rights connected with the same, be given to his mother, the said *Helen Roger Stratherne*, and by her used as her own, all her lifetime, and to be by her bequeathed at or before her death, as it may seem proper; and all his books and other personal property, to be equally divided among his brothers and sisters. His further words are: 'My mother to be the divider, and her word to be law among you in all cases, and this letter to be her authority. *George* shall receive, in addition to the same share of the rest, all the live stock of the farm, and his own tool chest and tools, that is, the same chest that was taken up when you and me went up.' We th esaid parties interested as above, hereby bind over and each of ourselves to abide by the will of the late Mrs. *Helen Roger Stratherne*, made under the authority of said letter of *John Stratherne*."

Judgment.

The document is signed by the defendant, and the two other surviving sons of the testatrix, by the plaintiff and by the four daughters of the testatrix, and is witnessed by *George Thomson* and *D. G. Hewitt*, the executors named in the will. The reason given by Mr. *Hewitt* for having this document executed is thus stated, in the evidence of *James Stratherne*. He said it was better that they all should sign it, that "it was not clear about the will that mother had made, and her authority to make it, and he thought it better to have this understanding, and more so as they were authorized

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to divide some personal property; my brother's personal property, that is books and tools."

The defendant now sets up that he understood the agreement to refer only to these books and tools, and *James's* evidence lends some confirmation to this. *David*, who was also present, says, that he was rather deaf and had no interest in the matter, that something was done about the effects of *John*, and he had an impression—only an impression—about his lands. *James* says he thinks the defendant made no objection, and that he himself was the only one who made any objection: that he said he would not sign any agreement binding him to abide by his mother's will; that he would sign an agreement if they chose, to abide by the division of the personal property, but not the will, and that *Hewitt* remarked upon that, that the agreement only went as far as the personal property.

Judgment.

Now it appears to me simply incredible that the defendant and *James* could have understood the agreement to relate only to the books and tools that had belonged to *John*, if the agreement was read in their presence. Nothing could well be more explict than its reference to their mother's will, and to its making a disposition of the lands of *John*, as well as his books and tools. The defendant says—in fact he is driven to say—that the part of the agreement relating to the will, and its disposing of lands, was not read by Mr. *Hewitt*, that "he skipped it," and *James*, I believe, says the same. The plaintiff in his evidence says the agreement was read over by Mr. *Hewitt*. *David's* impression, so far as it goes, is, that what was read related to lands as well as personalty, and it is clear from all the evidence that *Hewitt* professed to read the agreement, *i. e.*, the whole of the agreement, not portions of it only. If he "skipped" portions of it as is suggested, he was guilty of a very gross fraud, and without any motive that has been even suggested. We have in support of this grave imputation only the evidence of two interested and disappointed

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parties, one the defendant, dissatisfied with the will for not giving him enough; *James*, with more reason perhaps for being dissatisfied, as beyond an eighth share in the books and tools it gives him nothing. To support such a charge, all the available evidence ought to have been produced; the four sisters were present. The absence of two of them is attempted to be excused by the fact of a severe accident having happened to one of them, and the other being in attendance upon her; not a sufficient excuse, upon the evidence given in relation to it, for the absence of the latter, and no reason is given for the absence of the other two. I may add that the demeanor of the defendant and *James*, and the manner of giving their evidence, were not such—especially that of the defendant—as to inspire me with any great confidence in the truthfulness of their story. My note in regard to the defendant is "intelligent, sharp, *qu* if altogether reliable."

dgment.

It appears too that *John's* letter of 7th March, 1849, was before the parties upon that occasion—they had seen it before; they knew that their mother had made a will, and that it must have been in pursuance of that letter, for they knew she had nothing of her own to leave. The letter was quite explicit as to her making a disposition of the lands as well as of the small personalty of the writer. It is difficult to believe that any of the parties understood that an agreement referring to the will, was providing only for a division of the personalty.

It was known to the parties what that personalty consisted of. The books consisted of some fifteen or twenty volumes which had been sometime before sent from New York, and there were some tools. I am asked to believe that all these facts being known to all the parties, they all, eight in number, met at the suggestion of the executors not to give their assent to the provisions of the will of their mother, whom, as the evidence says, they all respected; but discarding her will, excepting as to this trifling personalty, to abide by it so far as that insignifi-

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cant part of it was concerned. If that were all, the action of the executors was most absurd, for they knew that the will divided this personalty precisely as the law, without any will, would distribute it, so that as to that no consent of any one was necessary. Nor was it a consent to abide by a division of the personalty that had been made by the executors, for none had been made—the division was made subsequently by one of the brothers.

An agreement in the terms of this whole agreement, is intelligible, taking all the circumstances into account. Such an agreement as the defendant contends was made, is not intelligible, and I must decline upon the evidence before me to believe that he understood such to be the agreement.

Moreover his conduct afterwards in causing the plaintiff to be assessed for lot 21, is evidence of his understanding the agreement to relate to the provisions of the will disposing of the land. He says it was in order to give a vote. That may be so or may not; I receive the explanation with doubt. The dealing in regard to compensation for the Monck road passing through lot 21, and taking about three acres of that lot, while a small piece only, about half an acre, was taken from lot 22. The compensation was distributed in proper proportions according to the devises in the will. The conveyances were from the devisees of lot 21 as to what was taken from that lot, and from the defendant as to what was taken from lot 22. This may have been because so required by the road authorities, but the compensation money was paid as a matter of right in accordance with the devises in the will, and in all this the defendant himself was not only an assenting party, but the manager of the business with the authorities of the road. Further, in relation to subsequent clearing upon lot 21. Lot 22 was the homestead, all the farm buildings were upon it, and all the clearing up to 1867. Up to that date lot 21 was a wild and unfenced lot, used for no other pur-

Judgment.

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pose than the pasturage of cattle. In that year two acres were cleared upon it, the chopping being done by the plaintiff, who had then recently come of age, and who appeared to be and acted as owner.

These circumstances may be some evidence of acquiescence by the defendant in the disposition of the lands made by the will of the mother; but I am now using them only as evidence that the defendant knew that the agreement of April related to the lands as well as the personalty of *John*.

Mr. *Fitzgerald* contends that at any rate the agreement having been made before the opening of the will was *nudum pactum* and void, and further, that the will by itself being simply invalid, the agreement did not make it binding upon the parties; that at most it was a case of election, and that to bind a party entitled to elect he must be shewn to be fully aware of his rights; and upon the latter point *Coleman* v. *Glanville* (*a*) is cited. That, however, is a case quite outside the case before me. It was the case of a widow entitled to dower, and for whom a provision was made by her husband's will. It was contended that certain acts of hers amounted to an election to take under the will. It was held that the acts relied upon did not amount to the exercise of a deliberate and well considered choice, made with a knowledge of her rights necessary to constitute an election.

Judgment.

The case before me stands upon an entirely different principle. The agreement of April was in substance a compromise of doubtful rights; and that between members of a family; and so a family arrangement or compromise; and such agreements are favoured by the Courts. In *Stapilton* v. *Stapilton* (*b*), a leading case upon the point, Lord *Hardwicke* quotes with approbation the language of Lord *Mansfield* in *Cann* v. *Cann* (*c*), that "an agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out

(*a*) 18 Gr. 50. (*b*) 1 Atk. 2. (*c*) 1 Will. 723.

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that the right was on the other side, shall be binding; and the right shall not prevail against the agreement of the parties, for the right must always be on one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation of an agreement.

Lord *Eldon*, referring to these two cases in *Gordon* v. *Gordon* (*a*) observed, "there is no necessity for me to say more than that they fully establish a principle of which I can have no doubt, that where family agreements have been fairly entered into, without concealment or imposition upon either side, with no suppression of what is true or suggestion of what is false, then, although the parties may have greatly misunderstood their position and mistaken their rights, a Court of Equity will not disturb the quiet which is the consequence of that agreement; but when the transaction has been unfair and founded upon falsehood and misrepresentation, a Court of Equity would have a very great difficulty in permitting such a contract to bind the parties." There is much more in the judgment to the same effect. In that case Lord *Eldon* held that there was a concealment by one of the parties of a material fact known to him, from the other, and the agreement was not sustained; but his lordship's statement of the cases in which a family agreement would be sustained fully meets the case before me.

Judgment.

The learned Judge had observed in an earlier case, *Stockley* v. *Stockley* (*b*), that "in family arrangements this Court has administered an equity which is not applied to agreements generally." I might refer to many other cases upon this point, but those which I have cited will suffice to shew the principle applicable to this case, and that this case is within the principle.

I do not see that the circumstance of this agreement having been entered into before the contents of the mother's will had been disclosed to the parties, should

(*a*) 3 Swan, 463.

(*b*) 1 V. & B. 30.

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prevent the application of the principle. The parties knew, and most certainly this defendant knew perfectly, the contents of the letter from *John* to his mother, of March, 1849; he could have had no doubt that the will assumed to deal with *John's* property, and their assent proceeded upon the confidence they felt that she would deal with them justly. *John* had made her an almoner of his bounty, and they were content to accept her disposition of it whatever it might be. It may be taken with the qualification that it was not palpably unreasonable and unjust; and certainly it is neither. I see nothing unreasonable in such an agreement made under such circumstances.

I do not agree in Mr. *Fitzgerald's* construction of the letter of March, 1849, that the authority it professed to convey was only to be exercised in the event of his dying without paying the whole of the purchase money. As I read it, he considered that his possible failure to pay, and payments being made by his brothers, might give them certain independent rights, but if he himself paid in full, the contingency which did happen, he thought his mother might and should dispose of the whole.

Judgment.

Mr. *Fitzgerald* further contended that this bill is in the nature of a bill for specific performance, and that it was therefore open to the defendant to shew by parol evidence that the written paper does not express the true agreement of the parties. The defendant has had the benefit of this position, as I have heard and adjudged upon the parol evidence that he has adduced. It has occurred to me to doubt whether this bill is not in substance for specific performance, and whether the plaintiff being an infant when the agreement was entered into, the suit is not open to the objection of want of mutuality at that date. The general rule certainly is, that if a party be an infant at the time of his entering into an agreement, he cannot enforce specific performance of that agreement, and the reason is, because the contract

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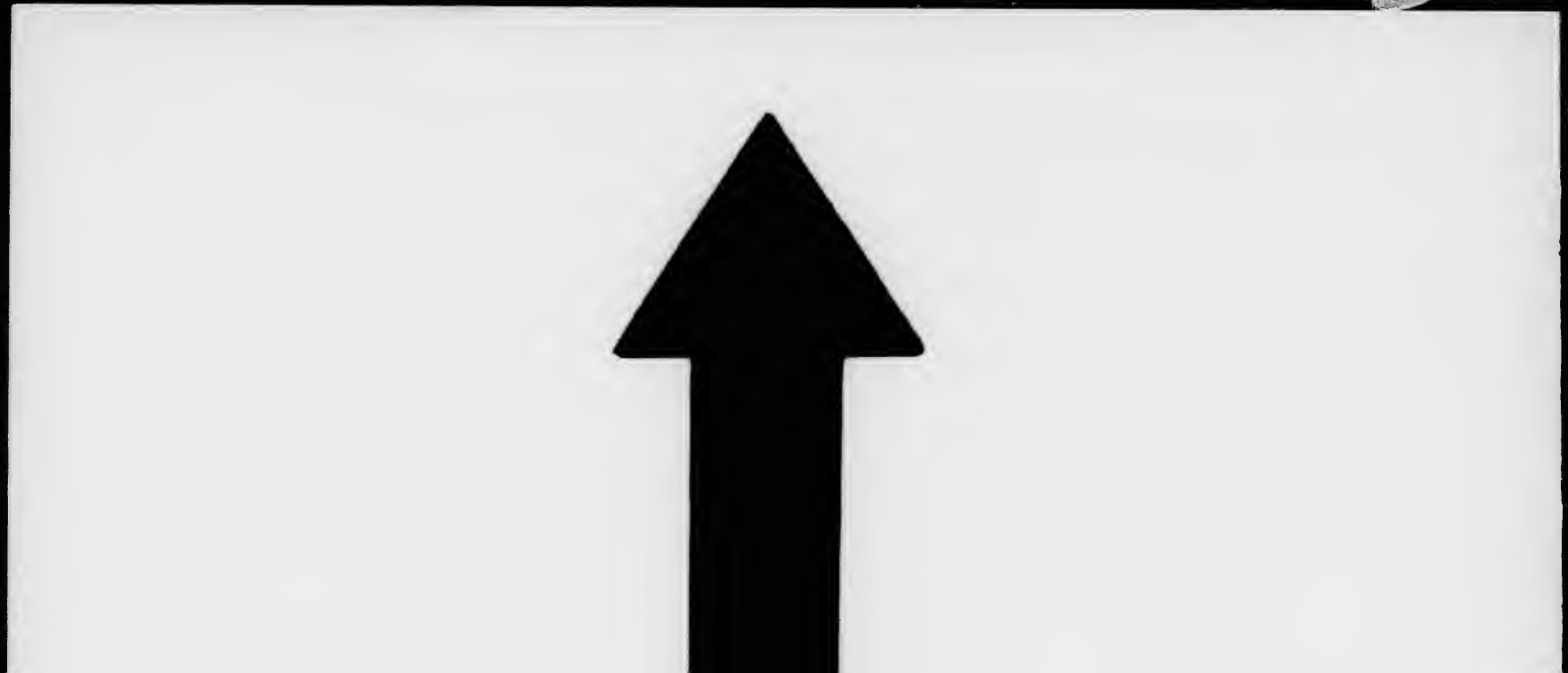
is incapable of being enforced against him. There are, however, exceptions to this doctrine of past want of mutuality being a bar to specific performance, and where a party has already obtained all the benefits that he was to derive from that part of the contract that is in his favour, such a defence would be most inequitable, and I apprehend would not be allowed to prevail, and such is the defendant's case. He and six other adult members of the same family signed the agreement, all agreeing that the plaintiff, though under age, being then about eighteen or nineteen years old, should sign it also. He did so, and it has been acted upon since, and the defendant has obtained all the benefit that he was to obtain under it. I would refer to the observations of Lord *Romilly* in *Hope* v. *Hope* (*a*). See also *Waring* v. *Manchester and Sheffield Railway Co.* (*b*), *McIntosh* v. *Great Western R. W. Co.* (*c*), *Salisbury* v. *Hatcher* (*d*), *Hoggart* v. *Scott* (*e*), and the observations of the late Vice-Chancellor *Esten* and my own in *Jackson* v. *Jackson* (*f*). I do not discuss this question further. The point was not raised at the hearing by the learned counsel for the defendant.

Judgment.

I think there is nothing in the defence of the Statute of Limitations. If the agreement be sustained the statute could not commence to run anterior to that date, nor indeed was there any possession of lot 21 in fact before 1867; and after that date the possession, so far as acts indicating ownership may be regarded as possession, the possession was quite as much that of the plaintiff as of the defendant, and as was said in *Reading* v. *Royston* (*g*), "Where two men are in possession the law will adjudge it on him that hath the right." There was further clearing done on lot 21 by the plaintiff and defendant, (both living in the homestead on lot 22), until

(*a*) 22 Beav. 364.
(*b*) 7 Hare 482.
(*c*) 2 DeG. & S. 758.
(*d*) 2 Y. & C. C. C. 54.
(*e*) 1 R. & M. 293.
(*f*) 5 Gr. 527, 532.
(*g*) Salk. 242.



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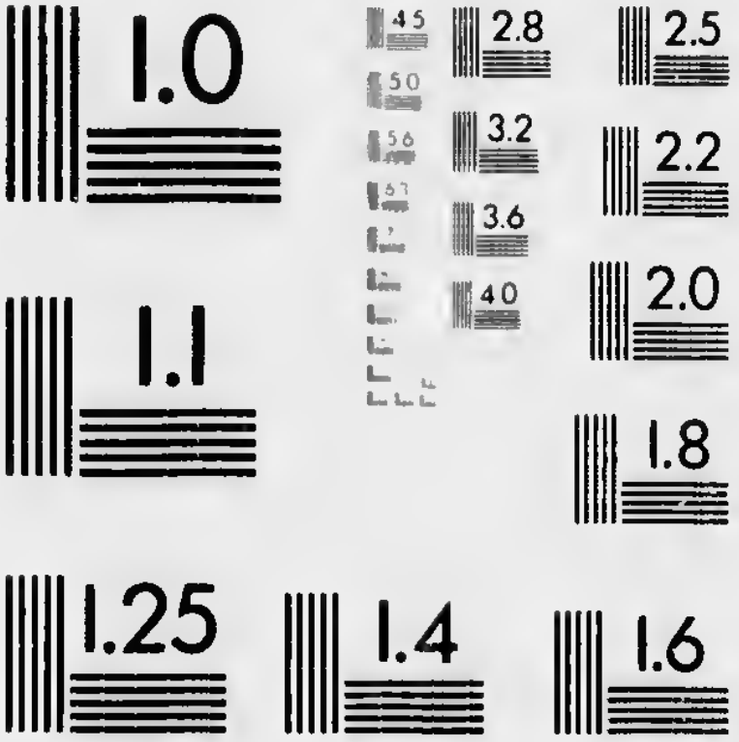

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the plaintiff left in 1874. I would refer also to *Holmes* v. *Holmes* (*a*), *Fraser* v. *Fraser* (*b*), *White* v. *Haight* (*c*), *McKinnon* v. *McDonald* (*d*), *McArthur* v. *McArthur* (*e*), *Orr* v. *Orr* (*f*). I think it clear that the defendant has not obtained title to the lot in equity by possession.

Taking the view that I do of the agreement of the 8th of April, 1863, and its effect. I have not thought it necessary to discuss the claim made by the defendant under the alleged agreement deposed to by him, and his brother *James*, as made between *John* and himself in 1845; because, even if there was anything in it, it was extinguished by the agreement of April, 1863. I will only observe that there are many circumstances against this alleged agreement of 1845, and I only abstain from enlarging upon them because it is unnecessary.

Judgment.

The plaintiff has a *locus standi* in this Court by reason of the defendant excluding him from the possession of the south half of lot 21, to which parcel of land the plaintiff, as tenant in common with *Betsy Stratherne Jane Stratherne* and *Christina S. Leigh*, is entitled under the agreement of the 8th of April, 1863, and the will of *Helen Rogers Stratherne* therein referred to. The decree will be accordingly, with costs.

(*a*) 17 Gr. 610.
(*b*) 14 U. C. C. P. 70.
(*c*) 11 Gr. 420.
(*d*) 11 Gr. 432.
(*e*) 14 U. C. R. 544.
(*f*) 31 U. C. C. R. 13.

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FLEURY v. PRINGLE.

Fraudulent conveyance—Statute 13th Elizabeth—Follows money fraudulently obtained into land.

The owner of land, subject to a mortgage created by himself and his wife, being in insolvent circumstances sold the equity of redemption therein to a *bonâ fide* purchaser, the wife joining in the conveyance and the larger portion of the consideration being paid her in the shape of a promissory note which she subsequently paid over to one *J. N.*, upon a purchase from him of his equity of redemption in other lands; the conveyance of which was made to the wife. On a bill filed by an execution creditor of the husband impeaching the transaction as fraudulent under the Statute of Elizabeth.

Held, That it was a fraudulent devise to defeat creditors and that the plaintiff was entitled to follow the consideration paid to *J. N.* into the lands conveyed by him to the wife.

This was a suit by a judgment creditor of the defendant *Philip Pringle*, against the debtor and his wife, impeaching a conveyance of land made to the wife as fraudulent against creditors under the statute of Elizabeth, the plaintiff having sued out a *fi. fa.* against lands upon the judgment, and placed the same in the hands of the sheriff. It appeared that the debtor had owned certain other lands which were subject to a mortgage to one *Rose*, for $500, created by the debtor, the 27th November, 1875, in which mortgage the wife had joined to bar her dower, and a conveyance thereof was made by *Pringle* and his wife to one *York* for $800, subject to the above mortgage. In part payment of this consideration a note for $450 was given, payable to the wife, and the balance of the consideration was paid by being applied by the purchaser on an indebtedness of the husband. By a conveyance made the 28th November, 1876, *John Newburn* conveyed to the defendant *Siphronia Pringle*, the lands now sought to be affected, or rather the equity of redemption of the vendor therein. The consideration paid therefor was the note for $450 given to the wife on the sale to *York*, and a horse worth about $10. The debt of *Philip Pringle* to the plaintiff was contracted prior

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to the conveyance to *York*, and the said defendant had no assets at the time of filing this bill. Under these circumstances the present suit was instituted and came on to be heard at the Autumn Sittings (1878) in Toronto.

Mr. *G. H. Watson*, for the plaintiff.
Mr. *T. H. Spencer*, for the defendants.
At the conclusion of the case—

Judgment. Nov. 18th.

SPRAGGE, C. — In the late case on re-hearing, *In re Robertson—Robertson* v. *Robertson*, (*a*) it was the opinion of all the Judges of this Court, that after mortgage given by a wife, it was in the power of the husband to sell his equity of redemption without his wife joining in the conveyance, she being only dowable of that equity in the event of his dying seized. *Black* v. *Fountain*, (*b*) had been already decided in affirmance of the same principle. It was therefore the right of the husband to receive the whole of the consideration payable on the sale to *York*, and she receiving a portion of it received it as, in law, his appointee.

The husband was at the time unable to meet his engagements; so not in a position to make a voluntary settlement upon his wife. The parties appear to have thought that the wife was entitled to dower, and that she was parting with her dower on the sale to *York*. I do not see how that can make any difference. If in fact the right to the whole consideration money was in the husband, it was to the prejudice of creditors under the circumstances, that any of it should have been appointed to her, and the mistake of the parties could not affect the rights of the creditors or make valid a withdrawal of funds to which the creditors were entitled. The creditors are in my opinion entitled to follow this money into the land purchased from *Newburn* in the name of the wife.

This case is also open to the observation that even if

(*a*) 25 Gr. 276. (*b*) 23 Gr. 174.

the wife had been dowable, the purchase money on the sale to *York* which passed into her hands was out of all proportion to the value of her interest. It was more than half the whole purchase money payable on the sale to *York*. The plaintiff is entitled to the usual decree under the Statute of Elizabeth, and with costs.

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GOYER v. MORRISON.

Fraudulent conveyance—Fraudulent representation as to age—Mortgage by infant—Voluntary conveyance.

If a minor fraudulently represents himself to be of age, for the purpose of effecting a loan of money, he will not be permitted afterwards to set up the fact of his infancy as a defence to a suit to enforce payment of a security created by him on effecting such loan.

The owner of real estate, six months before attaining majority, applied to effect a loan on the security thereof alleging in answer to a question, that he was then of full age. A mortgage was accordingly executed and the money advanced; this the mortgagor expended in the purchase of other lands which, together with the land so mortgaged he, on the day after he attained twenty-one, conveyed to his mother for a nominal consideration.

Held, that the minority of the mortgagor could not be set up in answer to a bill to enforce payment of the mortgage, but the same remained a valid and subsisting charge upon the land held by his grantee.

Statement.

This was a suit to enforce payment of a mortgage made by an infant when about 20½ years old. The defendant, the mother of the mortgagor, knew of the mortgage and purchased from him the land in question the day after he became of age for the consideration of $5. The cause came on for the examination of witnesses and hearing at Ottawa, at the Autumn Sittings, 1878. It was stated in evidence by Mr. *Taillon*, who acted for the plaintiff in effecting the loan, that he asked the mortgagor if he was of age, and that he answered that he was.

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He was called and denied this.

Mr. *Fitzgerald*, Q. C., for the plaintiff. The circumstance of the mortgagor conveying to his mother the day after he was of age although he swears he did not know that it was necessary he should be of age, was cogent evidence of fraud.

Besides on the conveyance to his mother nothing was said as to who was to pay the mortgage, and the question is if it is not to be taken that she was to pay the mortgage, looking at the consideration and other circumstances. The conveyance to the defendant was really made because the creditors were pressing as the defendant knew. In fact it was to defeat the creditors.

Mr. *Gormully* for the defendant.

The other facts appear in the judgment.

Judgment.

Nov. 11.

SPRAGGE, C.—I hold that the representation in answer to Mr. *Taillon's* inquiry sworn to by him is proved, notwithstanding the denial of *Edwin Bruce Morrison*, which I discredit. That being so he committed a fraud, *i. e.*, obtained a loan of money by a fraudulent representation. The sale to the mother for $5, the value of the property being about $600, was in its essence a gift, the $5 being a nominal consideration. The position of the mother therefore was that of a volunteer, and she stands in the same position as her son would if a defendant. The only question then is as to the extent of the remedy, Mr. *Gormully* contending that it is only personal; that the conveyance to the mother, though she be a volunteer is a disaffirmance of the mortgage to the plaintiff, and that there can be no charge upon the land, and he cites authorities for his position. Mr. *Fitzgerald*, contra, contends that the money having been obtained by fraud, and having been used with other money in the purchase of the land mortgaged can be followed into the land, and made a charge upon it, and I incline to agree with him.

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I made the foregoing note after hearing the case on Circuit, I have since examined the cases to which Mr. *Gormully* has referred me, and do not find that they establish the principle for which he contends. Where indeed the question is between two parties one of whom stands in the position of an innocent purchaser for value from a party of age, who when an infant entered into a contract with another person, such innocent purchaser is to be preferred. Such was the case in *Esson* v. *Nicholas*, an old case decided by Lord *King*, commented upon in *Stikeman* v. *Dawson* (*a*), and printed as a sort of appendix to that case at p. 118 of the same volume. Such was also the case in *Inman* v. *Inman* (*b*), a recent case before *Bacon*, V. C.

I cannot accede to Mr. *Gormully's* proposition that it is in the power of an infant who has been guilty of a fraud to disaffirm his act and avoid a security that he has given. *Cory* v. *Gertcken* (*c*), lends no countenance to its support, but the contrary, for the Court, after reviewing a number of cases in which fraud committed by an infant was held sufficient ground in equity for holding him bound by his acts, proceeded to comment upon his acts thus: "Did not *William Cory*, who was nearly of age and married, conceal his infancy? It is clear he did. Did he not employ his brother, an attorney, to prevail upon the trustees to transfer the £350 stock under a representation that they ran no risk in doing so? He did; was not that a fraud? The concealment of his infancy under such circumstances certainly was a fraud, and precludes him or his assigns, who stand precisely in his situation from calling for a repayment," and here as I have said, the mother of the mortgagor stands precisely in his situation. The Court in *Cory* v. *Gertcken*, proceed to say that "there is another ground on which the plaintiff's claim may be resisted," that ground being that after he came of age

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(*a*) 1 DeG. & S. 90. (*b*) L. R. 15 Eq. 260. (*c*) 2 Mad. 40.

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he did an act which amounted to a confirmation of what he had done when under age. The Court certainly did not mean to say that that was necessary in order to his being bound by what he had done when under age The Court call it another ground and say distinctly that what he had done when under age being acts of fraud precluded him and his assigns from objecting after he came of age. If precluded, he cannot be at liberty to disaffirm.

I can see no reason in the proposition contended for. It would be that the Court, while holding the party precluded by his fraudulent conduct from objecting that he was an infant at the time, and decreeing that he shall restore the money borrowed, holds its hand there; and leaves the party at liberty to deal with that, to the prejudice of the lender, upon the faith and pledge of which he obtained the loan. A decree for repayment would be a very incomplete relief; in many cases a futile one. If he is precluded by his fraud from objecting his infancy the logical sequence is, that his acts bind him for all purposes, as if he had been adult.

Judgment.

Mr. *Pollock* in his treatise on Contracts, under the head "Infants," has a passage in affirmance of this view " Where the objection is incident to an interest (or at all events to a beneficial interest) in property, it cannot be avoided while such interest ained." And Sir *Alexander Cockburn*, in *Bartlett* v. *Wells* (*a*), while distinguishing between what a Court of Equity would do in case of a fraudulent representation by an infant as to his age, and what a Court of Law would do upon the like representation being set up by way of equitable representation adds, "though a Court of Equity would compel the infant to make restitution or do equity" a short and terse exposition, and I think a sound one, by a very eminent common law judge of what he took it for granted a Court of Equity would do under such circumstances.

(*a*) 1 B & S. 836

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It appears to me also that the principle of following money into land applies in this case. One instance of the application of this principle is where the money has been obtained by fraud; and the money so obtained has been employed in the purchase of land or other property. In the *Merchant's Express Co.* v. *Morton* (*a*), it was applied to the case of money obtained by robbery. I refer upon this point to that case and the authorities referred to in it. In the case now before me the money for securing of which the mortgage in question was given, was procured by the fraudulent representation of the infant, credited by the solicitor of the lender, that the infant was of age; and it went with other money into the purchase of land, conveyed to his mother by the infant the day after he came of age, for a consideration which at the hearing I held to be nominal.

Upon these grounds I am of opinion that the plaintiff is entitled to hold the mortgage given by *Edwin Bruce Morrison* as a valid security upon the land mortgaged.

Judgment.

The plaintiff is entitled to his costs so far as they have been increased by the defence set up, absolutely against the defendant. The costs as of an ordinary suit for foreclosure will be as is usual in such cases.

(*a*) 15 Gr. 274.

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WHELAN v. COUCH—COUCH v. WHELAN.

Vendor and purchaser—Purchase money payable by instalments—Time essence of contract.

The defendant on the 31st August, 1874, by writing under seal agreed to purchase certain chattels from the plaintiff at the price of $1,078, payable $350 down, $109 on the first day of October, November and December, and $59 on the first day of January following, and $9.00 on the first day of each and every month thereafter, until the full sum of $1,078 without interest was paid, and in case of default all payments made thereunder to be forfeited to the vendor; and time was declared to be of the essence of the contract. The defendant took possession of the property and paid punctually all the instalments falling due up to and inclusive of the 1st of April, 1875. The instalment due on (Saturday) the 1st of May was through oversight not paid or tendered, but was tendered on the 3rd, when the plaintiff refused to accept it.

Held, That under the terms of the agreement the plaintiff had a right, though a piece of very hard dealing on his part, to insist upon the default in payment of the $9, as a forfeiture of the bargain and of the money paid; and that, notwithstanding the defendant swore, and there was some evidence to corroborate the statement, that the real bargain was a sale of the chattels for $700, and a renting of the premises (a bowling alley) in which they were placed at $9 a month during the period the vendor was entitled to hold the same under a lease from the owner of the fee.

Statement.

This was an action of ejectment brought in the Court of Queen's Bench, transferred to this Court by order of *Galt*, J., sitting as Judge of Assize, on the 28th June, 1875. *Couch* v. *Whelan* was an action transferred to this Court by the Court of Common Pleas by rule dated the 28th day of June, 1876.

Both actions were founded on the following agreement:

"This agreement made this thirty-first day of August, 1874, between *John Whelan*, of Toronto, saloon-keeper, and *Josiah Thomas Couch*, of the same place, saloon-keeper. The said *Whelan* hath agreed to sell and the said *Couch* to purchase the right to use the fixtures of bowling alley in and pertaining to the premises in rear of number sixty-six, on the west side of Jarvis street in the city of Toronto, as now used by the said *Whelan*,

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and access to use the same thereto from Jarvis street, together with the beds, balls and pins only (as the other fixtures and fittings do not pertain to the bargain) for the sum of ten hundred and seventy-eight dollars in gold payable, three hundred and fifty dollars in cash at this time, and one hundred and nine dollars on the first day of each of the months of October, November and December next ensuing the date hereof, and the sum of fifty-nine dollars on the first day of January next, 1875, and the further sum in equal payments of nine dollars per month (the first of such payments of nine dollars to be made on the first day of February, 1875) on the first days of each and every month after the said first day of January as aforesaid, until the full balance of said purchase money shall have been paid in full without interest. The said *Couch* to have possession on the first day of September next, but only as in the nature of one subservient to said *Whelan*, and he is not to have any other right or title to the place, nor is this agreement intended to be complete, nor to operate in favour of said *Couch* until the whole of the said payments have been made, when his right and title shall be considered complete; and in case of default in the after payments as above, or any of them, all matters hereunder are supposed and considered to fall through, and moneys paid hereunder to be forfeited to said *Whelan*.

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"It is further agreed that said *Couch* is to keep the place orderly, quiet, decent and peaceable and well cleaned, and to close the place at twelve o'clock each night and opened at six o'clock each morning. He shall also keep the place open, in good running order, each and every lawful day and night, and properly managed and looked after and make it as productive as possible. The players at each alley to have the privilege of playing three balls for the benefit of the house. The place and things pertaining to said alleys passing by this agreement to be insured. The said *Couch* shall conduct no other business upon said premises. Time to be of the essence of this agreement. The said beds, balls and pins are not to be removed from said premises until paid for in full.

"As witness our hands and seals this thirty-first day of August, 1874.

JOHN WHELAN, [L.S.]
J. T. COUCH, JR." [L.S.]

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Couch entered into possession under this agreement, and duly made all the payments up to and including the 1st day of April, 1875. On the 1st day of May (Saturday), another payment of $9 became due and payable. It was not paid on that day but was tendered on Monday the 3rd. *Whelan* refused to accept, and on the 6th brought ejectment. The cause came on for trial before *Galt*, J., and was by him transmitted to this Court by an order indorsed on the record. Without further prosecuting this suit *Whelan* took and retained possession of the bowling alley and prevented *Couch* obtaining access thereto.

Couch brought an action for damages. The declaration contained, amongst others, counts for trespass and trover. Plaintiff was nonsuited at the trial. The Court of Common Pleas set aside the nonsuit, and transferred the cause to this Court

Mr. *Bethune*, Q.C., and Mr. *Galt*, for *Whelan*.

Mr. *N. G. Bigelow*, and Mr. *W. Fitzgerald*, for *Couch*.

Judgment.

Sept. 11th.

SPRAGGE, C.—I have given this case a good deal of consideration, and have thought it over carefully more than once.

Whelan, the bargainor in this case, was himself the tenant of one *Lewis*, of premises which comprised the premises the subject of the bargain between him and *Couch*, his term being for five years from 8th March, 1873, and his lease containing a clause against sub-letting without leave.

The case of *Whelan* v. *Couch* is an action of ejectment, and *Couch* sets up by way of equitable defence an agreement between him and *Whelan*, dated the 31st of August, 1874; and he must shew that he is entitled to specific performance of this agreement, in order to its being a bar to *Whelan's* action of ejectment.

The written paper is in terms an agreement of purchase by *Couch* from *Whelan* of the right to use certain fixtures

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and chattels in a bowling alley on part of the premises leased from *Lewis*, and the right of access for using the same in the place in which they were, during the period over which the payments were spread; the last payment extending, as appears by calculation, to 1st March, 1878, being within eight days of the expiry of *Whelan's* lease. The amount expressed as purchase money is $1,078, payable $350 in cash, $100 on the first of each of the months of October, November, and December, following, $59 on the 1st of January, 1875, and $9 on the first of each month until full payment of the balance of purchase money, without interest.

Couch's case is that the writing does not express the true agreement of the parties—that the true agreement was a sale and purchase of the chattels for $700, and a renting of the bowling alley at $9 a month for a term corresponding with the term that *Whelan* himself had the place (less the eight days); and it is exceedingly probable, and it is supported by some evidence, that such was the footing upon which the parties intended at first to place their agreement; for the first payment and the four subsequent payments, deducting from the latter the $9 beyond the round sum in cash would be exactly $700, and the $9 added to each of those four payments, and the $9 a month for the term *Couch* was to have, would make up the $1,078 expressed as purchase money; but *Whelan* was advised by the conveyancer who had drawn the lease, and who also drew the agreement between *Whelan* and *Couch*, that that would be a sub-letting, and objectionable as against the lease held by *Whelan* from *Lewis*.

Judgment.

It makes all the difference in *Couch's* position whether the agreement was as he says it was, or as it is expressed in the agreement, because in fact he paid what in that case would be the whole purchase money, and paid also beyond the purchase money the $9 which he calls rent for the first eight months of his term. All that in that case would remain for him to pay would be his month's

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rent, and for non-payment of that the Court would relieve him from the forfeiture of the residue of his term; and the chattels being paid for would be his property. Upon the evidence, however, I am unable to come to the conclusion that the final and concluded agreement between the parties was what *Couch* contends it was. The result of the evidence I take to be that the parties finding the clause against sub-letting an obstacle to the granting of any lease by *Whelan* to *Couch*, changed their agreement to that which is embodied in the written agreement, making a substitute for an intended lease, and the terms as nearly the same as they could be consistently with the change from a lease to a sale and purchase. Assuming that a lease was at first intended, that intention was changed, and the parties entered into an agreement of another character, rather peculiar in its terms, attributable, as I think, to the change from a lease to a sale, but still an agreement that it was perfectly competent for them to enter into, and the terms of which I think, notwithstanding some evidence to the contrary, were fully understood by *Couch*. They are indeed too explicit to leave room for being misunderstood by men of the intelligence and sharpness of *Couch* and his father, who also was present when the agreement was entered into.

Judgment.

The terms of the agreement are certainly very stringent. They provide that the possession which *Couch* was to have was to be "only in the nature of one subservient to said *Whelan*, and he is not to have any other right or title to the place, nor is this agreement intended to be complete nor to operate in favour of said *Couch* until the whole of the said payments have been made, when his right and title shall be considered complete; and in case of default in the after payments as above, or any of them, all matters hereunder are supposed and considered to fall through; and moneys paid hereunder to be forfeited to said *Whelan*." Then follow a number of provisions as to how the place was to be kept, as to

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the hours of its being kept open, and the like, then "time to be of the essence of this agreement." Even an obtuse man could scarcely fail to comprehend the provision that in case of default in payments as above, or any of them, all moneys paid should be forfeited to *Whelan*. I cannot believe but that *Couch* perfectly understood this.

Agreements somewhat similar have been made in the case of the hiring of pianos with a contract of sale. I am referred to two cases arising upon them: *Stevenson* v. *Rice* (*a*), *Mason* v. *Johnson* (*b*), where the contracts were upheld. In the earlier case it was provided that the property should not vest until the whole purchase money was paid, and although part had been paid, and rent also paid, the seller to have the right to re-take possession upon any default; and it was held that he had such right, and that there was no change of property.

It has been held in several cases in the English Courts of Equity that it is competent to parties on a sale of property to make time of the essence of the contract. Judgment. In *Hipwell* v. *Knight* (*c*), Baron *Alderson*, observes: "I do not see therefore why, if the parties chose, even arbitrarily, provide . . both of them intended to do so, to stipulate for a particular thing to be done at a particular time, such a stipulation is not to be carried literally into effect in a Court of Equity. That is the real contract; the parties had a right to make it; why then should a Court of Equity interfere to make a new contract which the parties have not made? It seems to me, therefore, that the conclusion which Sir *Edward Sugden*, in his valuable treatise on this subject, has arrived at, is founded in law and good sense." Lord *St. Leonards*' own language is: "It was at one time a considerable question whether equity would permit parties to make time the essence of the contract. But it is now settled that if it *clearly appears to be the intention of the parties* to an

(*a*) 24 U. C. C. P. 245. (*b*) 27 Ib. 208. (*c*) 1 Y. & C. 416.

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agreement that time shall be deemed of the essence of a contract, it must be so considered in equity." And for this numerous cases are cited. Mr. *Fry*, in his book on Specific Performance, p. 314, says, that "express stipulations rendering time of the essence, have been maintained as valid and binding, as much in equity as at law, and in respect of covenants for the renewal of leases as well as of contracts of sale." And Mr. Justice *Story*, in his work on Equity Jurisprudence, holds the same doctrine. In regard to default in payment of an instalment, the language of Sir *James Wigram*, in *Hunter* v. *Daniel* (*a*), was, that "each breach on the part of the plaintiff in the non-payment of money, was a new breach of the agreement; and that being of the essence of the contract, each breach gave the defendants a right to rescind the contract."

The default in this case was in the non-payment of a sum of $9, which was payable 1st May, 1875. There was no payment, or offer to pay, on that day. On the 3rd,—the intervening day being a Sunday—there was an offer to pay, not a regular legal tender, and the offer was refused. It was not through any inevitable accident, or from any cause that could be admitted in law as an excuse, that the money was not paid on the 1st. It was simply an omission, and there was no waiver of the breach on the part of *Whelan*. It is conceded that there was no offer to pay within the time prescribed by the agreement.

Judgment.

I have examined a number of cases to see if I could find in any of them a ground for interfering in such a case as this, but I have searched in vain. The sum is very small compared to the whole purchase money, but still it is a *substantial* sum, and I do not see how I can treat it differently than if it had been ten times as much, and the purchase money also ten times as much. There might be a very extreme case *e. g.* all the instalments paid except the last, and the last itself intended to be

(*a*) 4 Hare 432.

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paid punctually, but through a miscount or other like accident a dollar or so short might be paid or tendered. I do not say that a Court of Equity might not in such a case relieve against the forfeiture; but this is not such a case; no accident or mistake is shewn, nothing but an omission and the fact that the sum is small.

It shocks one, certainly, that a vendor should receive such considerable sums as *Whelan* has received, and retain them as forfeited payments, because a sum so small as $9 was not paid to the day; but that was the contract of the parties, as explicit and in as binding a shape as the parties could make it; and I find no warrant for interfering with the contract under any circumstances that appear in this case.

It appears like a piece of very hard dealing on the part of *Whelan*. The explanation of it appears to be that he had complaints against *Couch* in regard to the way in which the place was kept, in violation, as he said, of the agreement between them; and he took the course he did for the purpose, as he says, not of retaining the payments made, but of getting rid of *Couch* from the place. There is conflicting evidence in regard to these alleged violations of agreement. I incline to think that they were not altogether without cause; and at any rate that *Whelan* believed that in regard to these stipulations the agreement was not observed in the letter or its spirit by *Couch*. He made an offer—so he states in his examination—which, under the circumstances, was not an unfair one, viz., to repay *Couch* any balance that might remain of the moneys paid after charging him with a fair rental for the premises during the time that he had them.

Statement.

I desire to be informed whether he is prepared to abide by this offer. If he is, I should, taking the law to be that *Couch* has not a case for the interference of this Court, hold *Whelan* entitled to possession of the land, and to all that was the subject of the agreement between them, and entitled also to his costs in both suits.

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If he does not abide by his offer, I should refuse him his costs. I should take a fair rental, to be a trifle over $25 a month—say $26. I arrive at this sum by dividing the amount of purchase money by the number of months that *Couch* was to have the place. This is not quite correct in principle, because the sum multiplied by the number of months would give the amount upon payment of which *Couch* was to have the chattels as his own property. A smaller sum, therefore, would be proper, say $150 for the eight months.

Judgment.

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Principal and agent—Bona fides—Vendor and purchaser—Representation as to standing of a company.

When a person sells property of his own and acts as the agent of his vendee in procuring other property of the same kind different considerations apply as to the amount of information the agent is bound to give his principal in the two transactions.

The plaintiff having expressed to the defendant, who was the local agent of an Insurance Company, a desire to purchase 50 shares of the stock, the defendant said he owned 30 shares which he would sell him, and the plaintiff requested the defendant to ascertain what the stock could be purchased for. The defendant wrote to the head office for information and the manager answered stating that the stock had always sold at a premium. This the defendant communicated to the plaintiff; but did not disclose the further information, communicated by the manager, that the company had during the then past year lost $32,000 over and above receipts. The plaintiff believing the price to be as stated, directed the defendant to procure him 20 shares and took from him a transfer of his own 30 shares at par. In reality the stock was valueless.

Held, That the defendant having withheld information; which might and probably would have affected his determination as to entering into the speculation at all, was guilty of such a concealment as rendered him liable to make good the loss sustained on the 20 shares: but as to his own 30 shares he was only bound to communicate truthfully the information he had been directed to procure, namely the price at which the stock could be purchased.

The plaintiff before intimating any intention of becoming a purchaser of stock, asked the defendant as to the standing of the company, who spoke of it as being in a good position.

Held, that this could not be treated as a representation binding on the defendant.

Examination of witnesses and hearing at Kingston, Autumn Sittings, 1878.

Mr. *Bethune*, Q.C., and Mr. *Bawden*, for the plaintiff.
Mr. *Britton*, Q. C., for the defendant.

The facts of the case and points relied on are stated in the judgment.

SPRAGGE, C.—The plaintiff was the purchaser of fifty shares of stock in the Canada Agricultural Insur- Judgment. Nov. 11th.

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ance Company. He purchased thirty of these shares from the defendant, and the other twenty through him. Different considerations may apply to the two.

The plaintiff is a dealer in stocks, and makes a business of it; and is also an attorney and solicitor, and a barrister. The defendant was local agent of the company at Kingston. The dealing by the parties grew out of a casual conversation between them, as they were driving together to a village called Glenvale. In this conversation, the defendant, in answer to a question from the plaintiff, spoke of the company as in a good position. This was before the plaintiff had intimated any intention of becoming the purchaser of stock. It is contended that this was a representation. In my opinion it was not. What was said was not in the course of any treaty for the purchase of stock, and was a mere expression of opinion. The defendant had no special knowledge of the position of the company. He had not access to its books, and his position as local agent did not inform him of its position. Further, it was not meant, nor could the defendant have been understood as meaning it as a representation for the plaintiff to act upon. And in fact the defendant believed what he said. Something was said as to the stock selling at a premium, from 102 to 103. The plaintiff's recollection is that the defendant asserted that as a fact, but he says he may have only said that it was *quoted* at that price; and the defendant says that he said all "I know is that it has been quoted at from 102 to 103;" and it is proved, by other evidence besides that of the plaintiff, that shortly before that time it had been quoted in at least one financial paper at that rate. So far the defendant was neither vendor of stock, nor the plaintiff's agent for any purpose in connection with it.

Judgment.

This conversation was followed by a request from the plaintiff that the defendant would write to Montreal to ascertain what the stock could be got at, and he proposed to pay him a commission, which he declined, saying that

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he would do it as a matter of friendship. The defendant informed the plaintiff that he had himself 30 shares of stock which he was willing to sell; and agreed to write and make inquiries at Montreal with a view to the purchase of 20 more for the plaintiff. This occurred early in February, 1877.

On the 10th of that month the defendant wrote to Mr. *Goff*, the manager of the company at Montreal, as follows:—

KINGSTON, 10th February, 1877.

E. H. Goff, Esq.

DEAR SIR,—I have a chance to dispose of 100 to 200 shares of The Canada Agricultural Insurance Co. stock, cash ten per cent. What can they be had at, and what commission can I make on the sale; please let me know at once, also what the stock is quoted at.

Very truly yours
R. W. VANDEWATER.

Goff, as appears by his answer of the 12th, understood the defendant to be inquiring as to stock on which 10 per cent had been paid, and recommended to him paid-up stock instead.

Judgment.

MONTREAL, February 12th, 1877.

R. W. Vandewater, Esq.,
Agent, Kingston, Ont.

MY DEAR SIR,—I am just in receipt of your letter of the 10th inst., saying you could sell 100 to 200 shares of our 10 per cent. stock and asking for a price. Now Vandewater let me advise you to sell some of the *paid up* stock, *i. e.* $100 shares, each fully paid and upon which no calls can be made. A portion of our stock is paid and the balance only 10 per cent. paid, with a contingent liability of 90 per cent. Our paid stock has all along been selling at a premium, and I now know where $4,000 or $5,000 can be had at par if you want it.

At our annual meeting on the 8th, a unanimous resolution was passed to reduce our *nominal* capital of $1,000,000 to $250,000, and have it all paid up, giving us a solid cash capital of that amount. This is the plan followed by all the American companies, and is vastly safer and better every way.

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Our business last year did not pay, in fact we lost over and above our receipts some $32,000, reducing our surplus so much. The loss though large and on the wrong side of the ledger is considered favourable, when we consider that every company doing business in Canada lost money last year. This year so far is opening much more auspicious and with a good show of profits.

If I knew you wanted the $5,000 stock mentioned above or any portion of it, I would secure some to-morrow. The regular brokerage paid on sales of stock is ¼ per cent., from seller and buyer, ½ per cent. This I could secure for you from seller; you had better telegraph me to-morrow how much you will take. I wish you could manage the whole amount, and then it would if in good hands strengthen your agency very much.

Yours truly,

EDWARD H. GOFF.

Goff's statement that paid-up stock had all along been selling at a premium was untrue. The stock was then at a discount of ten per cent. The statement of the amount of loss being $32,000 was literally true, though not the whole truth. It was true that the previous year had been a year of heavy losses to insurance companies from the great fires in St. John, New Brunswick, and in other places.

Judgment.

The plaintiff and defendant are at issue as to whether the letter from *Goff* was communicated to the plaintiff. The plaintiff says that it was not; he says he did not know that it said anything about commission, and adds that if informed that the losses of the company had been $32,000, it might have affected his desire to purchase. He says further that in a conversation after this, and before any contract for the purchase of stock was entered into, the defendant quoted *Goff's* letter as to sales of stock having been all along made at a premium. The defendant on the other hand swears that he handed *Goff's* letter to the plaintiff to read, which he did and remarked upon the amount of loss as being heavy. To discredit the defendant's evidence upon this point, the plaintiff's counsel referred to a passage in the 5th para-

graph of the answer to the original bill, in which he speaks of an interview with the plaintiff after receiving *Goff's* letter of 12th February, and says, "I saw the plaintiff and informed him that I could purchase 20 shares of the stock he desired at Montreal, and that I would also let him have my 30 shares in order to make the 50 shares he desired. I at this time told the plaintiff that I had learned from the manager that the company had made no money the previous year and that there would be no dividend on the stock." At the hearing the defendant having stated that he had handed to the plaintiff the letter from *Goff*, and that he had read it, was examined as to this passage in his answer; he admitted that the words of the answer would imply that what he told the plaintiff on that occasion was told verbally, and admitted also that he knew or at least thought that it was important for him to shew that the plaintiff saw *Goff's* letter. In explanation he says he believes that he had not the letter in question when he put in his answer; that this and other letters were mislaid when he moved his office. The answer was sworn 25th February, 1878. In defendant's affidavit on production, sworn 4th April, 1878, he states, *inter alia*, "certain letters from *E. H. Goff* to the defendant." The bill was amended on the 7th of the same month, and in the answer to the amended bill, sworn 13th May, 1878, the defendant states that having at the request of the plaintiff written to Mr. *Goff* for information, he received the letter of 12th February, "which (he adds) I shewed to the plaintiff." He was examined before the Master on the 17th of April, but his examination was not read at the hearing by the plaintiff. At the hearing he persisted upon cross-examination in saying that the letter of 12th February, was in the hands of the plaintiff. As I have noted it he said that he was sure of it, that that was his practice and he was sure of it, and upon his being referred to the 5th paragraph of his answer, he said that he did not think he told plaintiff in words the contents of

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the letter. The omission to state in his answer that the plaintiff had the letter to read is important in this, that the defendant knowing it or believing it to be an important fact would it is to be assumed have stated it in his answer if true; and the inference the plaintiff desires me to draw is that it is not true. This is a consideration of weight, but lessened somewhat by this, that the plaintiff knew of the existence of that letter; his bill was not filed till 31st January, 1878, before which time he knew that the shares had become worthless. In his bill he imputes to the defendant knowledge of their worthlessness at the time of this sale, but his bill while charging concealment makes no charge of concealment of information conveyed to him by that letter, so that his attention was not particularly drawn to the contents of that letter and its alleged non-disclosure to the plaintiff. I think the defendant is probably in error in supposing that this letter was mislaid upon his moving his office, for in his affidavit on production he says that the

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papers in that schedule of his affidavit were last in his possession on or about 9th February, 1877; it should of course be 1878, for this and other letters and some other papers referred to in that schedule were not in existence on 9th February, 1877. The affidavit does not state where they are at the date of swearing to it as it should have done. They are spoken of as continuously out of his possession from the date he names. I presume they were in the custody of his solicitor, and if so it would be strange if the solicitor having that letter before him had not asked the defendant in framing his answer if it had been communicated to the plaintiff, and if so in what manner. So obvious an answer to the plaintiff's bill could scarcely have escaped the defendant's solicitor; as its materiality did not escape the defendant himself. Looking at all the evidence in relation to the alleged actual communication of this letter to the plaintiff, I cannot come to the conclusion that it was, as stated by the defendant, placed in the hands of the plaintiff and read

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by him. If it had been the plaintiff's case would in my opinion be out of Court.

Then what was the position of the defendant as between himself and the plaintiff? As to the 30 shares owned by himself he avowed himself to be owner, the case differing in that respect from *Kimber* v. *Barber* (*a*), where the owner of certain shares in a company represented to an intending purchaser that he knew where he could procure a certain number at a certain price and the purchaser agreed to take them at that price. Lord *Selborne* held him to his character of agent and granted relief against him accordingly. In this case being owner, and there being no representation that he was otherwise, he stated truly to the defendant what he was informed by *Goff's* letter was the selling price at Montreal. *Goff's* letter was untrue; but as I believe not untrue to the knowledge of the defendant. Simply as seller, and not vouching for the truth of this piece of information, he was not answerable for its untruthfulness; then was he as seller bound to communicate to an intending purchaser the other circumstances contained in the letter? He was not requested by the plaintiff to ascertain for him any more than the one fact; he made the inquiry and received an answer. The other circumstances, not in answer to any inquiry he was to make on behalf of the plaintiff, were not of a nature that he as a seller was bound to communicate. The circumstances were the amount of the losses sustained by the company, which the plaintiff only says might have affected his intention to purchase, and the commission which he would be entitled to receive from the seller; which was not material where he was seller himself. If the transaction between the parties had been confined to the sale of the defendant's own stock, the plaintiff would not in my opinion be entitled to any relief. The case of *Hart* v. *Swaine*, (*b*) is plainly distinguishable. There the owner of copyhold land took upon

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(*a*) L. R. 8 Chy. App. 56. (*b*) 7 Chy. Div. 42.

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himself to sell it as freehold; it was an untrue representation. So in *Latham* v. *Crosby* (*c*), the purchaser by his agent made gross misrepresentations, false to his own knowledge, as to the position and value of the land he was in treaty to purchase, and the sale was relieved against.

In regard to the 20 shares, the defendant acted as agent for the plaintiff. Taking it that in the first place he acted from a motive of friendship only; that he did not intend to accept from the plaintiff the commission that the plaintiff proposed to give him, and was only to make inquiries as to the price at which this stock could be obtained, he became afterwards the agent of the plaintiff in the actual purchase of the 20 shares. If he was at the time of the inquiry and of *Goff*'s answer agent but for the one purpose, and not *then* bound to communicate any more than the answer, his duty to his principal grew *pari passu* with the growth of the agency and when it became an agency for the purchase of shares it became his duty to make known to his principal all known to himself that it concerned his principal to know to guide his judgment in entering into or declining this speculation. It was certainly material to the principal to be informed of the fact that the losses of the company in one year's business exceeded its receipts by $32,000, and it was also a fact material to know that the defendant had inquired of *Goff* what commission he could make on the sale, and that *Goff* had informed him in answer that he could secure for him (as I understand his letter) ½ per cent. from the seller. This commission would create an interest in the agent to carry out a sale. The defendant had started with declining commission at any rate from the plaintiff. There existed a reason for the non-disclosure to the plaintiff of anything that might deter him from purchasing the 50 shares he proposed to purchase. The defendant had an object in effecting a sale of his own shares, as he wanted the money to make a purchase of land. It is not necessary to infer that he

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withheld information which he knew that he ought to communicate, in order to serve his own private ends, that motive may have influenced him or it may not, but it does appear that his interest was to that extent in conflict with his duty; and it is a circumstance to be considered in weighing the conflicting evidence upon the alleged fact of the defendant communicating to the plaintiff, *Goff's* letter of the 12th February.

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It is not certain that the plaintiff would have abstained from purchasing if that letter had been communicated as alleged by the defendant, but the point is, whether the defendant having withheld from the plaintiff, his principal, that which it was his duty to communicate to him, it can lie in his mouth to say that if he had done his whole duty it might after all have made no difference. I do not think it does. If with the fuller light that would have been afforded to the plaintiff by the disclosure of that which was withheld, he had declined the speculation, he would have been saved from loss altogether; and I think that he and not his agent has a right to the benefit of the doubt whether with full information he would have still entered into the speculation.

Judgment.

There is no question as to the measure of present damages. The $200 paid for the 20 shares is a total loss. Nothing was said in argument about possible prospective loss, and I suppose that no relief on that score is asked.

Mr. *Bethune* asked at the hearing for leave to amend setting up some technical irregularities in the transfer of the shares. I said I thought it would not be in furtherance of justice to allow such amendment, the defendant having offered to do what if anything further might be necessary in order to complete and perfect the transfer. As matters stand it is to the advantage of the plaintiff, if he is validly the transferee; for liability and not benefit now attaches or may attach to that character. Mr. *Bethune* pressed that if it was material to the issue the party applying was entitled to it as of right, and that it

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had been so decided upon the construction at common law of the Administration of Justice Act. I do not find it so. One decision to which I am referred, *Montreal Bank* v. *Reynolds* (*a*) (and I find no other), is upon the Common Law Procedure Act. *Draper*, C. J., there speaking of the power of the Court to make amendments at the trial says (*b*), "On the * * question I am free from doubt. The 222nd section of the Common Law Procedure Act (Consolidated Statutes of Upper Canada, ch. 22,) enacts that 'The Courts and every Judge sitting at *Nisi Prius*, or for the trial of causes, may, at all times, amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs, and upon such terms as to the Court or Judge seems fit, and *all such amendments* as may be necessary for the purpose of determining in the existing suit, *the real question in controversy* between the parties *shall* be so made' * * * The words 'may' and 'shall' so used in the same section, plainly to my mind convey, that amendments falling within the first part are discretionary, within the latter part that they are commanded." The language of the Administration of Justice Act is essentially different, and in my opinion does not admit of the construction put upon section 222 of the Common Law Procedure Act.

Judgment.

The decree will be for payment of the sum paid by plaintiff for the purchase of the 20 shares purchased at Montreal, $200; and with interest and all costs and expenses to which he may have been put.

The decree must be with costs.

(*a*) 24 U. C. R. 381. (*b*) p. 386.

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OWSTON v. THE GRAND TRUNK RAILWAY COMPANY.

Purchase of right of way—Tenant pur autre vie—Demurrer.

The bill alleged that tenants *pur autre vie* had sold and conveyed to a railway company land for their roadway. After the cesser of the life estate the parties entitled in remainder filed a bill against the vendors and the company, seeking discovery as to what estate or interest the vendors had conveyed, stating that the company *alleged* they had paid the vendors the full price of the fee in the land, and that they (the vendors) were liable to account for the price so paid, and prayed for an account and payment to the plaintiffs of a proper share or proportion thereof:

Held, on demurrer by the vendors, that no sufficient ground of equity was alleged against them; the plaintiffs, however, to be at liberty to amend their bill as they should be advised.

This was a bill by *Charles W. Owston*, *Jane G. Owston*, and *Francis W. Owston*, against *The Grand Trunk Railway Company of Canada*, and *Sarah S. Williams*, *William Fraser*, and *John Ogilvy*, setting forth that on the 5th day of May, 1830, *John Tucker Williams*, being then seised in fee of certain lands in the town of Port Hope, conveyed the same in fee to *Agnes Owston*, wife of one *Thomas Owston*, and that she died intestate on the 2nd November, 1850, leaving the plaintiffs, her children and her husband her surviving, the plaintiff *Charles Owston* being the heir-at-law of the said *Agnes Owston*: that on the 1st day of February, 1834, the Sheriff of the then district of Newcastle, under and by virtue of certain writs against the said *Thomas Owston*, sold the life estate of the said *Owston* in said lands, to the said *John Tucker Williams*; that *Owston* died, on the 14th December, 1874, and that *Williams* died, on the 10th June, 1854, after having duly devised the said land to the defendants other than the Railway Company, and to one *James Scott*, since deceased, in trust. Statement.

The bill further stated that on the 20th May, 1856, the defendants the Railway Company bought, and the other defendants and *James Scott* sold the right of way for the said railroad across the said lands, and by inden-

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ture of that date conveyed the same to the Railway Company; and that the Company alleged that they purchased and took a conveyance of the fee of the said right of way, and paid the grantors for such fee simple the full purchase money thereof; but the plaintiffs alleged the contrary of such allegations to be true, and submitted that even if the company did make such payment, they did so in their own wrong, and that they ought to have retained or secured for the plaintiffs or those through whom they claimed the value of their estate in remainder in the said lands; and that the defendants, the company, claimed that in any event they were entitled to be paid by the other defendants the amount so over-paid by the company, and to have recourse against the said other defendants therefor, with interest; and that the plaintiffs were entitled to be paid by the said company a proportionate part of the sum agreed on as the price of the said lands. The prayer of the bill was, that the defendants might be ordered to discover and make known to the plaintiffs whether the said sale was of the fee simple or life estate in the said right of way; also the price paid therefor, and that the company might be ordered to pay a proportionate part thereof, with interest from the death of *Thomas Owston*, to the plaintiffs, or otherwise make compensation to the plaintiffs for the fee simple of the said right of way, and for further and other relief.

Statement.

The defendants *Williams*, *Fraser*, and *Ogilvy*, demurred for want of equity.

Mr. *Maclennan*, Q. C., in support of the demurrer. The defendants who demur are clearly improperly brought here; the interest sold by them was simply a life estate, and the bill itself states explicitly the nature of the estate they had in the premises. A right of way was all that was sold, which is only an incorporeal hereditament, and being so the vendor could sell only a right commensurate with his own title, nothing more.

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Cameron v. *Wigle* (*a*) may be cited on the other side as an authority in support of this bill; but the question there disposed of does not arise here, nor was there any attempt there to make the life tenant liable. Here we only professed to convey our own estate and interest. The bill certainly contains an allegation that our co-defendants, the Railway Company, *allege* that we agreed to give an estate in fee, but that is clearly an insufficient allegation on which to sustain a bill.

Mr. *VanKoughnet* on the same side. The only object with which the plaintiffs could possibly require to make the demurring defendants parties, would be, for the purpose of discovery, but a bill will not lie for that purpose only. The Consolidated Order 85, page 165, is clear as to that. Besides, the plaintiffs can get all the discovery they want by putting these defendants in the witness box in any suit they choose to bring against the railway company. That is their proper course, for they ask no substantial relief against the demurring defendants, but merely discovery or evidence of what the transaction between them and the company really was. *Mills* v. *McKay* (*b*) shews that unless the defendant primarily liable has a remedy over against another person, such third person ought not to be made a party, and no such case is made here. This is not a case either where it is proper to make the demurring defendants parties for the purpose of costs, for there is no charge of fraud contained in the bill: *Mills* v. *McKay*, just cited.

Argument.

Mr. *Moss*, contra. The company are entitled to some compensation for their not obtaining the interest in the lands that they purchased and paid for. If the demurring defendants sold only their life estate, then the plaintiffs are entitled to relief against the other defendants, the Railway Company, but the company allege that they bought the fee and paid for it, and *Cameron*

(*a*) 24 Gr. 8. (*b*) 15 Gr. 192.

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v. *Wigle*, shews that the company could safely deal with the tenant for life, the company retaining sufficient of the price agreed upon to compensate the plaintiffs. *Ford* v. *Proudfoot* (*a*), is a clear authority in favour of making these defendants parties, and was followed in *Totten* v. *Douglas* (*b*), and was again followed by the Chancellor at the last sittings at Belleville, in *Drurie* v. *The Royal Canadian Insurance Co.*

Mr. *Maclennan*, Q. C, in reply. The bill does not shew that there is any remedy over by the Grand Trunk Railway Company against us; on the contrary, the bill sets forth such a state of facts as shews clearly that there is no liability on our part. *Black* v. *Harrington* (*c*), *Smith* v. *Redford* (*d*).

Judgment.

PROUDFOOT, V. C.—The bill alleges the plaintiffs to be entitled to an estate in remainder in the premises in question, after an estate for life which terminated in 1874. The life estate had been sold under an execution against the tenant for life, and one *Williams* became the purchaser and thus became tenant *pur autre vie*. *Williams* died in 1854, having devised this estate to the executors, the defendants *Williams*, *Fraser* and *Ogilvy*.

The bill alleges, in the 7th paragraph, that the Railway Company, in 1856, purchased from the executors of *Williams* the right of way across the said land, which the executors conveyed to them. It then, in the 8th paragraph, states that the Railway Company allege that they purchased and took a conveyance from the other defendants, of the fee simple of the said right of way, and paid them the full purchase money for the fee simple. The plaintiffs shew the contrary of that allegation to be true, and submit that even if they did make such payment they did so in their own wrong, and that they ought to have retained or secured for the plaintiffs

(*a*) 9 Gr. 478.
(*b*) 15 Gr. 126.
(*c*) 12 Gr. 175.
(*d*) 12 Gr. 316.

the value of their estate in remainder. And in paragraph 8 *a*. it is said, the railway company claim that in any event they are entitled to be repaid by the other defendants the amount overpaid to them and to have recourse against them for the same with interest. 1878. Owston v. Grand Trunk R. W. Co.

The executors demur for want of equity.

The statement in the 7th paragraph, that the company purchased from the executors the right of way across the land, does not shew that the executors did anything more than they had a right to do, as in the absence of any allegation to the contrary, it must be assumed that they sold only to the extent of their interest, *i. e., pur autre vie.*

The company under the Railway Act of 1868, could obtain the fee by dealing with the tenant for life, but *Cameron* v. *Wigle* (*a*), shews that in such a case they ought only to pay to the tenant the value of his interest, and if they pay more they are still responsible to the remainderman.

In the 8th paragraph, the bill says the company allege they bought the fee and paid the price for it to the executors, and charges the contrary to be true, *i.e.*, that the company did not buy the fee and did not pay the price for it; and then says that even if they did it was in their own wrong, and they are still liable. This is very far from being an averment that the fee was purchased; indeed the view of the plaintiffs throughout seems to be that the fee was not purchased. The question, however, is not what the defendants allege, but what is the fact. Now there is no averment of the fact, and though a defendant should say that another person is interested it is not sufficient reason to justify making that other a party. Thus in *White* v. *Smale* (*b*), the bill was filed against *Smale*, as the owner of some land. *Smale* in his answer stated he had sold the land to one *James*. The bill was amended stating that *Smale* alleged Judgment.

(*a*) 24 Gr. 8. (*b*) 22 Beav. 72.

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he had sold to *James*, but did not state this was the fact and added *James* as a party. *James* demurred. The Master of the Rolls said that no case whatever was stated against the defendant *James*. The bill simply stated that somebody alleged that *James* had an interest, but that was not sufficient to sustain the bill. And in *Houghton* v. *Reynolds* (*a*), the Vice-Chancellor says that an allegation that defendant sets up pretences, followed by a charge that the contrary of such pretence is the truth, not specifically averring the facts themselves, is defective.

Ford v. *Proudfoot* (*b*), decides that in such a case as this, if the executors sold the fee they would be proper parties. The defendants do not question that decision but say there is no allegation here to bring this case within the rule, and in that view I concur.

Upon the whole bill I think the intention of the plaintiffs was to establish a case that the fee was not sold, and I do not mean to decide anything contrary to *Grant* v. *Eddy*. (*c*)

Judgment.

I think the demurrer must be allowed with costs. The plaintiffs will have liberty to amend within a fortnight.

(*a*) 2 Ha. 264, 267, 268. (*b*) 9 Gr. 482. (*c*) 21 Gr. 45, 568.

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DILK v. DOUGLAS.

Mortgages—Fraudulent transaction.

C. created two mortgages in favour of ***M. B.*** and her two sisters to secure repayment of moneys advanced by them. ***C.*** subsequently sold the lands comprised in these mortgages to different parties, and after the death of the two sisters procured ***M. B.*** alone to execute discharges of these mortgages, conveying to her other lands by way of security, which, however, were wholly insufficient in amount. After the death of ***M. B.*** the personal representatives of herself and her sisters filed a bill, seeking to charge the lands embraced in the original mortgages with the amount remaining due on these securities, and the Court, under the circumstances, made a decree for payment of the shares which should have been coming to the two sisters, with costs.

Statement

In 1862 and 1863, the defendant *Currie* made two mortgages to *Hannah C. Clench*, *Ann K. Clench*, and *Margaret Bullock*, to secure repayment of a loan made to him by the three sisters. The mortgages were in the usual form, and each contained the usual *habendum*. In July, 1867, *Hannah C. Clench* died, and *Ann K. Clench* died in November, 1868. *Maryaret Bullock* survived her sisters until April, 1877.

Subsequently to the registration of the mortgages, *Currie* sold the lands comprised in them, at intervals, to his co-defendants. In May, 1872, he induced *Margaret Bullock* alone, without the representatives of her sisters joining, to execute discharges of these mortgages, and to accept a new mortgage on other lands in their stead. These discharges were registered, and some of the defendants purchased after their registration. In 1873, *Currie* induced *Margaret Bullock* to discharge the mortgage of 1872, and to accept a new mortgage instead of it on lands which were insufficient to pay the mortgage debt,.

The interest on the loan was regularly paid up to the death of Mrs. *Bullock*.

The present bill was filed by the representatives of

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the three sisters against *Currie* and the present owners of the lands comprised in the original mortgages to the three sisters, to declare the discharges of them given by Mrs. *Bullock* invalid, and for the realization of the mortgage debt out of the lands comprised in those mortgages.

The cause was heard at St. Catharines on the 21st of October, 1878.

Mr. *Bethune*, Q. C., and Mr. *Coxe*, for the plaintiffs.

Mr. *Maclennan*, Q. C., Mr. *McClive*, Mr. *C. Brown*, and Mr. *Ewart*, for the defendants.

Jan. 4th.

Judgment.

BLAKE, V. C.—I do not think that Mrs. *Bullock* had the right to receive the mortgage money and to discharge the mortgages in question, to the detriment of the co-mortgagees. See *Matson* v. *Dennis (a)*, *Petty* v. *Styward (b)*, *Morley* v. *Bird (c)*, *Hind* v. *Poole*, *(d)*. But if she had this right on payment, yet she had not the power to do so, unless payment of the mortgage money were actually made. She had no power to bargain for a new security, and to bind the other mortgagees as to the value of the security, date of payment, rate of interest and otherwise. On this ground the discharge is inoperative, except so far as Mrs. *Bullock* is concerned, and the mortgage is a charge on the estate embraced in it for the amount due the representatives of the *Clenches*. The payments made on the mortgage prevent the running of the statute of limitations even in favour of the purchasers: see *Chinnery* v. *Evans (e)*. No reason was assigned against the exoneration of the earlier purchasers as against the later, following *Jones* v.

(*a*) 10 Jur. N. S. 461. (*b*) 1 Ch. Rep. 31.

(*c*) 3 Ves. 629. (*d*) 1 K. & J. 383; & 2 Wh. & Tu. Am. Ed. p. 265.

(*e*) 11 House of Lords, 115, 131, 138, & 2 Wh. & Tu., Am. Ed., pt. 2, 1974.

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Beck (*a*). There will be a declaration that, notwithstanding the discharges in the first and second paragraphs of the bill mentioned the mortgages in question are subsisting charges in favour of the representatives of the *Clenches* for the amount due them. There will be an order against the defendant *Currie* for payment of the amount due the plaintiffs and a sale of the premises, or so much thereof as may be needed, to answer the amount due the *Clenches* and costs; the properties entitled to exoneration being last sold.

(*a*) 18 Gr. 671.

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The Bank of Toronto v. The Beaver and Toronto Mutual Fire Insurance Company.

Mutual Insurance Company—Debentures of County—Premium Notes—Demurrer—Administration suit—Executor acting improvidently or contrary to duty.

Although the general rule is, that in an administration suit a debtor to the estate is not a proper party in the absence of collusion or insolvency, it is not limited to these cases, but applies equally when the creditor has obtained property from an executor acting hastily, improvidently or contrary to his duty, and which is known to such creditor.

By the Act of the Legislature of Ontario (31 Vic. ch. 52), The Toronto Mutual Fire Insurance Company (which afterwards became united with The Beaver Insurance Company), was empowered to issue debentures in favour of any person, firm, &c., for the loan of money, and in pursuance thereof debentures of the company were issued to the amount of $83.808, all of which remained outstanding and unpaid. One of these debentures for $5,800 had been issued to the plaintiffs for money loaned to the company; and the defendants *The Federal Bank* held debentures to the amount of $18,000, for securing the payment of which premium notes to the amount of $33,915, were by resolution of the directors of the company pledged to the Bank, and the Bank had obtained possession of the notes and collected large sums thereon, which they claimed the right of applying in liquidation of the debentures held by them. To a bill filed by other debenture holders seeking to have their priority declared, a demurrer by the Bank for want of equity was over-ruled with costs, giving the Bank liberty to answer in two weeks, the Court holding that under Consol. Stat. U. C., ch. 52, and 31 Vic, ch. 52, O., and 32 and 33 Vic, ch. 70, D., the pledge to *The Federal Bank* was not authorized.

The plaintiffs sued on behalf of themselves and all other the holders of debentures of *The Beaver and Toronto Mutual Fire Ins. Co.*, except such of the defendants as were holders of said debentures against the said insurance company, and among others *The Federal Bank*.

The bill stated the plaintiffs' title as follows: That by the Ontario Statute 31 Viet. ch. 52 sec. 12, the Directors of *The Toronto Mutual Fire Ins. Co.*, were

authorized to issue debentures in favour of any person, firm, banking or other company, for the loan of money for any term not exceeding 12 months and on such conditions as they might think proper and renew the same. That in pursuance of this power debentures of the company were issued to the amount of $83,800, all of which were outstanding and unpaid. One debenture for $5,800 had been issued to the plaintiffs for the amount loaned by them to the company, and on its face appeared to have been issued on the authority of that Act, and also under the provisions of an Act of the Parliament of Canada uniting *The Beaver and Toronto Mutual Fire Insurance Companies*. The bill further stated that default had been made in payment, and that the plaintiffs and other holders had presented their debentures, and the plaintiffs had been informed by the directors that *The Beaver and Toronto Mutual Fire Ins. Co.* could not pay the debentures so held by the plaintiffs; that the affairs of the company were embarrassed and they had ceased to do business since January, 1877: that judgments had been recovered by various parties against the company and executions issued which had been returned *nulla bona*, and that writs against lands remained in the sheriffs' hands unsatisfied. The bill further stated that the assets of the company consisted of premium notes received by them for insurances effected, amounting in all to about $130,000, and of moneys in the hands of agents; and the plaintiffs claimed that the premium notes were charged with the payment of the money advanced on the security of the debentures, and that the holders, by virtue of the legislative authority under which they were issued, had a first charge on the premium notes for the amount of the debentures and interest, in priority of any other liability of the company.

Statement.

The bill then stated the issue of a guarantee capital of the company under two by-laws amounting to $500,000, of which $88,720 had been subscribed for.

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That under the by-law each share of the stock till fully paid should be liable to assessment to pay any debt, loss, or expenses incurred by the company, but not to any greater assessment than 5 per cent. at any one time: that the subscribers claimed that the stock had been paid, but the plaintiffs alleged that the pretended payment was made by obtaining money from *The Federal Bank* on the personal security of the stockholders and one of the debentures of the company, and applying the money so obtained to the pretended payment of the stock.

The bill further stated that notwithstanding the lien of the debenture holders on the premium notes the directors of the company had pretended to pledge a large number of them to and in favour of the shareholders of the guarantee stock of the company, and by a resolution of the 20th October, 1876, set apart $76,435.30 of these notes and pledged them to the shareholders who had subscribed or might subscribe for the stock; and that the directors pretended that this resolution was passed under 27 & 28 Vic. ch. 38 sec. 6, but the plaintiffs alleged that it was not passed till long after the subscription of the stock, and the debenture holders had no notice of any such pledge when they advanced their money.

Statement

The bill further stated that *The Federal Bank* were the holders of debentures to the amount of $18,000, and under a resolution of the directors passed 30th November, 1876, certain premium notes of the company, mentioned in a schedule therein referred to, amounting to the sum of $33,915.71 were pledged to *The Federal Bank* for the payment of the debentures held by them, and they had obtained possession of the notes and had collected large sums on account of them, which they claimed to apply in part liquidation of their debentures and to hold the remainder of the notes unpaid in security for the balance due to them.

The prayer of the bill was that the priority of the

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plaintiffs might be declared, and the pretended pledging of premium notes might be declared invalid as against the debenture holders and that *The Federal Bank* might be ordered to deliver up the notes, and that the assets might be administered by this Court.

The Federal Bank demurred for want of equity.

Mr. *Cattanach* for the demurrer.

Mr. *McCarthy*, Q.C., and Mr. *Creelman*, contra.

Judgment.

PROUDFOOT, V. C., [after stating the facts above set forth].—It was suggested, but faintly, that a bill would not lie for administering the assets of the company, since the Act of 1877 (40 Vic. ch. 72, C.) giving power to wind up the company. But the bill states that since the Act the directors have held numerous meetings for considering the affairs of the company, and passed a resolution to wind up the company under the Act; but that no subsequent steps have been taken by the directors to wind up under the Act. The 3rd section provides that the directors shall call a meeting of *guarantee stockholders* to be held before the expiration of two months after the passing of the Act (28th April, 1877,) to consider whether the affairs of the company shall be wound up, or the company changed into a stock company. There is no allegation that any meeting of such shareholders has been called, and as the directors are said to have done nothing since passing their own resolution, the fair deduction is, that no meeting of shareholders has been called. If the defendants have any defence on that ground it must be set up by answer.

The principal question discussed was, whether the plaintiffs had the lien and priority they claimed. The Act of 1869, (32 & 33 Vic. ch. 70, D.) uniting the two companies enacted, (sec. 2,) that the united company should have all the powers conferred upon Mutual

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Insurance Companies by the Consol. Stat U. C. ch. 52, and the several amendments thereof, and subject to the obligations, &c., thereby imposed upon the uniting companies, except so far as the same may be inconsistent with the special Act, 27 & 28 Vic. ch. 99. C., 1864, and with this act.

The Consol. Stat. ch. 52, sec. 31, provided for raising a guarantee capital, by subscription of its members or some of them, or by the admission of new members not being persons assured by the company, or by way of loan, not exceeding, $500,000 which should belong to the company, and be liable for all the losses, debts and expenses of the company; and the subscribers of the capital stock should in respect thereof, have such rights as the directors might declare and fix by a by-law to be passed before such capital was raised;—and by sec 32 a reserve fund might be formed out of surplus profits for paying off the guarantee capital.

Judgment.

By an Act of 1864, (27 & 28 Vic. ch. 38, sec. 6,) an addition was made to that section (31) in the words, "As the object of such guarantee capital is to provide for the certain and speedy payment of losses, debts, and expenses, the directors of any Mutual Insurance Company incorporated under this Act may pledge as much as, but not more than, two-thirds of the premium notes belonging to said company as a security to the subscribers of such guarantee capital."

But the arrangement to be made by the directors determining the rights of such shareholders was to precede the raising of the capital. None of the by-laws of the company as set out in the bill contain any provision entitling these shareholders to a pledge of the premium notes, while there is a distinct allegation that the by-law sanctioning the pledge of the premium notes was not made till long after the subscription of the guarantee stock. It is clear, therefore, I think, that the pledge alleged by the defendants to have been made in pursuance of that power is not valid.

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By the Act of 1864, (ch. 99, sec. 3,) assented to upon the same day as the chapter 38 we have just been quoting, the directors of this company were vested with more extensive powers as to the formation of a reserve fund than they previously possessed. By the Consol. Stat. the fund was to be formed out of surplus profits, but by this section 3 it might consist of all moneys that remained on hand in each year after payment of ordinary expenses and losses, and of an annual assessment on the premium notes of the company, which might be applied either to paying off the guarantee stock or of other liabilities, but not more than one-third of one per cent. of property insured was to be levied in any one year unless and until the whole reserve fund was exhausted.

I cannot say that this is inconsistent with the right of the directors to pledge the premium notes as security for the guarantee stock; that might still be done although an increased fund were provided for payment.

Judgment.

In 1868 the Ontario Act, 31 Vic. ch. 52, was passed upon the petition of the Toronto Mutual Insurance Company, and by sec. 12, it provided that the directors of that company might issue debentures in favour of any person, &c., for the loan of money for any term not exceeding twelve months, and on such conditions as they might think proper, and renew the same for any such term: the whole of the premium notes and guarantee stock of the company being held liable to pay the same at maturity. *Quoad* this company, this must be considered an amendment of the Consol. Stat. ch. 52. By the 57th section of that Act the directors might issue debentures for borrowed money; by the 60th section these were to be paid solely out of the collections on the promissory notes, and by the 31st section the guarantee stock was liable for all the debts of the company. This 12th section so far does not seem to alter the Consol. Stat. sec. 31, as originally passed, though if the directors had duly exercised the power

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given to them by the added clause it would have been inconsistent with it, but until such power was exercised in a legal manner there is no contradiction, no inconsistency, in the enactments. And as appears on the bill no proper exercise of the power has been had, the supposed inconsistency does not arise.

The Statute of 1869, the amalgamating Act, when it vests the company with all the powers contained in the Consol. Stat. and the amendments thereto, must be taken to have referred not only to amendments by general law, but to such amendments as had been made peculiarly affecting the companies then being united, and therefore to have given the company such powers as had been conferred on one of them by the Ontario Act of 1868, and by the 5th sec. it subjected the united company to all the obligations, powers, and rights of the two companies, and among them therefore to the liability on these debentures of the Toronto Company issued under the 12th sec. of the Ontario Act, and to the mode by which they were secured. As at present advised it does not seem to me very material whether it did or not, as I apprehend the Consol. Stat. itself gives all the powers and rights contained in that 12th sec., unless a distinction be drawn between the collections on the premium notes being the fund for payment in the one case, and the notes themselves being held liable. But I apprehend that this Statute cannot be put on a lower footing than as a legislative agreement, between the company and those with whom it might deal, that the debentures were to be payable out of the premium notes and the guarantee stock, and such an agreement between private parties would create a lien on the fund, not only as against the debtor, but as against all who took with notice, and this statutable agreement has the peculiar advantage of being found in a public act of which every one has notice. (*a*) In either case therefore the plaintiffs have a lien.

Judgment.

(*a*) *Story's* Eq. Jur., sec. 1231; *Legard* v. *Hodges*, 1 Ves. Jr. 477; *Collyer* v. *Fallon*, T. & R. 459.

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The demurrer in this case is a general one, and if the plaintiffs are entitled to any relief, it must be overruled. Independently of the question of lien, the plaintiffs are creditors of the company, and entitled to sue for the administration of the assets. And to such a suit *The Federal Bank* are proper parties as having in their possession funds or assets of the company to which, according to the allegations in the bill, they have not a just right. The general rule that a debtor to an estate is not a proper party in the absence of collusion or insolveney, is not limited to these cases merel,, but applies to cases where the creditor has obtained the property from an executor acting hastily, improvidently, and contrary to his duty, which the creditor knew. *Consett* v. *Bell* (*a*), *Stainton* v. *The Carron Co.* (*b*). And in this case it must be taken that *The Federal Bank* knew the directors had no power to pledge the assets as they assumed to do. A considerable part of the relief prayed would be competent to a creditor without a lien.

Judgmen .

Upon these grounds I think the demurrer must be overruled, with costs. Leave to answer in two weeks.

(*a*) 1 Y. & C. C. C. 569. (*b*) 18 Beav. 146.

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Re Lot 27, 18th Concession of East Williams. Hamilton v. McKellar.

Will, construction of—Vendor and Purchasers' Act—Instruction to Executors—Limiting estate—Contingent devise.

Land was devised to the vendor after the death of her mother, the testator having directed in the event of the devisee not coming to live thereon that it should be rented, and the rent paid to the devisee, the land to come to her heirs afterwards.

Held, that these words did not operate to make the devise contingent, or to interfere with her estate in fee; and that under any circumstances the language was too indefinite, if the clause was not invalid, to create a forfeiture.

Statement.

One *Peter McIntyre* being the owner of lot 27, in the 18th concession of East Williams, made his last will and testament, with codicil thereto in June, 1877, and died shortly afterwards. By his will he devised the whole lot to his mother, to be by her freely possessed and enjoyed during the period of her natural life. Second, he gave, devised, and bequeathed the east half of the lot—the land in question—to his sister *Christina* (who afterwards married *Stewart Hamilton*), and the west half to his sister *Mary*, "to come into their possession at my mother's death, and to be freely possessed and enjoyed by them, their heirs and assigns, forever. I also give and devise to my sister *Christina* the sum of $150, to assist in bringing her family to this country." After some pecuniary bequests he made a residuary devise in favour of his mother. The codicil contained this provision; "And I further instruct my executors, that if the parties to whom I have bequeathed the land, (mother excepted), will not come and live on it, then it shall be rented, and the rent be given to my sisters *Christina* and *Mary* during their life, and the land to come to their heirs afterwards."

The testator's mother died. *Christina Hamilton* had not come and lived upon the land devised to her, but had contracted to sell it.

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The purchaser raised the objection that *Christina Hamilton* could not make a good title, and it was agreed that the following questions should be submitted to a Judge of the Court of Chancery for his opinion under the Vendor and Purchasers' Act.

(1.) Whether the said *Christina Hamilton*, can, under the circumstances hereinbefore stated, with or without the concurrence of the executors of the testator, make a good title to the east half of the said lot.

(2.) Whether, assuming the answer to the first question to be given in the negative, if the said *Christina Hamilton* shall now come and live on the land, she can, with or without the concurrence of the said executors, make a good title to the said east half of the said lot.

Mr. *Meredith*, Q. C., for the vendor.

Mr. *David Fraser*, for the purchaser.

Doe *dem. Gratrex* v. *Homfray* (*a*), *Leicester* v. *Biggs* (*b*), *Nash* v. *Coates* (*c*), *Cooper* v. *Kynock* (*d*), were referred to and commented on by counsel.

Judgment.

BLAKE, V.C.—By the will *Christina Hamilton* takes, subject to the mother's life-estate, an estate in fee in this lot. She therefore had the power to live upon it, or to sell or otherwise dispose of it. She had the right to sell it, subject to the mother's estate, or at her death to take possession of it. The testator adds these words in the codicil: "And I further instruct my executors that if the parties to whom I bequeathed the land (mother excepted) will not come and live on it, then it shall be rented, and the rent be given to my sisters *Christina* and *Mary* during their life, and the land to come to

(*a*) 6 A. & E. 206. (*b*) 2 Taunt. 109; 2 Jarm. 242, 273, 275.
(*c*) 3 B. & Ad. 839. (*d*) L. R. 7 Chy. 398; 2 Jarm. 242, 273-5.

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their heirs afterwards." These words do not so far qualify the language of the will as to make the devise to the daughter a contingent devise. Before the death of the mother, the daughter might have sold the property subject to the interest of the mother. I think the intention of the testator would be satisfied by holding that if the daughter did not choose to occupy the lot, then that it should not lie idle, but that the executors for her benefit, should deal with the lot. This, however, is not to interfere with the right which the daughter possessed of selling the land in case she so desired. If this be the true construction of the will, then this lady has the right to sell if she pleases. If this be not the true construction, then I think the language is too indefinite, if the clause be not invalid, to declare a forfeiture. It is admitted that the devisee is a married woman, and that she and her husband are living in Scotland. I am of opinion that the devisee, *Christina Hamilton* can, under the circumstances stated, without the concurrence of the executors make a good title to the lot in question.

Judgment.

See *Fillingham* v. *Bromley (a)*, *Clavering* v. *Ellison (b)*, *Wilkinson* v. *Wilkinson (c)*, *Mitchel* v. *Reynolds (d)*., *Theobald*, p. 311: *Flood*, p. 435.

(a) T. & R. 539.
(b) 7 H. L. 707.
(c) L. R. 12 Eq. 604.
(d) 1 P. Wm. 181.

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SANDS v. THE STANDARD INSURANCE CO.

Fire insurance—Alienation—Mortgage—Additional condition.

By an additional condition indorsed on a policy of insurance against fire, covering chattels, it was declared that "when property (insured by this policy) or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or any interest therein without the consent of the company, first indorsed thereon, or if the property hereby insured shall be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or in equity, this policy shall cease to be binding on this company."

Held, that this did not prevent the owner from creating a mortgage on the property covered by the policy, without notice to or assent of the company.

By ch. '62, sub-sec. 4, R. S. O., it is provided that conditions on fire insurance policies, differing or varying from the statutory conditions, "shall be added in conspicuous type, and ink of a different colour." Conditions of this character were printed on a policy in the same type as the statutory conditions, which was small, and in ink of a blue colour, not differing much in appearance from the black of the statutory conditions.

Held, not a sufficient compliance with this provision of the statute to enable the company to set up such conditions in answer to a suit on the policy.

Statement.

The plaintiff was the owner of a quantity of chattel property, and on the 5th of June, 1877, executed a chattel mortgage on it in favour of *William McCallum* to secure $323, payable in instalments, the last of which was payable on the 30th of September, 1879, and the plaintiff covenanted to keep the property insured during the continuance of the security to an amount not less than $323, to pay premiums, and on demand to assign the policy.

In pursuance of this covenant the plaintiff effected the insurance now in question on the 10th of July, 1877, with the defendants to the amount of $600. In the body of the policy there was stated to be an incumbrance to the amount of $300, and "Loss, if any, payable to mortgagee, as his interest may appear."

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Sands v. Standard Ins. Co.

The policy was made subject to the conditions indorsed, which were made a part of the policy.

The conditions upon the policy were the statutory conditions, with some variations and additions. The 4th statutory condition was, "If the property insured is assigned without a written permission indorsed hereon by an agent of the company, duly authorized for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession or by the operation of law, or by reason of death." The 5th additional condition was, "When property (insured by this policy) or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein without the consent of this company first indorsed hereon, or if the property hereby insured shall be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or in equity, this policy shall cease to be binding upon the company."

Statement.

On the 1st of August, 1877, the plaintiff executed a chattel mortgage to one *John T. Calton* to secure an indebtedness of $323, whereby he granted, bargained, sold, and assigned the insured property to *Calton* with a proviso to be void on payment of $323, in instalments, the last of which was to be payable on the 30th of September, 1879.

This mortgage was made without notice to, or assent by the company.

On the the 31st of August, 1877, the property was destroyed by fire.

The defendants resisted payment because the second mortgage was made without their consent in violation of the conditions above set out. They also resisted payment because they alleged the plaintiff to have been guilty of falsely and fraudulently overstating the amount of the loss, in violation of another condition; and also that the plaintiff had not at the commencement of the suit any insurable interest.

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

Mr. *Moss* for the defendants.

Jan. 6th.

PROUDFOOT, V.C.—[After stating the above facts.]—I determined the two last grounds of defence, at the hearing, in favour of the plaintiff, and reserved my decision upon the other.

The plaintiff objected to the variations of conditions and the additions indorsed upon the policy as not being printed in conspicuous type, and with ink but slightly differing in colour from the statutory conditions; and also that the 5th added condition was not just and reasonable. See R. S. O., ch. 162, sub-secs. 4, 5 and 6. The whole of the indorsement of conditions, statutory and additional is printed in the same sized type, and that a small size, and, as I should judge from a very slight acquaintance with such matters, seems to be "minion," or "agate," and the ink of the additions is of a blue colour, not differing much in appearance from the black of the statutory conditions. I would hesitate before determining that the additions comply with the requisites of conspicuous type and different coloured ink. Conspicuous type, in the meaning of the statute, I take to be something in the size of type to attract attention; it may be either larger, or perhaps smaller, if the other conditions should be printed in a very large type. The distinction between them is to be "open to the view; obvious to the eye; easily to be seen": as *Webster* defines conspicuous. Something to call the attention of the insured to the fact that the conditions authorized by the statute have been varied, modified, or added to. The contrast in the colour of the ink is also slight. But I need not pursue this subject further, as I think the 5th condition additional is neither just nor reasonable. The original condition (4), struck at assignments by the act of the party; but expressly excepted change of title by succession, or by operation of law, or by death.

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The added condition makes the policy void upon any transfer or change of title, which would include change of title by succession, by operation of law, or by death, and if the company do not choose to assent to the heir or next of kin succeeding, or if they do not assent to the death of the insured, or to the assignee in insolvency getting the policy, it is void. Not only so, but if the property be levied upon, or taken into possession or custody under any legal process, the policy is to be void; so that the unfortunate insured is not only to be deprived of his property by the fire, but also to lose the equivalent with which to pay his creditors: and this, no doubt, is in many cases a chief motive with a person insured to endeavour to secure himself against the hazard of loss by fire. And the final clause is even more unreasonable and unjust than the preceding; for if the title (*i. e.* of the property) is disputed in any Court, the policy is no longer to bind the company, so that no matter how unfounded a claim may be made to the property, the company are to be free. The only clause in this condition that has the semblance of fairness is, when it speaks of the company being free if the property be alienated. But I shall assume that this term is of precisely the same import as *assigned*, in the statutory condition, and shall therefore throw aside the 5th added condition entirely.

Judgment.

It then remains to be seen if the execution of the 2nd chattel mortgage is a violation of the 4th statutory condition against alienation or assignment.

And here I may first notice an argument employed by the company, that a mortgagor of chattels after default made in payment, had no right to redeem them; that the title became absolute both at law and in equity in the mortgagee; and therefore that the plaintiff had no interest when the fire occurred. It may be sufficient to say that no default had then taken place. To support the proposition that in the case of a mortgage of chattels there was no right to redeem after default, I

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was referred to *Baker* v. *Dewey* (*a*). But I find nothing in that case to justify the statement. That was a case where a vendor's lien in regard to a ship was sought to be enforced against a purchaser at sheriff's sale, under an execution against the vendee. The peculiar nature of the chattel, and the effect of the Registry Laws, was discussed; but there is nothing to shew that a right of redemption on a mortgage of chattels does not exist after default. And it is plain from the cases referred to by Mr. *Fisher* (*b*), and from *Cook* v. *Flood* (*c*), that the mortgagor has such a right. Where the mortgagee has the right to foreclose, and to file a bill for that purpose, it is evident that his title has not become absolute simply by default in payment. It is no more absolute, I apprehend, than in the case of a mortgage of realty. The title is absolute at law in both cases; and in both the mortgagee may seek foreclosure, and the mortgagor must in both have the correlative right to redeem.

Judgment.

The cases of *Smith* v. *The Provincial Ins. Co.* (*d*), and *Smith* v. *The Royal Ins. Co.* (*e*), unfortunately do not afford much assistance; for though in both it was held upon demurrer that a subsequent mortgage did not avoid the policy, as it still left an insurable interest in the mortgagor, yet in neither did there appear on the record any condition restraining alienation.

The defendants were incorporated by the 40 Vic. ch. 66, O., and are not a Mutual Insurance Company. There is, therefore, nothing in the nature of the company to avoid the policy by a subsequent mortgage, so long as the insured retains an insurable interest. In Mutual Companies, on the contrary, where the insured becomes a member of the company, and the property is liable for its proportion of losses to other members,

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(*a*) 15 Gr. 668.
(*b*) Mortgage, sec. 29 *et seq.*
(*c*) 5 Gr. 463.
(*d*) 18 C. P. 223.
(*e*) 27 U. C. R. 54.

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a mortgage without the approbation and consent of the company may well be considered as avoiding the policy. But here the question turns entirely on the meaning to be given to the terms *alienel* or *assigned* in the statutory condition. And in assuming that *alienel* is to be read in the condition, and is equivalent to *assigned*, I am doing no injustice to the company, as alienation is, perhaps, a wider word than assignment. Now *alienation* comprises any method wherein estates or property are voluntarily resigned by one man and accepted by another; whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties (*a*). And an assignment is properly, a transfer, or making over to another of the right one has in any estate; but it is usually applied to an estate for life or years; and it differs from a lease only in this, that by a lease one grants an interest less than his own, reserving to himself a reversion: in assignments he parts with the whole property (*b*). These definitions point to the absolute transfer of the property, a transfer by which the one party parts with all his interest, not reserving to himself any right or claim. I am not only at liberty, but I am bound, to assume, that the Legislature in framing the statutory conditions were aware of the legal meaning of these terms, and by the use of either of them were guarding against such an unconditional transfer. I may also assume that they were aware of the conditions frequently used in policies of insurance, and notably by the Niagara District Mutual Co., which has afforded so much occasion to judicial interpretation of its policies, which provides for the policy being void, if the insured shall "alienate conditionally by mortgage"; and being in possession of this knowledge deliberately made use of a phrase which technically, and in its ordinary sense means an

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(*a*) 2 Bl. Com. 257.

(*b*) 2 Bl. Com. 326.

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unconditional transfer. *Webster* defines an assignment, so far as the present purpose is concerned, to be, "A transfer of title or interest by writing: the conveyance of the whole interest which a man has in an estate, usually for life or years. It differs from a lease which is the conveyance of a less term than the lessor has in the estate." And alienation he defines as "A transfer of title, or the legal conveyance of property to another." In neither of these is there any difference between the legal and popular signification.

I am aware that a power of sale though generally construed to mean a sale out and out, may yet, when the intention can be gathered from the instrument, be interpreted to mean a mortgage or conditional sale: *Stroughill* v. *Anstey* (*a*). For instance, if it is for raising a particular charge, and the estate is settled subject to that charge, then it may be proper, under the circumstances, to raise the money by mortgage, and the Court will support it as a conditional sale, as something within the power, and as a proper mode of raising the money: *Ib.* But from what am I to infer any such intention here? Not from the nature of the contract; for, so long as the mortgagor retains an insurable interest the company suffer no wrong, and there is no agreement other than what may be deduced from the condition.

Judgment.

But some authorities are to be found that go a long way to decide the point. The original Mutual Insurance Co. Act, by sec. 10, enacted that if the property were *alienated by sale or otherwise* the policy should become void; and in *Hobson* v. *The W. D. Mutual Fire Ins. Co.* (*b*), the late Sir *J. B. Robinson*, C. J., said, "The Legislature mean that upon alienation by 'sale or otherwise,' *i. e.* by gift, exchange, devise, &c., so that the insured ceases to be owner, his policy shall be void, but his grantee may have it confirmed to him on his alien-

(*a*) 1. D. M. & G. 645. (*b*) 6 U. C. R. 536.

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ation." And again, in construing the same clause in the Act, in *Burton* v. *The Gore District Mutual Fire Ins. Co.* (*a*), the same learned Judge says, that "alienation by way of mortgage, (if the term can be allowed), has been held not to come within the prohibition in other (than mutual insurance) cases, even where the terms of the charter or the policy do, as in our Act now under consideration, declare that the policy shall be void when the building shall be 'alienated' by sale or otherwise."

And in the same case in equity, all the Judges held that to be the true construction of the statute. The present Chancellor, then Vice-Chancellor, said that the consent of the company was only required in the case of alienation; and he agreed with *Robinson*, C. J., that the transfer there, a mortgage, was not an alienation within the meaning of the Act. In the recent case of *Smith* v. *The Niagara District Mutual Fire Ins. Co.* (*b*), *Gwynne*, J., while criticising the judgments in *Burton* v. *The Gore District Mutual Fire Ins. Co.*, both in the Queen's Bench and in this Court, yet concurs with Sir *John B. Robinson* and all of the Judges in this Court, that a mortgagee is not an alienee within the meaning of that section, it being intended to apply to absolute alienees only, who could, more consistently with the nature and principles of mutual insurance companies, become members of the company in lieu and stead of the original proprietor.

Judgment.

From these cases it seems that the phrase "*alienation by sale or otherwise*," of much more extensive signification than *alienation* or *assignment*, alone, does not include an alienation by way of mortgage, in cases of insurance in Mutual Insurance Companies; and, as we have seen, there is the authority of C. J. *Robinson* for holding that *a fortiori* it does not include a mortgage in cases of insurance in other com-

(*a*) 14 U. C. R. 342, 352. (*b*) 38 U. C. 570, 575.

panies where the policy contains a similar prohibition. Mr. *Phillips* on Insurance, secs. 93, 880, says, "That mortgaging the insured premises is not an alienation under a provision of a charter making the policy void on an alienation by sale or otherwise," and cites a number of cases in the American Courts that fully sustain the proposition: *Conover* v. *Mutual Ins. Co. of Albany (a)*, *Shepherd* v. *Union, &c., Ins. Co. (b)*, *Rollins* v. *Columbia Fire Ins. Co. (c)*, *Folsom* v. *Belknap Ins. Co. (d)*, *Jackson* v. *Mass. Ins, Co. (e)*. And see *Clarke* on Insurance, 192, *et seq.*

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The recent Act relating to Mutual Fire Insurance Companies (*f*), provides apparently for a mortgage, avoiding a policy in such companies. That may be a proper enough provision, but the question here does not relate to a Mutual Company, and is to be decided upon the terms of the condition alone.

Judgment.

I think the plaintiffs entitled to a decree. Refer it to the Master at London to take the accounts, and the defendants to pay, with costs, within a month from date of report.*

(*a*) 3 Den. N. Y. 254.
(*b*) 38 N. H. 232.
(*c*) 25 N. H. 200.
(*d*) 30 N. H. 231.
(*e*) 23 Pick. Mass 418.
(*f*) 30 Vic. ch. 44, sec. 39 R.S.O., ch. 161, sec. 41.

* This case has since been reheard, and now stands for judgment.

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GOULD v. STOKES.

Will, construction of—Conversion into personalty—Dying without leaving issue—Costs—Bequest of residue.

A testator directed his executors to sell and realize all his estate in such manner as they should think proper, and the residue, after sundry devises and bequests, he desired them to apportion into certain shares, one of which he directed to be equally divided among the daughters of his son, *S. V.*, deceased, to be paid to them on attaining 21, or sooner if the trustees should think it for their advantage; and in the event of the death of any of his said granddaughters without leaving issue, her or their shares to be equally divided among their surviving sisters or their heirs.

Held, that this operated as a conversion of the estate into personalty and the words "dying without leaving issue" referred to the period of distribution—that is, when the legatees attained 21; and, therefore, that the share of one of them who had died without issue after the testator, and after having attained 21, went to her personal representative; and the Court being of opinion that the difficulty was occasioned by the testator, independently of the fact that the bequest was of residue, ordered the costs of all parties to be borne by the estate.

THIS was a suit for the construction of the will of *Nathaniel Vernon*, deceased.

By the 24th clause, as to the residue of his estate, he directed it to be divided into seven shares, and directed them to be appropriated to the persons named—one was as follows: "4th. One share to be equally divided between the five daughters of my son, *Silas Vernon*, now deceased, viz., *Sarah Jane Tridgett, Eliza Gould, Priscilla Vernon, Anna Vernon, Mary Maria Vernon*, to be paid when they shall attain the age of twenty-one years, or sooner if my trustees shall think it for their advantage; and should one or more of my above named grandchildren die without leaving issue, *then* her or their share or shares to be equally divided between the surviving sisters or their heirs."

Statement.

The plaintiff contended that the dying without issue

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meant so dying before twenty-one; the defendant insisting that it meant so dying at any time.

Mr. *Arnoldi*, for the plaintiffs.

Mr. *W. Cassels*, for the adult defendant.

Mr. *Hoskin*, Q. C., for the infant defendant.

PROUDFOOT, V. C.—[After stating above facts.]—*O'Mahoney* v. *Burdett* and *Ingram Soutten* (*a*), decide that in the absence of anything in the will to lead to a contrary conclusion, this phrase should receive its ordinary meaning, as applying to a death at any time without children. And, therefore, where there was a gift for life to one, and after her death to another, and if that other should die unmarried or without children to a third person, it was held that the dying without children at any time would defeat the absolute interest.

Judgment.

In *Olivant* v. *Wright* (*a*), the Court, while recognizing the rule laid down in *O'Mahoney* v. *Burdett*, held that it did not apply to a case where property was given for life, and after death of tenant for life "to be divided amongst my five children, share and share alike; and if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living; but if any of my children should die leaving issue, then that child (if only one) should take its parent's share, and if more than one, to be divided equally amongst them, share and share alike." The Court thought that the division on the death of the tenant for life was a final division, and that the word *then* pointed to the dying without issue before the period for division. And *Cairns*, C. (*a*), thought that

(*a*) L. R. 7 H. L. 388, 408. (*b*) L. R. 1 Chy. D. 346.
(*c*) L. R. 7 H. L. 394.

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the decision in *Edwards* v. *Edwards* might be sustained, because the will provided for an assignment and transfer to the children upon the death of the tenant for life, and the dying leaving no children referred to that period.

But if these cases of *Olivant* v. *Wright* and *Edwards* v. *Edwards*, do not infringe the rule in *O'Mahoney* v. *Burdett*, I do not see how, in the case now before me, it would infringe the rule to limit the dying without issue to the period of attaining twenty-one. The word *then* occurs here as in *Olivant* v. *Wright*, and in the same connexion; and according to the construction there put upon it, it must receive here the meaning of referring to attaining twenty-one, and therefore shew that the dying without issue was confined to that time. The reason for the decision in *Olivant* v. *Wright*, I take from the judgment of *James*, L. J., for though the other Judges assign additional reasons which may perhaps not be applicable here, they agree in the judgment given by him.

Judgment.

In Re Charles (*a*), is not affected by this, for there the qualification of dying without issue was in the will expressly applied to dying without issue after twenty-one as well as before.

Another question arises upon this will, whether the real estate was converted into personalty or not. *Eliza Gould*, one of the five grandchildren, having attained twenty-one and died without issue, the plaintiff is her personal representative. The fourth clause of the will, which is in these words:—

"I give, devise, and bequeath unto the aforesaid *Joseph Stokes*, *Harrison Vernon* and *Hiram Trigeit*, and the survivors or survivor of them, all other the freehold messuages, lands and tenements, hereditaments and real estate, and all ready money, mortgages, promissory notes, bonds, and all other securities for money of whatever nature or kind, in possession, reversion, remainder,

(*a*) 23 Gr. 610.

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or expectancy, whereof or wherein I am or shall be seized or interested, or over which I have or shall have a disposing power, with their and every of their rights, members and appurtenances: to hold the same in trust for carrying out of the provisions of this my will, and I hereby empower my trustees executors to collect all mortgages, notes and other debts due to me, and to give proper discharges and receipts for the payment of the same, and also to sell and dispose of all or any portion of my estate, in whatever manner may seem to them most to the advantage of my heirs, and also from time to time to make and execute all proper acts, contracts, deeds and assurances for carrying such sale or sales into complete effect. I empower the said trustees executors, or the survivor of them for the time being, at any time or from time to time to sell and dispose of any mortgages, stocks, funds, or securities whereon any of my trust moneys for the time being may or shall happen to be invested and to reinvest the money arising from such sale or sales in any stocks or funds, or other government securities, or on mortgage of freehold estate, and to vary and transfer the same as occasion may require or shall be thought fit"—

Judgment.

does contain an absolute direction to sell. The estate is given to the trustees upon trust to collect mortgages, &c., *and also to sell* all or any portion of my estate in whatever manner, &c. The discretion of the trustees seems to be limited to the *manner* of sale. And in such a case the property is converted. *Jarm.* 550 *et seq.*

The decree will be in accordance with these findings.

Subsequently, [December, 1878,] the minutes of decree were spoken to by counsel for the parties; the contention on the part of the plaintiffs being that the defendants personally should be ordered to pay the costs of their unsuccessful contest of the claim of the plaintiff; the defendants insisting that the contest having arisen in consequence of the difficulty created by the testator as to the proper construction of his will, and the opposition shewn by the defendants having been made in good faith, the costs should come out of the estate.

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PROUDFOOT, V. C.—(6th of January, 1879.)—I have already held that the plaintiff's construction of the clause was correct. And, as the difficulty was occassioned by the testator, I see no reason for departing from the ordinary rule, that the general estate must bear the costs: *Jolliffe* v. *East* (*a*). Besides the bequest in this case is one of residue, and it is the general rule that the costs of administration have to be deducted before the residue is ascertained: *Shuttleworth* v. *Howarth* (*b*).

The costs in this case will be borne by the estate.

THE ATTORNEY-GENERAL OF ONTARIO v. O'REILLY.

Escheat—Jurisdiction—Demurrer.

Held, on demurrer (1), that the doctrine of escheats applies to lands held in Ontario; (2), that the Attorney-General of Ontario is the proper party to represent the Crown, and to appropriate the escheat to the uses of the Province; (3), that this Court has jurisdiction in such cases; and ( ), that it was proper for the Attorney-General, if he saw fit, to file a bill in this Court to enforce the escheat.

This was an information by *The Attorney-General* of Ontario, to which a demurrer was put in by one of the defendants. The facts appear in the judgment.

Mr. *William McDougall* for the demurrer.

Mr. *Crooks*, Q. C., contra.

(*a*) Bro. C. C. 26. (*b*) Cr. & Ph. 228.

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Jan. 6th.

PROUDFOOT. V. C.—This is an information by *The Attorney-General* of Ontario against *Bridget O'Reilly*, *Andrew F. Mercer*, and *Catharine Smith*, stating that *Andrew Mercer*, late of the City of Toronto, died on the 13th of June, 1871, intestate, and without leaving any heir or next of kin, whereby the real estate of the said *Andrew Mercer*, in Ontario, became escheated to the Crown for the benefit of that Province. That he died, seised of certain specified real estate. That immediately upon his death the defendants entered into possession of it without the permission or assent of Her Majesty, and have continued in possession and refuse to give up the possession to Her Majesty. That possession was demanded on the 21st of September, 1878, but the defendants refuse to deliver possession.

The defendant *Andrew F. Mercer* demurs for want of equity.

For the demurrer, it was argued:—

Judgment.

1. That this Court has no jurisdiction in cases of escheat, assuming that cases of escheat *per defectum sanguinis* are known to our law.

2. That the doctrine of escheat does not apply to lands held in free and common socage. That it is not a doctrine of the common law; that it is a feudal doctrine and applicable only to feudal tenures.

3. That if the Queen is entitled, the Attorney-General of Ontario is not entitled to represent her, and to appropriate the escheats to the uses of the Province.

4. If escheats exist this is not the proper mode of procedure to obtain possession.

I shall consider these objections in the order in which they were presented.

The information is practically an ejectment suit, resting upon a legal title, and seeking to obtain possession of the property in question. But this Court has recently held, after much consideration, that the Queen may select any of her Courts to assert her

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rights whether legal or equitable, and this independently of the Administration of Justice Act. It was held also in the same case, that, although the Act does not name the Crown, the Crown may take advantage of its provisions: and the Act declares that this Court shall have jurisdiction in all matters which would be cognizable at law: *Attorney-General* v. *Walker* (*a*). Therefore, even if the Act be *ultra vires*, still this case is brought in a proper forum.

Judgment.

The tenure of free and common socage is well known to the law; it existed through all the period of the feudal tenures, and was in fact a feudal tenure itself. The Act of Charles II. abolished the military tenures but did not create the socage tenure, it found it in existence and changed the others into it. The incidents connected with this tenure before that time continued to be attached to it. When the Act of 1791 declared that lands in Canada should be granted in free and common socage, it therefore introduced the tenure with all its incidents and consequences. One of these consequences was the liability to escheat. "All lands and tenements held in socage, whether of the king or of the subject, are liable to escheat"; *Cruise* Dig. 3, 401. This is inherent in the tenure, an essential part of it, and imposes no restriction upon the owner. He had the power to dispose of it as he pleased during his life, and he might have devised it by his will; when he does neither, and dies without heirs, it is no restriction of his title to say that it shall revert to the Crown.

But it is a mistake, I apprehend, to imagine that the doctrine of escheat to the Crown for want of heirs, is only a feudal doctrine. It has a foundation much more ancient, and rests upon principles of general application, independent of any relation to feuds. *Blackstone* (*b*), says that in such a case, to prevent the robust title of occupancy from taking place, the doctrine of

(*a*) 25 Gr. 233. (*b*) Vol. 2, p. 11.

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escheats is adopted in almost every country, whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be found. It was a maxim of the Roman jurisprudence that the property of those who died intestate, and without legitimate heirs, belonged to the state. "*Scire debet gravitas tua, intestatorum res, qui sine legitimo haerede decesserint, fisci nostri rationibus vindicandus,*" Cod. 10, 10, 1. And *Domat*, the celebrated French jurist, refers it to this principle, that property which has no owner passes naturally to the use of the public, and accrues to the sovereign, who is its head, and that in France it passed to the king (*a*). And I apprehend that similar dispositions will be found in most of the European nations which derive their jurisprudence from the Civil Law. The Code Nap., sec. 539, enacts that the property undisposed of, of those who die without heirs belongs to the public domain. And the propriety of some such provision is also evidenced by the enactments of the neighbouring States to the same effect. It is no harsh rule, therefore, of an obsolete or antiquated state of society, stretching its baneful influence over times and circumstances to which it was never intended to apply, but it is an enlightened provision of the policy of many, if not all, civilized states, to prevent the anarchy and confusion that would arise from permitting the robust title of the strong hand to be asserted.

Judgment.

The s. 401 of the Lower Canadian code was referred to as shewing that an enactment was necessary to confer this right on the Crown. But that code was not a system of new laws, it was a codification of those that were in force before it was drawn up, and it rather proves the right as a part of the previous Provincial law on the subject.

(*a*) Dom. Loix Civ., Lib. IV., tit. VIII.

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By some strange misconception, it was said that gavelkind lands do not escheat, and therefore that lands under our system of inheritance similar to that of gavelkind ought not to escheat. *Blackstone*, 2, 252, is quoted for this; but he is there treating of escheats from corruption of blood from treason or felony, and he says that gavelkind lands are in no case liable to escheat *for felony*, though they are liable to forfeiture for treason. But even that is too general a statement for if a tenant in gavelkind, being indicted for felony, absent himself, and is outlawed after proclamation made for him in the county, his heir shall reap no benefit by the custom, but the lands shall escheat to the lord, *Cruise* Dig.. 3. 401. There is not a word, however, to establish the assertion that such lands do not escheat for want of heirs.

Judgment.

The expression quoted by the learned counsel for the defendant from the opinion of the law officers of the Crown, in 1817, (*Forsyth's* Com, &c., 124), that all the consequences which follow socage tenure by the law of England must follow it in Upper Canada, seems to me to state the law correctly. If the right of escheat did not necessarily follow the introduction of the tenure by the Imperial Act of 1791, our own statute of 1792, sec. 3, directing that in all matters of controversy relative to property resort should be had to the laws of England, must be taken to have introduced it. Our own law then has provided for it, and the assertion of the right is not in conflict with any local law, but in pursuance of it, and sanctioned by all the weight our approval could give it. It is not an odious prerogative, but a natural and essential right in every well regulated state. The revenue derived from it forms no part of the personal property of the sovereign, but is received and expended for the benefit of the common weal. It is no confiscation of any one's property, for, from the terms of this bill, it belongs to no one, and the defendants are unjustly in possession of what does not

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belong to them. There was a great deal said in the opinions of the Judges in *Burgess* v. *Wheat* (*a*), so largely quoted by the learned counsel, that renders it difficult to determine, as Lord *Thurlow* said, in *Middleton* v. *Spicer* (*b*), whether that case was such an one as bound only when it occurred *speciatim*, or afforded a general principle. It was determined upon divided opinions, and which opinions continued to be divided, of very learned men. All that was really decided in the case was that a trustee having the legal estate held it for his own benefit when the beneficiary died without heirs. There was a tenant, (who had the legal estate), to perform the services, and the land could not revert.

The next question discussed was, if the Crown was entitled, is the Attorney-general of Ontario authorized to represent her Majesty, and to appropriate the escheat for the purposes of the Province. The learned counsel made an able argument to shew that escheats belong to the Consolidated Revenue of the Dominion, and not to the local Legislature; that so far as there is any power in Canada of appropriating these revenues under Imperial Acts, the Federal Parliament alone can deal with them; that the casual revenues of the Crown in Ontario (as distinct from Territorial) are Federal revenues, applicable to Federal pusposes, and payable to the Receiver-General of the Dominion. The question has been the subject of judicial decision in the Queen's Bench in Quebec, on appeal from the Superior Court of Kamouraska, in a case in which the Attorney-General for Quebec was the appellant and the Attorney-General for the Dominion was respondent, and it was determined that the escheat accrued to the benefit of the Province of Quebec, and not of the Dominion. While not absolutely bound to follow that decision, yet considering that it was the unanimous decision of Judges of great eminence, of one of the Con-

Judgment.

(*a*) 1 Bl. Rep. 123; S. C., 1 Eden. 177. (*b*) 1 Bro. C. C. 201.

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federate Provinces, sitting in appeal, and construing the same Acts and Legislative provisions now brought into question, it would be unseemly in me to venture to give a contrary opinion, and I have therefore concluded to follow that decision, until it be reversed by some higher tribunal, without endeavouring to construe the various Acts that were referred to.

The last ground of demurrer argued was, that the mode of procedure was essentially wrong. By a misconception of a statement in some of the law books that while there was a tenant there could be no escheat and that here the defendants were tenants in possession. *Tenant*, however, in this case means one who holds by tenure. The case usually put to exemplify it is *Litt.* sec. 390. "If there be lord and tenant, and the tenant be disseised, and the disseisor alien to another in fee, and the alienee die without issue, and the lord enters as in his escheat; the disseisee may enter upon the land, because the lord does not come to the land but by escheat." Or, in other words, when the tenant in fee has been evicted by an intruder, who sells, and the purchaser dies without heirs, the land does not escheat, because there is a rightful owner, a tenant in existence who is entitled to enter and repossess himself of his estate, *i.e.*, the death of a person in possession without title and without heirs does not enable the lord to take it as an escheat to the prejudice of him who has the title. The case quoted from 4 Rep. 58*a*, *The Commonalty of Sadlers*, is to the same effect. In Sir *George Sand's* Case (*a*) the legal estate was in Sir *George Sand*, subject to a trust, and the beneficiary was executed for murder, and it was held there was no escheat for there was a tenant, *i.e.*, Sir *George Sand* had the fee simple in him. The same was the decision in *Burgess* v. *Wheat*, where it was held that where the beneficiary died without heirs, the

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(*a*) 1 H. P. C. 250.

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trustee might hold the estate. He had the legal fee in him, he was a tenant in the proper sense of the word, and there could be no escheat: *Doe* v. *Redfern* (*a*), proceeded upon the fact that office had not been found, and therefore the title of the plaintiff was not perfect. The cases quoted show nothing more than this, that if the legal estate be vested in some one, the death of the person beneficially entitled will not cause an escheat. The case of mortgagor and mortgagee proceeds on the same principle. The legal estate is in the mortgagee, and upon the death of the mortgagor without heirs there is no escheat for there is a tenant, the person having the estate. It was said that the son here was as much a tenant as the heir of a disseisor. Suppose that to be the case, the heir of the disseisor is not the tenant who prevents the escheat, but the disseisee.

Judgment.

If the view contended for by the defendant be law, the first occupant, any squatter, who might chance to get into possession, would be entitled to hold possession. But there is said by *Blackstone* (*b*), to be only one instance wherein a title to a real estate could ever be acquired by occupancy, viz., on the death of a grantee for the life of another, and even that has been altered since his time: 1 Vic., ch. 26, sec. 6; 1 Wms. Ex'ors, 648, ed. 1867. But a mere possessor without title is not a tenant. He may be an occupant, but the cases cited do not refer to such a person.

Following the decision in Quebec, I must also assume that the R. S. O., ch. 94, on this subject is not *ultra vires*, and that the A. J. Act, so far as applicable to the mode of procedure, is also not *ultra vires*. By the Escheat Act, ch. 94, the Attorney General may bring ejectment, and the proceedings may be similar to those in other actions of ejectment. Grants may be made of escheated lands without inquest of office being first

(*a*) 12 East. 96. (*b*) Vol. 2, p. 260.

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found, and the grantee may take proceedings in any court of competent jurisdiction for the recovery of them. By the A. J. Act, this Court has all the powers of a Court of law in such actions. It would be strange, therefore, if the grantee of the Crown would be in a better position than the Crown itself, and might bring a suit here which the Crown could not. But that would be reversing the order of affairs, as the Crown has the option of a forum, where a subject has not. There is no peculiarity in the case which would require the intervention of a jury, supposed to be the especial guardian of popular rights, and a protection against the encroachments of power. There is nothing of the kind to dread. The Crown has to establish the fact of the owner's death, without heirs. When that is done, the assertion of the right is not an injury to any one having a lawful right, for there is no such person, and no prejudice is done to the people, for it is in their interest the right is asserted.

Judgment.

The Act of Henry VI. was principally aimed at escheats from other causes than want of heirs. At that time the military tenures were in full force, and the grounds upon which escheats were incurred were numerous (*a*). Refusal to attend superior Court, denial of tenure, selling without license &c., &c., and in such cases great scope was given for oppression by the escheaters. None such now exist; and even the theoretical principle upon which the Act was based has ceased to operate. But I need not inquire into that now, as the Ontario Act, which I assume to be effective, has substituted another mode of procedure.

I think the demurrer must be overruled, with costs.

(*a*) See Hottoman, de Feud. disp. c. 38, and his Lib. Feud. throughout; Hume's Hist., 1, 462, 463.

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BARTER v. HOWLAND.

Patents—Prior disclosure—Similarity of claim—Rival inventors—Evidence—General denial of invention—Pleading.

Where the plaintiff had, more than one year previous to his application for a patent in Canada, obtained a patent in the United States disclosing the same invention, though not containing all the claims contained in the Canadian patent.

Held, under section 7, Patent Act 1872, that such foreign patent amounted to a publication of the whole invention in the United States, and imported a disclaimer of all parts not claimed in the foreign patent:

Held, also, that such defence was sufficiently raised by the pleadings in this case.

Held, also, that a patent in Canada granted to an independent inventor after the plaintiff's foreign patent, but before his application for a patent in Canada, was valid against the plaintiff's subsequent patent.

Held, also, that evidence of such prior Canadian patent to an independent inventor was admissible under a general denial that the plaintiff was the first inventor.

Statement.

This was a suit by *Benjamin Barter* against *F. A. Howland* and *A. J. Stephens*, as manufacturers, for infringing patent No. 3014, for a "Flour Dressing Machine," or "Middlings Purifier."

The first claim in the plaintiff's patent was as follows:—

"In a machine for dressing flour, the combination of a bolt or shaker, consisting of one grade or several grades of cloth, a brush or brushes to clean said bolt or shaker, and a fan or its equivalent to assist in the operation of dressing and cleansing."

The patent contained other claims, but the above was the only one infringed by the defendants.

The defendants' answer denied generally, that the plaintiff was the first inventor of this combination, and also set up a defence under the 7th section of the Patent Act of 1872, alleging the existence of a foreign

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patent for the same invention more than twelve months before the plaintiff's application in Canada.

The cause came on by special appointment for examination of witnesses. and hearing on the 16th of September, 1878.

The plaintiff's patent in Canada was put in. It bore date the 20th of January, 1874. The application bore date the 31st of December, 1871, but was not forwarded to the department until September 5th, 1873. It had been placed in the hands of the plaintiff's agent at Montreal in January, 1873, but he, discovering an informality in the execution, had returned it to the plaintiff, and owing to causes not, as the plaintiff alleged, within his control, it was not forwarded to the department until the date above stated.

The defendants proved a copy of a patent obtained by the plaintiff in the United States, dated April 9th, 1872. The drawings and general description of the invention in this patent were identical with those in the plaintiff's subsequent Canadian patent; but there was no claim equivalent to the one in issue, though the drawings and description clearly embodied that combination.

Statement.

The defendants also put in a Canadian Patent to *George Thomas Smith* covering the combination in issue, and dated April, 1873. The date of the application did not appear. Counsel objected to the admission of this patent, as it was a surprise upon the plaintiff. The defendants contended that they were entitled to give it as evidence under the general denial of the novelty of the plaintiff's patent.

[BLAKE, V. C.—I presume under that you may give the evidence.]

The defendants proved the construction of a machine containing the combination in issue by *George Thomas Smith* at Minneapolis in April, 1871.

The plaintiff swore that he had perfected his invention several months earlier at Faribault, Minnesota; but the evidence on this point was conflicting.

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Mr. *Boyd*, Q. C., and Mr. *Howell*, for plaintiff, contended that as the grant of the patent right in the United States patent was not co-extensive with that in the plaintiff's Canadian patent, section 7 of the Patent Act of 1872, did not apply: and that in any case the plaintiff's application ought to be taken as having been made at the date when it was originally forwarded to Montreal in January, 1873. They also contended on the evidence that the plaintiff was proved to be the first inventor, and not having lost his rights under the 7th section of the Patent Act, was entitled to succeed.

Mr. *Fitzgerald*, Q. C., and Mr. *Howland*, for the defendants, contended that the policy of the 7th section of the Patent Act 1872, was not confined to cases of foreign patents containing co-extensive grants, but the section must be read as referring to any substantial disclosure and publication of the invention by a foreign patent. Independently of this, *Smith* being the first patentee in Canada, and being proved to have *bonâ fide* invented what he had patented, must be held to be the first inventor in law: at all events the evidence of a prior invention by the plaintiff in a foreign country, was altogether too indefinite and contradictory to displace *Smith's primâ facie* priority. *Barter's* United States patent containing no claim for this combination, amounts to a disclaimer of any title as inventor.

Argument.

Mr. *Boyd*, in reply, submitted that the defence based on publication by the United States Patent, was not raised by the answer: *Seymour* v. *Osborne (a)*, *Minter* v. *Mower (b)*, *Lewis* v. *Marling (c)*, *Betts* v. *Menzies (d)*, *Morgan* v. *Seaward (e)*, *Johnson* on Patents, *Chapter* on Novelty, pp. 60 & 74, and cases there cited;

(a) 11 Wall. 516.
(b) Web. Pat. Causes 140.
(c) Web. P. C. 488.
(d) 10 H. L. C. 117.
(e) Web. P. C. 196.

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Household Co. v. *Neilson* (*a*), *Cornish* v. *Keene* (*b*), *Palmer* v. *Wagstaff* referred to in *Johnson* on Patents, page 29, were, amongst other cases, referred to.

BLAKE, V.C.—The 7th and 8th clauses of the defendants' answer are as follows:—

"We further say that we believe, and we charge that a patent for the said alleged invention was in existence in the United States of America more than twelve months prior to the plaintiff's application for his said patent in Canada."

"We further say that we believe, and we charge that the combination in the tenth paragraph of this our answer described and being the subject of the said claim in the said letters patent was, as the plaintiff well knew and knows, known and used by others before the plaintiff's alleged invention of the same, and that the plaintiff was not, and well knew that he was not, the first and true inventor of the same, and that the said combination was described in a printed book and other printed publications before the date of the plaintiff's said application."

Judgment.

In the examination of the plaintiff a copy of his American patent was marked "A," and his Canadian "B." As to these the plaintiff says: "On comparing the drawings attached to the documents 'A' and 'B,' I do not detect any difference between them. I do not believe that there is any difference between them. I am not aware that there was any difference in the drawings attached to my American and Canadian patents. As far as I recollect the drawings attached to the paper 'A' are copies of the drawings connected with my American patent. As far as my memory goes I believe that the drawings attached to the paper 'A' are copies of the drawings attached to my American

(*a*) Web. P. C. 683. (*b*) Web. P. C. pp. 501, 507, 508, 519.

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patent. I believe that the 9th of April, 1872, stated on the document 'A' is the date of my American patent. I can't tell now what the first claim in my American patent was. On reading the first claim appearing in the copy of the patent marked 'A,' I think my American patent contained a similar claim—it might not be in all its bearings. On reading it over I don't detect any difference. I think there was a claim in my American patent to the effect of the claim No. 2, appearing in the document 'A.' I think there was a claim in my American patent to the effect of the claim No. 3, appearing in the document 'A.' I think there was a claim in my American patent to the effect of the claim No. 4 appearing in the document 'A.' I think there was a claim in my American patent to the effect of the claim No. 5, appearing in the document 'A.' I think there was a claim in my American patent to the effect of the claim No. 6, appearing in the document shewn to me marked 'A.' I cannot point out any difference in the claims appearing in the document 'A' and the claims which to my recollection were in my American patent. Those plans I look at, attached and part of the document 'A,' substantially represent the machine which I built and patented in the United States."

Judgment.

The American patent is dated the 9th of April, 1872, the Canadian patent the 20th of January, 1874. The plaintiff, at the earlier date presented that which he now claims to cover by his Canadian patent to the public. He then covered by his American patent what he desired to protect, and to my mind, then dedicated to the public in the United States, what he did not so preserve to himself. By his claim he reserved what he wanted, and then disclaimed or abandoned any right in that which he then disclosed, and made no attempt to cover by the patent. This information and disclaimer is publicly made in the office, where naturally all of those interested in such matters would seek for information. I do not think I can hold that the para-

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graphs of the answer which I have cited do not raise this defence; if there were a doubt upon this point, it is a case in which the defendants, if they desire it, should have leave to add words to their answer to cover more plainly the case as it is made out by the evidence.

The plaintiff urges, and in this I think he is correct, that the American patent does not cover, as a patent, that which he seeks to cover by his Canadian patent. If this were otherwise he would have applied in Canada too late for his patent, as under section 7, "An inventor shall not be entitled to a patent for his invention, if a patent therefor in any other country shall have been in existence in such country more than twelve months prior to the application for such patent in Canada," and the plaintiff did not apply until after the expiration of the period designated in this clause.

Judgment.

Smith, the assignor of the defendants, invented that which is covered by the two Canadian patents in question. He had a right, on the evidence before me, to apply for a patent, and he did so, and obtained his patent before any application was made by the plaintiff. Of the two inventors, the assignor of the defendants first obtained a patent. This being so, I do not see on what principle I can deprive them of the right of manufacturing and vending the articles, the subject matter of their patent. I must dismiss the bill, with costs.

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McPherson v. McKay.

Presbyterian Church of Scotland—Union—Congregational property.

In 1836, by letters patent, lands were granted to trustees in fee, to hold the same to and for the benefit of the Presbyterian minister for the time being, incumbent of the Presbyterian Church of Scotland then erected in the township of Eldon. The defendant, who had always been a member of such Presbyterian body, was duly inducted as incumbent of the said church and so continued when in 1875, an Act of the Legislature of Ontario was passed for the union of the several Presbyterian Churches then existing in Ontario, but the members of this Church voted themseves out of the said union as provided by the Act, notwithstanding which the defendant gave in his adherence to the union:

Held, under these circumstances, that the lands granted by the said patent, as also the church and other buildings erected thereon, belonged to and were the property of the congregation; and that the defendant having joined the union was no longer entitled to hold possession or receive the benefits of the same.

Statement.

This was a bill by *James McPherson*, *Alexander McPherson*, and *Euchran McEuchran*, against the Reverend *Alexander McKay*, setting forth that in 1836 letters patent under the great seal of the Province of Upper Canada issued in the names of the plaintiff *James McPherson*, *James McAlpine*, and *Lachlan Cameron*, all of the township of Eldon, yeomen, granting them 200 acres of land, being lot No. 6, in the 4th concession of that township, in trust, to hold the same forever thereafter to and for the benefit of the Presbyterian Minister, for the time being, incumbent of the Presbyterian Church of Scotland, then erected in the said township of Eldon; that the plaintiffs *Alexander McPherson*, and *Euchran McEuchran* had, under the provisions of the said letters patent, been duly appointed trustees in the place or stead of *James McAlpine* and *Lachlan Cameron*, and thereby the plaintiffs under the said letters patent were entitled to hold the said lands for the benefit of the Presbyterian Minister for the time

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being, incumbent of the Presbyterian Church of Scotland, in the said township of Eldon, and for no other.

The bill further alleged that the defendant, previous to the year 1875 and up to the 5th day of June in that year, was the Presbyterian Minister for the time being, incumbent of the said church, and as such was entitled to the benefit of the lands granted by the said letters patent. The bill then alleged the passing, by the Legislature of Ontario, of the Act for the union of the Presbyterian Churches therein mentioned, reciting that the said Churches had agreed to unite or form one body or denomination of Christians under the name of The Presbyterian Church in Canada, and enacting that as soon as the union should take place, all real and personal property within the Province of Ontario, then belonging to or held in trust for the use of any congregation in connexion or communion with any of the said churches should thenceforth be held, used, and administered for the benefit of the same congregation in connexion or communion with the united body under the name of the Presbyterian Church in Canada; and the said Act provided, that if any congregation in connexion or communion with any of the said churches should, at any meeting called as in the Act provided and held within six months after the said union, by a majority of the votes of those in the Act specified, determine not to enter into such union, then the congregational property of such congregation should remain unaffected by the said Act or any of its provisions: that the union contemplated by the said Act was entered into and took place in June, 1875, and the defendant entered into such union, and became and continued a minister of the said united body, known and being The Presbyterian Church in Canada, and had separated himself from, and ceased to be a minister of the Presbyterian Church of Canada in connexion with the Church of Scotland.

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The bill further stated that at a meeting of the said congregation, called and held in accordance with the provisions of the said Act after the said union had taken place, and held within six months thereafter by a majority of the votes of those entitled to vote at such meeting, the said congregation determined not to enter into the said union, but to dissent therefrom, and the plaintiffs thereupon became entitled, and were in duty bound to hold the said lands upon the trusts and for the uses declared in respect of the same in the grant thereof from the Crown unaffected by the said Act or any of the provisions thereof; that upon the said land was erected a church, in which the said congregation were up to the time of such union accustomed to worship; and there was also thereon a dwelling house, together with other buildings for the use and occupation of the minister, entitled under the trust in the said letters patent contained.

Statement.

The bill further alleged that the defendant continued since such union to occupy the said land, and dwelling house, and officiated and ministered in the said church as a minister of the said united body against the will and protest of the plaintiffs and a large majority of the said congregation, and refused to permit the congregation entitled thereto to occupy or use the same unless he, the defendant, should be the minister officiating at their worship; by reason of which the plaintiffs and the said congregation had been obliged to use and were still using a school-house for the purpose of their public worship, which was conducted by a minister of the Presbyterian Church of Canada in connexion with the Church of Scotland; and the defendant refused to give possession of the said church, and the said buildings to the plaintiffs, although such possession had been duly demanded.

The plaintiffs charged, that by becoming a minister of the said united church and entering into the said union, the defendant had ceased to be the minister

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for whose benefit the said land was granted, and for whose benefit the said plaintiffs were by law and in equity entitled and bound to hold the same.

The prayer of the bill was that the defendant might be ordered to vacate the said land, and the church and buildings thereon erected, and to deliver up possession of the same to the plaintiffs to be by them held upon the trusts and for the uses in the said letters patent declared, and might be restrained by the order and injunction of this Court from continuing to occupy, use, or possess the same, and for further and other relief.

Statement.

The defendant answered the bill admitting the issue of the letters patent in the manner stated in the bill, and that prior to and up to June, 1875, he had been a Presbyterian Minister, and was the incumbent of a Presbyterian Church in the said township of Eldon, and that he had ever since continued to be a minister and the incumbent of the said church; that at the time he became such incumbent he was, and had ever since continued to be, an ordained minister of the Church of Scotland, which is a Presbyterian Church; that before the year 1875 there had been in the Dominion of Canada a number of Presbyterian bodies, all of Scottish origin, with separate organizations, but without any difference of doctrine or discipline, and that the one with which he had been connected was known as the Presbyterian Church in Canada, in connection with the Church of Scotland; that in that year all the said Presbyterian bodies resolved to unite under one single organization and one common name; and the defendant admitted that, accordingly, in or about the month of June, 1875, the said union took place, and all the said churches then became, and from thenceforth continued and still were one united church, by the name of the Presbyterian Church in Canada, but denied that he had ever separated from, or ceased to be a member of the

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church or body to which he had previously belonged; but on the contrary insisted that he continued to belong and adhere thereto, and then was the minister and incumbent of the said church, and claimed to be entitled to the benefit of the trusts of the said letters patent. The answer also admitted the passing of the Act of the Provincial Legislature in the bill mentioned, but submitted that the clauses thereof relating to congregational property had no reference to the land in question in the cause, and that no action of the congregation or of the members or adherents thereof could affect the trusts of the said lands; and that even if the Act were applicable the provisions thereof were not complied with; and denied that at a meeting of the said congregation called and held in accordance with the provisions of the said Act, after the said union had taken place and held within six months thereafter, by a majority of the votes of those entitled to vote at such meeting in accordance with the provision therefor in the said Act contained, the said congregation determined not to enter the said union; and charged that the said pretended vote was not a vote of persons entitled to vote according to the constitution of the said church. The answer admitted the fact of there being a church and the buildings in the bill mentioned, situate on the lands in question, and that a number of the persons who at the time of the union attended the said church had since discontinued their attendance, and had withdrawn from the congregation. The defendant submitted that his position as a minister was in no way changed by the union, and that by submitting to the action of the supreme governing body of the church to which he belonged, he did not, and could not forfeit his beneficial rights or interests under the said letters patent; and that his rights as a beneficiary thereunder were in no way impaired, but on the contrary were confirmed and established by the said Act of Parliament; and prayed by way of cross-

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relief, that in case the plaintiffs were the lawful trustees under the grant, it might be declared that they held the said premises in trust for his benefit during his incumbency of the said church as an ordained minister of the Church of Scotland, and a member of the Presbyterian Church in Canada.

The cause came on to be heard before *Moss*, C. J. A., sitting for the Chancellor.

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

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

The principal statements of the bill were, in the opinion of the Court, fully established at the hearing.

The points relied on by counsel sufficiently appear in the judgment.

Judgment.

Moss, C.J.A.—In this case a bill was filed by certain gentlemen claiming to be trustees of a church in the Township of Eldon, under a patent from the Crown, by which the lands were vested in persons, of whom they are the duly appointed successors, in trust for the Presbyterian minister, for the time being, incumbent of the Presbyterian Church of Canada in connection with the Church of Scotland, then erected in the said township of Eldon.

It is generally known that the then Presbyterian Church of Canada in connection with the Church of Scotland was, under a Provincial Act of 1875, amalgamated with other Presbyterian bodies. This particular congregation, it is claimed, did not accept the terms of union, and the question now is, whether the defendant, who has entered the union, is entitled to retain possession of the property, and conduct service in the church which has been erected there, and to occupy the lands on which he lives.

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I think I must find the questions of fact which are raised upon this record in favour of the plaintiffs.

I find that a meeting was regularly held, under the statute, for the purpose of considering whether or not this particular congregation desired to enter the union; and I am quite clear that the fair result of the evidence is, that the congregation, by a majority of votes, pronounced against any such step being taken.

Now that being so, the question is, what is the result in law of the action of the congregation in thus refusing to accept the terms of union?

In the first place, is the defendant, who is a minister of the Presbyterian church, formed under the terms of the Act, a *cestui que* trust under this deed? He is not in terms, for he is not such a minister as is there described. I confess I find some difficulty in arriving at any conclusion as to the exact status which is occupied by what may be termed, for convenience sake, the old church; but I do not think that that is material in the view which I take of the case.

Judgment.

The question is, has the property passed to the united body so as to entitle the defendant to it as a minister of that body? I think it has not so passed, because I am of opinion that this was congregational property within the fair meaning of the Act to which I have referred.

Now the enactment is this in effect, that upon the union taking place all the property, real and personal, of these different religious bodies should become vested in the united body, but if any congregation in connection with any of the churches, upon a meeting being held, and the votes of the persons entitled to vote being properly taken, dissented from the union, then in that case the congregational property of such congregation should remain unaffected by the Act.

The best opinion that I can form is, that this should be deemed to be congregational property, and that consequently the dissent of the congregation prevented it

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from passing to the union. But even if it were not congregational property, I think the defendant would encounter grave difficulty in the attempt to shew in what manner it did pass to the united body, so as to entitle them, by the appointment or retention of the defendant as one of their ministers, to keep him in possession of this property. A brief consideration of the Statute makes this apparent.

The first section relates to property "now belonging to or held in trust for, or to the use of, any congregation."

If this is congregational property, I think that under the proviso, as I have already intimated, it remains where it was, and has not become part of the property of the united body. This cannot be seriously disputed upon the evidence of what occurred at the meeting, and upon the plain construction of the Statute.

Judgment.

But it is argued that this is not, properly speaking, congregational property, and that accordingly under the 5th section of the Act, it passed to the united body. I am unable to place that construction upon the Act. I do not think it refers to properties of the character of this in question. The words of the section are: "All other property real or personal belonging to or held in trust for the use of any of the said churches or religious bodies, or for any college, or educational, or other institution, or for any trust in connection with any of the said churches or religious bodies, either generally or for any special purpose or object, shall from the time the said contemplated union takes place, and thenceforth, belong to and be held in trust for and to the use in like manner of the 'Presbyterian Church in Canada,' or for or to the use in like manner of the said college, educational or other institution or trust in connection therewith."

I do not think that this property was held in any of the modes specified in the section. The language upon which the defendant lays stress, is, "Any trust in

connection with any of the said churches or religious bodies, either generally or for any special purpose or object." No doubt this provision is couched in wide and general terms, but it appears to me only to cover property held for some general or special purpose in which the whole church had an interest.

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In effect, to hold that this property does not come within the 5th section, is little more than to repeat the opinion that it is congregational property.

I think the plaintiffs are entitled to a decree, with costs.

Emerson v. Canniff.

Executors—Contribution—Lapse of time.

After the distribution of the personal estate, and the allotment to the devisees of the real estate of a testator, an action was brought against the executors on a covenant of the testator, in which a judgment was recovered, the amount of which the executors paid out of their own money. Twenty-seven years afterwards, and after the greater number of the devisees had died, and all but one had sold their property to *bonâ fide* purchasers without notice, the executors who eleven years previously had instituted proceedings in this Court against the heirs of that one, brought on their cause for hearing on further directions, seeking to compel them to recoup the executors. The Court, under the circumstances, refused to make a decree against any one share for more than a proportionate share of the demand, leaving the executors to litigate the question with the parties liable to contribute to the payment of the debt, as owing to their delay in suing, the obstacles in the way of the defendants recovering were quite as great as they were to the plaintiffs enforcing the claim.

Statement.

This was an administration suit. The testator died on the 21st of February, 1843, the executors collected personal estate to the amount of about $700, and paid debts with it. There were farming implements and utensils to the value of about $400, which were distributed among the legatees, and the real estate was allotted to the devisees who went into possession. Subsequently a claim was made against the estate on a

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covenant in a deed executed by the testator, and judgment recovered upon it against the executors for about $1,000, which they paid out of their own money. An order for the administration of the estate was made on the 30th of April, 1867, in which *Emerson* and *Davis*, two of the executors, were plaintiffs, and *Joseph Canniff*, a devisee, *Phœbe Foster*, another devisee, and her husband, *Shubal Foster*, *Samuel Miller*, the husband of *Mary Miller*, another devisee, *Peter Ruttan*, the husband of *Aulay Ruttan*, another devisee, and *Jonas Canniff* and *Thomas Canniff*, two of the sons of *Daniel Canniff*, another devisee, and *Harvey Fowler*, an executor of the testator, were defendants.

Mr. *G. Henderson*, Q. C., and Mr. *Fitzgerald*, Q. C., for the plaintiffs.

Mr. *Hoskin*, Q.C., for the infant defendants.

Mr. *Boyd*, Q.C., and Mr. *Wells*, for the other defendants.

January 6, 1879.

PROUDFOOT, V.C.—[After stating the facts as above] —This cause came before me some time ago, when I was under the impression that it was governed by the case of *Miller* v. *Vickers* (*a*). It seems that the case was not then ripe for decision, as no account had been taken of the personal estate distributed amongst the legatees, and upon rehearing my order was varied by directing the Master to inquire as to the personal estate and to add necessary parties. By his report the Master has found that the personal estate distributed was about $400, but has not added the parties who received it or their representatives. It being clear that the Master had not complied with the order on rehearing, I was about to allow an appeal on that ground from his report when the plaintiffs' counsel abandoned their claim to the extent of the personalty distributed. The hearing of the case then proceeded on further directions.

Judgment

(*a*) 23 Grant, 218.

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The suit appears to have proceeded very deliberately, no explanation is given of the dilatory nature of the proceedings. Since the devisees were put in possession of their land, all of them have died. During the progress of the suit many parties have been added in the Master's office, and in the title of the cause in the Master's last report thirty-five persons are named as so added, though these are not all the persons who are now owners of the estate. Most of the devisees have sold their property, and it has passed into many different hands, being situate in or near the City of Belleville. Many of the owners, it is admitted, might set up a defence of purchase for value without notice; indeed the plaintiffs candidly admitted that if compelled to bring before the Court the owners of the land they might as well abandon the suit. The plaintiffs say they are to be considered as standing in the place of the creditor, and to have the right of enforcing the claim against the land of any one of the devisees. That *Miller* v. *Vickers* (*a*), is an authority sanctioning such a proceeding.

Judgment.

The defendants distinguish that case as being one of express charge, while here it is only an equity that is sought to be enforced, that the judgment has long since been barred by lapse of time. That *Greig* v. *Somerville* (*b*), establishes that when a creditor comes in after distribution, he can only claim from each distributee a proportionate share of the debt, and that the laches of the plaintiffs, in lying by so long while the properties were changing hands day by day, and great obstacles arising in the way of realising contribution by the defendants, should operate against the plaintiffs.

In regard to *Greig* v. *Somerville* (*c*), and *Gillespie* v. *Alexander* (*d*), upon which it was founded, I do not

(*a*) 23 Grant, 218.
(*b*) 1 Russ. & M. 336.
(*c*) 1 Russ. & M. 338.
(*d*) 3 Russ. 130.

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think they apply to a case where the distribution has not been made by the Courts; and it was so held in *Davies* v. *Nicolson* (*d*), and besides they could only apply to personal estate, as the executors could not distribute the real estate, it passes to the devisees by force of the will.

But upon further reflection it seems to me that *Miller* v. *Vicker* does not govern this case. That the circumstances are such as to raise equities in favour of the defendants that did not exist in it. The testator died in 1843, (*Doe Quinsey* v. *Canniff* (*b*),) and judgment was recovered in or before 1851 in the action brought by the creditor against the executors. The executors lay by for sixteen years before taking any proceedings to enforce their claim, and have conducted it in such a dilatory manner that now at the distance of twenty-seven years from the time the debt was paid, they seek to enforce it. The judgment has long since ceased to exist. There was no assignment of it to, or for the benefit of the executors, at least none has been produced or is said to exist. The only claim they have is an equitable one to be recouped the money paid for the estate. During all that time they have seen the lands passing into numerous hands, and many of these persons are probably in a position to hold them free from any claim by any one, and obstacles in the way of recovering a contribution by the defendants have been allowed to accumulate through the negligence of the plaintiffs, until we may assume them to be as great in the way of the defendants asserting the right, as in the way of the plaintiffs, and that is said to be in fact impracticable. Now the assertion of such a right by a creditor, and the plaintiffs cannot claim a higher position, may be lost by laches, by acquiescence, or such a course of dealing as would render its enforcement inequitable: *Ridgeway* v. *Newstead* (*c*),

Judgment.

(*a*) 2 DeG. & J. 693. (*b*) 5 U. C. R. 602.
(*c*) 2 Giff. 492; S. C. on Appeal, 30 L. J. Chy. 889.

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And where the assets have been settled *bonâ fide* on the marriage of the residuary legatee, they cannot be followed: *Dilkes* v. *Broadmead (a)*. And a purchaser of a legacy which has been paid or delivered, cannot be called on to refund or pay any part of a debt subsequently established against the testator's estate. *Noble* v. *Brett (b)*.

To apply these principles to the present case, while admitting the plaintiffs to have a recourse to some extent against the defendants, it would be harsh and inequitable to compel the owners of any one share to pay the whole debt, and leave them nothing but a doubtful or useless right which it would be impracticable for them to enforce. In *Miller* v. *Vickers* there was an express charge of the annuity on the whole land, there was no laches shewn on the part of the plaintiff, and the defendants must have known of the charge when they bought, which under these circumstances caused the learned Vice-Chancellor to think it more reasonable that the expense of litigating the matter of contribution should be borne by the defendants than by the plaintiffs; that it would be the more convenient course to proceed against the defendants and leave them to bring in the contributing parties on petition. But he nowhere says this is an absolute right of the plaintiffs. And here the circumstances are so different, the obstacles in the way of recovering contribution are so great, and caused to so large an extent by the plaintiffs, that I think it more convenient and more reasonable that they should litigate the questions with the contributors than that the defendants should.

Judgment.

The plaintiffs will therefore be entitled to an order on the defendants to pay their proportionate share of the debt only.

(*a*) 2 Giff. 113.

(*b*) 24 Beav. 499: 2 Wms. Exors 6th ed, 1344 (*u*) u.

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PRESSEY V. TROTTER.

Mortgagor and mortgagee—Assignee of mortgage—State of accounts—Existing equities.

The rule that an assignee of a mortgage takes, subject to all the existing equities and the state of accounts between the mortgator and mortgagee was acted upon and applied in a case where, in 1875 a married woman created a mortgage, in which her husband joined, and it was agreed that any balance then due by the mortgagee to the husband as soon as ascertained should be applied on the mortgage, and that any future accounts that might become due to the husband for lumber and work supplied to or done for the mortgagee should also be so applied; which mortgage was about fifteen months afterwards sold and assigned by the mortgagee to a purchaser without notice of such understanding or agreement, he having obtained such assignment as security for any deficiency that might be found to exist upon the realization of a mortgage then held by the purchaser against the mortgagee; and having taken the assignment without inquiring as to the state of accounts, or the title to the lands.

The case came on to be heard at Simcoe in the Autumn of 1878 before Moss, C. J. A., sitting for the Chancellor.

The facts are clearly stated in the judgment.

Mr. *Robb* for the plaintiff.

Mr. *W. Cassels* and Mr. *K. McLean* for defendants.

Judgment. MOSS, C. J. A.—The bill in this case is filed by *Enos Pressey*, and by *Mary* his wife, by her next friend, against Mrs. *Trotter*, the administratrix of the estate of *Archibald Henderson*, and *Archibald Vance*, for the redemption of a mortgage made by the plaintiffs on the 21st of January, 1875, to *Henderson*, and assigned by him on the 4th of April, 1876, to defendant *Vance*. It alleges that when the mortgage was given *Henderson* was indebted to the plaintiff, *Enos Pressey*, in a considerable sum for lumber and for work, but the

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amount had not then been ascertained, and it was agreed that when the amount was ascertained it should be applied upon the mortgage and be taken as a payment thereon, and that any future amounts that might become due to *Enos Pressey* for lumber or work "should be applied in like manner upon the said mortgage debt in reduction thereof." It then states that in pursuance of this agreement *Enos Pressey* had since the date of the mortgage supplied a large amount of lumber, and done work for *Henderson*, the value of which together with the amount due to *Enos Pressey* at the date of the mortgage was more than sufficient to satisfy the principal and interest: and it denies notice of the assignment until after the delivery of the lumber and the performance of the work. It will be observed that the mortgage transaction is not impeached, but on the contrary the case is rested upon the existence of a debt due by the plaintiffs to *Henderson*, and an agreement to apply a past claim of the male plaintiff, when adjusted, and a future claim which it was expected he might have, in reduction of the debt secured by the mortgage. The answer of Mrs. *Trotter* sets up that the mortgaged premises had been conveyed to Mrs. *Pressey*, and that the mortgage had been given to secure a portion of the purchase money, her husband having only joined for conformity, and while admitting that there had been business transactions between *Henderson* and *Enos Pressey*, it denies the existence of any agreement such as the plaintiffs alleged. It sets up in effect that the amount, if any, due to *Enos Pressey* should not be applied in reduction of the mortgage debt, but that he should be left to share with the other creditors of *Henderson's* estate in the ordinary course of administration.

Judgment.

The defendant, *Vance*, by his answer contends that such claim could not be set off against the mortgage debt, as *Pressey* was not really a mortgagor. He

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alleges that he held a mortgage upon other property from *Henderson*, and as the value of the property it comprised was depreciating, and he found the security was becoming scanty, he pressed *Henderson* for payment, and, in consideration of an extension of time, procured the assignment of this mortgage by way of improving his security. He only claims to hold the mortgage now in question as security for any deficiency that may exist upon the realization of his own mortgage. He sets up the registration of the mortgage from plaintiffs, and of the assignment to himself, and claims the protection afforded to a *bonâ fide* purchaser for value without notice. It is not argued that this defendant is entitled to any special protection on account of the peculiar provisions of sec. 8, ch. 95, R. S. O.

The evidence in the case is not of a very satisfactory character. The recollections of some of the witnesses seemed to me to be rather imperfect, even if their veracity was beyond question. Still, I think that the main facts can be ascertained with reasonable accuracy, and I shall proceed to state the conclusions at which I have arrived.

Judgment.

About the 15th of July, 1873, *Pressey* bought the mortgaged premises from *Henderson*, at a named price of $8,000. He gave him a farm, which was valued at $4,000, a mortgage upon the premises for $3,500, and his promissory note for $500. *Pressey* has sworn that the whole $4,000 was to be paid by him in lumber, and that this agreement was made in March, 1873, before he purchased the place. This statement furnishes an illustration of what struck me during the whole of his evidence, that, from want of education and experience in business, he is so inaccurate that it would be extremely dangerous to found an agreement upon his version of a conversation. I have no doubt that it being, as it was, in the contemplation of both parties that *Pressey* should manufacture lumber on the premises, and that *Henderson* should be a customer, there was

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the loose, vague talk common between vendor and vendee, that the latter could easily pay for the land by the lumber. Neither have I any doubt that it was perfectly understood that any claim which might thus accrue to the latter was to be applied on the note and mortgage. This view is so much in accordance with the ordinary dealings of mankind that it requires but little evidence in its support. But *Pressey's* own conduct is opposed to the notion that there was any right on his part to insist upon *Henderson* receiving payment in lumber, for he made payments in cash when he was able. It does not appear when the note became due, but under the mortgage the sum of $500 was payable on the 24th September, 1873, $500 on 24th March, 1874, and the same sum on that day in each of the five succeeding years.

Judgment.

In the winter of 1873-4 *Henderson* was dissatisfied with the lumber he was receiving, and he arranged to send to the mill a sawyer named *Alexander Hincks*, whose wages he was to pay, and to allow *Pressey* a certain amount per thousand for the lumber to be delivered. Under this arrangement a quantity of lumber was received by him, the value of which would of course be brought into the account between the parties. In December, 1874, an attempt was made at effecting a settlement of accounts, but this was not brought to a conclusion. There is evidence tending to show that *Henderson* admitted the receipt of lumber to the value of $2,400, but he was making a counter-claim, the items of which were not arranged, or even discussed between the parties. About the same time an endeavour was made by *Pressey* and *Henderson* to obtain a loan of $2,500, of which it was stipulated that $2,000 should be paid to *Henderson* and $500 to *Pressey*, but the intending lender refused to complete the transaction on account of some outstanding dower. It was assumed upon the argument that after this *Henderson*, under the power in the mortgage, pretended

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to sell the premises to Mrs. *Trotter* for $3,800. I am now somewhat surprised to find on examining the document itself, that the date inserted in the deed to her is the 14th of May, 1874, but I am satisfied that this date is fictitious. The appearance of the writing affords strong internal evidence that it was signed by *Henderson*, and witnessed by Mr. *Vansittart* at the same time that the latter prepared the affidavit of execution, which was manifestly some time in January, 1875. Besides the whole tenor of the evidence was such as to make natural the assumption of counsel that it was at a later period. This sale was only apparent, not real, Mrs *Trotter* having, as she admits in her answer, held for the mortgagee. The property, therefore, remained still liable to redemption. In January, 1875, *Henderson*, as I find upon the evidence, suggested to *Pressey* that a sale should be made to his wife, and $2,000 raised by means of a first mortgage, which sum he was to receive, and a mortgage given to him to secure the balance of his claim. This was arranged, Mrs *Pressey* simply obeying her husband's behests in the matter. Accordingly Mrs. *Trotter* conveyed to Mrs. *Pressey*, and $2,000 was borrowed from a Mr. *Frost* upon the security of a first mortgage, and received by *Henderson*. At the same time the morgage now in question was given to *Henderson*, purporting to secure the sum of $1,817.

Judgment.

Upon the whole of the evidence I have formed an unhesitating opinion that as between *Pressey* and *Henderson* this should be treated as a security for any balance remaining due upon the original purchase after all accounts between them had been fairly settled. The sale to Mrs. *Pressey* was really a mere form—at least in relation to the amount she was to pay upon this mortgage. It was simply a continuance of the original transaction of placing her in the position of her husband. No doubt they believed that something was due, for subse-

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quently they made, or rather the husband made, payments on account; but I think it was impossible to draw any other conclusion from the evidence than that the true character of the whole transaction was what I have indicated. It may be, as was hinted rather than suggested, that the object in the background was to place this property beyond the reach of *Pressey's* creditors, but no such issue was raised by the pleading, and it is not very manifest that it could even then be of any advantage to the defence.

It may serve, however, to afford one explanation of a circumstance that was commented upon at the bar, namely, that *Pressey's* son, who kept his books, opened an account in his mother's name in relation to this mortgage, in which account he credited subsequent, but not antecedent payments. The evidence of Mr. *Vansittart*, if accepted in its entirety, left little room for doubt as to the nature of the mortgage, but it was criticized as being that of impressions only. I cannot help thinking that that gentleman was fully cognizant of the true state of affairs and that he did not require any very specific or detailed statement to enable him to comprehend the exact significance of the mortgage. It is worthy of notice that all the deeds, from first to last, were prepared by him, and I am persuaded that he was fully aware that the sale to Mrs. *Trotter* was fictitious. But it was plausibly argued that I ought to infer that there was a settlement of accounts at that time, and that the sum of $1,817 was then due. It was asked, how else can the selection of this odd sum be accounted for; and it was urged with great force, and, as it seemed to me correctness, that *Vansittart's* explanation was improbable, that the instrument was drawn as if there had been no dealings as to lumber, because these had not been settled. But I think the explanation of this sum is not far to seek. The expressed consideration in the deed to Mrs. *Trotter* was $3,800, and, under the circumstances, it is, I think

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pretty certain that this is the amount which *Henderson* was claiming to be due. Believing, as I do, that this deed was really prepared and this amount inserted in it, when the new shape was given to the transaction, I find no difficulty in conceiving that the $1,817 was made up of the $1,800, in excess of the $2,000 mortgage, and the conveyancing charges. But whether that conjecture be well founded or not, the whole tenor of the evidence is irreconcilably opposed to the theory that there was any settlement of accounts. As between the plaintiffs and *Henderson*, therefore, I hold that their rights and liabilities should be governed by precisely the same rules, as if a claim were being made upon the footing of the original mortgage, and that the plaintiffs would be entitled to credit for all the lumber delivered, and the money paid from the beginning to the end, after deducting the claims of *Henderson* against *Pressey*, other than the mortgage debt. This may be otherwise expressed: the true nature of the agreement was, that each item of *Pressey's* account was to be treated as a payment applicable in the first place towards the satisfaction of any claim other than the mortgage debt, which *Henderson* then had against him, and then upon the mortgage debt, so that in the net result the balance coming to *Pressey* upon these independent accounts would be applicable upon the mortgage.

Judgment.

The question then arises, whether *Vance* stands in any better position. A large number of authorities decided in this Court, have established the doctrine, that the assignee of a mortgage will be affected by equities much more remote from the state of accounts, than that subsisting between the present mortgagor and mortgagee. The case of *McPherson* v. *Dougan (a)*, which was followed in *Baskerville* v. *Otterson (b)*, is so precisely in point that it must guide me,

(a) 9 Gr. 258

(b) 20 Gr. 379.

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while sitting here as a Judge of the Court of Chancery. Indeed, I do not entertain any doubt that it was perfectly well decided, although it was urged at the bar that its authority has been shaken by more recent decisions. The principles applicable to the present case appear to me to be precisely the same as if the mortgage had been given to secure a floating balance, or a sum to be advanced in various amounts, in neither of which cases has it ever, so far as I am aware, been questioned that the assignee's claim is limited to the amount actually due. It has never been seriously supposed that in such a case the assignee could claim by reason of his being a purchaser for value without notice of the real agreement, to hold the mortgagor liable for the full amount of the money consideration stated in the mortgage.

But further, I think there would be good ground for holding, if it became material, that *Vance* was not a purchaser for value without notice in the true sense. He made no inquiry as to the title to the property, or the value of the mortgage, and he gave no notice of the assignment. In fact, he simply appears to have taken the assignment for whatever it was worth in the hands of the mortgagee. The doctrines enunciated in such cases as *Goff* v. *Lister* (*a*), would seem to dispose of any contention in this respect.

Judgment.

The decree must therefore be, that which I have already indicated as proper between the original parties, and further directions and costs are reserved.

(*a*) 14 Gr. 451.

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JOHNSON v. GLEN.

Episcopal Church—Appointment of incumbent—Consultation by bishop with lay delegates—Construction of canon.

By one of the canons of the Episcopal Church in this Province it was provided "that on the vacancy of any rectory, incumbency, or mission within the diocese * * the appointment to the vacancy shall rest in the Lord Bishop of the diocese; * * provided that before making such appointment the Bishop shall consult with the churchwardens of said parish or mission, and with the lay representatives of the same."

Held, that the consultation here referred to was not intended to be by correspondence, but in a personal interview with the churchwardens and lay representatives, so as to afford an opportunity of stating reasons for or against any nominee to fill such vacancy; the suggestion and discussion of other names; the state of the congregation, its likings and dislikings; what would be for the advantage of the Church, the circumstances of the locality, and all the numberless particulars that might or ought to have an influence in guiding the opinion of the Bishop in filling such vacancy. But *quære*, if after such consultation it is not left discretionary with the Bishop to comply with the wishes of the delegates, and exercise his own judgment as to what is best for the congregation, even in contravention of the wishes of the delegates.

Held, also, that the facts in this case did not shew that any consultation had been had with the representatives of the congregation as to the appointment of the plaintiff to the incumbency, before it was made.

Statement

This was a bill by the Rev. *Colin Campbell Johnson* against *Francis Wayland Glen*, *Caleb Ellsworth Martin*, *George Hamilton Grierson*, and *James Carmichael*, setting forth that the plaintiff was a clerk in holy orders, and that at the village of Oshawa there was, and had for many years been, a church belonging to the Communion of the United Church of England and Ireland in this Province, within the diocese of Toronto, called "St. George's Church": that the plaintiff was before the 8th of December, 1878, duly appointed by the Bishop of the said diocese to be incumbent of the said church and the parish therewith connected, and he continued to be such incumbent: that prior to the

said 8th day of December notice of such appointment had been communicated to all the defendants; and that according to the canons of the church, the freehold and soil of the said church were vested in the plaintiff as such incumbent, but the possession was vested in the plaintiff and the defendants *Glen* and *Martin* as churchwardens, notwithstanding which the defendants had directed the doors of the church to be locked against the plaintiff, and had excluded and continued to exclude the plaintiff therefrom; and denied that the plaintiff had been legally appointed as such incumbent. The plaintiff submitted that the soil and freehold of said church being vested in him, he was entitled to have possession thereof, or that in any event he was entitled to free access thereto for the purpose of discharging his duty as such incumbent; and prayed for relief accordingly, and that the defendants might be restrained by the order and injunction of this Court from interrupting the plaintiff in the exercise of his office of incumbent; and that they might be decreed to open the doors of the said church. Statement.

The defendants *Glen* and *Martin* answered the bill, denying that the plaintiff was the duly appointed incumbent of the church, which was not in any way aided or assisted by the Mission Board, and alleged that under the circumstances, fully set forth in the judgment, the plaintiff was not the duly appointed incumbent of the said church. The defendants *Grierson* and *Carmichael* answered, setting up that they were improperly joined as defendants, although they admitted that they strongly objected to the plaintiff being appointed incumbent.

Notice of motion for an injunction was served before the answer, which, upon being brought on before the Court on the 13th December, 1878, was directed to stand, in order that the cause might be brought on for the examination of witnesses and hearing, and the same was accordingly brought on before Vice Chancellor *Proudfoot* on the 21st of December, and the 19th and

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24th of February, 1879. The important parts of the evidence given, and the points in issue, are fully set out in the judgment.

Mr. *Bethune*, Q. C., and Mr. *Hoyles*, for the plaintiff.

Mr. *Blake*, Q. C., and Mr. *W. Cassels*, for the defendants, the churchwardens.

Mr. *Boyd*, Q. C., for the other defendants.

Counsel, amongst other authorities, referred to *Canon* 284, *Porah's Case* (*a*), *Re Beloved Wilkes's Charity* (*b*), *Ritchings* v. *Cordingley* (*c*), *Ex parte Jenkins* (*d*), *Rex* v. *Bloor* (*e*), *Phillimore*, vol. i., pp. 477-80, 486; *Blunt's* Church Law, pp. 225-6, 271, 319-20.

March 7th.

Judgment

PROUDFOOT, V. C.—The plaintiff, a clerk in holy orders, states in the bill that there is, and has for many years been, a church belonging to the communion of the United Church of England and Ireland in Ontario, at Oshawa, called St. George's Church: that he was before the 8th December, 1878, duly appointed by the Bishop of the diocese of Toronto, within which the church is situate, to be incumbent of it, and he now is the incumbent of it and the parish connected therewith, of which notice was communicated to the defendants prior to that date: that, according to the canons lawfully in force for the regulation of worship in the said church, the plaintiff was entitled and bound to hold divine service in the church in the manner directed by the discipline of the United Church of England and Ireland on the 8th of December, 1878, and proceeded to the church for that purpose, and the plaintiff is bound, according to the discipline of the said church, to celebrate divine service on Sundays and certain other days in the year, and the said church was built and is now maintained in trust for that purpose: that on arriving at the church door, at the regu-

(*a*) 15 East 146. (*b*) 3 McN. & G. 440.
(*c*) L. R. 3 A. & E. 113. (*d*) L. R. 2 P. C. 258.
(*e*) 2 Burr. 1043, and 3 Burr. 1265.

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lar time appointed for morning service, all the defendants, except the defendant *Martin*, were there present, and had theretofore directed, with the concurrence of *Martin*, the locking of the door of the church against the plaintiff: that the defendants informed the plaintiff that the door would not be opened, and *Grierson*, one of the defendants, with the assent of the other defendants, denied that the plaintiff had been legally appointed: that the defendants *Glen* and *Martin* are the churchwardens of the church, and assumed, at the instance and with the concurrence of their co-defendants, as such churchwardens, to lock the door of the church: that according to the canons of the church the freehold and soil of the church were and are vested in the plaintiff as such incumbent, but the possession is vested in the plaintiff and the churchwardens, *Glen* and *Martin*. The plaintiff prays that it may be declared that he was on the 8th December, 1878, and still is, entitled to the soil and freehold of the church, or if not so entitled, that he is as such incumbent entitled to free access to, and ingress and egress to and from the church for the purpose of exercising his functions as incumbent of the said church, and that it may be so ordered and decreed, and that the defendants may be restrained from interrupting or disturbing the plaintiff in the exercise of his office as incumbent.

Judgment.

The churchwardens by their answer deny that the plaintiff is the duly appointed incumbent of St. George's Church at Oshawa. They say, that the church is not in any way aided or assisted by the Mission Board: that the church was in a very divided state, and there was a want of harmony in the congregation: the former incumbent resigned in the latter part of August, 1878. The church is not a church with free seats, but is divided into pews, which are let in the usual way. That immediately after the resignation of the late incumbent a meeting of the vestry was called for the purpose of considering the appointment of a successor. The meeting of the

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vestry was held on the 19th September last, when it was the unanimous wish and desire of the congregation that the Rev. *A. L. Fortin*, who had officiated at the church for several Sundays, should be appointed incumbent, and a resolution to that effect was communicated to his Lordship the Bishop. There are about fifty members of the church having pews and sittings, and of these all but two were desirous of having the Rev. Mr. *Fortin* appointed as incumbent, and a petition was signed by them addressed to the Bishop, asking him to appoint Mr *Fortin*. That his Lordship the Bishop was also informed that the whole congregation desired this appointment, and that it would give entire satisfaction to all, and secure harmony, peace, and concord among the congregation. Notwithstanding this, and in opposition to, and disregarding the wishes of the congregation, and without consulting the churchwardens and lay representatives of the church, the plaintiff alleges that the Bishop has appointed him incumbent.

Judgment.

The other defendants—*Grierson* and *Carmichael*—submit that they are improperly made defendants, though they admit they strongly object to the appointment of the plaintiff as incumbent of the church.

The only legal question in this case is, as to the validity of the plaintiff's appointment as incumbent of the church in Oshawa. I observe from the correspondence produced, and from what was stated at the hearing of the cause, that other matters of great interest, involving the respective rights of the Bishop and the people in the selection of incumbents, are supposed to be at stake. It is said to be a "trial case"; and the plaintiff is asked "to fight the battle of the church," in Oshawa. With the reasons for instituting, and the wisdom of persisting in, a contest of this nature I have nothing to do. But these professed objects render it incumbent on me to investigate with care all the proceedings of the parties, and to see that neither party gains any advantage over the other, except what the law fairly allows.

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The canon which regulates the mode of appointing incumbents to vacant churches is in the following terms: That on the vacancy of any rectory, incumbency, or mission within the diocese (with the exception of missions sustained in whole or in part by the Mission Board, the mode of appointment to which missions shall continue as heretofore) the appointment to the vacancy shall rest in the Lord Bishop of the diocese; it being, however, provided that, before making such appointment, the Bishop shall consult with the churchwardens of said parish or mission, and with the lay representatives of the same, provided that such lay representatives are resident within the said parish or mission."

The defendants contend that the churchwardens and lay representatives were never consulted with at all by the Bishop within the meaning of the canon; or that if they were consulted with, it was after the appointment had been made.

There is not much dispute as to the facts of the case, the most of them appearing in the correspondence, to which I shall refer, and in the resolutions of the vestry. Judgment.

It appears that the church in Oshawa had been in a very divided and unhappy condition prior to the resignation of the former incumbent. He resigned in the latter part of August.

The Bishop of Toronto was at that time in England, and the Ven. Archdeacon *Whitaker* was his commissary.

On the 4th September, 1878, the Archdeacon wrote to one of the churchwardens informing them that he had received Mr. *Rolph's* resignation of Oshawa, and proposing to them the name of the Rev. *J. M.* as his successor. He then quotes the canon as to consulting with the churchwardens and lay representatives, and proceeds:—

"I shall therefore be greatly obliged to you if you will kindly ascertain the opinion of your brother churchwarden and of the lay delegates, if resident in the parish, as to the name which I have mentioned. I trust that

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there will be no objection against it; * * * but if necessary it will be my duty to meet the representatives of the parish personally, and to consult with them."

On the following day, 5th September, Messrs. *Glen* and *Martin* wrote to the Archdeacon, referring to the excitement in the parish owing to the approach of the general election, and requesting that no action be taken till after the election, and stating that owing to the unfortunate circumstances connected with Mr. *Rolph's* retiring it was desirable that a little time should be given until the excitement consequent therefrom subsided, and entreating him in no way to commit the parish until communicated with again. That in a short time they would consult with the lay delagates, all of whom were resident, and advise as to what they believed would be the desire of the parish respecting a future incumbent.

On the 21st of September the churchwardens write to the Archdeacon informing him that they gave notice on Sunday last of a vestry meeting to be held on Thurs-

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day evening for the purpose of ascertaining the wishes of the vestry respecting a future incumbent. That the meeting was duly held, and a resolution unanimously passed requesting them to communicate to him their desire that he should appoint the Rev. *A. L. Fortin*, of Sorel, Province of Quebec. They mention a number of names that had been submitted to the Vestry; and then say they believe it is for the interest of the parish, that he should appoint the Rev. Mr. *Fortin*.

On the 23rd September, the Archdeacon acknowledges the receipt of that letter and states that he had transmitted a copy of it to the Bishop in England; that he did not consider himself authorized, as the Bishop's Commissary, to act further on his own authority in a matter of so grave importance.

On the 27th of September, the churchwardens acknowledge the receipt of the Archdeacon's letter.

The churchwardens arranged for the performance of the Sunday services; and on the 22nd, 23rd, 24th, and 25th,

October, there was some correspondence between them and the plaintiff, desiring him to preach, which he declined, feeling that it was a "trial sermon" the people wished to have, to which he had a strong distaste. 1879. Johnson v. Glen.

The Bishop returned to Toronto on the 15th November, and on the following day the churchwardens wrote to him, acquainting him with the meetings of the vestry in favour of the appointment of Mr. *Fortin;* the opposition of a few, but who had withdrawn it, and now united in a request for Mr. *Fortin's* appointment; and entreating the appointment of Mr. *Fortin* as one that would best serve the interest and the welfare of the church in Oshawa.

This letter was answered by the Archdeacon, at the request of the Bishop, on the 18th November:— "His Lordship would invite your attention to the canon on patronage passed in 1871. * * * It appears, then, that it rests with his Lordship to take the initiative, and he therefore regrets that any name should have been submitted to him as the choice of the vestry. He further regrets that the name selected should be that of a young clergyman, belonging to another and remote diocese, whom he could not appoint without doing manifest injustice to many clergymen who have served for a long course of years in this diocese, and enjoy a high reputation, and who might fairly expect to be advanced to a position so favourable as that of the incumbent of Oshawa. His Lordship is assured that on your representing his views to the vestry, they will be sensible of the force of his objection to the course which has been taken. * * * It will therefore be a great satisfaction to him to be assured by the vestry that it is their wish to leave him unfettered in respect of the choice of a successor to your late minister, and that they recognize the justice of his making a selection from among the clergy of this diocese." Judgment.

On the 20th November the churchwardens, Mr. *Western*, and Mr. *Carmichael*, had an interview with the

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Archdeacon at his house, and pressed upon him the necessity of complying with the wishes of the congregation, in order to secure the peace, harmony, and prosperity of the church. The Archdeacon referred them to the canon. They represented that Mr. *Fortin* was thirty-nine years old, and had been fifteen years in the ministry, in order to obviate the objections made on account of his youth; and as to the other objection, of coming from a remote diocese, they stated that their previous incumbents came from places equally remote. The Archdeacon was then to see the Bishop, and to meet the delegates at the Rossin House. He saw two of them, Messrs. *Glen* and *Carmichael*, there in the afternoon, and told them the Bishop's message was to lay before the vestry the letter of the 18th November, and the name of the plaintiff as the Bishop's nominee. He then left. Soon after the other two members of the delegation came into the room, and when told what had passed, with which all were dissatisfied, the four followed the Archdeacon to the Bishop's house, and saw him on the steps, and Mr. *Carmichael* said to him that Dr. *Martin* and Mr. *Western* desired to hear from himself the Bishop's message. The Archdeacon repeated to them substantially what he had said to the other two. Mr. *Glen* said he did not think he would call a church meeting, that there was no use, as there had been an expression of opinion by the vestry twice before. The foregoing statement of what took place on the 20th November is taken from the evidence of Mr. *Glen*. He also said, he did not think that the Archdeacon invited any expression of their opinion as to Mr. *Johnson's* merits.

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Mr. *Western*, who was one of the delegates, gives an account of this interview. He says he asked the Archdeacon what he would do if they refused to accept the nominee of the Bishop. He said in all probability another would be sent. Mr. *Western* then asked what if they still refused; the Archdeacon said that probably the Bishop would then refer to us for a name.

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The Archdeacon in his account of the interviews on the 20th does not differ from Messrs. *Glen* and *Western*, and he says he did not propose to consult them as to the nomination. The arrangement was done advisedly by the Bishop, in consequence of irregularity; it went beyond the requirements of the canon. The churchwardens expressed their dissatisfaction. There was no consultation between them then. He did not invite them to express their opinion as to the fitness of the nominee, as he thought that would be entered into at the vestry. The delegates, he says, refused to call a vestry—this was on the Bishop's steps.

On the same day, 20th November, the Archdeacon wrote to the plaintiff: "The Bishop has nominated you to the incumbency of Oshawa, and has instructed me to inform you of the appointment; but at the same time to represent to you the circumstances of the case." He then gives the history of the matter, and tells of his meeting that day with the churchwardens and lay delegates. "They told me at last that they would not call a vestry, and that they would not accept the Bishop's appointment. I said that they had better send him their conclusion in writing. So it stands." He then begs the plaintiff's assistance in maintaining the principle at stake, and in fighting the battle of the church.

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On the 21st November the churchwardens notified the members of the vestry by a circular through the post-office that a meeting of the vestry would be held on the following Monday evening.

On the same day the plaintiff wrote to the churchwardens, "I have to-day received the Bishop's appointment to the incumbency of Oshawa."

On the 22nd November, Mr. *Carmichael* wrote to the Archdeacon that, "in accordance with the wish of the Lord Bishop, a vestry meeting is called * * for Monday next, that his letter may be laid before it. At the Rossin House you stated to Mr. *Glen* and myself that it was the desire of the Bishop that the name of

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the Rev. Mr. *Johnson*, of Port Perry, be submitted for the church's consideration, as one his Lordship thought suitable as incumbent of Oshawa. This having been a verbal statement, and being desirous that the matter should be correctly represented to the vestry, it occurs to me it would be better, taking into account the sensitiveness to misinterpret in the present state of feeling here, if a communication direct from yourself were read regarding Mr. *Johnson*. Will you kindly by letter make the statement made to us about Mr. *Johnson*, and address to myself as lay delegate, or to one of the churchwardens, in time for the meeting?"

The Archdeacon replies by a letter on the 22nd November, repeating the verbal message brought from the Bishop to Mr. *Carmichael* and Mr. *Glen*, at the Rossin House, as follows:—"The Bishop requests that the letter which I addressed, at his Lordship's instance, to the churchwardens of St. George's Oshawa, may be laid before a meeting of the vestry; and the Bishop also nominates the Rev. *C. C. Johnson*, of Port Perry, to the incumbency of St. George's."

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On the 23rd November the churchwardens reply to the plaintiff's letter of the 21st, informing him that on the 20th they received instructions from his Lordship the Bishop, through the Ven. the Archdeacon, to call a vestry meeting, at which the plaintiff's name was to be submitted for approval or otherwise; that the meeting was called for Monday evening next, and the result would be communicated to the plaintiff.

On this 23rd November the Archdeacon wrote to the plaintiff a letter which I transcribe at length:—

"I have just received a letter from Mr. *Carmichael*, one of the Oshawa delegates who came to Toronto on Wednesday last, telling me they *had* called a meeting for Monday evening next, (which they said on Wednesday that they would *not* do), and requesting me to put in writing the verbal message from the Bishop which I gave them at the Rossin House. When they refused to

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call a vestry meeting the only course seemed to be that the Bishop should at once *appoint* you, but now the vestry will have the opportunity of hearing and considering the Bishop's objections to their nominating any one—and particularly a stranger—and they will also have your name before them as a gentleman *nominated* by the Bishop. I think, therefore, that you will now be able to enter on your duties under better auspices. When I hear the result of the meeting I will write you at once. There is no induction necessary, or indeed possible, where there is no endowment; and I hope that things may so issue as that a letter from the Bishop or from myself will be all that you may require. There will of course be a reply from the Bishop or from myself to any communication which may be made on behalf of the vestry."

On the 25th Nov. Mr. *Glen* telegraphed to the plaintiff, "Are you simply nominated for approval or actually appointed?" to which the plaintiff replied the same day, quoting the words of the Archdeacon's letter, "Provost's words. 'Bishop has nominated you to incumbency of Oshawa, and has instructed me to inform you of appointment.'" Judgment.

The vestry meeting was held on the evening of the 25th, and was more numerously attended than any that had been held for years. There seem to have been 31 members present. Two left before the vote was taken. The report of the churchwardens was read, giving an account of their interview with the Archdeacon. The letter of the Bishop, sent through the Archdeacon, a letter from the plaintiff, a letter from the Archdeacon, and a telegram from the plaintiff were also read. A resolution was passed by 27 votes to 2, "That this meeting respectfully conveys to his Lordship that the name of Rev. *C. C, Johnson* is not acceptable to it, but that the appointment of the Rev. *A. L. Fortin* would give great satisfaction to this congregation, and this vestry respectfully requests his Lordship to appoint him." And the

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churchwardens were instructed to forward a copy of the resolution to his Lordship the Bishop, and to the plaintiff.

The churchwardens wrote to the plaintiff on the 26th November, acquainting him with the proceedings of the vestry. And the result was telegraphed by Mr. *Cowan*, one of the lay delegates and one of the two who voted nay, to the Archdeacon on the same day.

On the 27th November, the plaintiff wrote to the Archdeacon informing him of having received from the churchwardens the account of the vestry meeting—a meeting which he says he believes "was a perfect farce, and from the first it was a foregone conclusion with them that they would do as they have done—just a mere make-believe that they would receive and consider the Bishop's proposal when they never intended to do anything of the kind—the minutes read like this."

On the 27th November, the churchwardens had an interview with the Bishop. And as the witnesses do not agree in what took place on this day I will extract from my notes what is said on the subject. Mr. *Glen* says: "On the 27th November we had an interview with the Archdeacon, when he promised he would make no appointment and take no action without consulting us. We saw the Bishop, but he was very feeble, and referred us to the Archdeacon, who had power to act. Dr. *Martin* and myself saw the Archdeacon. The Archdeacon made a distinct promise he would not make an appointment without consulting us, and would take no action, and that Mr. *Fortin* might remain and discharge the duties till the matter was settled, without prejudice. The Archdeacon read through the minutes in the minute book now produced (pp. 77-85, the vestry minute book, with an account of the proceedings at the vestry on the 25th November.)" On cross-examination he says, "Dr. *Martin* and I went to see the Bishop on the 27th November, pursuant to the direction of the vestry meeting on the 25th. We saw him for a few minutes in his parlour. We told him of the resolution of 27 to 2 to

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appoint Mr. *Fortin*. He expressed his dissatisfaction at our taking the matter into our own hands. We deprecated any such interpretation. No other name was discussed. He at last referred us to the Archdeacon, in whose hands it was. We saw the Archdeacon, and handed him the book with the report, &c. He called our attention to the paragraph relative to our belief of the plaintiff's appointment. He then said that on receipt of *Carmichael's* letter he had recalled the appointment of the plaintiff. We then pressed upon him the large majority; he answered by pointing out the right of the clergy of the diocese. He promised to meet us at the Bishop's in the afternoon. We suggested to the Archdeacon that the interest of the congregation of 500 to 600 was paramount to that of one clergyman. When we were at the Bishop's in the afternoon, a note from the Archdeacon was put into our hands, by a servant, in the hall—very short, not satisfactory—to the effect that considerable correspondence would be necessary, but that no unnecessary delay would be caused. We read the note in the hall, and then asked to be admitted to the Bishop, but were told by the servant that we could not see him. At this time the Archdeacon came into the hall from the parlour, and we expressed our dissatisfaction with the note. He promised nothing should be done without consulting with us, and in the meantime Mr. *Fortin* should continue without prejudice. We then pressed the question how soon we should get an answer, and he first asked for a week, but when we complained of the length of time, he promised that we should hear from him within three days. Dr. *Martin* begged him to telegraph at our expense. That was on Wednesday, (27th), Saturday came without any word from the Archdeacon."

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Dr. *Martin*, in his evidence, says, "I was in Toronto with the other churchwarden on the 27th November. We saw the Bishop at his own residence. He at first declined to see us, but ultimately saw us. He said he could bear no irritation, as he was ill. We told him we came

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to press for the appointment of Mr. *Fortin*. He said our request could, or should, be granted, but as he had delegated his authority to the Archdeacon, to see him. We then saw the Archdeacon. We told him the Bishop would appoint Mr *Fortin*, if he was agreeable, as he had delegated his authority to him. He at once repudiated such authority, We agreed to meet with him at the Bishop's. We went to the Bishop's, but were told he was unable to see us, but a letter was given saying that no appointment would be made to-day as further correspondence would be necessary. I think it was signed by the Archdeacon. We were not satisfied with this, and wanted to see the Bishop, if only for a moment. To our surprise the Archdeacon appeared at one door. We told him our dissatisfaction, and asked if he would not give us something more definite. He promised that no appointment should be made without consulting us first." On cross-examination he says:—"We went to Toronto to carry out resolution of vestry. When we were at the Provost's, we shewed him the book (vestry minutes) and he read the report the e. The report stated plaintiff's appointment. The Archdeacon gave a reason for that, because we had refused to call a vestry, but after we repented he recalled the appointment. At the Bishop's he promised to give us a definite answer in a week, but on pressure he said in three days; Saturday, none came." The only other person who can tell what occurred on this occasion is, the Archdeacon. He says:—"On 27th November, I met the churchwardens at my house. They told me they had been with the Bishop. They shewed me the minutes of the vestry. Dr. *Martin* said, 'Mr. *Johnson* is not appointed, is he?' I said, 'No.' I told him how it occurred. I said, they were like the man in the parable, who said he would not go, but afterwards repented and went. They had repented. I said I also had repented. I repudiated the delegation of authority ascribed to me. That day I wrote by the Bishop's direction that he could not possibly decide till he had held further

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correspondence. The servant brought a message that they wanted to see me. They urged the appointment of Mr. *Fortin*. I think it is probable I mentioned a week, and ultimately three days. I certainly did not say that nothing would be done without further consultation. * * * I have not the slightest doubt that I made no such promise as stated by the churchwardens." When cross-examined, he says:—"On the 27th I had an interview with the delegates. They shewed me the minute book. I read the report in it. I told them Mr. *Johnson* was not appointed. I explained to them that when they refused to call a meeting he had been appointed, but when they offered to call a meeting the appointment had been cancelled. I went to inform the Bishop. By his direction I wrote the note that he would not come to a decision for a few days, that it was necessary to have some further correspondence. On the 27th I wrote to Mr. *Cowan*, that the Bishop meant to abide by the plaintiff's appointment. It was only open so far as Rev. Mr. *Johnson's* consent was not obtained. The only correspondence required was that with Mr. *Johnston* * * * After hearing my letter to the plaintiff of the 28th November read, I say still it was only the plaintiff's consent we waited for."

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In ascertaining the true position of matters on the 27th the letter of the Archdeacon to the plaintiff of the 28th is very material. In it he says:—"I received on Tuesday (26th) a telegram from Mr. *Cowan*, saying that he wished to confer with me, and expressing his hope that the Bishop would abide by your appointment. I wrote to say that I wished to see him, and as he did not come on Wednesday (27th), I wrote again assuring him of the Bishop's purpose to abide, but of his anxiety for your sake to get some demonstration at Oshawa in your favour. I also got *Cayley* to write to Mrs. *Clarke*, from whom he looks for a reply. I rather think, from the delay, that they are getting a paper signed. *Glen* and *Martin* came up yesterday (27th) and induced the

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Bishop to see them. He sent them on to me, and I, after seeing the Bishop, told them that the Bishop must await further communication and information. I hope to see or hear from Mr. *Cowan* to-morrow or Saturday. I wish to explain to you that on Wednesday, 20th, the churchwardens and two of the delegates told me very plainly that they would not call a meeting, nor accept your nomination. Then nothing remained but for the Bishop to appoint you. But when I found that they had consented to call a meeting, I thought it right to recede from the position into which they had forced us, and to consider you as *nominated* according to the canon, as your name was then (Wednesday, 20th,) before them for the first time, and they had a right to advise with the Bishop on the subject. Now, it remains for the Bishop to appoint, which I hope he will do very shortly, as they had nothing to allege, except their settled determination to have Mr. *Fortin*. I am very thankful for the tone of your letter. The Bishop is kindly anxious about you; but I think that the simple fact is, that the appointment of Mr. *Fortin* would be a most grievous wrong—and an immoral surrender to self-willed and violent men—and so *utterly out of the question*. Then setting him aside, I know no one so well qualified as yourself to win the confidence of the people, and to fight the battle successfully. So I trust you will hold fast, and that in a day or two I may be able to give you cheering news."

Judgment.

On the 29th the Archdeacon wrote a letter to the plaintiff, in which he says: * * "I think however that it is a matter of principle for which we are contending, and that to yield would be ruinous. I must therefore advise the Bishop to inform the churchwardens that he cannot possibly present to the incumbency a clergyman who does not belong to this diocese, that justice to his own clergy compels him to refuse to do this, * * * and accordingly that he gives you the appointment, requesting you to take

charge of the parish from Sunday, December 8th. But before he sends this I wish to know whether you will accept." 1879. Johnson v. Glen.

On the 30th the plaintiff telegraphs to the Archdeacon, "I accept," and on the same day writes to him, "Your two notes just received (by same post) have put an entirely new face on the Oshawa question, and I cannot tell you my admiration of your conduct in this trying affair. * * I hope on Monday I may hear from you that the churchwardens have been apprised of my going there, and that the way is free for my entering on my work on Sunday 8th December."

On the same day the license to the plaintiff was signed, authorizing him to perform the office of incumbent of St. George's Church, Oshawa.

On the 2nd December (Monday) the churchwardens telegraghed to the Archdeacon:—"We looked for a telegram on Saturday confirming Mr. *Fortin's* appointment; will you kindly inform us what might have caused the delay?" This was answered:— Judgment. "The Bishop will write you to-day." The letter of the Bishop to the churchwardens, of the same date, says: "I beg to announce to you that I have appointed the Rev. *C. C. Johnson* to the incumbency of St. George's, Oshawa, and have instructed him to enter on his duties on Sunday, 8th December." The Archdeacon also on the same day informed the plaintiff of the Bishop's letter to the churchwardens, informing them of his appointment to Oshawa, and that by the Bishop's direction he now notified him of his appointment. On the evening of the same day the vestry passed a resolution instructing and enjoining the churchwardens not to permit the Rev. *C. C. Johnson*, or any clergyman or layman on his behalf, to have access to or enter the church or the parsonage, unless instructed to do so by the vestry, which was communicated to the plaintiff. On the 3rd December the churchwardens and two of the lay delegates telegraphed to the Bishop, "Letter

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received; congregation determined not to give Mr. *Johnson* admission to church or parsonage; will resist to the last extremity." This was communicated by the Archdeacon to the plaintiff on the 4th December. Another meeting of the vestry was held on the 5th December, when the resolution of the 2nd was repeated, and repeated its desire that the Lord Bishop be respectfully requested to appoint the Rev. *A. L. Fortin*, who is the unanimous choice of this vestry and congregation, and that a copy of the proceedings be sent to the Bishop and the plaintiff. A petition numerously signed requesting the appointment of Mr. *Fortin* was signed on the 4th December and forwarded to the Bishop, who, on the 11th December acknowledged its receipt, and stated that prior to receiving it he had appointed the plaintiff for reasons which he stated to the churchwardens on appointing him. It became, therefore, impossible to accede to the prayer of that memorial.

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Early in December the bill was filed. On the 31st December a memorial approving of the plaintiff's appointment, signed by thirty-nine persons was sent to the Bishop.

The meaning of the canon was the subject of some discussion; what is intended by *consulting with* the churchwardens and lay delegates? Does it mean that the Bishop should have a personal interview with them, which seems to have been the construction placed upon this phrase by the Archdeacon in his letter of the 4th September, where he says:—"If necessary it will be my duty to meet the representatives of the parish personally, and to consult with them;" or is it enough to learn their views by correspondence? Then what is to be the effect of the consultation. Is the Bishop at liberty, after ascertaining the views of the representatives, to act in opposition to them, or are their views to be respected and complied with? My impression is, that the Archdeacon correctly interpreted the phrase, "consult with" as requiring a personal interview. And it is quite possible

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that, after such consultation, the canon intended to leave it discretionary with the Bishop to comply with the wishes of the delegates, or to exercise his own judgment as to what was best for the congregation, even in contravention of their wishes. But, on the other hand, many considerations point to a different construction. The Church of England in this country has no connection with the State. As I had occasion to remark in the Belleville Case, *Dunnett* v. *Forneri* (*a*), the law looks upon it only in the light of a voluntary association, united indeed for religious purposes, but subject to no control in discipline, selection and appointment of ministers, and other matters connected with their religious organization, other than the people have chosen to confer upon persons or bodies of their own nomination. To a great extent, and, in this Oshawa case entirely, the church depends for the maintenance of its clergy and the ordinances of religion upon the voluntary contributions of the people. The lay element is recognized as a constitutent in its Supreme Church Courts. And the rules adopted for the appointment of ministers and other purposes, derive their force only from the voluntary assent of the members of the church. They are matters of mutual contract, entered into by, and for the benefit of, those who choose to become members. They have not the force of laws imposed by the power of the State, and binding all who come within their influence, whether they assent to them or not. The rules for their interpretation are to be found in the law of contracts, not in that of statutes. The parties affected by them are contracting parties, and can only be held to have surrendered their freedom of action, so far as their mutual agreement binds them.

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The question of the patronage of incumbencies has been the subject of much discussion in the church judicatories of this diocese, and it finally resulted in the

(*a*) 25 Gr.

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canon I have quoted. It was passed after a resolution was rejected, which proposed to vest the appointment in the congregation after consulting with the Bishop. But the object designed to be attained by the canon is probably that stated by the Bishop in his address to the meeting of the Synod at which it was passed. He desired to be aided in making the appointments, and if the Archdeacon and Rural Dean, to whom the vacant parish pertains, should not be always available, there were other experienced and judicious clergymen familiar with the locality, whose aid could be obtained. He says also, "I should desire that we should be joined in such consultation by two delegates chosen for this purpose by the parish to be supplied, and while such a course would have the benefit of enlisting the best practical aid in forming my own judgment, it would afford the required opportunity for the expression of the feelings and wishes of the parishioners to whom a clergyman is to be appointed." The plan of the Bishop was not entirely adopted; and though a majority of the constituent bodies of the Synod perhaps thought with the Bishop that "anything like direct and absolute popular election was most hurtful to the general interests of the church," yet they were like him also, doubtless "sensible of the need of giving a careful consideration of the special requirements of the parishes to be supplied, and of the men best suited to meet those requirements." The canon or by-law perhaps does not need any such extraneous aid to construe it, but with the assistance derived from these expressions of the Bishop its interpretation is susceptible of less difficulty.

Judgment.

There does not appear to be anything in the canon to sanction the claim of the Bishop, in some of the correspondence, that he alone has the right of nomination, or, as it is expressed, that the initiative belongs to him, nor that the feelings and wishes of the congregation are only to find expression in the shape of "specific objections" to his nominee. A person may be wholly unsuit-

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able to meet the requirements of the parish, and yet it may be impossible to set forth the grounds of unsuitableness so as to be intelligible to other men. The popular antipathy may be, to use the language of Dr. Chalmers, "too shadowy for expression, too ethereal to be bodied forth in language. * * Not in Christianity alone but in a thousand other subjects of human thought, there may be antipathies and approvals, resting on a most solid and legitimate foundation—not properly, therefore, without reasons deeply felt, yet incapable of being adequately communicated. And if there be one topic more than another on which this phenomenon of the human spirit should be most frequently realized, it is the topic of Christianity—a religion, the manifestation of whose truth is unto the conscience; and the response or assenting testimony to which, as an object of instant discernment, might issue from the deep recesses of their moral nature, on the part of men with whom it is a felt reality—able, therefore, to articulate their belief, yet not able to articulate the reasons of it. * * I would take the verdict of a congregation just as I take the verdict of a jury—without reasons. Their judgment is what I want, not the grounds of their judgment. Give me the aggrega e will; and tell me only that it is founded on the aggregate conscience of a people who love their Bibles, and to whom the preaching of the Cross is precious; and to the expression of that will, to the voice of the collective mind of that people—not as sitting in judgment on the minor insignificances of mode, and circumstance, and things of external observation, but as sitting in judgment on the great subject-matter of the truth as it is in Jesus—to such a voice, coming in the spirit, and with the desire of moral earnestness from such a people, I for one would yield the profoundest reverence."

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In assenting to this canon the congregation may say: "We consent to the Bishop appointing the incumbent, that the hand which consecrates for

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the performance of sacred functions, shall be the one to create the bond between the minister and us; but our wishes and feelings are to be consulted, we never agreed to accept any one the Bishop might choose to appoint, we never agreed to be limited to the statement of *specific objections*. Our objections may be too shadowy for expression, too ethereal to be bodied forth in language, but they may be none the less real, and may rest upon a solid basis; and we never agreed that the feelings and wishes to be respected were only those which could be put into articulate phrase."

And if ever this reasoning could be resorted to, this is a case to exemplify its legitimate force. Torn by dissensions under previous incumbents, apprehending the dissolution or division of the congregation, in the midst of active bodies of other Christians, who were making inroads upon its membership, the minister fitted for the place must be one possessing peculiar qualifications. He would require to be not only fitted by literature, life,

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and morals for the situation, but he would need many other, perhaps nameless qualities, to enable him to restore peace and harmony, to consolidate discordant elements into one homogeneous whole, to give force and vitality to the body, and to establish a united, harmonious, and energetic congregation.

But I do not design to pursue these subjects further. There is one clear direction in the canon —that the appointment is not to be made till after the Bishop has consulted with the representatives of the congregation. Upon this there can be no dispute; and, in the view I take of the evidence, this seems to me sufficient for the determination of the issues in this case.

The facts upon which this case turns all occurred between the 20th and 30th of November. The plaintiff's name was never before the congregation in the light of a possible incumbent until the 20th, and the plaintiff's license is dated on the 30th, and between

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these dates the consultation required by the canon must have taken place, if at all. The plaintiff's counsel and his witnesses do not agree as to the time when the consultation took place. When asked on this subject, the Archdeacon, at first, said it took place at the Rossin House (20th); he then said no, it would take place at the vestry meeting (25th), and one took place on the Bishop's steps (20th). At a subsequent stage of the examination he said the consultation required by the canon took place on the 27th between the Bishop and the churchwardens as the representatives of the vestry, when he was not present. He says, it was very desirable that the lay delegates should be present, but it was their own fault that they were not.

The counsel for the plaintiff, however, rested entirely on the meeting of the vestry. He admitted that what took place on the Bishop's steps was not sufficient. It is clear that what took place at the Rossin House was not enough. Only two of the four delegates were seen by the Archdeacon, and it was then for the first time that they were aware of the plaintiff being the Bishop's nominee, and the Archdeacon says there was no consultation there. And as to the consultation being with the Bishop on the 27th, it seems from the only evidence to be had on the subject—that of the two churchwardens—that there was no consultation. The Bishop was unable to consult with them, and referred them to the Archdeacon. But it is not pretended they had anything to justify the title of a consultation with him that day. So that the consultation, if any, was on the 25th, at the vestry meeting.

Judgment.

This meeting was not one of the matters authorized by the canon. It was required by the Bishop on the 20th, as the Archdeacon told the delegates. And although they at first refused to call it, they afterwards did so. It would have been equally a vestry if none of the delegates had been present. It is true they were there and took part in the proceedings, but it was

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not consulting with the Bishop as representatives of the congregation. It was a meeting of the congregation itself, summoned for the purpose of getting the congregation to leave the appointment in the Bishop's hands, and in the hope probably that the vestry would over-rule its delegates. That it is not, in my opinion, the sort of consultation contemplated by the canon.

Besides, the delegates and vestry, at this meeting, were under the belief that the plaintiff was not only nominated, but appointed. They were so informed by the plaintiff, quoting the very words of the Archdeacon himself. Neither the delegates nor the vestry could have been under the belief that they were being consulted in pursuance of the law of the church. The meeting might be an indignation meeting, but it was not a deliberative meeting. The vestry were indignant at their wishes being disregarded, though still entertaining hopes that the Bishop might be induced to recall the appointment. I do not think the representatives of the church can be considered as being consulted about something to be done in the future, when they believed the act to have been already consummated, and were not endeavouring to give the Bishop information to guide him in making an appointment, but were expressing their dissatisfaction with an appointment already made.

Judgment.

I am therefore inclined to be of the opinion that there never was a consultation such as is intended by the canon—an opportunity of stating reasons for and against any nominee to the incumbency, the suggestion and discussion of other names, the state of the congregation, its likings and dislikings, what would be for the advantage of the church, the circumstances of the locality, and all the numberless particulars that might, or ought to, have an influence in guiding the opinion of the Bishop, in filling the vacancy—at all events down to the 25th November the date fixed upon by plaintiff's counsel. Nor would this be affected by the fact that the appointment had been cancelled and changed into a nomination, unless that had

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been communicated to the vestry, or to the representatives of the church, which it was not. The action of the vestry was not based on any such state of circumstances, but upon the only information they had—that an appointment had been made.

But I will not bind the plaintiff by the selection of that date for the consultation, if another can be found. The only other suggested is, what took place on the 27th. On that occasion only the churchwardens were present, and we have seen the Bishop declined to consult with them. The Archdeacon says the consultation took place with the Bishop while he was not present. But that is erroneous. And it is scarcely worth while to inquire if what passed between the churchwardens and the Archdeacon amounted to a consultation, since it is not claimed by him or by the plaintiff as such. And indeed, he expressly disclaimed or repudiated the delegation of authority on the subject ascribed to him by the Bishop.

Judgment.

A more material question, however, is, assuming that what passed with the Bishop, or the Archdeacon, or both, was in the nature of a consultation such as is required by the canon, was it a concluded and definite act, or was it only a partial consideration of the subject, to be taken up and continued at another time? Upon this subject there is a marked variance between the account given by the churchwardens and that given by the Archdeacon. Mr. *Glen* tells us, "the Archdeacon promised, at the conclusion of the interview, to make no appointment and take no action without consulting us." Dr. *Martin* tells the same story: "That no appointment would be made without consulting us first." The Archdeacon says, he told them, by the Bishop's direction, that the Bishop could not come to a decision for a few days: that it was necessary to have some further correspondence. But he says he has not the slightest doubt he made no such promise as stated by the churchwardens. It is difficult to imagine that the churchwardens manufactured the

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statement—there is no imputation upon their probity or integrity—and it is in harmony with the statement of the Archdeacon that further correspondence was necessary, and his further statement that he probably mentioned a week, and ultimately three days, for giving a definite answer. They are besides speaking affirmatively to an occurrence affecting the object of their mission, and in such a case, according to ordinary observation, they are more likely to be correct than a person denying the fact, or not remembering it. It is true, very much of the force of this reasoning will be lost if we give to the phrase, "further correspondence," the meaning the Archdeacon attaches to it—namely, that it was merely to communicate with the plaintiff—if that was the sense in which the delegates ought to have understood it. For in that case the delegates must have misconceived the meaning of the Archdeacon, and supposed he spoke of corresponding with them, while he only meant corresponding with the plaintiff. But was that the fair and reasonable meaning to give to the Archdeacon's language? He had been corresponding with these delegates, they were proper persons to correspond with on the subject then being considered, no others were mentioned, and he tells them "further correspondence would be necessary." I think the delegates were fully justified in believing that further correspondence with them, or with the persons they represented, was intended. It is plain they did not understand it to refer merely to writing to the plaintiff for his consent, as they looked on Saturday, the last of the three days, for a communication that Mr. *Fortin* had been appointed, and they telegraphed to that effect on the 2nd December. I am satisfied that the promise, so distinctly sworn to by the delegates, was made, and that the Archdeacon must have forgotten it. The discussion or consultation, if it is to be deemed a consultation, was therefore pending and not concluded when the plaintiff's license was signed on the 30th of November.

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But assuming that any of these proceedings can be taken to be a consultation, another question still remains, namely, whether they took place *before* the appointment was made, for the purpose of informing and guiding the Bishop in the selection of a proper incumbent; or whether they were not subsequent to the appointment, or to the settled determination to appoint the plaintiff; for in either case they would not, in my opinion, be a compliance with the canon, either in its letter or spirit.

We have seen that on the 20th, when the Archdeacon desired the delegates to call a meeting of the vestry, which they refused to do, he immediately appointed the plaintiff. This was the same day he took the Bishop's message to the Rossin House. He did not communicate the fact of the appointment to the delegates, nor did he in his letter of the 22nd say the appointment was cancelled. He repeats in it the message he had delivered at the Rossin House, and he sends this, not as anything new to be acted upon, but as if the matter was in the same condition as when he saw the delegates at the Rossin House. It could not, therefore, be deemed an intimation of any change in the position of the plaintiff. The Archdeacon says, this was the only notice the delegates had of the appointment being cancelled—it follows from his recognition of their intention to call a meeting. But he says the plaintiff was to have the appointment anyway, notwithstanding the action of the vestry. It was only through the plaintiff that the delegates learned, before the vestry meeting on the 25th, that he had been appointed. The Archdeacon certainly wrote to the plaintiff on the 23rd, saying that "the vestry will have the opportunity of hearing and considering the objection of the Bishop to their nominating any one—and particularly a stranger—and they will also have your name before them as a gentleman *nominated* by the Bishop. I think, therefore, that you will now be able to enter on your duties under better auspices." He does not say the appointment is cancelled, though

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perhaps he left that to be inferred from the use of the word "nominated," but whether he was only nominated, or was appointed, it is obvious he was "to have the appointment any way," no matter what the Vestry might do. He was now to enter on his duties under better auspices. The letter of the 28th November from the Archdeacon to the plaintiff is quite in harmony with this view. In it the Archdeacon repeats the history of the affair from the 20th November, tells the plaintiff of having appointed him, of afterwards receding from the appointment, and considering him as *nominated* according to the canon; but he also tells him of having received a telegram from Mr. Cowan on the 26th, expressing his hope that the Bishop would abide by the plaintiff's appointment, and of his answer assuring Mr. Cowan of the Bishop's purpose to abide by it. There is nothing here that looks like a cancellation of the appointment: it rather affirms that though the word might be changed the sense remained the same. How could the Bishop be said to abide by the appointment if there was no appointment? If it be said it meant the intention to abide in the purpose of making the appointment, then that was not, in my opinion, a compliance with the canon. No consultation had been had, and the Archdeacon says that from the 20th, when the plaintiff was appointed, it was the settled determination that the plaintiff should have the incumbency anyway. The letters are to be read in the light of this declaration. And I cannot forget also that this was to be a trial case, that the letters were written by an acute and learned man, preparing for a conflict, and that it was necessary to establish that the delegates had the plaintiff's name before them as the *nominee* of the Bishop, not as his *appointee*. I have not overlooked the letter of the 29th, from the Archdeacon to the plaintiff, in which he wishes to know if the plaintiff will accept before the notice of appointment is sent to the churchwardens. This is quite compatible with the notion of the appointment having

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been made previously, as the attitude of the congregation had developed into more decided hostility, and the plaintiff might well pause before venturing to encounter the opposition he would be sure to meet with.

The license does not seem to have been actually signed till the 30th November, but this fact does not appear to me of any importance, as the Archdeacon had explained to the plaintiff on the 23rd that no induction was necessary, or indeed possible, where there was no endowment, and he hoped things would so issue as that a letter from the Bishop or himself would be all the plaintiff would require.

I need not discuss the case of the defendants other than the churchwardens.

I think the plaintiff has not established that he was lawfully appointed according to the canon, and I dismiss the bill, with costs.

It is my earnest wish that some method may be found, by mutual concessions, of settling these unhappy differences; and that both parties may unite in fighting the true battle of the Church.

Judgment.

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ALLEN v. EDINBURGH LIFE ASSURANCE CO.

Injunction—Contempt—Sequestration.

An injunction was obtained restraining the sale, under a writ of *ven ex.*, of a married woman's inchoate right of dower, subsequently to which an Act was passed rendering such estates saleable at law, and the plaintiffs in the action, without procuring a discharge of the injunction, sued out an *alias fi. fa.*, and were proceeding to a sale of the widow's dower, the husband having, after the injunction had been granted, died. The Court, under these circumstances, granted a sequestration to enforce the injunction; although, upon an application for that purpose, the defendants might have been entitled to be relieved from the operation of the injunction.

This was a motion for a writ of sequestration against the defendants, on the grounds stated in the judgment.

Mr. *Hodgins*, Q. C., for the motion.

Mr. *Leith*, contra.

PROUDFOOT, V.C.—This is a motion for a sequestration against the defendants for contempt in proceeding to sell the interest of the plaintiff in the land mentioned in the pleadings under an execution, contrary to a writ of injunction.

Judgment.

The report of the case when the injunction was granted is in 19 Grant 248. The defendants say that the sale restrained was under a writ of *ven. ex.*, and the one now being prosecuted is under an *al. fi. fa.* Also that the estate of the plaintiff when the injunction was granted was an inchoate right of dower only, which has since become absolute by the death of the husband; and that although not saleable at law, the recent Act 40 Vic., ch. 8, sec. 37, O., has rendered it liable to be sold under execution.

It does not appear when the plaintiff's husband died, but I apprehend it must have been after the motion, but before the issuing of the injunction. The

notice of motion, dated 27th of May, 1869, contains the original style of cause with the husband as a defendant. The judgment of the Court (19 Gr. 249) refers to the husband as still alive. The order for the injunction is dated the 26th of June, 1872, is entitled in a revived suit in which the husband's name is omitted, and directs an injunction to issue to restrain the sale of the plaintiff's right of, or estate in dower. I must assume that the order was correctly issued, and, if so, the estate now sought to be sold is the same restrained by the injunction. It is a matter of no moment whether the sale be under the same or a different writ, it is equally a violation of the prohibition to sell.

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If it is the same estate, then the fact of its being rendered saleable by the subsequent statute cannot be resorted to to excuse the contempt. The order was right when issued, and so long as it has not been set aside its prohibitive force must receive effect. It may be that upon an application, and establishing that the interest is saleable, the Court would relieve the defendants from its operation; but until that is done I have no option to refuse to enforce it.

Judgment.

It is not necessary therefore to decide the nice points discussed as to the effect of the recent statute. It only differs from the former one in making estates saleable "over which the debtor has any disposing power which he may without the assent of any other person exercise for his own benefit." Whether this authorizes the sale of a right of dower, where the dower has not been assigned, may still be a question. In *Beaven* v. *The Earl of Oxford* (a), Lord *Cranworth* held that these words gave no right against a person claiming under a voluntary settlement, for the voluntary setlor could not for his own benefit either with or without, certainly not without, the assent of any other person,

(a) 6 D. M. G. 507, 522.

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defeat his own settlement. And Lord Justice *Turner*, in the same case, p. 529, says: that the words, "disposing power" must be construed according to their ordinary acceptation, which he thought established by the context as the statute distinguishes between powers of different descriptions, as between a power which a person may exercise for his own benefit, and one which he cannot exercise without the consent of other persons.

But I need not pursue this further, as I think the injunction has been violated.

Judgment.

There were some preliminary objections made by Mr. *Leith*, but upon consideration, I do not think any of them should, under the circumstances of the case, prevail.

There will be an order for a sequestration, and with costs.

On a motion subsequently made by the defendants, the injunction was dismissed, but, under the circumstances, without costs.

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BURK v. BURK.

Devise of mortgaged lands "after payment of debts"—Life estate—Remainder.

Lands subject to mortgage were devised, "after payment of debts," to the widow for life, remainder to the plaintiff, who accepted from the widow a lease for her life of the premises. The widow having refused to pay the interest accruing on the mortgage, the plaintiff paid the same, and also the principal money thereon:

Held, that these facts did not entitle the plaintiff to call upon the widow for payment out of the rents reserved by the lease or out of the personal estate bequeathed to her; the only relief to which he was entitled being to have the mortgage debt, together with the interest on the sum secured until it became due, raised out of the land.

This was a bill by *George H. Burk* against *Sarah M. Burk*, setting forth that the testator, who died in 1872, by his will, dated the 27th February, 1871, gave and bequeathed, after the payment of his debts and funeral expenses, all his personal estate to the defendant *Sarah M. Burk*, to and for her own and sole use and benefit, and did give and devise all his real estate to the said *Sarah M. Burk*, for and during her natural life, and upon her death gave and devised the land in question to the plaintiff *George H. Burk*, subject to the payment of several legacies amounting in all to $3,000. Statement.

At the time of the testator's death, the land in question was subject to a mortgage, made by him, securing payment of $1,600, and interest at 8 per cent. per annum, being payable on the 16th May, 1876, and the interest annually on the 16th May.

On the 1st October, 1872, the defendant leased to the plaintiff the land in question for the defendant's life, at an annual rental of $300, payable half yearly, and this lease continued in force. The plaintiff had paid all the rent accrued on the lease to the time of filing the bill.

The defendant had refused to pay the interest on the mortgage, and the plaintiff had been compelled to

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pay it. The plaintiff also paid the principal when it became due, and had taken an assignment of the mortgage to himself.

The plaintiff filed his bill containing the foregoing statements, against the defendant alone, and submitted that the defendant was liable to pay the interest upon the mortgage debt from the death of the testator, and for the future, and asked that the defendant might be ordered to pay the interest already paid by the plaintiff, and in default, that her interest in the land might be foreclosed,—and that the plaintiff might be entitled to retain the rent payable under the lease until paid that sum, and to retain sufficient of the rent to pay the interest for the future.

The bill was taken *pro confesso*.

Mr. A. *Hoskin*, for the plaintiff.

Judgment.

PROUDFOOT, V. C.—[After stating the facts as above, proceeded.] It will be noticed that the defendant's estate in the property is only given to her after payment of debts.

The will is subject to the 29 Vict. ch. 28, sec. 33, O., which says that, in the absence of any contrary or other intention signified by will or deed or other document, the devisee of the land shall not be entitled to have the mortgage debt discharged out of the personal or other real estate, but the lands charged are to be the primary fund for payment of it. And by the 35 Vict. ch. 15, sec. 1, O., such contrary intention will not be found in a general direction to pay the debts out of the personal estate.

The defendant then was entitled to hold the personal estate, all of which was bequeathed to her absolutely, free from any liability to pay the mortgage debt which was primarily payable out of the land charged.

The defendant, as tenant for life, and the plaintiff, as remainderman, would be liable, according to their

several interests in the land charged, to the payment of the mortgage debt, if the land subject to the charge had been devised to them, and probably the plaintiff would have been entitled to the relief sought by this bill. But the land so charged is not devised to them. But the devise is *after payment of debts.* The interest of the defendant, by the will, is not in an incumbered property, but in one free from incumbrances.

The bill does not state that the testator appointed any executor, but whether he did or not, there is ample provision made by the 29 Vic. ch. 28, secs. 13–15, C., and 33 Vic. ch. 18, sec. 3, O., for raising money to pay this debt. It may be, that the sale of a part of the land, to pay the debt, may diminish the defendant's interest as much as if she were made liable to pay the interest on the debt, but that is a matter for her to consider.

The plaintiff paid the interest and principal of the debt. But taking an assignment of the mortgage cannot place him in a better position than he was under the statute. There is nothing in the will to shew an intention that the debt should be kept on foot for all time. It was to be paid like the other debts except that this was to come out of the land charged. If the plaintiff, instead of insisting on having it paid off at once under the will, has chosen to keep it on foot, there is nothing to shew that the defendant desired this. In fact her uniform denial of liability to pay interest, evinces her determination not to assent to it.

Judgment.

Whatever may have been the right of the mortgagee, which is saved to him by the statute, the plaintiff can claim nothing more than is permitted to him under the statute. For if in the character of mortgagee he were permitted to realize the debt out of the personalty, the defendant would have the right to have the liabilities adjusted as provided by the statute. He may insist upon the mortgage debt being raised out

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Decree accordingly.

TURNER v. SMITH.

Demurrer—Fraudulent conveyance—Misjoinder—Pleading.

A bill to set aside a conveyance as fraudulent against creditors, was filed by five distinct parties or firms who held overdue notes upon which the alleged fraudulent grantor was indorser, "on behalf of themselves and all other the creditors of the defendant." *Held*, on demurrer, that there was no misjoinder, and that the bill sufficiently shewed it to be on behalf of all creditors.

The bill in this case was filed by *John Turner* and *Joseph Tolfree* (of Toronto), *William Adams* and *George A. Burns* (of Toronto), *William R. Brock* and *Jeffrey H. Brock* (of Toronto), *James Young* and *Charles McGuaran* (of Montreal), and *Edward R. C. Clarkson* (of Toronto), on "behalf of themselves and all other the creditors of the defendant *Adam Smith*," against the said *Adam Smith* and *Alfred William Smith*, setting forth that one *John Patterson*, of the firm of *Patterson Brothers*, was the son-in-law of the defendant *Adam Smith*, and that the said firm had applied to all the plaintiffs other than *Clarkson* for the purchase of goods on credit, which was refused unless the said *Adam Smith* would become liable for the pay-

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ment thereof, and that *Smith* did indorse the notes of *Patterson Brothers*, and that paper to the following amounts was held by the plaintiffs; that is to say, by *Clarkson* for the sum of $181.65, by *Turner* and *Tolfree* for upwards of $420; by *Adams* and *Burns*, $236, and upwards; by plaintiffs *Brock* $652, and by *Young & McGuaran*, $626, all of which had matured and been duly presented for payment and dishonoured, and defendant *Adam Smith* duly notified thereof, whose liability thereon had become absolute.

The bill further stated that *Patterson Brothers* had become insolvent, and the defendant *Adam Smith* then becoming aware that he would be called upon to pay the said promissory notes, he did by one or more deeds convey to the defendant *Alfred William Smith*, who was his son-in-law, certain lands in the townships of Tiny and Tay, the consideration expressed to be paid therefor being in all $3,500; but that in fact no consideration was paid therefor, and the same were fraudulently conveyed in anticipation of his being called upon to pay the said notes.

Statement.

The prayer of the bill was, (1) that the deeds might be declared fraudulent and void as against the plaintiffs and all other creditors of the said *Adam Smith*; (2) that the defendant *Alfred William Smith* might be restrained from selling or incumbering the said lands; and for further relief.

The defendants put in a joint demurrer to the bill: "And for cause of demurrer shew that it appears by the said bill that the plaintiffs other than the plaintiffs *John Turner* and *Joseph Tolfree* are improperly joined as parties plaintiff to the said bill, together with such last named plaintiffs, inasmuch as the plaintiffs other than the plaintiffs *John Turner* and *Joseph Tolfree* do not base their claim to relief in this suit upon the debt alleged in the said bill to be due by the defendant *Adam Smith* to the said plaintiffs *John Turner* and *Joseph Tolfree*, but on certain other debts which they

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allege to be due by such defendant to themselves separately and severally, and apart and distinct from the debt claimed by the said plaintiffs *John Turner* and *Joseph Tolfree* to be so due and owing to them, and which other debts are also separate and distinct the one from the other and the others of them, by reason whereof the proceedings in this suit will be delayed and rendered intricate, prolix, and expensive, and the said suit will run great risk of being abated, to the great expense, delay, and prejudice of the defendants.

And for further cause of demurrer the said defendants shew that the said plaintiffs have not in and by their said bill made and stated such a case as entitles them or any of them in a Court of equity to any relief against these defendants as to the matters contained in the said bill, or any of such matters; wherefore and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and crave the judgment of this honourable Court whether," &c.

Argument.

Mr. *Rye*, in support of the demurrer, referred to *Longeway* v. *Mitchell* (*a*), to shew that this bill could not be sustained, as it was not filed on behalf of all the creditors of *Adam Smith*, and secondly he contended that there was a clear misjoinder, as there were five co-plaintiffs who had not any interest in common the one with the other, for although all the notes were indorsed by *Adam Smith* they all constituted separate and distinct claims or rights of action, and therefore could not form a joint ground of suit.

Mr. *W. N. Miller* contra. The objection really attempted to be raised to this bill is that of multifariousness; now that is an objection which the Court does not favour as a rule: *Campbell* v. *McKay* (*b*). And in *Kyne* v. *Moore* (*c*), the Court overruled the

(*a*) 17 Gr. 190. (*b*) 1 M. & C. 618.
(*c*) 1 S. & S. 61.

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objection taken here, where a mother who claimed an annuity in her own right joined her children as co-plaintiffs in a bill, the object of which was to establish two separate and distinct claims arising under separate and independent instruments; the one being a settlement in favour of the children, the other securing an annuity to the mother. The Court remarking, "The whole case of the mother being properly the subject of one bill, the suit does not become multifarious, because all the plaintiffs are not interested to an equal extent."

Westbrooke v. *The Attorney-General* (*a*), *Hudson* v. *Maddison* (*b*), *Turner* v. *Robinson* (*c*), *Abell* v. *Morrison* (*d*), *Fleury* v. *Pringle* (*e*), *Brinkerhoff* v. *Brown* (*f*), were, amongst other cases, also cited.

Judgment.

BLAKE, V.C.—The first ground of demurrer argued was, that the bill was not filed by or on behalf of all the creditors of the debtor. The bill is filed by the plaintiffs, who are named, "on behalf of themselves, and all others the creditors of the defendant *Adam Smith*." It was laid down in *Longeway* v. *Mitchell* (*g*), that the practice warranted the filing of a bill in this manner.

The second ground of demurrer argued was that two of the plaintiffs, *Turner* and *Tolfree*, had added as co-plaintiffs persons who had debts separate and distinct from the debts due to them, *Turner* and *Tolfree*. It was urged that although one creditor could file a bill on behalf of himself and all others the creditors of the debtor, that two creditors with distinct debts could not do so.

(*a*) 11 Gr. 264.
(*b*) 12 Sim. 416.
(*c*) 1 S. & S. 313.
(*d*) 23 Gr. 109.
(*e*) ante p. 67.
(*f*) 6 John C. C. 139.
(*g*) 17 Gr. 190.

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Lord *Redesdale* says, (*a*) "A few creditors may substantiate a suit on behalf of themselves and the other creditors of the deceased debtor, for an account and application of his assets real as well as personal, in payment of their demands. * * * As a single creditor may sue for his demand out of personal assets, it is rather matter of convenience than indulgence to permit such a suit by a few on behalf of all the creditors. * * * Some of a number of creditors, parties to a trust deed for payment of debts, have been permitted to sue on behalf of themselves and the other creditors named in the deed for execution of the trusts."

Mr. *Daniell* says, (*b*) "In the case of creditors under a trust deed for payment of debts, a few have been permitted to sue on behalf of themselves and the other creditors named in the deed. * * * In all cases, where one or a few individuals of a large number institute a suit on behalf of themselves and the others, they must so describe themselves in the bill." In *May* on fraudulent conveyances, p. 466, the statement is, "The bill ought to be filed by a creditor or creditors on behalf of himself or themselves, and all other the unsatisfied creditors of the settlor deceased." Mr. *Calvert* (*c*) quotes without exception the language of the Chief Baron *Macdonald* in *Ward* v. *Northumberland* (*d*). "The cases cited of unconnected parties being joined in one suit, are, where there is one common interest among them all centreing in the point in issue in the cause." See also *Story's*, Eq. Pl., in secs. 99 to 102. I can find no authority against the proposition so generally stated, that one or several creditors can file a bill on behalf of himself or themselves and all other the unsatisfied creditors, where there is the one

Judgment.

(*a*) Mitford on Plea. pp. 192 and 193. (*b*) 1 Dan. 209, 216.
(*c*) Calvert on Parties, p. 83. (*d*) 2 Anst. 469.

transaction attacked, in the impeaching of which each has an identical interest, and the same ground for relief. I overrule the demurrer with costs.*

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* NOTE.—The pleadings are here set out at greater length than may be considered necessary for a proper understanding of the case, but it was referred to as bearing upon a case where the point raised was that the plaintiffs in the *title* had not stated that they sued on behalf of themselves and all other creditors, although the bill did in the stating part of it set forth that they did so sue, I therefore thought it advisable to set out the demurrer in full, which I had not previously done, and although the case had been in type for some time, it had unfortunately been postponed for matters deemed of more general importance. The matter for surprise is, that any one should have considered that it was necessary to introduce the words mentioned into the title of the cause.—A. G.

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JOHNSON v. THE TRUSTEES OF PUBLIC SCHOOL SECTION No. 1, IN THE TOWNSHIP OF HOWARD.

Public school trustees—Selection of school site—Tenant of lands selected Orchard or no orchard—Practice—Varying minutes—Costs.

In proceeding to select a site for a public school-house, no notice of the proceeding to arbitrate upon the question of compensation was given to a lessee in possession of the property selected, and in consequence he did not name an arbitrator, neither did he attend before or take any notice of the arbitration; and the arbitrators in fact did not take into consideration the value of his interest, neither did they find that such interest was not of any value. The Court, at the instance of the lessee, declared that his interest had not been affected by the arbitration, and directed an inquiry as to damages sustained by him, and ordered the trustees to pay him his costs of suit.

The principal objection to land being taken for a school site was, that it was an orchard, but the facts shewed that the owner had only, after the selection was first spoken of, planted some trees which on the movement to take the land being stopped were suffered to die out; and these were renewed again on a subsequent movement of the trustees to take possession.

Held, that this was not such an orchard as should prevent the trustees from appropriating the land for school purposes.

At the hearing a decree was pronounced in favour of the plaintiff with costs generally, but on moving to vary the minutes statements and admissions in the answer were pointed out, to which the attention of the Court had not been drawn at the hearing, which would have enabled the plaintiff to have obtained the same decree on bill and answer. The Court varied the decree by directing that only such costs should be taxed as would have been incurred by a hearing on bill and answer.

Statement.

The bill in this cause was filed by *Stephen Johnson* against *The Trustees of Public School Section No. 1. in the Township of Howard*, from the statements of which it appeared, that the plaintiff was tenant of some land in the township, which the defendants had determined upon for the site of a school house, and his object in instituting the present suit was to prevent them from taking possession of it, and using it for the purpose of a school site, because as he alleged it was an orchard

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and could not lawfully be taken, and because the meeting at which the site had been decided upon was improperly called by the Inspector of Schools for East Kent, and not by the trustees of the school section.

The answer of the defendants denied that there was any orchard, setting forth that some fruit trees had been planted by the owner to give it the appearance of an orchard, and alleging that the plaintiff knew of the arbitration and made no objection thereto.

By the evidence and proceedings in the cause it appeared that *Elizabeth Wilson*, the wife of *Matthew Wilson*, became the owner of the land in question by virtue of a deed from her uncle on the 11th of July, 1861: that in 1873, the advantages of the site now in question were the subject of discussion among the inhabitants of the school section, and the trustees had applied to Mrs. *Wilson* or her husband for a site, which was refused; that no effectual steps were then taken to obtain it under the compulsory powers of the school law, and for the purpose of preventing it being so taken Mr. *Wilson* had a number of fruit trees planted so as to form an orchard, or what was to pass by that name. It also appeared that the intention to select this place for a site had at that time been abandoned and the trees so planted had been allowed to decay, or to be ploughed up, and only a very few—not more than ten—survived, three of which were produced at the hearing, of which the stems were about two or three feet high, which had been broken off, and they did not seem to be more than one or one and a half inches in diameter; that the subject was revived again, and was the subject of discussion at the annual meeting in January, 1875 (? 1876), when the trustees were directed to wait on Messrs. *Wilson* and *Desmond* (an adjoining owner,) for the purpose of selecting a new school site. But nothing seems to have come of this resolution, except to alarm the *Wilsons*, who in 1876 purchased and again set out a considerable number of

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fruit trees on the site: that on the 7th of September, 1876, the plaintiff obtained a lease of the property from *Matthew Wilson*, which had the approval of Mrs. *Wilson*, for a term of five years; and on the 21st of February, 1877, at a special meeting of the school section, it was resolved to select the site now in question; and on the 26th of March, 1877, the trustees gave notice to Mrs. *Wilson* and her husband that as she had refused to sell the same at a fair and equitable valuation ($200 had been offered), they had appointed an arbitrator for determining the damages which Mrs. *Wilson* would sustain by taking the land, and urging her to appoint an arbitrator; whereupon Mrs. *Wilson* complained to the Educational Department of these proceedings, and for some reason which did not appear the Deputy Minister of Education, in a letter to the School Inspector, in May, 1877, recommended him to call a special meeting to consider the whole question. The inspector, in pursuance of this recommendation, summoned a special meeting to be held on the 9th of June, 1877, for the purpose of reconsidering the question of the selection of the school site. He had asked the trustees to call it, but they declined, as they alleged they were disheartened with the failure to have the thing carried out, and the inspector then summoned it himself. This meeting by a large majority (25 to 5) approved of the site in question. On the 20th of October, 1877, the trustees offered $200 for the site to Mrs. *Wilson*, and in case she should refuse it they appointed an arbitrator, and required her to appoint another.

Mr. and Mrs. *Wilson* refused to appoint an arbitrator, or to recognise any thing done by the arbitrator appointed by the trustees and the school inspector, on the ground that the meeting of June should have been, but was not called by the trustees of the section.

The evidence further shewed that on the 29th of December, 1877, the arbitrator appointed by the trustees and the school inspector made their award, de-

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termining the compensation at $150, and on the 12th of February, 1858, a copy of the award was served on Mrs. *Wilson*, and the sum of $150 was tendered to her, which she refused to accept. It was also shewn that a copy of the award had been served on the plaintiff.

The cause came on for the examination of witnesses and hearing, at the sittings of the Court at Chatham, in the Autumn of 1878.

Mr. *Moss* and Mr. *Wilson* for the plaintiff.

Mr. *Boyd*, Q.C., and Mr. *Atkinson* for the defendants.

Jan. 6th.

PROUDFOOT, V. C.—[After stating the facts proceeded] I think the fair conclusion from the evidence is, that this was not an orchard within the meaning of such a thing as the statute intended to protect. The trees were stuck in the ground in 1873, when there was an apprehension the site would be selected, and when that passed away they were neglected, broken down, and ploughed up, and ceased to have even the semblance of an orchard till 1876, when again, upon a like fear, new trees were set out. If such a proceeding could claim the protection of the statute very few school sites would be obtainable. But whatever the true construction of the statute as applicable to such circumstances may be, I will assume in favour of the defendants that it would not protect this site as an orchard.

Judgment.

I will also assume in favour of defendants that the meeting was properly called by the inspector under the 37 Vic., ch. 28. sec. 112, sub-sec. 16, authorizing him to appoint in his discretion the time and place for a special school section meeting at any time for any lawful purpose; and indeed, supposing that the 5th title "settlement of complaints and differences," overrides all the clauses under it, including the sub-sec.

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16, I think there were such complaints as brought the power into operation, as the *Wilsons* had complained of the action of the trustees in the selection of the site.

The evidence is conflicting whether the plaintiff had notice of the intention to select this site when he took his lease, but upon a review of it I do not think it sufficient to establish that he had notice then. Whether it would have been of any importance or not I need not inquire.

But I think the defendants have failed to take the necessary steps to secure the expropriation of this land. The plaintiff became lessee of the property in September, 1876. An amendment to the School Act (40 Vic., ch. 16, sec. 3, sub-sec 4,) was passed on the 2nd of March, 1877, by which the expression "Owner" in the 37th Vic., ch. 28, was to include a mortgagee, lessee, or tenant, or other person entitled to a limited interest, and whose claims were to be dealt with by the arbitration therein provided, and the meeting at which the final resolution was taken was held on the 19th of June, 1877. It may perhaps be doubtful how this amendment is to be worked, and whether the landlord and tenant are each to appoint an arbitrator; but, however that may be, it is clear that the interest of the tenant is *to be dealt with* by the arbitrators, which must mean that his interest is to be valued, and the sum paid to him, or offered to him, before the compulsory sale of the property can be completed. Nothing of this kind was done. He was not asked to appoint an arbitrator, no notice of the arbitration proceedings was given to him, he had no opportunity of shewing the value of his interest, and the arbitrators award to him no sum for it, nor find it to be valueless.

Judgment.

Although I was impressed at the hearing with a strong conviction that *Johnson* was fighting this battle in the interest of the *Wilsons*, yet as the statute has pointed out the mode in which lands may be expro-

priated, and it is only by following that mode that a title can be had, and the defendants have not complied with it, I think the plaintiff entitled to a declaration that his interest has not been affected by the arbitration; and, if he desire it, an inquiry as to damages; and it must be with costs. 1879. Johnson v. School Trustees.

Subsequently, on the 11th of February, the defendants moved to vary the minutes of decree as settled.

Mr. *Boyd*, Q. C., in support of the motion, The only matter on which it is desired to vary the minutes, is as respects the costs, which it is contended ought to be apportioned. The plaintiff, at the hearing, relied on two grounds as entitling him to relief (1) that the place selected was an orchard, and (2) that the meeting at which the choice of this site was finally determined upon, had not been properly called; but on both grounds the Court was against the plaintiff's right, and only granted him relief in respect of any damages he could shew he had sustained. As to this the answer itself concedes the right of the plaintiff to recover damages, and the cause had been carried down to a hearing solely with a view of trying the question of orchard or no orchard. Argument.

Mr. *Moss*, contra. The defendants claim title to the land, and desire to arbitrate merely as to the plaintiff's interest therein. Their contention is, that the plaintiff had notice of the arbitration, and they seek now to bind his interests by the then existing award.

Mr. *Boyd*, in reply. By the 24th clause of the bill, the evident desire of the plaintiff is to invalidate the award that had been made, and that in the interest of the *Wilsons*. The right to all that the decree gives the plaintiff is conceded by the answer.

In respect of such issues as the defendants succeed upon, they are clearly entitled to a set-off of costs.

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March 5th.

PROUDFOOT, V. C.—At the hearing before me at Chatham, the question of costs was not discussed, and when I gave judgment it was under the impression that it was an ordinary case in which plaintiff had succeeded, and was therefore entitled to his costs.

On the motion to vary the minutes, several clauses of the answer, and of the bill, have been referred to as having a bearing on the question of the costs of the suit.

The bill claims the proposed school site as an orchard, and that a meeting of the school section was irregularly held. The greater part of the evidence was directed to these questions, and the inclination of my opinion on both points was in favour of the defendants, though it was not necessary to rest the decision on them.

But I was referred to some paragraphs in the answer which, had my attention been called to them earlier, would have saved a great deal of time, for section 17 admits that the award is defective in not awarding a special sum to the plaintiff for his interest. In section 19, the defendants submit that the plaintiff by his acquiesence, laches and neglect in not bringing his claim before the arbitrators, is not entitled to any relief as against the defendants other than for the damages to be assessed for his interest in said land, and the taking thereof by the trustees, and that his only remedy is before the arbitrator, or others to be appointed to arbitrate thereon, which the defendants are ready and willing to do, and have been ready and willing ever since they became aware that he had or claimed a substantial interest as tenant in the said land.

Judgment.

After such admissions I don't see that the plaintiff required any more evidence to obtain a decree. The award is admitted to be defective, and that the plaintiff should have had notice of the proceedings.

Both parties seem however to have thought it necessary to call witnesses on the question as to whether the

locality was an orchard or not, probably with a view to other proceedings.

The decree I have given might have been obtained by a hearing on Bill and answer; and though the plaintiff is entitled to costs, I think it should be such only as could be recovered on such a hearing.

Re Hirons—Foster v. Hirons.

Administration suit—Deficiency of assets—Costs.

Where there is a deficiency of assets in an administration suit, so that the claims of creditors cannot be paid in full, costs of proceedings which have been instituted for and have resulted in a benefit to the estate generally, will be ordered to be paid thereout, as between solicitor and client.

Hearing on further directions in an administration suit.

Mr. *Caswell*, for plaintiff, a creditor.

Mr. *Boyd*, Q. C., for the defendant, administratrix.

Mr. *Hoskin*, Q. C., for the infant defendants.

Mr. *W. Fraser*, for other creditors, asked that certain costs incurred by them in successfully resisting the claim of the administratrix to rank as a creditor of the estate for $10,000, might be ordered to be paid out of the estate as between solicitor and client, the estate being insufficient to pay the claims of creditors in full.

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BLAKE, V. C.—I think the principle on which *Thomas* v. *Jones*(*a*), and *Cross* v. *Kennington*(*b*), proceed applies here, and that the creditors should get as between solicitor and client any costs incurred by them in respect of any of these proceedings that have resulted in a general benefit to the estate.

FORRESTER v. CAMPBELL.

Mortgages.

The plaintiff was the holder of two mortgages, and in June, 1870, obtained a decree of foreclosure, whereby he was declared entitled to priority over one *F.*, who was the holder of a fourth mortgage thereon, and after the decree the plaintiff bought up the third mortgage, which was prior to that held by *F.*; and he had also, before the date of the decree, procured from the mortgagor a release of the equity of redemption.

Held, on appeal from the Master, following the decisions of *Barker* v. *Eccles*, ante vol. xviii., pp. 440-523, and *Hart* v. *McQuesten*, ante vol. xxii., p. 133, that the Master had correctly found the plaintiff entitled to priority over *F.* in respect of all the three mortgages.

Appeal from the Master at Stratford.

The facts are fully stated in the judgment.

Mr. *W. Cassels* and Mr. *Fisher*, for the appeal.

Mr. *Ferguson*, Q. C., contra.

SPRAGGE, C.—The plaintiff was at the date when he obtained his decree, the 22nd of June, 1870, the holder of two mortgages, in both of which one *Gilbert McIntosh* was mortgagor, a third and subsequent mortgage was at that date held by *John Campbell*, and a fourth mortgage

(*a*) 1 Dr. & Sm. 134. (*b*) 11 Beav. 89.

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subsequent to the *Campbell* mortgage was held by the defendant *Duncan Fisher*. Before the date of the decree, *i. e.*, the 25th of July, 1868, the plaintiff had acquired from the mortgagor a release of his equity of redemption for the expressed consideration (which appears to have been actually paid) of $100. The mortgage *McIntosh* to *Campbell* bears date the 20th July, 1867, and was assigned to the plaintiff the 14th of March, 1872.

The decree while declaring the two mortgages then held by the plaintiff entitled to priority over that held by *Fisher* is silent as to the *Campbell* mortgage; and this I apprehend is to be accounted for by the circumstance of the decree being drawn up after the plaintiff had acquired an assignment of that mortgage; I infer this from seeing it noted at the foot of the decree that it was entered the 10th of June, 1874.

The Master by his report has given priority to the plaintiff as well in respect of the *Campbell* mortgage as of the two prior mortgages held by him; and this is now objected to by *Fisher* on the ground that it was the duty of the plaintiff, having acquired the equity of redemption, to pay off the *Campbell* mortgage instead of taking an assignment of it to himself, and holding it in priority to his, *Fisher's*, mortgage. [P.] Judgment.

The contention is, that the Act (Consol. Stat. U. C., ch. 87,) does not apply, where, as in this case, the equity of redemption was acquired by a mortgagee, and he subsequently acquired an assignment of a subsequent mortgage; that it only applies to mortgages held by him at the time of his acquiring the equity of redemption.

This was precisely the ground upon which Mr. Justice *Gwynne* dissented from the majority of the Court, in *Barker* v. *Eccles* (*a*), on appeal. The judgment of the majority of the Court being that the statute does apply in such a case. This case was referred to with approbation and followed in *Hart* v. *McQuesten* (*b*) in appeal.

(*a*) 18 Gr. 523; *Ib.* 440; (*b*) 22 Gr. 123.

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The point raised by this appeal is therefore concluded by authority, and the objection must be over-ruled.

There are some other objections on minor points, but I have noted at the end of the argument—which was the reply of *Fisher's* counsel—that if plaintiff succeeds upon the first objection (the one I have been considering,) the others become immaterial, I suppose, because *Fisher* would not redeem in case of the *Campbell*, as well as the two earlier mortgages being allowed against him. I have, therefore, of course not considered the other objections.

GIBBONS v. McDOUGALL.

Sale under mortgage—Default in payment—Notice of sale.

Where a power of sale in a mortgage provides that after default of payment for a month, and a month's notice of sale, the mortgage premises may be sold, the month's default and notice of sale cannot run concurrently.

THIS was a motion to restrain the defendant from selling certain goods and lands under the following circumstances. The defendant was mortgagee of the lands in question under a mortgage made by one *James McNab*, which contained a power of distress and a power of sale in the event of default of payment for a month on giving a month's notice of sale. As to the goods, it appeared that default having been made, a distress warrant issued, and the defendant's bailiff proceeded to execute it on the mortgaged prem-

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ises, but at the request of *McNab* he desisted, and seized in lieu of goods on the property certain other goods in an adjoining building. Subsequently, and before sale of these goods, *McNab* became insolvent, and the plaintiff was appointed assignee.

Mr. *Boyd*, Q.C., in support of the application, contended that the goods not being on the mortgage property, were not liable to distress under the mortgage; but that, at all events, if defendant had any right under the distress, he must prove it in the insolvency proceedings. As to the land, he contended that the sale was premature, that the mortgage provided there must be a month's default, and after that a month's notice of sale.

Mr. *Spencer*, contra, contended that the plaintiff had no greater right than *McNab*, and that he was estopped by his own conduct from disputing defendant's right to distrain on the goods in question. He also contended that the month's default and the month's notice of sale might run concurrenly; but

BLAKE, V. C., was of opinion that they could not, and that no proceedings for sale could be taken until after the expiration of the month's default; and he accordingly restrained the sale of the land, but without prejudice to defendant selling on proper notice being given; and as to the goods, he directed that plaintiff should be at liberty to sell them without prejudice to any lien the defendant might have for payment of his claim out of the proceeds.

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Fraudulent assignment—Pleading—Practice—Liberty to move.

Held, affirming the judgment of *Blake*, V. C., that the plaintiffs were not at liberty to rely on a judgment at law recovered since the filing of the bill, for the purpose of setting aside an assignment of a claim as fraudulent, but must stand on their position as creditors when the proceedings were instituted in this Court.

Held, also, that the debt alleged in the bill being under a bond to *Merrick's* wife and not to *Merrick* himself, was not such a claim as could be garnished under the C. L. P. Act.

Held, also, [on rehearing, affirming the ruling of *Blake*, V. C.,] that where costs of interlocutory motions were reserved "until the hearing or other final disposition of the cause," and on a demurrer being allowed, the order drawn up directed the plaintiff to pay the costs thereof, "together with the further costs of this cause, forthwith after taxation thereof;" that whether or not such interlocutory costs would fall within the definition of further costs in the cause, the omission to provide for them in the order allowing the demurrer was "a mere mistake;" and that under the general order 186 the parties had a right to apply without liberty for that purpose being reserved. *Viney* v. *Chaplin*, 3 DeG. & J. 281, considered and acted on.

Statement.

This was a suit instituted by *St. Michael's College* against *Jeremiah D. Merrick*, *Sarah Merrick*, *Alexander Manning*, and *The Federal Bank of Canada*, to enforce payment of a debt due to the plaintiffs by the defendant *J. D. Merrick*, the facts of which are fully set forth in the report of the case in appeal in the first volume of Mr. *Tupper's* Appeal Reports, page 520. After the judgment on demurrer there reported, the plaintiffs, under an order of this Court, amended their bill by alleging that the defendant *Alexander Manning* had executed in favour of the defendant *Sarah Merrick* a bond for $4,560, being a debt due from *Alexander Manning* to *Jeremiah D. Merrick*, for the fraudulent purpose, as stated, of preventing the plaintiffs from attaching said debt; and charging that such bond was fraudulent against the plaintiffs, and should be declared void.

It was further alleged, that since filing their bill in

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this suit, the plaintiffs had recovered judgment against *Jeremiah D. Merrick* at law, and had issued execution against his goods, and had also obtained an order attaching the debt from *Alexander Manning* to *Jeremiah D. Merrick*, but that by reason of the fraudulent creation of the said bond to *Sarah Merrick*, the attaching order could not be made absolute. The amended bill prayed that the said bond might be declared fraudulent and be set aside.

A demurrer for want of equity was allowed by *Blake*, V. C., on the ground that the plaintiffs were concluded by the judgment of the Court of Appeal, above referred to. The plaintiffs thereupon reheard the order, allowing the demurrer, before the full Court on the 25th February, 1878.

Mr. *Donovan* and Mr. *W. Cassels*, for the plaintiffs.

Mr. *O'Donohoe*, for the defendants *Merrick*.

SPRAGGE, C.—At the date of the filing of this bill the plaintiffs had not recovered judgment against their debtor, *J. D. Merrick;* they had therefore no *locus standi* for the taking of proceedings under the garnishee clauses of the Common Law Procedure Act. See cases cited in *Boyd* v. *Haynes* (*a*). The subsequent recovery of judgment does not give a *locus standi* by relation: *Pilkington* v. *Wignall* (*b*), *Attorney-General* v. *Reeve et al. of Avon* (*c*).

Judgment.

But if the plaintiffs had a *locus standi* they would only have one difficulty the less to encounter; for it has been decided by the Court of Appeal in *Gilbert* v. *Jarvis* (*d*), following the judgment of the Master of the Rolls in *Horsley* v. *Cox* (*e*), that the Common Law Procedure

(*a*) 5 Prac. Rep. 15.
(*b*) 2 Madd. 238.
(*c*) 11 W. R. 1050.
(*d*) 16 Gr. 265, 277.
(*e*) L. R. 4 Chy. 92.

1879. Act applies only to the case of legal debts due to the execution debtor.

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The bill as amended in this case differs only from the case as it stood in the Court of Appeal (*a*) by the introduction of an allegation that the defendant *Manning* has executed a bond for the payment of $4,560, being the balance of the sum of $10,000 agreed to be paid by *Manning* for the share theretofore held in the name of *Sarah* or for *Sarah Merrick*, of the partnership in the bill mentioned; but that bond is not to the plaintiffs' debtor, *J. D. Merrick*, but to his wife *Sarah Merrick*, so that it is not a legal debt due to the plaintiffs' debtor, and therefore is not exigible under garnishee proceedings.

The point appears to be concluded by *Gilbert* v. *Jarvis* and *Horsley* v. *Cox*, and I find nothing in the reported judgment in Appeal in this case even intimating the existence of a different opinion.

Judgment.

It is to be regretted, I think, that such a case of fraud as is disclosed in this bill cannot, from the terms of the Common Law Procedure Act, as interpreted in the cases I have referred to, be reached in this Court. It may be that the case is incapable of being established in evidence, but as the law stands, were it established ever so clearly, the creditor is without remedy.

In my opinion my brother *Blake* could not, the authorities being as they are, do otherwise than allow the demurrer.

BLAKE, V. C.—The plaintiffs cannot rely on the judgment at law recovered since the filing of the bill, but must stand on their position as creditors when proceedings were commenced in this Court. Treating the plaintiffs as simple contract creditors of the defendant *J. D. Merrick*, it appears to me that the Court of Appeal has disposed of the questions argued before us. In that Court *Hagarty*, C. J. C. P. says, "It seems in

(*a*) 1 App. Rep. 520.

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substance the same as if the wife's name be dropped altogether, and that *Manning* is at a future day to pay the defendant in the action a large sum of money, and the Court is asked to intervene, and intercept or delay that payment, and have it made available to pay the expected judgment. I do not see how the Court could entertain such a claim. * * The claim against or to be paid by *Manning*, is treated throughout as really due to *Merrick*, though nominally or colourably to his wife. I think there is no jurisdiction to interfere."

Burton, J, A., thus states the nature of the case. "This is a bill filed by the creditors of *Merrick* generally, or, which is the same thing, by the plaintiffs on behalf of themselves and all other creditors, not only against the defendant *Merrick*, but against his wife, *Alexander Manning* and *The Federal Bank of Canada*, with the view of impeaching a transaction alleged to be fraudulent." And he thus deals with such a bill: "It was not necessary that the plaintiff should be a judgment creditor for the purpose of filing a bill to set aside a conveyance executed for the purpose of delaying, hindering, or defrauding creditors, but the conveyance must be o f property liable to creditors. A transfer or settlement of property which creditors cannot get at, puts no property out of their reach, and cannot be fraudulent against them. The interest of *Merrick* in the contract was not an asset which his creditors could attach in any way, or by any process, legal or equitable for setting aside the transaction, whatever it may have been (for it does not very clearly appear what it was), whereby that interest vested in his wife. Not being a judgment creditor, there is no foundation laid for that portion of the prayer of the plaintiffs' bill which seeks for equitable execution against the moneys in *Manning's* hands, but *Horsley* v. *Cox* (*a*) appears to be a clear authority against such a bill being sustained."

Judgment.

(*a*) L. R. 4 Ch. Ap. 93

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Moss, C. J. says, "The allegations in the bill with respect to the obligation which *Manning* has assumed, are by no means precise or specific. In one aspect it seems to be treated as a demand against him on account of the partnership. It is beyond question that if this be its character it cannot be reached by a bill in Equity at the suit of a creditor. In another aspect it seems to be treated as a debt due in reality from *Manning* to *Merrick*, although nominally to Mrs. *Merrick*. If this be its character, the case is governed by the decision in *Horsley* v. *Cox* (*a*), which has been followed by this Court in *Gilbert* v. *Jarvis* (*b*). If this bill were sustainable there would seem to be nothing to prevent a person from filing a bill against one whom he alleged to be his debtor, and any number of persons who were indebted to him, for the purpose at once of establishing his claim against his debtor, and attaching the debts due to him. For such a bill I know of no sanction either in legislative enactment or judicial decision, nor any authority either direct or inferential.

Judgment.

The amended bill alleged that subsequent to the filing of the bill the plaintiffs received notice that the defendants the *Federal Bank* claim an interest in or lien on the bond of the defendant *Manning*, given to Mrs. *Merrick* to assume payment of the said purchase money. No further description of the bond is to be found in the bill. There is no distinct or direct allegation that such a bond was given by *Manning*; if under some conceivable state of facts the existence of a bond might give the plaintiffs a right to equitable relief, it is clear upon familiar rules of pleading that the defendants should not be required to answer a statement so meagre, uncertain, and inconclusive."

It is clear that the Court of Appeal consider that the recent enactments in Ontario do not affect the case of *Horsley* v. *Cox*. We are bound to follow this conclu-

(*a*) L. R. 4 Ch. 92. (*b*) 16 Gr. 265.

sion, and so long as it stands I do not think we can give the plaintiffs the relief they ask. I still consider that we are bound by the judgments already given in this case, and that following them the demurrer must be allowed, and this appeal dismissed, with costs. 1879. St. Michael's College v. Merrick.

PROUDFOOT, V. C.—I think it is not competent for the plaintiff to amend his bill by stating a judgment, if a necessary constituent of his right of suit, which was recovered after the filing of the bill. The case of *Pilkington* v. *Wignall* (*a*), which is cited as still law in the latest edition of *Daniell's* C. P., seems to determine this clearly, and the plaintiffs' counsel, in expressing his willingness to abandon that statement, was only doing what he could not well avoid.

Upon the other branch of the case, which places the plaintiff s' right to sue as a creditor under the statute of Elizabeth, were it not for the judgment in Appeal in this case, there might have been scope for argument. It is true that when the case was before the Court of Appeal there was no allegation, or no sufficient allegation of the execution of the bond; and the remarks of the Court may be open to the objection that they were not necessary for the decision. But, however that may be, when the learned Judges of that Court took the trouble of construing the statute, and expressing their opinion on what the result ought to be, if the case were amended as it now is, for the guidance, as I must assume, of the inferior tribunals, I do not think it expedient to express any opinion upon the matters discussed in the argument before us, except to say that they seem to have been anticipated and disposed of in Appeal, and that if the plaintiffs think they can distinguish it by the matters introduced by amendment, they must do so by a recourse to that Court. Judgment.

The decree should be affirmed.

(*a*) 2 Madd. 238.

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Subsequently, and on the 19th November, 1878, Mr. *O'Donohoe*, for the defendants *Merrick*, moved upon notice to an order to amend the order drawn up on allowing the demurrer, by directing payment by plaintiffs of certain interlocutory costs incurred in the course of the suit, and which were not expressly provided for by such order.

Mr. *Donovan*, contra.

Judgment.

BLAKE, V.C.—There were some interlocutory motions made in this case which resulted in the order of June, 1877, which reserved the costs of those applications until the hearing or other disposition of the cause. When the order was made allowing the demurrer filed by *Sarah Merrick*, the Court was not asked to include these costs, to which the present applicant was clearly entitled. I think the defendant should have these costs, and that the omission to have them inserted in the order finally disposing of the case cannot preclude the Court from now so modifying the order as to make it embrace such costs. *Viney* v. *Chaplin* (*a*), is authority for giving the costs, although omitted in the order finally disposing of the cause.

It has been agreed to by all parties that *Manning* should have his costs, and the only point in reference to them now is, whether the plaintiffs or *Sarah Merrick* should ultimately bear them, they, in the meantime, having been paid out of the fund which *Manning* held, and deposited in Court under the order obtained in his favour when the action brought against him was stayed.

The result of this suit has been to find the defendant *Sarah Merrick* entitled to the money in question. This fund has been diminished by the costs allowed to *Manning* the stakeholder. There is nothing in this case to interfere with the ordinary rule which gives to the successful party, along with his own costs of suit,

(*a*) 3 Deg. & J. 1,

the costs of the stakeholder, which have in the meantime been taken out of the fund which is going to the applicant. As the first branch of this application is rendered necessary by the omission of *Sarah Merrick* to have inserted in the order the necessary direction as to costs, I give no costs of this motion to either party. 1879. St. Michael's College v. Merrick.

The plaintiffs thereupon reheard that order before the full Court on the 21st February, 1879.

Mr. *Donovan*, for the plaintiffs.

Mr. *Haverson*, for Mrs. *Merrick*.

SPRAGGE, C.—This rehearing is of so much of an order of the 12th and 21st days of November, 1878, as directs the payment to defendant *Sarah Merrick* of the costs reserved under order of 30th June, 1877. No other part of the order of November is objected to. Judgment.

The order of 30th June was made upon two motions, one by the defendant *Sarah Merrick* for payment to her of money out of Court, the other by the plaintiffs for leave to amend, and the costs were reserved "until the hearing or other final disposition of this cause."

By order of 31st October, 1877, the demurrer of the defendants, the *Merricks*, to the re-amended bill was allowed with costs, "together with their further costs of this cause forthwith after taxation thereof."

It may be a question whether the costs in question would fall within the definition of further costs in this cause; but assuming that they would not, the omission to ask that they should be provided for in the order allowing the demurrer, was, what is called by Lord *Chelmsford* in *Viney* v. *Chaplin* (*a*), "a mere mistake." In that case a new order was made, under the liberty to apply given by an order giving to the plain-

(*a*) 8 DeG. & J. 281.

1879.

St. Michael's College v. Merrick.

tiffs the costs in the cause. By our general order 186, a party has a right to apply without liberty to apply being reserved to him, so that the defendants are here in the same position as were the plaintiffs in *Viney* v. *Chaplin*. The liberty to apply in that case was general, "to apply as they may be advised."

In the subsequent case of *Kendall* v. *Masters* (*a*), relied on by the plaintiff, Lord *Campbell* was informed by the Registrar that a general liberty to apply would not extend to an application for costs. *Viney* v. *Chaplin* was not cited; but still what Lord *Campbell* did was not to disallow the costs, but to give liberty to apply for them. *Viney* v. *Chaplin*, which was before the Lord Chancellor and the Lords Justices, is clear authority for the order that was made in this cause; and would be so if upon the allowance of the demurrer nothing had remained to be done in the cause but the taxation of the costs of the cause. But other questions did remain to be disposed of; there were the costs of defendant *Manning* in this Court and at law, and certain interest to be paid by *Manning* in respect of money paid by him into Court; and upon such payment the dismissal of the bill as against him, so that the final disposition of the cause, to which or to the hearing the costs of the application of the 30th June, were reserved was not made by the order on demurrer, but was made by the order of November, 1878. I am quite clear that upon both grounds the order for costs contained in that order was right.

Judgment.

BLAKE and PROUDFOOT, V.CC., concurred.

Per Curiam—Order affirmed, with costs.

(*a*) 2 F. & J. 200.

1879.

BREEZE v. THE MIDLAND RAILWAY COMPANY.

Mechanic's lien—Railway company—Sale of railway lands.

This Court will not direct the sale of lands required for the use of a railway company, to enforce the payment of a mechanic's lien for work done on the property: in such a case the decree will only be for payment of the amount found due, with costs.

THIS was a bill to enforce a mechanic's lien for work done upon a station house of the defendants the railway company. The cause was heard *pro confesso*.

Mr. *A. Hoskin*, for the plaintiff, moved for a decree in the usual terms, to enforce the lien by a sale of the land on which the house in question had been erected.

BLAKE, V. C.—I do not think that you are entitled to that relief as against the land of a railway company required for the purpose of their railway. The only decree I can make is one for the payment of the amount due, with costs.

1879.

McGibbon v. North Simcoe Railway Co.

Railway Act—Arbitration to determine value of land taken for railway purposes—Notice of application to County Judge to appoint arbitrator.

The provisions of the Railway Act, R. S. O. ch. 165, apply as well to cases where a sole arbitrator is appointed by the Judge, as where the owner names an arbitrator on his own behalf, to value lands taken for railway purposes. Therefore, where the owner had omitted to name an arbitrator, and a sole arbitrator was appointed by the Judge of the County Court, without notice of the intended application for his appointment having been given to the owner, and the arbitrator proceeded to ascertain the amount of compensation to be paid by the company:

Held, that the owner was not bound by the act of the arbitrator so appointed, and restrained the company from proceeding with their works on the land until a proper application was made upon notice.

Motion for injunction to restrain the defendants from proceeding to complete their railway over certain lands owned by the plaintiff, of which the company had taken possession under the compulsory powers conferred by the Act, on the ground that no notice had been given to the plaintiff of the intention of the company to apply to the Judge to name a sole arbitrator under the provisions of the statute, to determine the amount of compensation to be paid by the company to the plaintiff.

Mr. *D. McCarthy*, Q. C., and Mr. *Rye*, for the plaintiff.

Mr. *Lount*, Q. C., contra, insisted that the plaintiff having omitted to avail himself of the provisions of the statute by naming an arbitrator to act in the matter, had waived his right to any notice of proceedings to be taken before the Judge, and that under these circumstances the arbitrator named by the Judge could also proceed *ex parte*.

1879.

McGibbon v. North Simcoe R. W. Co.

BLAKE, V. C.—By sub-section 4 of sec. 20 of cap. 165, Rev. Stat. O., it is enacted that, "If within ten days after the service of such notice or within one month after the first publication thereof as aforesaid, the opposite party does not notify to the company his acceptance of the sum offered by them, or notify to them the name of a person whom he appoints as arbitrator, then the Judge shall, on the application of the company, appoint a sworn surveyor for Ontario, to be sole arbitrator for determining the compensation to be paid as aforesaid." Sub-section 16 of the same section of the Statute enacts, that "The surveyor or other person offered or appointed as valuator or as arbitrator, shall not be disqualified by reason that he is professionally employed by either party, or that he has previously expressed an opinion as to the amount of compensation, or that he is related or of kin to any member of the company, provided he is not himself personally interested in the amount of the compensation; and no cause of disqualification shall be urged against any arbitrator appointed by the Judge after his appointment, but the objection must be made before the appointment, and its validity or invalidity shall be summarily determined by the Judge." By sub-section 4, the sworn valuator to be appointed is styled "arbitrator." In sub-sec. 16, it is stated, "No cause of disqualification shall be urged against any arbitrator appointed by the Judge after his appointment."

Judgment.

I cannot limit these words "any arbitrator," to arbitrators other than the "sole arbitrator," in case of non-appointment by the land owner. It is plain that an opportunity of objecting must be had as the clause winds up with the statement, "the objection must be made before the appointment, and its validity or invalidity shall be summarily determined by the Judge." In order to allow this opportunity to the land owner notice of the application must be given to him. It was not done in this case, and therefore the

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McGibbon v. North Simcoe R. W. Co.

act of the arbitrator, appointed without notice, does not bind the plaintiff. He is entitled to an injunction. The order need not issue for a week, within which time if the Railway Company deposits in Court $1,500 to answer any claim the plaintiff may establish against it, no writ of injunction need issue.

HOLMES v. WOLFE.

Will, construction of—Devisee for life—Repairs by tenant for life—Intestacy as to personalty not specifically bequeathed.

A tenant for life is bound to keep the premises in repair; and the Court will not apply the undisposed of personalty in effecting such repairs.

The fact that the tenant for life (the widow) has not the means of making the repairs, and that the premises are deteriorating in consequence of non-repair, are proper matters for trustees with power of sale to take into consideration in determining whether or not they will sell.

The testator directed all his just debts, &c., to be paid; and devised and bequeathed to his wife for life, his real estate, and his "household furniture, plate, linen, and china." After her decease, he gave the proceeds of the sale of the land, and also all and singular the residue of his personal estate that might be in her possession at the time of her decease, to other parties:—*Held*, that there was an intestacy as to all the personalty not specifically bequeathed to the wife.

Hearing on further directions.

Mr. *Arnoldi*, for the plaintiff.

Mr. *W. Cassels*, for the defendants.

1879.

Holmes v. Wolfe.

PROUDFOOT, V.C.—The testator, after directing all his just debts, &c., to be paid, devised, and bequeathed to his wife for life his real estate, and his "household furniture, plate, linen, and china." From and after her decease, he gave and bequeathed the proceeds of the sale of the land, "and also all and singular, the residue of my personal estate that may be in the possession of my dear wife at the time of her decease," to other relatives. He then devised the land to *Wolfe*, *Leslie*, and *Moore*, their heirs, &c., upon trust to hold and dispose of the said trust estate at such time and in such a manner after the decease of his wife, or with her consent during her life, as might seem advantageous for the interest of those to whom he had bequeathed the proceeds of his estate, and they were to give good titles, &c. And he appointed these trustees his executors.

The testator had no children. The plaintiff was his widow. He had other personal estate than that specifically given to the wife.

Judgment.

The report finds that there were no specific bequests, which is clearly erroneous. It also finds that there was personal estate not specifically bequeathed $1,319.61, with which the executors are chargeable. It also finds that there is personal estate outstanding to $435.86. It is said this latter sum is included in the $1,319.61; if so, the report will have to be corrected in this respect also. The report does not shew the nature of the personal estate, but it is clear that part of it, promissory notes still outstanding, was not included in the specific bequest. If the parties cannot agree on these points, the report will have to be referred back.

The bill is filed by the wife, claiming that she is either entitled to a life estate in the whole personalty, or that there is an intestacy as to the personalty other than the specific bequest, and that as widow she is entitled to one-half.

It was argued that from the bequest to the other relatives after the death of the wife, these relatives

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being also next of kin, that a life-estate in the wife would be implied. The facts do not call for any decision on this point, for the wife has an express life-estate in all the personalty that is affected by the bequest to others after her death.

I think that there is an intestacy as to the beneficial interest in all the personal estate not included in the specific bequest to the wife. The appointment of executors is sufficient to pass the property to them, which, if not otherwise disposed of, they will hold for the next of kin. The testator makes a specific bequest to his wife of furniture, plate, linen, and china. After her decease he bequeaths the residue of the personal estate in her possession at the time of her death to others. The obvious meaning of this is, the residue of all that remained of what he had bequeathed to her, all of which she rightfully had the possession. All the personal property not included in the specific bequest passed to the executors by virtue of their appointment,

Judgment.

and it could not be contemplated by the testator as getting into her possession by some arrangement with the executors to which he had given no sanction, and for which he had made no provision.

The plaintiff will therefore be declared to be entitled to half of the undisposed of personal estate.

As to the real estate, the trustees are vested with a discretion as to the time of sale, with which I cannot interfere upon any statements in this bill. There is no charge of misconduct of any kind. They have the power to sell during the plaintiff's life with her consent, but they are not bound to do so.

The realty passing by the will consists of two parcels, one of fifteen and a quarter acres, the other of one-eighth of an acre, the latter in the village of Kemptville. It is said there is a small framed dwelling-house on the land which is greatly out of repair, and that the fences also are much out of repair. The plaintiff says she is unable to make the repairs, and the lands are not.

productive and greatly deteriorating, and asks that the trustees may apply the undisposed of personalty for that purpose.

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However much I might desire to assist the plaintiff, it is not in my power to give any such direction. As tenant for life she is bound to keep the premises in repair, and I cannot take the property to which others are entitled to do what the law says she should do herself. The circumstances of the plaintiff, and the condition of the property, are very proper matters for the defendants to take into consideration, in determining whether they will sell or not, as it might be more advantageous to sell than to suffer the property to become ruinous.

Judgment.

With these declarations the parties will be able to prepare the minutes.

1879.

CARTER v. CARTER.

Practice—Personal liability of devisee—Devise subject to annuity.

Where a devise of real estate is made subject to the payment of an annuity, and the devisee accepts the devise, he will be deemed to have assumed a personal liability to pay the amount, which will be enforced by this Court.

Motion to vary minutes of decree.

Mr. *Howard*, for the defendant, moved to vary the minutes of the decree under the following circumstances. The bill had been filed by the plaintiff to recover payment of an annuity charged upon certain land, of which the defendant was devisee subject to payment of the annuity. The decree, as settled, contained a personal order for payment of the annuity by the defendant, and counsel contended that the annuity was only a charge upon the land, and that there was no personal liability on the part of the defendant for its payment.

Mr. *Hoyles*, contra.

BLAKE, V. C., held that the defendant, by accepting the devise, assumed a personal liability to pay the annuity, and therefore refused the motion, with costs.

1879.

REES v. FRASER.

Legacy to infant—Loco parentis—Residue—Next of kin—Maintenance.

A testator bequeathed $4,000 to his grandson, payable on his attaining twenty-one, and in case of his death before that period, the amount was to revert to the residuary estate, and it had been decided (*ante* vol. XXV., page 253) that in the events that had happened the grandson was absolutely entitled to one-half of the residuary estate, the income of which was amply sufficient for his maintenance.

Held, that although the testator had been *in loco parentis* to the infant, the infant was not entitled to claim interest on the legacy for his maintenance; but that being entitled to one-half of the residue as next of kin, and there being a *quasi* intestacy as to the interest on the legacy, one-half of it should be paid into Court to the credit of the infant; the legacy itself to be paid into Court upon the trusts of the will.

The facts of this case sufficiently appear from the report of the case, *ante* vol. XXV., page 253, and in the judgment.

Hearing on further directions.

Mr. *Walkem*, for the plaintiff.
Mr. *G. M. McDonell*, for the executors.
Mr. *Hoskin*, Q. C., for the infant defendant.

PROUDFOOT, V. C.—Mr. *Hardy*, the testator, bequeathed a legacy to his grandson, the defendant, of $4,000, to be paid when he attained twenty-one years of age, and if he should die before he attained that age the sum bequeathed to him was to revert to the testator's residuary estate. All the remainder of his estate, real and personal, he gave to his wife for life, and on her decease it was to go to his heirs and next of kin. It has been decided that under the residuary devise, the wife having died, the grandson is entitled to one-half of the estate: *Rees* v. *Fraser* (*a*). The grandson

(*a*) 25 Grant, 253.

1879.

Rees v. Fraser.

is still an infant. No provision is made by the will for his maintenance.

It appeared upon the evidence that the infant's father has never been in circumstances to enable him to maintain the infant. The child was born in the testator's house; resided with and was maintained by him till his death, and by the widow till her death. I think the reasonable conclusion, from all that appeared as to the relationship and circumstances of the parties, is, that the grandfather meant to put himself in the situation of the lawful father of the child, with reference to the father's duty of making a provision for the child: 2 Wms. Exors., 6 ed. 1241.

The question now is, if the legacy of $4,000 carries interest. The general rule, where the time for payment is fixed by the testator, is, that general legacies do not bear interest before the arrival of the time for payment; and it makes no difference whether the legacy be vested or contingent. The rule, however, is subject to an exception in case of the testator being the parent, (or *in loco parentis*), of the legatee: for there, whether the legacy be vested or contingent, if the legatee be not an adult, interest on the legacy shall be allowed as a maintenance, from the time of the death of the testator, *if there is no other provision for that purpose* (*a*). If the infant have other property of his own, sufficient for his maintenance, I apprehend he can have no right to interest upon this contingent legacy, which only bears interest *when necessary* for maintenance (*b*).

Judgment.

Here there was no provision made for the maintenance of the infant, and the testator was *in loco parentis* of the infant. If the circumstances of the infant require it I think, therefore, that the legacy would bear interest from the testator's death. But while the grandmother lived the infant was maintained by her, and I assume no charge was made by her on that

(*a*) 2 Wms. Exrs. 6 ed. 1323, 1324. (*b*) Chamb. Inf. 301.

1879.

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account. It was not necessary to resort to the interest for maintenance. If in taking the accounts it is found that the infant has been charged by her with the expense of maintenance, then interest will be allowed, otherwise not.

After the death of the grandmother, when the estate became divisible, and has in fact in this suit been divided, the infant became absolutely entitled to half of the estate, not subject to any contingency, nor liable to be divested in case of his not attaining twenty-one, and as I understand the income of this share is amply sufficient for his maintenance, and is, besides, derived from the testator himself, I do not think he can claim interest upon the legacy which may never be his, and which is not required to maintain him: *Haughton* v. *Harrison*. (*a*).

The legacy will be paid into Court upon the trusts of the will, and the half of the interest will be carried to account of the infant, and the other half paid to the plaintiff. The infant's share of the residue will be paid into Court to his account, and the income, or so much of it as may be necessary, applied for his maintenance.

Judgment.

I think the interest of the legacy should be apportioned in that way, because there is no disposition of it in the will, and to that extent there is a *quasi* intestacy, and the plaintiff and defendant being the next of kin under the statute, would take it equally.

(*a*) 2 Atk. 330.

1879.

McKay v. Ferguson.

Tax sale—List of lands liable to sale—Setting aside sale.

Where a township treasurer had neglected to furnish the clerk of the municipality with a list of lands liable to sale for taxes, and no such list or copy thereof was delivered to the assessor as provided by section 108 of ch. 180, R. S. O., and by reason thereof a lot worth $1,500 or $1,600 had been sold for $5.53, taxes due thereon, the Court, on a bill filed impeaching the sale, set it aside, with costs, less the amount of taxes paid with interest thereon, and the expenses attending the purchase.

This was a bill filed by *George McKay* against *Thomas A. Ferguson*, seeking to set aside a sale of a parcel of land in the Township of Innisfil, under the circumstances appearing in the judgment.

Mr. *D. McCarthy*, Q. C., for the plaintiff.

Mr. *W. McDonald*, for the defendant.

Judgment.

Blake, V.C.—On the 30th January, 1875, the County Treasurer prepared the list required by sec. 108 of cap. 180, R. S. O.; and on the same day he transmitted it to *Benjamin Ross*, as Clerk of the Municipality in which the lands were situated. Mr. *Ross* had, on the 21st of the same month, ceased to be Township Clerk, but retained the office of Treasurer of the Municipality, and on or about the 4th of June, 1875, he prepared the list contemplated by sec. 111 of this Act, which he signed, "*Benjamin Ross*, Township Treasurer." This must have been sent to the County Treasurer, as in its margin are found in pencil the following words:—

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"Mem., as this return should be signed by the Township Clerk, will you please sign it as such, and return to

Yours truly,

S. M. SANDFORD,
Assistant Treasurer, County Simcoe.

To BENJAMIN ROSS,
Township Clerk, Innisfil."

The pen was thereupon run through the words, "*Benjamin Ross*, Township Treasurer," and the words "*Charles Palling*, Township Clerk," were appended to the paper. At this time *Charles Palling* was, as he had been since 21st January, 1875, the Township Clerk. In 1875 the lands were occupied, as they had been for some years previous, by one *Alexander Frazer*, who had been assessed therefor, and had paid the taxes for these years on the lot in question. When the Township Clerk received this list he was bound under sec. 109, (*a*) "to keep the said list, so furnished by the Treasurer, on file in his office, subject to the inspection of any person requiring to see the same," and (*b*) "to deliver to the assessor or assessors of the municipality, in each year, as soon as such assessor or assessors are appointed, a copy of such list," and when the assessor returns the lists to the clerk he is (*c*) "to file the same in his office for public use;" whereupon certain proceedings are to be taken for altering and correcting the rolls, advising the County Treasurer thereof, and collecting the taxes in arrear. The assessor was bound under sec. 109, (*a*) "to ascertain if any of the lots or parcels of land contained in such lists, are occupied or are incorrectly described," and (*b*) "to notify such occupants and also the owners thereof, if known, whether resident within the municipality or not, upon their respective assessment notices, that the land is liable to be sold for arrears of taxes, and enter in a column, (to be reserved for the purpose) the words, 'occupied and notified,' or 'not occupied,' as the case may be;" and (*c*) "to sign and return

Judgment.

1879.

McKay v. Ferguson.

all such lists to the clerk with a memorandum of any error discovered therein." By sec. 110 the assessor is *(d)* "to attach to each such list a certificate signed by him and verified by oath or affirmation." All that we can find as actually done in the present instance was the making of the return above mentioned. There can be but little doubt that if the proceedings set forth above had been taken the $5.53 due for taxes would have been paid, and the premises, shewn to be worth $1,500 or $1,600, would not have been sold. I am not prepared to say, if the list had been furnished to the Township Clerk, and he had returned it, or if the return were all the Clerk had to make, that the plaintiff could successfully impeach this sale. But here, the list not having been sent to the clerk, the question arises whether the person seeking to uphold the sale should not shew that all the requirements of the Act have been complied with, in order that the Court may be convinced that nothing has been left undone which the statute demands, to warn the owner of the taxes in arrear, and of the result of non-payment. By sec. 130, "The Treasurer shall not sell any lands which have not been included in the lists furnished by him to the clerks of the several municipalities in the month of February, preceding the sale." In the present case no such list was sent to the Township Clerk, and his sole connection with this paper seems to have been that he, at the request of *Ross*, appended his name to the list returned to the Township Treasurer. The list sent by the County Treasurer, according to the evidence, was never received by the Township Clerk, never was exhibited in his office, nor was any step whatever taken by him in respect thereof, save the signing his name to the return made to the County Treasurer, which was demanded by the local Treasurer. It is not shewn that such a list was ever "on file in his office," nor that the requirements of the Act were complied with by any other officer or official on his behalf or in his stead. I think the land

Judgment.

could not be sold on this ground, even if there were no other objection to the sale. I doubt very much whether these taxes should not have been collected in the manner referred to in *Snyder* v. *Shibley* (*a*), and that the lands being on the resident roll do not come within the clauses on which it is attempted to support the sale. I think the plaintiff is entitled to a decree with costs, against which must be set off the costs of the last hearing, to which the defendant is entitled, and also the amount paid for taxes, interest, and expenses.

1879.

McKay v. Ferguson.

Judgment.

(*a*) 21 U. C. C. P. 527.

1879.

CAMPBELL v. CHAPMAN.

Fraudulent conveyance.

A man who had been carrying on business in partnership agreed to buy out the interest of his co-partner, for the purpose of continuing the business on his own account, and subsequently made a purchase of property and took the conveyances thereof in the name of his wife, the husband swearing that at that time he did not owe a dollar, and that the money expended in the purchase of the property belonged to his wife, having been obtained on the sale of lands belonging to her. This statement, however, was shewn to be incorrect; and a judgment having been recovered against the husband, upon which nothing could be realized under execution, the Court, on a bill filed by the judgment creditor, following the decision in *Buckland* v. *Rose*, *ante* vol. vii., page 440, declared the transaction fraudulent as against creditors, and ordered a sale of the lands in the usual manner, and payment of the proceeds to creditors.

Bill impeaching two conveyances as fraudulent against creditors under the circumstances stated in the judgment.

The cause was heard at the Goderich sittings in the spring of 1878.

Mr. *Maclennan*, Q. C., for the plaintiff.
Mr. *Davison*, for the defendants.

SPRAGGE, C.—The plaintiff's debt is of small amount. He recovered a judgment in June, 1877, for $103.75 debt, and $14.17 costs, against the defendant *John Chapman*. The debt was a note indorsed by *Chapman* for one *Aiken*, in or about February. Executions have been issued against the goods and the lands of *Chapman*, without anything being made.

The bill impeaches two conveyances of property in the village of Wingham, one of a lot with a tannery upon it, the other of an adjoining lot with a house upon it; both of the conveyances are to the defendant the wife.

John Chapman in his answer states, that the lands were bought with the money of his wife, which money

1879.

Campbell v. Chapman.

was the proceeds of land sold by her, and which land had been her separate estate; and that the lands mentioned in the bill were bought for her and not for himself, and the answer of the wife is to the same effect.

First, as to the purchase of the tannery lot; the evidence shews that it is not true that it was purchased with money of the wife. What was purchased was the lot and the good will of the business. *Chapman* had been in partnership with one *Trott*, and bought him out; the business, a small one, being insufficient for the support of two. The land was subject to a mortgage for $100, which *Chapman* assumed, and the purchase money was $350 beyond the mortgage debt; and was paid not with the wife's money, but to the extent of $308 with money borrowed by *Chapman* from one *Aiken*, for which a chattel mortgage was given, and the balance by delivery of "stock."

Nor is it true that the house lot was purchased with the money of the wife. The purchase money was $175, subject like the other lot to a mortgage, and was paid to the extent of $125 with money borrowed from one *Scott* upon the note of the husband, and the balance by delivery of stock. It is said, and it may be the case, that the wife intended to pay for this second purchase out of the proceeds of the sale of land called hers, and that the note was paid by money so raised. If so, the answer may be only inaccurate as to that purchase, and not intentionally untrue.

Judgment.

The defendants further set up, that even taking the conveyances to the wife to be a voluntary settlement by the husband, he was in a position to make such settlement; and he says in his evidence that he did not owe one dollar. But he was obliged to admit that the money borrowed for the tannery lot was and still is unpaid; and that it was borrowed in February, 1877, before the making of the deed of that lot, and that he has not paid it because he has been unable to do so. There was also the mortgage debt on the same lot.

1879.

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If the lender of that purchase money had filed a bill impeaching the settlement of that lot on the wife, I do not see what answer could have been made to it, and the plaintiff in this suit is, I apprehend, in the same position. The language of Lord *Cranworth* in *French* v. *French* (*a*) is apposite: "A person may, although indebted at the time, withdraw some portion of his property, provided there remains enough for the satisfaction of his creditors, but it is an act which *primâ facie* must be made out. * * * If the effect is to withdraw any portion of the property, so that there does not remain sufficient to enable creditors to pay themselves, that is, in my opinion, clearly within the statute." The directing this conveyance to be made to his wife, the purchase money having been paid by himself, was a withdrawing it from his creditors. It is said now that his wife had made him large advances, had put money into the business, and that it was proper therefore that the conveyance should have been made to her, but this evidently is an afterthought due to the ingenuity of counsel, and is not a ground taken by the defendants in their answer.

Judgment.

But there is another ground upon which I think clearly these settlements, and peculiarly the conveyance of the tannery lot, are brought within the mischief of the statute. The husband had been in trade, in partnership with *Trott* for some six or eight months; and was about conducting the business entirely on his own account. That business might succeed or might fail. If it failed leaving insufficient to satisfy the demands of creditors, this settled property would have been, if effectually settled, withdrawn from their reach. I take the rule to be that where a voluntary settlement is made with a view to the uncertainties of business, by a person about to engage in business, the settlement will be very closely inquired into; and where it embraces the whole of the

(*a*) 6 D. M. & G. at p. 101.

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settlor's property, it will be difficult to resist the conviction that it was made in order to hinder and defeat creditors in the event of business proving unsuccessful, so far as the withdrawal of the settled property would have that effect.

I had to consider this point in *Buckland* v. *Rose* (*a*), and have seen no reason to change my views upon the subject. I observed (the Chancellor here read the whole of the first paragraph on page 447).

And I met or intended to meet the objection that no man in business, or about to engage in business could, if my view were correct, make a settlement upon his family. Upon that point I said (the Chancellor here read the whole of the second paragraph on page 446).

In *Buckland* v. *Rose* the settlement was made avowedly with a view to save the property from debts that might be incurred in business, but as the husband said he did not at the time anticipate such debts. In the case before me it does not appear that there was any such avowal; but that, in my opinion, makes no difference, upon the well-known maxim that parties are to be taken to contemplate that which is the natural consequence of their acts, and I am confirmed in this from two cases decided in England since the decision in *Buckland* v. *Rose*. One of these cases was *Crossly* v. *Elworthy* (*b*), the other was *Mackay* v. *Douglas* (*c*). I refer particularly to the latter, because the language of Sir *Richard Malins* is very distinct as to the inference to be drawn from the fact of a settlement being made in view of engaging in business. In the course of the argument he observed: "The question is, whether a man who within two months of going into business makes a voluntary settlement, must not be considered to have done so with the intention of delaying his creditors," and in giving judgment he quoted the language of Lord *Hardwicke* in *Stelsman* v. *Ashdown* (*d*), "It is

Judgment.

(*a*) 7 Grant, 440.
(*b*) L. R. 12 Eq. 153.
(*c*) 14 Ib. 106.
(*d*) 2 Atk. 477.

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not necessary that a man should actually be indebted at the time he enters into a voluntary settlement; for if a man does it with a view to his being indebted at a future time, it is equally fraudulent," which passage Sir *Richard Malins* proceeded to say, "I read thus, that if a man does it with a view of being indebted at a future time, that is, with a view to a state of things in which he may become indebted, that makes it fraudulent, just as if he were indebted at the time." And he states his conclusion thus: "The conclusion which I arrive at proceeds upon the broad ground that a man who contemplates going into trade cannot, on the eve of doing so, take the bulk of his property out of the reach of those who may become his creditors in his trading operations." The principle thus enunciated applies exactly to this case, and if I may be permitted to say so, it is in my humble judgment perfectly sound. I refer in support of the same doctrine to *Higinbotham* v. *Holme* (*a*), before Lord *Eldon*.

Judgment.

I have not considered it necessary to refer to the funds called by the parties the moneys of the wife, and I only notice them now to say that it is open to serious question whether they were so. I should, however, decide the case as I do if it were shewn ever so clearly that they were so.

The decree will be in the usual shape, with costs, which I suppose will be on the lower scale.

(*a*) 19 Ves. 88.

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WARDELL v. TRENOUTH.

Specfic performance—Vendor and purchaser—Costs of shewing title.

Although the general rule is, that a vendor must pay the costs of shewing a good title, a different rule may be applied as to the expense of investigating the title in the Master's office.

On a sale of land, the purchase money was payable by instalments, which were paid into Court as they fell due, and the purchaser had gone into possession and was not entitled for some time to a conveyance. Without calling for an abstract, or affording the vendor an opportunity of clearing up the title, he filed a bill for specific performance. The Court, on further directions refused the purchaser the costs of investigating the title in the Master's office.

On re-hearing, the Court being of opinion that this was not an appealable matter, affirmed the order, with costs.

Hearing on further directions:

The only question reserved was, as to the costs incurred in investigating the title in the Master's Office.

The bill was for specific performance by a purchaser against the seller. But it was not an ordinary bill, for the time for payment of all the purchase money had not arrived when the bill was filed, nor had it when the present hearing took place, and the decree made 2nd October, 1876, declared the plaintiffs to have a right to specific performance, and to an inquiry as to title, but did not decree specific performance.

The investigation of the title had been made; many objections were made to the abstract, and the abstract at first produced was abandoned by the seller, and another substituted, and finally the Master certified that the defendant first shewed a good title to the lands and premises in question on the 5th of September, 1878.

At the time of the agreement for sale—12th October, 1870—no abstract of title was asked for or given. The plaintiffs were to go into possession at once and did go into possession; the purchase money was payable in three instalments, and the deed was not to be executed till all were paid.

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The plaintiffs alleged that they had no notice or suspicion that the defendant could not make a title till the 15th July, 1875, and on the 19th August, 1875, they filed their bill without demanding an abstract, praying for a rescission of the agreement, and in the alternative for specific performance with compensation.

Mr. *Arnoldi*, for the plaintiff.

Mr. *Attorney-General Mowat*, and Mr. *Langton*, for defendants.

Judgment.

PROUDFOOT, V. C.—[After stating the above facts proceeded.] There is no doubt of the general rule that a vendor must pay the expense of shewing a good title.

But it is a very different question whether he is bound to pay the expense of investigating the title in the Master's Office. I have been referred to many cases by the plaintiff in which the general rule is stated. Several of them were cases where the sellers were plaintiffs, but it is obvious that in such instances a very different rule may properly and does prevail, than where the seller is defendant.

In *Wilson* v. *Allen* (*a*), the seller was plaintiff, and carried into the Master's Office an imperfect abstract, and the purchaser was held entitled to his costs before the difficulties in title were removed.

But the Master of the Rolls says: "The deeds did not on the face of them make out the title, as they failed to identify the premises. Affidavits were then filed, which were not originally before the Master, and which were not before the defendant when he first resisted. Why was not this done before the commencement of the suit, or why was it not provided for in the contract?"

Wilkinson v. *Hartley* (*a*) was a bill by a seller. An abstract was delivered in 1866. The bill was not

(*a*) 1 J. & W. 611, 624. (*b*) 15 Beav. 183, 188, 189.

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filed for more than a year afterwards. The purchaser objected to the title on various grounds before suit, which the seller neglected to clear up.

Townsend v. *Champernown* (*a*) was also a bill by a seller, and it is clear from the report that an abstract had been delivered before suit, and objections made to the title, which the seller did not clear up before filing the bill; but even in that case the defendant took many and insufficient objections to the title, and neither party got the costs of those discussions before the Master as to title.

Harrison v. *Coppand* (*b*) was also referred to for the rule that a seller making misrepresentations, and thereby occasioning the suit, must pay all costs. But the costs of investigating title in the Master's office were not there in question. And here the defendant has been made to pay the costs up to decree.

In *Healy* v. *Ward* (*c*) the suit was by the purchaser, the defendant having brought ejectment, and denied payment of part of the purchase money, which was proved to have been paid. The plaintiff took a reasonable objection to the title, which the defendant for eighteen months took no steps to remove, and then brought ejectment. It was properly held that his bad faith having occasioned the suit, and not having cleared up the title in the long period allowed after the objection, he ought to pay the costs of the suit as well as of the inquiry as to title.

Judgment.

Freer v. *Hesse* (*d*) was a suit by a seller, and an abstract had been furnished and long discussions had taken place before the bill was filed. *Knight Bruce*, L. J., states the rule that "*prima facie* a vendor has to pay the costs to the time when a successful objection is first removed. But where it appears probable that the objection might have been removed if it had been made before the commencement of the suit, the Court does

(*a*) 3 Y. & C. 505.
(*b*) 2 Cox 318.
(*c*) 8 Grant 337.
(*d*) 4 D. M. G. 495.

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not throw, or does not always throw, the costs upon the vendor."

Smith v. *Leigh* (*a*) was also a suit by a seller, who did not shew title till after the filing of the bill, and he had to pay the costs of the suit till he shewed the title,—the purchaser had to pay the subsequent costs. But it does not appear that any part of the costs to be paid by the seller were incurred in investigating the title.

Fielder v. *Higginson* (*b*) is not very fully reported but it seems to have been the case of a bill by a seller who attempted to make out title and failed, and then substituted another; but there an abstract had been delivered before suit.

The result would seem to be that in such a case as this, where the purchaser has entered into possession under the contract, and is not entitled to a conveyance for some time yet, and when the instalments of purchase money are paid into Court as they fall due and he runs no risk of losing them, and where he made no requisition for an abstract before suit, and gave the seller no opportunity of clearing up his title out of Court, the purchaser should not get the costs of investigating the title.

Judgment.

If a seller chooses to rush into Court without delivering an abstract and removing reasonable objections, it is reasonable enough that he should pay the costs of the suit; but where a seller is forced into Court without an opportunity of clearing up his title it would be unjust to load him with the costs of doing that which might have been done without it.

I think each party will bear his own costs of the investigation of title.

And I think the costs of the appeal from the Master's Report must follow the same rule. The order on appeal recites the various grounds, and an allegation by defendant's counsel that he was prepared to shew a good title

(*a*) Sug. V. & P. 648. (*b*) 3 V. & B. 142.

and then referred it back to the Master, reserving the costs. I think it clear that the learned Judge meant that these costs should follow the disposition of the costs as to title.

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This case was reheard on the 6th December, 1878, and the Judges, holding that it was not an appealable matter, affirmed the decree, with costs.

St. John v. Rykert.

Statute of Limitations—Appropriation of payments.

In November, 1861, the defendant made his promissory note in favour of the plaintiff for $510 payable on demand, with "interest to be paid at the rate of $10 per week." There being other dealings between the parties, defendant, in March, 1867, paid plaintiff $2,000 upon his indebtedness generally, and by an agreement in writing the plaintiff extended the time for paying the balance for 1, 2, 3, and 4 years, but in default of any instalment the whole might be sued for. Default having been made in payment of the instalment due in 1868 the plaintiff, in 1872, appropriated a portion of the $2,000 to the discharge of the $510 note, no appropriation of the money so paid having been made by the defendant, *Held*, notwithstanding the fact that the plaintiff on receipt of the $2,000 had entered the same in his books to the credit of the defendant generally, that he was at liberty to apply the payment to such note.

Where a promissory note is made payable with interest at a certain named rate until paid, the holder will be entitled to enforce payment with interest at that rate, after the maturity of the note notwithstanding the fact that the holder had recovered judgment at law upon collateral securities held by him.

This was a bill by *Samuel L. St. John*, against *John C. Rykert* and *Thomas Burns*, alleging that in October,

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1862, the plaintiff had recovered judgment against the defendant *Rykert* and one *A. M. Rykert* for £855 10s. damages, together with costs, which remained in full force, on which judgment a writ against the defendants in said judgment had been sued out and placed in the hands of the proper sheriff duly indorsed to levy that amount, which was returned no lands; and it alleged that certain lands had been conveyed by one *John Page* to the defendant *Burns*, but that *Rykert* paid the purchase money therefor, and that *Burns* held the same as trustee for *Rykert*, and prayed to have the same made liable to the execution sued out in favour of the plaintiff. On the 5th of March, 1867, *Rykert* paid $2,000 upon the indebtedness to *St. John*, who entered the amount to the credit of *Rykert* generally.

Statement.

On the hearing a decree was made in favour of the plaintiff; and directing an account to be taken by the Master at St. Catharines, who made his report, dated 12th November, 1877, whereby he disallowed to the plaintiff the amount of a note for $510. dated in November, 1861, by which the defendant promised to pay plaintiff that sum on demand for value received. "Interest to be paid at rate of $10 per week, from November 23rd 1861," and also disallowed interest at more than six per cent. on another promissory note of 4th March, 1862, for $3,000, for value received, "with interest at the rate of two per cent. per month till paid," on the ground that judgment had been recovered at law on a note of $360, held as one of several collateral securities for the $3,000 note.

From this ruling of the Master the plaintiff appealed on the grounds, (1) that the Master should have allowed plaintiff the amount of the $510 note and interest thereon. (2), That the fact of judgment having been recovered upon the $360 note, held with other securities as collateral to the $3,000, was not a sufficient reason for limiting the interest on the sum of $3,000 to six per cent. per annum.

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Mr. *Ewart*, for the appeal.

Mr. *Bethune*, Q. C., and Mr. *P. McCarthy*, contra.

The other facts and cases cited appear in the judgment.

PROUDFOOT, V. C.—I came to the conclusion yesterday that I could not interfere with the finding of the Master that the $510 note had not been paid.

It was conceded, or at all events established, that a new point of departure was found in March, 1867, for the Statute of Limitations to begin to run when the $2000 were paid. By the agreement then come to the time of payment was extended for 1, 2, 3, and 4 years, with a proviso that upon default in payment of any instalment the whole might be sued for. I cannot distinguish this case from *Hemp* v. *Garland* (*a*), which held in a similar case that the entire cause of action accrued on the first default and the period of limitation began to run from that time. And if the case turned on that I would be bound to hold that the action was gone. Judgment.

But it does not seem to me to govern this case. Default was made in 1868. The plaintiff, in 1872, appropriated a part of the $2000 to discharge the note for $510. No appropriation having been made by the debtor—for that I determine to be the result of the evidence.—this was then a payment of the note before the statute had run; and when the plaintiff sues in 1875 he does not sue for this note, but for an account of the dealings of the parties. The note was paid, and no longer formed an item in the plaintiff's account, it is only brought up by the claim of the defendant to have the whole $2000 applied to other items.

Where no appropriation is made by a debtor the creditor may appropriate it; and may do so to a debt even if barred by the Statute of Limitations: *Mills* v. *Fowkes* (*b*).

(*a*) 4 B. R. 524, Add. on Cont. 1007.

(*b*) 5 B. N. C. 461, Add. on Cont. 957.

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And the creditor has the right to do so at any time *before action*, the appropriation being complete when communicated to the debtor. *Simpson* v. *Ingham* (*a*). Here the communication was made to the debtor in 1872, when the account was rendered. The appropriation was then complete, and if necessary to be so, it was within six years from the time the statute began to run.

The $2000 had been received years before and carried to the debtor's credit in the plaintiff's books, but entries made by a man in his private books are not conclusive on him till he has acquainted the debtor with those entries. Until that time he has the option of applying the payments as he thinks fit.

I think this ground of appeal must be allowed.

On a subsequent day the other ground of appeal was disposed of in favour of the plaintiff.

Judgment.

PROUDFOOT, V. C.—As to the claim that interest at 24 per cent. should be allowed on the note after judgment recovered, the question is to be determined by what was the agreement of the parties; if they choose to contract for that rate, the Court, in the absence of fraud, will not interfere with it.

In *Keene* v. *Keene* (*b*), where a bill was drawn for 10 per cent. interest, it was held that the holder might recover that sum after the note fell due as well as during the time it was running.

Howland v. *Jennings* (*c*), followed that case. The note was payable one month after date with interest at 20 per cent. per annum, and the whole amount was allowed.

Montgomery v. *Boucher* (*d*), decided that upon a note payable two months after date with interest at 20

(*a*) 3 B. & C. 65.
(*b*) 3 C. B. N. S. 141.
(*c*) 11 U. C. C. P. 272.
(*d*) 14 U. C. C. P. 45.

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per cent. per annum, that the jury ought to have allowed interest at that rate after it fell due.

In *Young* v. *Fluke* (*a*), the note was payable two months after date with interest at 5 per cent. each month *after due till paid*, and following the two previous cases plaintiff was held entitled to recover the whole interest reserved.

This last case professed to rest upon the two former, but it will be seen that the contract was quite different, as the interest after the note became due was expressly agreed upon. In the others unless the rate specified being 20 per cent. per annum, while they were payable at a shorter date than a year, could be construed to mean that interest at the rate specified should extend beyond the maturity of the notes, there was no provision for interest beyond maturity. I apprehend also that *Montgomery* v. *Boucher*, at all events, cannot be considered law now as although the jury may continue the rate prior to maturity by way of damages after maturity, they are not bound to do so.

Judgment.

In *Dalby* v. *Humphrey* (*b*), the note was for $1000 payable 150 days after date with interest at 2 per cent. a month. The decision rested chiefly on *Cook* v. *Fowler* (*Infra*), and that after maturity interest was in the nature of damages, and although the previous rate might be given it might also be varied from, and the circumstances there induced the Court not to continue the conventional rate.

In *Cook* v. *Fowler* (*c*), the security was for the payment of money at a day certain with interest at 5 per cent. per month. And the decision that after maturity interest was in the nature of damages, and need not follow the rate agreed upon before maturity, went expressly on the ground that there was no contract for any interest beyond that time, "without any mention of subsequent interest upon the face of the instru-

(*a*) 15 C. P. 560. (*b*) 37 U. C. R. 514. (*c*) L. R. 7 H. L. C. 27.

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ment. * * * Is there or is there not any contract after the day upon which judgment was to be entered up for the payment of any specified sum and interest?" All the Lords who gave judgment introduce that element into the decision.

In the *Central R. W. Co. Case* (*a*) the debentures were read by the Court as imputing only an agreement to pay £1000 and £60 for interest on or before the 11th October, 1865. There was no fresh contract for the payment of any further interest, and upon that ground it was held that only the usual rate of 4 per cent. after judgment was recoverable. And it is distinguished by that means from the *Agricultural Cattle Ins. Case*, (*a*) where there was a new agreement for interest, although there was reason to argue that interest meantime till repayment might have covered the whole period till payment.

Judgment.

But in this case I can only read the stipulation in the note, payable on demand, with interest at 2 per cent. per month *till paid*, upon a fair construction, as meaning *till actually paid*, although that period might be after demand and after judgment. It is very like the case of *Young* v. *Fluke*, which has however the words "after due," but I do not think these make any essential difference. I regret to have to come to this conclusion as the rate seems a very high price to pay for money; but the parties were better judges of its value to them, and of the goodness of the security and of the risk incurred, than I can possibly be, so that what seems to me unreasonable may not have been so to them. And reading the agreement as one to pay that interest till the note was paid, I think this appeal must be allowed.

(*a*) L. R. 4 Ch. D. 33. (*b*) p. 39, n. 1.

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Presbyterian Union Act of 1874—38 *V. c.* 75, *O.*

Held, under the circumstances appearing in this case, that the anti-unionists had not properly voted themselves out of the union within the six months prescribed in the statute respecting the Union of Presbyterian Churches, 38 Vic. ch. 75, O., and that the property in question, St. Andrew's Church, Dalhousie Mills, belongs to the "Presbyterian Church in Canada," the meeting at which they had assumed to vote themselves out having, according to the practice of the Church, been irregularly called by an announcement from the pulpit on Sunday for the following Tuesday; and which announcement was made by a minister who had formally dissented from the union, then performing divine service therein, though not duly appointed to the Church, the congregation being what is termed a "vacant congregation."

Observations on the meaning of "the practice of the church," and the "constitution of the congregation" mentioned in the 2nd section of the Act.

Semble, that immediately upon the consummation of the Act of Union, the congregational property of the various churches composing the union became subject to the jurisdiction of the United body, and that the right of dissentients was merely one of withdrawing the property from the union in the manner indicated in the Act.

This suit was instituted by *Alexander McRae* and others, adherents of the so-called Presbyterian Union of 1875, against *Duncan McLeod* and others, who claimed to be entitled to hold St. Andrew's Church, at Dalhousie Mills in the interest of the so-called anti-union party; this church having, before the union, been under the jurisdiction of the Synod of the Presbyterian Church of Canada inconnection with the Church of Scotland.

The defence raised the question of the validity of the Ontario Statute respecting union, 38 V. c. 75, alleging it to be *ultra vires* as affecting civil rights in other provinces; but this point was not argued, as it had already been determined in this Court in *Cowan* v. *Wright* (*a*), *ante* vol. xxiii., p. 615.

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It also denied that the act of union had been consummated under the statute, alleging that the necessary preliminary of the signature of the four moderators, required by the eleventh section of the statute, had not been complied with, because Dr. *Snodgrass*, one of the four moderators, was not *de jure*, although *de facto*, moderator, owing to his election having taken place in a synod in which the lay element required by the rules of the church was not properly represented; but this ground was not pressed in argument. There were other questions raised, which, however, were not argued, the defendants relying mainly on their having voted themselves properly out of the union within the six months prescribed by the Act.

A meeting was held at St. Andrew's Church on a Tuesday, on notice given from the pulpit on the preceding Sunday by a minister of the anti-union party; and it was alleged by the defendants, but denied by the plaintiffs, that the meeting had been properly called in accordance with the statute, and that the majority of the congregation had voted themselves out of the union. This involved the consideration of whether this congregation was governed as to the mode of conducting its meetings by the model constitution, which was passed in 1847, after its organization; of what is meant in the second section of the Act by the "practice of the church," or the "constitution of the congregation"; and of whether in short this meeting had been duly called and held, and, subordinately, whether the majority of the congregation had at the meeting voted themselves out of the union.

The other facts appear in the judgment.

Mr. *Maclennan*, Q.C., for the plaintiffs.

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

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SPRAGGE, C.—The questions raised in this cause have been discussed in this Court in *Cowan* v. *Wright* (*a*), and *Hall* v. *Ritchie* (*b*); except that in this case it is denied by the defendants that the congregation which they represent came under the provisions of the "Model Constitution" which is referred to in those cases.

The union of the four churches named in the Act 38 Vict. ch. 75, took place on the 15th of June, 1875. Section 1 enacts as follows: "As soon as the union takes place, all property, real or personal, within the Province of Ontario, now belonging to, or held in trust for or to the use of any congregation in connection or communion with any of the said churches, shall thenceforth be held, used and administered for the benefit of the same congregation in connection or communion with the united body, under the name of 'the Presbyterian Church in Canada.'"

Judgment.

Upon the union going into effect, the several congregations theretofore in connection or communion with the several churches, thus and thereby becoming one united body, became, and were by virtue of the Act, in connection or communion with the united body. That at least strikes me as the proper reading of this section, taken by itself. The word "thenceforth," *i.e.* from the date of the union, renders it, in my opinion, the only possible reading of the section. The provision in the second section, enabling congregations to dissent from the union within a limited time, is not inconsistent with the reading of the first section that I have indicated. They might be in the union until, in the mode provided in the Act, they voted themselves out of it. There is indeed one short phrase in section 2, which looks the other way. It speaks of a congregation determining "not to enter into" the union, but to dissent therefrom. Strictly taken, these words import the not

(*a*) 23 Gr. 615. (*b*) Ib. 630.

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being already in; but the two sections must be read together. I cannot discard the very explicit provision of section 1, on account of what appears to me, looking at the two sections together, as a piece of faulty phraseology in section 2. The effect of the two sections I take to be that all congregations, by force and effect of the Act, ceased to be members of the particular church to which, up to the union, they had belonged; and became in communion with the united body; the Legislature giving validity to the action of the religious bodies which had agreed to unite, and making provision in regard to the temporalities of what had been several, but which upon the union taking effect were to become one united body; the Legislature at the same time, by section 2, enabling any congregation which might, within six months, determine to dissent from the union to reinstate itself in communion with the particular church, with which it had, previous to the union, been connected.

Judgment.

Section 2 points out the mode in which this was to be done. The will of the congregation upon that point was to be ascertained "at a meeting of the said congregation regularly called according to the constitution of the said congregation, or the practice of the church with which it is connected." The congregation in question belonged, at the passing of the Act, and up to the date of the union, to the Presbyterian Church of Canada in connection with the Church of Scotland: and I take it that under this provision of the Act, if the congregation in question had a constitution of its own providing for the calling of meetings of the congregation for the purposes of this or a cognate character, the meeting was to be called according to such constitution: if without such constitution it was to be called according to the practice of the Church of Scotland. It is in evidence that some Presbyterian congregations have written constitutions, but I do not think it necessary in order to a constitution, that it should be in

writing. I have referred to the Imperial and to Worcester's dictionaries for their definition of the word. In the former I find among others the following: "The established form of government in a state, kingdom, or country; a system of fundamental rules, principles, and ordinances for the government of a state or nation, either contained in written documents, or established by prescriptive usage. A particular law, ordinance, or regulation made by the authority of any superior, civil or ecclesiastical; as, the *constitutions* of the churches; the novel *constitutions* of Justinian and his successors." In Worcester I find, "3. The body of fundamental laws as contained in written documents, or established by prescriptive usage, which constitute the form of government for a nation, state, community, association, or society. 4. Ecclesiastical; a regulation or canon respecting the doctrine or discipline of the church."—I have no doubt that the words "constitution" of the congregation and "practice" of the church are used advisedly in the Act, and that it was intended that where the congregation had not a constitution, in the proper meaning of the term, the practice of the church to which the congregation belonged was to be resorted to. The evidence convinces me that this congregation had no constitution within the proper meaning of the term. It does not seem indeed to have had anything that could be properly called a "practice" in the matter of calling meetings; they were called, sometimes in one way and sometimes in another; and sometimes by one functionary, sometimes by another. I am satisfied that this congregation had no "*constitution*" within the meaning of the Act: and it becomes necessary to see what was the "practice of the church," and whether the meeting of the 7th of December, 1875, under which the defendants claim, was regularly called according to the practice of the church.

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Judgment.

In the cases in this Court to which I have referred, there was no question but that the congregations whose

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interest were in question were governed by the "model constitution" of the Church of Scotland. This congregation was in existence before the adoption in Canada of the "Model Constitution." The Act is styled, "Act anent the Model Constitution of New Churches," and was passed 13th of September, 1847, and does not in terms apply to churches already in existence. Still, as I gather from the evidence, there is nothing else that can be called the "practice" of the church. If not universal, it had at the date of the passing of the Union Act, (1875,) obtained so generally that it, and it only, could be called the practice of the church at that date.

If that practice was the practice to govern, the meeting of the 7th of December was not regularly called. Under the model constitution all meetings therein provided for except the annual meetings, were to be called by public intimation after Divine service, on at least one Sabbath ten days previous to the day of meeting. This meeting was called on Sunday, the 5th, for the following Tuesday, and so was not regularly called as to time: that objection is fatal if the directions of the model constitution had, in that respect become the practice of the church.

Judgment.

There is this further objection to the regularity of the calling of the meeting. If I am right in the position that after the union took effect this congregation became and was in communion with the united body, it follows that they continued so, unless and until they effectually severed the connection. It is agreed on both sides that this congregation was what is called a "vacant congregation," and that by the practice of the Church of Scotland meetings of such a congregation are called by the moderator of the presbytery. The meeting in question was called from the pulpit by Mr. *McPherson*, an ordained minister of the Church of Scotland, who had formally dissented from the union, and was not a minister of the united body. His ministering in this congregation was therefore in law an

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intrusion, and he could do no valid official act pertaining to the office of minister. There was a moderator of the kirk session, a Mr. *Macdonald;* it is contended that he was not moderator *de jure;* but he was so *de facto*, and being so, he was the proper person to call the meeting.

What took place at the meeting is described in the evidence as disorderly in the extreme. Mr. *Brodie*, who was, like Mr. *McPherson*, an ordained minister of the Church of Scotland, and who had formally dissented from the union, took a very prominent part in the proceedings. A Mr. *Duncan McLeod*, a layman, was chosen chairman. Mr. *Brodie* stated publicly who were, and who were not entitled to vote. That women and minors of sixteen years of age, who contributed to the support of the church, were qualified; and it is in evidence that the collecting box was actually sent round, that those present might contribute, and so constitute themselves supporters of the church, and be qualified to vote. Mr. *Brodie* also stated that certain classes were not entitled to vote, among them, those who had joined the union, those who were not adherents of the old church *i.e.*, the Church of Scotland, and those who did not intend to continue to support the old church, and he declared, what I can designate by no fitter term than preposterous, when propounded to a deliberative body, that there was to be no discussion upon the matter upon which they were to vote, till after the vote was taken.

Judgment.

It is true, that it was by Mr. *Brodie*, not by the chairman that these positions were taken and openly announced to the meeting; but the chairman did not negative or correct any of them, and they were taken, by some at least of those present and entitled to vote, as the rule by which the voting was to take place. It is said that Mr. *Brodie* was misunderstood, and that he intended only to state that the members of another congregation who used the church for Divine service,

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were not entitled to vote; but certainly he was not understood to confine his exclusion to that class of persons.

The Rev. *John Burnett*, a minister of the united body, was present at the meeting. He objected to the proceedings, and advised those who were in favour of the union not to vote. The vote was put to the meeting by the chairman, directing those in favour of being out of the union to go to the west side of the church, those in favour of the union to go to the east, and the rest of those present to remain in the middle of the church. Forty-six went to the west side; of these, some eighteen or twenty were heads of families. Of those who voted, several were children, and several were under age. None went to the east side of the church. There is evidence that it was possible to go to the east side of the church, and possible to vote. Mr. *Wm. C. Sylvester* made a protest against the proceedings. He and a Mr. *Alexander Morrison* say in their evidence that they considered themselves excluded from voting. They were entitled to vote.

Judgment.

If parties abstain from voting for any reason which is not a sufficient ground for such abstention, they simply lose their votes, and the proceedings at which they might have voted, and did not, are unaffected thereby; but it is my opinion that those not voting at this meeting were justified in so doing, under the circumstances; and that a majority obtained and composed as this was cannot be said, in any proper sense of the term, to express the determination of those present, qualified to vote.

It is impossible to say from the evidence what would have been the result, if the meeting had been duly convened and properly conducted. It may or may not have been in favour of remaining in the union. It is not certain that it would have been against it; and one evidence of this is, that at a meeting of the same congregation before the union the vote was in its favour.

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All however that is before me for my decision is whether this meeting was regularly called; and whether at a meeting regularly called the congregation decided by a majority of the votes of those entitled to vote thereat not to enter into the union, but to dissent therefrom. The affirmative of both these propositions is necessary to the defendants' case. In my opinion neither of them is sustained. The decree must therefore be for the plaintiffs.

No account is asked by the plaintiffs against the defendants, except in respect of certain premises, the property of the congregation, which have been occupied by the defendant *Ferguson*. As to those premises, there will be a reference to fix an occupation rent with which *Ferguson* is to be charged.

Judgment.

The decree will be with costs.

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THE CANADA FIRE AND MARINE INSURANCE COMPANY v. THE WESTERN INSURANCE COMPANY.

Marine insurance—Re-insurance—Memorandum of effecting insurance.

B, who was the agent in Montreal of two insurance companies, had authority from one to accept marine risks to a sum not exceeding $5,000. An application having been accepted by *B.* to grant an insurance for $7,700, he immediately directed his clerks to enter a memorandum of application and acceptance in the books of the other company of a re-insurance for $2,700, which was done, thus limiting the liability of the first company to $5,000; but no notice was given of the re-insurance to the re-insuring company until after a loss occurred:

Held, that the fact of there having been an entry made of the application for and acceptance of the risk by the clerk of the agent was sufficient, and the amount so re-insured having been paid, the company could not recover back the amount, although no certificate of insurance had ever been issued by one company to the other; the evidence in the cause negativing entirely anything like *mala fides* on the part of the agent in the transaction.

Statement

THIS was a suit to recover back from *The Western Insurance Company* the sum of $2,700, being the amount of an alleged re-insurance paid by the plaintiffs, *The Canada Fire and Marine Insurance Company*, to them, on the ground that no re-insurance had actually been effected; and that the money had been paid therefor in mistake.

The bill alleged that in 1877 and previously the plaintiffs carried on business in Montreal through one *Bethune*, as their agent, who was also the agent of the defendants there for the purpose of effecting marine insurances and re-insurances: that plaintiffs defined the extent of the authority conferred on their agent as follows: "With power to receive proposals for insurance, to fix rates of premium, to receive moneys, to countersign, issue and renew, and consent to the transfer of policies, subject to the rules and regulations of said company and such instructions as may from time to time be given to its officers:" that on the 30th of

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October of that year certain parties shipped a large quantity of wheat and other grain for Great Britain in certain vessels, one being named "*Northumbria*," then lying in the port of Montreal, and insured such wheat and grain against the perils of navigation in various insurance companies, and amongst others in that of the defendants', through *Bethune*, acting as their agent, for the sum of $7,700, and he immediately thereafter reported to the defendants that he had re-insured $2,700 of such risk, not stating in what company such re-insurance had been effected: that on the 14th of November plaintiffs for the first time received information from *Bethune* that he had issued a certificate, or policy of the plaintiffs, No. 199, dated on the 30th of October, reinsuring that amount, and on the 19th of the said month of November the plaintiffs received from *Bethune* a letter dated the 16th day of that month containing the following information, and nothing further regarding such risk: "I am afraid we are going to sustain a consierable loss by the *Northumbria*; she is stranded on Anticosti:" and on the 14th of December following the defendants made an application to the plaintiffs for payment of such re-insurance of $2,700, and such claim was approved by *Bethune*, who drew on plaintiffs for the amount, and they, relying on the good faith of their agent, and believing from the representations made by him that he had, before the loss happened, or at all events before he became aware of it, entered into a legal and binding contract on behalf of the plaintiffs, and that they were legally liable for that amount paid the same.

Statement.

The bill further alleged that in February, 1878, *Bethune* ceased to be an agent of the plaintiffs in Montreal, and a new agent was appointed, and that in May following the plaintiffs received information which led them to believe that such certificate or contract of re-insurance had not in fact been issued to or entered into with the defendants until after the loss had

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occurred, and *Bethune* had information thereof: that information of the stranding of the vessel was received in Montreal about noon of the 13th of November, and *Bethune* heard of the loss about the same time, and then set about to make good his report to the defendants as to his having re-insured, and then prepared the said certificate No. 199, dating the same back, and issued the same to himself as agent of the defendants, and on the evening of that day reported the issue thereof to the plaintiffs, but withheld all information as to the loss, though in possession of such information at the time: that next day *Bethune* reported the loss to the defendants, but did not report the same to the plaintiffs until three days later.

Statement.

The bill further stated that the defendants sometimes pretended that *Bethune*, at the time of effecting the insurance for $7,700 in the defendants' company, made a promise to himself as agent of the defendants', or entered a note or memorandum in the registration which he kept of the defendants' business at Montreal, that $2,700 of said insurance was to be re-insured with the plaintiffs, and that the plaintiffs were bound by such promise or note, or memorandum; but the plaintiffs insisted that no such note or memorandum was made or entered until after *Bethune* knew of the loss; but that if the same were made or entered before knowing of the loss it was done by *Bethune* as agent of the defendants, and that plaintiffs could not be bound thereby, as the Act incorporating the plaintiffs (39 Vic., ch. 51, sec. 15) requires that "all policies or contracts of insurance issued or entered into by the said company shall be signed by the president, or one of the vice-presidents, and countersigned by the managing director, or secretary, or otherwise, as may be directed by the by-laws, rules and regulations of the company, and being so signed and countersigned shall be deemed valid and binding upon the company, according to the tenor and meaning thereof," and that therefore the

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plaintiffs could not be bound by any verbal contract of re-insurance, or by any mere informal unsigned memorandum.

The prayer of the bill was, that such certificate or contract of re-insurance might be declared to have been fraudulently signed and issued by *Bethune* to the defendants, and the same declared void *ab initio*; and that the sum of $2,700 had been paid to the defendants by the plaintiffs in consequence of the fraudulent conduct of *Bethune*, and that plaintiffs were entitled to recover back the same.

The defendants answered the bill setting up that prior to the 30th of October, 1879, the plaintiffs had issued to the defendants an open policy of insurance, No. 202, duly signed and countersigned, as required by law, but which since the happening of the events set forth in the bill had been handed back to the plaintiffs, and defendants were unable accurately to state the contents thereof, but the same was in full force and effect at the time when the said re-insurance was effected and fully covered the risk in the bill mentioned, and rendered the plaintiffs liable on the happening of the events set forth in the answer: that on the 13th of October the defendants having effected the insurance on the grain in the *Northumbria* for $7,700, their inspector, *William Leslie*, applied to *Simpson & Bethune*, as agents of the plaintiffs, for a re-insurance of $2,700, and as such agents they accepted the same, and such re-insurance was effected according to the conditions of such open policy, and the application was made and accepted in the usual and invariable course of business in such cases, and the course of dealings theretofore adopted between the plaintiffs and the defendants, and that to repudiate such a course of dealing would be a fraud on the defendants; and that on the 1st of November the defendants received from their agents in Montreal a daily report of cargo risks which set forth the said re-insurance of $2,700; that

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about that date *Simpson & Bethune* dissolved partnership, and *Bethune* alone continued during the remainder of the year 1877 to act as agent of the plaintiffs.

The defendants further alleged that subsequently they received from *Bethune* a cargo certificate, bearing date the 30th of October, 1877, and dated at Hamilton, duly signed by the general manager of the plaintiffs, certifying that the defendants were insured under and subject to the conditions of the said cargo policy No. 202, in the sum of $2,700, and submitted that whether the said certificate was or was not made under the circumstances detailed in the bill their rights on the one hand and the liability of the plaintiffs on the other were the same, and that the liability of the plaintiffs accrued from the acceptance by the plaintiffs' regularly constituted agents of the risk, and which was duly noted by such agents in their re-insurance book at the time such re-insurance was effected; and that the only purport and effect of such certificate was an acknowledgment by the general manager of the plaintiffs that such re-insurance had been effected under and subject to the conditions of the said policy; and the defendants submitted that they paid the plaintiffs the premium upon the said re-insurance at the time and in the manner, and according to the well established usage in such cases, and that they had done everything that was necessary, usual, or proper for them to do to entitle them to receive the $2.700, which they admitted having been paid to them by the plaintiffs.

Statement.

The cause having been put at issue, evidence was taken before the Court, the effect of which sufficiently appears from the judgment.

Mr. *Ferguson*, Q.C., and Mr. *E. G. Patterson*, for the plaintiffs.

Mr. *Bethune*, Q. C., and Mr. *Wells*, for the defendants.

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Kelly v. *Salori* (*a*), *Perry* v. *Newcastle* (*b*), *The Union Mutual Ins. Co.* v. *The Commercial Mutual Ins. Co.* (*c*), *Insurance Co.* v. *Colt* (*d*), *Lucas* v. *Worswick* (*e*), *Dominion Bank* v. *Knowlton* (*f*), *The Queen Ins. Co.* v. *Devinney* (*g*), *Perkins* v. *Washington Ins. Co.* (*h*), *Hendrickson* v. *The Queen Ins. Co.* (*i*), *Montreal Ins. Co.* v. *McGillivray* (*j*), *Walker* v. *The Provincial Ins. Co.* (*k*), *Ionides* v. *The Pacific Ins. Co.* (*l*), *Bize* v. *Dickason* (*m*), *May* on Insurance, sec. 128, *Arnold* on Insurance, pp. 230, 231, 260 were, amongst other authorities, referred to and commented on by counsel.

BLAKE, V. C.—First, as to to the question of fraud upon which the bill is entirely based. The bill itself, there is no doubt, makes out quite a sufficient case for the recovery back of the money if the circumstances there set forth had been proved. So far as *The Western Ins. Co.* is concerned, there can be no doubt that there is no fraud that can possibly be traced to them. Upon the loss being made known to them they immediately asked that the re-insurance, of which they had been informed by their agent, should be made good by the company that had agreed to re-insure, and this was done.

Judgment.

Then, so far as the fraud of the agent is concerned, and as to Mr. *Corey's* knowledge of the circumstances, Mr. *Corey's* information seems to have been arrived at in this way: Mr. *Kavanagh* entered the service of the plaintiffs, and, while in their employ, there is a conversation in which Mr. *Kavanagh* makes some remark, and Mr. *Corey* is afterwards desirous of getting some

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(*a*) 9 M. & W. 54.
(*b*) 8. U. C. R. 368.
(*c*) Curtis 534, S. C. on App., 19 Howard 318.
(*d*) 20 Wallace 560.
(*e*) 1 Moo. & R. 293.
(*f*) 25 Gr. 125.
(*g*) 25 Gr. 400.
(*h*) 4 Cowen 645.
(*i*) 31 U. C. R. 547.
(*j*) 10 Priv. Co.
(*k*) 8 Gr. 217.
(*l*) L. R. 6, Q. B. 674.
(*m*) 1 T. R. 285.

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further information as to the reason of the statement made by Mr. *Kavanagh*. That statement of Mr. *Kavanagh*, whether purposely or not is immaterial, was a misrepresentation of what took place in Mr. *Bethune's* office. I don't know whether he deliberately made the misrepresentation, or whether he did it not intending to falsify the statement that was made, but he certainly then stated that which made Mr. *Corey* believe that there had been a gross, a very gross fraud perpetrated by Mr. *Bethune* upon his company. The statement was, that Mr. *Bethune*, on the 18th November, being informed of the fact of the loss of this vessel, there being no re-insurance upon it, in order to sustain the position which he had taken so far as the *Western* was concerned, and to display something in the nature of a re-insurance, which did not actually exist, prepared some papers; that he then made a statement to his clerk, overheard by Mr. *Kavanagh*, that there was no re-insurance, and that then they set to work to concoct this conspiracy which was to compel the *Canada Fire and Marin* to make good the $2,700, the re-insurance which Mr. *Bethune* represented as made, but which did not actually exist.

Judgment.

That is the way that Mr. *Kavanagh* presented the case to Mr. *Corey;* but the facts as they took place, unless grossly exaggerated, or grossly misrepresented, could not possibly be reduced to the state of circumstances thus described. It is perfectly plain from the evidence of Mr. *Bethune*, Mr. *Wheatley* and Mr. *Leslie*, that this is not what took place at all. It is perfectly evident that Mr. *Bethune* approached these two clerks as one of them says, "And blew them up, because they had not carried out his instructions." There was no statement then that there was no re-insurance, or that they did not intend to re-insure; but there was a distinct statement, on the part of Mr. *Bethune*, that there was to have been a re-insurance, that there was neglect on the part of his clerks, and he at once instructed

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them to make good their neglect, by preparing a certificate and an application, if, after hunting for it, it was found not to be in existence, and informing, at once, the *Canada Fire and Marine* of the fact that there was this insurance. Mr. *Kavanagh* either imperfectly heard, or very imperfectly represented what he did hear, but he gave Mr. *Corey* to understand that there was a gross fraud in connection with this matter, when in reality the circumstances, as displayed in this conversation of the 13th of November, were entirely different from that which was represented by Mr. *Kavanagh*.

Mr. *Corey* thereupon became alarmed. He became suspicious. He considered his company had been cheated, and then he sets matters in motion for the purpose of discovering what actually did take place.

Now, what actually happened prior to the 30th of October, and up to the 13th of November?

Judgment.

As a matter of fact, Mr. *Bethune* had no power to insure for *The Western Insurance Company* to a greater extent than $5,000 on this vessel. He was aware of that, and therefore he intended to cover a portion of the $7,700 which he had taken, and thought this a good risk to be covered by a re-insurance in another company. There is no doubt that there was a conversation between Mr. *Bethune* and his clerk, and there is no doubt that he advised that, this being a thoroughly good risk, they should take it in *The Canada Fire and Marine Insurance Company*.

Mr. *Bethune* then says that he gave instructions for the preparation of the application, and the clerk says he then entered in the book the fact of the re-insurance, and prepared and handed to another clerk the application. There is a difficulty in coming to a conclusion as to whether the paper produced was the application that was written on the 30th of October, or the one that was written on the 13th of November. Mr. *Leslie* I think a truthful witness, and I believe what he says,

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when he states that, upon instructions being given by Mr. *Bethune*, he prepared the application.

If Mr. *Bethune*, Mr. *Leslie*, and Mr. *Wheatley* had determined to come into Court with a case made out for the purpose of aiding the defendants, they certainly, knowing that this was a question which would be put to them, and knowing the importance of it, and knowing that they would be called to give evidence upon it, would certainly have made up their minds, and fixed upon a certain day, probably the 30th of October, as the date of that application being prepared, and have sworn that this was the very application which is now produced; so that it strengthens my belief in the testimony of these witnesses when, upon a known point, and a turning point in the case, and knowing they are going to be called to give evidence as to this specific matter, they three meet together, and, there being no person to contradict them, where they could have agreed as to their statement, on an im-

Judgment.

portant fact in the case, they come into Court and choose to differ upon it.

Mr. *Leslie's* statement in the matter I should prefer taking. He seemed to be a very cautious man. I think he was a truthful man, and he had the best means of knowing or recollecting what actually did take place. He produces this paper and says, "that is the paper that I prepared;" and he says, "I know that I prepared that paper, and there can be no doubt whatever that then the entry was made in that book."

I don't think it was at all reasonable to apply the term "doctored" to the book produced. I think it was highly unreasonable. We know what is meant by that term. It has a technical signification; and so far from there being any "doctoring" about it, after Mr. *Bethune* had given instructions to ink over the entries in pencil the clerk, Mr. Leslie, thinking it would look better to have the name "Canada" in full, instead of simply the letters "Can." having inked over the pencil,

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and written that word "Canada" in full, he (Mr. *Bethune,*) seeing it, said, "That is wrong, strike that out at once, that book must go before the Court just as it was on the 30th of October." The moment he found that his clerk had added the letters "ada" to the letters "Can" he desired them to be erased so that it might be presented to the Court just as the book appeared on the 30th of October.

This is the evidence of *Leslie*, *Wheatley*, and *Bethune;* and *Simpson*, called to contradict them all, concurs in the fact that on the 30th of October this entry was made then. Mr. *Leslie* says, that on that day the application was made, and I believe that statement to be correct, and therefore we have an application made by *The Western Insurance Co.*, on the 30th of October, for an insurance. We have the amount settled; we have the rate; we have every thing material connected with it settled. And then we have an entry in the book of the company, in which they state this as accepted, and as an insurance in the Canada at this date.

Judgment.

The amount of the risk and everything connected with it appears upon the application, so that so far from there being anything in the shape of fraud or impropriety, or a misleading up, to that point, the 30th of October, there was nothing done but what was in the regular course of the business of Mr. *Bethune.*

A proposition is made to take an admirable risk, so far as I can see. A good rate is allowed, and no reason why it should not be accepted. As Mr. *Bethune* writes in one of his letters he considers it one of the best vessels that ever took a cargo from that port. An application was made and accepted, and there being a loss, the amount of re-insurance is paid.

Now, on what ground is it sought, on the part of the company that has paid the re-insurance, to recover it back from the company to whom the payment has been made. Firstly, that there was no insurance at all; that the insurance was merely a matter of

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thought; that Mr. *Bethune* desired that there should be an insurance, and consequently now alleges that there was an insurance; but that Mr. *Bethune* could not think the insurance into existence, and thus bind *The Canada Fire and Marine Insurance Company*, and as the insurance never existed, but in the imagination of Mr. *Bethune*, the plaintiffs cannot be bound.

The present differs from the cases that have been cited or that I have seen, so far at all events as one circumstance is concerned. I know of no case in which so full and complete power has been given to the agent as has been given in this case. It is most peculiar in this respect, that instead of the head office being the fountain from which the power to act was to be obtained, the fountain from which instructions were to be obtained, all the power, and all the rules, and all the regulations, were to be made by this agent in Montreal, and the head office in Hamilton, the manager of which knew nothing about marine insurance, was prepared to take from the person who occupied the position of agent in Montreal, rules and regulations to bind the company in Hamilton; treating as it were *Simpson* and *Bethune* in Montreal as being in this matter their principals.

Judgment.

A form of policy is sent from the manager in Hamilton to the agents in Montreal. It does not suit them. Another is sent, and Mr. *Bethune* has full instructions to deal with that policy as he thinks best. Now, what is the nature of the policy? It guarantees an insurance in favor of *Simpson* and *Bethune* to whatever amount of risks, not exceeding $5,000 each, and, if there be no fraud in the transaction, whatever kind of marine risks they choose to write in that policy.

The mode of covering a risk by the policy, was to insert on the back of it the risk, the rate, the amount, and so on. And that constituded the insurance, and the insurers then occupied the same position as if the

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policy Mr. *Bethune* had received had written on the back of it. "This policy of insurance in favour of the insured is issued as if direct from Hamilton in their favour."

The whole of the policy having become covered with these risks, Mr. *Bethune*, on this application being presented, causes to be written in his book the fact that he has accepted it. All this is known to Mr. *Bethune*. If this was a case in which Mr. *Bethune* raised this defence, it would be laughed out of Court. There could be no ground whatever for holding Mr. *Bethune* not responsible to the insurers. What more was to be done. If they did not want the certificate, which was generally used simply for the purpose of raising money at the bank or otherwise; if they did not demand the certificate which merely certified to the fact that the contract had been made, and that there was an insurance, because they did not require it, that did not in any way interfere with the risk or its acceptance, or the terms on which it had been taken. The rate had been agreed to, the amount had been agreed to. There was the noting then of the fact in the book of the agents, the policy having been filled, and all that was necessary, if Mr. *Bethune* was the individual being dealt with, quite apart from the company, all that could have been done to make him responsible to these persons sending, the insurance had been done.

Judgment.

They might have said: "We do not want the certificate; we are not going to raise money; we do not want any receipt; we do not want to transfer it to whatever port, Plymouth or Falmouth, the cargo may be going; we do not want it, and therefore do not ask for the certificate." The entry in the book and the application linked with the policy, made that vessel just as much insured as if the certificate had been given.

The manner in which Mr. *Bethune* chose to carry out the business, as to which he had full power from the

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company, was to present an application and to note in his book the insurance; and this vessel was then as much insured as if the policy had been issued. Mr. *Bethune* had full power; he was not in any manner to be controlled according to their practice by the company in Hamilton. He rather controlled them. Now what was the practice of Mr. *Bethune* when an insurance had been effected, so far as the head office was concerned? He sent them a memorandum informing them of the fact. He did not do that in this case, but they afterwards do not object to that. They afterwards paid the loss, knowing that he had not done this, in due course and within the usual time, so that they cannot make any objection so far as that is concerned. When they paid this loss they knew that within a reasonable time, that is taking the term reasonable to mean as he had done in other cases at the close of the month, he had not entered this loss in the slip from time to time sent the company. The company cannot now make anything out of the fact that there was not presented to them a slip informing them of the fact of insurance, at the time that should have been done, if in reality there was an insurance on the 30th of October, when, as I understand, returns of losses were being made. They pay this loss, knowing that they did not receive the returns within proper time, so that they cannot make complaint that they were not informed of the insurance within the period within which ordinarily they were told of it.

Judgment.

I think that there was upon the evidence, an insurance in *The Canada Fire and Marine*. I think that Mr. *Bethune* did all that was necessary, not only in his mind, but also in the way of noting and entering the fact of this insurance. That there was no fraud, or even impropriety, with but the one exception.

I think it would have been better if Mr. *Bethune*, when he wrote the letter of the 13th November, had informed *The Canada Fire and Marine* of the fact.

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"I did take this application. I noted it in my book, but I did not then prepare a certificate." I dare say it would have been better for him to have informed the company of this fact, and I dare say that if that had been done this question would never have been raised; but, holding that there was an insurance, and holding that there was no fraud, or other impropriety, and that there was nothing of that kind in the transaction with the defendants, I have come to the conclusion that the *Canada Fire and Marine* did only that which they were bound to do. They made good this loss on the representation of their agent, who had insured in good faith. They were bound to have paid this amount, and they have no ground for now claiming to recover back the money paid.

I think the whole difficulty has arisen from a misapprehension of the facts by Mr. *Corey*. Mr. *Kavanagh*, whether intentionally or not, gave Mr. *Corey* a wrong impression of what took place on the 13th of November, thereby misleading Mr. *Corey's* company as to what did take place on that day, and putting the company thereby in an entirely wrong position; and from the way in which he gave his evidence, and from the facts which he himself adduced, I believe that he was influenced in doing so not from a desire to benefit the company, but simply out of an ill-feeling against Mr. *Bethune*, and I think that Mr. *Corey* has, more or less, sustained Mr. *Kavanagh* in that position. I believe that if this company had known the facts of the case as they have been laid before me in the evidence on Thursday last, this bill would never have been filed.

Judgment.

There is no fraud, no dishonesty, no impropriety on the part of the defendant company. There was an insurance in fact, and the plaintiffs did only what they were bound to do in making good this loss, and therefore there is no ground for the recovery back of this money.

Bill dismissed, with costs.

1879.

BOYD v. SIMPSON.

Practice—Costs—Letter written without prejudice.

Although a letter written "without prejudice" by a party in the course of a cause cannot be read against him, it may be read by him on the question of costs, in order to shew that he had made such an offer as rendered the further prosecution of the suit unnecessary.

Hearing on further directions, the defendant submitting to a decree as asked, except as to costs.

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

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

SPRAGGE, C.—The question upon further directions is only a question of costs, and that question turns upon whether an offer contained in a letter written "without prejudice" by the defendant shortly after the commencement of the suit, can be read by himself.

Judgment.

I said at the hearing that I took the meaning of such an offer to be, that the writer was willing to pay so much in order to settle the suit; but that in case his offer was not accepted, it was not to be taken as an admission that so much was due; and that I thought his offer, being expressed to be without prejudice, did not preclude him from using it upon the question of costs in order to shew that he had made such an offer as rendered the further prosecution of the suit unnecessary.

Mr. *Bethune* has since referred me to the case of *Williams* v. *Thomas* (*a*), in which the like objection was made, and was overruled by Sir *Richard Kindersley*. The learned Vice-Chancellor said he considered that the terms, "without prejudice," contained in the letter, meant that the writer of it must not be

(*a*) 2 DeG. & S. 37.

1879.

Boyd v. Simpson.

prejudiced by it; he did not think it at all followed that if a person wrote a letter without prejudice it was not competent for him to use it, although it could not be used against him.

In *Woodland* v. *The Eastern Counties and London and Blackwall R. W. Co.* (*a*), Lord *Hatherley*, then Vice-Chancellor, interprets such an offer thus: "When a party has exhibited what he considers reasonable terms on a treaty 'without prejudice,' his course is quite evident, and why he adopted it. It is as if he were to say, 'I send you a proposal, and expect your answer, and shall make use of your answer with a view to costs.'"

In *Morgan and Davy*, p. 85, the rule is stated thus: "Although letters written 'without prejudice,' with a view to the compromise of the suit, are not generally admissible in evidence, they may be read on the question of costs."

Judgment.

In my opinion, the view that I took of the question at the hearing is supported by authority, and is consonant with reason.

In the defendant's letter, to which I have referred, he offered to pay to the plaintiff a sum of money slightly in excess of the sum found due to him, with the costs up to the date of that offer. The order will be that the defendant pay the sum found due with costs up to the making of the offer, the subsequent costs of the defendant to be paid to him by the plaintiff.

(*a*) 1 Jurist N. S. 899.

1879.

CAMPBELL v. MCDOUGALL.

Mortgagor and mortgagee—Notice—Priority.

In October, 1863, the owner of real estate created a mortgage thereon in favour of *J. M.* to secure $20,000, which was duly registered on the day of its execution, and was in 1875 assigned to a bank to secure a liability of the mortgagee, there having been a prior mortgage on the same estate, created in 1861, securing $1,000. In 1866 another mortgage was created in favour of the plaintiff for $4,000, which was intended to be substituted for the prior mortgage for that amount, and the money obtained thereon was applied towards the payment thereof, *J. M.* giving a written consent that the latter mortgage should have priority to his own notwithstanding its prior registration, such consent, however, not being registered. The mortgaged estate proved insufficient to pay the mortgage assigned to the bank, who had taken the assignment thereof in good faith and without notice of *J. M.'s* consent to be postponed to the plaintiff.

Held, that these circumstances did not create an equity in favour of the plaintiff to call upon *J. M.* to make good his loss by reason of *J. M.'s* neglect to notify the bank of his priority.

The case of *Slim* v. *Croucher*, 2 Giff. 37, considered and distinguished.

Examination of witnesses and hearing at Cobourg, at the Autumn Sittings, 1878.

The facts appear in the judgment.

Mr. *W. Cassels*, for the plaintiff.

Mr. *Attorney-General Mowat*, for the defendant, *James McDougall*.

Mr. *Kingstone*, for the Quebec Bank.

Mr. *Moss*, for the creditors.

April 2nd. SPRAGGE, C.—There was a mortgage by *Wm. McDougall* dated 24th October, 1863, registered the same day, to defendant, *James McDougall*, for $20,000. This mortgage was assigned to the Quebec Bank in 1875 by *James* to secure a liability to the Bank: there are two assignments, one dated 13th November, 1875, and a more formal one of an earlier date, 16th March, 1875.

1879.

Campbell v. McDougall.

I think it should be 1876, but it is not material. The mortgage of *William* to *James McDougall* was not a first mortgage on the property, there was a previous mortgage by *William* to *George Taylor*, dated 12th July, 1861, for $4,000.

The mortgage by *William* to the defendant, which is also for $4,000, is dated 28th January, 1866, and was intended, as appears by the evidence, to be substituted for the mortgage to *Taylor*; the money to be advanced by the plaintiff to be applied, *pro tanto* at least, to the discharge of the mortgage to *Taylor*, and it appears that it was so applied; and *James McDougall* gave a written consent that the plaintiff's mortgage should stand before his own: that his own should stand postponed notwithstanding priority of date and registration. This consent is dated 7th February, 1866, after the date of the plaintiff's mortgage, but the money was not advanced by the plaintiff till after that date. This consent was not registered. Upon the registry therefore the mortgage of *William* to *James* assigned to the Bank would appear to have priority to the plaintiff's mortgage.

Judgment.

The case made by the bill is that it was the duty of *James*, in assigning to the Bank, to have notified the Bank of the consent that he had given, so as to preserve the priority of the plaintiff's mortgage to *James'* mortgage assigned to the Bank, and that he omitted to do so; that the Bank took the assignment innocently without notice, and the plaintiff asks for a personal remedy against *James McDougall* as the penalty for his neglect; that the mortgage property being insufficient to pay the mortgage assigned to the Bank, *James McDougall* should pay the plaintiff's mortgage himself.

James McDougall was examined at the hearing, and gave, as it appeared to me, honest evidence, though his memory upon some points may have been at fault. He says he was never informed whether the proposed

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arrangement with the plaintiff had been carried out; that in making his arrangement with the Bank for the assignment of his mortgage he informed the manager that there was a mortgage standing before his of $5,000 or $6,000; he says he did not mention the name, as he had forgotten, and I thought he spoke truly; the mortgage to the plaintiff was more than ten years before: that to *Taylor* more than fifteen years before, and he was not a party to either of them; all that he had done was to give his consent that the one should be substituted for the other, his own mortgage standing second, as it did before.

I have nothing to do upon this pleading and this evidence, with any case that may be made between the plaintiff and the Bank, or between the Bank and *James McDougall;* nor is it necessary that I should say whether *James McDougall* owed it as a duty to the plaintiff to notify the Bank at all of the existence of the prior mortgages; or whether, if the plaintiff sustains a loss, it is not to be attributed to his own neglect in omitting to register the consent of *James* to the postponement of his own mortgage: I have only to say that upon the pleadings and evidence before me the plaintiff does not in my opinion establish a case against *James McDougall.*

Judgment.

The case of *Slim* v. *Croucher* (*a*), is very different. There the defendant, on the 7th of December, 1856, wrote to the agent of the plaintiff: "I am quite agreeable to grant a peppercorn lease of ground on which four houses are erected, and situated at Bromley, to Mr. *Hudson.*" This was written to enable *Hudson* to borrow money from the plaintiff, and the plaintiff upon the strength of it lent *Hudson* $300. It turned out that in August of the same year the defendant had granted to *Hudson* a lease of the same premises, which *Hudson* had assigned to a stranger, and that *Hudson*

(*a*) 2 Giff. 37, 1 D. F. & J. 518.

had left the country. The defendant's excuse was that he had forgotten the former lease. The learned Vice-Chancellor, in giving judgment, said the defendant must have known that the lease which he had granted before giving this letter was still valid and effectual, and that he must be held to have known that the plaintiff was lending his money upon an illusory grant, and granted relief.

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In my opinion the plaintiff is not entitled to relief in this case. His bill must be dismissed, and with costs.

CROSBIE V. FENN.

Mortgages—Attaching mortgage debt.

A creditor of a mortgagee who has sued out an attaching order against the mortgage debt, is not an incumbrancer within the terms of the General Order 448, of which the Master is to take an account.

Statement.

This was an appeal from the report of the Master at Barrie, under the following circumstances.

The suit was an ordinary one by a mortgagee for a foreclosure or sale of the property, and the usual decree for taking the accounts and ascertaining incumbrances had been made.

It appeared that one *George Fletcher* had recovered judgment against the mortgagee *Crombie*; and in August, 1875, having ascertained that *Fenn* owed *Crosbie* this mortgage debt, he obtained an order from the County Court Judge attaching it, but nothing further was done upon it.

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Crosbie v. Fenn.

This suit having been brought, *Fletcher* claimed before the Master a lien or charge upon the interest of the plaintiff by virtue of the attaching order, and asked to be reported as a person to whom a portion of the debt was due. The Master thought he had no power to do so. *Fletcher* thereupon appealed from the report.

Mr. *Rye* and Mr. *Pepler*, for the appeal.
Mr. *George Lount* and Mr. *Mulock*, contra.

Judgment.

Proudfoot, V. C., [after stating the facts above set forth.]—I was referred to *McDonald* v. *Wright* (*a*), as establishing that in such a case the Master should have reported who was the owner of the mortgage upon which the suit was brought. But I do not think it decided the question; for in that case the contest was between the plaintiff and a defendant who claimed to be entitled to an incumbrance upon the land, the plaintiff seeking to attack the charge upon equitable grounds. It was not a dispute as to the ownership of the plaintiff's security; and the remarks of the learned Vice-Chancellor *Mowat* apply to such a case, when he says, the Master has to report not only what are the incumbrances, but who are the incumbrancers. He says: "Generally there is no dispute as to the assignment. At other times the dispute may be easily and promptly and inexpensively investigated and disposed of by the Master under a decree like the present; sometimes a suit between the parties may be necessary for the convenient and satisfactory adjudication of the controversy." And in that case he thought the contention could not possibly be disposed of by the Master in that suit.

The incumbrance in that case was one properly sought to be proved under the decree. But it is no authority to shew that a like contest as to the plaintiff's security came within the Master's authority.

(*a*) 12 Gr. 552.

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The Reg.-Gen. 441, directs that decrees are to contain a general reference to take accounts, and are to be read as if they contained, amongst other things, a reference to inquire as to incumbrances subsequent to the plaintiff's mortgage upon the lands and premises embraced in it; and by order 448 he is to take an account of what is due to the plaintiff and other incumbrancers, &c. But incumbrances upon the plaintiff's security do not come within the terms of this reference. *Fletcher's* claim is not a claim upon the lands subsequent to the plaintiff's mortgage; so that I think the Master was quite right in saying he had no power under this decree to take an account of what was due to *Fletcher* by the plaintiff.

Assuming, however, that it was a proper subject of inquiry, there seems great room for the argument that there was no lien in the ordinary sense of that word until an order for payment had been obtained. The cases cited of *Holmes* v. *Tutton* (*a*), and *Turner* v. *Jones* (*b*), seem to establish that. At all events they render it expedient that any claim of such a nature should be adjudicated upon by bill, or by petition.

Judgment.

I dismiss the appeal, with costs.

(*a*) 5 E. & B. at p. 80. (*b*) 1 H. & N. at p. 883.

1879.

MASSON v. THE GRAND JUNCTION R. W. CO.

Injunction—Railway company omitting to erect fences—Time within which company must erect fences—Damages.

A railway company who take possession of land under the compulsory powers conferred by the statute are bound to erect fences for the proper separation of the railway from the remainder of the land within six months from the time of possession being taken, not from the time of notice being given requiring such fences to be constructed, which need only be a reasonable notice to fence; and if they neglect to do so they may be enjoined from further using the line of railway. In such a case the owner is not required to erect the fences at his own expense and depend on his recovering damages from the company.

Statement.

THIS was a suit by the owner of lands against the Grand Junction Railway Company seeking to restrain the defendants from continuing to use their line of railway until they had constructed proper fences along their line of railroad. It appeared that the defendants, under the compulsory powers given by the Railway Act, had taken possession of certain lands belonging to the plaintiff for the purpose of their railway, in October, 1878, and the plaintiff, in December following, served the company with notice requiring them to fence off the land so taken by them from the other lands of the plaintiff, as, owing to the position they were left in, the plaintiff was unable to cultivate the same; neither could he safely allow his cattle or other live stock to graze thereon. The defendants paid no attention to such demand of the plaintiff, but continued to construct their line of road, leaving the farm of the plaintiff entirely open along their line of railway.

The plaintiff, after the expiration of six months from the time possession was taken by the defendants, gave notice of motion for an injunction to restrain the defendants from continuing the use of the road until they had properly fenced in that portion of it adjoining the plaintiff's farm. The affidavits filed in support of the

application clearly shewed that plaintiff could not safely till his land or allow cattle to run on it.

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Mr. *Northrup*, in support of the motion, referred to section 22, sub-section 7, Consol. Stat. U. C. as defining the duties imposed on railway companies thus taking possession of lands, which enacts that "within six months after lands have been taken for the use of the railway, and if thereunto required by the proprietors of the adjoining lands respectively, but not otherwise, the company shall, at their own costs and charges, set and make on the lands so taken * * a sufficient post and rail, hedge, ditch, bank, or other fence, sufficient to keep off hogs, sheep, or cattle, and thereby divide and separate * * such lands from the lands or grounds adjoining thereto." One objection raised by the defendants is that notice requiring the work to be done had not been served six months, although possession had been taken for more than that period. *Elliott* v. *The Buffalo, etc., R. W. Co., (a)* however, shews that six months' notice is not required, but only possession for that time and notice for a reasonable time is sufficient. Here ample notice was given. The injury here, if any should arise, by granting the injunction, will be to the company alone, not to the public, as the affidavits filed by the defendants shew that the line of railway at this point is not made use of except for the purposes of construction. And, in *Cosens* v. *Bognor R. W. Co.* (*b*), the Court restrained the defendants from using their railway in default of payment of the purchase money, for which, of course, the plaintiff was clearly entitled to relief at law. Here the plaintiff is without any adequate redress other than he may be able to obtain in this Court. He also referred to *Arnold* v. *Furness R. W. Co. (c); Biscoe* v. *The Great Eastern R. W. Co., (d)*. The Court will interfere

Argument.

(*a*) 16 U. C. R. 289.
(*b*) L. R. 1, Ch. 594.
(*c*) 22 W. R. 613.
(*d*) L. R. 16 Eq. 636.

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Masson v. The Grand Junction R. W. Co.

by injunction to restrain a constantly recurring injury, which would be the case here if cattle were allowed to have access to plaintiff's lands, thereby destroying his crops.

Mr. *Applebe*, contra, contended that the company were entitled to six months' notice of the work being required to be performed, and the affidavits shew that all has been done that could be done owing to the inclemency of the weather. Here the plaintiff has an easy method of redressing the injury, as he need only construct the requisite fencing himself and recover the expense from the company in case of neglect to pay; and *Kerr* on Injunction, page 231, shews that the Court restricts this kind of relief to cases in which there is no adequate remedy at law. In this case the plaintiff can obtain a mandamus at law compelling the defendants to erect this fence: but here he is in effect asking for that relief as also an injunction.

Mr. *Northrup*, in reply, referred to *Wilson* v. *The Northern R. W. Co.*, (a).

Judgment.

PROUDFOOT, V.C.—I do not entertain any doubt that the injunction ought to go. Railway companies have great powers and privileges conferred on them by the Legislature, and it is only right that they should be held to a strict observance of the duties imposed upon them. One of these is, to construct fences. Section 22 of the Railway Act says that "fences shall be erected and maintained on each side of the railway, of the height and strength of an ordinary division fence, with openings or gates or bars therein at farm crossings of the road for the use of the proprietors of land adjoining the railway"; and sub-section 7 says that "within six months after," &c. [The Vice-Chancellor here read the clause above set forth.]

(a) 12 U. C. R. 463.

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The defence offered by the company is, that the severity of the winter has been such as to preclude the possibility of erecting these fences, but for six weeks past at least that obstacle did not exist; and although the affidavits filed in opposition to this application shew that 300 or 400 men have been and are employed in the construction of this railway, it is no where stated that any portion of this large force has been employed in the construction of fences on any portion of their line. A reasonable time must, of course, elapse in all cases between the time of giving notice and an application to compel the work to be done; but here certainly no ground for objection exists on that score, as it is admitted that the requisite notice was given as far back as some time in December last. Neither can I agree that the plaintiff's proper remedy is at law by recovering damages—that is, that he should construct the fences himself, and then sue for the amount expended in doing so.

Judgment.

The injunction will, therefore, go to restrain the defendants from the further use of the road until these fences are constructed.

NOTE.—This case was subsequently carried to the Court of Appeal, and on the 29th day of May, 1879, the above decision was reversed, that Court, while adopting the construction of sec. 22, sub-s. 7, contended for by the plaintiff, in effect determining that a proper case had not been made out for granting an injunction peremptorily restraining the company from further constructing or working the line of railway; that under the circumstances the possible injury and loss to the defendants, by the sudden and immediate stoppage of their work largely outweighed any possible advantage to the plaintiff; and that the proper relief was in the nature of a mandamus, or mandatory injunction, requiring the company to construct the fences, and that if there was jurisdiction to restrain the further use of the road, as to which any expression of opinion was avoided, it should not be exercised except in the case of a contumacious refusal.

1879.

TORONTO DAIRY COMPANY v. GOWANS.

Covenant in restraint of trade—Injunction—Liquidated damages—Waiving claim for damages.

The defendant agreed to serve the plaintiffs in their business of milkmen, and in case of any breach by him of the agreement entered into between the parties, and signed by them, that he would forfeit the sum of fifty dollars, to be recovered by the plaintiffs as stipulated damages, and not as a penalty.

Held, That this did not enable the defendant, on payment of the $50, to do the prohibited acts: and in a bill seeking to enforce the agreement the plaintiffs prayed for payment of the amount of the liquidated damages, and for an injunction to restrain the defendant from acting in breach of his agreement, on the motion for injunction coming on, *held*, that the plaintiffs were at liberty to waive their claim for damages and elect to have relief by injunction.

Statement.

The bill in this case stated that the plaintiffs were incorporated by Act 35 Vic. ch. 85, O., and were empowered to carry on the business of dairy farmers, the buying and selling of cattle, and other farm produce and stock, and the supplying of milk, cream, or other dairy produce to the city of Toronto and elsewhere; that for the purpose of carrying on their business it was necessary to employ servants to sell and deliver milk to the customers or those who might become customers of the plaintiffs: that on the 17th December, 1878, the plaintiffs employed the defendant as their servant, and a written contract was entered into between them by which the plaintiffs engaged the defendant for one month certain, and so on from month to month; and it was stipulated that each should give the other two weeks' notice to quit, and the defendant further agreed as follows:—"The party of the first part further agrees that he will at any time when required, point out to the company, and shew them, their servants or agents, or any person they may name for that purpose, who the customers are whom he serves, and their place of residence,

and will, if required, give a full list in writing, of such customers, and their address, where such milk is delivered, and when changes are made in the customers, or new customers are added he will give the changes and new addresses in writing, that the list may always shew all the customers he serves; and further, that he will not at any time during the said service, nor for a period of nine months after he has left the service of the said company, attempt to serve such customers on his own behalf or on behalf of any other person or persons; and that he will not in any way interfere with or solicit the said customers, and in any case of a breach of this said agreement on his behalf that he will forfeit the sum of fifty dollars, to be recovered from him by said *Toronto Dairy Company* as liquidated damages and not as a penalty."

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The bill further stated that on the 14th February, 1879, the defendant gave the plaintiffs notice of his intention to leave, and left on the first of March following. That whilst the defendant was in the service of the plaintiffs he delivered milk for them in a certain designated locality in Toronto to a great number of customers: that since the defendant left their service he had served on his own behalf several of such customers with milk, and had solicited others, and threatened to continue to do so. The prayer of the bill was for an injunction restraining the defendant in the terms of the contract, and then asked "That the defendant may be ordered to pay to the plaintiffs the said sum of fifty dollars as damages for his said conduct."

Statement.

The defendant opposed the motion, and on the return of the notice demurred to the bill *ore tenus* on the ground that the plaintiffs were not entitled to an injunction, because the contract provided for liquidated damages, and the plaintiffs were only entitled to recover such damages; and because the plaintiffs had by their bill asked for payment of such liquidated damages, and

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they could not obtain both damages and relief by injunction.

Mr. *Winchester*, for the defendant, referred to *Cornwall* v. *Hawkins* (*a*), *Atkyns* v. *Kinnear* (*b*), *Sainter* v. *Ferguson* (*c*), to shew that where liquidated damages are stipulated for the Court will not interfere by injunction. In fact, that here the defendant by payment of the $50 as liquidated damages, would give him the right to carry on this business which he had covenanted not to do either by himself or others.

Argument.

Mr. *A. Hoskin*, for the plaintiffs, contended that the plaintiffs were entitled to an injunction notwithstanding liquidated damages were provided for in the contract; that they were entitled to enforce either remedy, and were entitled to elect at any time which they would take, and the plaintiffs offer to waive any claim for damages. He referred to the following cases: *Bird* v. *Lake* (*d*), *Avery* v. *Langford* (*e*), *Fox* v. *Scard* (*f*), *Howard* v. *Woodward* (*g*), and *Jones* v. *Heavens* (*h*).

At the opening of the Court next morning:

Spragge, C.—The question really is, what is the proper construction to be given this agreement, which is an express one?

Is it that upon payment of the stipulated sum, $50, the defendant is to be at liberty to violate his agreement, that is, do what he had agreed not to do? This is stated in the bill to be stipulated damages, and if so, what is the effect of it? In *Atkyns* v. *Kinnear* (*i*), there was no question as to the right of the plaintiffs

(*a*) 41 L. J. N. S. 435.
(*b*) 4 Ex. 776.
(*c*) 1 McN. & G. 286.
(*d*) 1 H. & M. 111.
(*e*) Kay 664.
(*f*) 33 Beav. 328.
(*g*) 34 L. J. Ch. 34.
(*h*) L. R. 4 Ch. Div. 636.
(*i*) 4 Ex. 776.

obtaining an injunction, but simply whether the sum named was liquidated damages or penalty. In *Sainter* v. *Ferguson* (*a*), before Lord *Cottenham*, the plaintiff came for an injunction after having obtained his compensation at law, and the Lord Chancellor discharged an order of Vice-Chancellor *Knight Bruce* granting the injunction.

In *Bird* v. *Lake* (*b*), an injunction was granted on the ground of express covenant between the parties, although there was something in the language of the recital to indicate a purchase at a certain agreed sum. *Howard* v. *Woodward* (*c*), appears to be a strong case. There a bond was given by a solicitor's clerk, binding himself not to carry on business as a solicitor within fifty miles of a given place, and it provided that if he paid £1,000 to the solicitor, the plaintiff, as liquidated damages the bond should be void; and on the clerk afterwards assuming to carry on business as a solicitor within the prescribed distance, the Court held the plaintiff was entitled to an injunction restraining him from so doing.

Judgment.

Fox v. *Scard* (*d*), was not a case of liquidated damages, but the objection raised by the defendant was, that the remedy was at law. There the defendant had given the plaintiff a bond for £1,000, conditioned not to practise at Weymouth, notwithstanding which, on his dismissal from the employment of the plaintiff, he continued to practise there on his own account. The Master of the Rolls on overruling a demurrer for want of equity remarked, "Where a person enters into an agreement not to do a particular act, and gives his bond to another to secure it, the latter has a right at law and equity, and can obtain relief in either, but not in both Courts. If he proceeds at law on the bond, and, recovers damages, and afterwards comes into equity

(*a*) 1 McN. & G. 286
(*b*) 1 H. & M. 111.
(*c*) 34 L. J. Ch. 47.
(*d*) 33 Beav. 328.

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and states that fact in the bill, a demurrer will lie, because he has chosen the jurisdiction and the remedy he will have. Accordingly the practice has been to adopt the rule very strictly in equity." [The Chancellor here reviewed the other cases cited on the argument and continued.] the result of all the cases in my opinion, therefore, is, that they do not establish that where liquidated damages are stipulated for the party complaining has no remedy in equity, but that where there is an agreement not to carry on business, &c., that agreement will be enforced in equity. There may be an agreement that upon payment of a liquidated sum, a party shall be at liberty to do acts which he had agreed not to do. Or it is competent for parties to agree that certain acts shall not be done; and if done that a liquidated sum shall be paid, and still such payment will not enable the party to do the prohibited act, but it is not contended here that this is such an agreement where the plaintiffs elect as they do, their remedy by injunction in this Court, foregoing the stipulated damages.

Judgment.

1879.

PRESSY v. TROTTER.

Mortgage—Mortgagor and mortgagee—Assignee of mortgage security—Costs.

Under the facts appearing in the report of this case, *ante* page 154, the Court on further directions refused to allow the plaintiff, Mrs. *Pressy*, costs against the assignee of the security, although it was shewn on taking the accounts in the Master's office that the mortgagee was indebted to her husband at the inception of the mortgage in a sum exceeding that mentioned in the mortgage; restricting her right to recover her costs from the mortgagee alone, though, had the mortgage money been satisfied by payments, costs would have been given against the assignee as well.

Hearing on further directions.

The facts of the case are fully stated in the report thereof, *ante* page 154.

Mr. *Creelman*, for the plaintiff, asked for a direction that the mortgagee should be ordered to pay the amount found due by the Master, and that the defendants should be ordered to pay the costs of suit. Argument.

Mr. *Cassels*, for the defendant *Vance*.

Mr. *Cattanach*, for defendant *Trotter*.

SPRAGGE, C.—*Mary Pressy* (with her husband) files a bill to redeem her mortgage. The bill is filed against the mortgagee and the assignee of the mortgagee.

Concurrently with the mortgage was an agreement to which she and her husband and the mortgagee were parties, to the effect that any sum, in which the mortgagee might then be, or should thereafter become indebted to her husband upon the dealings between them, should be applied towards satisfaction of the mortgage.

It was unknown how the accounts between them at that time stood, but it turns out now upon taking the accounts that the mortgagee was indebted to the

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husband in a sum exceeding the amount purporting to be secured by the mortgage, so that except in name and upon paper, there never was any mortgage debt.

The report of the Master finds this, and upon the matter coming before me upon further directions, the only question I reserved for consideration was, whether Mrs. *Pressy* was entitled to her costs against the assignee of the mortgage, as well as against the mortgagee himself.

If it had been a case of mortgage debt reduced by payment, I should not have hesitated, and I agree that as against the mortgagee himself, she is entitled to her costs; but it does not appear that the assignee knew of the very unusual agreement made between the parties to the mortgage. She did not register it, so that the

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natural conclusion drawn by any person dealing with the mortgagee would be that it was a mortgage debt subject only to the dealing between the mortgagor and mortgagee. I think that Mrs. *Pressey* contributed to mislead the assignee, and as a matter of discretion, I refuse her her costs against any one but the mortgagee.

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RE HENDERSON—HENDERSON V. HENDERSON.

Administration suit—Staying proceedings of a creditor suing at law—Costs.

The Court in making an order to stay the proceedings of a creditor, who had instituted proceedings at law to recover his demand after an order for the administration of the estate had been obtained in this Court, ordered the creditor to receive his costs; the creditor and his attorney in the action both swearing that at the time of suing out the writ they were not aware of the pendency of the administration, there being no reason to doubt the *bona fides* of their conduct, although it was shewn that a year before they had been notified of the administration order.

Statement.

This was a suit instituted for the purpose of administering the estate of one *Archibald Henderson*, deceased, who died an the 5th of March, 1877. After the order for administration had been obtained, one *George Frost*, the holder of a mortgage created by the deceased to secure the payment of $600 and interest, dated the 9th of March, 1874, commenced an action, on the 23rd of April, 1877, against his administratrix, to enforce payment of $648, being principal and overdue interest; and also gave notice of his intention to sell under the power contained in the mortgage, and she, for the purpose of protecting the estate and preventing the land being sacrificed, paid the amount of interest accrued due, and also a sum of $45 for costs. That the order for administering the estate was obtained on the 23rd day of October, 1877, and the same was being proceeded with, in the office of the Master at Guelph, when *Frost* again, on the 14th of March, 1879, issued another writ of summons against the administratrix to enforce payment of $648; being principal money and interest due on such mortgage. An application was thereupon made on behalf of the administratrix for an order upon *Frost* to stay his proceedings at law.

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Re Henderson.

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

Mr. *T. H. Spencer*, contra, did not object to the order being made if the costs incurred at law, and of appearing upon the present application, were ordered to be paid to him.

Innis v. *Innis* (*a*), *Gardner* v. *Garret* (*b*), *Jones* v. *Brain* (*c*), were, in addition to the cases mentioned in the judgment, referred to by counsel.

Judgment.

SPRAGGE, C.—This is an application to stay proceedings at law; an order for the administration of the estate of the debtor having been obtained. The action was brought in the month of March last, proceedings being at the time pending in the Master's office. This case, therefore, belongs to the class where proceedings at law are commenced—not continued only—after decree or order for administration. The creditor plaintiff at law does not resist the application, but claims that he is entitled to his costs at law, and his costs of appearing upon this application; and he and his attorney each file an affidavit, the attorney that he was ignorant of the estate being administered till after service of process at law; and the plaintiff himself that he was so ignorant until served with notice of motion.

It appears from the affidavit of the solicitor of the plaintiff in this cause, that the attorney in the action at law was made acquainted with the pendency of proceedings in the administration by letters written to him by the solicitor in February and March, 1878, not however in relation to the debt now sued for, which had not then accrued due, but through the solicitor in the earlier letters asking for information, and in the later letter, which covered a draft for interest on the mortgage the principal of which is now sued for, informing him of the pendency of the proceedings, but

(*a*) 5 Sim. 675. (*b*) 20 Beav. 469. (*c*) 2 Y. & C. C. C. 170.

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Re Henderson.

still not with a view to his coming in under them. The administration order is dated 23rd October, 1877, and requires the Master's report to be made within six months. So it was within the six months that these letters were written. The time for making the report was extended by order for six months from 17th April, 1878, and for another six months from 16th October, 1878.

The decisions are not quite uniform as to the terms upon which proceedings at law will be stayed. *Re Langstaff* (*a*), before Mr. Justice Strong, then Vice-Chancellor, was a case where the action at law had been commenced before administration order granted; and he stayed proceedings only upon the terms of the costs at law and of appearing upon the motion, being paid. The rule is thus stated in *Daniell's* Chancery Prac., 5 ed. 1466, "The creditor is, unless his claim is unfounded, entitled to his costs in the action up to the time when he first had notice of the decree, but not to his costs subsequently incurred. He will also be allowed his costs of the application unless his conduct has disentitled him thereto." Whether he would be entitled to his costs up to his being served with notice of motion, is a point upon which there may be question. The terms depend very much upon the conduct of the plaintiff at law. I gather from the cases that if his conduct has been vexatious, or even unreasonable, that will affect his title to costs.

Judgment.

This case seems to me to resolve itself into this. Whether the creditor suing now for a debt which accrued in March, 1879, and for the recovery of which he sues at law in that month, is affected with notice of an administration order being still open and proceedings pending at that date, by the knowledge which his attorney had of the pendency of such proceedings in the February and March of the preceding year; that

(*a*) 18 Gr. 450.

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knowledge being of the character that I have described; and the plaintiff and his attorney each denying upon oath their having notice of such proceedings when the action at law was brought.

I think I should not be warranted in affecting him with such notice, and that he is entitled to the costs claimed by him upon appearing upon this application.

SMITH, ASSIGNEE, v. MCMILLAN.

Fraudulent assignment—Insolvency—Res judicata—Official assignee, powers of.

The official assignee of an insolvent's estate is appointed for the conservation of the estate, and his powers and duties are only those pointed out in section 16 of 38th Vic. ch. 16. Where, therefore, a person claiming to be a purchaser of the assets petitioned the Judge in insolvency to have them restored to him, to which petition the official assignee appeared, and on discussion the Judge ordered a restoration of the estate to the alleged purchaser.

Held, that the insolvent estate was not represented in such proceeding, and that there had not been any valid adjudication upon the questions raised in this suit.

This was a suit instituted for the purpose of having declared void an assignment of the stock in trade, shop-fixtures, &c., made by one *Joseph A. Smith* to the defendant as being a fraud on creditors, under the circumstances appearing in the judgment.

The cause came on for the examination of witnesses and hearing at the sittings in Toronto, on the 19th of November, 1878.

Mr. *W. Cassels* and Mr. *Monkman*, for the plaintiff.

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Mr. *Maclennan*, Q.C., and Mr. *Meek*, for the defendant.

Counsel for the defendant took a preliminary objection that the question involved in the case had already been disposed of by the County Court Judge sitting in insolvency, under the 125th section of the Insolvency Act of 1875, which enacts that every assignee shall be subject to the summary jurisdiction of the Court or Judge, citing *Archibald* v. *Haldan* (*a*), *Dumble* v. *White* (*b*), *Henderson* v. *Kerr* (*c*), *Cameron* v. *Kerr* (*d*), *Martin* v. *Powning* (*e*).

And here the purchaser submitted his rights to the jurisdiction, and the parties were therefore bound by the adjudication which had taken place between him and the assignee, which was precisely the same question as is now raised for decision in this Court. *Stone* v. *Thomas* (*f*), *Re Edwards* (*g*), *Mathers* v. *Lynch* (*h*), *Burke* v. *Mc Whirter* (*i*), *Crombie* v. *Jackson* (*j*), were also referred to.

Argument.

SPRAGGE, C., took time to look into the authorities, as in the event of the objection raised by the defendant being sustained, it would be unnecessary to proceed with the evidence in the cause.

On a subsequent day,

SPRAGGE, C.—In January, 1878, *Joseph A. Smith* was carrying on business as a dealer in fruit and confectionery. On the 24th day of that month he made a bill of sale of his stock in trade to the defendant for $200, for which he was paid by the defendant. The defendant took and carried on the

April 29.

(*a*) 30 U. C. R. 30-7.
(*b*) 32 U. C. R. 601.
(*c*) 22 Gr. 91.
(*d*) 23 Gr. 374.
(*e*) L. R. 4. Ch. 366.
(*f*) L. R. 5 Ch. 210.
(*g*) L. R. 9 Ch. 6?3.
(*h*) 27 U. C. R. 244.
(*i*) 35 U. C. R. 1.
(*j*) 34 U. C. R. 575.

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same business and added to his stock. On the 20th of March an order for attachment in insolvency was issued against Smith, at the suit of *Morphy & Monkman*, and on the 21st a writ of attachment was issued. On the 20th the plaintiff, as interim assignee, went to the place where the defendant was carrying on the business, and stating his official character to the person who was in charge on behalf of the defendant, demanded possession, and obtained it. The defendant thereupon made application to the County Court Judge, under sec. 125 of the Insolvency Act of 1875, to which the assignee, the plaintiff in this suit, appeared. Evidence was adduced on both sides. The defendant's case was, that he had purchased the stock-in-trade of *Smith*; that of the stock seized by the assignee a portion, of the value of about $50, was part of that purchased from *Smith*, the rest having been sold by him, and that the residue had been since purchased elsewhere. The case was treated as a question of property. The judgment of the County Court Judge was that the whole of the property in question between the parties was the property of the defendant; and he, by his order of the 26th of March, 1878, ordered the goods seized by the assignee to be restored to the defendant. This bill impeaches the bill of sale of January, and the defendant, *inter alia*, sets up the adjudication before the County Court Judge as *res judicata* upon the same matter. The Judge tried the question of the validity of the bill of sale, the assignee impeaching it before him as a fraudulent preference. The adjudication of the Judge and the order made necessarily involved the decision of the question raised, for he could not have ordered the restoration of the portion of goods remaining of those purchased by the defendant from *Smith* without adjudicating that the sale was valid.

Judgment.

The question now raised is, whether the Judge had jurisdiction under sec. 125 of the Statute to adjudicate upon that question.

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It may be conceded that the defendant claiming title by purchase should not have been brought before the Judge by the assignee to determine that question; but the defendant by his petition brought the assignee before the Judge for a summary determination of the question raised by the assignee's seizure of the goods. He invoked the jurisdiction, and the assignee submitted to it by appearing and giving evidence, and the question now is, whether the matter was *coram non judice*.

The cases in this Court, to which I am referred, do not decide the point that is before me. They decide only that a person, not occupying the position of a creditor of the insolvent estate, who claims goods which are in the possession of the assignee, may bring his action in the ordinary Courts of the Province; such Courts not being ousted of their jurisdiction by sec. 125. I am myself inclined to the opinion that upon the summary adjudication of the Court being invoked by a person claiming adversely to the estate and raising a question in regard to a subject matter which under that section is cognizable by the County Court Judge, and such question being presented for adjudication between the parties claiming on the one hand, and the assignee representing the estate on the other, the question would be properly before the County Court, and that upon his judgment upon it, it would be *res judicata*. But, since the argument my attention has been drawn to what, upon looking at the papers, appears to be the fact, that the plaintiff at the date of that adjudication was only official assignee of the estate. The section contemplates the estate being represented at the proceeding before the Judge, where a right of property is involved, though it appears by the concluding words of the section that the official assignee, as well as the assignee who is appointed to represent the estate, is subject to the jurisdiction of the Judge under this section.

Judgment.

The writ of attachment in this case was issued on

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the 21st of March; the order made by the Judge which is claimed to be an adjudication is dated the 26th. The plaintiff must have been at the later date, as at the earlier, only official assignee, as no meeting of creditors for the appointment of an assignee could have been held for some three weeks afterwards. The official assignee is appointed for the conservation of the estate; his duties and his powers are of a limited character, (see sec. 16), and though he becomes assignee in default of the appointment of an assignee by the Court, his duties are only those defined by section 16, and in the meantime he is not the representative of the estate; and anything that he might do in the meantime outside of the duties and powers defined by that section would not, in my opinion, be binding on the estate. My conclusion is, that the insolvent estate was not represented in the proceeding before the Judge, and that there was no valid adjudication upon the questions which are the subject matter of this suit.

Judgment.

The above question was the only one argued at the hearing. It was taken by way of preliminary objection to the hearing of the plaintiff's case, which I assume will be proceeded with at the next Hearing Term. The costs will be costs in the cause to the plaintiff.*

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* The cause was subsequently heard at the sittings at Toronto, on the 20th day of May, 1879, and a decree made in favour of the plaintiff, with costs.

1879.

WOOD v. PAGE.

Mortgages—Vendor and purchaser.

Where lands are sold upon which there is a subsisting mortgage, of which the purchaser is aware, and the vendor covenants that he will pay it off, the purchaser cannot set off against such mortgage the amount due upon a mortgage given by himself for unpaid purchase money, which has been transferred to a *bonâ fide* purchaser. His only recourse in case of damage is to proceed on the covenant of his vendor.

Eagleson v. *Howe*, 15 U. C. L. J., p. 45, and vol. 3 of Mr. *Tupper's* Appeal Reports, p. 566, referred to and acted on.

The evidence and documents shewed that on the 20th June, 1877, the defendant bought the land in question from *Joseph Davis* for the sum of $1,100, paying $400 cash, assuming a mortgage for $115 and interest on the south part of the land in favour of one *Rollings*, and giving a mortgage to *Davis* for $580 to secure the balance. *Davis* assigned this mortgage to the firm of *Ramsay & Burgess*, who gave value for it, and took an assignment thereof without any notice of it being for unpaid purchase money. *Ramsay & Burgess* transferred this mortgage to the plaintiff, who filed a bill for immediate payment or sale. At the time of the sale by *Davis* there was a mortgage for $500 on the north part of the lot which *Davis* had given to one *White*, who had assigned it as collateral security for a loan obtained by him. The defendant set up that an agreement had been entered into between *Davis*, *White*, and himself, that this $500 mortgage should be discharged, and he claimed that he should be allowed to retain the amount thereof out of the money due on the $580 mortgage. Statement.

Mr. *W. Cassels* and Mr. *J. R. Roaf*, for the plaintiff, contended that the defence by way of set off could not be taken, as the amount of the mortgage had not been

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paid by the defendant. That after assignment of the mortgage in question the defendant could not exercise any right to apply the amount secured by the same as a balance of unpaid purchase money in payment of prior incumbrances. That *Ramsay & Burgess* took the mortgage without notice and for value, and the defendant had not any equity as against them or their assignee. That even if defendant could have this mortgage applied in payment of prior mortgages, he ought to pay the whole money into Court and then ask the Court to protect him; and that, under the circumstances, the plaintiff was entitled to a decree for sale in default of payment.

Argument.

Mr. *Kingstone* and Mr. *Black*, for the defendant, contended that a purchaser has the right to apply his purchase money in paying off incumbrances. The plaintiff took his assignment subject to the agreement and state of account between the mortgagee and the mortgagor: *Hamilton* v. *Banting* (*a*), *Woods* v. *Marling* (*b*), *The Church Society* v. *McQueen* (*c*), *Jeffreys* v. *Agra and Masterman* (*d*), *Tully* v. *Bradbury* (*e*), *Watson* v. *Mid-Wales R. W.* (*f*). The judgment of *Strong*, V. C., as reported in *Henderson* v. *Brown* (*g*), and the recent decision of the Court of Appeal in *Eagleson* v. *Howe* (*h*), were, amongst other cases, referred to by counsel.

BLAKE, V. C.—There seems to be no doubt on the evidence that the *White* mortgage is so held that it will not affect prejudicially the position of the defendant. I think it is equally clear on the authorities that the plaintiff is entitled to succeed in this suit. The defendant must look to the covenant which he

(*a*) 13 Gr. 484.
(*b*) 11 Irish Chy. 148.
(*c*) 15 Gr. 281.
(*d*) L. R. 2 Eq. 674.
(*e*) 8 Gr. 561.
(*f*) L. R. 2 C. P. 593.
(*g*) 18 Gr. 79.
(*h*) U. C. L. J., vol. 15, p. 45, vol. 3 App. Rep. 566.

has taken, and demand against his covenantor its fulfilment. He cannot set this up as a defence in the present suit. Whatever doubt there may have been on the point, owing to the conflict of authority, is removed by the decision in the Court of Appeal of *Eagleson* v. *Howe*, which follows the judgment of the dissenting Judge in *Henderson* v. *Brown* (*a*). See also *Davis* v. *Hawke* (*b*), and *Tully* v. *Bradbury* (*c*). The plaintiff is entitled to an order that the defendant procure a discharge of the *Rollings* mortgage in pursuance of his covenant.

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Judgment.

The decree will be with costs.

COURCIER v. COURCIER.

Infant—Partition—Ouster—Rents and profits.

The general rule in equity that an infant is entitled to treat a person who takes possession of his estate as his bailiff or agent applies to a case where the party in possession is a tenant in common with the infant, although there has not been any ouster or exclusion of the infant, or any denial of his title.

Hearing of motion for decree for partition.

The defendants by their answers set up that plaintiff was liable to be charged with an occupation rent, he having been in sole possession of the joint estate.

Mr. *Ewart*, for the plaintiff contended that no occupation rent should be charged, there being no ouster shewn. The Statute of *Anne* gave an account between tenants in common for rents and profits received, but none for occupation rent. One tenant in common, while in possession of the whole, is only in possession of his own, unless he keeps the others out. He referred to *Rice* v. *George* (*d*).

(*a*) 18 Gr. 79.
(*b*) 4 Gr. 394.
(*c*) 8 Gr. 561.
(*d*) 19 Gr. 174.

1879.

Courcier v. Courcier.

Mr. *Hoskin*, Q. C., for the infant defendant.

Mr. *W. Cassels*, for the other defendants, referred to *Pascoe* v. *Swan* (*a*).

May 23th.

Judgment.

PROUDFOOT, V. C.—The general rule in equity is, that an infant is entitled to treat a person who takes possession of his estate as his bailiff or agent, to get if he likes from him an account of the rents and profits, and a decree for possession.

The same rule applies where the occupant is tenant in common with the infant. Where both tenants in common are adult, an account of occupation rent can only be had, under the Statute of *Anne* where the occupant excludes the other. But in the case of an infant plaintiff it is not requisite there should be any other exclusion than not having accounted for the rent.

In *Pascoe* v. *Swan* it seems to have been stated in the bill that the defendant excluded the infant and denied his title, but there does not appear to have been any evidence of this, and the judgment does not proceed upon it, but simply on the ground that having entered upon the estate of the infant he must account for the rents and for an occupation rent while in possession. In fact the defendant had not intruded on the infant, but had only continued the possession which he had at the time the plaintiff's title accrued, and the case is treated as an authority for the general proposition, irrespective of exclusion, by the text writers: *Foster's* Joint Ownership, 20; *Simpson* on Infants, 107; *Lewin* on Trusts, 5th ed., 639.

I am told there have been decisions to the contrary in this Court, but I have been unable to find any; and the reason of the rule, and the authorities referred to, seem to lead to the conclusion I have indicated.

(*a*) 27 Beav. 508.

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KERR v. STYLES.

Mortgage—Sale of equity of redemption under execution.

The rule laid down in *Donovan* v. *Bacon*, *ante* vol. xvi., p. 472, that the sheriff cannot sell, under common law process, the equity of redemption in lands upon which two several mortgages have been created, was held to apply where the second mortgage was in the hands of the plaintiff, an execution creditor, who had recovered judgment in an action upon the covenant contained in the second mortgage.

This was a hearing *pro confesso*.

The plaintiff held a second mortgage on certain lands of the defendant, and default having been made in payment, he had instituted proceedings on the covenant contained in his security, in which action he had recovered judgment, and had issued execution on such judgment; but the sheriff having been unable to find any lands of the defendant other than those comprised in the mortgages, the plaintiff filed the present bill seeking to obtain a sale of the mortgaged lands, and payment of the incumbrances according to their priority.

Mr. *Hoyles*, for the plaintiff, now asked for a decree in the terms of the prayer of the bill.

PROUDFOOT, V.C., suggested that the fact that the execution creditor was himself the holder of one of the mortgages, might make a distinction in the case, and thus enable a sale to be effected under common law process; but after taking time to look into the authorities, and referring to the case of *Samis* v. *Ireland* (*a*), decided in the Court of Appeal on the 22nd of March, 1879, made the decree as asked. Judgment.

(*a*) 4 App. R. 118.

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MUNRO V. SMART.

Married Women—Wills' Act—Power of married woman to devise to her children—Costs.

Held, that under the R. S. O., ch. 106, sec. 6, a married woman could not devise or bequeath her separate property to one of several children to the exclusion of others.

A testatrix by her will devised all the rents and profits of her estate to *C.*, an unmarried daughter, so long as she remained unmarried; and upon her marriage, the whole to be divided between her and her four sisters, but if she died unmarried the division was to be amongst her four sisters; and in case of either of these four dying before the marriage or death of *C.*, the share of the one so dying, to go to her children; and in case of the death of any of her "*said*" daughters without leaving child or children, the share of such daughter to be divided among the surviving daughters or children of deceased daughters.

Held, that the division intended, on the marriage or death of *C.*, was of the income only, not the *corpus* of the estate; and that the five daughters took only life estates.*

Where a cause was carried to a hearing in a defective state through an error common to all parties, diverse interests of infants being represented by one guardian and one counsel, no costs of that hearing were given to either party on the final disposition of the cause.

Statement.

The bill in this case was filed by *Margaret Ramsay Munro*, *Mary Ritchie Logan*, and *Susan Leeming Hamilton*, against *William Lyon Smart*, and his three infant children, setting forth the ownership by Mrs. *Mary Crooks* of certain lands in the City of Hamilton, and her death after having, on the 26th November, 1859, made a will disposing of them as follows:—

"I give and bequeath to my executors hereinafter named, all my estate and property of whatever kind and description and wherever situate upon the trusts, and to and for the uses and purposes following, that is to say: In trust in the first place to pay all my debts, funeral and testamentary expenses; and after payment thereof to hold the residue of my said estate and property for the use and benefit of my daughter, *Catherine McGill Crooks*, if at the time of my decease she shall be alive and unmarried, and so long only as she remains unmarried, so that my said daughter while she remains so unmarried, may receive the interest, dividends, or profits

* Affirmed on rehearing, 5th September, 1879.

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arising from my said estate. And upon the marriage of my said daughter, it is my will and desire that all my said estate and property be equally divided, share and share alike between and among my daughters, *Margaret Ramsay*, wife of *Hector Munro*, Esq., *Mary Ritchie*, wife of *Alexander Logie*, Esq., *Susan Leeming*, wife of *Henry Hamilton*, Esq., *Augusta Anna*, wife of *James D. McKay*, Esq., and the said *Catherine McGill Crooks;* and if my said daughter, *Catherine McGill Crooks*, should die unmarried, then my will is that the said trust property be equally divided between and among my other daughters. And further, it is my desire that in case of the death *of any of my said married daughters before the marriage or death of the said Catherine McGill Crooks*, then upon the division of the said estate, the children or child of any such deceased daughter, shall be entitled to the share which their, his, or her mother would have been entitled to, had she survived. And in case of the death of any of my said daughters without leaving any children or child surviving, then the share of such daughter so dying childless, shall be divided among my surviving daughters, and the children of any who may be deceased per *stirpes* and not per *capita* as aforesaid."

Statement.

The bill further set forth that in addition to the plaintiffs, Mrs. *Crooks* left her surviving her daughters, *Augusta Anna McKay* and *Catherine McGill Crooks*, the latter of whom subsequently intermarried with the defendant *W. L. Smart*; that by an agreement entered into on the 17th of July, 1866, by all parties beneficially interested under the will of Mrs. *Crooks*, it was agreed that Mrs. *McKay*, should, and that she and her husband, for good consideration, did, on the 16th of April, 1868, grant and convey to the plaintiffs and the said *Catherine McGill Smart*, all their estate and interest in the said lands and premises; and alleged that the plaintiffs were each entitled to an undivided one-fourth part of said lands, and the infant defendants were each entitled to an undivided one-twelfth part thereof; and that the plaintiffs were desirous of realizing their shares of the said lands, but were unable to do so by reason of the interest of the infant defendants, and prayed (1) that the rights and interests of all the parties might be declared; (2) that the lands and

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premises might be sold or partitioned; (3) the appointment in the meantime (if necessary) of a proper person to receive the rents and profits of the lands, and divide the same amongst the parties interested, according to their respective rights and interests therein.

The cause came on by way of motion for decree before The Chancellor, who pronounced the judgment reported *ante* page 37, where the additional facts of the case appear. The Chancellor afterwards directed the case to be again spoken to by counsel.

Mr. *Cattanach*, for the plaintiff.

Mr. *Moss*, for the infant defendant, *Eleanor Smart*.

Mr. *Boyd*, Q. C., for the other defendants.

The points raised are sufficiently stated in the judgment of

April 2nd.

Judgment.

SPRAGGE, C.—The contention is as to the construction of the will of Mrs. *Mary Crooks*, and as to the power of a married woman, Mrs. *Smart*, to bequeath her property to one of several children.

The will of Mrs. *Mary Crooks* leaves: 1. Whole rents and profits to unmarried daughter *Catherine*, if alive and unmarried at death of testatrix, as long as she remains unmarried.

2. Upon her marriage division equally among all the daughters including herself, *i. e.*, into fifths.

3. If she die unmarried, division among other daughters, *i.e.*, into fourths.

4. If any other daughter die before marriage or death of *Catherine*, her children to have her share.

5. "And in case of the death of any of my five daughters," without leaving child or children, the share of such daughter to be divided among surviving daughters, or children of deceased daughters.

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The contention on behalf of Mrs. *Munro* is, that the proper reading of the will is, that if any of the four daughters die before the marriage, or before the death of *Catherine*, whichever event might first happen, and in that case only, her share was to go over; that if she survived either event she was to take absolutely.

It would seem that it must either be that, or that her share was to go over only in the event of her death childless, at whatever time it might happen; in that case she is only to take an interest for life.

Is the first interpretation consistent with the fifth contingency as expressed in the will. "My five daughters," must refer to all the five daughters, *Catherine* as well as the others. It could not refer to *Catherine* if the period of distribution was to be her marriage, for it refers to a contingency which might or might not happen, the leaving children; nor could it refer to her if the period of distribution was to be her death. It would involve this absurdity, that it would be equivalent to saying "in case *Catherine*, one of said daughters, should die before her own marriage, or, before her own death, without leaving children, then her share is to go over." Judgment.

It is obvious that the construction contended for by Mr. *Cattanach* would make the fifth contingency apply only to the four daughters, other than *Catherine*, whereas the words: "all of my said daughters," contained as they are in that clause, which provides for the last contingency contained in the will, applies to *Catherine* as well as the others, and this reading agrees with all the other contingencies provided for in the will.

Mr. *Cattanach's* conclusion is founded upon what has been called the fourth class of cases enumerated in the judgment of the Master of the Rolls, in *Edwards* v. *Edwards* (*a*). Lord *Romilly* enunciated rules of con-

(*a*) 15 Beav. 357.

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struction as to each of the four classes. Mr. *Cattanach* concedes that the rule laid down as to the fourth class was modified in the House of Lords in *O'Mahoney* v. *Burdett* (*a*). I should say that the rule as laid down in *Edwards* v. *Edwards* is more than modified; that it is overruled in the later case and in the case of *Ingram* v. *Soutten*, which immediately follows it in the same volume. The language of Lord *Cairns* is (p. 398), "I am unable to find in any case prior to *Edwards* v. *Edwards* any authority that the words introducing a gift, even in case of the death, unmarried, or without children of a previous taker, do not indicate according to their natural and proper meaning, death, unmarried, or without children, occurring at any time, or that this ordinary and literal meaning is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper." The language of the other law Lords who gave judgment in these two cases is much to the same effect.

Judgment.

Indeed, if the rule laid down in *Edwards* v. *Edwards* had stood unimpeached, I should still have thought that the period of the death referred to in the fifth contingency was the death at whatever time it might occur; for Lord *Romilly* lays down his rule as applying "in the absence of any words indicating a contrary intention," and the words which I have quoted from the will of the testratrix do, in my opinion indicate a contrary intention.

In the subsequent cases referred to by Mr. *Cattanach*, the wills before the Court for construction were distinguished from those in the cases in the House of Lords, on the ground that a contrary intention to the ordinary meaning, appeared in the will.

I do not feel pressed by the use of the word "divided" in the will before me; or that the construction contended for on behalf of the infants would or might

(*a*) 7 E. & I. App. 388.

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make more than one division or distribution necessary. The will directs the trustees to hold the residue of the estate after payment of the debts, &c., for the use and benefit of *Catherine* alone until her marriage or death. Upon the happening of either of those events it directs a division into fifths or fourths, according to the event, and this is, as I understand from the terms of the will, to be done by the trustees. Primarily, I think, to divide would mean to divide the *corpus*, but it may mean to divide or distribute the income. In this case after applying the income for the use of *Catherine* until her marriage or death, to divide or distribute it after either of those events into fifths in case of marriage, into fourths in the event of her death. It appears to me to be only in that way that the intentions of the testatrix could be carried out.

Judgment.

Another question arises in this case. *Catherine* intermarried with the defendant *Smart*, and died in 1870, leaving three children, issue of the marriage; and by her will bequeathed all her interest derived under the will of her mother to one of her children. The question is, whether she could do this.

Her power to make a will was of course derived from the Married Womens' Act, and was under the Act then in force a limited power, to make a devise or bequest of her property, "to or among her child or children issue of any marriage."

But a previous question is, whether the daughters of Mrs. *Crooks* took anything more than a life-interest under her will. If they did not, they had of course no power of disposition by will. Her will contains indications of her intention, that upon the death of any of her daughers, the children of the daughter dying should take their mother's share; and that they should take equally is indicated by the direction that they should take per *stirpes* and not per *capita*, though what is there primarily intended is, that they should take only what their mother, if living, would take.

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In the will two contingencies are provided for upon which the children take their mother's share, one where the mother dies before the marriage or death of *Catherine*; the other where one of the daughters of the testatrix dies childless, and another daughter has died leaving children; in the former of these events the children take their mother's share; in the latter the children take the share which the deceased mother would have taken, in the share of the daughter who has died childless. In neither of these contingencies do the daughters of Mrs. *Crooks* have any power of disposition by will. Other contingencies of death, leaving children, are not expressly provided for; but it would be a strange anomaly if the children of a daughter dying before the marriage or death of *Catherine*, would be entitled as of right, and if the same daughter had survived the marriage or death of *Catherine*, they would take subject to their mother's will.

Judgment.

The same may be said of the share by survivorship of a daughter dying childless; the children of a deceased daughter take as of right what would have gone to their mother. She could not dispose of it by will. It comes to the children through their mother, and because it would have been their mother's if she had not predeceased her childless sister. The testatrix, in such contingencies as she has provided for of the death of a daughter leaving children, has given the children the share of their mother. Is it reasonable to impute to the testatrix an intention that the children should take differently in these contingencies than in other cases upon the death of their mother, *e.g.*, in the case I have first put upon the accident of the mother dying before or after the marriage or death of *Catherine*? I incline very much to think that we find in the will sufficient indications of its being the intention of the testatrix that her daughters should take life interests only, and that after their death their children should

take absolutely; that such is what is called the general scheme of the will; though it is only in some instances that it is in terms provided for. 1879. Munro v. Smart.

But assuming that *Catherine*, Mrs. *Smart*, had more than a life estate; that she had a power of disposition by will; the question arises, which I touched upon when the case was formerly before me. I have examined the cases to which I have been referred. I do not think that they controvert the rule laid down by Mr. *Chance*, in his book on Powers, he says, (Sec, 1045): "Where a power is to appoint to, or for the benefit of, or among, or, to or among objects generally, whether named or not, it seems that each must have a share; the words taken literally imply this, whatever may be the intention. The word 'among' has always been considered to shew strongly that an exclusive appointment is not authorized; but it may be nevertheless coupled with other words manifesting that the donee is to have authority to select the objects." And so Lord *St. Leonards* in his book on Powers, (p. 444): "Under a power 'to appoint to all and every, the child and children,' or, 'unto and among several objects', every one must have a share, So, even a power of disposal 'unto and amongst such children, begotten between us, and in such proportion' as the wife shall appoint, compels a distribution amongst all the children; no child can be excluded." Judgment.

It is not my purpose to review the cases. The one nearest, I think, in the language of the power to the language of our statute is *Robinson* v. *Sykes* (*a*), which is thus summarized in a recent work on Powers, by Mr. *Farwell*, (p. 295): "The power was to appoint 'unto and amongst such child or children of the marriage, or unto and amongst the issue of such child or children, in case such child or children should be then dead leaving issue, (which event happened,) in such

(*a*) 23 Beav. 40.

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shares and proportions as A. should think fit."' This was held not to authorize an exclusive appointment. The language in the case I have cited does indeed differ but little from that in *Spring dem Titcher* v. *Biles* (*a*), where the power was held well executed by an appointment in favour of one; but the power there was to appoint among relations; and Lord *Mansfield* said: "It is not like the cases where a power is given to devise among children;" and *Buller*, J., "The cases of powers to distribute among children stand, on very different grounds; for the Courts have considered them as portions to the children." If the language of the statute had been "to or among such child or children as she may think fit," it would probably have authorized an exclusive appointment: *Sugden* on Powers, p. 445, and cases cited. The word "such," has been held to authorize such appointment; but I find no case in which such language as is used in our statute authorizes in the case of children the exclusion of any.

Judgment.

Mr. *Moss* argues, that unless an exclusive appointment is authorized by the statute, it only authorizes the wife to appoint, as the law would appoint without her. But it is not so, and that in two respects; one that while she can exclude none, she is not bound to distribute among them equally, and this is a substantial and valuable power; the other, that as to her personalty, if she died intestate, her husband would be entitled absolutely, while the statute enables her to distribute it among her children.

My conclusion, therefore, upon this branch of the case is, that the will of Mrs. *Smart* is not a valid execution of the power of appointment given to married women by the Act then in force; and that her children are consequently entitled equally.

Mr. *Cattanach* refers to the costs of hearing before

(*a*) 1 T. R. 435, note *f*.

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my brother *Proudfoot*, which he contends should be borne by the guardian or by the children of *Smart*. The other counsel say, that hearing was abortive through an error common to all—the having diverse interests of the infants represented by one guardian and one counsel—the plaintiff was in error in carrying the cause to hearing with that mistake apparent. They suggest that those costs should be costs in the cause.

I think that no party should have costs of that hearing.

MACHAR v. VANDEWATER.

Adding to minutes of decree—Practice—Costs.

At the hearing the defendant was found answerable to the plaintiff for a breach of duty in respect of shares of stock bought by the plaintiff through his agency, and subsequently the Court, on motion, added to the decree a direction that the defendant should indemnify the plaintiff against future calls on such stock, but refused costs of the application to either party; to the plaintiff because the relief would have been granted at the hearing if then asked; and to the defendant because he resisted that, to which the plaintiff was clearly entitled.

In drawing up the decree on the judgment reported, *ante*, page 83, the plaintiff desired to have inserted a direction that the defendants should indemnify and save harmless the plaintiff against future calls on the twenty shares of stock therein mentioned. This the Registrar refused to do, as not being warranted by the judgment. A motion was therefore made to vary the minutes by adding thereto a provision for this purpose.

Mr. *Bethune*, Q.C., in support of application.

Mr. *Black*, contra.

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Machar v. Vandewater.

SPRAGGE, C.—This is a motion to vary, or rather add to the minutes of decree by providing that the defendant do indemnify the plaintiff against future calls in respect of the twenty shares of stock purchased through the agency of the defendant. In my judgment at the hearing, I observed that the $200 paid for these shares, being a total loss, there was no question as to the measure of present damages; and that nothing being said in argument about possible prospective loss, I supposed that no relief on that score was asked. That relief is, however, asked now upon this motion; and I find upon referring to the pleadings, that it was asked for in the plaintiff's bill.

I found the defendant answerable to the plaintiff as for a breach of duty, in respect of these twenty shares; and it follows logically that he is bound to make good to the plaintiff any loss that may hereafter occur to him, as well as any loss that he has already sustained, growing out of such breach of duty. What the bill asks is, that the defendant be ordered to relieve the plaintiff from all liability, if any, in respect thereof, or to indemnify the plaintiff against all such liability and resulting loss; but he does not suggest how this is to be done. The plaintiff should assign these shares to the defendant, and whatever liability may attach to the mere ownership of the shares, would, I apprehend, follow the transfer. It does not appear that any demand has been made upon the plaintiff in respect of these shares. If there has been, or if there should hereafter be any such demand, the defendant must stand between the plaintiff and such demand, and relieve the plaintiff from its legal consequences.

Judgment.

So far as any declaration and direction in the decree can protect the plaintiff in this respect, he is entitled to have it. I do not know whether he asks more. If he does, he must put it in some definite shape. The decree can give him all that he could have by personal bond or covenant. If he asks for security other than

personal security, he must refer me to authority to shew himself entitled to it. This can be done without the matter being again mentioned in Court. 1879. Mashar v. Vandewater

This order will be without costs. If at the hearing the plaintiff had asked this relief, I should, I have no doubt, have come to the same conclusion as to his right to it that I do now, I therefore do not give him costs; and I do not give costs to the defendant, because he has resisted that which, in my judgment, the plaintiff is entitled to.

The defendant asks that the remedies may be mutual; *i. e.*, that he may be entitled to the same protection in respect of the thirty shares and future calls, if any upon them, as the plaintiff is entitled to in respect of the twenty shares. He has not asked for it by way of cross relief, but it would not be right to debar him from relief, and hold him not entitled. The proper course will be to give him liberty to apply, so that in the event of calls being made upon him he may make his claim in this suit without being put to file a bill. His position is, of course, quite different from that of the plaintiff, resting in his case upon the objection growing out of a contract of sale; while in the plaintiff's case it is a consequence of a breach of duty. Judgment.

If the sale of the thirty shares had passed unquestioned it could not be denied that it was the duty of the purchaser to stand between the company and the seller in the matter of future calls. Can it be less so where the transaction has been brought in question by the purchaser and impeached; but unsuccessfully.

However, as no cross relief is prayed, the proper course will be, to make no adjudication upon the defendant's claim, but to leave him to apply in case of calls being made upon him by the company and not answered by the plaintiff.

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POWELL v. PECK—PECK v. POWELL.

Sale of patent—Specific performance—Party bound to make good his representation.

C. P., who had for some time been carrying on the business of pump-making, in partnership with *B. & C.*, was the holder of a patent for an improved pump, which would expire on the 19th of July, 1877, but was renewable under the Patent Act for two further terms of five years each. On the first of June, 1877, *C. P.* agreed to sell to the defendant *Peck* his interest in such partnership business, together with the land and buildings in which it was carried on, for $4,500; and by the instrument evidencing the agreement executed, on the 23rd of June, "he agreed to assign his interest in his pump patents to Mr. *Peck* for the Counties of," &c. After the expiry of the patent (19th July, 1877,) *C. P.* filed a bill seeking to enforce payment of $3,000 balance of purchase-money, due in respect of the sale of his interest in the partnership, and of the right as before stated, insisting that all he had sold, or intended to sell, was his interest in the then current patent; one object which he had in view in so doing it was proved being to prevent *Peck* and his partners, as assignees, afterwards disputing the validity of any renewal of the patent, although it was shewn in evidence that *C. P.*, in speaking of the patent he held, said it was good for ten years. The Court being of opinion that what the defendants intended to purchase was the right for ten years, and that the belief that they were purchasing such right was induced by the representations of *C. P.*, who knew how the fact was and was therefore bound to specifically perform the agreement by executing such an assignment as would effectually convey the right for the counties named, whether at the time of the original contract the patent was really good for ten years, or afterwards became so, made a decree for that relief at the instance of *Peck*, and his partners in a suit instituted by them for that purpose, and ordered *C. P.* to pay the costs of both suits.

The first mentioned suit was by one *Charles Powell* against the defendants *Peck, Coleman & Brett* to enforce payment of a mortgage for $3000 due to *Powell* in respect of a sale by him to the defendants of his interest under a patent for an improved pump; the second suit was one brought by *Peck, Coleman & Brett* to enforce specific performance of an agreement for sale of such patent right for the full period to which

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Powell was entitled to renew the same under the patent laws.

The causes came on to be heard together at the Autumn Sittings, in Toronto, 1878.

Mr. *Moss* and Mr. *Black*, for *Powell*.

Mr. *Fitzgerald*, Q.C., and Mr. *W. Fitzgerald*, for other parties.

The effect of the evidence given and points raised, are clearly stated in the judgment of

Judgment.

SPRAGGE, C.—For some years previous to 1st June, 1877, *Powell*, *Coleman & Brett*, had been partners together in the city of Toronto, in the business of pump-making. The pump principally, if not entirely manufactured on the premises at the above date, was the cone pump, of which pump, *Powell* was the patentee. He was also owner of the premises in which the business was carried on. The machinery was owned by the partners jointly. *Powell's* share of the business was four-sixths, and the share of each of the other partners one-sixth. The patent then in existence had been taken out on the 19th of July, 1872, and was for five years, and would consequently expire on 19th, July, 1877. It was, however, renewable under the Patent Act, 35 Vic. ch. 26, for five years, and at the expiry of that term for a further term of five years, making fifteen years in all.

For some time before the 1st of June, *Coleman* and *Brett* had been dissatisfied with *Powell* as a partner, and were desirous that *Peck* should purchase his interest in the business, and form a partnership with them to carry it on. On the 1st a written agreement was entered into between *Powell* and *Peck*; to which *Coleman* and *Brett* were also parties for a purpose not material to this case. By that instrument *Powell* agreed to sell, and *Peck* to purchase *Powell's* right to

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the patent in the pump manufacturing business with the land, &c., where the building stood for $4,500; and after providing for terms of payment, occur these words: "*Powell* to assign his interest in his pump patents to Mr. *Peck* for the counties of York, Halton, Peel, Simcoe, and Ontario," then follow other provisions.

Peck and *Powell* were negotiating respecting this purchase for some days before the 1st of June, and in these negotiations *Coleman* and *Brett* and their solicitor, Mr. *J. B. Davis*, also took some part. The short question is, whether the patent right, *i. e.*, for the five counties above named, was one of the subjects of purchase; and, if so, whether it was for the short period up to the 19th of the following month, or for the whole period for which his patent was available to *Powell*.

Judgment.

The evidence is very voluminous, relating not only to what passed upon these negotiations, but to several circumstances calculated, as the parties conceive to throw light upon the question at issue; and upon the main point and also upon some minor points it is very contradictory. It is not my purpose to go through the evidence minutely. To do so would be more than tedious, and in my opinion unnecessary.

There are two or three circumstances that are proper to be taken into account. The patent had been infringed by a number of pump-makers in Toronto, and in various other localities; and this had been going on unchecked and to such an extent as to impair its market value. *Powell* had been patentee of other inventions (of pumps probably) and had been defeated in attempts to enforce them. He seems to have hesitated to incur the cost of legal proceedings to enforce his rights under this patent, and I think the result of the evidence is that he felt doubtful whether he had rights that he could enforce; and that his partners and *Peck* saw the patent ignored on all hands; and that

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they and he attached but little value to it. At the same time in taking the business off the hands of *Powell*, it was very material to *Peck* and the other members of the new firm, that they should have a right to continue the manufacture of the same article. *Coleman* and *Brett* were safe upon that point, while they were partners with *Powell*. When his interest as a partner passed to *Peck* their position was changed, and it was to be expected that some arrangement should be made in regard to the patent. The patent had then little or no market value; but its enforcement against the new firm would be of very serious detriment to them.

The evidence is not satisfactory as to how the amount to be paid by *Peck* to *Powell* was made up. Each probably made it up in his own way. *Powell's* share in the good will of the concern was taken into account, and it is certain that *some* interest in the patent was to pass. This is clear from the parol evidence as well as from the written agreement.

Judgment.

It strikes one as nothing less than an absurdity, that *Powell* should agree to sell his patent right only up to 19th July, and that on the 23rd of June (the actual time not the date) he should make a formal assignment of it. He explains in his evidence that he had an object in this. He was acting under legal advice, and had been advised that parties taking an assignment would be estopped after the expiry of the term assigned from disputing the validity of the patent, and that this was his purpose is used in argument as an answer to the objection that he could not be taken to have intended an assignment for so short a period, as the residue of the current term.

It is certain that he did not, and it is certain also that he would not disclose this as his real object to *Peck* and his partners; for it would be manifest to them, that instead of acquiring a benefit they were placing themselves at a disadvantage, for after the 19th

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of July they would be helplessly at his merey, they would have disabled themselves from making the same defence that was open to any one else.

It is clear from the evidence that not the existence of the patent only, but its duration also, were the subjects of inquiry by *Peck* and *Davis*, and of answer by *Powell*. *Peck*, *Davis*, *Coleman*, and *Brett* agree substantially as to *Powell's* answers to these inquiries, viz., that the patent had yet ten years to run. Upon its being put to them upon cross-examination whether what he said may not have been that the patent was good for ten years, some of their witnesses say it may have been, and that the two mean the same thing. *Powell* himself denies that he made the answer imputed to him by these witnesses. In his first answers he does not admit that he made any statement in answer to these enquiries. I do not follow him in his answers to the many questions put to him upon this point; but the result was an admission, not a very direct one, but still an admission, that the patent was good for ten years. I think it not improbable that that was the answer that he did make; and that he put it in that shape advisedly so as to avoid stating that it had ten years to run, or agreeing to assign for that term; and that the witnesses without any particular regard to verbal accuracy, stated his answers as they recollected them.

Judgment.

It is very possible that *Powell*, in his own mind, did not intend to agree, in terms at least, to assign for a longer period than the then term; and that he used guarded language when asked as to the duration of the patent. As a fact it was, as I incline to think, good for ten years; and he may have stated so, mentally as a bare statement of that fact, and intending not to commit himself to anything beyond that bare statement. But using the language that he did use, in a conversation in which an agreement for the five counties was the subject of discussion, the interpretation

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that would naturally be put upon it by the parties making the inquiry would be that the assignment for those counties would be for that period. It does not lie in his mouth to say that in his own mind he meant differently, The question is, in what connection he stated the fact; if in connection with an assignment, his words would be understood by persons of ordinary intelligence, to mean that the assignment would be for that period; he cannot sever the words from the connection in which they were spoken.

I do not see how he could have supposed that his statement was understood and received in any other sense. If he had told the other parties what may be now assumed to have been in his mind, it could only have been regarded as a mockery, if the patent was as I take it to have been, an element of consideration in the transaction.

Judgment.

Placing, therefore, upon what passed the only interpretation of which, in my judgment it is capable, my conclusion is, that there was a representation that the patent that *Powell* was assigning was good for ten years. I cannot say that it was not upon the faith of that representation that the new arrangement was entered into by *Peck*, *Coleman*, and *Brett*: I think the proper conclusion is that it was.

If it be said that a virtual relinquishment of his patent for five counties surrounding Toronto was more than could have been thought of by the parties; or than could have been understood by the assignees, the answer is, 1st, that it was either that or a mere illusory benefit. 2nd. That he intended to give the business a good territory, which would naturally be understood as meaning something substantial. 3rd. That it was looked upon as of no great value except probably as a means of protecting the new firm from *Powell* himself. 4th. That there was an arrangement for *Powell* selling the manufactured pumps upon commission. But probably the reason that is avowed by

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Powell for making an assignment of the patent at all would induce him to regard it as a matter indifferent to him whether he assigned for one county or for several, *i. e.*, that he had been advised that as a matter of law the assignment would stand good only to the end of the term, and that after that the assignees would be estopped from denying his title; and if any doubt should arise as to the estoppel applying to any counties other than those for which the patent was assigned, it would be to his interest to make the assignment cover a wide area. I certainly do no wrong to *Powell* in attributing to him as a motive for what he did, a reason avowed now by himself, though certainly not disclosed to those with whom he was dealing. As advised he was parting with nothing of any substantial value to himself; and he believed he was furnishing himself with a weapon which he could use at his pleasure against *Peck* and his partners. The legal advice and his acting upon it seem to me to furnish a key to the assignment being made in the shape that it was.

Judgment.

On the other hand, there are some circumstances presented for my consideration, in order to shew that *Peck* was conscious that the assignment did not extend beyond the then current term of the patent. Prominent among these is the payment of $150 for royalties, these royalties being, of course, not payable to *Powell* if the contention of *Peck* and his partners be correct. This payment was made, and a receipt was given for it in the following terms:—

"TORONTO, 10th August, 1878.

"Received from *A. R. Peck*, of Ontario Pump Company, the sum of one hundred and fifty dollars in full of royalties on pumps made under my patents known as the 'Cone Pump and its connections,' by them since the renewal of said patents to me, and since their license to make same expired in July, 1877, with the understanding that in the meantime the said parties

keep an account (at a rate to be agreed on), if aught should occur to prevent the bargain now under negotiation between us being consummated or carried out as expected." 1879. Powell v. Peck.

(Signed) "C. POWELL."

"P. S.—Nothing in this receipt is to bind the patentee to continue license if he does not choose."

(Signed) "C. P."

The value of this receipt to *Powell* is as a piece of evidence. It is of weight, no doubt, but of what weight depends upon circumstances. It was drawn by *Powell* and sent to *Peck* upon a cheque for the amount being sent by *Peck* to *Powell*. Its language is the language of *Powell*, and was employed for a purpose or for purposes: one was the admissions it contains, negativing the right of *Peck* to use the patent; another, and an avowed purpose, was to use it against infringers of the patent to shew acknowledgment of his right by the party to whom he had sold his share of the business; and to induce others to do as *Peck* had done. Further is this circumstance, that *Peck* and *Powell* had been for some time, and still were, negotiating for the purchase from *Powell* of all his rights in the patent for the whole Dominion, with some comparatively small exceptions. From the letters which are before me, it appears as if the parties were in each approaching nearer to a settlement, until at last they appeared to be at one as to price, $5,250. *Powell*, however, all through insisting upon his claim for royalties being paid separately, and not as part of the price of the patent. *Peck*, on his part, yielded to this, but appears in all his letters to avoid admitting *Powell's* claim as a matter of right. *Peck*, it appears, had resolved in his own mind to go as far as $6,000 for the whole patent right, and if he obtained it, the question of royalties was a matter of indifference. I think it would be giving undue weight to this payment to hold Judgment.

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it to be material evidence of what *Peck* and his partners understood they were purchasing in June, 1877.

Immediately after obtaining the cheque on the claim for royalties, *Powell* raised difficulties in the way of carrying out the sale, and it was soon after broken off.

Another circumstance urged against *Peck* is in relation to a treaty with the firm of *Plews & Kennedy* for the purchase jointly with them of *Powell's* whole patent right. Whether they were to share in the proposed purchase that I have just referred to is not material. The point is, that *Peck* and the firm were to purchase jointly, *Peck* to pay half and the firm half; and to be interested in the same proportions in the patent when purchased; and it is put, that if *Peck* had already a right to five counties, he would have excepted them; or, at any rate, not have consented to an *equal* division.

Judgment.

But this argument loses much of its force when we find (as appears in evidence,) that *Peck* and his partners knew at that time that *Powell* claimed that their assignment was good only for the then current term; and had been advised that *Powell's* contention was well founded in law, that as put in some of the evidence, the assignment was not worth the paper it was written on. There is some evidence, too, that *Plews & Kennedy* were to advance the purchase money, another reason for not advancing a claim, that it is scarcely likely that *Plews & Kennedy* would have admitted.

There is some evidence besides, of offers made to *Powell* if he would stop infringers. Any offers made by *Peck* and his partners after being advised as to their legal position are of little or no weight upon the fact of representation; and as to any offers made before being so advised, it is to be observed that it was more to their advantage to have a monopoly, paying something for it, than that the manufacture should be given to general competition.

I pass over the circumstances of *Powell* asking *Peck*

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to furnish him with $42 to pay for the renewal of the patent because it may be that *Powell's* version of what passed is correct, and because I think it is not necessary to the case of *Peck* and his partners.

There is another piece of evidence that I have not noticed for a like reason, that of *John Grant;* and, I may add, that I think it is not likely that *Powell* would have said to him in the autumn of 1878, that he had sold any patent rights to the parties. I only doubt *Grant's* accuracy, not his truthfulness.

I noted several other points in going through the evidence, but those which I have commented upon appeared to me the most material, and sufficient, so far as the facts are concerned, for the determination of the case.

It does not appear to me to be very material whether the ground for relief be placed upon representation or contract. If in fact the patent held by *Powell* were not good for ten years and he stated that it was so, *Peck* dealing with him upon the faith of what he stated being true, it falls under the old head of equity that he was bound to make good his representations, for he knew how the fact was, whether it is to be taken to be false or true. If, on the other hand, his statement that his patent was good for ten years was true, and he agreed to assign a certain interest in that patent, good for ten years, it was a matter of contract; and the other party to that contract is entitled to call for its performance, if not already performed by the instrument executed; and this was the view which I was inclined to take at the hearing, and am inclined to take still.

Judgment.

In either view, *Powell* is bound to make such an assignment as would be clearly good in law for the five counties. His own evidence is, that he has not made such assignment, his reason being that he was not bound to make it. My conclusion being that his reason is not sustained, it follows that finding the fact

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in issue against him, as I do, he is bound to make it, if the instruments executed are not sufficient. Under the American cases, decided upon the patent law of the United States, they are not sufficient, and it is doubtful whether they are sufficient, especially the later and more formal instrument, to convey more than an interest in the then current patent.

In that case there is a contract to convey an interest, for ten years: and the instruments executed convey it, as *Powell* puts it, for about six weeks. The contract then is only partially executed, and this being the case *Manson* v. *Thacker* (*a*) and *Besley* v. *Besley* (*b*), cited by Mr. *Moss*, do not apply. Those cases, indeed, do not any more apply if the title to relief be placed upon the other ground: that of representation, for if false he was bound to make it good; he is able to make it good and has not done so.

Judgment.

I think the title to relief may well be placed upon this ground. There was an agreement to convey a certain interest in a patent right held by *Powell*. He represented that his patent was good for ten years. Whether that representation was then true or not is immaterial, because if the patent was not then good for ten years, it afterwards became so; and he being now able to perform his contract and make good his representation, he is bound to do so.

(*a*) 7 Chy. Div. 620. (*b*) 9 Ib. 103.

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SPROATT v. ROBERTSON.

Devise—Mortgaged lands—Trustee to raise Money.

A testator possessed of several freehold properties, each of which was subject to an incumbrance, devised to a trustee all and singular his real estate, and the rents, issues, &c., due or to become due and payable to him, upon trust to receive the same and therewith pay all his personal debts, funeral and testamentary expenses; and, also, thereafter from time to time pay and discharge therewith all debts, dues, and incumbrances upon his estate. And after providing for payment of all his just debts and the incumbrances on his estate, he made specific devises of his lands.

Held, that the devise in each case was not of the equity of redemption merely, but that all of the lands were bound to contribute to the paying off of all the mortgages; not that each parcel should bear its own burthen; and that in order to avert a sale of one of the parcels in a proceeding upon the mortgage, the trustee should raise by mortgage of all the lands, a sum sufficient to pay off all the incumbrances thereon; the rents and profits of the whole to constitute a fund wherewith to pay the interest and ultimately liquidate the principal.

The powers of a trustee, who is directed to raise or to pay money out of rents and profits, to sell the trust estate considered and acted on.

Hearing by way of motion for decree and *pro confesso*.

The facts giving rise to this suit and the points relied on, are clearly stated in the judgment.

Mr. *H. J. Scott*, for the plaintiff.

Mr. *J. E. Robertson*, for defendant *Robertson*.

Mr. *Hoskin*, Q. C., for infant defendants.

Mr. *McArthur*, for the defendant *Charles Sproatt*.

The bill was taken *pro confesso* against the other defendants.

SPRAGGE, C.—The question before me in this case arises upon the will of the late *Henry Sproatt*, which is dated the 5th of March, 1874. Judgment.

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The first clause of the will is as follows:—"I give and devise to my executor and trustee hereinafter named, all and singular my real estate, and the rents, issues, profits, debts, securities, and amounts due or to become due and payable to me for or in respect of each and every part of my estate, real or personal, subject to the legacies hereinafter given, or intended to be, upon trust, that my said trustee shall and may have and receive the said rents, issues, profits, debts, and amounts, as the same shall become due or payable, and therewith and thereout of pay all my personal debts, funeral and testamentary expenses, and the legacy hereinafter named, as soon after my decease as possible, and also thereafter from time to time pay and discharge therewith the debts, dues, and incumbrances upon my said estate, until the whole shall have been paid, satisfied, and discharged, as also, if so required, the annuity hereinafter named," then, after a bequest to his wife of household furniture and effects, and a legacy of £50 in cash, and the provision for the use by her of his dwelling house, or, at her option, the payment of an annual sum in lieu thereof, the will proceeds thus: "and from and after payment of all my just debts and the incumbrances on my estate, as hereinbefore provided, and the legacies herein devised, I devise and bequeath my real estate as follows: "To my son *Charles* and his heirs and assigns for ever" a particular parcel of land which he describes; "To my son *John* and his heirs and assigns for ever," another parcel particularly described; and he devises to his grandson *Henry* another parcel, and to his granddaughter *Emma* another parcel, each particularly described. The grandson and granddaughter are infants. The will appoints the defendant *Robertson* trustee and executor thereof. It appears by the examination of *Robertson* that the lands specifically devised were all incumbered, and it is I understand a fact not in question, but it should be proved against the infants;

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this may be by affidavit, or the infants may read the examination of *Robertson*.

The question in the cause arises out of one of these incumbrances, a mortgage made by the testator upon the land devised to his son *John*. Upon this mortgage proceedings have been taken and a decree for sale obtained; and this bill is filed by the widow and devisee of *John*, praying that she may be entitled to have the mortgage paid off out of the personal estate of the testator, and the rents and profits of his real estate; and that the real estate specifically devised be declared liable to contribute ratably to the payment of the mortgage. It is the latter branch of the prayer that is contested by the other beneficiaries under the will.

Judgment.

It is to be observed that what the testator devises and bequeaths to his trustee and executor is not the rents and profits only of his real and personal estate, but he devises to him the real estate itself; and he then divides the trust into two parts; first that the trustee shall receive rents, issues, debts, and amounts, as the same shall become due and payable, and therewith pay debts, funeral expenses, and the legacy of £50 to his wife, as soon after his decease as possible; the second part of the trust is that the trustee shall "also thereafter, from time to time, pay and discharge therewith the debts, dues and incumbrances upon my said estate, until the whole shall have been paid, satisfied and discharged." It is quite clear that the testator did not intend that each parcel of land devised should bear its own burthen, for he makes all the rents and profits of all the parcels along with the personalty applicable to the payment of all the incumbrances: and this is made all the more clear by the language of the clauses containing the specific devises; for those specific devises are not to take effect until "from and after payment" of debts and incumbrances upon his estate as thereinbefore provided, and the legacies.

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There is no question as to the general rule where a trustee is directed to raise or to pay money out of rents and profits. It is thus stated by Lord *Hardwicke* in *Green* v. *Belcher* (*a*), "where money is directed to be raised by rents and profits unless there are other words to restrain the meaning, and to confine them to the receipt of the rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell, and as a devise of the rents and profits will at law pass the lands, the raising by rents and profits is the same as raising by sale."

Quotations to the same effect might be multiplied, but I will only quote further the judgment of the present Master of the Rolls, in *Metcalfe* v. *Hutchinson* (*b*), where the rule and the reasons of it are stated with admirable clearness. "That rule is intelligible. The rule being, that where there is a trust to pay, or to raise and pay, or to raise or pay gross sums out of rents and profits, that means out of the estate; and you may sell it or mortgage it for the purpose of paying the gross sum, the reason being that the sum is to be paid at once, and the rents and profits are not sufficient for that purpose. There are two interests here—the one to pay the gross sum, and the other to raise it out of the rents and profits. The gross sum can only be paid in the case of sale or mortgage, and therefore if the testator says out of rents and profits he means out of the estate. That is the rule, and it is a very intelligible one. That appears with greater force where the gross sums to be paid are debts—present debts—because the testator must know that he cannot avoid paying his debts. I am now speaking, of course, of a modern will where the creditor can resort to the real estate as a matter of right

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(*a*) 1 Atk. 505. (*b*) L. R. 1 Chy. Div. 594.

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for the purpose of obtaining payment of debts, and it would be a very strange intention to attribute to a testator that he should, by his will, intend to postpone the creditor, he having no legal right to postpone him. I think that would not be a right mode of construing wills. We must assume that a testator knows his debts must be paid, and soon after his disease. The whole of the argument which applies to paying portions or a gross sum at a fixed day applies with greater force to the payment of debts. I hold it to be an established rule of construction that in a deed or will where you find a trust to pay debts out of rents and profits, that, without more, means that you may raise them by sale or mortgage. I say 'without more,' because you may find in the instrument a context which will over-rule that construction, but the great point to bear in mind is that you must find a context to get rid of that construction. It is not that there is a *prima facie* construction that rents and profits mean annual rents and profits, but in the case that I have put the *prima facie* construction is that it means to pay out of corpus. Whether that is or is not the natural meaning of the words to any person not a lawyer is not the point I have to consider. That had come before the Court many times before; and in *Bootle* v. *Blundell* (*a*), decided in 1815, we have this stated by Lord *Eldon*, 'Then, it is asked, could it be the meaning of this testator to delay his creditors and legatees so as to make them obtain payment of their debts and legacies only out of rents and profits as they shall accrue? If I were asked this question anywhere but in Westminster Hall I should answer it in the affirmative, that by profits he probably meant annual profits only; but I have understood it to be a settled rule that when a term is created for the purpose of raising money out of the rents and profits, if the trusts of the

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(*a*) 1 Mer. 193, 232.

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will require that a gross sum should be raised, the expression 'rents and profits' will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage.' No doubt he speaks of a term being created, but the rule is general. In that case the word was 'pay,' and he did not intend to limit the rule to a case in which the word 'raise' was used instead of 'pay.' So that as long ago as 1815 the Lord Chancellor held that, whatever the natural or general meaning of the words was to people who were not lawyers, to a lawyer rents and profits meant, in a case of that kind, to describe the corpus of the estate for this purpose. That is the general rule, and you must find a context against it."

Then is there any context against it; any context, *i.e.*, sufficient to outweigh the general intent of the will as interpreted by the cases. I am referred to the authority given to the trustee to lease for five years.

Judgment.

In some cases authority to lease has been held to negative the otherwise implied authority to sell; but these, with one exception I think, have been cases of trusts to raise portions or other moneys for beneficiaries. *Ivy* v. *Gilbert* (*a*), *Forbes* v. *Richardson* (*b*), and *Ward* v. *Marsh* (*c*), were such cases.

The exception is the case of *Henage* v. Lord *Andover* (*d*) decided by Lord C. Baron *Alexander*, 1829. The estate was a very large one, it was treated as a pure question of intention, and the debts were such that it was not necessary to impute to the testator any intention of having them raised out of the estate from the necessity of their being met. Here from the circumstances of the estate the testator must be taken to have seen that the corpus of the estate or of portions of it would have to be applied, unless the incumbrancers would consent to forbear and to wait. He

(*a*) 2 P. Wms. 19.
(*b*) 11 Hare, 354.
(*c*) 3 Jur. N. S. 348.
(*d*) 3 Y. & J. 360.

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probably hoped, and even expected this; and in that hope and expectation made provision for giving leases for short terms. I do not think that under the circumstances of this estate this provision can be taken as negativing the intention that, under the rule applicable to this case, is to be imputed to the testator. I will quote upon this point another passage from the judgment in *Metcalfe* v. *Hutchinson* (at p. 598), and which applies also to the point raised that the rents and profits here meant are annual rents and profits. "The result is, that you must find on the face of the will a clear restriction of the general meaning of words, directing you to raise a gross sum payable immediately or at a day fixed, out of rents and profits; and the words are not otherwise to be read as annual rents and profits."

Judgment.

As a test of the rights of the parties, I will put this case: Suppose *John* were living and had, to save his estate, paid off this mortgage upon the land devised to him, out of his own means, he would certainly have had the right to have the rents and profits of all the lands devised applied to recoup him before they passed into the hands of the devisees; as the will makes the payment off of all incumbrances a charge prior to the enjoyment by any of the devisees of the lands devised to them. Being a prior charge upon all, it should be raised from all. The question is, how this is to be done? It is not, I grant, the same question as is raised by the bill except in this way. The rights of the parties being what they are, and those rights growing out of the will, the testator must be taken to have contemplated that which was the natural consequence of the provisions of his own will; and so have intended that the corpus of his estate should be applied, if necessary, and to the extent necessary, to preserve his estate, as far as it could be preserved, to those to whom he devised it.

It appears to me to be quite clear that if the land

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devised to *John*, and by him devised to the plaintiff, were to be sold under the decree, the amount of the incumbrance would continue to be, what it is now, a charge upon the other land devised ratably according to the value of such other land with the land in question. It cannot be that the sale of this land could release the other land devised from the charge created upon it by the will.

Upon the whole, I think that the proper conclusion is, that the plaintiff is entitled to such a decree as was pronounced by Lord *Cranworth*, in *Harper* v. *Munday* (*a*), or to a modification of it. Probably the best course will be to raise by mortgage of all the lands, such sum as may be necessary to supplement any moneys that may be in hand, and to pay off all incumbrances upon all the lands, the rents and profits to be a fund to pay the interest, and from time to time to liquidate the principal. This would not be against the interest of the infants, but for their benefit, if as stated in their answer, the lands devised to them yield no rents and profits, because the rents and profits of the other lands devised would go towards removing the incumbrances which under the will have to be removed before the enjoyment by any of the devisees of the parcels devised to them.

Judgment.

I do not know whether the lands are of such value that this can be done. If not, I will approve of such scheme as may be submitted to me as may appear to be practicable and just. The costs of the suit will come out of the estate.

(*a*) 7 D. M. & G. 369.

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BUTLER v. THE STANDARD FIRE INSURANCE COMPANY.

Fire insurance—Unjust and unreasonable conditions—Ownership of goods insured.

A married woman to whom a stock of goods had been bequeathed by her brother, insured the same as her own property, although the executor to the will (her husband) had not formally assented to the bequest:

Held, that this was not any breach of the first statutory condition as to the ownership of property insured being truly stated in the application for insurance.

By an additional condition it was provided that if in the application the assured made any erroneous or untrue representations material to the risk, or make any untrue statement respecting the title or ownership, the policy should be null and void:

Held, that if the above statement as to ownership, though not to the prejudice of the company, could be construed to avoid the policy the Court would hold such condition not just and reasonable, and therefore null and void under "The Fire Insurance Policy Act."

The plaintiff, a legatee of a stock of goods, acquiesced in her husband (the executor of the will), carrying on business in the same manner as the testator had done, in the course of which the greater portion of the original stock had been disposed of and other goods had been purchased; so that at the time a fire occurred the stock had been somewhat increased:

Held, that under these circumstances the plaintiff was entitled to recover the full amount of her policy, though greatly in excess of the value of the original goods remaining unsold.

Statement.

The bill in this case was filed by *Hannah Butler*, who claimed to recover upon a policy, made on the 2nd November, 1877, by which the defendants insured her against loss by fire to the extent of $1,000 on a general stock-in-trade of groceries, &c., and $100 on shop-fixtures, contained in a described building. The evidence shewed that the goods had been destroyed by a fire, which occurred on the 28th February following.

The defendants resisted her demand on several grounds: 1st. That it was a condition of the policy, that if any person should insure his building or goods

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and should cause the same to be described otherwise than as they really were, to the prejudice of the company, or should misrepresent or omit to communicate any circumstance material to be made known to the company in order to enable them to judge of the risk they undertook, such insurance should be of no force; and that the plaintiff misrepresented material circumstances by representing herself to be the owner of the goods, and that no other persons were interested therein.

Secondly. That it was a condition that the application should be taken and considered as part of the policy, and if in the application the assured made any erroneous or untrue representation or statement, or omitted to make known to the company any fact material to the risk, or make any untrue statement respecting the title or ownership, the policy should be null and void; and that the plaintiff by the application warranted that she was the owner of the insured goods, and that no others were interested therein; and that the defendants issued the policy upon the faith of such warranty, whereas she was not the owner of the goods and others were interested therein.

Statement.

Thirdly. That there was a condition that the company was not liable for loss of property owned by any other party than the assured, unless the interest of the insured were stated in or upon the policy, and that the goods were owned by other persons than the plaintiff, and the interest of the plaintiff was not stated in or upon the policy. And, fourthly, that the plaintiff was not at the time of the loss interested in the goods, and sustained no loss.

The facts established by the evidence were that the plaintiff was the sister of one *Michael Collins*, who died on the 11th August, 1877, having made his will, by which he devised and bequeathed to her all his real and personal estate after payment of debts and funeral and testamentary expenses, for her sole and separate

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use absolutely. He appointed as sole executor her husband *Charles Butler* who obtained probate and assumed the administration of the estate. The testator, it was shewn, had been carrying on the business of a grocer, and was possessed of a stock-in-trade and fixtures. After his death *Charles Butler* carried on the business, put up his own name over the door, and used the same books of account.

There was no evidence of any agreement between him and his wife upon the subject, or of any express assent upon her part to his assuming that position. It appeared that she was aware that he was continuing the business in his own name, and using the goods which were hers by bequest, and although she stated that she supposed he was carrying it on for her, her evidence tended to shew that she simply acquiesced in his so dealing with the property. But there was not any pretence that she had effected a sale to him, or made any contract in relation to the goods.

Statement.

Charles Butler, it was shewn, had, in an affidavit which he made for the purpose of proving the claim after loss, sworn that it was agreed that the policy should be held by her as security for the payment of the value of the stock and shop fixtures, and which fact was relied on by the defendants as evidence of his being the owner or asserting to be the owner of the property.

It appeared that throughout the whole transaction she supposed the goods to be her own property, and that she simply left them there, although she knew that her husband was carrying on business with them. The value of the goods at the time of the testator's death amounted to about $1,800, and of these only about $667 remained *in specie* when the fire occurred. The rest had been sold by her husband, and in the course of carrying on the business other goods had been purchased, and the whole amount in stock had increased to about $2,800.

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The cause came on for the examination of witnesses and hearing at the sittings of the Court at Peterborough, in the Autumn of 1878.

Mr. *J. A. Boyd*, Q. C., and Mr. *Damble*, for plaintiff.

Mr. *Moss*, for the defendants. *Goulstone* v. *Royal* (*a*), *Merritt* v. *Lyon* (*b*), *Sands* v. *The Standard* (*c*), *Fowler* v. *The Scottish Equitable Life Insurance Co.*, (*d*), were referred to.

The other facts of the case appear in the judgment.

SPRAGGE, C.—The whole question raised in this suit is, whether there was any untrue representation as to the ownership of the property insured. All the conditions set out in the answer relate more or less directly to the one question—that of ownership.

The first condition (a statutory one), is general—not in terms speaking of ownership or any other head of representation, but applies to ownership, as well as other heads of representation, and is so applied in he second paragraph of the bill.

Judgment.

This general condition does not make an incorrect (or say untrue) representation *per se* avoid the policy; but only such as are to the prejudice of the Company. [The Chancellor here read this condition as above set forth.]

All the conditions in relation to the one subject matter, are in *pari materia*, and are to be read together. The qualifications with which the first general condition is expressed dominate and pervade the whole —thus relating as it does *inter alia* to ownership. If the lands or goods are described as to their ownership, "otherwise than as they really are to the prejudice of the company," the insurance is of no force as to such

(*a*) 1 F. & F. 276.
(*b*) 3 Barb. S. C. Rep. 110.
(*c*) Ante p. 113.
(*d*) 4 Jur. N. S. 1169.

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lands or goods. Other conditions apply to the like representations without in terms repeating the qualification "to the prejudice of the company." How are these conditions to be construed? If a policy is avoided by reason of a representation whereby the company is not prejudiced, the first general provision is, as to that qualification, silenced.

The policy of the law as evinced by legislation is, that parties insured are a class requiring protection; that insurances are contracts between public companies, some of whom are disposed to act inequitably and to over-reach, on the one hand; and individuals who as a class are in the matter of insurance improvident; and this should be borne in mind in construing a policy of insurance.

The first item of representation in the application may be taken as truly interpreted by the defendants—namely, that the plaintiff was owner, and that no other person had an interest in the thing insured; I think that a proper construction of the first interrogatory in the application and its answer.

Judgment.

I think the proper construction of the conditions, including the non-statutory one, to be what I have indicated without the aid of the Insurance Companies Act. That act enacts that in case any policy contains any provision other than or different from the conditions set forth in the statutory conditions, if such conditions be "held by the Court or Judge before whom a question relating thereto is tried, to be not just and reasonable—such condition shall be null and void." Upon that my opinion is, that if the proper construction of that non-statutory condition is, that the policy is to be avoided by any incorrect statement, *although* it be not to the prejudice of the company or material to be made known, in order to enable it to judge of the risk it is undertaking; then looking at the statutory conditions and the policy thereby indicated, I should hold such condition not just and reasonable,

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and therefore null and void. Looking at the statement in the application in that view, it is divested of the technicalities which go to make up *strict legal ownership*. If in truth the applicant for insurance was the sole beneficiary under the will, and if there were no creditors to stand between her and the bequest, it was not a fact to the prejudice of the company, nor material to be made known to it as affecting the risk, that the executor—in this case her husband—had not given his formal assent to the bequest.

It is then objected that the application represents all the goods offered for insurance to be hers; but this is not necessarily so. It is "on general stock of groceries, crockery, glassware," &c., the valuation of which is put at $2000; that would be literally true if she had of her own property such goods in the store of that value, although her husband had in the same store goods of his own. It is perhaps not very clear that the husband having also goods in the store would not prejudice the company, or that it was not a material circumstance to be made known to them; but I do not judicially or at all know that it would be so, and the company calls none of its officers or any one else to say that it would be so. It seems a fair inference that if it would be so they would have shewn it.

Judgment.

As to the valuation: the answer makes no objection on that score, and I think the defence so unmeritorious that I should permit no supplemental answer to be filed. Further, the sum assured is only $1000, and I cannot assume or suppose that the risk would have been refused if the valuation had been put at $800, or even a lower sum; but at any rate over-valuation is not put as a ground of defence.

It is not objected that the goods in question had before the insurance become by the act of the parties the property of the husband.

[The Chancellor here remarked upon the effect to be attributed to the affidavits made by both the

plaintiff and her husband after the fire, Mrs. *Butler* swearing that "(7) The said stock of goods and property at the time of said fire were in the possession of my husband, who carried on the business, but the policy was held by me, as the stock of goods and shop fixtures, at the time he commenced business * * was mine, having been bequeathed to me by my late brother, *Michael Collins*, * * (9) My said husband never paid me for said stock, and I held said policy as security for my interest therein."] This is interpreted by Mr. *Moss* as meaning security to her for payment of their price on sale by her to her husband. I think, however, it has not necessarily that meaning, and they both deny the fact of any sale having been effected; and the simple question now remains, whether the use allowed by the wife to be made of them by her husband operated a change of property.

Before concluding my observations in this case I may remark upon the very objectionable course pursued at times by insurance companies, asserting that they raise technical objections because if the whole truth could be made known the claim of the assured would be shewn to be not a just one. In my view the Court should give no credit to such a suggestion. If there is any fact behind they should bring it forward to be tried. It would be a monstrous state of things if it were admitted that contracts between insurance companies and the insured should stand upon such a footing as some companies seem to desire:—binding on the assured, but only to be fulfilled by the companies at their own will, upon objections started upon the suspicion of an inspector or local agent. This would be a thoroughly false position between contracting parties, and one that should be unequivocally discountenanced by Courts of Justice.

Judgment.

Lett v. *Commercial Bank* (*a*), is referred to as having

(*a*) 24 U. C. R. 552.

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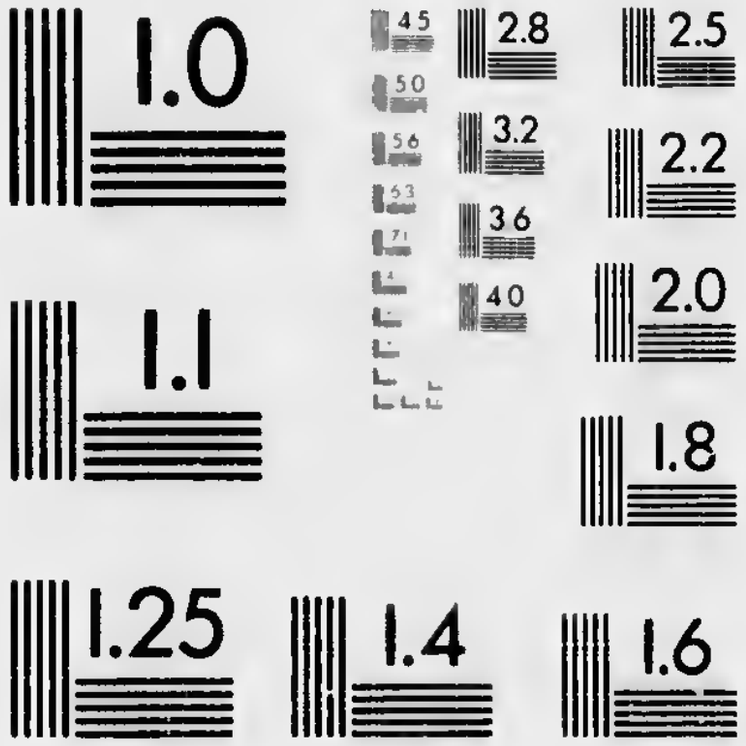

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a material bearing on this question; and before finally disposing of the case I desire to look at this authority, and to consider how far, if at all, it applies to this case. In no case—whatever the event—should this company have costs, of their unrighteous defence.

On a subsequent day, (12th March, 1879,)

SPRAGGE, C.—At the hearing, I disposed of the several points of the case with the exception of two, viz., whether the goods destroyed by fire were as stated in the application upon which the insurance was granted, the goods of *Hannah Butler*, or the goods of her husband, and whether the statement in the application that they were the goods of the wife, was to the prejudice of the company, and avoided the policy.

Judgment.

A certain quantity of the goods burned, had been the property of *Michael Collins*, a brother of the plaintiff, he devised and bequeathed all his real and personal property to the plaintiff. The husband of the plaintiff, the executor of *Collins*, proved his will, but it did not appear that he had assented to the bequest, and it was objected that without such assent, she did not become owner of the goods bequeathed, and that there was consequently an untrue representation as to the ownership of the goods which avoided the policy.

I held that the first statutory condition is a general one, not in terms speaking of ownership or any other head of representation, but that it applies to ownership as well as other heads of representation, and I observed that it was so applied in the second paragraph of the bill.

I held that an incorrect, say untrue representation does not *per se* avoid the policy, but that the representation must be to the prejudice of the company; or misrepresent, or omit to communicate some circum-

stance material to be made known to the company in order to enable it to judge of the risk it is undertaking. 1879.

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It appeared that there were no creditors, and therefore nothing standing in the way of strict legal ownership in the goods bequeathed in the plaintiff, but the absence of formal assent by the executor, her husband; and I held that the absence of such assent was not a circumstance to the prejudice of the company, or material to be made known for the reasons indicated in the Act.

Since the hearing, I have been referred by counsel to several cases under the Married Women's Act of this Province, and to cases in England and the United States, arising upon similar provisions in statutes in those countries.

Upon looking at those cases, upon referring to our Acts on those subjects, and again considering the circumstances of the case, I cannot but regret that I did not then hold the representation made as to ownership, although it might be incorrect, still not such a representation as would avoid the policy. Judgment.

In the cases referred to, the question was between the wife and the creditors of the husband; and the Courts have manifested an anxiety, a very proper one no doubt, lest the provisions of these Acts, beneficial and protective to married women, should be made instruments of frauds upon creditors. In those cases it was the interest of the wife, and generally of the husband also, to give a colouring to the dealings between the husband and wife, which might preserve the property in question to the wife, and defeat the claims of creditors, and such dealings are properly regarded with suspicion.

In the case before me there could be no possible object in representing the ownership of the goods insured otherwise than as it really was. The goods themselves, of what they consisted, their value, where they were, all these were the material points to be

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taken into account by the company in accepting or declining the proposed insurance. Whether in strict law, the ownership was in the wife or in the husband, was really a matter indifferent. The reasons for requiring a true statement as to ownership, are, that if the insurance be by one not the owner, it is a species of gambling; and because the insured when not the owner, has not the same interest in being careful about fire, as the owner. There can be no doubt that the risk would have been accepted with equal readiness, whether the husband or the wife had been stated to be the owner, that the risk would have been assumed to be, and would in fact have been the same, whichever was in truth the legal owner.

If this be the case, it follows that if these goods were in law the goods of the husband, the describing them as the goods of the wife was not to the prejudice of the company, and there was no circumstance misrepresented or omitted to be communicated which was material to be made known to the Company.

Judgment.

If the description of ownership was wrong it was a mistake of law; a statement which, if erroneous, was still made in good faith: indeed, I have not heard any suggestion to the contrary.

It is certain that by the will of *Collins* the beneficial interest in the goods insured (with the exception I will refer to presently,) vested in the plaintiff. They were goods in a shop, which shop, up to the death of *Collins*, was managed by the plaintiff's husband, and it was continued under the same management after his death; and it does not appear that by any act, or writing or word, the property in [illegible] was changed, and passed from the wife to the husband; or that there was anything manifesting an intention, at any rate on her part, that the property should cease to be hers and become that of her husband. The exception as to the insured goods to which I have referred, was that of goods purchased (to keep up the stock) out of sales of the goods

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bequeathed: and as to these I apprehend the property in the goods so purchased would be the same as the property in the goods, from the proceeds of the sales of which the purchases were made. I refer upon this point to *Merritt* v. *Lyon* (*a*).

There are some passages in the judgment of the Court, in *Commercial Bank* v. *Lett* (*b*), which militate somewhat against the view which I incline to take of the law; but the circumstances of that case were essentially different, and the judges were impressed, as they were in several of the American cases, with the danger of holding goods purchased under the circumstances existing in those cases, not liable for the debts of the husband.

In this case the inclination of my opinion is, that the goods in this case were intended and understood to be, and in law were, the goods of the wife; and that it was because they were taken to be the goods of the wife that they were insured as her goods. But as I have said, it is not necessary, in my view of the case, that I should find these goods to be in law the goods of the wife. If in law they were the goods of the husband, the statement in the application that they were the goods of the wife, was a mistake upon a question of legal ownership, which a layman or even a lawyer might very well make, and that it was not a misstatement to the prejudice of the company.

Judgment.

In my opinion the plaintiff is entitled to recover to the extent of the loss. There could scarcely be a question, I conceive, as to her right to recover to the extent of the value of the original goods unsold and destroyed by fire; but I think her entitled to recover beyond that, to the extent of her loss.

The decree will be with costs. If I thought her entitled to recover only the value of the original goods remaining, I should be inclined to give her her costs;

(*a*) 3 Barb. 110.

(*b*) 24 U. C. 552.

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and if I had felt compelled to hold her not entitled to recover, I should, as I said at the hearing, have refused the defendants their costs, by reason of the unrighteous defence that they have set up.

FOX v. THE TORONTO AND NIPPISING RAILWAY CO.

Practice—Receiver.

The decree ordered payment of a sum of money by a railway company, and in default that a receiver should be appointed; from which the company gave notice of appeal, and moved to stay the appointment of the receiver and the enforcement of the debt until after judgment in appeal. The Court refused the application unless security was given for payment of the debt in case the decree should be affirmed; and in any event ordered the defendants to pay the plaintiff the cost of the motion.

This was a motion by Mr. *Hoskin*, Q. C., on behalf of the defendants to stay the appointment of a receiver as directed by the decree in the cause; and also to stay proceedings to enforce payment of the sum of $4970, with interest from the 5th day of September, 1877, also directed by the decree to be paid by the railway company to the plaintiff.

Mr. *W. H. L. Gordon*, contra.

PROUDFOOT, V. C.—The decree in this case ordered the defendants to pay to the plaintiff a sum of money forthwith, and in default that a receiver be appointed. The defendants have given notice of appeal, and now move to stay the appointment of a receiver, and the enforcement of the debt, until after judgment shall be given by the Court of Appeal, upon their giving security for all money which in the meantime may be

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received by them and applicable to the payment of the judgment debt and costs of the plaintiff.

The defendants are desirous to avoid giving security absolutely for the debt, as from the figures stated by Mr. *Gray*, their secretary and treasurer, it seems doubtful if the defendants can from their receipts pay the plaintiff after satisfying prior charges, and they do not want a receiver, as it must necessarily cause some expense and inconvenience.

The defendants ask for relief either under the R. S. O. c. 38, s. 27, sub-sec. 3, or under the general authority of the Court. That clause of the section provides for security being given against waste, &c., when the judgment appealed from directs delivery of possession, and that the order here to appoint a receiver, must involve the delivery of possession.

It is quite clear this case is not within that clause at all. The clause refers to cases where the object of the suit and the decree was to obtain the possession, not where as here the delivery of possession is only incidental to the real relief, which is payment of the money. The clause applicable is the sub-sec. 4, which enacts that where the decree orders payment of money the execution of it will not be stayed until security be given for the amount ordered to be paid.

Judgment.

I have no authority to interfere with this provision of the statute, and it is certainly convenient I should not have such authority. The presumption is in favour of the decree, and that it will be ultimately affirmed. The plaintiff is, in the meantime, being kept out of his money, a delay which in many cases is not compensated by the allowance of interest. I cannot assume that, because the earnings of the road have for some time been so small as not to afford much probability of a payment being made to the plaintiff, the traffic will not increase. The amount for which security is offered, what meantime will be received and be applicable, &c., will necessarily require an account to be taken, and

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involve questions of priority, that would probably be more costly than the appointment of a receiver.

If security be given for payment of the debt in case the decree be affirmed, the appointment of a receiver need not be made. If such security be not given, motion dismissed, in either case with costs to the plaintiff.

GREEN V. THE PROVINCIAL INSURANCE COMPANY.

Deposit by Insurance Companies—Parties entitled to claim thereon in case of insolvency of company.

An insurance company had been licensed under the statute, 31 Vic. ch. 48, to transact fire and inland marine insurance business, although its original charter authorized the transaction of fire and marine insurance, without distinction of ocean from inland marine. The holders of ocean marine policies, though resident in Canada, are not entitled to rank as creditors on the fund deposited with and remaining in the hands of the Government, in the event of the company becoming insolvent.

This was a motion on behalf of *The Boston Marine Insurance Company*, by way of appeal from the report or certificate of *Arthur Harvey*, Esquire, who had been appointed assignee of the said company, under decree of the Court of 23rd January, 1878. The circumstances giving rise to the present appeal clearly appear in the judgment.

Mr. *Biggar*, for the appeal, insisted that under the circumstances appearing in the case, the assignee had not any right or jurisdiction to determine the right of Canadian holders of policies, issued by the defendants

in respect of ocean risks, to rank on the government deposit as creditors, and that his duty was simply to to report whether the appellants had proved their claims.

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Mr. *Crickmore*, Mr. *H. Murray*, Mr. *Foy*, and Mr. *Creelman*, contra, contended that the only object of the company making the deposit in question, was to secure a license for the transaction in Canada of a Fire and Inland Marine Insurance business, and no license or deposit is necessary for the transaction of an Ocean Marine Insurance business in Canada, this is clear from the wording of the 1st and 2nd sections of the Act, 38 Vic. ch. 20.

PROUDFOOT, V. C.—The principal question in this case is, whether the holder of an Ocean Marine policy can claim upon the deposit in the hands of the Receiver-General concurrently with the holders of policies for Fire and Inland Marine risks.

Judgment.

The bill is filed by the plaintiff on behalf of himself and all other the creditors of the Provincial Insurance Company of Canada.

The decree made on the 23rd January, 1878, declared the company insolvent, within the meaning of the statute, 38 Vic. ch. 20, of the Parliament of Canada, and that the deposit made by the said company with the Receiver-General of Canada, in compliance with sec. 16 of that Act, is liable to distribution pursuant to the said statute among the creditors of the said company, who are holders of claims in respect of policies issued to policy holders in Canada. And it appointed Mr. *Harvey* to be assignee of the company, in pursuance of and for the purpose of the act.

The assignee has made a report or certificate, stating that he had cited to appear before him the three principal creditors under Ocean Marine policies, two of whom were policy holders in Canada, and after argu-

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ment he refused to entertain any of these as claims upon the deposit.

This finding is appealed from for the following reasons :—

1. That the asignee should simply have made a list or schedule of the creditors of the company, who hold claims in respect of policies issued to policy holders in Canada, and that his finding in regard to the holders of Ocean policies is void.

2. If otherwise, the report is erroneous in finding that the Ocean policy holders are not entitled to rank.

3. That the assignee should have read the Act, 40 Vict. c. 42, along with the 38 Vict. c. 20.

4. That the company was under its charter entitled to do Ocean Marine as well as Fire and Inland Marine, business in Canada, and the deposit was for the security of holders in Canada of policies issued by the company without distinction.

Judgment.

5. That the deposit having been taken out of the general funds of the company, formed by receipts of premiums as well from Ocean Marine business as from Fire and Inland Marine business without distinction it would be inequitable and against the wording and spirit of the Acts in that behalf to hold that the deposit is applicable to the payment of one class of creditors only.

The following facts were established and admitted by all parties before the assignee :—

1. The Provincial Insurance Company was chartered to do fire and marine insurance, without distinction of ocean from inland marine.

2. The charter did not contain any clauses separating its property into funds for the benefit of any particular class of policy-holders, nor were the premiums received by the company on ocean risks dealt with differently from others. The receipts formed a common fund out of which losses and expenses were paid, without reference to the kind of business in respect of which they occurred.

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3. The company was first licensed to transact fire and inland marine insurance business on the 1st of August, 1868, under the Act 31 Vict. ch. 48, sec. 4.

4. The license was continued under 38 Vict. ch. 20, by certificate dated 31st March, 1876, issued by the finance department at Ottawa, and renewed on the 31st March, 1877. This renewal license covered the year to March 31st, 1878.

5. The government deposit was taken out of the general funds of the company.

6. The company, as above stated became insolvent in the end of 1877, or beginning of 1878.

It was not contended that the matter was concluded by the decree, all parties apparently proceeding upon the assumption, and I think correctly, that the decree declaring the deposit distributable "pursuant to the statute, among the creditors who are holders of claims in respect of policies issued to policy holders in Canada," left it still to be ascertained who were entitled pursuant to the statute among such policy holders.

Judgment.

The duties of the assignee are defined by the Act of 1875, sec. 17. He is to call upon the company for a statement of all its outstanding policies in Canada, and upon such policy holders to file their claims; and upon the filing of the claims the parties interested shall have the right of contestation thereof, and the right of appeal from the decision of the assignee to the Court. It seems clear, therefore, that the duty of the assignee is not merely ministerial,—matters may be contested before him,—and from his decision there is a right of appeal. The assignee in this case has not exceeded his authority.

I have had much difficulty in arriving at a conclusion satisfactory to my own mind upon the true meaning and effect of the Acts upon this subject.

The first statute requiring a deposit, was made in 1860, and applied only to foreign insurance companies

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doing business in Canada. The statute of 1868, extended this to all companies, native or foreign, except those doing an exclusively ocean marine business; and where a company carried on more than one description of business, it had to make a separate deposit for each branch, though if the two branches were Life and Accident, or Fire and Inland Marine, only one deposit was required for each combination. Upon the required deposit being made a license was to issue authorizing the company to carry on the insurance business, and doing business without such license was declared to be unlawful. Upon the insolvency of the company the deposit was to be applied towards the payment of all claims duly authenticated against the company, upon or in respect of policies issued in Canada. But this general language must, from the nature of the other provisions in the Act, be construed with qualifications. A deposit was required to be made for each branch of business transacted by the company, and the necessary implication is, that it was for the benefit of policy holders in that branch. Suppose a company to transact the business of Life and Fire Insurance, and make a deposit in each branch, it could not be contended that a life policy could rank on the fire deposit, or a fire policy on the life deposit. If it could, there would have been no necessity for the separate deposits.

Judgment.

The Act of 1875 is entitled an Act to amend and consolidate the several Acts respecting insurance, in so far as regards Fire and Inland Marine Insurance, and notwithstanding the vagueness of the language employed in many of its sections, which seems to invite criticism, I think the title correctly describes it. It defines a "Canadian Company" to mean a company incorporated in Canada for purposes of Fire or Inland Marine Insurance, or both, in Canada. And it enacts that except certain insurance companies, and those that transacted Ocean Marine business exclusively, it should not be lawful for any company to accept any risk or

issue any policy of Fire or Inland Marine Insurance without a license. In this respect it differs from the Act of 1868, which rendered unlawful any insurance business except Ocean Marine business of companies exclusively for that purpose, so that under the Act of 1868, a Fire and Inland Marine company could not have taken an ocean risk without making a deposit, while under the Act of 1875, that might be done. In the Act of 1875 the deposit is said (sec. 6) to be for the benefit of policy holders in Canada, and there is a provision (sec. 8) for making good a deficiency, if upon examination it appears that the re-insurance value of all risks outstanding in Canada, together with any other liabilities in Canada exceed its assets including the deposit. The general terms of this sec. 8, must be read in connection with the whole scope of the Act, and must receive an interpretation consonant to it. All the risks must be taken into account, because they might be so great as to exhaust all the general assets, and thus impair the security of those who had a claim upon the deposit as well, but it does not necessarily imply that all risks are to rank on the deposit.

Judgment.

Nor is there any specific power given to make deposits for the separate branches of business, but that seems to me to follow from the form of the license which is to specify the business to be carried on by the company, and in fact I find that licenses are issued for fire insurance, for inland marine insurance, and for fire and inland marine. And the license of a fire company, was extended, at a subsequent date, to include inland marine also. The license then is the guide to determine what policy holders are entitled to rank on the deposit.

I do not apprehend that sec. 15, confers upon any creditor who may obtain final judgment against the company, a right to seize the deposit, or to be paid out of it; the language of the section will be fully satisfied by assuming that right only to exist in those who have claims on policies in the business to which the license extends.

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The 16th section, which declares what shall constitute insolvency, enacts that the deposit held for policy holders *in Canada*, shall be applied towards payment of all claims duly authenticated against the company, upon or in respect of policies issued to policy holders in Canada. The latter part of the sentence must be read in connection with the first, and the policy holders to be paid are only those for whom the deposit is held, and these, I think, are the policy holders in the business licensed.

The language of the 17th section is to be construed in the same way, and so of the 18th.

It was further argued that I ought to read the Act of 1877, in connection with that of 1875, and that the definition of company, as meaning any incorporation or association, etc., for carrying on the business of insurance other than an ocean marine business exclusively, did not exclude a company, doing a united business such as the "Provincial," and that therefore all policy holders of every class are under the 15th section, entitled to share in the deposit. But this Act seems to me to apply to life, accident, &c., insurance, not to fire and inland marine; the definition of "policy in Canada," as a policy issued by any company licensed under that Act to transact the business of life insurance in Canada in favour of a resident in Canada; and "policy holder in Canada," means any such person, seems to shew this to have been the intention of the Act. And it does not repeal the Act of 1875, but that Act and the Act of 1877, may be cited together as "The Insurance Acts of 1875 and 1877." The one is the complement of the other. One relates to fire and inland marine insurances, the other to life insurances. The 15th section which declares that the deposit is to be distributed among the policy holders in Canada, means holders of life policies.

Judgment.

I think the assignee was right, and the appeal is dismissed, with costs.

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BOLTON v. BAILEY.

Will, construction of—Gift to a class—Vesting—Lapsed legacy.

A testator, after sundry bequests and devises, amongst others an estate for life in all his lands to his widow, devised the same lands to trustees upon trust, within two years after the death of his widow, to sell and dispose thereof; to execute deeds, and to give receipts, &c., and "after the sale of my said real estate I give and bequeath the proceeds of such sale or sales to my nephew *G. B.*, son of my brother *Joseph*, and to the following children of my brother *George*, (naming them) equally share and share alike, male and female, without exception, when they respectively attain the age of twenty-one, to them their heirs and assigns; and in the event of any of my legatees dying before getting their share or portion as aforesaid leaving child or children, in such case the child or children of any so dying shall inherit the share of the deceased parent." One of the nephews died during the life-time of the widow without issue.

Held, That there was no bequest of anything until the sale had taken place; that the bequest was one of personalty, not of realty; that no interest vested in such deceased nephew, as he did not live till the time of sale; that the gift was not a gift to a class; and there being no residuary clause in the will, that the share of such deceased nephew lapsed and passed to the next of kin of the testator, and not to the legatee of the nephew.

This was a suit to obtain the construction of the will of the late *Thomas Bolton* by the trustees and executors named therein. The case came on by way of motion for decree.

Mr. *W. Mortimer Clark*, for the plaintiffs.

Mr. *Fitzgerald*, Q. C., Mr. *Bain*, and Mr. *McArthur*, for the defendants.

PROUDFOOT, V.C.—This bill is filed by the executors of the will of *Thomas Bailey* for the construction of his will. June 11th.

The testator by his will, dated 28th of August, 1872, gave all his personal property to his wife absolutely, she paying thereout all his just debts, funeral and testamentary expenses. He also devised to her for life

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the rents, issues, and profits, of a lot of land, being all his real estate, subject to the payment of debts, &c., if the personal property was insufficient. He then devised the said lot to *Thomas Bolton*, *James Gardhouse*, and *Robert Wood*, his executors and trustees, their heirs, administrators, and assigns, to hold to them, their executors, their heirs and assigns, absolutely for ever, (subject, nevertheless, to the charges and incumbrances, if any, now existing thereupon,) upon trust, within two years after the death of his wife to sell and dispose of it, and to execute deeds, &c., and to give receipts, &c. "And after the sale of my said real estate, I give and bequeath the proceeds of such sale, or sales, to my nephew *George Bailey*, son of my brother *Joseph*, and to the following children of my brother *George*, viz.: *George Bailey*, *Thomas Bailey*, *John Bailey*, and *Elizabeth Bailey*, equally share and share alike, male and female, without exception, when they respectively attain the age of twenty-one, to them, their heirs and assigns; and in the event of any of my legatees dying before getting their share or portion as aforesaid, leaving child or children, in such case the child or children of any so dying, shall inherit the share of the deceased parent." The testator died on the 27th of March, 1873, without any children, or issue of any children, surviving him. The widow died on the 15th of September, 1878.

Judgment.

The executors have sold the land and are desirous of dividing the proceeds, but find a difficulty from the following facts.

Thomas Bailey, jr., the nephew, died on the 10th April, 1876, without leaving any children, but survived by his father and his widow, and having made a will devising to his widow all his property, of whatever kind, and all his interest in the estate of his late uncle *Thomas Bailey*.

George Bailey, the father, claims his interest as heir-at-law of *Thomas*. The widow of *Thomas* claims it as

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his devisee. The other nephews and neice of the testator claim it on the ground that the devise was to a class, and that *Thomas*, one of the class, died before the sale, took nothing, and the whole survived to them.

The bill alleges that *George Bailey*, the father, claims as heir-at-law of his son *Thomas*, and by his answer *George Bailey* admits this, he also says he is the brother of the testator, and submits his rights to the Court. Upon the argument, however, his counsel rested his right as heir-at-law or an heir-at-law of the testator, contending that *Thomas*, jr., was only to take in the double contingency of attaining twenty-one and living to the sale, and not having done so, there was an intestacy as to his share.

Counsel for the widow concurred with the counsel for *George* in arguing that this was not a gift to a class, but contended that the interest vested in *Thomas*, jr., on attaining twenty-one, and that it passed by his will to his widow.

Judgment.

The other nephews and niece concur in the argument that nothing was given until a sale, but that this was a gift to a class, and that *Thomas*, jr., not having lived till the sale took nothing.

I think that there was no bequest of anything until the sale had taken place: that it was a bequest of personalty, not of realty: that no interest vested in *Thomas*, jr., as he did not live till the time of sale: that the gift was not a gift to a class; and there being no residuary clause in this will, that the share of *Thomas*, jr., passed (and passes) to the next of kin of the testator.

Elwin v. *Elwin* (*a*), determined that upon a devise to testator's wife for life, and as soon after her decease or refusal to release dower as conveniently might be, upon trust to sell and divide the produce between five named nephews at such time as the sale should be

(*a*) 8 Ves. 547.

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completed, if then living; if any should die in her life or before the sale should be completed, his share to his children; if none, to the survivors—the interests did not vest till the sale. The bill was filed by the executors of one of the nephews who died before the sale, claiming that he took a vested interest that passed to them as his representative. But the bill was dismissed. I cannot distinguish that case in principle from this, and it establishes that nothing vested till the sale, and that *Thomas*, jr., not having lived till that period took nothing.

Mendham v. *Williams* (*a*), is not a decision to the contrary. In that case there was a devise to the widow for life, then the land to be sold and the proceeds to be divided equally between the testator's seven children, the shares of his three sons to be vested as they should attain twenty-one, and the shares of his daughters as they should attain that age or be married. The shares of the children during minority were to be invested, and the proceeds applied to their maintenance. And in case any of the children should die leaving issue before their shares should become due and payable, their shares should be equally divided amongst their issue. One of the daughters attained twenty-one, and died leaving an infant child, during the life time of the widow. The contest was between the mortgagee of the daughter's share and her child, and is was held that the mortgagee was entitled. There was an express clause vesting at twenty-one, or marriage, and the application of the income meantime for maintenance. And in such a case it was held there was not a double contingency of surviving the tenant for life, and attaining twenty-one. But that cannot apply where nothing is given till after the sale.

Judgment.

Re Kirkbride's Trusts (*b*), to which I was also referred, was a case where the gift was clearly

(*a*) L. R. 2 Eq. 396. (*b*) L. R. 2 Eq. 400.

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a vested interest, and the question was whether it was divested by a clause, that in case a legatee should die in the lifetime of the testator, *and* before he should have received any benefit from the bequest, then it should go to his children. The legatee survived the testator, but died before the tenant for life, and it was held that *and* could not be read *or*, so as to defeat the intent, that having survived the testator the vesting was absolute. But that has no application to this case.

In *Walker* v. *Main* (*a*), there was a direct gift to the children and grandchildren of the proceeds of the sale of land, after the death of the tenant for life, with a proviso, that if any of them died before the legacy became due and payable, then to the survivor. And it was held that two dying before the tenant for life were entitled. There was the vested gift, not divested by the use of the words, *dying before it became due and payable*. But the Master of the Rolls says the testator may impose a condition, that none of the objects shall take unless they survive the tenant for life. If, upon the whole instrument, you can collect that the testator means to annex the condition of surviving the person entitled for life, as well as attaining twenty-one or marrying, the Court cannot reject the second contingency. And that is what I think the testator has done in this case, as well as in *Elwin* v. *Elwin*.

Judgment.

There can be no question but that the property was converted into personalty, by the absolute devise to sell.

This is not a bequest to a class. Mr. *Jarman* (1.243) defines a gift to a class as a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take equally, the share of each being depen-

(*a*) 1 J. & W. 1

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dent for its amount upon the ultimate number of persons.

In *Re Stanhope's* Trusts (*a*), the Master of the Rolls says, a gift in trust for five daughters, naming them, and their issue, is not a gift to a class.

In this case the body of persons is not uncertain in number, they are named, they were not to be ascertained at a future time, and therefore it does not come within the definition.

The legacy to *Thomas Bailey* having lapsed, and there being no residuary clause, there is an intestacy to that extent, and it goes to the next of kin of the testator.

Judgment.

There will be a declaration to that effect. And the difficulty having arisen upon the construction of the will, the costs of all parties will come out of the estate.

(*a*) 27 Beav. 201, 203.

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BAIRD v. BAIRD.

Construction of will—Trust deed.

A testator devised his real and personal estate to his wife for life, for the benefit of herself and their children, and directed that, upon the the death of the widow, his property should be equally divided among the children. *Held*, that only such of the children as survived the widow, were entitled to participate in such partition of the estate; and one of the sons, as personal representative of the testator, having purchased land with the moneys of the estate, and executed a declaration that he held the lands so purchased (except as to his own interest) in trust only for the other parties interested under the will, and afterwards died during the life of his mother. *Held*, that his children were not entitled to any share in such land, the only persons entitled being such of his brothers and sisters as should survive their mother. [BLAKE, V. C., dissenting, on the ground that these questions were not properly raised by the pleadings.]

This was a suit instituted by *Helen M. Baird*, widow of the late *David Baird*, and their surviving children, against *Judith Baird*, widow of *John Baird*, son of *David Baird*, and the infant children of *John Baird*, together with one *John Pritchard*, a mortgagee of the lands in question.

Statement.

At the hearing of the cause before *Blake*, V. C., at the sittings of the Court at Ottawa, in the Spring of 1878, a decree was made declaring that by virtue of the declaration, signed by *John Baird* on the 15th of July, 1857, mentioned in the judgment, the plaintiff *Helen M. Baird* became and was entitled to a life-estate in these lands, and that the defendants, other than *Judith Baird* and *Pritchard*, were entitled to the share of *John Baird*, deceased, and directing a partition or sale thereof, subject to the life-estate of the plaintiff *Helen M. Baird*. The plaintiffs being dissatisfied with this decree reheard the cause.

Mr. *Fitzgerald*, Q. C., for the plaintiffs.

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

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Baird v. Baird.

March 28th.

SPRAGGE, C.—The only question raised upon this re-hearing is, whether the real representatives of *John Baird* are entitled to a share in a certain parcel of land in the township of Torbolton.

David Baird, the father of *John Baird*, and of the plaintiffs, by his will as set forth in the bill and which is taken to be correct, devised his real and personal estate to his wife *Helen Macan Baird*, during her lifetime, for the benefit of herself and the children of him the testator, and by the said will directed that upon the death of his said wife, his said real and personal estate should be equally divided among her children.

The parcel of land in question was purchased by *John Baird*, with moneys of the estate of the testator, and was conveyed to him by deed bearing date 15th July, 1857, (he being then administrator, with the will annexed, of the estate of the testator) and he executed a deed of trust bearing the same date, in which his purchase with the moneys of the estate, is set forth, and in which he declares that he holds the lands purchased (except as to his own interest under the will of his father) in trust only for the other parties interested under the said will. The widow of the testator was and is still living, and at that date *John* had precisely the same interest in the estate, real and personal, of his father, as his brothers and sisters had. Afterwards *John* died, leaving his mother and the brothers and sisters, who are plaintiffs, surviving him.

Judgment

If the land in question had formed part of the testator's estate at the time of his death, it would be clear, I take it, that only children who survive the widow would be entitled to share in it; so if the moneys wherewith the land was purchased had remained personalty the survivors only of the widow would be entitled. So, again, if the declaration of trust had gone no further than to declare that the land had been purchased with the moneys of the estate, or if the fact

had been established *aliunde*, there would have been a resulting trust; and the same consequence would have followed—the survivors only would have been entitled

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And further, if it were thought expedient to declare the trust, it would have been the duty of the conveyancer preparing the instrument to declare the trusts in conformity with the will; and this he would do as a matter of course, unless there were an agreement between the parties, that as to this parcel of land the will was to be departed from.

We have not even a suggestion that there was any such agreement, and the document itself furnishes no evidence of any. I have looked carefully through the document and find several references to the will without in any of them, or in any other part of the instrument, finding any indication of an intention to make any disposition of this property, other than that made by the will in regard to the estate, real and personal, devised and bequeathed. On the contrary, the whole scope of the instrument indicates an intention to place this property upon the same footing. A portion of the estate, the amount of the purchase money of this land, had been apparently, though I assume, innocently diverted from its proper channel. The recital of this instrument as well as the general terms of it indicate, that its purpose was simply to restore it; to make the land, what the purchase money of it had been, a portion of the estate. I should require very plain indications of an intention to do other than this before interpreting the instrument as meaning and intending more.

Judgment.

Mr. *Boyd* calls our attention to the fourth prayer of the bill. It is evidently framed as is the 16th paragraph of the bill, upon the assumption that the Court *might* construe the will and declaration of trust as entitling the representatives of *John Baird* to share with the other devisees in remainder in the land in question, and it asks a remedy appropriate to that

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hypothesis. It would have been better pleading if it had been put, that in case the Court should be of that opinion then that the plaintiff should have the remedy prayed for. But this faulty pleading cannot affect the plaintiffs' right, and the defendants could scarcely, I should have thought, have been misled, for the 4th and 14th paragraphs of the bill are distinct and explicit as to what the plaintiffs claim, and it is apparent from the defendant *Judith* controverting in her answer the case made in the fourth paragraph, that she understood what it was. The answer of the infant, too, makes no such contention but only states that, which if any thing is matter of account; their legal adviser therefore would appear not to have been misled. If, however, their counsel is now prepared to say that their case has been prejudiced by the frame of the pleadings, and that they desire to make a defence other than that already made, I should acquiesce in granting them leave; but inasmuch as I think there was no sufficient reason for their being misled, I should grant it as an indulgence, and only on payment of costs.

Judgment

The mortgage held by *Pritchard*, I understand not to be impeached.

BLAKE, V. C.—When this bill was filed *John Baird* was dead, and the event had happened which, according to the present contention of the plaintiffs, determined whether *John Baird* and his representatives took anything under the will. By clause 4 of the bill it is alleged that the lands in question "should be held by the said *John Baird* upon trust for all the parties entitled under said will, to the same extent as if the same had been originally a portion of the real estate, devised by said testator by virtue of said will." This paragraph does not touch the question of the construction of the will, nor the position in which the plaintiffs or defendants are placed under the will and the agreement. It was open to the plaintiffs to contend

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that, as *John Baird* predeceased the widow, his estate took nothing by the will and agreement; whereupon his representatives could have answered setting up such a case as they thought proper; or the plaintiffs might have admitted that whatever may be the strict reading of the agreement, they did not contend that the interest of *John Baird* depended on his surviving the widow, or have declined entering into this question and asked the Court to partition the estate, not disputing the right of the representatives of *John Baird* to participate in the estate. Paragraph 14 of the bill does not define the effect of the agreement according to the plaintiffs' contention, but simply asks that "it should be declared that the lands and premises herein mentioned are now held by the defendants upon the trusts mentioned, and set out in said declaration of trust." Paragraph 15 follows in the same strain, and submits that the only interest in the premises chargeable with the mortgages, is such estate or interest in said lands as would have passed to said *John Baird*, under the will of the said *Daniel Baird*, had said lands formed a portion of the real estate of said *Daniel Baird*, at the time of h's death; instead of repudiating the idea that under the above state of facts, *John Baird* or his representatives took anything under the will and agreement. Judgment.

The bill proceeds in its 16th paragraph as follows: "And in any event that the estate and interest in said lands, which said *John Baird* and his legal representatives are entitled to under the will of said *Daniel Baird* and said declaration of trust, may be charged with said mortgage moneys and interest." The plaintiffs do not ask for the construction of these documents by the Court, and then that a charge may be declared upon any interest that may be found in *John Baird's* estate; but it asks that, "in any event, * * the estate and interest in said lands which said *John Baird* and his legal representatives are entitled to, * * may be charged." The plaintiffs do not deny the position now

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taken by the representatives of *John Baird*. There is no issue between them on this point; and in the prayer of the bill, paragraph 4, the plaintiffs ask that "in any event it may be declared that the estate and interest which the defendants other than *John Pritchard*, are entitled to in said lands, may be charged with said mortgage moneys and interest." If the plaintiffs had denied the position taken by the infant defendants, a case might have been made out which would have prevented a partition of the estate without the recognition of the interest of *John Baird* or his representatives. The Court cannot speculate upon the defence which might have been raised. I thought at the hearing, and still think, that the guardian of the infants was justified on this bill in claiming that there was an admission of an interest in the infants he represented, and that although the plaintiffs might have asked and would have obtained an amendment striking out this admission on such terms as the Court thought proper, yet not having done so, no decree could be made disregarding the interest admitted to be in the infants, by virtue of which they were brought before the Court, and which the plaintiffs sought to have charged with the mortgages which were in the hands of *Pritchard*. The whole scope of the bill is one for a partition of the premises, notwithstanding that a portion is held in the name of *John Baird*, and is based upon the view that *John Baird* did take under the will; and I think the defendants might well complain of being surprised or misled if the Court on such a pleading allowed the plaintiffs to alter the position at the hearing so plainly indicated in the bill. If the question merely depended on the will there might be less ground for complaint; but the will, the agreement, and the circumstances connected with its execution and the purchase of the property, may all materially bear on the point, and the grounds of defence which they may afford, the defendants should have liberty to

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present on a record in which the point is plainly taken.

If the plaintiffs do not choose to ask an amendment, I think the decree should stand.

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PROUDFOOT, V. C.—I concur in the judgment just read by the Chancellor, that it was open to the plaintiffs on these pleadings to claim all the rights available to them under the will and the deed; and under the facts stated it is clear that the son took nothing under the will, and that his subsequent dealing with the property as his own, was an infringement of the rights of the plaintiff. The bill is, however, clumsily framed, and if the defendants have really been misled by it, they should have an opportunity of bettering their case if they can, and an amendment should be allowed for that purpose, without costs.

Judgment.

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PARDEE v. LLOYD.

Arbitration—Setting aside award—Practice—Improper conduct of arbitrator.

Where a notice had been served by one of the parties (the defendant) to an arbitration of his intention to move against the award in due time after publication, and the plaintiff thereafter served notice consenting to the award being set aside, but the defendant did not proceed with the motion, the Court, under these circumstances, held that the defendant could not afterwards set up delay as an answer to an application by the plaintiff for the purpose of having the award set aside.

Any communication between one of the parties to an arbitration and an arbitrator on the subject of the reference of which the other party and the other arbitrators are not aware, and at which they are not present, is illegal, and renders the award invalid—an arbitrator being a judge, whose duty it is to be indifferent between the parties. Therefore where it was shewn that one of several arbitrators had held interviews with the defendant pending the reference, and that the arbitrator in one at least of such interviews consulted the defendant as to the modes in which the award might be framed, and asked the defendant which he preferred, these facts being withheld from the other arbitrators, the Court set aside the award, and ordered the defendant to pay the costs.

This was a motion by Mr. *Hector Cameron*, Q. C., and Mr. *Moss*, on behalf of the plaintiff, for an order to set aside an award made in the cause, on the grounds set forth in the judgment.

Mr. *G. D. Dickson*, contra.

The cases cited are mentioned in the judgment.

March 26th. PROUDFOOT, V. C.—This is an application by the plaintiff to set aside an award made in this cause on the 13th August, 1878, on account of improper conduct of one of the arbitrators in consulting with the defendant, and receiving and acting upon suggestions made by the defendant, pending the reference—and because the same arbitrator acted during the progress of the reference as agent and counsel to the defendant,

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and never exercised an impartial judgment,—and because the award is unjust and erroneous in several particulars, which I need not specify, as in the view I take of the evidence the charge of improper conduct on the part of that arbitrator, *Patterson*, is fully established, and the award ought to be set aside, if the plaintiff has made his application in proper time.

The award was made on the 13th August, 1878, Trinity Term began on the 26th August, and ended on the 7th September Michaelmas Term began on the 18th November, and ended on the 7th December. The notice of motion was given on the 2nd December, and any delay that has taken place since does not seem to me attributable to the plaintiff.

The Statute of Wm. III. (*a*), I suppose to be that which regulates the time for appealing from an award made upon a reference by consent—the R. S. O. ch. 50 sec. 192, appearing to apply to awards on compulsory references, and section 206, leaving others to be set aside in the same manner as heretofore.

Judgment.

The award may be set aside provided, "complaint * * be made * * before the last day of the next term after such arbitration or umpirage made and published to the parties." The time for making complaint, to which notice of appeal is equivalent, *Re Huddersfield* (*b*), expired in this case on the 7th September.

Compliance with the regulation of the statute is strictly enforced. I would have thought that the rule was made for the benefit of the person in whose favour the award was made, that it was not made for the public benefit, and that no public interests require such a provision; and therefore that it was subject to the maxim: "*Quilibet potest renunciare juri pro se introducto.*" Thus a person may decline to avail himself of a defence which would be a sufficient answer

(*a*) 9 & 10 Wm. III. c. 15 s. 2. (*b*) L. R. 19 Chy. 92.

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to the plaintiff's demand, as infancy, or the statute of limitations. *Broom's* Maxims, p. 699, and the restriction of the time for moving to set aside an award is nothing more than a statute of limitation. But these considerations do not seem to have been given effect to in the case of *In re North British R. W. Co. and Trowsdale* (*a*), where both parties consented to the application being made after the lapse of the statutory limit. It may be that the consent there not having been given till after the expiry of the time for moving, may have had some influence with the Court—the judgment, however, states no such reason,—and if no other line of authority can be found I must of course be bound by the decision, however harsh it may appear to be.

Judgment.

It is to be noticed, however that in that case the delay of the party moving was entirely voluntarily, not caused, or induced, by the conduct of the other side, not one word was said, not an act was done, which had the effect of causing the party to sleep upon his right, to lull him into fancied security.

Mr. *Russell*, on Awards, 652, ed. 1878, says it may be doubted whether the Courts have a discretionary power of allowing further time than the statute prescribes for the application. The cases he cites are generally such as arose from the neglect of the party applying, either to move to enlarge the time, or to take some other step to enable the motion to be made in proper time, and not when any act of the defendant induced the delay in moving. In one instance, *In re Perring and Keymer* (*b*), the time seems to have been enlarged because one of the parties improperly kept the submission so that it could not be made a rule of Court; but that has been questioned on several occasions: *In re Smith and Blake* (*c*), *Reynolds* v.

(*a*) L. R. 1 C. P. 410. (*b*) 3 Dowl. 98.
(*c*) 8 Dowl. 133.

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Askew (*a*). The party should have moved for production of the submission. And where the person moving asked an enlargement because the affidavits on which the motion was to be made had not arrived from the country, it was refused: *Evans* v. *Howell* (*b*); and see *Ross* v. *Ross* (*c*).

But there is one case cited by Mr. *Russell*, *Midland R. W. Co.* v. *Heming* (*d*), which contains a principle applicable to cases where the delay has been induced by the one of the parties. In that case, on the last day but one of the Term next after the making of the award, a party obtained a rule *nisi* for the other party to file the submission with the Master, in order to its being made a rule of Court as of the day on which the motion to set aside the award was made; and that the rule to set aside the award should be drawn up on reading such rule. The party applying had good ground for supposing that the other side, in whose hands the submission was, intended to make it a rule of Court, and it was only by accident that that result did not take place. *Erle*, J., said, "The distinction between the present case and those which have been cited I take to be this; that here the party applying to set aside the award did take the initiative within the time limited by the statute, and that he was not able to make the submission a rule of Court by reason of its being in the hands of the other party, whereas in the cases which have been referred to, the motion itself was made after the time limited by the statute. If there had been no reason for supposing that the submission would have been made a rule of Court, so as to enable the party to move to set it aside within the limited time, I think a different answer must have been given to this motion."

Judgment.

In that case the rule to set aside the award was obtained on the 30th of January, but as the submission

(*a*) 5 Dowl. 682.
(*b*) 4 M. & G. 767.
(*c*) 4 D. & L. 648.
(*d*) 4 D. & L. 788.

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was not then a rule of Court. the motion could not be attended to by the Court, as decided in *Ross* v. *Ross* (*a*). That rule could not be termed the initiative of such a proceeding, when it could not be attended to, was in fact a nullity; and the decision really amounted to an enlargement of the time for making the motion to set aside the award, because the act of the other party, although in perfectly good faith, had misled the party moving.

The case of *Jobson* v. *McNulty* (*b*), gives full effect to the consent of the parties as authorizing a motion to set aside an award after the lapse of the statutory time, but as I think that was not a reference under the statute, and the limit as to time is not so rigidly adhered to, I do not rely upon it.

I think, therefore, there is nothing either in the statute or the cases to prevent a motion for such a purpose being made at a time after the lapse of the statutory limit, where the delay has been caused or induced by the conduct of the defendant.

Judgment.

In the case before me Mr. *Dickson* states in his affidavit that Mr. *Bickford*, after the award was made, told him he would not submit to it, that he would move against it. This was both before and since the notice of appeal given by Mr. *Dickson*. But on the 4th of September, Mr. *Dickson* served Mr. *Bickford's* solicitor with a notice: "That the above-named *Henry Crampton Lloyd* appeals from the award of the arbitrators herein; and will amongst other grounds demur to the jurisdiction of the arbitrators, some or all of them, to act or make the said award." Mr. *Bickford* was satisfied with this intention to appeal, and on the 8th of October, caused to be served on Mr. *Dickson* a notice, "That in accordance with the terms of the notice given to him on the 2nd September, the plaintiff consented to an order being made by this Court setting aside the award of the arbitrators."

(*a*) 4 D. & L. 648. (*b*) 2 Pr. R. 119.

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It is quite true that the notice of appeal was defective; it does not specify the Court to which it was intended to make it, nor the time when the appeal was to be heard; but I apprehend it was quite sufficient to amount to a complaint within the statute, and to sustain a more formal notice. *Bickford* always intimated his intention to move against the award; both parties seem to have been dissatisfied with it, and each knew that the other was dissatisfied. The notice of the defendant was given three days before the end of the first term after the award, and the plaintiff had then ample time to have given a notice himself. I think the necessary inference is that he refrained because he had been served with the notice; and to save the defendant any trouble in his application he sends him a consent in October to setting aside the award.

I think, therefore, that the plaintiff not moving in the first term after the making of the award was induced by the act of the defendant in leading him to believe that the defendant was appealing from it, and that being so, the plaintiff is not to be prejudiced by it. Judgment.

I think it unnecessary to examine at any length the evidence on the subject of Mr. *Patterson's* interviews with the defendant, pending the reference. Upon Mr. *Patterson's* examination it appears that he did consult Mr. *Lloyd* as to the modes in which the award might be framed, and asked which he preferred. He did not tell the other arbitrators that he had spoken to the defendant about it, they did not know that he intended speaking to the defendant about it. He mentions several interviews he had with the defendant, and does not recollect speaking of the arbitration at them, but won't be positive he did not. It seems that at the one interview which he mentions, remarks were made by the defendant as to the evidence of one of the witnesses which he said should have been given differently.

The affidavit of the plaintiff *Bickford*, would seem

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to indicate that *Patterson* acted rather as counsel for the defendant than as an impartial judge. But I do not rest upon this at all.

I desire that my decision should rest upon a broader basis, viz., that *any* communication between the plaintiff and the arbitrator on the subject of the pending reference, of which the other party and the other arbitrators were not aware, and at which they were not present, is illegal. That an arbitrator is a judge, whose duty it is to be indifferent between the parties. *In re Lawson and Hutchinson* (*a*), and the cases cited there.

Judgment.

I think this award must be set aside, and the defendant must pay the costs.

(*a*) 19 Gr. 84.

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THOMPSON v. DODD.

Practice—Decree incorrectly drawn—Setting aside sale under decree.

At the hearing a decree was pronounced declaring a deed void to the extent of the interest reserved in favour of the grantor and his wife, and the children of a daughter of the grantor, but in drawing up the decree the deed was declared void as to the children of an intended marriage of the son of the grantor. Under this decree a sale of the trust estate was had at the instance of the plaintiff, a creditor who had filed the bill impeaching the deed as fraudulent. The Court under these circumstances, refused to carry out the sale, and ordered the decree to be corrected, and a new sale had, in which the interests of the children of the marriage should be protected.

Where the tenant for life was trustee and after the cesser of other estates, was to hold the estate for the benefit of the children of *P. C.*

Held, that the trustee sufficiently represented their interests, and that they need not be parties to a bill impeaching the trust deed as fraudulent against creditors.

This was a petition by *William Ellis*, seeking to have a declaration that the title which could be conveyed to him, upon a purchase under a decree in this cause, was free from any claim or interest of the children of *Priscilla Crosby* in the pleadings mentioned. The facts are fully stated in the judgment.

Mr. *McKelcan*, Q. C., in support of the petition.
Mr. *Teetzel*, contra.

PROUDFOOT, V. C.—By a deed of 26th May, 1876, *William Dodd* in the contemplation of the marriage of his son, conveyed the property in question to his son to hold, to the use of the grantor till the marriage, after the marriage to the use of the son for life, then to the use of the son's wife for life, and after her death to the children of the marriage as tenants in common in equal shares, and for and in default of such issue to the use of the child or children of *Priscilla Crosby*, a daughter of the grantor in fee, subject to a provision for the maintenance

March 5th.

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and support of the grantor and his wife for their lives as therein particularly specified; to the payment of two mortgages on the lands, and the payment by the child or children of the intended marriage (should the estate vest in them by virtue thereof) of $590, to the eldest child of *Priscilla Crosby* living at the time of the premises coming into possession of the said child or children of the intended marriage.

A creditor filed a bill impeaching this deed as void against creditors, to which *William Dodd*, the father and his wife, and *William Dodd* the son and his wife, were made defendants, and a decree was made declaring the deed, so far as regards all rights, interests, provisions and estates by the said deed created, or intended so to be, other than the estate or interest thereby created in favour of *William Dodd*, the son, and his wife, or charged and incumbered by the said deed is fraudulent and void as against the plaintiff and other creditors of *Dodd* the elder.

Judgment.

This is not the decree I made, as it avoids the interest created by the deed in favour of the children of the intended marriage, which I never intended to decree. I declared the deed void "to the extent of the interest reserved for *Dodd*, Sen., and wife, and *Priscilla Crosby* and her children," but left it in full force so far as the children of the intended marriage were concerned.

The decree directed, in default of payment, a sale of all the right, title, and interest of the said *William Dodd*, the elder, and all the rights, interests, estates, and benefits, of whatsoever nature by the said deed created, or intended so to be, of, into, or out of the lands, except the estate or interest in favour of *William Dodd* the son and his wife.

This property was sold under the decree, and *William Ellis* became the purchaser, and he now presents a petition saying his solicitors are satisfied with the title, subject only to the question whether the decree was

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effectual to set aside the deed so far as respects the children of *Priscilla Crosby*, the said children not having been parties to the suit.

It is admitted that there were children of the said *Priscilla Crosby* in England seven or eight years ago, and there is no evidence of their death.

It is prayed that the Court may declare whether the objection be a valid one or not.

William Dodd, Jr. and wife, have no children.

William Dodd is trustee—he is also tenant for life—with remainder for life to his wife—with remainder to their children—remainder to the children of *Priscilla Crosby*.

The case of *Giffard* v. *Hort (a)*, to which I was referred, is clear that the bill constituted as this is, is sufficient to bind those in remainder. The more recent changes in the practice might also be called in aid, by which a trustee represents the *cestuis que trust*, notwithstanding what is said in *Read* v. *Prest (b)*. See *King* v. *Keating (c)*.

Judgment.

But the decree must be corrected, and a new sale had, in which the interests of the children of the marriage shall be protected.

(*a*) 1 S. & L. 408. (*b*) 1 K. & J. 183.
(*c*) 12 Gr. 29, 31.

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LUCAS v. THE HAMILTON REAL ESTATE ASSOCIATION.

Trust deed—Power of appointment.

T. C. K., by a deed of 7th April, 1870, conveyed lands to two trustees to and for the sole and absolute use of his wife, *C. E. K.*, for and during the term of her natural life, to and for her own separate use and benefit, or for the use of such person or persons, and for such estates and interests as she, notwithstanding her coverture, should by any deed or writing under her hand and seal, or by her last will, appoint. By a deed made two years afterwards, *T. C. K.* conveyed other lands to the same trustees, upon the same trusts as were set forth in the former deed. One of the trustees having died, and the other having removed from this Province, *C. E. K.*, professing to be acting in pursuance of the power contained in the first mentioned deed, by a deed made in 1877, appointed the plaintiffs trustees of the lands, to hold upon the trusts of the deed of 1870. By a deed poll made in July, 1878, *C. E. K.*, after reciting these several conveyances appointed the several premises upon trust to permit *C. E. K.* to use, &c., the said lands for life, or until she should require the trustees to sell, and after her death, without such requisitions to sell, to permit *T. C. K.* to use and enjoy the same premises for his life, and, on his request, to sell, &c., and upon the death of *T. C. K.* and *C. E. K.* upon trust for their children in such proportions as *C. E. K.* should appoint, &c. *T. C. K.* died

Held, that the power in the deed of 1870 to appoint new trustees was a trust, and as such incorporated by reference in the deed of 1872; and that under these conveyances the plaintiffs could, on the request of *C. E. K.*, make a good title to the lands in question in fee.

The manner in which deeds had been drawn was such as to invite inquiry as to the power of trustees to convey; and, therefore, although the Court had not any doubt of the effect and operation of the conveyances, no costs were given to either party, on an investigation of title under the Vendor and Purchaser's Act.

This was a special case submitted for the opinion of the Court, wherein *Richard Alan Lucas*, *Hamilton Young*, and *Catherine Elizabeth Kerr* were made plaintiffs, and *The Hamilton Real Estate Association* were made defendants, and which, so far as material to the present case, set forth that *Thomas Cockburn Kerr*, deceased, had been in his lifetime possessed in fee of

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five certain lots on James street in the city of Hamilton, and by deed duly executed on the 27th of April, 1872, for good consideration conveyed the same to *Edward Cartwright Thomas* and *George Lowe Reid*, as joint tenants, "To have and to hold unto the said parties of the third part (*Thomas* and *Reid*), their heirs and assigns, to and for their sole and only use for ever * * * upon the same trusts as are set forth in an indenture between the same parties, dated the 7th day of April, 1870." In this conveyance the plaintiff *Catherine* joined to bar her dower. The trusts of the last mentioned indenture, and upon which the said lands were conveyed to the trustees, were as follows: "Upon the trusts and to the uses nevertheless hereinafter declared and contained of and concerning the same, that is to say, to and for the sole and absolute use of the said party of the second part for and during the term of her natural life, to and for her own separate use and benefit, or to the use of such person or persons, and for such estates and interests as she, the said party of the second part, notwithstanding her coverture, shall by any deed or writing, under her hand and seal, or by her last will appoint—and in default of appointment, then on trust to sell and convey as to the trustees shall seem proper." That the said *E. C. Thomas* died on the 16th May, 1875, and *G. L. Reid* left Canada to reside permanently abroad, and was desirous of being relieved from the said trusteeship; and thereupon the said *C. E. Kerr* and *G. L. Reid* joined in a deed of the 18th day of June, 1877, for the purpose of vesting the said lands in the plaintiffs *Lucas* and *Young*.

Statement.

The case further stated the execution by Mrs. *Kerr* of a deed poll on the 12th of July, 1878, the effect of which is stated in the judgment.

It was further stated that the defendants had recently contracted with the plaintiffs *Lucas* and *Young* for the purchase in fee simple of the said lands and premises for the sum of $5,250.

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The questions submitted for the opinion of the Court were:—"(1) Whether the above recited instrument of the 7th April, 1870, referred to in the fourth paragraph hereof, effectually gives the plaintiff *Catherine Elizabeth Kerr* a power of appointment over the said lands and premises for any estate greater than an estate for the term of her natural life. (2) Whether, assuming that the plaintiff *Catherine Elizabeth Kerr* could validly appoint the said lands for an estate in fee simple or other estate or estates, the said deed of appointment mentioned in the seventh paragraph hereof is in conformity with the power of appointment in the original settlement of 7th April, 1870. (3) Whether the plaintiffs can, by any form of conveyance, vest or cause to be vested in the defendants an estate in fee simple in the said lands. (4) Whether the said *Catherine Elizabeth Kerr* could confer upon the said plaintiffs *Lucas* and *Young* a power of sale in fee simple, to be exercised by them during the term of her natural life, and if so, whether she has by said lastly mentioned deed of appointment sufficiently conferred such a power upon the plaintiffs *Lucas* and *Young*. (5) Whether, assuming that the said *Catherine Elizabeth Kerr* had no power to appoint the land to the trustees for the purpose of selling the same upon her direction, she has by such attempted appointment deprived herself of any further control over the property, and is simply confined to her life-estate in it, or if she can now by deed or will appoint."

Statement.

Mr. *W. Cassels*, for the plaintiffs.

Mr. *George Patterson*, for the defendants.

April 29th.

PROUDFOOT, V. C.—This is a case stated under the Vendor and Purchaser Act, and the questions are:—

1. If Mrs. *Kerr* under a deed of the 7th of April, 1870, can appoint any greater estate than for her own life?

2. If she has power to appoint a greater estate, has she validly exercised it by a deed poll of the 12th of July, 1878?

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There are several other questions stated in the case, but if these two are answered in the affirmative they are of no importance.

The deed of the 7th of April, 1870, was made between *T. C. Kerr*, of the first part, *C. E. Kerr*, his wife, of the second part, and *Thomas* and *Reid*, trustees, of the third part; and by it *T. C. Kerr* conveyed land, not that now in question, to the trustees, their heirs and assigns, as joint tenants. "To and for the sole and absolute use of the said party of the second part, for and during the term of her natural life, to and for her own separate use and benefit, or to the use of such person or persons, and for such estates and interests as the said party of the second part, notwithstanding her coverture, shall by any deed or writing under her hand and seal, or by her last will appoint;" and in the event of her death without appointment then to other uses. And this deed contained a power of appointing new trustees, in case of the trustees dying or declining to act, &c., by the party of the second part during her life.

Judgment.

By another deed of the 27th of April, 1872, the same grantor conveyed to the same trustees the land now in question, to be held by the trustees upon the same trusts as are set forth in the former indenture.

Mr. *Thomas*, one of the trustees, having died and Mr. *Reid* having left Canada and being desirous of being relieved from the trusts, Mrs. *Kerr*, purporting to be acting in pursuance of the power in the deed of 1870, by a deed of the 18th of June, 1877, appointed *Lucas* and *Young* trustees of the land in question, and *Reid* conveyed to them the premises, to hold upon the trusts of the indenture of 1870.

By deed poll of the 12th of July, 1878, Mrs. *Kerr*, after reciting these conveyances and professing to act under and by virtue, and in the exercise of the powers

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contained in the indenture of April, 1872, and of all other powers enabling her, appointed the premises in question and others to *Lucas* and *Young*, their heirs and assigns, as joint tenants to have and to hold to the use of the trustees, their heirs and assigns, as joint tenants, upon trust to permit her to use, occupy and enjoy, the said lands for her natural life, or until she should require them to sell, and upon her decease without such requisition to sell, to permit the said *T. C. Kerr* to use, &c., for his life, and on his request to sell, &c., and upon the death of *T. C. Kerr* and Mrs. *Kerr* upon trust for their children, in such proportions as Mrs. *Kerr* might appoint, and in default of appointment, for them in equal shares, &c.

T. C. Kerr died the 21st of November, 1878

The case states that the defendants have contracted with the trustees for the purchase in fee simple of the lands in question, but does not state that the trustees have agreed to sell at the request of Mrs. *Kerr*, but the case was argued upon the assumption, and it was stated to be the fact, that Mrs. *Kerr* had required the trustees to sell as provided by the power.

Judgment.

The principal difficulty suggested arises from the language of the trust in the deed of 1870, which directs the trustees to hold for the sole and absolute use of Mrs. *Kerr* during her natural life for her separate use, or to the use of such persons, and for such estates and interests as she should appoint by any deed or writing under her hand and seal, or by her last will. It is said that the life-estate only is subject to her appointment, and that the language applies to such lesser estates as she might choose to carve out of it. But it is the whole estate that is subject to her appointment, it is the whole estate that is to be held for her life, or for her appointment, or on the trusts declared in default of appointment. If it needed anything to render it more plain, this is found in the power to appoint by will, which is clearly in-

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applicable to an appointment of her life-estate, which must necessarily terminate before the will could come into operation.

It was further argued that the deed of 1872, which conveyed the property now in question to the original trustees upon the same trusts as are set forth in the deed of 1870, containing no power to appoint new trustees, and that the power in the deed of 1870 not being a trust, that Mrs. *Kerr* had no power to appoint new trustees to this land.

The power in the deed of 1870, enabled Mrs. *Kerr* to appoint new trustees in case of the death or declining to act, &c., of the old trustees; the trustees therefore held the land subject to the exercise of this power, and I am unable to distinguish it from a trust, and it would therefore seem to be incorporated by reference in the deed of 1872. It is doubtful if reliance can in such a case be placed on the statutory power, R. S. O. ch. 107, sec. 3; as it authorizes the person nominated by the deed for that purpose, or if there be no such person then for the trustee to appoint. Here no one is nominated by the deed of 1872 for that purpose, and unless the power in the deed of 1870 be incorporated by reference, the trustees or survivor would seem to have been the proper person to make the appointment. Judgment.

The deed of July, 1878, appears to have been executed for the purpose of giving a life estate to Mr. *Kerr* if he should survive his wife. But there was nothing in the nature of the trust to prevent Mrs. *Kerr* declaring such a trust, or an entirely new trust of the whole or any part of the estate. The deed appears to be properly executed to comply with the power.

I think that the trustees can, at the request of Mrs. *Kerr*, make a good title in fee to the lands in question.

There should be no costs to either party. The mode in which the deeds have been drawn rather seems to invite inquiry, although I have no doubt as to their operation and effect.

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SILVERTHORN v. HUNTER.

Liability of paid valuator for deficiency—Balance of evidence—Costs.

A paid valuator is not liable to make good any loss sustained by the person employing him, by reason of his overvaluing the property, where he has been led into making such over-estimate by the improper conduct of the agent of the employer.

On a balance of evidence, the Court refused to order a paid valuator to make good a loss sustained by a party advancing money upon his certificate of valuation, the valuator swearing that he intended to certify the value at $2,000, whereas, by the fraud of the lender's agent, he was induced to certify at $3,000, notwithstanding the alleged agent denied the charge, and the plaintiff, who advanced the money, swore that but for such certificate, he would not have done so: But the Court, in consequence of the negligent manner in which the valuator had discharged his duty, on dismissing the bill refused him his costs.

Statement.

This was a suit by *Norman Silverthorn* against *Alexander Hunter* and *Alexander Brown*, to compel the defendants to pay to the plaintiff the sum of $899, and interest from the 20th December, 1878, under the circumstances, as alleged in the bill, that plaintiff had been induced to advance to one *George Campbell*, a sum of $1500, by reason of the defendants having given a certificate that the lands offered in security were of the full value of $3000 at a forced sale by auction; whereas upon the plaintiff proceeding to a sale of the property, after default in payment, in pursuance of a decree of this Court, the same realized only the sum of $1270, and that by the Master's subsequent report, dated 20th December, 1878, a balance was still due the plaintiff of $899, for principal money, interest, and costs. The plaintiff insisted that at the time of signing such certificate or report, the defendants well knew the premises, and that they were misrepresenting the value of the same to the plaintiff.

The defendant *Hunter* answered, alleging that the certificate was not correctly set forth in the bill, and that if the same were correctly set forth it must have

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been altered after he (*Hunter*) had signed it: that he signed such certificate in good faith, and when he so signed it he believed the statements therein were true. And in the fifth paragraph of his answer, he stated, "I say that I signed the said certificate at the instance of one *Archibald McLellan*, who was, I believe, the plaintiff's agent in the said matter; and the said certificate was read over to me by the said *McLellan*, and if the said certificate has not been altered since I signed it, the said *McLellan* read the same to me inaccurately, and I ought not to be bound thereby."

On the 29th of April, 1878, the defendant, in answer to a letter from the plaintiff's solicitors reminding Mr. *Hunter* that he had estimated the property as being worth $3000 "at a forced cash sale," informing him Mr. *Nichol* had valued it at only $1400, and notifying *Hunter* that the plaintiff would hold him liable to make good the deficiency, wrote them as follows: "Regarding Mr. *Nichol*, I am in no way desirous of casting any reflections on him, but I may say his idea of the value of property is very different from mine, at the time I made my valuation I believed it correct. * * I believe now you will make your own money out of the property without any trouble."

Statement.

The certificate signed by *Hunter* was as follows: "I certify that I am well acquainted with the foregoing property, and believe that at a forced cash sale it would bring about three thousand dollars; the said lots, 21 and 22 N. D. R. Glenelg, are ample security for a loan of $1500."

The cause came on for hearing at the sittings in Toronto in the Spring of 1878, after evidence had been taken at Walkerton.

The defendant *Hunter* had been examined as a witness, and had repeated the statement that he had signed the certificate at the instance of *McLellan*, who, he said, was acting as agent for the plaintiff.

McLellan was also examined in the cause, and gave

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evidence to the effect that *Hunter* had come to *McLellan's* office, and stated that he had inspected the property and was prepared to make his report, when *McLellan*, at *Hunter's* dictation, filled up the answers to the several questions set forth in the valuation, and after *Hunter* had carefully read it all over, he signed it, and left it with *McLellan* to be used in obtaining the loan; that *Hunter* well knew who the valuation was for, and the amount of the loan applied for, and that his valuation would be relied on; that both he and *McLellan* knew that only half the actual cash value would be advanced by the plaintiff, and this was referred to and spoken of by *Hunter* in discussing the value of the property; and *Hunter* was paid by *McLellan* $4 for making the valuation.

Statement.

The plaintiff also was examined in the cause, and verified substantially the statements in the bill, and that he had made the advance to *Campbell* relying entirely on the valuation made by *Hunter*.

The bill was *pro confesso* against defendant *Brown*.

Mr. *J. Bain* and Mr. *H. Ferguson*, for the plaintiff, contended that the facts of the case established clearly the plaintiff's right to recover from both the defendants the amount of deficiency, notwithstanding the defence set up by the defendant *Hunter*.

Mr. *J. A. Boyd*, Q.C., for defendant *Hunter*, relied on the evidence of *Hunter* as shewing that he had been led inadvertently into signing the certificate of valuation by *McLellan*, who was really the agent of the plaintiff, and ought not therefore to be held bound to make good any deficiency, *Hunter* having intended to value the property at $2,000, and had been led to believe that he was certifying to that effect: *French* v. *Skead* (*a*), *Langridge* v. *Levy* (*b*), *Addison* on Torts (Am. ed.) sec. 1174, and cases there cited were referred to.

Argument.

(*a*) 24 Gr. 179 (*b*) 2 M. & W. 529.

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BLAKE, V. C.—The case made by the bill, as it originally stood, was not sustained by the evidence given, as it appeared that the defendant *Hunter* did not sign the "report and valuation," and so did not certify to the correctness of the facts set forth, but merely appended his name to a certificate of the value of the property. I allowed the bill to be amended at the hearing, and the question then raised is, whether or not *Hunter*, having signed a paper in which he states, "I certify that I am well acquainted with the foregoing property, and believe that at a forced cash sale it would bring about $3,000;" whereas he intended it to be a certificate valuing the property at $2,000 only, is liable for the amount of loss which has arisen to the plaintiff. Looking at the undisputed facts of the case, and at the impeaching of *McLellan's* evidence by the respectable witnesses who say they would not believe him on oath, I fear there can be no doubt but that *McLellan* is a dishonest and untruthful man, on whose statement no reliance can be placed, and that he has been guilty of a gross fraud in the present case. I reject his evidence on all the matters in which he and *Hunter* disagree. I believe *Hunter's* statement, and that *McLellan* imposed on him as well as on *Brown*. There is no doubt in my mind that *Hunter* did not state the property to be worth $3,000 to *McLellan*, but he stated it to be, as he thought, worth $2,000; and the question is, whether *Hunter* is liable because he, by the fraud of *McLellan*, placed his name to the certificate which contains the valuation at $3,000, in place of $2,000. I do not believe, at the time that *Hunter* signed this paper, that the certificate, afterwards signed by *Brown*, was filled up. It may have been that reference was made to the "foregoing property," so that if any question had arisen on the part of *Hunter* he could have been referred to the property, insurance, and stock, as being covered by the words, "foregoing property." It appears that *McLellan* went

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to the solicitor of the plaintiff and asked for the loan in question, to be made to one *Campbell*, whereupon the solicitor asked for the certificate of *Hunter*, as to the value of the premises offered as security, and thereupon *McLellan* procured the certificate in question. *Hunter* might have shielded himself under the statement that the certificate was a mere matter of opinion, and therefore not one which made him liable to the plaintiff, had he been prepared to speak untruly in order to escape liability; but he frankly admits I thought then, and still think, the property worth $2,000, and an ample security for a loan of $1,200; I made this statement to *McLellan*, and it is by his act that my opinion has not been correctly conveyed to the plaintiff.

Judgment.

I have gone over the cases referred to, and am unable to come to the conclusion that *Hunter* is, under these circumstances, responsible to the plaintiff. By the fraud of *McLellan*, the person who is told by the plaintiff's solicitor that he must procure the certificate of *Hunter* in order to the obtaining the loan, the plaintiff has been misled. *Hunter* was not guilty of any fraud. He had no interest in the money procured. I cannot hold that his carelessness in giving this certificate, procured on the representation made and by the person who obtained it, is a sufficient ground for making him liable for the loss that has arisen. The fraud of *McLellan* was the true cause of the difficulty, and to him the plaintiff must look for any redress to which he may be entitled. The defendant *Hunter* might well have been more careful in granting the certificate he gave, and on the ground of his negligence, in dismissing the bill against him, I do so without costs.

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COLVER V. SWAYZE.

Fraudulent conveyance—Parties—Demurrer.

A bill to set aside a fraudulent deed by a simple contract creditor, whether the debtor is living or dead, should be filed on behalf of the plaintiff and all other creditors.

Although it would seem that in this Province every bill by a creditor against the assets of a deceased debtor, whether so expressed or not, should be taken to be on behalf of all the creditors, and that it is the duty of personal representatives in every case where a deficiency of assets is apprehended to ask for a general administration, and if they do not ask for it it would be the duty of the Court to direct it; and although there may not exist any cogent reason for requiring the bill to be in that form in this country, still the practice of the Court here having been uniform in following the English rule it would now require the decision of a higher tribunal to alter it.

The same reasoning which requires that in proceeding against a living debtor a creditor without a lien must sue on behalf of all others applies with equal force where the suit is against the representatives of a deceased debtor.

Longeway v. *Mitchell*, *ante* vol. xvii, p. 190, observed upon and followed.

Demurrer for want of parties, the grounds of which are clearly stated in the judgment.

Mr. *Bethune*, Q.C., and Mr. *Hoyles*, for demurrer.

Mr. *Maclennan*, Q. C., contra.

June 14th.

PROUDFOOT, V. C.—The plaintiff is the obligee in a bond made on the 16th of March, 1851, by *William Freeman Swayze* in a penal sum of £150, conditioned to be void upon payment to the plaintiff of £75, twelve months after the death of *Mary Swayze*, the mother of *W. F. Swayze*. *Mary Swayze* died on the 30th of August, 1863. The plaintiff files her bill alleging that on the 17th of September, 1864, *W. F. Swayze*, while indebted to the plaintiff and other creditors and having no assets but the lands now in question, and intending to defeat, delay, and hinder the plaintiff and his other creditors from recovering payment, made a conveyance to his children without consideration: that

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W. F. Swayze died the 28th of December, 1876, intestate, and his widow has taken out administration, and is a defendant, and leaving the grantees his children and heirs-at-law. By several transfers the interest of the children has become vested in the administratrix, and the other defendant *Albert E. Swayze*. The children have made mortgages on the property which are not impeached. The plaintiff prays that the deeds other than the mortgages may be declared fraudulent and void as against her, and may be set aside, and that the lands may be sold subject to the mortgages, and the proceeds applied in payment of her debt.

The defendants demur for want of parties, as the bill ought to have been filed on behalf of all the creditors of *W. F. Swayze*.

It was argued for the demurrer that the plaintiff has no specific lien on the lands, and that in such case the bill must be on behalf of all the creditors.

Judgment.

The plaintiff contended that whatever may be the rule as to proceeding against a living debtor, as in *Longeway* v. *Mitchell* (*a*), and the case on which it was founded, that it does not apply where the suit is brought against the assets of a deceased debtor; and *Adames* v. *Hallett* (*b*), was referred to as precisely in point.

The general question involved is one of considerable interest in a legal point of view, and I have endeavoured to ascertain the origin of the rule as to parties suing in such cases on behalf of all the creditors; and what is the precise benefit to be derived from that frame of suit. Lord *Redesdale* (5th ed. 193), says, "As a single creditor may sue for his demand out of personal assets, it is rather matter of convenience than indulgence to permit such a suit by a few on behalf of all the creditors; and it tends to prevent several suits

(*a*) 17 Gr. 190.

(*b*) L. R. 6 Eq. 468.

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by several creditors, which might be highly inconvenient in the administration of assets, as well as burdensome on the fund to be administered; for if a bill be brought by a single creditor for his own debt, he may as at law gain a preference by the judgment in his favour over other creditors in the same degree, who may not have used equal diligence."

Justice *Story* (*a*), after quoting this passage, proceeds, "But it does not disclose the whole ground of the doctrine. It is, on the other hand, the real danger of doing injustice to parties not before the Court, where interests might be jeopardied without being represented; and the utter impracticablity of making all the interested persons actually and technically parties, from their being unknown, or being so exceedingly numerous that any obligation to join them all would amount to a positive denial of justice, which constitute the main grounds of the doctrine."

But neither of these writers shew it to be compulsory to sue in that mode, both are assigning reasons for permitting a variation from the rule that every creditor must sue for his own debt; and, while assigning valid reasons for the variation, leave the general rule unimpeached, that a creditor may sue alone for the satisfaction of his debt out of the personal assets of the deceased debtor.

Judgment.

In a bill by a single creditor the prayer is that the executor may admit assets, or set out an account, and if the executor admit a sufficiency of assets, the decree orders payment of the particular debt, without any general decree for an account. But if by the answer it should appear that the assets will be deficient, a decree is made for a general administration: *Hallett* v. *Hallett* (*b*), (cited in note to *Story's* Eq. Pl. sec. 100). As this mode of proceeding by a single creditor enabled the executor, if so disposed, to benefit him by enabling

(*a*) Eq. Pl. sec. 100. (*b*) 2 Paige R. 15, 19.

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him to obtain a priority at the expense of the others, it became the practice for those interested to get a friendly creditor as soon as danger was apprehended to file a bill on behalf of himself and the other creditors: *Whitworth's* Eq. Prec. 288, Na.; 2 *Wms.* Executors, 6th ed. 1853.

Under our Property and Trusts Act, (R. S. O., ch. 107, sec. 30,) no such priority can now be obtained, and as the executor is liable for allowing proceedings to be taken that may enable creditors to get paid at the expense of others, no such danger need be apprehended, and this removes one reason for authorizing a suit on behalf, &c., *Taylor* v. *Brodie* (*a*); but the others are of sufficient importance to justify it.

But where the endeavour was, to obtain payment out of real as well as personal assets, the case is different. Real estates descended were at common law assets in the hands of the heir for payment of specialty debts, just as land here, under the 5th Geo. II., ch. 7, is assets in proceedings against executors for payment of all debts. Lord *Redesdale* (*b*), places the right to sue on behalf, &c, as a modification of the general rule requiring all persons interested in the subject of a suit to be parties to it. Mr. *Dickens* reports the case of *Bedford* v. *Leigh* (*c*), where the plaintiff was a mortgagee of a deceased debtor, with a covenant for payment, and asked to have the premises sold, and the money applied to pay his mortgage, and if deficient to be paid out of the personal estate, and if that deficient out of real estates descended: Mr. *Dickens*, who was Registrar, hesitated about drawing a decree in that way for a single creditor, and mentioned it to Lord *Thurlow* the Chancellor, who seemed at first to wonder at his difficulty, but afterwards was satisfied that the doubt was well founded, and dismissed the bill, so

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(*a*) 21 Gr. 607.
(*b*) 192, 5th ed.
(*c*) Vol. 2, p. 707.

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far as it sought satisfaction out of the real estate descended.

The reasons for Mr. *Dickens'* doubts were, that as legal assets were subject to all specialty debts, there might be some of a superior nature to the plaintiff's; the account of debts was not general, and if it had been so, the language of the decree would have been to apply the money to make good the deficiency of personal estate to pay all the creditors, and would then have provided for subrogating simple contract creditors to the place of the specialty creditors. The reasons assigned by Lord *Thurlow*, as stated by Mr. *Dickens*, are rather obscure, viz., that if the estate should be sold, the money would be paid to the heir—meaning, I suppose, that the other creditors might perhaps lose their debts in that case—and that the estate could not be sold under an elegit, only held till payment out of profits; meaning, I suppose, that if he could have gone on at law and sold the estate, his bill would have been in proper form. In *Johnson* v. *Compton* (*a*), a decree was refused to affect real and personal estate at the instance of a single specialty creditor. In *May* v. *Selby* (*b*), the same rule was acted upon.

Judgment.

If the reasons of Mr. *Dickens*, in *Bedford* v. *Leigh*, are the only ones in support of the rule, they would not seem to apply in this Province where debts must all be paid *pari passu*, and a specialty has no preference over a simple contract, and where it therefore becomes the duty of the personal representative to see the whole estate applied in payment of all equally, and there would be no need of subrogating simple contracts to the place of specialties.

Lord *Thurlow's* reason that the bill must be in that form because the land could not be sold at law, does not hold here where lands can be sold at law, and it would rather seem therefore that the bill need not express it to be on behalf, &c.

(*a*) 4 Sim. at 47. (*b*) 1 Y. & C. C. C. 235 (1842).

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I would think, therefore, that in this Province, every creditor's bill against assets of a deceased debtor, whether so expressed or not, should be taken to be on behalf of all the creditors, and that it is the duty of personal representatives in every case where a deficiency of assets is apprehended, to ask for a general administration, and if they do not ask for it, it would be the duty of the Court to direct it.

In cases of the kind now in question, impeaching conveyances made by the deceased, the practice in England seems to require that the bill should be on behalf of all creditors. That was the case in *Skarf* v. *Soulby* (*a*), *French* v. *French* (*b*), *Richardson* v. *Smallwood* (*c*).

In *Adames* v. *Hallett* (*d*), if the bill were by a single creditor, and it would so appear from no mention of its being on behalf, &c., in the report, the objection was not taken, and it is not an objection that would prevail at the hearing, for the Court could always do as was done there, make the decree for all the creditors. So that it is no authority against this demurrer. And the same reasoning that required a suit for administration of real and personal assets to be filed on behalf of all creditors requires it in this case.

Judgment.

While, therefore, I see no very cogent reason for requiring the bill to be in that form in this country, yet as I understand the practice of the Court here has been uniform in following the English rule, it will require the decision of a higher tribunal to alter it.

I may say also that if in proceeding against a living debtor a creditor without a lien must sue on behalf, &c., I do not see any reason why it should be otherwise where the debtor is dead, and if so *Longeway* v. *Mitchell* (*a*), is an express authority against this bill.

Allow the demurrer with costs, with leave to amend within a fortnight.

(*a*) 1 M. & G. 364.
(*b*) 6 D. M. & G. 95.
(*c*) Jac. 552.
(*d*) L. R. 6 Eq. 468.
(*a*) 17 Gr. 190.

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DOUGALL v. DOUGALL.

Principal and surety—Purchase of surety's lands by principal in suit by creditor against surety's estate—Acquiescence.

A wife at her husband's request executed a mortgage of her separate lands to a creditor of her husband to secure his debt. After the wife's death, leaving several children (of whom the plaintiffs were two) the creditor commenced a suit for the sale of the wife's lands to which the husband and all the wife's children except the plaintiffs were parties, the plaintiffs having made an assignment under the Insolvent Act, and by arrangement the husband became the purchaser in his own name upon advantageous terms of credit, which enabled him to pay off the purchase money out of sales of portions of the lands. Upon a bill filed by the plaintiffs claiming that the husband was bound to pay off the debt himself, and therefore could not purchase for himself, the defendants insisted that the husband had become the nominal purchaser, but in reality for the benefit of the children, other than the plaintiffs, and in trust for them only:

Held, that the plaintiffs were entitled to the benefit of the husband's arrangement with the creditor, equally with the other children, and that under the circumstances the purchase could not be for the benefit of the latter only.

The sale by the creditor to the husband was made in June, 1867. This bill was filed in September, 1875. In the meantime sales had been made of portions of the lands, as was alleged, with the plaintiffs' knowledge, and the defendants insisted that the plaintiffs' acquiescence had debarred them from questioning the transaction. The Court being of opinion upon the evidence that the plaintiffs believed the sales were being made by or with the authority of the creditor for the purpose of paying off the mortgage, and not by their father as owner, and that the defendants could be readily reinstated in the position they occupied before the arrangement with the creditor:

Held, that in the absence of clear proof of knowledge by the plaintiffs of the arrangement with the creditor, and that it was claimed to be for the benefit of the other children only, the defence of acquiescence could not be maintained.

The bill in this cause was filed by two of the children and heirs-at-law of one *Susan Dougall*, for the purpose of compelling the defendants to account to them for two-sevenths of certain lands in the town of Windsor, and alleged that in the month of June, 1860,

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Susan Dougall was the owner of the said lands and voluntarily and without any consideration at the request of her husband executed a mortgage thereon to the Bank of Montreal to secure payment of $15,000, for which her husband was then indebted to the bank; that after the death of *Susan Dougall* the bank took proceedings in this Court for the sale of the lands, making the husband and all the children of *Susan Dougall*, except the plaintiffs, parties to the suit; that a sale of the lands was had at which the husband became the purchaser and the bank conveyed the lands to him for the sum of $7,000; that the said sale did not take place under the decree in the suit, but that the husband and children other than the plaintiffs, arranged and agreed with the bank that it would extend the time for payment of the amount found due by the report (which amounted to $12,609.94) and would allow the husband to sell off from time to time portions of the lands in order to pay and satisfy the bank; that in order to carry out the arrangement the bank should proceed to sell, and that the husband should become the purchaser of the said lands; that the sale and purchase were thus carried out and that thereafter the husband sold sufficient of the lands to pay off the bank, and that a large and valuable portion of the lands remained; that the husband had recently conveyed this residue to his co-defendants, the other children of *Susan Dougall*. And the plaintiffs charged and submitted that it was the obligation and duty of the husband to pay and discharge the said mortgage, and that by his purchase he became a trustee for the plaintiffs as well as the other children of *Susan Dougall*, and that he ought to account to them for two-sevenths of the proceeds of the lands sold, and that the other defendants ought to convey two-sevenths of the lands conveyed by the husband to them to the plaintiffs, and the bill prayed for this and other and further relief.

By their answers the defendants alleged that at the time when *Susan Dougall* executed the mortgage to the

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bank the plaintiffs and the husband were in partnership; that the $15,000 was a partnership debt; that the mortgage was given as well for the benefit of the plaintiffs as the husband, and as well at their request as at that of the husband; that the plaintiffs, although applied to to join in endeavoring to pay the bank declined to do so; that some of the children were then infants, and the husband and an elder brother wishing if possible to preserve some part of the property, endeavoured to get the plaintiffs to join in an arrangement with that view; that the plaintiffs refused to join, and that thereupon it was arranged that the lands should be bought in the name of the husband, but in reality for the children other than the plaintiffs; that about the same time as such sale was about to take place the bank was about to sell the premises in which the partnership business had been carried on; that the plaintiffs were anxious to purchase this for themselves; that the husband was opposed to their obtaining it, and that it was arranged as a family settlement that the husband would withdraw his opposition to the plaintiffs' purchase, the plaintiffs agreeing to the purchase of *Susan Dougall's* lands for the benefit of the other children; that the moneys required to make the first payment to the bank and other payments for taxes, &c., were made by the elder of the children other than the plaintiffs; that the purchase by the husband was solely for the benefit of the other children, and that he had conveyed the residue of the lands to them in pursuance of his trust; that the plaintiffs were well aware at the time of the purchase of its purpose and object; that sales of the lands were made from time to time with their knowledge; that they had by their acquiescence disentitled themselves to any relief; and that they only now sought to claim the benefit of the transaction because the residue of the lands had recently become valuable.

Statement.

The cause came on for examination of witnesses at Sandwich before *Blake*, V. C.

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Mr. *J. A. Boyd*, Q. C., and Mr. *A. Cameron*, for the plaintiffs.

Mr. *C. Moss*, for the defendants.

BLAKE, V. C.—When this case was argued I expressed my opinion as to the questions of fact discussed before me, and gave my reasons for the conclusions at which I then arrived. I desired, before finally disposing of the matters in issue, to peruse carefully the evidence and documents. Having done this, and still retaining the opinion I formed at the conclusion of the argument, it will not be necessary to do more than state shortly the reasons for the view I formed and retain. (1) It is impossible to find that the sons assumed the payment of the $15,000 when they entered into partnership with their father. It was a debt which arose out of another business in which they had no interest. This is shewn by the partnership books; the statements made at the time of the insolvency, in which this sum was shewn to be an indirect liability of the firm, a direct liability of the father and Mrs. *Dougall*; the dealings between the father and the sons which embraced payments made on the basis of a debt due from the sons to the father, as appeared by the partnership books, which would not have been the fact if this $15,000 had been charged against them; the letters of the father, which do not claim that the statement of the sons, as now made on this head is incorrect, but merely refer to this sum as an amount which, at the time he writes, he thinks, with the light thrown upon their business by the time that had meanwhile elapsed, it would have been reasonable to have charged them with. In addition to this we have the testimony of the plaintiffs, and opposed to it only the evidence of the father, which is not easily to be reconciled with the documentary evidence with which he was confronted.

Judgment.

(2) Then as to the giving of the bond. It is clear in my mind that it was not the intention of the father,

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mother, or sons, between themselves, to alter their position by the transaction which then took place. There was no assumption of the debt then by the sons or the partnership. There was no request even made that this should be done. There was no entry made in the books of the firm, but the family finding that proceedings were about to be taken against the father by the bank, they stepped forward and did all they were called upon to prevent the father being disgraced and their business ruined. It is impossible to find on the testimony connected with this matter that the position of the plaintiffs was altered as between themselves, and the father and the mother, by the giving of this bond. The debt still remained the debt, as between these parties, which the father was bound primarily to pay.

(3) The third question is, was there anything in the shape of a family arrangement whereby the plaintiffs were to take the storehouse property; and the rest of the property was to be left for the other members of the family. In this, the evidence of the parties to the suit is corroborated by the documentary evidence. The sons from the first insisted that they were entitled to the store, that it was their place of business; that they were determined to buy it; that the father in interfering with their attempts to purchase was merely injuring them, and would not benefit himself, as, at all risks, this property, which was absolutely necessary to their business, must be by them acquired. The father's testimony negatives any arrangement. He speaks of the "annoyance," the conduct of his sons caused him, and *Duncan*, the son, says he received a letter from the plaintiffs which was "not satisfactory" to him. Taking the letters and the testimony there can be no doubt that, so far from there being any such arrangement as that alleged by the defendants, the rest of the family were much annoyed at the action of the plaintiffs in insisting on buying the stores to the exclusion of the father

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and no settlement of this matter has ever up to the present time been made amongst them.

(4) Then did the proceedings in the Chancery suit bind the plaintiffs? I think not. In disposing of this point, it is not to my mind, necessary to determine whether or not for the purposes of the suit Mr. *Court*, the official assignee, represented the plaintiffs. It would have been incumbent on me to consider this question if the steps ordinarily taken in a foreclosure suit had been followed here. The rule, *pendente lite nihil innovetur*, might then have saved the proceedings from any attack. But in the present case we find that an arrangement eminently beneficial to the defendants is made between them and the Bank, the plaintiffs. The plaintiffs, in the present suit, may not have been necessary parties to the Bank suit, but they had an interest in the property, and although it may be that this would be bound by the ordinary result of a suit, they cannot be deprived of an interest in the property by a private arrangment whereby their interest is to go to other persons. This was, as *Duncan*, who proposed the arrangement says, a plan whereby *John* and *Francis* were "to be cut out," and as he says further, "it would serve them right for their obstinacy." By this arrangement the property of the father, which should have gone to redeem this very mortgage, and to discharge the instalment which the sons had paid on the $15,000, or bond debt, goes a great way to meet the purchase money of the fictitious sale made by the Bank to the father. The plaintiffs were justified in demanding that the $2,000 paid by them should be considered in the carrying out of the proposal for a settlement with the Bank. In place of doing this, or giving the plaintiffs an opportunity of joining in the redemption contemplated by the father and *Duncan*, they prepare a scheme whereby the plaintiffs are to be "cut out," and the properties held by the father to be diverted from the payment of a debt which should be borne by them.

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I cannot hold the plaintiffs bound by such a bargain, entered into for the very purpose of defrauding them of rights they possessed, and carried out without their knowledge.

(5) The only question on which I have had any doubt in my mind is, whether there has been on the part of the plaintiffs such a standing by, as that the Court would be justified in saying they must be taken to have assented to the transaction, and are bound by the Bank suit.

In the first place it is to be observed that the arrangement made between the Bank and the defendants, was not until recently made known to the plaintiffs. It can not be said that they assented to the arrangement, for it was but shortly before the bill in this cause was filed that they were made aware of it, and when they were informed of its nature they claimed a share in its benefits. There was no dealing with the premises but such as might have taken place if the mortgagor and mortgagee had desired by sales of portions of the premises to pay off the mortgage. The plaintiffs were aware that there was this mortgage which must be paid, and were not bound to trace the sales of the property to any cause other than the reasonable one that the Bank was taking this means of repaying its advances. The defendants now say the plaintiffs must have known of the transaction between them and the Bank. This is positively denied by the plaintiffs; and it is to be observed that if they did know of it, it was not on account of anything the defendants said or did as to the transaction; but, on the contrary, it must have been discovered, in opposition to all the defendants did to keep it secret. These defendants can scarcely find fault, if I now hold that the object which they sought has been accomplished, and that the plaintiffs were ignorant of the agreement and its terms.

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The annoyance of the father with the sons, and the annoyance of *Duncan*, with his brothers, prevented a

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cordial feeling existing between them, and this was given as a reason by the father for not conversing with the plaintiffs on the subject. In writing to the Bank the father says, "We will be buying in reality for the heirs, though in our own name." I think the defendants could not otherwise carry out the transaction referred to in this letter, and that the purchase so made could not have the effect of excluding one interested in it and not assenting to it. It is alleged that certain statements were made in Montreal and elsewhere by the plaintiffs, or one of them, which shewed their knowledge that the defendants were the owners of the premises. This is positively denied by the plaintiffs. The language alleged to have been used is not so plain but that it is capable of the explanation that the plaintiffs intended thereby, only to imply that they left the management of matters as to payments, &c., in the hands of those who had been theretofore looking after them. But whether or not this be so, it is clear that at this time, the plaintiffs had been led to suppose that the Bank was making a demand for settlement on very different terms from those which were actually carried out. Bearing in mind the principle expressed in *Smyth* v. *Simpson* (*a*), *Skae* v. *Chapman* (*b*), *Arkell* v. *Wilson* (*c*), I cannot find that there was any dealing other than that which would have taken place if the mortgagor and mortgagee had desired by sale of the premises to discharge the mortgage, and there is no question but that the defendants can be reinstated in the position they would have occupied but for the agreement. I must give the plaintiffs an account against the defendants, and allow them to participate to the extent of two-sevenths in the balance of the property left, after duly applying the father's estate in payment of the debt he was bound to indemnify them

Judgment.

(*a*) 7 Moo. P. C. 223. (*b*) 21 Gr. 534.
(*c*) 7 Gr. 270.

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against. I make this decree, while I may conclude, as Lord *Westbury* did in *Tennent* v. *Tennents* (*a*), "Although I could have wished that natural affection had suggested a different course of action." I did not understand that the parties differed about the form of the decree if I found in favour of the plaintiffs; if there is any dispute the matter can be spoken to when the minutes are being settled.

Further directions and costs will be reserved.

BARRETT v. MERCHANTS' BANK.

Lessor and lessee—Notice to determine lease—Joint tenants—Judicial acts—Priority of acts.

A. B. created a lease in favour of *C. W.* and *W. W.*, brothers and partners in trade, of certain premises in Toronto, in which the partnership business was carried on, reserving the right to the lessor of determining the lease by giving six months' notice, "limited to the act of *A. B.* himself or his certain attorney." A notice, for the purpose of determining, was, during the currency of the lease, served by *A. B.*, which was in ample time, but was served on *W. W.* only, who signed an admission of service for himself and *C. W.*, who was at the time absent from the Province, but the fact of such service it was shewn had been communicated to him by his brother, whether within the six months or not did not appear. *Held*, sufficient within the terms of the lease: and, *Semble*, that service upon one of two joint tenants would be sufficient.

On the same day, but subsequent to the service of such notice, a writ of attachment in insolvency issued against a trading firm, of which *A. B.* was a member. *Held*, notwithstanding the rule that a judicial act relates back to the earliest moment of the day on which it is done, that the notice so given by *A. B.* was effectual.

This suit was instituted by *Robert George Barrett*, against *The Merchants' Bank of Canada*, *Charles Walker* and *William Walker*, seeking the specific performance of an agreement to purchase certain premises

(*a*) L. R. 2 Sc. Ap. 6.

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in the city of Toronto, freed from a lease thereof created in favour of the defendants *Walker*, and in the event of it being found that such lease had not been determined then that the agreement for purchase might be rescinded and the deposit paid by plaintiff returned to him, or performance decreed with compensation for loss.

Statement.

It appeared that one *Amos Bostwick* having been seized in fee of the premises in question, leased the same on the 1st day of May, 1868, to the *Walkers*, who were carrying on business in co-partnership for a term of twenty-one years, subject to a proviso contained in such lease, for terminating the same at the end of ten years, at a rental of £240 per annum: the buildings and improvements erected and being on the premises at the end, or sooner termination of the lease to be paid for on a valuation to be ascertained by arbitration, which "proviso for terminating said lease at the expiration of ten years from its commencement, is limited to the act of *Amos Bostwick* himself, or his certain attorney." After executing this lease, *Bostwick* on the 14th of May, 1873, created a mortgage in favour of *The Merchants' Bank*, for securing certain promissory notes and liabilities of his to the bank, whereby it was agreed that if default were made by him in paying such indebtedness, the bank should be at liberty after giving one month's notice in writing to proceed to a sale of the property by public auction or private contract; and that default having been made in such payment by *Bostwick*, the bank did on the 5th day of January, 1878, offer the said lands for sale by auction, and at such sale the plaintiff became the purchaser at the sum of $24,000. It further appeared that the advertisement of sale stated that the premises were to be sold, subject to a notice to determine the lease on the first day of May, 1878, with the privilege of acquiring the buildings erected on the premises; and before the plaintiff bid therefor, it was publicly stated

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and represented by the solicitor of the bank, that a proper notice to determine the lease on the first day of May, 1878, had been duly served on the defendants *Walker*. The plaintiff alleged that a principal inducement to him to purchase the property, was the belief that the lease would cease on the day named, and that thereafter a much larger ground rent could be obtained for the premises and he would not have offered so large a sum for them but for his reliance on the representations and statements of the solicitor as to the lease having been determined by notice; that after the sale the plaintiff for the first time learned that the defendants *Walker* contended that no proper legal or binding notice to determine the lease had been given, and that they were entitled, and intended to continue on under the lease for a further period of eleven years, and that plaintiff thereupon applied to the bank to satisfy him that he would be entitled to the possession of the said premises, and to turn out the defendants *Walker*, on the 1st day of May, 1878, but that the bank had been unable to satisfy the plaintiff in respect thereof. Statement.

The bill further stated the issue on the 29th day of January, 1877, of a writ of attachment under the Insolvent Act of 1875, whereby the official assignees, Messrs. *Kerr & Anderson*, were commanded to attach the estate and effects of *Amos Bostwick*, and of one *John Henderson*, and of one *Thomas B. Henderson*, trading under the style and firm of *Henderson, Bostwick & Co.*, a copy of which writ was served on *Amos Bostwick* in the afternoon of the said 29th of January, on which day, but at an earlier hour of the day, the notice of determining the said lease had been served, which notice the bank contended was sufficient and binding on the lessees, and that the plaintiff was bound to complete his purchase: whereas the defendants *Walker* contended that such notice, by reason of the writ of attachment having been issued and served in the manner stated, rendered the lessor, *Amos Bostwick*,

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unable to give a legal notice, and that they were entitled to continue in possession under said lease for the residue of the term thereby created.

Under these circumstances the plaintiff submitted that he was entitled to the said premises freed of such lease from the 1st day of May, 1878, or if it should appear that the lease had not been properly determined, then that he was entitled to a rescission of the sale, or to a specific performance of the contract, with compensation for loss sustained by reason of the continuance of said lease for the further period of eleven years.

The bill further stated that the defendants *Walker* had, for the purpose of having all the questions finally determined, agreed to become parties to the suit, and to submit to the judgment of this Court, and to give up possession if the Court should be of opinion that the lease had been determined.

The other facts material to the matters in issue are stated in the judgment.

Mr. *Moss*, for the plaintiff.

Mr. *Attorney-General Mowat* and Mr. *Rae*, for the defendants *The Merchants' Bank*.

Mr. *W. N. Miller*, for the defendants *Walker*.

April 9th.

Judgment.

SPRAGGE, C.—It will be convenient to consider first whether the notice given by *Bostwick* to his lessees, *Charles* and *William Walker*, was sufficient for the determination of the lease. There is no question as to its being given in due time; but there are two questions raised upon it, one whether the *service* of notice was sufficient, the other whether it was given by the proper person.

First, as to the service. In the lease the lessees are described as partners in trade, and the evidence shews

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that the lease was to them as partners, and the rent paid out of partnership funds. The premises are in the city of Toronto. At the time of the service one of the lessees was in Toronto, the other was absent in Montreal, on the business of the partnership. The service was admitted in writing by *William*, the lessee in town, at the foot of the notice, for himself and *Charles Walker*, the other lessee. It appears further that the fact of this giving of notice was communicated by *William* to *Charles*. It was necessary that the notice should be given, not later than the 1st of May, 1877; it was served on *William* on the 29th of January of that year, *Charles* returned to Toronto in April and *William* says he informed him of the notice, but cannot say whether he did so during the month of April; *Charles* is not called to say whether he was so informed during the month of April; and no reason why he is not is given.

Judgment

I think the proper inference is that the notice was communicated to *Charles* in April. I refer to Doe *Batten* v. *Murless* (*a*), and to *Tanham* v. *Nicholson* (*b*); particularly to the observations of Lord *Westbury*, at p. 565 and 575. But I apprehend that service upon one of two joint tenants is sufficient. In Doe *Bradford* v. *Watkins* (*c*), service on one upon the premises, the other living at Liverpool, and not being served was held sufficient. It was at first objected to, but upon the strength of *Jones ex dem Griffith* v. *Marsh* (*d*), the objection was withdrawn, and in Doe *Macartney* v. *Crick* (*e*), it was held by Lord *Ellenborough* that notice to one of two joint tenants is sufficient.

After the making of the lease to the *Walkers*, *Bostwick* made a mortgage of the demised premises to *The Merchants' Bank*; and it is contended that the notice

(*a*) 6 M. & S. 110.
(*b*) L. R. 5 E. & I. App. 561.
(*c*) 7 East. 551.
(*d*) 4 T. R. 464.
(*e*) 5 Esp. 196.

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could only be given by the mortgagees, but there are two answers to this; one, that the mortgage contains a proviso that the mortgagor may enjoy until default, which operates as a re-demise, and it does not appear that the mortgagees had interfered with the possession of the mortgagor by his tenants by requiring the tenants to attorn, or otherwise; the other is, that the provision in the lease for terminating it by notice at the option of the lessor, contains a provision that it should be "limited to the act of *Amos Bostwick* himself or his certain attorney." This is a stipulation that any notice to determine the lease should come from *Bostwick* himself, or his attorney; and it does not now lie in the mouth of the lessees, while *Bostwick* still retained such an interest in the demised premises as to have an interest in the continued duration or termination of the term, to say that the notice ought to come from some other party. It cannot be contended that it was the meaning and intention of this provision that he should lose his right under it upon making a mortgage, but rather, if anything is to be presumed from its terms, that he was still to be the person to exercise the right. It may also have been intended that in case the lessor should sell, the right should not pass to the alienee.

Judgment.

What has appeared to be the most formidable objection to this notice is, that on the day on which the notice was given, proceedings in insolvency were taken against the firm of which *Bostwick* was a member. My conclusion from the evidence is, that the notice was served earlier in the day than was the issue of the writ of attachment: but in *Converse* v. *Michie* (*a*), it was decided by the Court of Common Pleas that the issuing of a writ of attachment is a judicial act, and being so, that it has relation back to the earliest moment of the day on which it is issued.

In that case a writ of *fi. fa.* against goods was placed

(*a*) 16 U. C. C. P. 167.

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in the hands of the sheriff about half-past ten a.m. and a levy was made about eleven of the same forenoon: and later in the same day an attachment in insolvency was issued, and it was held that the latter having relation to the earliest period of the day, prevailed over the writ of execution.

A leading case referred to in the case in the Common Pleas was *Regina v. Edwards* (*a*). The question was one of priority between an official assignee and the Crown, the official assignee being appointed at an earlier period of the same day on which an extent was issued: and it was held, *Martin*, B., dissenting, that a fraction of a day could not be considered so as to deprive the Crown of its priority.

In *Wright* v. *Mills* (*b*), *Bramwell*, B., referring to *Edwards* v. *Regina*, said, "That case can only be supported on the prineiple that judicial acts shall have precedence of others. To give a priority to such acts you must suppose them to have been before the others. It is not that you do not inquire into fractions of a day, but that you give precedence to the judicial proceeding."

Judgment.

These questions have generally arisen where the contest has been between the priority of two legal proceedings; but the rule has also been applied, where it has been necessary to sustain a legal proceeding which otherwise would have been void. So where a writ of *fi. fa.* was issued on the same day, but later in the day, than the death of the defendant, the better opinion appears now to be, though decided otherwise in *Chick* v. *Smith* (*c*), by Mr. Justice *Patteson*, that the issue of the *fi. fa.* would be good.

Chief Baron *Pollock*, in *Wright* v. *Mills*, referring to that decision, spoke of it as more in accordance with the rules of common sense than the rule that judgments are supposed to be signed at the earliest

(*a*) 9 Ex. 32, 628. (*b*) 4 H. & N. 488.
(*c*) 8 Dowl. 337

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hour of the day on which they are signed, adding, "but although it is exceedingly desirable that all the decisions of the Courts should as far as possible be in accordance with the decisions of common sense, it is impossible to over-rule the established practice, which is indeed the law of the land and the right of the suitors."

From this and from observations of other learned Judges, I take the judicial feeling to be, that this fiction that the judicial proceedings are, where it is necessary to sustain them or to preserve their priority, to have relation to the earliest hour of the day, is a fiction not to be extended or applied where it is not necessary for these purposes.

I may quote here a terse observation of Lord *Mansfield*, in Lord *Porchester* v. *Petrie* (*a*): "A fiction shall not be contradicted in order to defeat the ends of that fiction; but it may be contradicted, if its objects are not thereby destroyed." The same learned Judge observed to the same effect in *Mostyn* v. *Fabrigas* (*b*: "It is a fiction of form; every country has its forms, which are invented for the furtherance of justice; and it is a certain rule, that a fiction of law shall never be

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contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted. Now the fiction invented in these cases is barely for the mode of trial; to every other purpose, therefore, it shall be contradicted, but not for the purpose of saying the cause shall not be tried."

The same very eminent Judge, in *Combe* v. *Pigot* (*c*), said at p. 1434: "But though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish: and I do not see why the very hour may not be so too, when it is necessary and can be done; for it is not like a mathematical point which cannot be divided.

(*a*) 3 Doug. 261. (*b*) 1 Cowper 177. (*c*) 3 Burr. 1423.

I find language to much the same effect in several judgments of Lord *Mansfield*, and I find his language quoted as a sound enunciation of the law by different Judges in other cases.

I will now refer to one or two cases in which, in furtherance of justice, the actual fact has been shewn by evidence in contradiction of the legal fiction in relation to judicial proceedings. One of these cases is *Lyttleton* v. *Cross* (*a*). By legal fiction, all judgments at law were, at the date of that decision, taken to be recovered in term, and to relate to the first day of the term. The defendants, who were executors, pleaded a judgment recovered since the last "continuance," and the question was whether the Court could give effect to it as a judgment recovered on the day that it was actually recovered; or was bound to give effect to the legal fiction that it was recovered in the preceding term. The plea was held good. Lord *Tenterden*, in giving judgment, said broadly: "It is a general rule that where it is for the interest of the party pleading to shew that a proceeding did not take place at the precise time when by fiction of law it is supposed to have happened, it is competent for him to do so." And to much the same effect was the language of Mr. Justice *Bayley*: "Whenever, therefore, a fiction of law works injustice, and the facts which by fiction are supposed to exist are inconsistent with the real facts, a Court of law ought to look to the real facts."

Judgment.

The language of the other learned Judges who delivered judgment in the case was to much the same effect.

In *Whitaker* v. *Wisbey* (*b*), a man had been tried and convicted of felony, by which conviction his goods were forfeited to the Crown. The commission day of the assizes was the 19th March. On the 20th he made a *bonâ fide* conveyance of his goods to a stranger, and

(*a*) 3 B. & C. 317. (*b*) 12 C. B. 44.

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he was tried and convicted on the 22nd. By the record of the conviction it appeared that all that was done at the Assizes was done on the first day. This was the fiction of law; and the question was, whether the actual day of the trial and conviction could be shewn by parol evidence in the civil action, and it was held that it could, Mr. Justice *Maule* observing: "There is no more inconsistency in that, than there would be in shewing that the conviction took place at a particular hour on the 19th; and I apprehend nobody would deny that that might be shewn, if necessary. That is the real principle upon which I think we are bound to decide this case: and it is quite reconcilable with the doctrine as to fictions of law, which are never allowed to prevail against justice." And Mr. Justice *Williams*, in giving judgment, observed: "I agree with my brother *Maule* in thinking that though for some purposes the whole Assizes and the whole term are to be considered as one legal day, the Court is bound, if required for the purpose of doing substantial justice, to take notice that such legal day consists of several natural days, or even of a fraction of a day."

Judgment.

These two cases are illustrations of the maxim, "*In fictione juris semper Æquitas existet.*" I have selected these out of a number, because in their circumstances they resemble, perhaps more than any others, the case before me; and also for the sake of the clear enunciation by learned Judges of the principle which is in my opinion applicable to the case before me. I will close with one more quotation from Lord *Mansfield*, made in a case which, like those I have referred to, was an instance of the application of the same rule: "But fictions of law hold only in respect of the ends and purposes for which they were invented; when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may shew the truth." In the case before me, the shewing

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of the actual facts did not, of course, interfere in the least with the writ of attachment.

If in this case I should hold those interested in shewing the true actual time of the notice to the *Walkers* not entitled to do so, and should allow the legal fiction of the issue of the attachment being taken to have been at the earliest hour of the day, to prevail against evidence of the true time of its issue, I should run counter to authority and most certainly to reason. Taking this view of the case, it becomes unnecessary for me to consider the other points presented to me.

The decree will be with costs to be paid by the defendants the *Walkers*, to the plaintiff, and to *The Merchants' Bank*.

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Re Bank of Montreal and Imperial Statutes.

Will, construction of—Vesting.

A testator bequeathed £2,000 of bank stock, which stood in the name of trustees, to his daughter *Jane*, the interest of which was "to be allowed to remain, and no part thereof to be raised or drawn out of the bank until she comes of age, and that the amount of interest so accumulated should, from and after the aforesaid time, when she comes to age, be added to, and form part of the aforesaid principal, and thenceforth be and remain an additional amount of bank stock, and that from and after the period when she shall come to age, as aforesaid, she may draw the amount of interest yearly, and every year, so arising from the before-mentioned sums during her own natural life, and that no part of the principal be raised by her at any time; but if she marry and have children to the number of four or less, that the said sum or principal shall be equally divided amongst them, and be at their disposal, and under their own control and management at any time they come to age, after her death, but not sooner. But if she have no children, then after her decease the aforesaid principal be at the disposal of my son *Robert*, provided he be twenty-five years of age, or upwards, or to his heirs after him in case of his death; but if she shall have more children than four, then and in such case, she shall be at liberty to will the aforesaid principal after her death to her children respectively in way and manner she may think proper." *Jane* married and had three children, all of whom died in infancy during the life of their mother.

Held, that no interest had ever vested in the children, and that on the death of their mother, the testator's son *Robert* became absolutely entitled to the fund.

Statement. This was a petition in the matter of the Imperial Statute 22 and 23 Vic. ch. 63, filed by *Robert Archibald Morrow*, setting forth that in an action pending in the Superior Court of the province of Quebec between the Bank of Montreal petitioners therein, and the said *Robert A. Morrow* petitioner and claimant, and one *Donald Mitchell McDonald* also a petitioner and claimant, it was the opinion of that Court that it was necessary for the proper disposal of the action to ascertain the law applicable to the facts administered by this Court, on points on which the law of the one

province differed from the other; and the said Court directed a proper case to be submitted which stated that on the 25th day of July, 1877, the Bank of Montreal petitioned the said Superior Court, setting forth in substance as follows: 1879.

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"That there are now standing in the books of the bank in the names of *James Morrow*, of Bally James Duff, Ireland, and *Walter Sheriden*, of the town of Peterborough, in the province of Ontario, trustees of the late *Oughtry Morrow*, 106 shares of the capital of the said bank. That the said shares are held in trust for the late *Jane Morrow*, now deceased, under the will of the said late *Oughtry Morrow*; that *Jane Morrow* is now deceased, and that on the 6th day of March, 1877, *Robert Archibald Morrow* made and lodged with the bank a declaration of transmission whereby he claimed that the said 106 shares should be entered in his name as the proprietor thereof, under the provisions of the will of the said *Oughtry Morrow*. That one *Donald Mitchell McDonald* has also claimed to be the proprietor of the said 106 shares of stock. That the bank entertains a reasonable doubt as to which of the said claimants is entitled to the said shares and the dividends thereon: and the said bank thereupon prayed for an order from the Superior Court adjudicating the said shares to the parties legally entitled to the same, by which the bank shall be guided, held harmless and indemnified, and the allegations made by the bank are not disputed. This petition was notified and advertised in due form of law and no claimants appeared other than *Robert A. Morrow* and *D. Mitchell McDonald* above mentioned. There is no dispute as to the facts of the pretensions of the respective claimants being as follows: Under the will of the said late *Oughtry Morrow* the said 106 shares of stock are now held by the said trustees *James Morrow* and *Walter Sheriden* for the late *Jane Morrow*, now deceased, who died at the City of Toronto on the 8th of December, 1876, intestate, and without living issue, and without leaving as the said *Robert A. Morrow* pretends any legal heirs other than himself, her brother. By the last will of the said *Oughtry Morrow* (copy of which is annexed to form part of the present case) executed the 22nd day of April, 1848, and proved, it

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was provided by the testator as follows: [The second clause of the will as appears in the judgment and head note was here set forth and the case proceeded]. The said *Oughtry Morrow* did, by his said will, bequeath to the said *Robert A. Morrow* his entire estate, subject to the above reservation. The said *Jane Morrow* married in Ontario the said *D. Mitchell McDonald* * * and had lawful issue (three in number) all of whom died in infancy before their mother * * ; *Jane Morrow* died at Toronto on the 8th of December, 1876, intestate. Her husband the said *D. Mitchell McDonald* survives her. The petitioner *Robert A. Morrow* has attained the age of twenty-five years. The amount of 106 shares of stock of the Bank of Montreal now in question represents the £2000 originally bequeathed by *Oughtry Morrow* and the accumulations thereon by way of interest and allotments of new stock, and is the amount to be taken under the clause of the will above cited. The last will and testament of the said *Oughtry Morrow* was made and proved in the province of Ontario and the said *Oughtry Morrow* resided and died therein; the said *Jane Morrow* was born and was married to said petitioner *D. Mitchell McDonald* and died in said province, and the said children issue of the said marriage were born and died there, and the said petitioner *D. Mitchell McDonald* and the said petitioner *Robert A. Morrow* both reside in said province, and are subject to the laws of said province, and the descent of said stock is governed by the laws of the said province of Ontario. The pretensions of the said *D. Mitchell McDonald* are as follows: That by the laws of the province of Ontario a will drawn and made in manner and form and containing similar provisions to the will of the said late *Oughtry Morrow* in question in this cause, and more particularly containing provisions similar to those contained in the clause of the said will above recited means and conveys that the said stock should be vested in the children born of said marriage between the petitioner *Donald Mitchell McDonald* and the said *Jane Morrow* as their property, subject to the life interest of their mother the said *Jane Morrow* therein, and that upon the death of said children intestate and unmarried the said stock should devolve to their father as his property subject to the said life interest of the said *Jane Morrow*

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therein; that under and by virtue of the terms and provisions of the said last will and testament of the late *Oughtry Morrow*, and according to the laws of the said province of Ontario the said 106 shares of stock became and were vested in the said children issue of the marriage of the said late *Jane Morrow*, and upon the death of all of said children of said marriage the said stock became vested in and the property of the said present petitioner *D. Mitchell McDonald*, subject to the life interest of the said *Jane Morrow* therein, and upon the death of the latter the said stock became and is now the absolute property of the said petitioner *D. Mitchell McDonald*, and he is entitled to have the same placed in his name in the books of said Bank of Montreal, and to be paid the dividends accrued and to accrue thereon. The claimant *Robert A. Morrow* on the contrary maintains that in consequence of the decease of all the children of the said *Jane Morrow* prior to their attaining the age of majority and in the life time of the said late *Jane Morrow* they acquired no vested interest in the fund which could be inherited by their father the claimant *D. Mitchell McDonald*, and the said *D. Mitchell McDonald* has no legal claim thereto, and that the said *Robert A. Morrow* is entitled to take the fund under the terms of the will. The parties all admit that this question must be decided according to the laws of the province of Ontario. The opinion of the Court of Chancery is requested as to the rights of the parties respectively."

Statement.

The petition came on originally to be heard before *Blake*, V. C., who directed the same to stand over to be spoken to before the full Court in re-hearing term, and the same came on accordingly on the 9th day of December, 1878.

Mr. *Hector Cameron*, Q.C., and Mr. *J. A. Boyd*, Q.C., for the petitioner, *Robert A. Morrow*.

Mr. *Attorney-General Mowat* and Mr. *T. H. Spencer* for *D. Mitchell McDonald*, contra.

The points in issue are sufficiently stated in the case. In addition to the cases mentioned in the judgment,

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Saunders v. *Vautier* (*a*), *Vawdry* v. *Geddes* (*b*), *Branstrom* v. *Wilkinson* (*c*), *Greet* v. *Greet* (*d*), *Jeffreys* v. *Conner* (*e*), *Wall* v. *Tomlinson* (*f*), *Weakley* v. *Rugg* (*g*), *Stone* v. *Maule* (*h*), *Knight* v. *Knight* (*i*), *Bland* v. *Williams* (*j*), *Hanson* v. *Graham* (*k*), *Wilson* v. *Beatty* (*l*), *McLachlan* v. *Taitt* (*m*), *Woodcock* v. *Dorset* (*n*), *Davies* v. *Fisher* (*o*), *Lister* v. *Bradley* (*p*), *Leeming* v. *Sherratt* (*q*), *Monkhouse* v. *Holme* (*r*), *Jopp* v. *Wood* (*s*), *Chaffers* v. *Abell* (*t*), *Ingram* v. *Suckling* (*u*), *King* v. *Isaacson* (*v*), *Bigelow* v. *Bigelow* (*w*), were, with other cases, referred to and commented on by counsel.

The judgment of the Court was delivered by

Judgment.

BLAKE, V. C.—The second clause of the will, under which the question presented to us arises, reads as follows:—"I will and bequeath to my daughter *Jane*, the sum of £2000, now deposited in bank stock in the Bank of Montreal, and that the interest be allowed to remain, and no part thereof to be raised or drawn out of the bank until she comes to age, and that the amount of interest so accumulated should, from and after the aforesaid time, when she comes to age, be added to, and form part of the aforesaid principal, and shall thenceforth be and remain an additional amount of bank stock, and that from and after the period when she shall come to age, as aforesaid, she may draw the

(*a*) Cr. & Ph. 240.
(*b*) 1 Russ & M. 203.
(*c*) 7 Ves. 421.
(*d*) 5 Beav. 123.
(*e*) 28 Beav. 328.
(*f*) 16 Ves. 413.
(*g*) 7 T. R. 322.
(*h*) 2 Sim. 490.
(*i*) 2 S. & S. 490.
(*j*) 3 M. & K. 411.
(*k*) 6 Ves. at p. 247.
(*l*) 2 App. R. 417.
(*m*) 28 Beav. 407.
(*n*) 3 Br. C. C. 569.
(*o*) 5 Beav. 201.
(*p*) 1 Ha. 10.
(*q*) 2 Ha. 14.
(*r*) 1 Br. C. C. 298.
(*s*) 28 Beav. at p. 58.
(*t*) 3 Jur. 577.
(*u*) 7 W. R. 386.
(*v*) 1 S. & G. 371.
(*w*) 19 Gr. 549.

1859.

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amount of interest yearly and every year, so arising from the before-mentioned sums during her own natural life, and that no part of the principal be raised by her at any time; but if she marry and have children to the number of four or less, that the said sum or principal shall be equally divided amongst them, and be at their disposal, and under their own control and management, at any time they come to age, after her death, but not sooner. But if she have no children then after her decease, the aforesaid principal be at the disposal of my son *Robert*, provided he be twenty-five years of age, or upwards, or to his heirs after him in case of his death; but if she shall have more children than four, then and in such case, she shall be at liberty to will the aforesaid principal after her death to her children respectively in way and manner she may think proper."

We do not think there can be any doubt what the intention of the testator thus expressed really was. He desired to set apart a sum of £2,000 in Bank of Montreal stock, the interest of which was to be allowed to accumulate until his daughter *Jane* attained twenty-one, when the accumulation was to be added to the original bequest, and thenceforth during her life she was to be allowed to draw the interest on this whole sum; that upon her death the corpus was to be divided amongst her children, either equally or as she might direct by will, according to whether there be four children, or less or more, whenever they come of age; but if at her death there was no child to accept this benefit, then the property went to the son *Robert*, "or his heirs after him." There can be no question on the construction of the will of the limited interest that the daughter *Jane* takes. The clause which begins with "I will and bequeath unto my daughter *Jane* the sum of £2,000," postpones her enjoyment until she arrives at the age of twenty-one, precludes her dealing with the principal money, and gives her but the right to say, under certain circumstances, in what way her children shall

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take after her death. The sentence in the will, which first points to an interest to be taken by the children of *Jane*, defines the interest given; and the direction to benefit the children declares when the benefit is to be received. There is not a gift of the property, the enjoyment of which is subsequently postponed; but the gift and condition of enjoyment are blended in the one sentence. The subsequent clause agrees with this construction, "But if she shall have more children than four, then, and in such case, she shall be at liberty to will the aforesaid principal after her death to her children respectively in way and manner as she may think fit and proper." This points to the children that are to receive as being alive at the period of the death of the mother. The bequest, under which *Robert* claims, does not aid the contest of the respondent, "But if she have no children," refers to the class spoken of before in the will, and simply provides, that if there be not, at the mother's death, those intended to be benefited by the will, then *Robert* or his heirs take the property. In *Bell* v. *Phyn* (*a*), Sir *William Grant* says: "Supposing that done, the question is, what the testator meant by dying without leaving children. These words admit of different constructions, which are stated in *Pinbury* v. *Elkin* (*b*). The first is out of the question here, the word being 'children' The third sense, a person dying without leaving issue at the time of his death, undoubtedly is the only construction, that can be put upon these words, whenever the interest is limited to the parent, and the capital to the children, but given over in case the parent dies without children. Then it must mean, if there are none at the death of the parent; for then the provision is intended to be made." In *Williams* v. *Clark* (*c*), Sir *Knight Bruce* says, "Where there is no gift except in the direction to pay at twenty-one, the bequest has been held to be contingent." Mr. *Theobald*

Judgment.

(*a*) 7 Ves. 459. (*b*) 1 P. Wm. 563. (*c*) 4 DeG. & Sm. 473.

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says, p. 274, "The difficulty in these cases is, to decide whether there is a substantive gift and a direction to pay, or whether the only gift is in the direction to pay." The language of Vice-Chancellor *Kindersley*, in *Shum* v. *Hobbs* (*a*), favours strongly the construction contended for by the petitioner: "In the case before me, the clause which contains the gift, is not a complete sentence, the trust is, to pay in manner hereinafter mentioned, and until you have looked to see what is the manner hereinafter mentioned, there is no complete gift. Now, when you look to the subsequent branch of the sentence, to see what is meant by 'in manner hereinafter mentioned,' you find this,—that the shares are to be payable at twenty-one, or marriage. Suppose the language had been this,—'Unto and amongst the children, in manner hereinafter mentioned, that is to say, to the sons at twenty-one, and to the daughters on marriage.' There can be no doubt that would not be a substantive gift and a separate direction to pay, but one direction, to pay at twenty-one, or marriage, and I think it is impossible to say that because the two branches of the sentence do not come immediately together, but the latter is postponed, that can make any difference. It appears to me that I must read the clause as if there were only one general direction to pay the trust fund unto and amongst the children, in manner following, that is to say, 'at twenty-one or marriage.'" We are of opinion that, on the true construction of the will in question, under the circumstances set forth in the case submitted, *Robert A. Morrow* is entitled to the fund, the subject of this controversy.

Judgment.

(*a*) 3 Drew. 99.

1879.

DUFFY v. SMITH.

Proof of execution of conveyance.

Where the signature to a deed under which the plaintiff claimed was spelled in a manner different from that in which it was shewn the alleged grantor had spelled his name, and other circumstances of suspicion were shewn, and his sister gave evidence proving the signature to be a forgery; the only evidence in support of the genuineness of the signature being that of the solicitor who prepared the instruments, who had no recollection of the circumstances, but swore he must have been satisfied, at the time, with the identity of the grantor or he would not have allowed the deed to be executed; the Court *held*, that the execution of the conveyance had not been proved.

Hearing of cause. The only question reserved was as to the genuineness of the conveyance under which the plaintiff claimed title.

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

Mr. *George Evans*, for defendant.

Judgment.

BLAKE, V. C.—The plaintiff claims under a conveyance from *John Alexander McBean* to *John McBean*. The defendant does not admit the execution of this instrument. The document is produced, and to it there appears attached the name "*John A. McBain*." The paper where this name is placed is cut in several places, and presents a mutilated and suspicious appearance. The name is written "*McBain*," whereas *McBean*, the heir-at-law, spelled the name as did the other members of the family "*McBean*." A letter written by him in 1846 is produced, the signature to which is very unlike that appended to the alleged deed. The name is misspelled, and as it appears on the deed it has a suspicious look. It does not resemble the hand-writing to the letter produced, and the sister swears that the signature is not that of her brother.

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Duffy v. Smith.

The only evidence to support the due execution of the conveyance is that of the solicitor, whose name appears as witness, Mr. *James D. Pringle.* He says he has not the slightest recollection of the instructions given, or of the circumstances connected with the signing of the deed. He, at the same time, states that he must have been at the time satisfied with the identity of the grantor, or he would not have allowed the deed to be executed. I do not think I can hold on this evidence, that the execution of this conveyance has been proved.

If there were no circumstances of suspicion from the appearance of the deed when produced: if the handwriting had resembled that of the letter, and if the name had not been misspelled, I should have felt disinclined to lay much stress upon the testimony of the sister, and should have found the instrument produced to be the deed of the heir-at-law; but giving to these circumstances the weight which I think should be allowed to them, I must conclude that the execution of this deed, on which the plaintiff's case depends, has not been proved, and therefore that the bill must be dismissed, with costs.

Judgment.

1879.

SCOTTISH AMERICAN INVESTMENT COMPANY v. HOPE.

Paid valuator, liability of.

A paid valuator estimated the value of certain property at $4,980, stating in the certificate of value that he held himself "responsible to you for the correctness of this report and valuation," which was enclosed in a letter stating "the houses are unfinished, and my valuation of $4,980 is on the supposition that they will be finished in a manner similar to those adjoining. A final inspection should, I think, be made." The houses never were finished similarly to these adjoining, nor was the defendant ever called upon to make any final or other inspection, and at a subsequent sale the property, which had been taken possession of by the mortgagees and allowed to become greatly out of repair, realized only $1,800.

Held, that under these circumstances, there being no *mala fides* imputable to the appraiser, that he was not answerable for the loss sustained by the lender.

Statement. This was a suit instituted by *The Scottish American Investment Company* against the defendants *Hope* and *Temple*, who carried on business in Toronto as real estate agents and valuators, to compel them to make good a loss sustained by the plaintiffs on a loan effected by them upon the security of certain real estate owned by one *Cooper* in Toronto, and which the defendants as such valuators, upon payment of their usual fee, had appraised at the sum of $4,980, but for which, upon a subsequent sale, $1,800 only could be realized. The houses on the property were unfinished at the time of the estimate being made, and the certificate of value stated that fact, and that the valuation was made on the supposition that they would be finished in a manner similar to certain adjoining houses, and suggested that a final inspection should be made. The building of the houses was proceeded with, and money in all to the amount of $2,500 was advanced by the plaintiffs to the owner, but the buildings never were finished in the manner suggested in the certificate, nor was either of the defendants ever called upon to make any further inspection or

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estimate. The owner, *Cooper*, having made default in payment of his instalments the plaintiffs took possession, and from time to time rented the premises as occasion offered; but no attempt was ever made to finish the buildings in a style similar to the adjoining houses; nor was it shewn that any expenditure had been made to put the premises in repair. On the contrary it was alleged, and there was some evidence to bear out the statement, that the houses had been let to very rough and disorderly characters, by reason of which they had, at the time they were offered for sale, fallen into thorough disrepair. There was not the slightest attempt to impute to the defendants any bad faith in the transaction.

Under these circumstances the defendants resisted the claim of the plaintiffs, insisted that the plaintiffs had advanced money without any reference to them, and that at the time the certificate was given had the houses been finished in the manner stated and had then been offered for sale, they would have realized the amount estimated by the defendants; or if not, a sum greatly in advance of the amount lent by the plaintiffs.

Mr. *Cassels* for the plaintiffs.

Mr. *D. McCarthy*, Q. C. for the defendants.

The additional facts appear from the judgment.

Judgment.

BLAKE, V. C.—On the 26th April, 1875, the defendants received from the plaintiffs' solicitors a request in the following words: "*Cooper* loan. Please have the enclosed valuation made at once for us, as the man is to call on Wednesday for an answer." On the 28th of the same month the defendants sent their report to the plaintiffs, in which they describe the buildings as "four houses with brick fronts, eight rooms each, un-

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finished * * land, $14 per foot, $980; buildings, $4,000; total estimated value, $4,980;" and to this there is added the certificate: "I hereby certify that the property above described was personally inspected by me to make this report, and that the foregoing report and valuation are, to the best of my judgment, correct in every particular, my estimate being based upon what the property would realise at a forced cash sale by auction at the present time, and I hold myself responsible to you for the correctness of this report and valuation." This report was enclosed in a letter in which the defendant says: "The houses are unfinished, and my valuation of $4,980 is on the supposition that they will be finished in a manner similar to those adjoining. A final inspection, should I think, be made." There is no doubt that at the period this valuation was made, this property was at its highest; that very soon it began to depreciate; that it has fallen in value from 30 per cent. to 60 per cent; that it could not be sold at all to-day; that the buildings were never finished as they should have been; that there were wanting wells, cisterns, fences, sheds, and other conveniences, which although not costing a very large sum, are worth a great deal in rendering such property attractive to would-be tenants or purchasers; that this property has depreciated very much, not only with the general depreciation of property in the city, but because the houses were originally badly built, because there was an excess of building of this class of house, far beyond the demand; and because the buildings were allowed to fall into disrepair and to be tenanted by a bad class of tenants. Some twenty-five witnesses were examined, most of whom spoke of the cost of the houses erected.

Judgment.

This evidence no doubt is useful to a certain extent in ascertaining the value of the property; but it is to be observed that the defendants were not asked to certify the cost of the houses. They were asked to

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certify "what amount this property would fetch if it were sold by auction." The defendants were bound to consider the demand for such houses, the locality, the probabilities of sale; and on these to report. Some houses, the cost of which was large, from the lack of demand would fall much in the market, and the actual cost would form no criterion of their selling value; while other houses, the cost of which was small, from eligibility of site and consequent demand from location, could be truly certified as, in connection with their locality, comfort, and salability, worth more at the time the report is made than their actual cost. The value of the land, on the evidence given, was not untruly stated. The value of the houses, was to some extent problematical. Their value depended on the building operations. The defendants represented to the plaintiffs, that if the buildings were finished in a manner similar to those adjoining they would then realize the amount of the valuation made. They never were thus finished. If this had been done, and the property had been put up for sale in 1875, I have no doubt the property would have realised a sufficient sum to have discharged the liability of the plaintiffs. The defendants warned the plaintiffs that a final inspection should be made. The plaintiffs within a week of the valuation advanced $1,500 to the borrower. Thereafter further sums are advanced on the progress estimates of the person who inspected the premises from time to time for the plaintiffs. The $2,500 is paid out without the houses being completed, they are permitted to go into disrepair; the demand for such property has ceased, and under these circumstances only $1,800 is offered for the property.

Judgment.

I do not think the defendants are chargeable with the loss thus accruing to the plaintiffs. I believe their certificate represented what would have been the value of the property in question in April, 1875, if the houses were finished in the manner indicated; that the invest-

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ment was a hazardous and speculative one, as shewn by what has transpired since it was made; and the plaintiffs must bear the loss which has arisen from circumstances as to which the opinion of the defendants was not asked. I dismiss the bill, with costs.

Judgment.

See *French* v. *Skead* (*a*), *Chapman* v. *Chapman* (*b*), *Jenkins* v. *Betham* (*c*), *Cleland* v. *Leech* (*d*), *Holmes* v. *Thompson* (*e*), *Haycraft* v. *Creasey* (*f*), *Foster* v. *Mackinnon* (*g*), *Swift* v. *Winterbotham* (*h*), *Peel* v. *Gurney* (*i*), *Ingram* v. *Thorpe* (*j*), *Bigelow* on Fraud (*k*), *Ekins* v. *Tresham* (*l*), *Swan* v. *British Australasian Co.* (*m*), *Story* v. *Richardson* (*n*), *Turner* v. *Goulden* (*o*), *Collins* v. *Gripper* (*p*), *Taylor* v. *Ashton* (*q*), *Wright* v. *Leonard* (*r*), *Vernon* v. *Keys* (*s*).

(*a*) 24 Gr. 179.
(*b*) L. R 9 Eq. 276.
(*c*) 15 C. B. 168, 188.
(*d*) 5 Ir. Ch. 478.
(*e*) 35 Q. B. 292.
(*f*) 2East 107.
(*g*) L. R. 4 C. P. 704.
(*h*) L. R. 8 Q B. 253.
(*i*) L. R. 6 H. L. 403, 4, 7, 399.
(*j*) 7 Ha. 72, 68.
(*k*) 13 & 14.
(*l*) 1 Lev. 102.
(*m*) 7 H. & N. 603; S.C. 2 H. & C. 175.
(*n*) 8 Scott, 291.
(*o*) L. R. 9 C. P. 57.
(*p*) 1 F. & F. 332.
(*q*) 11 M. & W. at p. 415.
(*r*) 11 C.B. N.S. 266.268.
(*s*) 12 East 632.

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MASURET v. MITCHELL.

Fraudulent settlement—Subsequent creditor.

The owner of Blackacre and Whiteacre created a mortgage on Blackacre in favour of a loan society to secure an advance of $2,000, the estimated value of the mortgaged premises being $3,000 at least. The mortgagor subsequently, being not indebted otherwise, voluntarily settled, in good faith, Whiteacre on his wife. On a bill filed by a subsequent creditor the Court set aside the settlement as fraudulent against creditors, it being shewn that Blackacre was not sufficient to pay the loan society at the time of the settlement, although the loan society was not a party impeaching the settlement. [PROUDFOOT, V. C., *dubitante.*]

An equitable mortgage by deposit of title deeds had been created for $1,000 by a son in favour of his mother who had advanced him that sum. The mother subsequently delivered the title deeds to the party in favour of whom a voluntary settlement had been created, but it was not intended to be a transfer of the $1000 due to the mother:

Held, that the effect of the delivery of the deeds was to extinguish the claim on the land for the $1,000 and that in a decree declaring the settlement void as against creditors the beneficiary under the settlement was not entitled to any lien in respect of this amount. [PROUDFOOT, V. C., dissenting.]

Statement.

This was a suit by *Moses Masuret* against *Frederick Mitchell*, *Joseph Winters*, and *Mary Ann Winters*, for the purpose, under the circumstances stated in the judgment, of setting aside a settlement made by *Joseph Winters* on his wife, the defendant *Mary Ann Winters*.

The cause was heard at the sittings of the Court at London, before *Proudfoot*, V. C., who pronounced a decree, directing (1) a reference to the Master at Sandwich and Windsor to inquire and state the value of the property in the pleadings mentioned conveyed to *Frederick Mitchell*; (2) and in case the Master should find that the property was less valuable than the sum of $1,000, ordered, that the bill of complaint should be dismissed, with costs. (3) But in the event of the Master finding the value of the lands to

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be greater than that amount, declared the defendant *Mary Ann Winters* to be a trustee of the said lands to the extent of such excess of value for her husband, and that such lands to the extent of such excess were liable to payment of the claim of the plaintiff and his costs of suit, and ordered the same accordingly; (4) and that in such latter event the said Master should take an account of the amount due to the plaintiff for principal and interest, and tax to him his costs, and appoint a day one month from the making of his report for payment by the defendants *Winters* and wife of the said debt and costs. (5) And in the event of the defendants *Winters* and wife making such payment, ordered, that the plaintiff should execute to them a good and sufficient discharge of his claim to be settled, &c. (6) But in the event of the defendants *Winters* and wife making default, it was further ordered that the lands should be sold, freed from or subject to, the lien of *Mary Ann Winters*, for the sum of $1,000, as she might elect; (7) and that the purchase money thereof should be applied in payment of the amount due *Mary Ann Winters* in respect of her said lien, in the event of her electing to have the lands sold free therefrom, or if not, then first in payment of the amount due to the plaintiff for principal, interest, and costs, and subsequent interest and subsequent costs and the balance, if any, to remain in Court subject, &c.; and in the event of there being a surplus, the defendants *Winters* and wife were to pay the plaintiff his costs of suit.

Statement.

The plaintiff being dissatisfied with this decree, re-heard the case before the full Court.

The facts giving rise to the suit appear in the judgment.

Mr. *Gibbons*, for the plaintiff.

Mr. *W. A. Foster*, for the defendants.

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Masuret v. Mitchell.

SPRAGGE, C.—The defendant, Mrs. *Winters*, is protected by the decree to the extent of $1,000, being the amount advanced by Mrs. *Mitchell*, who is not a party, to her son *Frederick Mitchell*, the debtor. Beyond that sum of $1,000, the decree avoids the conveyance by *Winters* to his wife as void under the Statute of Elizabeth. If as to all beyond the $1,000, the conveyance to Mrs. *Winters* is avoided, it should be avoided as to that also, unless her title to hold it to that extent is unimpeachable by creditors. Then upon what does that rest?

Mrs. *Mitchell* held an equitable mortgage upon the land for that amount. *Winters* had conveyed the land to *Mitchell* to enable him to borrow money upon the security of it, and he did borrow $1,000 from his mother and created an equitable mortgage upon the land by deposit of the title deeds. The next step is, that *Mitchell* conveyed the land not back to *Winters*, his grantor, but to his grantor's appointee, his grantor's wife. Upon these conveyances no valuable consideration passed, the considerations expressed were merely nominal.

Judgment.

The next thing is, that Mrs. *Mitchell* delivers the title deeds to Mrs. *Winters*. This was not intended to be, nor was it in legal effect, a transfer to Mrs. *Winters* of the $1,000 debt due by *Mitchell* to his mother. That debt either continued to subsist or was remitted by the mother to the son. It matters not which, so as it did not pass as a debt to Mrs. *Winters*, making her a creditor instead of Mrs. *Mitchell*, with the same charge upon the land. For all that appears the debt from *Frederick Mitchell* to his mother continues to subsist.

This delivery of title deeds then not having that effect, could it have any other effect beyond that of extinguishing her charge upon the land in favour of Mrs. *Winters*, the grantee of the land? There was no indication of intention on the part of either party to keep this charge alive. If kept alive for the protection

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of Mrs. *Winters*, it would be a lien upon her own land and not for any debt to herself. If there had been a reconveyance by *Mitchell* to *Winters* himself, and the charge extinguished by delivery to him of the title deeds, it is clear that he would have held the land as of his former estate, and the intent to be attributed to Mrs. *Mitchell* in doing what she did was, I conceive, simply to extinguish her charge, the delivery being to Mrs. *Winters* because the conveyance was to her.

If this view be correct this sum of $1,000 ought not to have been made an exception to the right given by the decree to the creditor. The decree should either have given no relief at all against this land or have given full relief without this exception. It established the creditor's title to relief, and if right in that respect it follows that unless the exception can be supported the creditor is entitled to have the conveyance simply declared void under the statute.

Judgment

The next question is, whether the decree is wrong in holding the conveyance to Mrs. *Winters* impeachable at all, for it is the right of Mrs. *Winters* to impeach the decree upon the point while content to accept it as it is if not impeached by the creditor.

I was inclined after the argument to think that the settlement upon the wife of *Winters* in March, 1877, was a good voluntary settlement, the only debt of any consequence then existing being secured by mortgage. Mr. *May*, in his book on the Statutes of Elizabeth (*a*), thus states quite correctly, I think, the law upon that subject: "The question is varied also by the nature of the debt owing; the existence, for example, of a mortgage debt is of no importance. The subsequent voluntary conveyance cannot possibly affect the mortgagee's rights; for, if the mortgaged property is comprised in the voluntary deed, his claim is paramount to that of the volunteers, whose right can only extend to the equity of redemption; and if the settlement is of the

(*a*) page 50.

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other property than that mortgaged, it does not touch the mortgagee, for he has still the security for which he bargained * * but a mortgage debt is not of itself a debt within the statute, though if the property mortgaged proves insufficient the unpaid surplus is a debt," or as he puts it in another place, (*a*) "If, however, the property mortgaged is not sufficient to satisfy the debt, the mortgagee, of course, will be a creditor for the balance."

The guaranty which resulted in the debt to the plaintiff was not till the December following, some eight or nine months after the settlement; and I take the fact to be, that the guaranty was not contemplated or had anything to do with the impeached settlement. This seems clear. The matter then stands thus. The plaintiff cannot impeach the settlement by reason of his own debt. He must go upon the debt to the Trust and Loan Company; but that being a debt secured by mortgage, the question arises whether the property mortgaged is sufficient to secure the debt. I incline to think that the *onus* to shew this is upon the defendant, because the previous debt being shewn, it should lie upon him to shew something to take it out of the rule applying to ordinary debts; and that something is, that the debt is secured by a mortgage upon land, which land is sufficient to satisfy the debt.

Judgment.

It is, however, not material in this case to decide upon whom this *onus* rests, for evidence has in fact been given; and without going through it in detail, I take the result of it to be that while any private owner would not probably sell the mortgaged property unless for some pressing reason, for much, if at all less than $3,000, it is not at all probable that $2,000 could be obtained for it. The larger value is based upon what it was worth at a former time and upon the probable cost of the building that is upon it; the smaller sum it

(*a*) p. 142.

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is supposed could only be obtained in case some one could be found who was wanting such a place. The mortgagees advanced upon it $2,000, and they being a Loan Company, it may be assumed that it was valued at that date, 1872, at a considerably larger sum. But the point to be got at is its selling value at the date of the settlement, and that appears from the evidence to have been much the same as it was in November last when the evidence was given. Indeed the two sums I have already given and the selling value appear to have been much the same from when the evidence was given back to before the date of the settlement. From the evidence I do not think that the selling value at that date can be placed higher than $1,500.

There are one or two facts and dates that might have placed the question in issue in a clearer light. It appears that the mortgagees have been in possession; but when they took possession, and whether before March, 1877, does not appear, but I infer that they had possession before that date from a statement of accounts between them and *Winters*, shewing principal only due on the 1st of April in that year, and from its being stated by *Winters* in his evidence that he only paid about two years of interest. Unexplained, the inference would be that the interest accruing in the interval had been kept down by receipt of rents and profits. Another, and a more material circumstance is, that there has been an attempted and abortive sale by the mortgagees. Its date and the amount bid are material. If before the settlement it would furnish a motive for making it; if after it, it would still be of value in shewing the market value at the time; whenever it was there could not be much beyond the principal debt due, there never was any great arrear of interest.

Judgment.

I think upon the whole of the evidence it must be taken that at the date of the settlement the market value of the mortgaged property was about $1,500.

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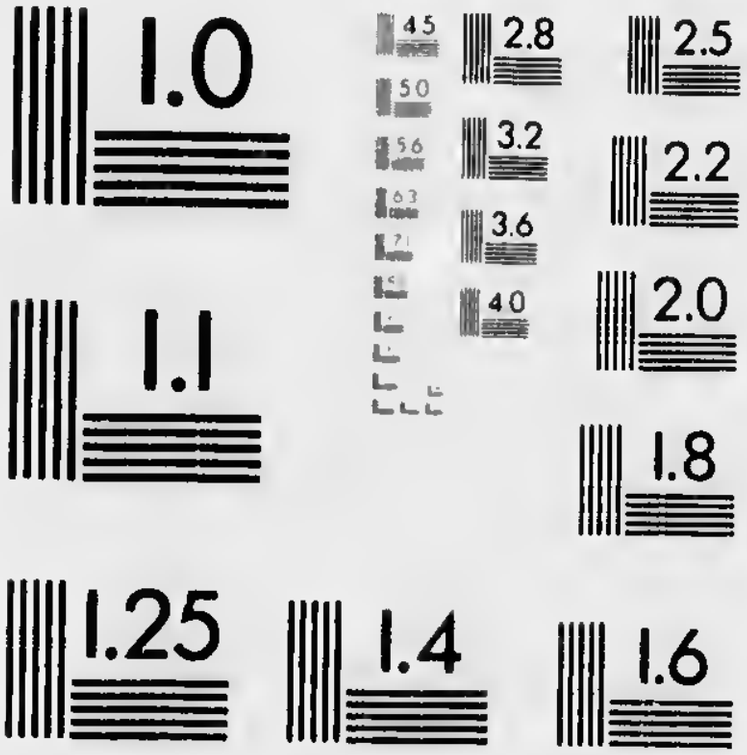
The mortgage debt being $2,000, that is equivalent to there being an unsecured debt of $500, and the question is, whether the mortgagor could put all his other property into voluntary settlement under these circumstances. If the mortgagees had realized by sale, and their debt had fallen short of being satisfied in full, they would have been entitled to resort to this other property if not in settlement; and being in settlement it follows that land to which they were entitled to resort had been withdrawn, and that the settlement would have been impeachable by them; and if impeachable by them, and their debt remaining still unsatisfied, it was impeachable by subsequent creditors. I really see no escape from this conclusion. It is settled law upon the authorities, that the subsequent creditor may stand upon the rights of the creditor existing at the [illegible] of the settlement.

I have treated the settlement as a voluntary one, and I think it was so. Assuming for the moment that *Winters* having before the settlement, conveyed the after-settled property to his son-in-law *Mitchell*, in order to his raising money upon it for *Mitchell's* own purposes; and that the advance of the $1,000 to *Mitchell* by his mother upon the deposit of title deeds, was a valuable consideration to *Winters;* all this so far had nothing to do with the settlement. After this Mrs. *Mitchell* restored the title deeds to her son; and the purpose of the conveyance to him having been answered, his position was that of a bare trustee for *Winters* to convey the property back to him. Then came the settlement, *Winters's* wife was his appointee, and the position of the three just the same as if *Mitchell* had conveyed to *Winters*, and *Winters* had conveyed to his wife. I am unable to see any valuable consideration for the settlement.

Judgment.

BLAKE, V. C.—In this case Mrs. *Mitchell* advanced a sum of $1,000, and certain title deeds were deposited



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with her to secure this debt, Thereafter these title deeds were delivered up by Mrs. *Mitchell* to *Frederick Mitchell*, who conveyed the property to Mrs. *Winters* as the voluntary appointee of *Joseph Winters*. At the period of this latter transaction *Winters* owed a sum of $2,000, or over, on a mortgage to the Trust and Loan Company. The period within which the principal money was to be paid had elapsed, and no sum was paid on account of it, and *Winters* was unable to pay. This property has not been sold yet, and apparently cannot be disposed of for a sum sufficient to pay the amount due the Trust and Loan Company.

The evidence of Mr. *Patterson* shews that the property would not, in 1878, realize over $1,500, although he considers it worth $3,000, and he states that it is worth as much now as for the past three years.

This debt was not then, nor has it since been satisfied, and it still remains a claim against *Frederick Mitchell* in favour of Mrs. *Mitchell*.

Judgment.

It was originally a debt secured by the delivery of the title deeds, and remains still the same debt, unsecured however by these deeds, which Mrs. *Mitchell* voluntarily delivered to her son. This $1,000 cannot, therefore, in any manner be used as a consideration in favour of the present grantee of the land.

Had the property embraced in the mortgage been ample to satisfy the claim of the Trust and Loan Company, I think the transaction impeached could not under the authorities have been impeached; but, as this is not so, we have a debt, existing at the time of the impeached conveyance, insufficiently secured, and yet unpaid. On this, a bill could have been filed to realise the property withdrawn from this creditor. A subsequent creditor can take advantage of this state of matters, and is entitled to have the voluntary alienation of property prevented to the extent that it interferes with the payment of his claim.

I think that is the position of the plaintiff here,

and that the plaintiff is entitled to the usual decree in fraudulent conveyance cases, with costs, including the costs of this rehearing.

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PROUDFOOT, V. C.—I think this decree should be affirmed. At the rehearing the argument of the plaintiff proceeded entirely upon the fact that although he was a creditor subsequent to the date of the impeached conveyances, yet that there was in existence a debt to the Trust and Loan Company prior to them.

I believe the law is tolerably well settled now that a subsequent creditor may avail himself of the fact of an unpaid prior debt; and if the person entitled to it could have avoided the conveyance, it will enure to the benefit of the subsequent creditors. But if the prior debt be secured by a mortgage, or in any other way, then the presumption of fraud does not arise, and the holder of it could not successfully attack the conveyance even if voluntary. Here the debt to the Trust and Loan Company was secured by a mortgage on different property, and no interest was due upon it at the date of the deed from *Winters* to *Mitchell* in March, 1877. The account put in only shews the principal due on the 1st April, of that year, and calculates interest from that period. From the well-known rules of that company we may assume that, when the loan was made of $2,000, in 1872, the property was an ample security at that time. It is true that property since April, 1877, has not been readily saleable in that locality, but it is not shewn that in April, 1877, it would not have brought the whole $2,000. It is in evidence that the house alone cost $2,500 to build it, and that even now to a person wanting it, the place would be cheap at $3,000. If the plaintiff had contented himself with establishing the prior debt, then probably the *onus* would have been on the defendant of shewing that it was secured, and sufficiently secured. But when the same evidence that proved the debt,

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proved the security, (and all the evidence on the subject of value was given by the plaintiff,) then it was incumbent on the plaintiff to prove its insufficiency. This I do not think he has done, and I remain of the impression, made upon me at the hearing, that the prior debt was sufficiently secured. But we have not had the advantage of having this matter discussed before us. The plaintiff relied only upon the fact of the existence of the prior debt, and the counsel for the defendant was justified in assuming that the subject of value was not an item to be considered.

Besides, there seems to me great difficulty in dealing with this mortgage debt in this suit. Mr. *May* (p. 50) says: "The subsequent voluntary conveyance cannot possibly affect the mortgagee's rights; for if the mortgaged property is comprised in the voluntary deed, his claim is paramount to that of the volunteers, whose right can only extend to the equity of redemption, and if the settlement is of other property than that mortgaged, it does not touch the mortgagee, for he has still the security for which he bargained. * * but a mortgage debt is not of itself a debt within the statute, though if the property mortgaged proves insufficient the unpaid surplus is a debt."

Judgment.

Now the Trust and Loan Company are not parties to this suit—the value of their security has never been ascertained—and it is only the surplus beyond that which is a debt within the statute. It may be that upon a sale the whole mortgage debt may be paid off, and then the plaintiff will be shewn to have had no *locus standi*. If the deed be set aside in this suit for the benefit of all the creditors, what are the Trust and Loan Company to prove? It would be contrary to the practice of the Court to permit them to value their security, and prove for the difference. The surplus can only be ascertained by a sale, and that cannot be compelled in a suit to which the mortgagees are not parties. It may be that the mortgagees will elect to

foreclose, and in that case the plaintiff would be equally without a *locus standi*.

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But neither the plaintiff nor the Trust and Loan Company could assail the deeds here, unless they were voluntary, or made with the intention of defeating these creditors. But in this case there is no imputation of any fraudulent design. There certainly was no fraud possible in regard to the plaintiff. The debt was not that of *Winters*. He was only asked to become security in December, while the conveyance to *Mitchell* was made in the March preceding; and it would be an unwarrantable deduction to impute to him that he divined he would be asked nine months later to become security, and that he made the deed to defraud this person who was then to become a creditor. And as to the Trust and Loan Company they were, I think, sufficiently secured. They had taken no steps to recover judgment, or to make their debt a lien upon any other property than that which they already held in security. Fraud in fact then is out of the question.

Judgment.

The deed to *Mitchell* of this property was not voluntary as between *Winters* and the person who advanced money on the security of it. The deed was made to *Mitchell* for the express purpose of enabling him to raise money upon it. The money was advanced by Mrs. *Mitchell*, the mother of the grantee, who obtained an equitable mortgage upon the property for her security. *Muir* v. *Dunnett* (*a*), has established, that in the hands of Mrs. *Mitchell* this was a valid security: and see *Van Hook* v. *Somerville Manufacturing Co.* (*b*). *Winters* could not have redeemed the property without paying the money advanced. At the request of her son Mrs. *Mitchell* gave up her security, to permit the property to be conveyed to Mrs. *Winters*. To the extent of $1,000 it was her own to do as she liked with it, and she chose to give it to Mrs. *Winters*.

(*a*) 11 Gr. 85. (*b*) 1 Holt's Chy. 633; 1 Hill on Mortgages 368.

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It is true there is no evidence of her having assigned the debt, or having discharged it. But the whole transaction must be taken together, and it was part of the original arrangement, that when the sum advanced was provided for the land should be conveyed to the wife; and the effect of the different dealings is this: the land was the husband's, it is now in the wife's name, and in the absence of value given might still be looked upon as the husband's. The element of value is introduced by means of the advance of Mrs. *Mitchell* to her son. In effect she gives the $1,000 to procure the vesting of the estate in the wife. She is not shewn to have given up the debt, but she has given up something of value to her, and probably all she will ever get for the debt; or, to put it in another shape the consideration, the value, received by *Winters* for the conveyance to his wife was the advance to *Mitchell* of the $1,000. If *Mitchell* were solvent, and he were compelled to repay this advance, another question would arise. But he is insolvent, and his estate will only pay a fractional dividend. If the transaction be honest, and the consideration a real, not a fictitious one, the Court is not in the habit of balancing in very nice scales.

Judgment.

In *Harman* v. *Richards* (*a*), the plaintiffs were mortgagees, and filed their bill for the administration of the estate of one who had joined with the mortgagor in the covenant for payment in the mortgage, and to set aside a settlement made by the surety. But the mortgaged property had been realized by a sale under a prior mortgage, and left a balance of their debt due to the plaintiffs. The surplus was ascertained.

In *Lush* v. *Wilkinson* (*b*), a suit by a subsequent creditor, the only debts shewn to exist were two mortgages, and the bill was dismissed, though Lord *Alvanley* in dismissing the bill gave the plaintiff leave

(*a*) 10 Hare, 81. (*b*) 5 Ves. 384.

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to file another, a circumstance which caused Sir *William Grant* to express his surprise that it had not been dismissed absolutely: *Kidney* v. *Coussmaker* (*a*).

Had the plaintiff made the Trust and Loan Company parties, they must have offered to redeem them, as there is no instance of relief prayed against a mortgagee without offering to redeem him: *Rogers* v. *Lewis* (*b*).

It seems to me impossible to work out the equities of the parties in the suit as at present framed.

Probably the proper conclusion to be drawn from these premises is, that Mrs. *Winters* should be declared entitled to the whole land, and not merely to the value of the $1,000. But the defendants do not complain of the inquiry on the subject, and it ought not to be disturbed.

I think the decree should be affirmed.

Judgment.

(*a*) 12 Ves. at 155.

(*b*) 12 Gr. 257.

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ELVERT v. ELVERT.

Practice—Revivor—Solicitor reviving for costs.

After a decree, which had the effect of creating an interest in the lands of the defendant in favour of the plaintiff as also of their infant children, had been pronounced in an alimony suit, the plaintiff died, whereupon the suit was revived in the name of the infants, and subsequently the defendant died.

Held, under these circumstances the executor of the defendant had no right to object to the solicitor of the plaintiff reviving in his own name against the estate of the defendant, making the infants defendants instead of plaintiffs in order to recover his costs.

THIS was an alimony suit in which a decree had been made by consent declaring the plaintiff entitled to alimony; directing a sale of defendant's lands, and out of the proceeds directing (1st) the payment of alimony accrued due; (2nd) the payment of the costs of the suit, and (3rd) that one third of the balance remaining in hand should be paid to *Samuel Barton Burdett*, and by him invested, and interest or income thereof be paid to plaintiff in lieu of the alimony previously charged, and upon the death of the plaintiff the moneys to be invested were to descend to the two children of the plaintiff and defendant as tenants in common, in equal shares or to their children. Shortly after the issuing of this decree the plaintiff died, and thereupon the suit was revived in the name of the two children above referred to, who were infants. In a few days after the suit had been so revived the defendant in the cause died, and no action having been taking on behalf of the infants to revive the suit against the defendant's estate, the solicitor for the plaintiff obtained an order of revivor in his own name, alleging therein his interest as trustee for the purposes above set forth as well as his having a personal claim for costs.

Statement.

The executor of the original defendant thereupon

filed a petition seeking to have the second order of revivor set aside as having been improperly issued. 1879. Elvert v Elvert.

Mr. *W. Cassels* in support of the petition.

Mr. *Fitzgerald*, Q. C., contra.

SPRAGGE, C.—This was a suit for alimony and a consent decree.

The decree created an interest in the infant children of the parties, as well as in the plaintiff herself, in certain lands of the defendant, which were, by the decree, directed to be sold by the Master. The decree is dated the 28th of April, 1877, and the plaintiff died on the 6th of June following, before any sale by the Master in pursuance of the decree, and, as is stated in the order of revivor, obtained by Mr. *Burdett* in his own name. After her death, the cause was revived by order of revivor, dated 15th November, 1877, in the style of cause *Mary Elvert* and *Thomas Elvert*, the infant children, against the same defendant, the father, and the name of Mr. *Burdett* appears as solicitor for the children who revive. Judgment.

If this allegation of revivor be correct, and indeed, whether correct or not, these children would be proper parties to revive the suit again, upon the death of the defendant, which occurred on the 23rd of November, 1877. This was not done, but Mr. *Burdett*. on the 18th of May, 1878, took out an order of revivor in his own name, upon an allegation in his order that by the operation of the decree he became interested in the lands as trustee for the purposes and persons in the decree stated, and was also personally interested in the prosecution of the decree for the recovery of his costs as plaintiff's solicitor, and of money advanced by him to the plaintiff, as provided for in the decree.

It appears then, upon the face of this last order of revivor, that there are two orders of revivor subsisting

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at the same time, and that in the later one, the one now moved against, the parties who were plaintiffs in the earlier of the two are made defendants. But it is now contended, in answer to this application, that the allegation in Mr. *Burdett's* own order, that the suit was revived by the children after the death of the plaintiff was erroneous, inasmuch as the defendant against whom it was revived died before the expiry of fourteen days after service of the order. By this contention Mr. *Burdett* impugns a material allegation in his own order; but supposing that he may do this, is he right in his contention that the death of the original defendant made void the order of revivor in the name of the children. That order was served on the 17th of November, and under the general order 338 it was binding upon the defendant from the time of service.

Judgment.

But however that may be, has not the solicitor a right to revive in order to the recovery of his costs, if for no other reason. Ch. 8, sec. 19 of 40 Vic. gives him that right in terms. Has he done anything to debar him from its exercise. Under the order of revivor by the children he might, if that order had been prosecuted and the defendant had lived, have recovered his costs and his advances to the plaintiff, but the order was not prosecuted and the defendant died. There was then a transmission of interest and liability, and the defendant's estate owes to the solicitor *Burdett* what the defendant himself owed; and this application is made by the representative of the estate to set aside the order reviving the suit against the estate. No objection is made on behalf of the children. Unless the order reviving on their behalf is a bar, I see no bar to the right of the solicitor to revive, and since the revivor by the children the suit has become abated, and a revivor has become necessary. The children have not revived, and if the solicitor had a right to revive, where is the bar to his doing so?

I do not see how the fact of the revivor by the children should be a bar to their being made defendants

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Elvert v. Elvert.

under a change of interests. They were plaintiffs in respect of an interest devolving upon them on the death of their mother. They are made defendants in respect of interests acquired by them under the will of their father. I suppose a guardian *ad litem* will have to be appointed, and he may or may not object to this order of revivor; but I see no good ground for this objection by the executor of the defendant.

I am referred to *Jervise* v. *Clark* in the Weekly Reporter (*a*). I do not find the case in the regular reports. It is not explained why the case was not within the statute, (with which our order 338 corresponds,) and *Atkinson* v. *Parker* (*b*) would seem to warrant such an order as was taken out in this case.

Judgment.

(*a*) Vol. 2 p. 237.

(*b*) 2 D. M. & G. 221.

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LICENSE COMMISSIONERS OF PRINCE EDWARD V. COUNTY OF PRINCE EDWARD.

Temperance Act of 1864—39 Vict. ch. 26, O.—Ultra vires—Auditing accounts of expenses—41 Vict. ch. 14.

The Act 39 Vic. ch. 26, O., in relation to the Temperance Act of 1864, is not unconstitutional, and the Provincial Legislature has power to appoint Commissioners for the purposes mentioned in the Act, and (under 41 Vic. ch. 14, O.,) to provide for the charges attending the execution of their duties even when previously incurred; and the provisions of the Act apply to a municipality in which the Temperance Act is in force.

The audit of accounts against the municipalities is not final and binding on the municipalities, it being open to them to shew that charges have been allowed in such accounts for which they are not liable, although it would not be necessary or proper to require evidence of matters in detail where an audit has been had.

The auditing of such accounts need not appear to have been done by the Provincial Treasurer personally: it is sufficient if they have been so audited by a subordinate officer in the department, whose duty it is to attend to such matters.

Statement.

This was a bill by *The Board of License Commissioners of the Electoral District of Prince Edward* against *The Corporation of the County of Prince Edward*, setting forth (1) that the plaintiffs were the duly constituted board of license commissioners for the license district of Prince Edward, composed of the electoral district of Prince Edward, and that such license district and electoral district and the territorial division of Ontario, known as the county of Prince Edward, severally embraced and were composed of the same territory, and the defendants were the duly constituted municipal corporation of such county; (2) that by virtue of the Statute of Canada, 27 and 28 Vic. ch. 18, (called "The Temperance Act of 1864,") and a by-law under the authority and for the enforcement of the Act passed by the defendants, and duly approved and adopted by the municipal electors of each municipality in said county, such Act had, since the 1st of March, 1876, been in full force in that

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county and such license and electoral district; (3) that in and during the license years of 1877 and 1878, there was also a duly appointed board of license commissioners and an inspector for said district, who had duly performed the duties of such commissioners and inspector; (4) that during those years the duties of said board and inspector consisted in carrying into effect the provisions of "The Temperance Act of 1864," of the Acts of Ontario, 39 Vic. ch. 26; 40 Vic. ch. 18; the Revised statutes of that Province, chapters 181 and 182; and the Act, 41 Vic. ch. 14, applicable in said county, being a county in which a by-law for the enforcement of "The Temperance Act of 1864" was in force; (5) that the expenses incurred in the performance of these duties during the year ending 30th April, 1877, amounted to $1,537.54, those for the year ending in April, 1878, to $923.25, and the estimate of the same for the year ending April, 1879, $1,550, and the license fund in the county was insufficient to pay the same; (6) that the plaintiffs had duly estimated the amount of the expenses for the then current license year, and such estimate, together with a detailed statement thereof during the two previous years signed by the plaintiffs, was duly approved by the Provincial Treasurer, and also by the Provincial Secretary of Ontario, and the plaintiffs had also caused a copy of such estimate and statement and approval, together with a notice in writing requiring payment by the defendants of $2,673.86, being the proportion of such expenses payable by the municipality, to be served on the clerk thereof, and that a month had elapsed since service thereof, but the defendants had refused to pay the same; (7) and the plaintiffs submitted that under these circumstances the defendants were bound to pay the said sum of $2,673.86, with interest thereon, from one month after service of such notice and demand of payment, and prayed a declaration that plaintiffs were entitled to be forthwith paid that sum and interest as

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aforesaid, and costs of suit, and were also entitled to all necessary and proper writs to enforce payment.

The defendants, while admitting the truth of the first and second paragraphs of the bill, insisted that while "The Temperance Act of 1864" was so in force in the said county, the Acts of the Legislature of Ontario, referred to in the bill and relating to the granting of tavern licenses in said Province, and regulating of houses for which such licenses might be granted, were in suspense and inoperative, and that neither the board of commissioners nor the license inspector had any legal authority or proper organization, while the by-law passed under the authority of "The Temperance Act of 1864" was in force in the said county. They also claimed that the Acts of the Ontario Legislature intended to add to, amend or modify the provisions of the said Temperance Act, were *ultra vires;* and that sub-section 4 of section 6 (41 Vic. ch. 14) was *ex post facto* in its operation, as also *ultra vires;* denied the truth of the statements in the fifth paragraph of the bill as to the amount of expenses incurred, and asserted that the statements thereof had not been duly approved by the Provincial Treasurer, or any person having complete authority to approve thereof.

The objection to the accounts not having been duly approved was rested on the fact that such approval or auditing was done, not by the Provincial Treasurer himself but, by an officer in his department.

The cause came on for examination of witnesses and hearing at the sittings of the Court at Belleville.

Mr. *Hodgins*, Q. C., and Mr. *Alcorn*, for the plaintiffs.

Mr. *Diamond* and Mr. *Burdett*, for the defendants.

Judgment.

SPRAGGE, C.—The plaintiffs are the Board of Commissioners of the electoral district of Prince Edward

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and the suit is against the Corporation of the County, for the recovery of certain charges and expenses payable to the Commissioners by the County. The Commissioners are appointed under the Provincial Act of Ontario, 39 Vic. ch. 26. The county of Prince Edward is a county in which the Temperance Act of 1864 was adopted in 1875, and was in force while the proceedings which are in question in this suit were taken.

The principal question raised is whether the provisions of 39 Vic. can be made to apply to a municipality in which the Temperance Act is in force—whether those sections and subsequent sub-sections of the Act, which in terms make it applicable to such a municipality are not *ultra vires*.

The Act constitutes a Board of License Commissioners to discharge duties which under a previous Act, 37 Vic. ch. 32, were to be discharged by other officers or bodies: municipal councils, or commissioners of police, according to the municipality. The purpose of each of these Acts was to regulate the issue of tavern and shop licenses and to regulate the sale of intoxicating liquors.

Judgment.

See. 27 of the later Act provides that nothing therein contained "shall be construed to affect or impair any of the provisions of 'The Temperance Act of 1864' of the late Province of Canada, all of which, so far as the same are within the jurisdiction of this Legislature are declared to be in full force and effect; and no tavern or shop license shall be issued or take effect within any county, city, town, incorporated village, or township in Ontario within which any by-law for prohibiting the sale of liquor under the said Act is in force."

Sub-sec. 2 provides that "the Lieutenant-Governor in Council may, notwithstanding any such by-law affects the whole of any county, nominate a board of commissioners of the number and for the period mentioned in the first section of this Act, and also an inspector;

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and the said board and inspector shall have, discharge, and exercise all such powers and duties respectively for preventing the sale, traffic, or disposal of liquor contrary to said Act, or this Act, as they respectively have or should perform under this Act"; and sub-sec. 3 provides "that the license commissioners and the inspector appointed under this Act shall exercise and discharge all their respective powers and duties for the enforcement of the provisions of the Temperance Act of 1864, (as well as of this Act, so far as the same shall apply), within the limits of any county, city, incorporated village or township in which any by-law under the said Temperance Act is in force."

We have to look at the earlier of these two Acts to see whether the duties of the officers and bodies to whom these duties were committed, conflict with the provisions of the Temperance Act. The first duty committed to them is to make by-laws in relation to licenses; and this, as a matter of course, is restricted to those municipalities where the Temperance Act is not in force. The Act imposes penalties for the infraction of its provisions, and by section 54 the Lieutenant-Governor is empowered to appoint one or more Provincial officers for the purpose of enforcing the observance of the provisions of the Act; and municipal councils and commissioners of police are directed to appoint officers for the like purpose, and to define their duties.

Judgment.

Taking then the two Acts together we find the duties of the board of license commissioners, constituted by the later of the two, to be, as regards municipalities in which the Temperance Act is in force, to enforce the provisions of that Act; and to appoint officers with defined duties, for that purpose. There is nothing in either of these Acts to interfere with the procedure which is prescribed by the Temperance Act itself, and there is nothing in the Temperance Act to exclude such persons as the license commissioners from prosecuting for infractions of the Act; they may well come

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under sub-section 3 of section 34 of the Act. If the 39th Victoria altered the mode of procedure, it would probably be open to the objection that it was interfering with that which was the province of the general Government, "the procedure in criminal matters." It has been held that prosecutions for penalties under the Temperance Act, are proceedings in criminal matters.

There appears to me therefore to be no ground for the objection that the provisions of 39 Vict. ch. 26, in relation to the Temperance Act, are unconstitutional. In my opinion it was within the competency of the Provincial Legislature to appoint commissioners for the purposes for which they were appointed; and to provide for the charges, attending the execution of their duties in the way in which they are provided for. As to the objection to the Act of 1878 (41 Vict. ch. 14), that it provides for the payment by municipalities of expenses previously incurred, I have no doubt of the competency of the Legislature so to provide, or of the construction of the sections of the Act by which such provision is made.

Judgment.

One or two minor points were made in argument. One that the accounts had not been audited. The audits are signed, not by the head of the department, but by an officer of the department whose duty it is to audit the accounts. He gave evidence that he was such officer, and did audit the accounts, and that, I think, was sufficient. It was contended for the plaintiffs that such audit was final; and precluded the defendants from disputing any of the items of charge. I was not referred to any statute or authority upon that point. In the absence of authority, I should think that it would be open to the defendants to shew that there were charges in the accounts for the payment of which they were not liable.

The heading of some of the accounts is of "expenses incurred in carrying out the provisions of the License

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Act of Ontario," another is "Statement of cases dismissed under License Act." These do not in terms point to expenses incurred in prosecutions for infractions of the Temperance Act, but rather the contrary. Still they may have been incurred for that purpose; and the fault may be in the heading.

Unless there be some authority making the audit final, there must be a reference to the Master to see what are proper charges against the county. It may not be necessary or proper to require evidence of matters of detail, as an audit has been had. The Master has large powers as to the evidence in taking accounts, which he will exercise in this case. The plaintiffs will have their costs up to and inclusive of the hearing. Further directions and costs are reserved.

Judgment.

It may be that a reference to the Master will not be found necessary, but that the inspector and the officials of the county upon going through the accounts under the supervision of the License Commissioners may be able to settle upon what are proper charges—failing this, there must be a reference to the Master.

1879.

CRONE v. CRONE.

Building Society—Saving and Loan Society—Rate of interest—Discount on anticipated repayments.

By one of the rules of a Savings and Loan Society, which were subscribed by all members on obtaining loans or advances of shares, it was provided that when a payment off of a mortgage was made before it became due, the present value of future re-payments should be calculated to the end of the term, and discounted at such rate of interest and on such terms as the directors might determine; and by another of the rules the directors, on default, were empowered to sell the mortgaged estate, and on such sale to retain and apply so much of the purchase money as should be necessary to redeem the property pursuant to the provisions contained in the foregoing rule:

Held, that the Master proceeded on an erroneous principle in calculating interest on the sum advanced at 9 per cent. from the date of its advance until the day appointed for payment; and that he was bound to ascertain the amount necessary to discharge the mortgage by the same rules, and on the same principle, as the directors of the society computed the same.

This was an appeal from the report of the Master at London by the Huron and Erie Savings and Loan Society, on the grounds appearing in the judgment.

Mr. *W. Cassels*, for the appeal.

Mr. *R. M. Meredith*, for the plaintiff.

Mr. *Hoyles*, for the defendant.

PROUDFOOT, V. C.—The question reserved in this case was, whether the Master had properly calculated the amount due upon a mortgage made by *Henry T. Crone* and *Sarah Ann Wilson*, to the Huron and Erie Savings and Loan Society. The Master, I understand, has allowed to the society in the accounts the sum actually advanced, $7,700, and interest at 9 per cent. to the day appointed for payment. Judgment.

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The mortgage recites that the mortgagors are members of the society, having subscribed for 154 shares of its stock, which the society have agreed to pay them in advance on receiving this security therefor; and then it witnesses that in consideration of $7,700, the mortgagors convey the land. The proviso is, that the mortgage is to be void on payment of $12,666.50, in equal yearly instalments of $1,266.65, on the 1st of May in each year, during the term of ten years, the first instalment to be paid on the 1st of May, 1873, together with interest at the rate of one per cent. per month, on any portion of the money thereby secured in arrear, while in default, and taxes and performance of statute labour. There was a proviso that in default of payment for six months of any portion of the money secured, the whole should become payable.

Judgment.

The 13th rule of the society prescribes the mode by which a member may obtain an advance of a share or shares. Rule 14 provides that the directors shall have the power to regulate the amounts applicable for advances, the time and manner of making the same, the interest and bonus payable thereon, and the time and amount of the re-payments to be made in respect therof, and that the re-payments on advanced shares shall be for a fixed period, in respect of each share, and shall not be liable to the contingency of losses or profits in the business of the society. Rule 16 provides that the directors, among other things, shall have power to sell the property, and that when any sale shall take place of any property mortgaged to the society, the directors shall have power to retain and apply so much of the purchase money as will be necessary to pay the same, as would be required to redeem the property pursuant to the provisions contained in the rules; together with all other payments, moneys and expenses due to the society, and to pay the surplus thereof to the mortgagor. Rule 23 provides that if any member shall desire to have his property discharged from a mortgage to the

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society before the expiration of the full term for which it has been taken, he shall be allowed to do so on payment of all re-payments, and any fines, fees, and other sums due in respect thereof up to the time of the redemption of such mortgage, and of the present value of the future re-payments, calculated to the end of the term, and discounted at such rate of interest, and on such terms as the directors may determine. Rule 25 provides for levying fines in default of punctual payment.

I assume that on becoming members the mortgagors subscribed the usual covenant appended to the rules, by which they covenanted to truly observe, perform, fulfil, and keep all the foregoing rules of the society.

If the mortgage is to be considered as subject to the rules of the society, then the mode of ascertaining the amount due is concluded by authority. When any sale shall take place, the amount to be retained will include all payments due to the time of sale, and fines for default, and interest on arrears, and the present value of future payments. The society have the right to say they never intended to enter into a contract to take the principal and any specific rate of interest,—their agreement was to take the annual instalments, or if redeemed before hand, to calculate the present value of the undue payments, at such rate as specified by the directors. I understand that to be the effect of the decision in *Western Canada Loan and Savings' Society* v. *Hodges* (*a*), and in *In re O'Donohoe's* Estate (*b*).

Judgment.

And I apprehend that a member applying for an advance of his shares, is bound by the rules regulating the advance and the mode of re-payment. The security is on the face of it for shares paid in advance to members of the society. The mortgagors, in becoming members of the society, covenanted to observe, perform, fulfil, and keep all the rules, including therefore, amongst others, the terms upon which the proceeds of

(*a*) 22 Gr. 566. (*b*) Irish Rep. 10 Eq. 221.

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the sale of the property were to be applied, and the terms for redemption.

The rules provide that the mortgage is to contain such clauses, provisoes and agreements as the solicitor for the society shall think fit with the approval of the directors. But it nowhere appears that members obtaining an advance are to be bound only by what appears in the mortgage, or that the execution of the mortgage was to relieve them from the obligations they incurred by becoming members of the society.

Judgment.

I think the Master has proceeded upon an erroneous principle in ascertaining the amount due upon this mortgage, and that the calculation should be made in the way I have indicated.

I allow this appeal, with costs.

1879.

FOLEY v. FOLEY.

Statute of Limitations—Practice—Amending bill at hearing.

By a paragraph of the plaintiff's bill, an ouster by the defendant was alleged at such a date and continued possession since, as would, if true, have defeated the plaintiff's claim to relief; but this statement was not proved: on the contrary, the fact was proved to be otherwise; and the Court being of opinion that the title of the plaintiff was clearly made out, directed the objectionable paragraph to be expunged, it being evident from the course the suit had taken that the defendant would not be placed at any disadvantage thereby.

The plaintiff was jointly interested in the estate of her father, who died in 1865, and she continued to reside upon the homestead with her brother, who exercised sole control as to renting and working the property, up to within ten years of the filing of a bill for partition:

Held, that such residence with her brother was a joint occupation by both, and as such sufficient to prevent her right being barred by the Statute of Limitations.

Statement.

This was a suit for partition instituted by *Joanna Foley* against her brother *Thomas Foley* and *The Western Canada Loan and Savings Company*, mortgagees of the interest of *Thomas Foley*. The bill stated that the land was the property of the father, who died in 1865, and that upon his death the defendant *Thomas Foley* entered into possession of the land, and kept out the other heirs. The bill sought to avoid the effect of the Statute of Limitations by alleging that the plaintiff had filed her bill within five years of her coming of age. This fact, however, was found against her, but it appeared in the evidence that although *Thomas Foley* had sole control of the working and renting of the farm, and treated it as his own, the plaintiff had resided with him up to within ten years of the filing of the bill.

The cause came on for the examination of witnesses and hearing at Peterborough.

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Foley v. Foley.

Mr. *W. Moore*, for the plaintiff.

Mr. *H. J. Scott*, for the defendants *The Loan and Savings Company*.

As against the defendant *Thomas Foley*, the bill was taken *pro confesso*.

SPRAGGE, C.—In my opinion the case made by the plaintiff as to her age is not proved, and that her claim to relief is barred as to her own share by the Statute of Limitations, unless saved by her possession from her father's death up to August, 1868. The bill, it is shewn, was filed 28th March, 1878. If her possession up to August, 1868 be such as to save her rights as a tenant in common the question as to her age becomes immaterial. I incline to think her remaining on the place as she did up to August, 1868, was a possession in her as tenant in common; that there was no ouster by Thomas, and that the statute did not begin to run till that date. If that be so she established her right to two-fifths of the land. If not, then to one-fifth only, which she acquired from her sister *Catherine*.

Judgment.

Mr. *Scott* has since referred me to *McArthur* v. *McArthur* (*a*), *White* v. *Haight* (*b*), *Holmes* v. *Holmes* (*c*), and *Orr* v. *Orr* (*d*).

I see nothing in any of these cases to alter the view that I took at the hearing of the effect of the continued residence of the plaintiff upon the land in question.

In the two earlier cases and the last the possessor, or rather *quasi*-possessor, was without title, and the possession was attributed to others, also in possession, who had title. Here the plaintiff had the same title as the defendant, who claims possession

(*a*) 14 U. C. R. 544.
(*b*) 11 Gr. 420.
(*c*) 17 Gr. 610.
(*d*) 31 U. C. R. 13.

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against her, and she was also in possession, *i.e.*, she was actually living upon the land, and in such possession, taking her age and sex into account, as well as her title as tenant in common, as she naturally would have after her father's death. The two earlier cases shew that the fact of one managing a farm does not give him possession as against one having title also in possession.

In *Holmes* v. *Holmes* it was held that the joint possession without claim of title of the heir-at-law of a tenant in common, with the other tenant in common, prevented the Statute of Limitations from running against him. I feel clear upon the point of law that the statute did not commence to run against the plaintiff until she left the premises in 1868, and therefore that she is not barred.

Since writing the foregoing, Mr. *Moore*, counsel for the plaintiff, has sent me a memorandum of some other cases. One is the English case of *Groves* v. *Groves* (*a*), a case which went a great way in attributing possession to the party having title.

Judgment.

In *Fraser* v. *Fraser* (*b*), a child, five years old, had title by descent from his father to a lot of land. The land had been conveyed to the father by his father, and at the time of the death of the father of the child the grandfather was in possession, the father having removed from the lot some time previously. Upon the death of the father in January, 1829, the grandfather took the child to live with him, and he continued to live with him until the death of the grandfather in 1841. The question was, whether the grandchild was in possession of the land during the time that he was living upon it with his grandfather.

Wilson, J., remarked: "It may be if *Abraham* (the grandfather) did intend to keep this land as his own, that he did not mean to put *Randolph* (his grandson)

(*a*) 10 Q. B. 486. (*b*) 14 U. C. C. P. 70.

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Foley v. Foley.

in possession of it by merely taking him to his own home; but, on the other hand, how can it be said that *Randolph* was ever out of possession of the land at any time during all the time he was actually living upon it between 1829 and 1839 [query 1841], for where two men are in possession the law will adjudge it to him that hath the right: *Reading* v. *Royston*" (*a*), and the possession was adjudged to have been during that time in the infant.

Mr. *Scott* refers me to the prayer of the bill, and especially to the eleventh and twelfth paragraphs. The plaintiff alleges certainly that after the death of her father, her brother *Thomas Foley* entered into possession, and kept the other parties interested out of possession, and if she had proved this she would have proved herself out of Court. But the fact was proved to be otherwise, and no objection was made at the hearing that there was any variance between the fact proved and the allegation. If this had been pointed out, it would have been a matter of course to have asked leave to amend, and a matter of course to grant it, unless it appeared that the defendant would be unfairly prejudiced by the bill having been framed as it was, and amended at the hearing in that particular. It might be improper to grant it for instance if the defendant were placed at a disadvantage by being taken by surprise; but so far was this from being the case, that I hear of the variance between the record and the proof, for the first time, upon cases being sent in to me by the defendant's counsel after the hearing, and then without any suggestion that the defendant had been prejudiced in any way by the record being framed as it is.

Judgment.

It is proper, however, that the allegation of ouster contained in the eleventh paragraph should be expunged, as the fact being otherwise is the very turning point

(*a*) Salk. 423, Ld. Raymond 826.

of the case in the plaintiff's favour; and the allegation should be made to conform with the fact proved. As to costs; I incline to give no costs to either party up to the hearing. Further costs will be as usual in partition suits.

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Foley v. Foley.

Field v. The Court Hope of Ancient Order of Foresters.

Order of Foresters — Laws and rules of an association—Secretary, treasurer, or other officer of association.

Where an association has a code of laws, as also rules for the government of members, which point out what course a member shall pursue if he finds himself aggrieved, he must exhaust the remedies thus provided before applying to the Courts of Law for redress; and such rules of the association may require to be more rigidly enforced in the case of a secretary, treasurer, or other officer of the association, than they would be in the case of an ordinary member.

Statement.

The bill in this case was filed by *Edward Field* against *The Court Hope of Ancient Order of Foresters* and *George A. Garratt, and Joseph Wilde,* which stated that the defendants, *The Court of Hope,* were incorporated under R. S. O. ch. 167, for friendly purposes, and the mutual benefit of the members and were a branch of the Ancient Order of Foresters: that the defendants were governed by certain by-laws, by one of which it was provided that annually they should elect twelve contributing members, who should form an Arbitration and Appeal Committee: that the functions of this Committee

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"shall be to hear and decide according to the rules and laws of the district upon the following cases:—

"1st. Any dispute, charge, or complaint in respect of some matter or thing duly connected with the Order between one member or officer of the Court and another member or officer of the Court.

"2nd. Any charge made by an officer of the Court against a member of the same Court for violation of the rules of the Court or laws of the Order, where such violation of the rules or laws incurs penalties of suspension or expulsion, a fine exceeding $1, the return of sick pay improperly obtained, or other penalty not within the summary jurisdiction of the officers of the Court under its rules.

"3rd. Any appeal against a fine inflicted by the officers of the Court or stoppage of sick pay by the officers, or against any act of such officers done on their own authority, and not under a resolution of the Court.

"4th. Any false rumour which may be circulated by a member to the detriment or injury of the character or business of a member of his own or any other Court.

Statement

"5th. Divulging the business transacted in any Court or Committee to any person other than a member of the Order."

Section 2: "That every brother or officer preferring a charge or complaint, or making an appeal as above, shall give notice of the same in writing to the C. R. of the Court within three calendar months of the discovery of the alleged offence or date of the act appealed against, or such charge, complaint, or appeal shall not be entertained, nor unless the complainant or appellant make a deposit of $2 towards any fine or expenses that the Committee may record in their verdict against him.

"A copy of the charge, complaint, or appeal, duly signed by the secretary, and bearing the seal of the Court, shall be served upon the defendant, or at his residence, at least fourteen days previous to the date upon which the Committee are summoned to sit, the said deposit to be forfeited to the Court if the complainant or appellant wilfully neglects to appear, or if the charge, complaint or appeal be proved frivolous or

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vexatious. And if the defendant neglects to appear, unless caused by illness, duly certified, judgment shall be recorded against him by default, and the Committee shall be empowered to fine him any sum not exceeding $5 for such neglect to appear, and also to charge either the plaintiff or defendant with the whole or any part of the expenses of the Committee, or of witnesses in a case: the fine to be paid to the Court Funds. The decision of the Committee shall be binding until reversed or altered upon an appeal to the Arbitration Committee of the district."

And that there should be an appeal from the decision of the Committee to the Appeal Committee of the United District: that the defendant *Garratt* was, in the year 1878, Chief Ranger (*i.e.*, presiding or chief officer) of the Court Hope: that in July, 1876, the plaintiff was appointed treasurer of the Court Hope, and continued so up to the month of August, 1878, when he was removed from office, and finally was in the month of November expelled from the Order, because he had refused to deliver up the treasurer's book: that he had given up such book before he was expelled: that he was not present at the meeting at which he was expelled, nor had any notice that he was to be expelled: that he was expelled by the said *Garratt* alone, and without any complaint having been made to or before the Arbitration Committee, or any opportunity given to him to have a trial before the Appeal Committee: that the defendants had expelled him in pursuance of the following by-law, No. 35 in the Rules of the Toronto United District:—"That should any trustee, treasurer, or secretary of any District or Court be removed from or resign his office, and refuse or neglect to deliver up, assign, or transfer any money, property, or securities for money which may be in his possession or under his control belonging to such District or Court upon demand being made by order of the District or Court, or through their Committees of Management, such trustee, treasurer, or secretary shall be expelled from

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the Order, and shall thereby forfeit all rights and benefits in the branch of which he was a member": that such last mentioned by-law did not apply to the defendants, The Court Hope, but only to the "Toronto United District" as an independent body; and the plaintiff submitted that he had been illegally expelled, because, 1st. No notice that he was to be expelled was given to him; 2nd. That he could only be expelled after a trial before the Appeal Committee, and 3rd. That the by-law under which he was expelled did not bind the Court Hope.

Statement.

The defendants, by their answer, stated that the Court Hope was a branch of the "Toronto United District," which was formed of delegates from a number of Courts: that the by-laws and rules of the Toronto United District were binding upon the Court: that the Court and District were bound by certain laws which were known as the executive laws: that after the plaintiff had been deposed from office demand had been made upon him for the treasurer's book, and finally the Court Hope had brought an action of trover in the First Division Court of the County of York against the plaintiff, which resulted, after a trial, in an order being made commanding the plaintiff to deliver up the book: that the plaintiff never gave up the book, and finally the defendant *Garratt*, as Chief Ranger, read out in open Court the by-law No. 35, and declared the same enforced against the plaintiff.

The defendants submitted that the plaintiff's duty was to have appealed, and that his offence was not one to be tried, but was within the summary jurisdiction of the Chief Ranger, and the only remedy the plaintiff had, was appeal to the Committee: that the said by-law was binding on the Court Hope, because it was one of the executive laws binding on the whole Order.

By the evidence it appeared that there was the following code of laws and rules binding on the society. 1st. The executive laws, one of which was, No. 35, the

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law enforced by *Garratt*. 2nd. The general laws of the Toronto United District, in which this law was not included. 3rd. Rules of the Toronto United District, in which this law was included, and 4th. Rules of the defendants, The Court Hope, which did not in terms include this law. The evidence was that the executive laws were binding on the Court Hope.

Mr. *Bethune*, Q. C., and Mr. *W. Barwick*, for the plaintiff, contended that as this by-law was not included in the general laws of the "Toronto United District," nor in the rules of the Court Hope, it was not binding on the Court Hope: that the rules of the "Toronto United District" were only binding upon, and for the governance of the district body as a whole: that the plaintiff was entitled to be tried by the Appeal Committee, on a charge laid against him, and that he could not be expelled until notice was given to him of the intention to expel him.

Statement.

Mr. *McMichael*, Q. C., and Mr. *A. Hoskin*, for the defendants, contended that although this law was not included in the rules of the Court Hope, nor in the general laws of the Toronto United District, yet, being one of the executive laws, the plaintiff was subject to it: that the offence of the plaintiff was within the summary jurisdiction of the Chief Ranger: that the case of the plaintiff came under the following portion of the by-law defining the duties of the Appeal Committee: "Any appeal against a fine inflicted by the officers of the Court or stoppage of sick pay by the officers, or against any act of such officers done on their own authority, and not under a resolution of Court": that there was nothing to try—his was an offence against the Order as a body, not against any member or officer of the body, and therefore it was not a case contemplated by the by-law for a trial: that the plaintiff was not entitled to notice: that the effect of the

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by-law itself was on his neglecting or refusing to give up the book to deprive him of his rights of membership: that in any event the plaintiff had a right of appeal and a remedy within the Order and, until he had exhausted that, this Court ought not to interfere.

BLAKE, V. C.—In disposing of the case said, in doing so he did not desire to place the defendants on any lower plane than that which they had themselves assumed; and proceeded to read from the preamble of the constitution of the Order extracts shewing the object of its existence, and continued: I fear the society and its members have not lived up to the plane upon which it originally started, as witness the large amount of litigation about this wondrously trifling matter. The case has not been argued on the principle upon which I think it must be decided. It has been argued as a case between member and member, as if it were merely a question between *A.*, occupying only the position of member, and *B.*, occupying the same position, and only thus interested in the matter. I think there is a great deal in the argument of the plaintiff, if this were merely a matter of dispute between member and member. Where a person occupies the position, not only of member, but of treasurer or secretary, a reason exists for laying down a rule as to his guidance very different from the rule laid down in the case of an ordinary member. It is absolutely necessary that where a person occupies the position of secretary or treasurer, there be a speedy mode of checking any improprieties on his part; and that seems to be the object of this rule 35. It is not a rule that is to guide all the members of the association; but where a person assumes the office of secretary or treasurer, then he assumes an office in which it is necessary to control him by means unnecessary where the member is not an official. By this rule 35 a much more expeditious method of dealing is adopted than where the association is dealing with an ordinary member.

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What does the rule say? [The Vice Chancellor here read the order No. 35 above set forth.] In the month of August a resolution is passed by the committee ordering this man to deliver up this book within forty-eight hours; demands had been made upon him; he had been asked for it, and the answer was that in certain proceedings taken in the month of January he had given it into the hands of certain auditors, and it had not been returned, and he had not the book. They were not willing to accept of this statement, and in August they passed a resolution that in forty-eight hours the book should be handed to the committee appointed for the purpose of receiving it. The book is not delivered up, and matters go on till November, and then he is declared expelled by the Chief Ranger, under rule 35.

The position of the plaintiff in the month of November was, that he was discharged from the office of treasurer; he no longer held that office; he had been discharged for cause; and it does not seem that the case could be put by the plaintiff, nor has it been put by the plaintiff, upon his being deposed improperly from the office of treasurer. There were reasons assigned which were quite sufficient for his deposition, if it were necessary to assign a reason for it; therefore he comes within the first clause of order 35. The rest of that order states the consequences that are to flow from this deposition If he is removed from his office, and neglects to deliver up the book as required, he shall be expelled.

Judgment.

I quite agree that if this were the case of an ordinary member, and that he had not occupied the position of a treasurer, who had retained the books of the society, that it would seem to be a hard rule that he should be expelled from the association; but when we know the harm that might follow to the association from the want of this book; when we know that cheques were being presented from time to time, and that it was a

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matter of great moment to the association to ascertain the funds that it had, and whether it could liquidate these demands, we find that there was a very good reason for placing the treasurer in a position in which the Court could control him completely; and I do not see that it was unreasonable in the Court adding that clause which they knew would be so powerful a stimulant to the treasurer to do his duty. If the plaintiff was dissatisfied with the position in which he was placed he had a very considerable time to appeal to that committee, which, it is perfectly clear, would have had the right to have entertained this demand, and which could have dealt with it in the way that the counsel for the plaintiff thinks they should have dealt with it; but that is not the position he has taken. He makes no objection to this mode of proceeding; he is present in November; he does not then say, "I have not been heard."

[Mr. *Bethune*.—He was not present in November.]

You are right; it was in August he was present. He does not then say, "I have not got the book," and does not demand that there should be trial.

Judgment

[Mr. *Moss*.—He did say that.]

He did not say that in the Court meeting, but down stairs he said to *Butcher* that they should not get the book. He does not demand a new trial. He knew in August there was a demand being made for this book, and the consequences that would flow from it if not complied with—that he should be expelled from the society. He was aware of that in the month of August. He makes no demand for a new trial, and no demand for further investigation. I think it was a power very reasonable for the Court to retain in itself. Whatever may be the position of members retaining other offices, it is not unreasonable to place the treasurer in this position: "If you do not deliver up the book on demand, remember the result is you are expelled." It may be very unreasonable so

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far as ordinary members are concerned who do not occupy that position, but I think where persons occupy the position of officers, when they fail to obey an order, and do not appeal against it, they must take the result. I do not think the other rule at all conflicts with that. The two can be read in harmony. When they expelled him he had the right to appeal; when they refused him the rights of a member he had the right to appeal against the whole case to the Court. He had the right, notwithstanding there was the verdict in the Division Court which might or might not be opened, to have the whole of his case re-tried; and I think the plaintiff should have adopted this course and not to have come here.

After some discussion with counsel upon the interpretation of certain rules of the society, his Lordship continued: He was present when the order was made as to the giving up of the book. He did not demand any trial after that.

[Mr. *Bethune*.—He insisted that rightly or wrongly he must have a new trial.]

Judgment.

There was a consequence that was to flow from that act: he might have said: "You have unjustly ordered me to deliver up this book, and I want a trial upon that;" but he did not do that. He did not demand a trial, and, therefore, the consequences of the order is, that he is expelled. I think it a very great pity that he did not come before the committee, and although this Court is very anxious not to permit any arbitrary action on the part of any association against a member, still I think that it should be very careful to see that where the members have desired to have all such matters settled within the domestic forum, that a person should not be allowed to come here until he has exhausted every possible means of redress outside of the Court. It is out of the question to say that with an association formed like this, with a complete machinery for the redress of the wrongs of its members

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the mere caprice of any member may be the means of dragging the association before this Court, and expending time and money in the accomplishment of that which could be much more satisfactorily and less expensively done by the association itself.

This Court would have been more prepared to listen to anything suggested on the part of the plaintiff if he had displayed a desire to have had justice, or what he imagines to be justice, done to him by these other means, rather than come here directly upon his being expelled.

I think, while the only order I can make is, that the plaintiff pays the defendants the costs of the litigation, the decree should embody the undertaking which Dr. *McMichael* says he is prepared to assume, that notwithstanding the time has elapsed within which this matter should be brought before the committee for investigation, the defendants do, within one month, listen to whatever complaint the plaintiff chooses to bring before the committee entitled to investigate the matter according to the rules of the association.

Judgment.

The plaintiff having rejected the offer here referred to, his Lordship said, in that case, the bill would be dismissed, with costs.

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THE CANADA LIFE ASSURANCE COMPANY v. THE PEEL GENERAL MANUFACTURING COMPANY.

Specific performance—Trading company—Ultra vires.

The holding of shares by one trading corporation in another trading corporation is not *ultra vires*.

The rule that, in the absence of fraud on the part of a vendor of land, a deficiency in quantity—small in proportion to the quantity sold and not necessary to the enjoyment of what the vendor can make title to—is not a bar to specific performance at the suit of the vendor with compensation to the purchaser, applies also to sales of stock or shares in a trading company. Therefore, where a contract was entered into for the sale and transfer of 360 (out of 400) shares of stock in such a company, and upon a bill being filed on behalf of the vendors, which in effect was to enforce the sale and purchase, it appeared that the plaintiffs could validly assign 343 out of the 360 shares, the Court at the hearing held the vendors entitled to a decree for the sale and payment of the number of shares they could so make a good title to.

This was a bill by *The Canada Life Assurance Company* against *The Peel General Manufacturing Company* seeking a sale of certain lands comprised in a mortgage dated the 1st day of September, 1876, executed by the defendants, in favour of *Stephen S. Lee* and *Alan Cameron*, trustees of *Ellen Madeline DeBernier Cameron*, and by the said trustees assigned to the plaintiffs, securing payment of the sum of $20,000 and interest. The circumstances giving rise to the suit are fully stated in the judgment.

The cause came on for examination of witnesses and hearing at the sittings at Hamilton, in the Spring of 1879.

Mr. *Boyd*, Q.C., for the plaintiffs.

Mr. *Bain*, for the defendants.

SPRAGGE, C.—The mortgage given by the defendants to *Stephen S. Lee* and *Alan Cameron*, trustees of the wife of *John Hillyard Cameron*, and dated 1st of

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September, 1876, was given upon an account stated of the balance due upon an agreement for the sale of stock in the Port Credit Harbour Company. The whole stock of the Harbour Company consisted of 400 shares of the par value of $50 per share. The original contract was for the sale of 360 shares, the trustees to acquire, if able to do so, the remaining 40 shares, and to sell them also to the defendants at the same rate, viz., at their par value. It was an object with the company in furtherance of their business to acquire the stock of the Harbour Company, or at any rate so much thereof as would give them control of the harbour. At the date of the original agreement, 21st of July, 1869, the trustees were the owners of 160 shares; 200 shares were owned by a brother-in-law of Mr. *Cameron*, Col. *Muter*, and the rest were in other hands. This agreement and everything in connection with it were entered into and managed by Mr. *Hillyard Cameron*, on the part of the owners of the stock.

Judgment.

Twenty-five shares were subsequently sold and transferred to the company and paid for by them. From the time of the original contract the harbour itself has been as it was intended to be in the possession and under the management of the defendants, and they have received whatever profits and benefits have been derived from it. The plaintiffs profess themselves prepared now to transfer to the defendants 343 of the 360 shares which they agreed to sell and transfer to the defendants, and the sale and transfer of which was the consideration for the mortgage.

The shares have now become much depreciated in value, and the defendants object that they are not now bound to accept them; and that the plaintiffs are not entitled to hold the mortgaged premises as security for the agreed mortgage debt or for so much thereof as the plaintiffs are now prepared to advance. The contemplated consideration not having been actually advanced or paid, the litigation between the parties

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becomes in substance a suit by a vendor of stock in an incorporated company against another company which has contracted for its purchase, and has subsequently agreed to secure the purchase money by a mortgage upon the stock sold, and certain lands of the purchaser. Counsel agree that this is the true aspect of the case. The defendants object that at the date of the original contract the trustees had not what they contracted to sell, they having only 160 shares, while the contract was for the sale of 360. It is to be observed in reference to this that the transfer of shares was not according to the original contract to be immediate, but from time to time as the purchasers were prepared to pay for them. No security for payment by mortgage or otherwise, was at that time contemplated.

In 1876, the contract was to some extent changed. The 360 shares were, as it is alleged, to be transferred to the purchasers contemporaneously with, or presently after, the execution of the mortgage, and the purchase money with interest secured by the mortgage was to be paid at a future day. Judgment.

Requests were made by officers of the defendants' company to Mr. *Cameron*, for a transfer of the shares. A transfer was promised by Mr. *Cameron*, but he died in November of the same year, without the promised transfer being made. At the date of the mortgage the trustees had not acquired any shares in the company beyond those possessed by them at the date of the original contract; and it may be the 25 shares, but that is in question.

It appears by the evidence that all the dealings and arrangements between the parties were made through Mr. *Cameron* on the one hand, and Mr. *Capreol*, President of the defendants' company, on the other, including therein the placing of the defendants in possession of the harbour and the receipt of the rents and profits thereof. This was partly expressed and partly assumed in all the evidence given.

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It appeared by the evidence of Mr. *Barwick* that he has now the control of 343 shares: that on the 24th of September last, Mr. *Capreol*, the president of the defendants' company, made an application to him for the transfer of the stock, and that he offered to transfer it upon the mortgage being paid, or to transfer it to third persons subject to the payment of the mortgage. He says that at the time of giving his evidence he did not know that it was a term of the mortgage that the stock should be transferred, and certainly in the mortgage it is not so expressed in terms. I understand that it is in the power of the plaintiffs and that they are prepared to transfer to the defendants 343 shares of stock.

The defendants make some other objections, suggesting that the non-transfer of the stock had prejudiced them in the way of a projected allotment of shares or stock; and that the non-withdrawal of an execution against lands had been a difficulty in the way of raising money upon a parcel of land not comprised in the mortgage in question. These other objections I regard rather as ingenious than solid. The real reason for resisting the carrying out of the agreement, I take to be the great depreciation in the value of the harbour stock. Still, whatever the motive on the part of the defendants for resisting this suit, it is for the plaintiffs to shew that they are entitled to succeed.

Judgment.

Since the hearing and since I had penned the substance of the foregoing, counsel on both sides have referred me to several cases. I have examined them and some others, and they do not alter the view that I had already taken of the case.

In the absence of fraud on the part of the vendor of land, a deficiency in quantity, small in proportion to the quantity sold, and that which is deficient not being necessary to the enjoyment of what the vendor can make title to, is not a bar to specific performance at the suit of the vendor, with, of course, compensation, (where the price is a gross sum) to the purchaser.

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There are many authorities establishing this position: *Calcraft* v. *Roebuck* (*a*), before Lord *Thurlow*, is one of the earliest. This was followed by *McQueen* v. *Farquahar* (*b*), before Lord *Eldon*, by *Scott* v. *Hanson* (*c*), before Lord *Lyndhurst*, and by several other cases in England, in the United States, and in this Province. I say, in the absence of fraud, for though fraud is imputed in this case in the bill, the imputation is a groundless one.

There are circumstances which make it reasonable in this case that specific performance should be enforced and unreasonable to refuse it. It was the desire of the defendants certainly to acquire the whole of the stock in the harbour company; but they were content if they could acquire 360 shares, because holding such shares would give them virtually the control of the harbour, and as a fact they did obtain from the vendors of the shares the control of the harbour and they have exercised such control, have dealt with the harbour as owners, and have received the rents and profits of it unchallenged up to the present time.

Judgment

The language of *Tindal*, C. J., in *Flight* v. *Booth* (*a*), well defines the cases in which a purchaser will not be held to his bargain, *i. e.*, where there is a misdescription "in a material and substantial point, so far affecting the subject matter of the contract as that it may be reasonably supposed that but for such misdescription the purchaser might never have entered into the contract at all." It is true that in that case the conditions of sale contained a provision for compensation, and I do not say that the court would in all cases enforce specific performance unless the description or representation were untrue to the extent described by Sir *Nicholas Tindal*; but, taking it that Mr. *Cameron* represented that he had 360 shares of stock, as was

(*a*) 1 Ves. Jun. 121.
(*b*) 11 *Ib.* 467.
(*c*) 1 R. & M. 128.
(*d*) 1 Bing. N. C. at 377.

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represented in the contract, it is morally certain that if it turned out in fact that he was able to make title to only 343, the difference would have been regarded as, what in truth it would have been, an immaterial one.

Mr. *Cameron*, it must be conceded, was not free from blame in making this representation; but in judging of it, it must be taken into account that there were in fact 160 shares standing in the name of the trustees, whose agent he was in the management of the trust, and 200 shares in the name of his brother-in-law, Col. *Muter*, which he would probably reckon upon being able to obtain upon their transfer being called for in terms of the contract; and it is to be observed that under the contract only $1000 was to be paid down; and that the purchasers had ten years less a few days for the payment of the balance—a time not expired at the hearing of the cause; and that the contract provided that the vendors would vote at all meetings of shareholders in accordance with the views of the purchasers, provided their security was not thereby impaired.

Judgment.

It thus appears that from the date of the contract continuously, the purchasers have had the possession and exclusive usufruct of the subject matter of the purchase; though as yet they have not obtained the legal title. So that apart from the question of quantity —which appears to me to be, under the circumstances, not a substantial objection to the execution of the contract—the real question is, whether the delay in making title to the purchasers is such an objection.

In regard to the making out of title by the vendor, the Court has always been very indulgent. I take from Mr. *Fry's* book some instances of this. Speaking of references as to title, the learned writer says: "The inquiry is, whether the vendor can make a good title, not whether he could do so at the date of the contract; and therefore he may make out his title at any time

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before the report, and if he can do so he will be entitled to a decree, at least where there has been no unreasonable delay, and time is not material. Accordingly, the Court often allows time for the completion of the title: so in an old case, the Court more than once allowed the vendor time to get an Act of Parliament; and in a recent case, where upon the face of the contract it appeared that there was a difficulty in the plaintiff's title, Vice Chancellor *Wood* refused on demurrer to stop a suit for specific performance, on the ground that the Act of Parliament contemplated had not been obtained. So in another case, the Court allowed the vendor time to procure a small part of the estate; and in another case, allowed a limited time to procure the concurrence of an assignee in insolvency. The Court grants indulgence in point of time for the getting over any difficulties in matters of conveyance, as much where the vendor is the plaintiff, as where the suit is instituted by the purchaser."

Judgment.

I quote also the high authority of Lord *St. Leonards* (*a*): "A seller need not at law any more than in equity, have those things done in regard to title which may properly be effected before the completion of the purchase; therefore at the time of the contract the want of a license to assign where one is requisite, or the neglect to register a deed is unimportant. * * A delay accounted for by the state of the title will not be a bar to specific performance, where the time fixed is not material. Where time is not material and the title is bad, but the defect can be cured, if the vendee is unwilling to stay, the vendor should file a bill to enforce the contract; for it is sufficient if the party entering into articles to sell, has a good title at the time of the decree."

There is certainly this difference against the plaintiffs in the case before me, that at the date of the contract

(*a*) V. & P. 14th ed. 259.

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the vendors had nothing that could be called title to any more than 160 shares. Lord *St. Leonards* says (*a*): "If a man were a mere land jobber, and bought an estate, and before a conveyance, and without having paid for it, carried it at once into the market with a view to profit, that might be considered a case of fraud, and an attempt to sell at an improved price the original seller's estate, and thereby involve him and the sub-purchaser in litigation." This is in reference to the general rule as to damages recoverable by a purchaser on contract of sale; and Lord *St. Leonards* goes on to say: "Short of circumstances amounting to fraud, the case seems to fall within the general rule."

In the case of *Sikes* v. *Wild* (*b*), previous cases upon this point were reviewed, and it was held that in the absence of misconduct, although the vendor had not title, the general rule would prevail. This decision was by *Blackburn* and *Wightman*, JJ., Sir *Alexander Cockburn*, dissenting, and Lord *St. Leonards* expresses his concurrence in the soundness of the judgment (*c*).

Judgment.

The decision applies to the case before me in this way: that the mere absence of title in the vendor when he makes his contract of sale, does not taint his conduct in making the contract with fraud or with misconduct. This case does not fall within the category of land-jobbing transactions, and the mere absence of title in a portion, though a large portion, of the subject of sale does not, in my judgment, disentitle the plaintiff to specific performance.

There is this further point in this case appearing upon the evidence of Mr. *Capreol*, the president, and it seems the manager of the defendants' company, and from his letters to Mr. *Ramsay*, manager of the plaintiffs' company, that there was no repudiation of the contract by the defendants upon the discovery of the real state of the title. Letters are put in of the 21st

(*a*) p. 359. (*b*) 1 B. & S. 587. (*c*) V. & P. 360.

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and 25th of March, 1877, of the 25th and 28th of April, of the 22nd of May, and the 6th of June, in the same year; in all of which Mr. *Capreol* treats the Credit harbour property as the property of the defendants, and does so in correspondence with the representative of the holder of the mortgage given for the purchase money of that property; and he says in his evidence that he must have known at that time that Col. *Muter* and others were in fact the holders of stock assumed to be held by Mrs. *Cameron's* trustees. I rather gather, indeed, from his evidence that he knew this before Mr. *Cameron's* death, if not at a much earlier date, for he speaks of his understanding that Mrs. *Cameron* had "control" of the stock, and that he had perfect confidence in Mr. *Cameron*.

It is true that Mr. *Capreol* was not individually the purchaser of this stock, and that it did not lie with him to affirm or disaffirm the contract, but to put it at the lowest, his course of conduct, evidenced by his correspondence, is cogent evidence that the state of the title to the stock was not material to the purchasers, so as a good title could be afterwards made to them; and is evidence also that the other objections to which I have referred, were not regarded as material, and were in fact only thought of afterwards. If Mr. *Capreol* had been individually the purchaser, his course would I apprehend, have estopped him from making these objections. I refer upon these points to *Sugden* on Vendor and Purchaser, (*a*) and *Dart* on Vendor and Purchaser (*b*), and to Mr. *Fry's* book on Specific Performance.

Statement.

In further evidence that the contract was a subsisting one, is the fact, that, after the assignment of the mortgage to the present holders, the title deeds of the property were placed in the hands of their solicitor. The secretary of the defendants' company, says they

(*a*) 14 Ed. p. 314, ss. 21, 22. (*b*) 4 Ed. p. 970.

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were lent, but his letter of the 8th June, 1877, admits it to be quite proper that they should be held by the plaintiffs as holders of the mortgage.

The case is not without its difficulties, but I think I should run counter to many decided cases, and to the principles established in this Court on questions of specific performance, if I refused specific performance in this case, on any of the grounds set up by the defendants.

Another objection was made which does not appear to me to present any serious difficulty; that objection is, that it was *ultra vires* of the defendants to acquire stock in another trading company. There is, I apprehend, no general rule that one trading corporation cannot hold shares in another trading corporation. Where indeed the holding of such shares would be incompatible with the purposes for which the company was incorporated, there would be an implied prohibition against holding them. The rule is thus stated by Mr. *Brice*, in his book on the doctrine of *Ultra Vires*: "A corporation may deal in the shares of other corporations without express power so to do, provided the nature of its business be such as to render such transactions conducive to its prosperity." If this be correct, we have the statement of the defendants themselves to bring them within the rule; for their answer prefaces their account of the contract of purchase of shares with this allegation: "That the property and the privileges of the said Port Credit Harbour Company being adjacent to the property of the defendants it became important for the defendants to acquire the said property and all the rights, privileges, and franchises of the said company"; and we find that in 1873, the Legislature enabled the two companies to aid one another, and to hold stock each in the company of the other—some evidence that the holding of such stock was conducive to the prosperity of each company.

Judgment.

Whatever doubt may have existed of the power of

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one trading company to hold shares in another, and such doubt did exist as is shewn by the elaborate judgments in the *Mayor of Norwich* v. *The Norfolk Railway Company*, (*a*) it seems to be now settled that the holding of such shares is not *ultra vires*. The question was discussed very fully by Lord *Cairns*, in *In re Barned's Banking Company, ex parte* contract corporation (*b*), and decided by him in favour of the power. This was followed by a very explicit affirmance of the same doctrine by Lord Justice *Selwyn*, in *In re Asiatic Banking Corporation*, the Royal Bank of India's case (*c*). The Lord Justice said, "Now with respect to the first question which has been argued, viz., as to the capacity of a trading corporation to accept shares in another trading corporation, it is sufficient for me to say that I entirely agree with the judgment of Lord *Cairns*, in the case of *Barned's Banking Company*, viz., that there is not, either by the common or statute law, any thing to prohibit one trading corporation from taking or accepting shares in another trading corporation. There may, of course, be circumstances which prohibit or render it improper for a company to do so, having regard to its constitution as defined by its memorandum and articles. * * Looking at the question as a mere abstract question, in my judgment, there is nothing to prevent a corporation from being a shareholder in another trading corporation."

Judgment.

I understand Mr. *Bain's* contention to be, that the acquiring of these shares was *ultra vires* of the defendants' company; and that being so, that the giving of the mortgage for purchase money was also *ultra vires*. I do not understand him to contend that, if the acquiring of the shares was not *ultra vires*, still the giving of the mortgage would be so. I should think such a contention untenable. It is at any rate answered by the judgment of the Supreme Court of

(*a*) 4 E. & B. 397. (*b*) L. R 3 Chy. 105. (*c*) 4 *Ib.* 252.

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Canada, in *Bickford* v. *Grand Junction Railway Company*, (*d*).

My conclusion is, that the contention of the defendants fails upon both points. They are, of course, entitled to an inquiry as to the stock to which the plaintiffs can make good title; that in fact constitutes the mortgage debt, and will have to be proved by the plaintiffs.

DEEKS v. DAVIDSON.

Presbyterian Churches—Church Property—Dissent from Union.

In pursuance of notices duly given from the pulpit by the officiating clergyman, a member of the United Presbyterian body and belonging to the presbytery, a meeting of the congregation was held, at which the members unanimously passed a vote of dissent from the union. *Held*, that such dissent entitled the congregation to hold its property as it had held it before the Act of the Legislature was passed for the purpose of uniting the several bodies of Presbyterians in Canada.

Examination of witnesses and hearing at the Brockville Spring Sittings, 1879.

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

Mr. *Carman* and Mr. *Leitch*, for the defendant.

The facts are stated in the judgment.

(*d*) 1 Sup. Ct. 696.

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Deeks v. Davidson.

SPRAGGE, C.—This case involves the same question generally as the cases of *Cowan* v. *Wright* (*a*), *Hall* v. *Ritchie* (*b*), and *McRae* v. *McLeod* (*c*), which have been decided in this Court, so far as the title to property of the congregation in question is concerned. At the hearing I expressed the opinion that it was proved as a fact in the case that notice was given from the pulpit by the Rev. *W. Davidson*, he being then minister of the congregation, of a meeting to be held on Monday, the 13th of September, to take a vote on the question of dissent from the union, such notice being given on Sunday, 29th August, 1875, and repeated on Sunday, the 12th of the following month; and that a meeting was held in pursuance of such notice on the day named for it, Monday, 13th September, at which meeting a vote was taken, which was unanimous for dissent from the union. I think it proved that at the time of giving such notices and of the meeting, Mr. *Davidson* was a member of the United Presbyterian Body, and belonging to the Presbytery of Brockville. It was made a question, whether the meeting should not have been called by the "temporal committee," but in such case the notice would, I apprehend, be given by the minister from the pulpit, and I take it that the authority of the "temporal committee," assuming it to be necessary, would be presumed, under the maxim, *omnia præsumuntur rite acta donec probetur in contrarium*. I refer upon this point to *Broom's* Legal Maxims (*d*); to *Best* on Presumptions (*e*); to the judgment of Mr. Justice *Story*, in *Bank of the United States* v. *Dandridge* (*f*), and to the case of *Rex* v. *Allison* (*g*). No evidence was given as to the practice in the congregation in the matter of giving notices.

Judgment.

I am prepared, therefore, to hold that the congrega-

(*a*) 23 Gr. 616.
(*b*) 23 Gr. 630.
(*c*) Ante p. 255.
(*d*) p. 974.
(*e*) p. 78.
(*f*) 12 Wh. 169.
(*g*) 1 Russ. & Ryan 109.

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tion did in manner prescribed by section two of the Presbyterian Union Act, 38 Vict. ch. 75, O., dissent from the union contemplated by the Act. But the learned counsel for the defendants, Mr. *MacLennan*, addressed to me a very able argument upon the consequences of the union upon the property of the several Presbyterian churches, independently of the Act; an argument which had not been presented to the Court in any of the other cases arising under the Act. His argument is, that by the union, without any aid from the statute, the property of the different congregations composing the several bodies of Presbyterians in Canada became the property of the United body. The second section of the Act enacts that, upon a congregation dissenting from the union, "then and in such case the congregational property of the said congregation shall remain unaffected by this Act or by any of the provisions thereof," leaving, as it is contended, the property of the congregations to whatever effect, if any, *the fact of union* may have had upon such property.

Judgment.

Mr. *Maclennan* founds his position upon two cases in the Court of King's Bench of Upper Canada, Doe *dem. Trustees of the Methodist Episcopal Church in Kingston* v. *Bell*, (*a*) and Doe *Methodist Episcopal Trustees* v. *Brass* (*b*). In the earlier of these cases, very elaborate judgments distinguished by great learning, research, and ability, (if I may be allowed so to characterize them,) were delivered by the then Chief Justice *Robinson* and Mr. Justice *Macaulay*; those learned judges taking opposite views of the question, and Mr. Justice *Sherwood*, by whom a shorter but able judgment was pronounced, arriving at the same conclusion as Mr. Justice *Macaulay*. When the later case was decided, the Court had been increased from three to five judges. The judgment was delivered by the learned Chief Justice in accordance with a pre-

(*a*) 5 U. C. O. S. 344. (*b*) 6 *Ib.* 437.

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vious decision in a case not reported, and sustaining the opinion of the Chief Justice in the case against *Bell*. In the case against *Brass*, the learned Chief Justice said: "Upon the best judgment that we could form upon the very important question which was discussed in this action, we have given our opinion that it was competent to the conference to make that change in the constitution of the Society which they did make; that the change was accomplished in a manner sanctioned by their code of discipline; and that by the proceeding the religious body did not lose its identity, and has not lost the property which they held before the abolition of Episcopacy." These few words indicate with sufficient clearness the ground upon which the learned Chief Justice based his opinion in the earlier case; and its adoption by the Court in the later case. The learned Chief Justice held that the amalgamation of the Episcopal Methodist body with the Wesleyan Methodist body in England, the abolition of Episcopacy and the substitution of a Superintendent with functions somewhat analogous, the change being effected by a governing body of ministers in which the laity had no voice, made no change in the identity of the body; while Mr. Justice *Macaulay* thought that the identity was preserved to those who held Episcopacy to be an essential, or at least a material part of their organization; and certainly weighty reasons were adduced on both sides in support of the respective views of those very learned Judges.

Judgment.

Both learned Judges, however, or I should rather say all the learned Judges (for in the latter case the Chief Justice delivered the opinion of the Court) concurred in this; that in a question of title to property, the question of identity was *the* material question. Upon that question the Court of King's Bench had material for forming a judgment which I have not. The Court had evidence oral, documentary, and historic, which led the great majority of the Court to the conclusion

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that the identity of the Wesleyan Methodist body with the Episcopal body was established. I have before me no evidence whatever upon that point, that is, the point of identity of these churches the one with the other.

These churches were not united and made one by the statute. When the statute was passed certain authorities of the several churches had *agreed* that the churches should become united, and the statute enacted that, upon the happening of a certain event, the union of the churches should be held to take place, *i. e.*, upon the moderators signing the articles of union. The statute by so enacting recognized the powers of those who had agreed to the union to enter into such agreement, but I have no evidence outside of the statute that they had such power.

Judgment.

In the eye of the law the four churches that agreed to unite and become one, were four voluntary associations of persons—associated certainly for a lawful and highly laudable purpose. I do not know judicially that there was any thing in common between them other than Presbyterianism. How divergent they may have been in faith or doctrine, or in what they held as to church government, or in any other tenets held by them as religious bodies, is unknown to me. I cannot assume that what they held was identical upon these points or upon any of them. The inference would be to the contrary, from the fact that up to the union they remained distinct organizations; and from the fact known to every one in this Province that in every city and in almost every town the two Presbyterian bodies of Ontario had distinct places of worship belonging respectively to each body.

The inference from all this is, that there were points of difference more or less material; and the inference from the *union* is, that by a majority of the members of these churches these differences were not deemed of so vital a character as to outweigh the advantages of

union. Still the difficulty as to identity remains, there is nothing to shew identity in any of these points; the inference is against identity in all, or in all material points, and this is strengthened by the fact that a considerable number both of ministers and people opposed the union; it may be for insufficient reasons, but I have no right to assume it to be so. If I assume any thing upon the point it must be that there was such divergence upon essential points between them and the religious bodies with which it was proposed that they should unite, that they honestly believed that they ought not to identify themselves with them; and this inference against identity is further strengthened by the fact that the Legislature has deemed the case of the opposers of the union worthy of special provision by the enactment of the second section, enabling congregations to reinstate themselves in the position they held before the union.

1879.

Deeks v. Davidson.

There are two cases in this Court which militate against the position that the Canada Presbyterian Church and the Presbyterian Church of Canada in connection with the Church of Scotland are identical. They are *The Attorney-General* v. *Jeffrey* (*a*), and the *The Attorney-General* v. *Christie*, (*b*). In the earlier case land in Cobourg had been conveyed to certain parties and the Kirk Session of the body in connection with the Church of Scotland; then came the disruption in Scotland in 1844, and following it the division of the Church in Canada into two, called for convenience, one the old Kirk, the other the Free Church. The bulk of the Cobourg congregation became adherents of the latter, as is stated in the judgment, almost if not quite to a man, and used the church which had been erected until 1857, there being in the interval no congregation of the adherents of the old Kirk. In that year certain professed adherents of the old Kirk

Judgment.

(*a*) 10 Grant 273. (*b*) 13 *Ib.* 495.

1879.

Le Decks v. Davidson

applied to the trustees for the use of the church for religious worship, and this being refused, an information and bill was filed. If the defendants could have shewn that the Free Church was identical with the church which was the object of the trust, that would, I apprehend, have been an answer. Whether such identity was claimed does not appear, as the Report does not give the arguments of counsel; but such position is negatived by the judgment; the learned Judge, the late Vice Chancellor *Esten*, observing, "It is an undoubted fact that the gift was to a branch of the Church in Canada in connection with the Church of Scotland. That church became divided into two parts, one of which has been erected into a new and different church of which the congregation at Cobourg now enjoying the use of the building in question is part and parcel. It appears to me to be no more entitled to the benefit of the gift than a congregation of the Church of England or of Methodists or Baptists would be."

Judgment.

In the other case the claim was on behalf of adherents of the Free Church, by which body a church had been built on a site contracted to be sold to them, and a congregation assembled and divine service was performed therein. Afterwards "the great body of the congregation (I quote from the judgment of the late Chancellor Mr. *VanKoughnet*,) abandoned their connection with the Free Church; but (the learned Chancellor goes on to say) so long as any one remained to claim the site and church on behalf of the Free Church, the right of the latter body continued, notwithstanding the change of opinion in the body of the members." Here the identity of the two bodies was again negatived.

Further, the union has been on the part of the church in connection with the Church of Scotland, not only with "the Canada Presbyterian Church," but with "the Church of the Maritime Provinces in connection with the Church of Scotland," and "the Pres-

byterian Church of the Lower Provinces." How can I get at identity with them or be able to say that there is no divergence in faith, doctrine, or church government, or if any, that it is not of a substantial character. 1879. Deeks v. Davidson.

There is also another aspect in which the case of the plaintiffs presents to my mind a very serious difficulty. Those who now constitute the united body, went to the Legislature for a sanction to their proposed union, so far as the properties of the several churches about to unite were concerned. They asked that the properties theretofore held in severalty by the several churches, should after the union become the property of the one united body; and they accepted from the Legislature a measure which enabled any congregation manifesting its will, in a mode prescribed, to dissent from the union, and which enacted that therefrom the congregational property of the congregation so dissenting should remain unaffected by the Act.

It seems to me too clear to admit of doubt that the Legislature intended that any congregation so reinstating itself in its former position, should thereupon hold its property as it held it before the union. It was one of the terms upon which the sanction of the Legislature was obtained. The measure of the Legislature was accepted *cum onere*; and it almost savors of bad faith to attempt now to go behind the Act of the Legislature and claim this land, as becoming theirs by the fact and operation of the union outside of and independently of the Act. I do not consider this view necessary to the defendants' case, but it is to my mind an additional reason for denying the plaintiff's claim. Judgment.

In my opinion the plaintiff's case fails, and the bill should be dismissed, with costs.

1879.

McIntosh v. Bessey.

Will—Latent ambiguity—Extrinsic evidence—Postponement of division until death of tenant for life.

The testatrix devised and bequeathed all her real and personal estate (*except her ready money*) to one *M.* for life; and upon the death of *M.*, she directed that all her real and personal estate should be sold; and the proceeds thereof, *together with all her other moneys*, she bequeathed to (among others) the sons and *daughter* of her sister *M. A.* There were at the date of the will two daughters of *M. A.* living: *Held*, that parol evidence was admissible to shew that the testatrix intended to benefit only one of the daughters, and that the evidence shewed that she intended to exclude the other.

Held, also, that the division of the *ready money* was postponed until the death of *M.* the tenant for life.

This cause came on to be heard at the sittings of the Court at St. Catharines, in the Spring of 1879. The evidence was then taken and the cause was afterwards argued at Osgoode Hall before Vice Chancellor *Blake*.

The clauses of the will material to the issues were as follows:—

Statement.

"*Second*—I give, devise, and bequeath to *Peter McIntosh*, of the township of Grantham aforesaid, and who is now working my farm, all and singular all my estate, both real and personal, of what kind and nature soever the same may be, (save and except sufficient thereof to pay my debts, funeral charges, and testamentary expenses, *and save and except ready money*, bonds and securities for money, and bank stock, which I may be possessed of at the time of my death); to have and to hold the same unto the said *Peter McIntosh* to his use for and during the term of the natural life of him, the said *Peter McIntosh*, and no longer.

"*Third*—I will and devise that upon the death of the said *Peter McIntosh*, or so soon thereafter as may be convenient, my executors, hereinafter named, do dispose of all my estate, both real and personal, by either public sale or private sale, as they deem expe-

dient, for the best price they can obtain, and the proceeds thereof, together with all my other moneys, I give and bequeath as follows, that is to say: To the sons and daughters of my brother *John Bessey;* the sons and daughter of my sister *Margaret Appleby; William Jones*, son of my sister *Mary Jones;* and to my cousins *Mary McCombs* and *Jane Dangle*, and *Priscilla Watson*, formerly *Priscilla Parkes*, and in case of their death to their and each of their legal representatives, I give and bequeath to them and each of them in even portions, share and share alike, forever."

1879.
McIntosh v. Bessey.

The testatrix was not entitled to any bonds or securities for money or bank stock, but left a large sum of ready money. At the date of the will and the death of the testatrix there were *two daughters* of *Margaret Appleby* living, namely, *Rebecca Jane Appleby*, and *Mary Patience Livingstone.*

The will was dated 6th March, 1877, and the testatrix died 1st September, 1878.

Statement.

The evidence given to exclude Mrs. *Livingstone* was as follows:—

(1.) *William Elijah Bessey* deposed that in June, 1877, he had some conversation with the testatrix about her will. "She went on to say that *Morgan Jones* not having made good use of what he already had, she had not left him any share of her estate; that *Livingstone* (husband of *Mary Patience Livingstone,*) had been to see her, and she had given him no encouragement, as she understood him to be a dissolute character. She did not intend to leave anything to him or his wife, on the grounds that they had not made proper use of what they already had."

(2) *Peter McIntosh* deposed:—"I have lived in the same house with testatrix for forty-two years. Before her death, after the will was made, she said she would not like to give Mrs. *Livingstone* anything, as her husband would destroy it. About two months before she died, she seemed to regret that she had not left

1879.

McIntosh v. Bessey.

anything to Mrs. *Livingstone*. She said if ever the will was questioned *Mary* must get something as well as the rest. She seemed to think the will had not provided for *Mary*. Before making her will she did not express her intentions as to *Livingstone* or his wife."

Statement.

(3) *John R. Bessey* deposed that *Livingstone* was a man of dissipated habits; that he had a conversation with testatrix about eight years ago, when she said that neither *Livingstone* nor his wife should ever have a cent of her money, if she could help it. Often conversed with testatrix about *Livingstone*, and she always expressed an antipathy to him, and said that it was a pity he had ever got into the *Appleby* family. Saw testatrix the year before she made her will, and appeared still incensed against *Livingstone*.

Mr. *Maclennan*, Q. C., for the defendant *Mary Patience Livingstone*, one of the daughters of *Margaret Appleby* claimed to be entitled to a share of the estate.

Mr. *McClive* for the infant defendant, and Mr. *Haverson*, for one of the adult defendants, resisted this claim.

Mr. *R. G. Cox*, for the plaintiffs.

Mr. *Moss* and Mr. *Walter Cassels* appeared for the other defendants who had answered.

All parties interested submitted that an immediate division of the ready money was intended by the will.

Sept. 11.

BLAKE, V. C.—I must admit that I quite share the doubts of the Chancellor as to the admissibility of evidence of the kind adduced in this case. He, however, has recently considered the question in *Ruthven*

1879.

McIntosh v. Bessey.

v. *Ruthven* (*a*), and has carefully gone over the leading authorities, and has determined that where there is, as here, a latent ambiguity in a will and evidence is given which shews the ambiguity, then, within certain bounds, evidence may be received to explain that which is, by extrinsic evidence, shewn to be apparently a mistake. In the present case it is reasonably clear that the testatrix intended that but one daughter should be by this will an object of her bounty. The married daughter, for reasons set out in the evidence, the testatrix did not feel disposed to assist. The ambiguity is thus explained; and, to a person reading the will, possessed of the facts surrounding the testatrix when she made this disposition, it is plain that the "daughter" referred to was *Rebecca Jane Appleby*. Except for *Ruthven* v. *Ruthven*, and the cases on which it is based, I should have thought the word "daughter," should have been read in the plural, and that both should have taken.

Judgment.

An estate for life is given to *Peter McIntosh* in the property real and personal, with some exceptions as to the personalty. The will then proceeds to dispose of the property upon the death of *Peter McIntosh*; and the executors are authorized to dispose of all the estate real and personal, and "the proceeds thereof, together with all my other moneys," are bequeathed as set out. I am of opinion, that under this clause, no disposition amongst the legatees, other than *Peter McIntosh*, can be made until his death. "My other moneys," must refer to the moneys in existence other than those to come from the sale of the estate referred to as "all my estate, both real and personal." There is to be but the one division, and that amongst those to take at the death of *Peter McIntosh*. The other points were disposed of on the argument. Costs out of the estate.

(*a*) 25 Gr. 534.

1879.

THE CORPORATION OF HOUGHTON v. FREELAND.

Liability of treasurer for money destroyed by fire—Practice—Party exonerated by his own oath.

The defendant being treasurer of a municipality kept his moneys in his house, there being no proper place for depositing the same provided by the municipality, and there being no bank in the county within a distance of thirty-five miles: *Held*, that under these circumstances the treasurer was not liable to make good to the corporation the amount of loss sustained by the accidental burning of his house, and the destruction therein of the moneys of the municipality: and that his own statements under oath, which appeared satisfactory to the Court, were sufficient evidence to exonerate him from liability.

Statement.

This was a suit by *The Corporation of the Township of Houghton* against *William Freeland*, the treasurer of the corporation, and against *Robert Mercer* and *John James Hutchison*, sureties for the faithful discharge of the duties pertaining to such office of treasurer by the said *William Freeland*, and praying, under the circumstances set forth in the judgment, that the defendants might be ordered to pay over the sum of $1965.96, alleged to have been lost by fire in the house of the defendant *Freeland*, but which the plaintiffs claimed had been lost under such circumstances as did not discharge *Freeland* from liability to make good the same.

The cause was heard at the sittings of the Court at Simcoe, in the Spring of 1879.

Mr. *Robb* and Mr. *Livingstone*, for the plaintiffs.

Mr. *Duncombe*, for defendant *Freeland*.

Mr. *W. Cassels*, for defendant *Mercer*.

The bill was taken *pro confesso* against the defendant *Hutchison*.

1879.

Corporation of Houghton v. Freeland.

Sept. 3.

SPRAGGE, C.—The defendant, *Freeland*, as treasurer of the municipality, had in his hands on the 14th October, moneys of the municipality to the amount of $2,089.60. His house was consumed by fire on the night of that day, he being at the time absent from home. His answer to the plaintiffs' claim for the money is, that it was in his house at the time of the fire, and was consumed with the house and most of the furniture; that the moneys of the corporation were always kept there, that this was known to the corporation; that there was no bank in the county nearer than the county town, a distance of thirty-five miles; that the town hall was distant from the county town about thirty-two miles; that the municipality made no provision for the safe-keeping of the money; and that it was necessary to keep a large sum in hand to meet orders made on account of road repairs and other expenses of the municipality.

Judgment.

I do not think, under all the circumstances, that the defendant is chargeable with the loss on the ground of negligence. The principal question then is, whether the money in question was in the defendant's house and consumed with it on the occasion of the fire; and that fact rests upon the evidence of the defendant himself. His evidence was given clearly and consistently, and, as far as I could judge from his manner and demeanour, truthfully. There was nothing to lead to any well grounded suspicion that he had used the moneys for his own purposes, or retained them for his own use, dishonestly using the occasion of the fire to cover a fraud. That was the way the case struck me at the hearing; but before disposing of it, I desired to refer to *Walker* v. *Smith* (*a*), and other cases of that class at the Rolls; and *Hill* v. *Wilson* (*b*), before the Lords Justices, to see if they established any rule against a party exonerating himself from liability by

(*a*) 29 Beav. 394. (*b*) L. R. 8 Chy. 888.

1879.

Corporation of Houghton v. Freeland.

his own oath. None of the cases establish any such rule, nor do I find it intimated by any of the learned Judges who decided those cases that any such rule exists. It becomes then a question of credibility, and I see no sufficient reason for disbelieving the evidence of the defendant.

I dismiss the bill, but I do not give costs against the plaintiffs, because I think it reasonable that they should not accept the statement, not under oath, of the defendant as to the loss of the money. It was due to the municipality that the council should make the loss of a considerable amount of its funds, in the way alleged by the defendant, the subject of judicial investigation; and it is only reasonable that the defendant should bear his own costs of the investigation, under the circumstances.

Judgment.

I cannot part with the case without observing upon the folly and negligence of the municipal councillors of the township from time to time, in providing no means for the safe keeping of the municipal funds, either in the town hall or elsewhere.

1879.

GRIFFITH v. BROWN.

Easement—Absolute title—Statute of Limitations.

The plaintiffs for the purpose of obtaining ready access to the upper part of their house, constructed a platform, stairway, and landing on the outside of their building, and the defendant, the adjoining owner, on whose land these structures were placed, never took any proceedings against the plaintiffs or made any protest against their user of the premises. *Held*, that after the lapse of ten years, the plaintiffs had acquired not only an easement in the premises but a title to the land covered by the platform, stairway, and landing; and the fact that during the time the plaintiffs were in possession the defendant had, for the purpose of carrying out some works on his own premises, temporarily taken up the platform and removed a portion of the stairway, had not the effect of stopping the running of the statute, the acts referred to not being shewn to have been done in assertion of any right on the part of the defendant.

This cause was heard before the Chancellor at the Sittings of the Court at Hamilton, in the Spring of 1879. The facts of the case were briefly these.

The plaintiffs and their predecessors in title were owners of a store situate on Main street, in the town of Welland. The defendant and his predecessors in title were owners of the lands immediately adjoining those of the plaintiffs on which their store was erected. On the defendant's lands, and at a distance of about five and-a-half feet from the plaintiffs' store, had stood for many years a building known as the "City Hotel." More than ten years before the filing of the bill, one of the plaintiffs' predecessors in title, built a staircase on the defendant's lands, as an outside means of access from Maine street to the rooms in the second story; and towards the rear of the store. A platform formed of planks and scantling extended from Main street along the side of the store five or six feet to the foot of the staircase. The platform rested on blocks of wood—not fastened to the ground, but the end of

Statement.

1879.

Griffith v. Brown.

the platform was nailed to the foot of the staircase. At the top of the staircase and connected with and forming part of it was the usual landing. A piece of scantling at each of the outer corners of the landing and let into the ground below supported the staircase, which was further sustained by being fastened to the wall of the store. There was no outer railing to the platform, but the staircase had the usual hand-rail. The platform was "a step up" from the ground. Between the outer limit of the platform and staircase and the hotel there was a strip of land (not claimed by the plaintiffs) about a foot and a half wide. The platform and staircase had been used by the occupants of the store as a means of access from the outside to the rooms in the rear part of the second story for more than ten years before March, 1879, when the defendant tore up the platform and excluded the plaintiffs from access to the staircase. There was a staircase in the interior of the store leading to the same rooms.

Statement.

In the spring of 1877, and before the statutory period had expired, the defendant raised the "City Hotel" a foot or two from the ground, and for the purpose of doing so removed the platform and placed the earth thrown out in the process of raising the hotel, partly on the ground previously occupied by the platform. As soon as the work was finished the defendant restored the platform to its former position, and the plaintiffs resumed their use of it as before. The plaintiffs filed their bill for ejectment claiming title by length of possession to the lands occupied by the platform and staircase. The defendant resisted the claim on the two grounds mentioned in the judgment.

Mr. *James A. Miller* and Mr. *R. G. Cox*, for the plaintiffs.

Mr. *W. Cassels* and Mr. *Brennan*, for the defendant.

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SPRAGGE, C.—It is not questioned that the strip of land upon which the plaintiffs erected a platform and stairway as a means of access to the upper floor of their own house, is the land of the defendant, unless his title is barred by the Statute of Limitations. His title is barred or not according to what is to be regarded as the proper character of the acts of the plaintiffs in erecting and maintaining such platform and stairway; the plaintiffs' contention being that what was done, was done in exercise of an assumed right of property in the land, and was a mode of user of the land by them as owners. The contention of the defendant is, that what was done by the plaintiffs was in the nature of an easement. If the plaintiffs are right, the defendant, is barred by the Statute of Limitations, unless certain acts of the defendant which I will notice presently amount to an interruption of possession. If the defendant is right as to the character of what was done creating or growing into an easement only, he is not barred.

Judgment.

Upon the argument at the hearing I was inclined to think, upon the authority of some cases that were cited by his counsel, Mr. *Cassels*, that the defendant was right in his contention; but upon examining the cases with more deliberation since, they seem to have but little application to the case before me.

Rex v. *Otley* (*a*) and *Culling* v. *Tuffnal* (*b*), were cases turning upon the question, whether certain things put up by a tenant—in the one case a windmill, in the other a barn upon piles—were fixtures or not. I have no doubt that the erections in this case were, and were intended to be part of the freehold.

Keats v. *Hugo* (*c*) was the well known case of the eaves of a house projecting over the land of another, and it was held to give no rights in the land under-

(*a*) 1 B. & Ad. 161. (*b*) Bull N. P. 34.
(*c*) 115 Mass. 204-217.

1879.

Griffith v. Brown.

neath the eaves. *Hoare* v. *The Metropolitan Board of Works* (*a*), was the case of an inn bordering on a common, and a sign-post erected and continuing for forty years on the common itself. It was held that the innkeeper had as an easement a right to have the sign-post where it was, and to repair it when decayed.

In *Lancaster* v. *Eve* (*b*), a wharfinger on the river Thames had driven a pile into the bed of the river. The action was for negligently running against it and destroying it, and it was held, more than twenty years having elapsed since the driving in of the pile, that it might be presumed that the pile had been placed where it was in virtue of an easement with the consent of the owner of the soil.

In *Wood* v. *Hewitt* (*c*), a fender or hatch was placed on a stream, it being erected on the defendant's land. The head note succinctly shews the point: "When a chattel has been annexed by its owner to another's freehold, but may, without injury to the freehold, be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder. Whether, in a particular case it has become so or not, may be a question on the evidence; and a jury may infer, from user or other circumstances, an agreement, when the chattel was annexed, that the original owner should have liberty to take it away again."

Judgment.

It is to be observed that in all these three cases, it was a chattel that had been placed upon what was confessedly the land of another; and all that was claimed was an easement to keep it there. In none of the cases was it claimed that the land in or on which the chattel was placed was the land of the person placing it there; and that what had been done was done in assumed exercise of rights of ownership; and

(*a*) L. R. 9 Q. B. 296. (*b*) 5 C. B. N. S. 717.
(*c*) 8 Q. B. 913.

further, the acts were of the character of encroachment—presuming upon non-interference by the owner, rather than upon any assertion of right. In the last case the principal question was, whether the fender or hatch being placed upon the defendant's land did not become his property, and it was held to be always a matter of inquiry and evidence how a chattel placed upon the land of another became so placed, Mr. Justice *Patteson* observing: "The general rule respecting annexations to the freehold is always open to variation by agreement of parties."

In the same case Lord *Denman* said: "The decision in *Mant* v. *Collins* (*a*), is so far an authority in point of law, as it shews that in a case of this kind it is always open to inquiry how the article came to be in the place in which it is found, and what the parties intended as to its use; and the respective rights may be determined by the evidence on these points." In this case the erection, composed of scantling and boards, was built on the land in question; it is not the case of a chattel or "article" brought and placed there, but "an annexation to the freehold," and it came to be in the place in which it is found in assumed exercise of right to build it there.

Judgment.

When we come to look at the nature of an easement, it seems to me more clear that what was done in this case was not in the nature of the creation or continuance of an easement. I refer to, without quoting from, Mr. *Gale's* book on Easements, 5th ed. pp. 5 and 38, and the authorities to which he refers. The old definition from the *Termes de la Ley* is, that it is "a privilege that one neighbour hath of another by writing or prescription without profit, as a way or a sink through his land," which definition was adopted by the Court, in *Mounsey* v. *Ismay* (*b*), and by Mr. Justice *Bayley*, in *Hewlins* v. *Shippam* (*c*).

(*a*) 8 Q. B. 916, note a.
(*b*) 3 H. & C. at 497.
(*c*) 5 B. & C. 221.

1879.

Griffith v. Brown.

My opinion upon this part of the case is, that the plaintiffs took and held possession of the land on which the platform and stairway were erected as in possession of the land itself, and not as having an easement in the land of another.

The question remains whether anything occurred to interrupt the running of the Statute of Limitations. It appears that defendant did, in the spring of 1877, in order to the more convenient carrying out of some works on his own premises, take up the platform and remove a portion of the stairway before the expiration of the ten years. I do not think that it is satisfactorily made out that this was done in assertion of right; but rather that it was a temporary removal of that, without the removal of which the defendant was unable to carry out his works on his own land.

Judgment

It is well observed in *Darby* and *Bosanquet* on the Statute of Limitations, (*a*): "What may amount in any particular case to discontinuance of possession on one side and commencement of possession on the other must depend very much on the nature of the property, and the particular circumstances," and the same learned writers, in another passage (p. 318), referring to the case of *Tottenham* v. *Byrne* (*b*), say: "It is apprehended that the true test in every case, whether a rightful owner has been dispossessed or not, is that applied in this case, namely, whether ejectment will lie at his suit against another person." I do not think that upon the above occasion there was any dispossession by the defendant of the plaintiffs.

I am of opinion that the defence fails, the plaintiffs establishing their title by possession to the land in question, *i.e.*, to the land covered by the platform and stairway and the landing at the head of the stairway. I mean by this all the land underneath platform, stairway, and landing. The decree will be with costs.

(*a*) p. 216.

(*b*) 12 Ir. C. L. Rep. 376.

1879.

YOUNG v. DERENZY.

Donatio mortis causâ.

The testator during his last illness handed to his wife the key of a cash-box containing sundry papers, together with a promissory note for $400, which he intended to give to her for her own benefit, but the box and its contents remained as much in the possession of the testator as before the alleged gift; and the note, with other papers, came to the hands of the executors after the death of the testator: *Held*, that there had not been a valid *donatio mortis causâ*.

The testator devised to his widow, the present plaintiff, "all the right, title, interest, claim, and demand whatsoever of, in and to" certain lands, being lands comprised in a certain mortgage made by one *J. T.* to the testator for securing $4,000. The bill alleged that the defendants, who were the executors under the will, had collected all the moneys due under and by virtue of the said mortgage since the death of the testator, but had refused to pay over to the plaintiff $500, part thereof; and alleged further, that all legacies under the will had been paid except the moneys secured by this mortgage. Statement.

The prayer of the bill was, that the executors might be ordered to pay over of all moneys received by them on account of the mortgage, and also to assign the mortgage to the plaintiff.

One of the executors answered, setting up that his co-executor had, by mistake, paid over to the plaintiff the residue of the moneys collected from the estate amounting to $746.70 or thereabouts; admitted that he had received the sum of $500 on account of the mortgage, and submitted that he was entitled to retain it. The evidence shewed that the $746.70 was made up of (1) the proceeds of the sale of certain chattels, (2) certain rents and profits of the testator's estate received by the executors, and (3) a promissory note held by the testator for $400, and which had been kept

1879.

Young v. Derenzy.

by the testator in a box along with other papers and securities belonging to him. This note for $400, it was stated in the evidence, had been given by the testator to his wife while on his death-bed, and that he handed to her the key of the box in which it was, but the box and its contents remained in the possession of the testator as before, and it was only after his decease that actual possession of the note was obtained by the wife. Under these circumstances the question discussed was whether there had been a valid *donatio mortis causâ*.

The cause was heard before the Chancellor at Ottawa, at the Spring Sittings, 1879.

Mr. *Fitzgerald*, Q. C., and Mr. *Christie*, for the plaintiff.

Mr. *Maclennan*, Q.C., for the executors.

Mr. *Gormully*, for the infant defendants.

After taking time to look into the authorities,

June 30th.

SPRAGGE, C.—Since this case was before me at Ottawa I have examined a number of authorities upon the point whether there was a sufficient *donatio mortis causâ* of the $400 note. My difficulty was not then, nor is it now, as to the subject matter of the gift. As to that I should follow *Veal* v. *Veal* (*a*), which case itself followed *Rankin* v. *Weguelin* (*b*); but my doubt was, whether there was a sufficient delivery of the note. There was a delivery of the key of the cash box which contained this note, with other papers. *Jones* v. *Selby* (*c*) was cited for this being a good delivery. Before the Master of the Rolls it was held that the delivery of the key of a trunk, with apt words of gift, was a delivery of the trunk and its contents. When the case

Judgment.

(*a*) 27 Beav. 303. (*b*) 27 Beav. 309.
(*c*) Prec. in Chy. 30.

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came before Lord *Cowper* upon appeal, the judgment below was affirmed upon another ground. The delivery of a key has been spoken of as a symbolical delivery of that of which it is the key; but Lord *Hardwicke*, in *Ward* v. *Turner* (*a*), puts it thus: "Delivery of the key of bulky goods where wines, &c., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing, and therefore the key is not a symbol, which would not do."

The observations of *Kindersley*, V. C., in *Trimmer* v. *Danby* (*b*), are also material upon this point. It is of the essence of such a gift that there must be a delivery; mere words without more are not sufficient. The cash box and its contents appear to have remained as much in the custody and power of the husband after this verbal gift, as before; and indeed the note came to the wife from the hands of the executor after the death of her husband; and it does not appear that she ever had actual possession of it in any other way than she had possession of other papers of her husband, until after his death.

Judgment.

I am obliged, therefore, to say that the doubts which I expressed upon this point at the hearing remain unremoved.

I am of opinion, however, that the wife takes a life interest in this piece of personalty under the residuary clauses of her husband's will. There appears to be no question as to debts; and therefore, as between the executors and the infants and their mother, I hold this not to have been an improper delivery of the note. No question is made as to its being a personal chattel, or as to security being given by the widow, and I do not say that any question could have been made.

I disposed of the other questions in the cause at the hearing.

(*a*) 2 Ves. Senr. 443. (*b*) 25 L. J., Chy. 424.

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SILLS v. BICKFORD.

Wharfinger—Lien for wharfage.

It is not necessary that the proprietor of a wharf or quay upon navigable waters, used for the loading and unloading of vessels, should have a warehouse or shed or other convenience for the storage of goods and protection thereof from the weather; and as such wharfinger he is entitled to a lien on goods unloaded at his wharf, for money due to him for wharfage.

Renald v. *Walker*, 8 U. C. C. P. 37, and *Llado* v. *Morgan*, 23 U. C. C. P. 517, referred to, observed upon, and, though doubted, followed.

Examination of witnesses and hearing at Belleville, in the Autumn of 1878.

Mr. *Fitzgerald*, Q. C., and Mr. *Burdett* for the plaintiff.

Mr. *Hector Cameron*, Q. C., for the defendant.

The facts giving rise to this suit are stated in the judgment.

Sept. 3rd. SPRAGGE, C.—The first question raised in this cause is, whether the plaintiff was a wharfinger. I think that point must be determined in his favour. He had a wharf or quay upon navigable waters for the loading and unloading of vessels. His not having a ware-

Judgment. house or shed or other convenience for the storage of goods and protecting them from the weather, shews only that he did not combine the business of a warehouseman with that of a wharfinger.

The course of decision in this Province has been in favour of the right of lien for wharfage. In *Boyd* v. *Maitland* (*a*), the existence of such right was assumed, the language of Sir *John Robinson* being: "Still no doubt he was at liberty to do so," *i.e.*, hold the goods in question by virtue of his lien for wharfage. In a case

(*a*) 16 U. C. R. 311.

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in the following term in the Court of Common Pleas, which was a case for the opinion of the Court, *Renald* v. *Walker* (*a*), it was assumed in the case that a wharfinger had a particular lien, the question submitted for the opinion of the Court being, whether he had a general lien for his charges against *Holcomb & Henderson*, forwarders and common carriers, by whom and in whose name the goods in question, wheat, were delivered at the defendant's wharf. In that case and in a subsequent case in the same Court, *Llado* v. *Morgan* (*b*), the right to lien seems to have been assumed, in the latter case for storage as well as wharfage; but in both the cases in the Common Pleas the assumption was rather on the part of counsel than by the Court.

I apprehend that at common law there was no lien for wharfage. In *Naylor* v. *Mangles* (*c*), Lord *Kenyon* stated the doctrine thus: "That liens were either by common law, usage, or agreement. Liens by common law were given where a party was obliged by law to receive goods, &c., in which case as the law imposed the burthen, it also gave him the power of retaining for his indemnity. This was the case of innkeepers who had by law such a lien; that a lien from usage was matter of evidence." He added that the usage in the case before him, which was the case of a wharfinger claiming a lien for a general balance, "had been proved so often that it should be considered as a settled point that wharfingers had the lien contended for."

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This decision was followed by Lord *Eldon*, in *Spears* v. *Hartley* (*d*), who said he considered the decision in that case set the question completely at rest.

These decisions are cited in some text books as authority for the general proposition that a wharfinger

(*a*) 8 C. P. 37.
(*b*) 23 C. P. 517.
(*c*) 1 Esp. N. P. 109.
(*d*) 3 Esp. 81.

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is entitled to lien; but it is to be observed that these decisions were at the sittings, the one at Guildhall, the other at Westminster. The proof of usage referred to by Lord *Kenyon* must have been of usage at a particular port, probably at the port of London, for as was observed by Mr. Justice *Bayley*, in *Holderness* v. *Collinson* (*a*): "There may be usage in one place varying from that which prevails in another." The defendants in that case were owners of a wharf and warehouse at Hull, and claimed a lien not only for wharfage but also for labour in "handling" the goods in question, and for warehouse rent. The claim for wharfage was not contested. The evidence of usage as to the other items of claim was conflicting. In the face of this the learned Judge said: "It is impossible to infer that the plaintiff landed his goods at the defendant's wharf upon the terms of giving a general lien in respect of those demands." The learned Judge also observed: "Where the usage is general and prevails to such an extent that a party contracting with a wharfinger must be supposed conusant of it, then he will be bound by the terms of that usage. But then it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself by imposing special terms; and he should give notice to his employers of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right of general lien for any thing beyond the mere wharfage."

Judgment.

This reference to wharfage seems to indicate that a lien for wharfage would exist without proof of usage; that, however, was not in question.

There is no evidence before me of usage in relation to lien at the port of Belleville, the port at which the plaintiff's wharf is, or of usage in relation thereto in any port in this Province. I am only referred to the decisions in England and in this Province.

(*a*) 7 B. & C. at 216.

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The plaintiff's claim is not only for wharfage, but for rent or storage, or what would be rent or storage in the case of goods being stored in a warehouse. The bill puts it that the plaintiff received from the defendant in the ordinary course of business, and the defendant delivered and stowed upon his wharf a large quantity of railway iron. This is not established in evidence. The facts as proved are, that one *Brooks* was a contractor with the Grand Junction Railway Company for the construction of their road; that the defendant contracted to supply the iron at so much per ton, the same to be delivered over the rail of the vessel; and that one *McLaughlin*, as agent of *Brooks*, not of the defendant, made a contract with the plaintiff for the wharfage of the iron at five cents per ton. The iron was to be merely passed over the wharf and to be taken away as fast as it could be laid on the track. A large portion was so taken away; another large portion remained on the plaintiff's premises for a long period, some of it for more than a year; and a portion of that so left was afterwards re-shipped by the defendant, he not having been paid for it by *Brooks* or the Railway Company, and having acquired title to it by a proceeding which it is not material to this case to explain, and the plaintiff claims for this rent or storage in addition to his claim for wharfage. So far as the plaintiff is entitled to a lien for wharfage, he is, I apprehend, entitled to it against the defendant, as he would have been entitled to it against *Brooks*. The iron was properly on the plaintiff's wharf and the defendant was a party to its being placed there. The lien for wharfage attached upon its being placed there, and remained attached. The defendant subsequently acquiring title to it, could not have the effect of displacing the lien that had so attached upon it, and so the defendant appears to me to stand upon the same footing as to wharfage as did *Brooks*. The plaintiff claims a lien for wharfage for the whole quantity delivered on

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his wharf, that taken away as well as that left. Such a claim was supported in the case of *Steinman* v. *Wilkins*, (*a*) in the Supreme Court of Pennsylvania, *i. e.*, that the wharfinger should have a lien on what remains with him for the wharfage of all of which that which remains was a portion, and I think this claim is founded in good sense and reason. He is also entitled to a lien for wharfage on that portion of the iron which was reshipped by the defendant, *i. e.*, on the reshipment as well as on the original landing of the same iron.

As to the charge for storage or wharf room or rent, my opinion is, that the plaintiff is not entitled to a lien in respect of it. For that he has only his remedy against *Brooks*, until such time as the defendant reacquired property in the iron, after that he is entitled to charge the defendant for reasonable compensation. The question of lien for storage or warehouse-room, as well as wharfage, was raised in the case of *The King* v. *Humphrey* (*b*), in the Exchequer; and *Graham*, B., was of opinion that the wharfinger was entitled to a lien for both; but the other learned Judges, BB. *Garrow* and *Hullock*, while agreeing to the lien for wharfage, did not agree that there was a lien for warehouse-room. The wharf there in question was in the Borough of Southward, and, therefore, as I understand, in the port of London.

Judgment.

I have already referred to *Holderness* v. *Collinson*. The case of *Dixon* v. *Stansfield* (*c*), was referred to, for the language of Chief Justice *Jervis*, by the late Chief Justice *Draper* and Mr. Justice *Hagarty* in *Rendd* v. *Walker*, The language quoted was "A man is not entitled to a lien simply because he happens to fill a character which gives him such a right, unless he has received the goods or done the act in the particular character to which the right attaches," &c. The prin-

(*a*) 7 Watts & S. 466. (*b*) 2 McC. & Y. 173.
(*c*) 10 C. B. 398.

ciple enunciated is quite as applicable to this case as to *Renald* v. *Walker*. Assume that the plaintiff was entitled to a lien upon this railway iron for what he did in his character of wharfinger, *i. e.*, in receiving it at his wharf and passing it over his wharf, it does not follow that because entitled in that character, he is entitled to a lien for what he has done or suffered in another character, that of warehouseman, and to assign to him that character is placing his position as high as it can be placed; it seems to me the nearest analogy.

In *Renald* v. *Walker* there were charges for "elevating, shovelling, storing, and spouting" grain. As to these, and in reference to these, *Draper*, C. J., said: "Assuming that there was a general lien for wharfage by express or implied contract, I gather that other charges are included, as to which certainly there is no ground for issuing (so in report) any lien," and Chief Justice *Hagarty* referring to the same claim, said "It does not seem to me, as in the language of *Dixon* v. *Stansfield*, as done in the particular character to which the right attaches."

Judgment.

I have quoted only such of the English authorities as bear most directly upon the points in question. The weight of authority is against the lien for anything beyond wharfage, and anything beyond that is negatived in *Renald* v. *Walker*.

In regard to lien for wharfage I am not free from doubt, but, as the claim has been acquiesced in and effect given to it in some cases in this Province, I think it better as a Judge of first instance to give effect to it in this case.

The parties will have no difficulty in framing a decree upon what I have indicated as in my opinion the rights of the parties.

This is a case in which each party should pay his own costs, unless the defendant has made a tender of as much as was properly due to the plaintiff. Apart from that no costs to either party. The plaintiff

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succeeds in only one branch of his case, making upon that in which he fails what appears upon the evidence to have been a claim to a very unreasonable amount. On the other hand the defendant should have tendered as much as was properly due to the plaintiff. If he has done so he should have his costs. If not he should not have them.

Judgment.

I believe an interlocutory injunction was granted, and I suppose upon the usual terms of answering damages. If damages have been occasioned for which the plaintiff should answer there will be an inquiry in regard to them.

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REYNOLDS V. WHITBY RAILWAY COMPANY.

Railway companies—Paid directors.

By a special act incorporating a railway company, it was enacted that the board of directors might "employ one or more of their number as paid director or directors," and by a resolution under the seal of the company, the board of directors appointed the plaintiff, one of their number, a paid director as manager at a salary of $1000 a year, under which appointment $500 accrued due to the plaintiff, but this the company refused to pay, contending that they were liable for expenses and disbursements only:

Held, that, although under the General Railway Act (C. S. C. ch. 66), a director could not hold any office under the company, yet under the words of the Special Act, and the resolution of the board, he was entitled to recover; and a reference was directed to take an account of what was due to the plaintiff, together with costs to the hearing.

Hearing of motion for decree.

Mr. *J. C. Hamilton*, for the plaintiff.

Mr. *W. Mulock*, for the defendants.

PROUDFOOT, V. C.—The only question argued in this case was, whether the plaintiff was entitled to a sum of $500 for services as managing director of the defendants' railway company. Judgment.

The plaintiff was a director of the company, and under the Railway Act (C. S. C. ch. 66, sec. 46,) it was not disputed that as director he could not hold any office under the company, and therefore could not claim a salary for services as managing director.

The Special Act incorporating the defendants (31 Vic. ch. 42, O.,) by sec. 2 incorporated this clause of the Railway Act, save and except so far as varied by any of the provisions of the Act, and by the 12th section of the Special Act it was enacted that the board of directors "may employ one or more of their number as paid director or directors."

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The board of directors on the 1st May, 1869, passed a resolution appointing the plaintiff managing director, at a salary of $2,000 per annum, not to be payable unless the railway was under contract within three months from that date.

That condition not having apparently been fulfilled, the board on 19th October, 1869, passed another resolution appointing the plaintiff managing director, at a salary to be afterwards determined by the board.

On the 6th September, 1871, the board resolved that the plaintiff be and he was thereby appointed a paid director of the company; and to hold and occupy the position of managing director of the railway, exercising the powers and authority usually exercised by managers of railways in Canada, and to hold and occupy such position, until forfeited by such dereliction of duty as in the opinion of the board to disqualify him from holding such position, at a salary of $1,000 per annum, and disbursements until the railway was in actual operation, when such salary should be increased to a reasonable extent, in proportion to what was being paid by other railways of a similar character, &c. This resolution was sealed with the company's seal.

Judgment.

Under this appointment a sum of $500 accrued to the plaintiff for salary and expenses which was passed to his credit in the books of the company on the 23rd January, 1872, by virtue of a resolution of the board, subject to be transferred to his credit in stock. The plaintiff's stock account has long since been otherwise arranged. The defendants, by their answer, say that it has been placed to his credit in the books of the company, but they have never had an account shewing what part of the sum was for services, and what part for expenses and disbursements. They admit their readiness to pay the expenses and disbursements, but deny their liability to pay for services.

The argument for the defendants was, that the resolution was *ultra vires*; that the appointment named the plaintiff as *managing* director; that this was an

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office not contemplated by the statute, that it only authorized a paid director; that as manager he would have duties distinct from those of director, which *qua* director he could not perform; that the payment mentioned by the Act was only for duties as director, *i. e.*, duties they are compellable to perform; and that even if a proper charge, and though the stock account has been otherwise settled, that the plaintiff still owes, or is supposed to owe, something for interest on arrears of calls, which should be set off.

In my opinion the plaintiff is entitled to recover. The special Act evidently contemplated the paid director as one who would have duties to perform different from the other directors; duties that would occupy more time, and require perhaps special qualification, that would not be expected to be possessed by the other directors. Otherwise there would have been no reason for giving the salary. It could not have been intended that the salary was to be given as a gratuity, which would be the effect of the defendants' contention, or perhaps, to carry it out to its legitimate conclusion, the directors might have voted salaries to the whole board, without any special services being required.

Judgment.

There is nothing in the duties of a managing director, inconsistent with his duty as a director, when once the payment of a director is sanctioned. It is well known that in several of the railway companies of the province, the position of manager has long been held by a director.

The resolution of September, 1871, adopts the very language of the Statute, and appoints the plaintiff a *paid director* of the company; it then proceeds to define the duties he was to perform for the salary that was voted, to hold the position and exercise the powers of a managing director. I think they had the power to require the performance of extra duties for the salary, and that the duties they have required are within the meaning and intention of the statute.

If the defendants have any claim for interest on

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arrears, that can be enforced against the plaintiff, it is right that they should be permitted to set it off.

The parties are agreed on the other questions.

There will be a reference to ascertain the amount due to plaintiff, with costs to the hearing; subsequent costs reserved.

CAMPBELL V. THE NORTHERN RAILWAY COMPANY.

Power of railways to arrange with each other—Competing lines.

The Railway Act of 1868, enacts that, "The directors of any railway company may at any time make agreements or arrangements with any other company, either in Canada or elsewhere, for the regulation and interchange of traffic passing to and from their railways, and for the working of the traffic over the said railways respectively, or for either of those objects separately, and for the division and apportionment of tolls, rates, and charges in respect of such traffic, and generally in relation to the management and working of the railways or any of them, or any part thereof, and of any railway or railways in connection therewith, for any term not exceeding twenty-one years, and to provide either by proxy or otherwise for the appointment of a joint committee or committees for the better carrying into effect any such agreement or arrangement with such powers and functions as may be necessary or expedient, subject to the consent of two-thirds of the stockholders voting in person or by proxy," the word "traffic" being interpreted by the Act as meaning "not only passengers and their baggage, goods, animals, and things conveyed by railways, but also corn, trucks, and vehicles of any description adapted for running over any railway."

Held, that the powers of a railway company to make such arrangements were not qualified by a subsequent Act, which conferred similar powers with others, and "provided also that the powers hereby granted shall not extend to the right of making such agreements with respect to any competing lines of railways,"

Under the special powers conferred on *The Northern Railway Company of Canada*, by 38 Vict. ch. 65, D., sec. 61, and the similar powers of *The Hamilton and North Western Railway Company*, conferred on them by 35 Vict. ch. 55, O., sec. 32, those companies are authorized to combine their rolling stock and to work their lines jointly as if they were one railway, under the management of a joint committee appointed by the boards of both companies and to divide the gross revenue after deducting all expenses of working, maintenance, management, and compensation for damages in certain agreed proportions.

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This was a suit by *Charles James Campbell*, who sued on behalf of himself and all other the shareholders of *The Northern Railway Company of Canada* against that Company and the *North Western Railway Company*, the bill in which was filed on 9th June, 1879, setting forth that the defendants *The Northern Railway Company*, were incorporated by the Legislature of the late Province of Canada with power to construct, maintain, &c., a railway extending from Toronto to Barrie and Collingwood as also branch lines; and that in the exercise of their corporate powers they had constructed their railways and had for many years been running and operating the same, and had acquired and were using a large quantity of rolling stock: that the defendants *The Hamilton and North Western Railway Company* had been incorporated by the Legislature of Ontario with power to construct, maintain, &c., another railway from Hamilton to Barrie and Collingwood, and also certain branch railways, and they had in exercise of their corporate powers constructed their railway and had for some time been running and operating the same and had acquired and were also using a large quantity of rolling stock: that the said two railway lines were rival and competing lines, the chief traffic of both being derived from the same localities.

Statement.

The bill further alleged that plaintiff was a shareholder of the Northern and was owner in his own right and as trustee for others of about one-fourth of all the shares of the capital stock of that company, and was also a director of the company: that the corporation of the Northern consisted of holders of shares of the capital stock thereof, and were very numerous, and it would be impossible to make them parties, and the affairs of the company were managed by a board of directors who were elected annually, as were also the affairs of the other defendants. The bill further alleged that negotiations had taken place

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between the two companies for the purpose of combining the rolling stock, plant, and material of the companies and of working and operating both the said railway lines and exercising the franchises thereof under the joint management of both companies for a period of twenty-one years, and they intended immediately carrying such agreement into effect, unless restrained from so doing, and submitted that such contemplated agreement would be illegal and *ultra vires* of both companies; that plaintiff was opposed to such intended agreement, and had resisted the same in every way: and prayed a declaration that such intended agreement was illegal and *ultra vires:* and that the defendants might be restrained from entering into the same, and for further and other relief.

The plaintiff gave notice of motion for an injunction, and, upon the same coming on, it was agreed to turn the motion into a hearing, and the cause according came on for hearing on the 19th day of September, when evidence was taken before the Court the effect of which is stated in the judgment.

Statement.

In addition to the clauses of the contemplated agreement set forth in the judgment the same stipulated that:

"5. Out of the gross earnings to be produced by the working of the railways and from all other the property movable or immovable placed at the disposition of the two companies shall be paid all working expenses as hereinafter defined; and the net surplus, after providing for such payment hereinafter called net earnings, from time to time shall be divided between the companies in manner hereinafter provided.

"6. Under the expression, working expenses, shall be included the following expenses and charges, that is to say:—

(*a*) All expenses of the maintenance of the railways, stations, sidings, buildings, works, warehouses, elevators, appliances, conveniences, real and immovable property, the subject of the management and working

arranged for by this agreement, and of the rolling and other stock, machinery, equipment, plant, and movable property used in the working of the railways or any of them.

"(*b*) All rents or annual sums payable in respect of any railways, warehouses, wharves, or other property, including land leased to or held by either of the companies, which, under the provisions of this agreement shall be subjected to the control of the Executive Committee and including such rent or annual sum as may from time to time be payable under any lease or agreement to or with the Northern Company of or in respect to the said railway of the North Simcoe Railway Company not exceeding $18,000 per annum; but exclusive of any rent, royalty, or other payments in respect of the user of the Hamilton elevator unless and until the same shall be subject to the provisions relating to other like property of the North Western Company.

"(*c*) All expenses of and incident to the working of the railways and the traffic thereon including stores or consumable articles.

"(*d*) All rates, taxes, insurance and compensation for accidents, losses and damages. Statement.

"(*e*) All salaries, wages, commissions and compensations of persons employed in or about or for the working of the railways and traffic including the expenses of the Executive Committee and of their chairman and secretary, and of the auditors, and of the joint London Committee, (if any), and of the London agent to be appointed as hereinafter provided, and all legal parliamentary and all other incidental working expenses whatsoever and including also an allowance of $2,500 per annum towards the payment of the separate secretarial and establishment expenses and directors' fees of the North Western and Northern Companies respectively, (but without prejudice to the amount which either of the said companies may expend on this account) and all other sums whatsoever which are by any clause of this agreement expressly authorized to be paid out of gross earnings.

7. The net earnings in each year of the said term shall from time to time be divided between the companies in manner following, that is to say:—

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"Up to the sum of £80,000 sterling in each year, the same shall be appropriated and paid as to 66¾ per cent. thereof to the Northern Company, and as to 33¾ per cent. thereof to the North Western Company.

"After £80,000 shall have been appropriated in any one year, any additional net earnings of the year shall as to the next £10,000 (between the sums of £80,000 and £90,000) be appropriated and paid to the Northern Company, and as to the next £10,000 (between the sums of £90,000 and £100,000) be appropriated and paid as to 70 per cent. thereof to the Northern Company, and as to 30 per cent. to the North Western Company, and any excess of net earnings over £100,000 in any year shall be appropriated and paid to the Northern Company and to the North Western Company in equal shares.

The agreement further provided for the appointment of a joint committee, to be called "The Executive Committee" the duties of which were pointed out by the agreement, and the 19th clause thereof amongst other things.

Statement.

"Provided also that all engagements and liabilities entered into or incurred by the Executive Committee in the performance of the powers and functions hereby entrusted to them, or by reason of the working shall as between the Northern Company and the North Western Company, and without prejudice to their being provided for out of the gross earnings be deemed and taken to be joint engagements and liabilities of both companies for the performance and satisfaction of which both companies shall be equally answerable, but save as aforesaid nothing in this agreement shall extend to make either of the companies responsible or liable for any of the present or future debts or liabilities of the other of them." Provision was also made for not interfering with existing contracts by either company.

Mr. *Maclennan*, Q. C., for the plaintiff, contended that the contemplated agreement was clearly *ultra vires* of both companies; that the agreement was in fact a partnership, and such an arrangement as the statute expressly prohibited as being made between rival companies.

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Mr. *Blake*, Q. C., Mr. *Bruce* and Mr. *Moss*, for *The Hamilton and North Western Railway Company.*

Mr. *Hector Cameron*, Q. C., and Mr. *G. D. Boulton*, for *The Northern Railway Company.*

Sept. 30th.

BLAKE, V.C.—It was urged by Mr. *Maclennan* that the power of the Northern Railway Company to deal with other lines of railway was controlled by the 2nd section of 41 Vict. ch. 26, which, he contended, should be read as restricting the rights of the defendants, not only as to the arrangements dealt with by this Act, but as to all matters passed upon by earlier enactments. This argument is based on the clause: "Provided, also, that the power hereby granted shall not extend to the right of making such agreements with respect to any competing lines of railways." I think, however, it is perfectly clear that the restriction here found cannot be extended beyond the power granted by the Act, and if, outside of this statute, the railway has the power which it contends has been given to it, this clause does not deprive it of the right to exercise it. This is made the more apparent when we consider that certain powers are awarded to the company by this clause, not theretofore possessed by it, as to tramways and as to purchase, in respect of which the restriction may be intended, and thus force may be given to this limitation of power without depriving the company of powers which it enjoyed when this Act was passed. It is only by implication that this clause could be held to operate, as contended for by the plaintiff, and it is plain upon the authorities that the language of the Act is not wide enough to operate as a repeal of the statutes on which the defendants depend as a warrant for the agreement which the bill attacks: *Maxwell* on Statutes (*a*), *Birkenhead* v. *Laird* (*b*).

Judgment.

(*a*) p. 143 *et seq.*

(*b*) 4 Deg. M. & G. 732.

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An argument may, however, be based on this enactment, that, as here, the "power granted shall not extend to any competing lines of railways," is especially mentioned in those enactments where this restriction as to competing lines is not found, it was not there intended to prevent arrangements in respect of such railways being made.

By section 48 of "The Railway Act, 1868," 31 Vict. ch. 68, D., it is enacted that "The directors of any railway company may, at any time, make agreements or arrangements with any other company, either in Canada or elsewhere, for the regulation and interchange of traffic passing to and from their railways, and for the working of the traffic over the said railways respectively, or for either of those objects separately, and for the division and apportionment of tolls, rates, and charges in respect of such traffic, and generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway or railways in connection therewith for any term not exceeding twenty-one years; and to provide either by proxy or otherwise, for the appointment of a joint committee or committees for the better carrying into effect any such arrangement or arrangements, with such powers and functions as may be considered necessary or expedient, subject to the consent of two-thirds of the stockholders voting in person or by proxy." By sub-sec. 5 of that clause, the word "traffic," is interpreted as meaning "not only passengers and their baggage, goods, animals, and things conveyed by railway, but also cars, trucks, and vehicles of any description adapted for running over any railway;" and the word "railway" "includes all stations and depots of the railway." The power of the Northern Railway Company to make arrangements with other companies is defined in section 61 of 38 Vict. ch. 65, D., "The company may enter into any arrangments with any other railway company or companies for the

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working of their railways on such terms and conditions as the directors of the several railways may agree on, or for leasing or hiring from such other company or companies any portion of their railway or the use thereof or for the leasing or hiring any locomotives or other movable property from such companies, or persons, and generally to make any other agreement or agreements with any other company touching the use by one or the other, or by both companies, of the railway or rolling stock of either or both, or any part thereof, or touching any service to be rendered by the one company to the other, and the compensation therefor; and any such agreement shall be valid and binding according to the terms and tenor thereof; provided that the assent of at least two-thirds of the shareholders present at a general special meeting of the respective companies, to be called for the purpose, shall be first obtained." The power of The Hamilton and North Western Railway in this respect, is found in section 32 of 35 Vict. ch. 55, O., "The company incorporated by this Act may enter into any arrangement with any other railway company or companies for the working of the said railway on such terms and conditions as the directors of the several companies may agree on, or for leasing or hiring from such other company or companies any portion of their railway, or the use thereof, or for the leasing or hiring any locomotives, or other movable property from such companies or persons, and generally to make any agreement or agreements with any other company touching the use by one or the other, or by both companies of the railway or rolling stock of either or both, or any part thereof; or touching any service to be rendered by the one company to the other, and the compensation therefor; and any such agreement shall be valid and binding according to the terms and tenor thereof; provided that the assent of at least two-thirds of the shareholders shall be first obtained at a general special

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meeting to be called for the purpose, according to the by-laws of the company and the provisions of this Act; and the company or companies leasing or entering into agreement for using the said line, may and are hereby authorized to work the said railway in the same manner and in all respects as if incorporated with its own line."

I have set out these clauses in these Acts in full as it is on them that the defendants rely to sustain the agreement which is attacked by the plaintiff. It is said on the part of the plaintiff that the agreement is invalid, (1) as it creates a monopoly, (2) as it creates an unauthorized amalgamation between these companies, (3) as it forms a partnership between them, (4) as it casts upon a committee all the powers and functions of the railways and their boards, (5) as it makes the companies jointly responsible for the acts of each (6) as the powers, under which it is claimed the agreement was made, do not apply to competing lines as are those in question. These grounds adduced on the argument of the case form a wider cause of attack than is presented by the bill, which simply alleges that "Negotiations have lately taken place between the said two companies for the purpose of combining the rolling stock, plant and material of the said two companies and of working and operating both the said railway lines, and exercising the franchises thereof under the joint management of both companies for a period of twenty-one years, and the defendants intend immediately to enter into an agreement for that purpose, and will, unless restrained by the order and injunction of this Honorable Court, carry the said intended agreement into effect." The objection here taken is to the "combining the rolling stock plant, &c.," and to the "working and operating both the said railway lines and exercising the franchises thereof under the joint management of both companies." By clause one of this agreement it is agreed that "the working of the railways

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shall be carried on upon the terms and conditions and according to the tenor of this agreement, under the direction and superintendence of the joint executive committee for the appointment of which provision is hereinafter made, and according to such rules, regulations, and resolutions as shall from time to time be made by the executive committee, and shall be confirmed by the boards of directors of both companies, or not disallowed by the board of directors of either company, or in case of disallowance by the board of directors of one only of the companies shall be confirmed on reference to a referee as hereinafter provided." By clause two it is further agreed that "For the purposes of such working as aforesaid all the locomotives and other rolling stock, vessels, equipment, and plant, and all the stores, tools, and other movable property of *The Northern Company* and of *The North Western Company* shall throughout the said term be used by both companies, and shall accordingly on the date hereinafter fixed for the coming into operation of this agreement, be placed and throughout the said term shall remain at the disposition of the two companies and subject to the control of the executive committee as herein provided." The agreement then proceeds to provide for an inventory being made of the rolling stock, &c., and as to the dealing with the same and as to the stations, sidings, &c., as to the payment of working expenses, &c., and that "working expenses shall include all rates, taxes, insurance, and compensation for accidents, losses, and damages." It provides further for the percentage of net earnings to be received by each company, and for the appointment of the executive committee by the board of each of the railways.

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Clause 13 defines thus the power of the executive committee: "The executive committee for the time being shall have power to make by-laws not inconsistent with the provisions of this agreement for the

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regulation of their meetings and business, including the appointment of sub-committees, the fixing the quorum necessary for the transaction of business, the mode of giving notices, and all other matters which may be necessary or expedient for the due and convenient conduct of their business, but all such by-laws shall, before becoming operative, require to be confirmed by the boards of directors of the companies respectively, or in case of difference between the boards, by the referee as herein provided, with reference to rules, regulations, or resolutions of the executive committee."

Clause 19 further provides that, "The executive committee shall have and exercise all powers and functions which shall be required for enabling them effectually to work in accordance with rules, regulations, and resolutions, to be from time to time made by them, the railways and properties submitted under the provisions of this agreement to their control, and for the purposes aforesaid, shall be entitled and are hereby authorized to act as agents for and in the name of the companies respectively, and may, as occasion requires, or as may be expedient, treat the said railways and properties as being worked or used by either or both of the said companies. Provided always, that no rule, regulation, or resolution of the executive committee shall be deemed to be of any validity, or shall be acted upon unless and until the same shall be confirmed by the board of directors of each of the companies, or unless and until with reference to each of the companies a minute of such rule, regulation, or resolution, shall have been given or forwarded to the secretary or other proper officer, and ten days shall have elapsed from the day on which the same was so given or forwarded, without such rule, regulation, or resolution being disallowed by the board of directors of such company in which case the rule, regulation, or resolution shall have been deemed to have been confirmed by such board of directors; or unless and

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until in case of disallowance by the board of directors, of one only of the companies, the rule, regulation, or resolution disallowed, shall have been referred to and confirmed by the Referee hereinafter provided for; * * * Provided, also, that all engagements and liabilities entered into or incurred by the executive committee, in the performance of the powers and functions hereby entrusted to them, or by reason of the working, shall, as between *The Northern Company* and *The North Western Company*, and without prejudice to their being provided for out of the gross earnings be deemed and taken to be joint engagements and liabilities of both companies, for the performance and satisfaction of which both companies shall be equally answerable, but, save as aforesaid nothing in this agreement, shall extend to make either of the companies responsible or liable for any of the present or future debts or liabilties of the other of them." By clause 20, the executive committee "shall direct and control all receipts and disbursements in respect of the working arranged for by this agreement." Provision is made for the appointment of a Referee to decide any matters referred by the board of directors of either of the companies, or other differences or disputes which may arise, whose decision is to be final and conclusive. The last clause provides for the calling of meetings to ratify the agreement in pursuance of the statutes in that behalf; failing which the agreement was to be of no effect.

Judgment.

The "traffic arrangements" clause of the Railway Act is very wide. It applies to "any railway company." It permits the railway companies to make agreements or arrangements for "the regulation and interchange of traffic passing to and from their railways, and for the working of the traffic over the said railways respectively, or for either of those objects separately, and for the division and apportionments of tolls, rates, and charges in respect of such traffic, and generally in

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relation to the management and working of the railways;" and to appoint "a joint committee or committees for the better carrying into effect any such agreement or arrangement, with such powers and functions as may be considered necessary or expedient."

The clauses in the Act incorporating the defendants, or the amendments thereof, enable them to enter into any arrangements with any other railway company or companies for the working of their railways, or for the leasing or hiring any locomotives, and generally to make any agreement or agreements with any other company touching the use of the railway or rolling stock of another railway, or touching any service to be rendered and the compensation therefor.

It was argued by the learned counsel for the plaintiff that these clauses did not in so many words sanction in all its details the arrangement made between the companies, and that on this ground it was invalid.

Judgment.

In *Winch* v. *The Birkenhead and North Western R. W. Co.* (*a*), much relied on by the plaintiffs, the Vice-Chancellor granted the injunction on the following conclusion at which he had arrived. "It appears to me, although *The Birkenhead Company* are not at all bound to be carriers, that what is called working the line is a duty that is imposed by the Act of Parliament upon them; and it appears to me, therefore, that the agreement is, that they shall part with certain statutory powers which they have no authority to part with, and, moreover, that they are to part with them to a body who, by their constitution, cannot accept them."

The case of *Hare* v. *The London and North Western R. W. Co.* (*b*), in some respects closely resembles the present. There there was an arrangement between two main lines of railway, the one called the West Coast, the other the East Coast, both starting at

(*a*) 5 Dett. & S. 579. (*b*) 2 J. & H. 80.

London and terminating at Edinburgh. There, as here, on the argument it was urged that "it is impossible to read the agreement without seeing that it constituted a *quasi* partnership, and is not a mere arrangement for through traffic, such as is authorized by the Railways' Act. Through traffic means only traffic carried along a series of lines in continuation of one another. It follows, therefore, that the agreement is *ultra vires* and illegal. * * The East route and the West route have not a mile of railway in common. * * It is the same thing to buy off a competing railway; and that is what this agreement is designed to do." For the defence it was there, as here, urged: "Railway companies are carriers, and are at liberty to conduct their business as other carriers may, except so far as they are subjected to express prohibition by the Legislature. There is nothing in any of the Acts to say, that a railway company may not make such arrangements as they consider most advantageous to enable them to make profits in their own proper business as carriers, and this is all that has been done. * * The true principle is, that a company may conduct its business as it pleases, subject only to any prohibition imposed by the Legislature."

Judgment.

In that case, as here, the railways entering into the agreement were not lines in continuation the one of the other, but they ran side by side, and the Vice Chancellor first disposes of this point, using the following language: "With regard to the argument against the validity of the agreement, I may clear the ground of one objection, by saying that I see nothing in the alleged injury to the public arising from the prevention of competition, I find no indication, in the course taken by the Legislature, of an intention to create competition by authorizing various lines. * * It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being, at last, to

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raise the fares to the highest possible standard. * * I must, therefore, dismiss from consideration the arguments founded on the notion that the companies were under any obligation to carry on their traffic with a view to keep up competition, and proceed to the real question on which the legality of this agreement depends. It may be briefly stated thus: There are two lines of connected railways, one forming the west coast, the other the east coast route, and the question is, how far the companies owning these distinct groups of lines are justified in coming to an arrangement by which, having calculated the probable amount of traffic which would in the ordinary course flow over the one or the other route, they agree for a certain period of years, to take this calculated proportion as the basis of their arrangement; and provide that accounts shall be kept on this footing, and that if the actual earnings of either set of lines shall differ from the estimate the difference shall be made good, after allowing for working expenses, by payments from one set of companies to the other." The Vice Chancellor proceeds to quote with approval the following passage from the judgment of Lord Justice *Turner*, in the *Shrewsbury Case* (*a*): "In determining questions of this nature, Courts of Justice, as I apprehend, are bound to consider, not what in their judgment may be most for the interest of the public, but what was the scope and object of the law, which is said to be infringed or attempted to be infringed." He proceeds further: "A good understanding between the different companies conducting this traffic, though it may not in one sense be for the immediate advantage of the public, inasmuch as it may tend to raise fares, is, nevertheless, in the end beneficial, by preventing the ultimate raising of fares, as the consequence of ruinous competition, and also by promoting the convenience of travellers. * * If one company agree with another not to carry

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(*a*) 7 Railw. Ca. 600.

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between particular places, in consideration of having the forwarding of all the traffic beyond those limits, I see nothing objectionable in that. * * In the first place, let me consider what the shareholder's position is. His interest is to gain the largest possible amount of profit. As between him and the directors, if the directors find that (without entering into any foreign speculation) the largest amount of profit is to be made by granting to other companies a certain proportion of their traffic, and securing corresponding advantages to their own company, it is not very obvious that the shareholder is injured. It would be difficult, no doubt, to find in the letter of the law any express authority for such an arrangement, because the company is only authorized to construct its own line, to carry upon it, and to enter into contracts for through booking. There is no specific enactment to enable such an arrangement as I have mentioned to be carried out. Still the question is, whether the general powers of doing what may be necessary to carry on the traffic of the line do not cover the case; and I confess that, but for the authorities on the subject, I should feel much difficulty in saying that there is in such a course anything which a shareholder is entitled to treat as a wrong to himself."

Judgment.

The Vice-Chancellor then considers the authorities, as to which he says there is in them "an unfortunate amount of conflicting opinion," and, following the decision of the four Judges of the Court of Queen's Bench who decided that the contract in the *Shrewsbury Case* was legal, he upholds the arrangement made in the case before him.

In *Midland R. W. Co.* v. *Great Western R. W. Co.* (*a*), the Master of the Rolls, relying upon *Winch* v. *The Birkenhead and North Western R. W. Co.* (*b*), and *Beman* v. *Rufford* (*c*), concluded the agreement was

(*a*) L. R. 8 Ch. 841. (*b*) 1 S. & S. 550. (*c*) 7 Railw. Ca. 48.

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illegal. As stated by the Master of the Rolls, the position of the railways there was: "The *Hereford Company* have given up the entire control of their railway to the plaintiffs; the plaintiffs are to have the stations, to fix the fares, to have their own clerks, their own officers; nay, more, under the provisions of this agreement it is clear that the *Hereford Company*, though it may reserve the power, will not in truth reserve to themselves the real working of the line, or any part of it, or anything upon it. They will have no carriages, receive no fares, retain no stations, hire no servants." In appeal in Chancery this decree was reversed. In that case the arrangement as to fares and the compensation to be awarded to each company was much more open to objection than in the present case. It is thus dealt with by the Court: "It is said that this agreement enables *The Midland Company* to fix their fares—that is to say, the remuneration of the *Hereford Company* is to be dependent upon what the *Midland* themselves will get for the use of the line. I cannot find anything in the Act of Parliament which is to prevent a company from fixing its remuneration in that way; I can see nothing that amounts to a delegation of authority * * It seems to me the only mode in which it can be done conveniently for both companies is, that there should be a division, one of the companies having the carriage of the through traffic; that one of them should fix the whole price from terminus to terminus, and then that the company over whose line the train is going should receive a certain proportion of the whole [illegible] ordance with the mileage. It is said that it is not a toll. I do not know why it is not a toll. I do not know why a sum fixed with reference to the gross receipts is not as much a toll as if it were fixed in any other way." In the following language Sir *Wm. James* shews that an arrangement can be made as to the discharge of claims for compensation made against the companies or either of them.

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"Then, again, it is said there is something in the clause with reference to the claims for compensation, which is in some way against the policy of the law. I am unable to see anything whatever objectionable in that. It provides that the claims for compensation shall be satisfied by the company deriving the profit from the traffic, that is the *Midland Company*, with regard to the through traffic; and the claims for compensation arising from the local traffic, which belongs to the *Hereford* are to be settled by arbitration between them, having regard to the respective profits they were getting from it. I cannot conceive how it can be in any way against any principle or policy of the law that there should be that mode of arrangement for the payment of persons who have claims for compensation between two companies who are jointly interested, and who are in some way or other mixed up in the cause of the injury."

Judgment.

There are some passages in the case of *The Attorney-General* v. *The Great Eastern Railway Co.* (*a*) which shew the inclination of the Courts is not to extend the doctrine of *ultra vires* in cases such as the present. In that case the Master of the Rolls says, (p. 457): "Of course you may take a lump sum, even if it is a contract with reference to the payment of toll, because it would still be a toll. A lump sum would be as much a toll as a separate sum taken on the passing of every carriage." In reference to a section of the Act which it was sought to limit, as it has been sought to limit the section here, Sir *William James* says, at p. 463: "My impression at present is, that I cannot see any limit to the 14th section." On the question of *ultra vires*, the same Judge continues, (p. 480); "It appears to me that, whether as regards a private partnership, a joint stock company, or an incorporated company, in the absence of fraud or deliberate perversion, the majority of managing partners may be trusted in

(*a*) L. R. 11 Ch. Div. 449.

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determining for themselves what they may do, and to what extent they may go in matters indirectly connected with or arising out of their business relations with others. * * I recollect a case of an attempt being made to restrain an insurance company from paying or contributing to losses which were not technically covered by the terms of their insurances, but it was answered by the Court that such liberality was a legitimate mode of preserving and increasing their customers: *Taunton* v. *Royal Insurance Company* (*a*). Where is this notion of *ultra vires* to extend to? Is it *ultra vires* for a railway company to make a profit from the sale of meat and drink at its refreshment rooms? Would it be *ultra vires* for two companies, whose lines are connected, to have joint workshops, for the construction or repair of their rolling stock, or joint depots of coals or other stores; or to enter into a joint contract with such persons as the relators for the hire of rolling stock, and apportion the cost and expenses between themselves, according to the respective train miles run on their several lines? Would it be *ultra vires* for one company to let another company have the use of part of its offices, warehouses, and grounds?"

Judgment.

Lord Justice *Bramwell* thus deals with this question (p. 501): "It is said that because they are not empowered or permitted, they are prohibited; and that they are, therefore, disobeying an Act of Parliament, and so breaking the law. This is, undoubtedly, contrary to one's general idea that, unlike some countries where it seems as though nothing is lawful save what is permitted, here in England everything is lawful save what is prohibited. It is opposed to those free trade and *laissez faire* notions, which are commonly supposed to have something in them, and under the influence of which some people think that England has thriven considerably." (p. 505.) "But the deci-

(*a*) 2 H. & M. 135.

sions have not gone to the extent of saying that nothing can be done but what is expressly mentioned in the Act incorporating the company. There may be a ferry boat to aid railway traffic, book-stalls may be let, refreshment rooms kept, and other things done which may be called ancillary, and subordinate to the main purpose of the railway company, or arising out of or consequent on its existence."

It is now abundantly evident that, while contracts for objects and purposes foreign to, or inconsistent with, the Act of Incorporation are *ultra vires* of the company and will not be allowed to stand, the Court will not be astute to find that the company has been exceeding its power, but will allow it a very considerable latitude as to the mode in which its directors may think it best to carry out the purposes of the Act of Incorporation. I am unable to conclude that this agreement is illegal (1) "as it creates a monopoly," or because (6) "the powers under which it it is claimed the agreement was made, do not apply to competing lines as are these in question." The Acts in question permit an arrangement to be made. Such an arrangement is not limited to lines that are not competing lines, I cannot therefore add to the statute on which the defendants rely a clause which would virtually place there a restriction which the Legislature has not thought fit to insert. Nor can I find the agreement illegal, (2) "as it works an unauthorized amalgamation between the companies," (3) "forms a partnership between them," (4) "casts upon the committee all the powers and functions of the railways and their boards," and (5) "makes the companies jointly responsible for the acts of each." The board of each company is preserved, and it has duties to perform which will enable each company, subject in case of a difference between the boards to the finding of a referee, to control the joint committee.

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There has not been an amalgamation of the boards, but a joint committee having been formed, as prescribed

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by the Act, and without which it would be almost impossible to carry out the joint arrangement, each board preserving its separate existence, passes upon what the joint committee lays before it. If there was not the limited joint liability settled by the agreement, there might be endless disputes between each railway and their officers in case of accidents or wrong being done to those using the railway; it was therefore reasonable to arrange that claims thus arising should be borne as defined by the agreement. The authority to which I have referred shews, that although there may result a *quasi* partnership from the arrangement, yet this does not vitiate the agreement. It was necessary to agree as to the cars, &c., and the agreement being otherwise legal, it cannot be said to be illegal because of the plan, hit upon for interchanging cars, keeping up the stock, and returning and dividing the rolling stock when the twenty-one years expire. It is not a handing over by the one company of its line to the other, but each company preserves a controling power, and by the arrangement seeks for itself to decrease the expense of running, diminish competition, and so increase the profits to be received. I am of opinion that the agreement made is not prohibited by any of the enactments referred to, that it is not illegal on any of the grounds urged, and is but the exercise in a reasonable manner of those powers given by the Legislature to the companies who have entered into the arrangement impeached by the bill.

Judgment.

It was urged by the counsel for the defendants, that the plaintiff had no *locus standi*; that he was a transferee without consideration of the stock he held; that he was merely taking these proceedings, as he had taken steps before the Legislature, to harrass the defendants, and to compel them to buy him off, and not really to terminate the agreement, which he attacked by the present bill. It is true that the plaintiff admits he "got this stock for nothing; that he at the

time thought it was valueless, but thought it probable he could make it valuable by legislation or otherwise; that he then commenced a war with Mr. *Cumberland*, the managing director, in the Court of Chancery, and before the Legislature; that to aid in the war he transferred a part of his interest in the stock to a member of Parliament (presumably to preserve his independence;) who was to aid him in the Parliamentary war, whose name, for obvious reasons, he did not desire to mention, and I did not call upon him to disclose it; that the agreement on the face of it appears advantageous; that if it is economically carried out it might be for the advantage of both railways; that his real ground of complaint is the extravagance of the manager, as to which, however, he made no complaint during the years he was a director on the board, and that the present bill should be for the removal of the manager; that the real meaning of the present bill and of all the proceedings taken was to make the company give something for this stock."

Judgment.

Notwithstanding the admissions made by the plaintiff of his true position, I yet think under the authorities that, as holder of the stock he owns in the *North Western Railway Company*, if the steps taken by the railway companies were *ultra vires*, he has the power to demand the intervention of this Court to restrain such steps. I cannot, therefore, find that the plaintiff has no *locus standi*, but, on the grounds set forth, finding he is not entitled to the relief demanded, I dismiss the bill, with costs.

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FAIR v. YOUNG.

Husband and wife—Fraud.

Where the evidence shewed that a husband had received moneys from his wife, for which she claimed to be his creditor, these moneys having in great part been produced by sale of her lands, and she subsequently obtained moneys from her husband, which she expended in the purchase of land; a bill, filed on behalf of the creditors of her husband, seeking to enforce their claim, against the property so purchased, was dismissed, with costs, the Court being satisfied with the *bona fides* of the dealings between the husband and wife, although there were some slight discrepancies in their evidence.

Statement.

The bill in this case was by *John Fair*, the official assignee of *James C. Young* and *James Griffis*, who had for about three years been carrying on business in partnership at the village of Colborne, against *Jerusha A. Young*, setting forth that *James C. Young* had purchased lot No. 146 in the village of Colborne, in the name of the defendant, his wife; and in the autumn of 1874, the insolvents had paid $266, in respect of the purchase money of said lot, and in reduction of a mortgage made by the defendant to secure the purchase money, which payment was entirely gratuitous and no consideration had ever been given by the defendant therefor, and at the times of such payment the said insolvents were in difficulty and unable to pay their debts in full, as they and the defendant well knew.

The bill further alleged that such payment was made with the view and intent of benefiting the defendant at the expense of the then and future creditors of the insolvents, and to hinder and delay the said creditors in their remedies; and that the defendant refused to repay such moneys to the plaintiff as such assignee though requested so to do; and that she intended to alienate said land; and prayed that the defendant might be ordered to refund the said sum and interest

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to the said insolvent estate, or in default, a sale of the said land or a competent part thereof might be directed.

The defendant answered, denying that her husband had purchased the land for her, and alleged that she had purchased the same with her own funds, her husband acting simply as her agent in reference thereto. The additional facts appear in the judgment.

The cause came on for hearing at the Cobourg Sittings in the autumn of 1878.

Mr. *Cassels*, for the plaintiff.

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

Judgment. Sept. 3rd.

SPRAGGE, C.—I think upon the dealings between the defendant and her husband the moneys received by him in payment of notes taken for stock sold were the moneys of the wife. It had been agreed between them that they should be her moneys, and there was nothing in the way of their coming to such an agreement. It appears indeed that there was consideration for such agreement. Land, the property of the wife, had been sold, the price being $1,250, $200 was paid down, which according to the evidence, was treated as the money of the wife and was lent by her to her husband. A mortgage was taken for the balance, and was taken in the name of the wife.

Assuming that the husband could sell his marital interest in his wife's land, and that the purchase money would be his, as was determined in *Robertson* v. *Norris* (*a*), what was sold here was not the marital right of the husband but the whole estate in the land, and there was nothing in the then circumstances of the husband, or in any other circumstance that appears in evidence, to prevent the purchase money being appropriated to the wife and becoming her pro-

(*a*) 11 Q. B. 916.

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perty; and this was done by the mortgage being taken in her name; and there is no pretence that it was, or that any part of it was in trust for her husband. It was not an extraordinary or unusual arrangement under the circumstances.

The mortgage was for $1,050, of this she received $400 and applied it in part payment of the purchase of a lot of land, the further payment on which of $266 by the husband is in question in this suit. The wife sold the mortgage receiving therefor the balance due upon it, $650 or thereabouts, and this sum, her case is, that she lent to her husband in some three or four advances. The stock sold belonged to the husband, and he being debtor to his wife for these advances she asked that the notes to be taken on the sale of the stock should be made over to her in payment or part payment of what he owed to her. This was done, and she held the notes in her own hands till they fell due, and then handed them to her husband to collect for her. The stock sold for something over $600. A further payment on the mortgage given by the wife for purchase money, was coming due, and she pressed her husband to put her in funds to pay it. The notes for stock fell due, with one small exception, in or about October, 1873; the husband received the money and used it, and made the payment of the $266 out of the moneys of the firm. I have no papers shewing the date of this payment. The bill alleges it to have been in the autumn of 1874. It was probably about that time. There are some little discrepancies in the evidence of the husband and wife, but I take the facts to have been substantially as I have stated them.

Judgment.

The husband went into business in September, 1872, in partnership with one *Griffis*; they became insolvent in September, 1875. At the date of the $266 payment, the result of the evidence is, that the firm was not in insolvent circumstances or had any reason to appre-

hend insolvency. The agreement that the notes taken for stock should be the property of the wife appears to have been made before the husband entered into business. The parties were married in 1850, the land the property of the wife, was sold in 1868. The mortgage taken to her was, I suppose, taken contemporaneously. (I have not the papers.)

The land was 100 acres and was part of a lot of 200 acres, of which the wife and her mother were tenants in common, until the death of the mother, when it became the sole property of the wife by the devise to her of the interest of the mother. It was let to a tenant by the wife and mother, and it does not appear that it had been taken possession of by the husband or his tenants before, (if taken possession of at all) the passing of the Married Women's Act, 4th May, 1859; in that case she held it free from her husband's debts, and "from his control or disposition without her consent in as full and ample a manner as if she were *sole* and unmarried."

Judgment.

That was her estate in the land when it was sold. The land was not absolutely hers, as her husband still had, if they had issue, his tenancy by the courtesy; but the statute had greatly abridged the common law marital rights of the husband. When the husband and wife agreed to convert this land into personalty, they agreed also as to what should be the character of the personalty, they agreed that it should be the property of the wife; and if this could be done, and was done effectually, this purchase money became her personal property with the incidents given to it, and to real property of a wife by the Married Women's Act.

I apprehend that there could be no serious question as to the competency of the husband and wife to make such disposition of the purchase money as was done in this case. To the extent to which it may be assumed to have represented the interest of the hus-

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band it may be regarded as a gift by him to her; and it was doubtless competent to him to make such gift, and the purchase money paid being paid to her, and the balance being secured by mortgage to her, to be paid to her was the mode in which the gift was carried out. The husband's assent to this would, I take it, be presumed. At any rate his borrowing from her the money paid down, and afterwards the money produced by the sale of the mortgage is sufficient evidence of his assent. In short all his dealings in relation to it evidence his assent. That the husband and wife could agree to do all that was done, I think is clear. *Re Miller* (*a*), in Appeal, is authority for it if authority were needed, and there were no creditors, nor was there any other obstacle in the way.

Judgment.

Having got thus far, that the purchase money of the wife's land became, the whole of it, the property of the wife, *Re Miller* may be again referred to for authority that the husband and wife might come to an agreement in regard to it that she might become his creditor upon her lending it to him. In short, all the subsequent dealings between them stand upon the same footing and were valid upon the same authority.

In regard to the payment of the $266 in question it was a payment by a debtor to his creditor, and the only peculiarity about it was that it was paid by a partner out of partnership funds. The wife knew that the husband had not in his hands at the time any moneys of hers; whether she knew that the $266 was taken from partnership funds, does not appear; but if she did, she would not see any wrong in it, nor would there necessarily be any wrong in it. He would, as a matter of business, charge himself with the amount in the partnership books. It does not appear that his partner found fault with him; and the busi-

(*a*) 1 App, Rep. 393.

ness of the firm appears from the evidence to have been then in a sound condition. 1879.

In my opinion the plaintiff's case fails, and the bill should be dismissed, with costs. Fair v. Young.

ELLIOTT v. BAIRD.

BAIRD v. ELLIOTT AND SHEARD.

Riparian proprietor—Mill owner.

The owner of the banks and bed of a river (not a navigable one) may sever them and deal with them as with any other real estate.

The owner of the banks and bed of such a river made a tail-race through his land drawing water for the purposes of his mill from the river, which he, by means of this tail-race returned to the river at a point lower down the stream, but where the bed of the river was owned by him. Subsequently the owner conveyed the land through which the tail-race ran: *Held*, that such tail-race could not be di· ·ed, but that the owner of the bed of the river was entitled to .e the water in the tail-race discharged into the river at the point where it originally was discharged.

Such a proprietor made a conveyance of a portion of the property to a manufacturing company, reserving the "free use of two water-courses over the said parcel of land for conveying away the water from his grist mill * * * one of the said water courses entering the said parcel of land on the side next the grist mill * * * and the other water course running along the south end of said factory and passing under the flume, and being twenty feet in width * * * with the exception of the space occupied by piers, or abutments, for supporting the flume, which, however, must not be so built as to obstruct the free passage of the water as aforesaid." It appeared that at the time of the conveyance the water course in question at one point was of the width of twelve feet only.

Held, that this did not entitle a party claiming by mesne conveyance from such proprietor to have such water course of the width of twenty feet throughout its entire length.

The facts giving rise to the present suits were substantially as follows: Statement.

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Statement.

Prior to the year 1850, one *Daniel Shipman*, was the owner in fee of the land on which the dam in question was erected. He was also the owner of the bed of the river Mississippi. At the place in question *Daniel Shipman* constructed the dam, and also erected two mills; the first mill erected was at the upper part of the dam. This mill was fed by means of water drawn through a flume from the dam, which water was carried back to the river Mississippi at a point considerably below the dam, and thence flowed into the river. Subsequently another mill was erected further down the dam, and this mill was on the 23rd of June, 1851, conveyed to the Ramsay Woollen Manufacturing Company. In the deed of conveyance conveying this mill to the company, there was the following reservation: "reserving, however, to the said *Daniel Shipman*, his heirs, executors, administrators, and assigns, the free use of two water courses over the said parcel of land for conveying the water from his grist mill before mentioned; one of the said water courses entering the said parcel of land on the side next the said grist mill, and running through under the factory occupying ten feet in width and the other water-course running around the south end of said factory, and passing under the flume, being twenty feet in width and five feet in depth at the side next the factory, and decreasing in depth outwards according to the level of the ground, with the exception of the space occupied by piers and abutments for supporting the flume, which, however, must not be so built as to obstruct the free passage of water as aforesaid." By various mesne conveyances, the property conveyed to the Ramsay Woollen Manufacturing Company, subsequently became vested in *Elliott* and *Sheard*, the defendants in the second named suit. On the 21st of April, 1852, *Shipman* conveyed the mill first erected to one *William Riddell*. The plaintiff *Baird* was lessee of the mill. By various other conveyances the plaintiff *Baird* became the owner

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in fee of the land fronting on the river Mississippi. Among other parcels was the land through which the tail-race from the mill constructed higher up the dam, discharged itself into the river.

Elliott and *Sheard*, being the owners of the mill deeded to the Ramsay Woollen Manufacturing Company, constructed a lower wheel for the purpose of giving additional power for working the said mill. In order to work that wheel, *Elliott* constructed a dam across the tail-race at the front where the water from the tail-race entered the river Mississippi; and by this means the waters of the tail-race were diverted and caused to flow to the wheel so constructed and entered the waters of the river at a point lower down.

The plaintiff *Baird* contended that the tail-race having been constructed by *Daniel Shipmen* as far back as the year 1852 and the deed conveying the mill to the Ramsay Woollen Manufacturing Company reserving the right for this tail race, and he being the proprietor of the land adjoining the river through which the tail-race discharged itself, he was entitled to have the waters of the tail-race flow free and uninterruptedly into the river Mississippi by its original channel. *Elliott* and *Sheard* on the contrary contended that the tail-race being an artificial channel, they had a right to divert it. The defendants *Elliott* and *Sheard* also constructed a wool shed over the tail-race, whereby the tail-race was narrowed to the width of about ten feet. It was contended by *Baird* that he was entitled to have the tail-race of a width of twenty feet from its commencement to its end.

Statement.

The first suit was the suit brought by *Elliott* and *Sheard* against *Baird* to restrain him from throwing ice into the tail-race; his allegation being that this ice was carried to the lower wheel constructed by *Elliott*. The defence set up was that *Elliott* had no right to construct the dam across the tail race, and that it was by reason of the construction of the dam that the ice

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was diverted; that if the tail-race were left free the ice would be readily carried into the river Mississippi.

The defendant *Baird* also prayed by way of cross-relief that the dam might be removed, and that it might be declared that he was entitled to have the waters of the tail-race flow uninterruptedly through his land into the river.

The other bill was filed by *Baird* against *Elliott* and *Sheard* to restrain them from running the wool shed across the tail race and the complaint made was that by reason of such erection the waters of the tail-race were penned back and flooded the engineroom of the mill of which he was the lessee.

The two causes came on together for the examination of witnesses and hearing at the Brockville sittings in the autumn of 1878.

Amendments were made in order to meet the facts which occurred subsequently to the filing of the answers.

The foregoing statement of facts together with those set forth in the judgment it is believed shew sufficiently the points in issue.

Mr. *W. Cassels* for *Baird*.

Mr. *Bethune*, Q.C., and Mr. *Jamieson* for *Elliott* and *Sheard*.

Judgment. April 29th.

SPRAGGE, C.—The grievance complained of in the first named suit is the throwing of ice, dirt, and rubbish, into the tail-race, to the injury of the plaintiffs in regard to their factory, situated near the south bank of the Mississippi river. In the bill in which *Baird* is plaintiff the complaint is the construction by the defendants of an archway on their own land, which he says so obstructs the flow of the water in the tail-race as to dam it back into the cellar of *Baird's* factory: that the archway built by them is too narrow,

and does not leave sufficient space for the free passage of the water, and he prays for its removal. I will deal first with the case made by this bill. 1879. Elliott v. Baird.

The properties owned by all these parties were formerly the property of one *Daniel Shipman*, and in conveyances made by him he made reservations in regard to the water used in his mill and factory, and its free exit after use to the river. In his conveyance of the 23rd of June, 1851, to the Ramsay Woollen Manufacturing Company he makes two reservations, as follows: "Reserving however to the said *Daniel Shipman*, his heirs, executors, administrators, and assigns, the free use of two watercourses over the said parcel of land, for conveying away the water from his grist mill before mentioned, one of the said watercourses entering the said parcel of land on the side next the said grist mill, and running through under the factory and being ten feet in width and six feet in depth, and the other watercourse running along the south end of said factory and passing under the flume and being twenty feet in width and five feet in depth at the side next the factory, and decreasing in depth outwards according to the level of the ground, with the exception of the space occupied by piers or abutments for supporting the flume, which however must not be so built as to obstruct the free passage of the water as aforesaid." And by the same conveyance he granted to the Ramsay Company "the right and privilege of drawing water from his dam for their necessary uses; and of allowing it to be discharged into the stream below without obstruction;" and in another conveyance made by him on the 21st of April, 1852, to one *William Riddell*, after the description of the property conveyed is the following: "Having free and uninterrupted access to the river so as to secure a sufficient supply of water and a free and uninterrupted tail-race for carrying off the waste water, the said *Allan McDonald* to have the privilege of an uninterrupted tail-race from his cloth Judgment.

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factory, and the said *William Riddell* to enlarge the tail-race from his premises so as to do no damage to the premises below as far as the new mill flume." The tail-race here referred to I understand to be the same as is secondly referred to in the grant to the Ramsay Company, and it is the one that is in question in this case.

It is put in *Baird's* pleadings that he, as owner of the factory by mesne conveyance from *Daniel Shipman*, is entitled to have this tail-race twenty feet in width throughout its whole course to the river, but the watercourse is not reserved in these terms. The only mention of twenty feet is where it is described as being of that width at the side next the factory; and we have the evidence of *William Riddell*, who knew the place since 1847, that the width of the tail-race at the site of the archway used to be less than twelve feet; that he has crossed it there on a plank of about that length; and another witness gives evidence to much the same effect.

Judgment.

Other witnesses give evidence as to the fall of water between the archway and the factory, and the rapidity of the current and other circumstances, which shew that it is scarcely possible that the water could be backed by the archway upon the floor of the factory. The evidence of experts in hydraulics, and of persons well acquainted with the locality, is against it; there is evidence, too, of the water in the factory being attributable to other causes: and *Baird* himself states that water has not been on the floor of the factory since the building of the archway; and further, there is evidence that the archway is of sufficient capacity to pass all the water that can pass through the mills whose waste water passes through the tail-race. The weight of evidence is, in my judgment, certainly against the case made by the bill filed by *Baird*.

In the answer filed by *Baird* to the bill filed against him by *Elliott* and *Sheard*, there is, besides the case of

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obstruction by the archway, cross relief prayed, upon quite other grounds arising out of rights alleged to exist in *Baird* independently of his property in the factory.

The water for the supply of the mills and factories owned by these parties is drawn from the river, above *Baird's* factory, above a factory owned by one *McPhee*, of which *Baird* is lessee, and above a factory owned by one *McDonald*, and the tail-race in question is the watercourse for the exit of all the waters used in these factories. The waters of the tail-race if emptied into the river in the direct, or nearly direct line, of its course would issue under a timber slide which runs in a south-westerly direction.

By conveyances which are put in *Baird* appears to be the owner of what is described as a plot of ground in the village of Almonte, commencing at the north-west side of the slide and at the head thereof, thence down the slide 182 links to a road; thence 115 links along the road to the centre of the stream, thence up the centre of the stream to a point opposite the head of the slide, thence at right angles to the place of beginning. The upper part of this, somewhere about two-thirds, is composed of the southerly side of the bed of the river. The waters of the tail-race, if they flowed out in a nearly direct course, would flow into this part of the bed of the river. *Baird* claims that he is a riparian proprietor; that the outflow of the tail-race would be in that course if not diverted, and that it is diverted by *Elliott* and *Sheard*.

Judgment.

What has been done is this. There was no artificial obstruction in the way of the outflow of the waters of the tail-race for more than twenty years after the construction, or about the year 1847. Since that time, and in or about the year 1870, according to my notes of the evidence, *Elliott* and *Sheard* placed a dam composed of two boards, each about ten inches wide and about fifteen feet in length opposite the direct outflow of the

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waters of the tail-race, the height of this dam being thus about twenty inches. The waters generally flow over this dam, sometimes to the a depth of several inches; at other times the water is some two or three inches below the top of the dam. *Elliott* and *Sheard* have a factory to the west of what would be the direct outflow of the tail-race, and the water wheel is just a little south of the slide. There is some conflict of evidence as to what would be the natural course for the water to take. A large proportion of it takes, or is made to take, a course to the westward and feeds the water-wheel of this factory. The weight of evidence is that a large proportion would flow in a direct course over the rock, and under the slide into the river; this is variously estimated from one-half to more than half, as high as three-fourths. It appears to be the necessary effect of the dam, the water standing at the height it does against it, to pen back the water and conduct it to the water-wheel of this factory; and this it is evident was the purpose of the dam and the object of its constructors. There is a very considerable fall from the bed of the tail-race to the water-wheel, and it is said a corresponding fall on *Baird's* property on the north side of the slide. There is some evidence of the removal of rock by blasting, in order to divert the natural flow of the tail-race waters and conduct them to the water-wheel, but this is denied, and I take it not to be established. The water used as motive power in the factory finds its way into the river considerably lower down, and below the fall which gives the water power.

Judgment.

Such are the facts upon this branch of the case. Mr. *Bethune* denies that, assuming these facts to be established, *Baird* has any right in respect of the issue of the waters of the tail-race into the river. He says that *Baird* has no land, *i. e.* land not covered with water, at the point in question, and has therefore no riparian rights.

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It is not denied that *Daniel Shipman* had rights as a riparian proprietor. The grant to him is not before me, but I suppose I may assume his right to rest upon a grant of land to the river, or some equivalent expression; and such grant would carry the exclusive right and title of the grantee to the middle thread of the stream. It is true that the grant of land does not carry with it the ownership of the bed of the stream unless the stream is in contact with the land granted, but where there is such contact the bed of the stream passes just as much as the dry land along which the stream runs; the proprietorship in the grantee is the same as to both, subject of course, as to the latter, to certain easements of the public in respect of the use of the waters of the stream; but the title to the soil is the same.

The title to the soil having become vested by grant, it is an incident to such title that the owner may alien that of which he has title. I see nothing in the nature of the property to prevent it, nor any principle against it; nor am I referred to any authority against it. If, therefore, there were no judicial decision one way or the other I should hold upon principle that the owner of the banks and bed of a river, (I of course except navigable rivers,) may sever them, and otherwise deal with them as he may with any other real estate. I do not find any English case upon the point. There is indeed a passage in *Hargrave's* Law Tracts (*a*), which looks in that direction. The learned writer, after saying that *primâ facie* the owner of the adjoining land is entitled to go to the middle of the stream, says that the stream may be separated from the adjoining land by prescription, so that one man may own the bed of the stream and another the adjoining lands. Mr. Justice *Washington*, in *Den* v. *Wright* (*b*), concluded that if they could be separated by prescription

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(*a*) p. 5.

(*b*) 1 Peter C. C. at 70.

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they could be by grant; the former always presupposing the existence of the latter at some past period of time, and in this I agree.

The point was expressly affirmed in the Supreme Court of Massachusetts, in *Knight* v. *Wilder* (*a*), in which case Chief Justice *Shaw* uses this language in speaking of riparian proprietors: "No doubt the owner of land so situated having himself an estate in fee in the bed of the stream to the thread of it, may sell his estate in the bed of the river, without his upland, or his upland, without the bed of the river; and such conveyance will be good and available. It follows as a necessary consequence, that such owner may convey a part of his estate in the bed of the river and may divide it in any form, or by any lines which he may think proper;" and in this also I agree.

Judgment.

I take *Baird*, then, to be a riparian proprietor of that part of the bed of the river which is comprised in the description which I have quoted. If it can however be pointed out that *Shipman* in any conveyance under which *Elliott & Sheard* claim has granted to the river, or in any shape that would entitle his grantee to the bed of the river, *Baird's* claim under the conveyances which he produces will fall to the ground; but unless this be done I must hold *Baird* entitled to the rights of a riparian proprietor.

If a riparian proprietor, he is entitled to the natural flow of waters of the river over that part of the bed of the river of which he is proprietor, just as *Daniel Shipman* himself would have been if he had remained its proprietor, subject however to such modification of his right as had been established against him by the acts of *Shipman*, or otherwise.

The position, then, of *Baird* would be this: a portion of the waters of the river has been diverted at a point above certain mills and factories that I have named,

(*a*) 2 Cush. at 209.

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and, after supplying them, flows through the tail-race and is restored to the river. This diversion has subtracted so much from the volume of the waters of the river, which otherwise would have flowed over the bed of the river to the middle thread of which *Baird* is entitled for a certain space. It was the right of the grantees of *Shipman*, from whom *Baird* derives title, to have the waters diverted restored to the river, unless, which is not shewn, there was something to interfere with that right. As a fact these waters were restored to the river at a point of which *Baird* has become proprietor. That was the state of things when those from whom *Baird* derives title acquired their title. In this way, according to my judgment, *Baird* has the right of a riparian proprietor at the point in question; and the board dam is an interference with his rights, which entitles him to come to this Court. I am not prepared to say that the owner or lessee of the *McPhee* factory has, as such, any rights as to the point of issue of the waters of the tail-race.

Judgment.

As to any right in *Elliott & Sheard*, there would be great difficulties, I apprehend, in the way of their establishing any beyond the user of the water while it flows; quite a distinct thing from a right to have the waters flow there. But, assuming in them a right to have the waters flow there, that would give them no right to interfere with the rights of *Baird* as a riparian proprietor, on the north side of the slide.

As to the practice of throwing ice and dirt into the tail-race, charged against *Baird*, the evidence is weak to establish the charge; and there is evidence that if it does not pass directly into the river its detention is due to the board dam, improperly erected by *Elliott & Sheard*; and I do not think *Elliott & Sheard* establish a case for relief on this head.

The decree will be that *Baird's* bill be dismissed. As to *Elliott & Sheard's* bill, that they establish no case for relief: As to the cross relief prayed, that

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Baird is entitled to a decree for the removal of the board dam.

As to costs, *Elliott & Sheard* are entitled to their costs of resisting *Baird's* bill, and *Baird* to his costs of making and sustaining his case for relief as a riparian proprietor. The evidence is a good deal mixed up, the same witnesses speaking to more than one branch of the case. It will be best and do no injustice, that each of the parties bear the cost of his own witnesses.

I confess I do not understand why *Baird's* case, as a riparian proprietor was not made by his bill. It would have saved it from dismissal. The case was, indeed, scarcely a case for cross relief, but no objection was made on that score, and it was well that all the matters in question between the parties should be heard and disposed of together.

Judgment.

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THE WESTERN ASSURANCE COMPANY v. THE PROVINCIAL INSURANCE COMPANY.

Reinsurance—Agent of company—Nonpayment of premiums.

The agent of the plaintiffs effected a reinsurance with the agent of the defendants, but did not pay the amount of the stipulated premium, the plaintiffs alleging that it was the custom of agents to give each other credit for such premiums, and settle at the end of the month, when the balance, if any, was paid by the one to the other. The existence of this custom was denied by the defendants, and it was shewn that the defendants required all premiums on reinsurances to be paid to their agents in cash, the same as in ordinary insurances, before the insurance should be considered binding, and this was known to the agent of the plaintiffs. A loss having occurred, the plaintiffs sought to compel payment of the amount of such reinsurance, but the Court, under the circumstances, *held* that the defendants were not bound by what had taken place between the agents, and dismissed the bill with costs.

Statement.

The bill in this case was filed by *The Western Assurance Company* against *The Provincial Insurance Company*, to recover the amount of two policies of insurance that the plaintiffs alleged they had effected with the defendants on certain property in the city of St. John, N. B., which was destroyed in the great fire. The bill alleged that on or about the 26th of February, 1877, the plaintiffs insured certain persons of the name of Messrs. *Scofield* and *Beer*, of the city of St. John, to the extent of three thousand dollars on certain goods and merchandise belonging to the said *Scofield* and *Beer*; that on the 10th day of June, 1877, the said firm of *Scofield* and *Beer* applied to the plaintiffs' agent, in the city of St. John, for a further insurance of $2,000 on the said goods and merchandise, but inasmuch as the plaintiffs' agent was precluded by his instructions from taking a larger risk upon the property without reinsuring it, he delayed accepting the application until he could effect such reinsurance. The plaintiffs said agent applied to the

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general agent of the defendants' company in St. John, one *Henry H. Reeve*, for a reinsurance of $1,000 on the risk already taken, and for a reinsurance of $1,000 on the new risk offered. The defendants' agent thereupon inspected the said risk in company with one *Boyle*, who was the inspector of the defendants' company, and happened to be in St. John at the time and the risk was approved of by them. The plaintiffs' agent thereupon accepted the further risk from Messrs. *Scofield* and *Beer*, and issued a policy to them for the sum of $2,000. The plaintiffs' agent afterwards sent formal applications in writing to the defendants' agent for the two reinsurances. The defendants' agent accepted the said two risks and entered the application for reinsurance in the books of his company; and on the 16th day of June duly forwarded them, after they had been indorsed by the inspector as approved of by him, to the head office of his company in Toronto for approval. The defendants' company approved of the two risks at their head office, and forthwith executed and sent to their said agent *Reeve*, the two policies of insurance for the same. The said policies were executed and dated on the 19th of June, 1877. The goods and merchandise insured by the plaintiffs for the said *Scofield* and *Beer*, and which they intended to reinsure with the defendants, were destroyed by fire on the 26th of June, 1877, and the plaintiffs after due proof of loss duly paid to the said *Scofield* and *Beer* the full amount of the two insurances that they had effected with them amounting to $5,000. The two policies of reinsurance issued by the defendants and forwarded to their agent in St. John, duly arrived in the City of St. John on the 21st of June, but their agent the said *Reeve* acting under instructions that he had received from their inspector, the said *Boyle*, refused to hand over to the plaintiffs' agent the said policies, and on behalf of the defendants, repudiated all liability in respect thereof

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on the ground that the premiums had not been paid by the plaintiffs' agent. The plaintiffs alleged that a custom existed among insurance companies in Canada, and especially between the plaintiffs and defendants, not to pay the premium upon reinsurances effected with each other, at the time of effecting same, but that the agents of the different companies credited each other with premiums to be paid and charged each other with premiums due, and struck a balance and settled with each other, at the end of every month. The plaintiffs also alleged that this was the way they had always carried on business with the defendants at the head office in Toronto. They also alleged that when the policies were executed and issued at the head office in Toronto, the defendants knew very well from this universal custom and course of dealing between companies, that the premium had not been paid; and that the policies were issued under that understanding. The plaintiffs claimed that they were entitled to have the said two policies delivered to them, or to be treated in this suit as if the same had been so delivered to them, and they further claimed that the condition on the back of the policy as to payment of premium, was never intended to and did not apply to reinsurances between companies, and therefore the plaintiffs claimed to be paid the full amount of the said two reinsurances.

Statement.

The defendants, by their answer, admitted the application for the said reinsurances and the transmission of the same to the head office in Toronto, and the acceptance of the risk there and the issue of the policies for such reinsurances; but they claimed that the said policies were null and void, and of none effect, because the premiums had not been paid. They denied that the agent *Reeve* was a general agent of the company, or had power to alter or waive any condition of the company. They stated that by the conditions of the policy no insurance should be considered as binding

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until the actual payment of the premium, and stated that no premium was ever paid to them or their agent for the said reinsurance. They denied that the policy had been issued from the head office on the supposition that the premium had not been paid. The defendants further denied the existence of the custom contended for by the plaintiffs as to a monthly account being kept between agents and companies with regard to reinsurance business. They admitted that such might be the case, but that it was only done for the convenience of the individual agents, and that although this happened to be the manner of doing business between companies at their head offices, such a thing was not recognized or allowed by the companies at their agencies. They further stated that their inspector, the said *Boyle*, instructed their agent at St. John not to accept this particular reinsurance unless the premium was paid, and that he so informed the plaintiffs' said agent.

Statement.

The case came on for hearing at Toronto, when the plaintiffs called their agent at St. John, *W. W. Street*, who stated the facts of the case to be as alleged in the bill, that the said *Scofield* and *Beer* applied to him for a further insurance of $2,000, that before accepting the risk, knowing that he had already an insurance of $3,000 on their goods and merchandise, he applied to the defendants' agent and inspector, who attended and viewed the said risk; that they approved of the same, and on an application being drawn up and sent to him, he forwarded it to the head office, indorsed with their approval; that nothing was ever said to him about the payment of the premium; that he recognised a custom among agents of running monthly accounts with each other with regard to reinsurance business; the issue of the policy and its arrival in St. John, as well as their being demanded by the said agent.

The defendants called their agent, who admitted that there was a custom of the kind referred to by the

plaintiffs, but alleged that it was, in his opinion, only adopted for the convenience of the agents, and in this he was corroborated by the defendants' inspector.

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Mr. *James Bethune*, Q. C, and Mr. *W. H. Lockhart Gordon*, for the plaintiffs.

Mr. *McCarthy*, Q. C., and Mr. *Creelman*, for the defendants.

BLAKE, V. C.—At the close of this case, I noted in my book, "I think that in this case no such arrangement was proved, and so I dismiss the bill, with costs." Since then I have given the matter much consideration, and have read over the cases, some of which certainly are very strong in favour of the plaintiffs' contention—as for instance: *Insurance Company* v. *Colt* (*a*), *Goit* v. *National Protection Insurance Company* (*b*), *Post* v. *The Ætna Insurance Company* (*c*), *Baxter* v. *Massasoit Insurance Company* (*d*) *Fish* v. *Cattenet* (*e*), *Audubon* v. *Excelsior Insurance Company* (*f*), *Halloch* v. *The Commercial Insurance Company* (*g*). The large powers given to agents in the United States, where in many cases, they represent their companies for all the purposes of an insurance business; and can, therefore, bind them to the extent of the almost unlimited powers they possess, render these cases generally unsafe guides in this country, where powers of such a limited nature are given to the local agents of most of the companies. There is no doubt, that as between these two companies, at their head offices in the city of Toronto, a binding custom prevailed, whereby reinsurances were effected by the one company in the other without the immediate payment of the pre-

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(*a*) 20 Wal. 566.
(*b*) 25 Bar. 189.
(*c*) 43 Bar. 351.
(*d*) 13 Allen 320.
(*e*) 44 N. Y. 538.
(*f*) 27 N. Y. 216.
(*g*) 26 N. J. 268, and 27 N. J. 645.

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miums, but, at the close of the month, the accounts were made up, and the balance paid by the company against which it stood. There is no doubt that this mode of transacting business was not sanctioned by the head office in the case of its agents. Returns were not made by local agents to the head office of reinsurances effected, so that in the monthly accounts these premiums might also be included. The reinsurances effected by local agents were entered in their returns in the usual manner, the amounts of these premiums were inserted, and the whole matter treated as a dealing, so far as these receipts and payments were concerned, independent of the head office. These dealings, in this respect, did not differ from the usual insurances of individuals, and it is not shewn that anything ever passed between the head office and the agencies, to warrant the agents placing their companies in this respect on a footing different from that occupied by individual insurers; nor is there any evidence to shew that the company was aware that the re-insurance business was carried on in a different manner from that in which the ordinary business was conducted. The company requires the agent to obtain the premium in cash, before the insurance was to be considered binding. This general rule was well known to both the agents in this case. It is urged here, however, that a custom existed between the agents whereby in the case of reinsurances the premium was not paid in cash, but, at the close of the month the accounts were settled. On the other hand, it is argued that this custom did not exist; that some agents trusted each other in that way; that in the present case the agent *Street* was not trusted; that in no case had the defendants' agent thus dealt with him, and that he did not intend to do so. I think all that has been proved before me on this point, has been that, in some places where the agents mutually trusted each other, the accounts of the re-insurances were kept, and squared at the close

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of each month; that it has not been shewn that this was a universal custom, but on the contrary, that it depended on an arrangement to be made, and which was not entered into except in those cases where there was a mutual confidence between the agents, and that this mode of transacting business was unknown to and not sanctioned by the head office. I am obliged to come to the conclusion that the neglect to pay the premium of insurance in this case, is fatal to the case of the plaintiffs, and that the bill must be dismissed, with costs.

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McNeil v. The Reliance Mutual Fire Insurance Company.

Insolvent Act—Insolvent company—Jurisdiction—Demurrer.

The object of the Legislature in creating the Insolvent Court, is to administer the estates of insolvents, and this Court will not, unless in a very exceptional case, interfere with the jurisdiction thus created. Therefore, where a bill was filed for the purpose of winding up the affairs of an Insolvent Insurance Company, a demurrer for want of equity was allowed although the bill prayed, amongst other things, for the appointment of a receiver to get in the assets and wind up the affairs of the company.

Demurrer:

The grounds of demurrer are clearly stated in the judgment.

Mr. *Black*, for the demurrer,

Mr. *Hall*, contra.

Blake, V. C.—The bill in this cause is filed by a creditor of the defendants, and alleges that the company is insolvent, and that the directors have so noti-

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fied the policy-holders, but that they have neglected to take any steps for the winding-up of the company, or the collecting in of the assets, although it has ceased to carry on business. There are allegations in the bill which would warrant an order being made for the winding-up of the company; but, although there is a prayer for a receiver, there are not circumstances set out which would entitle the plaintiff to such application unless it were, not for the purpose in the meantime of preserving the property, but, in order to the ultimate realization of the assets. The receiver is in fact the means which the plaintiff prescribes for getting in the assets, discharging the liabilities and winding-up the company. By sec. 147 of the Insolvent Act of 1875, and 41 Vic. ch. 21, complete provision is made for the carrying out of all that the plaintiff demands. The authorities now seem to warrant this position, that where, as here, jurisdiction is not taken from the Court of Chancery, yet complete provision is otherwise made by the Legislature for the dealing with certain matters by a prescribed Court, there the Court of Equity will not interefere, unless it be shewn that something is asked of it which, under peculiar circumstances, cannot be given by the forum constituted primarily for the disposition of such matters. Lord Justice *Turner*, in *Dyson* v. *Hornby* (*a*), says: "The Legislature has created the Insolvent Debtors' Court for the purpose of administering the estates of insolvents, has provided for the vesting of their estates in their assignees, for the payment of their debts, and for the revesting in them, or those claiming under them, of the surplus, if any, of their property through the medium of that Court; and I scarcely know anything which in my judgment, would be more mischievous than for this

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(*a*) 7 D. M. & G. 7.

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Court to interfere with the jurisdiction thus created by the Legislature."

In *Martin* v. *Powning* (*a*), Lord Justice *Selwyn* says: "In his judgment in the present case the Vice Chancellor *Stuart*, in referring to the decision in *Bell* v. *Bird*, says, 'where no relief was sought by the bill, except what was incident to the simple administration of the property, no difficulties stated by the bill, and nothing asked of this Court but a simple performance of that duty which can be well performed by the Court of Bankruptcy, the Court, finding nothing specially alleged by the bill to induce it to exercise that jurisdiction which might easily be exercised by the Court of Bankruptcy, refused to entertain jurisdiction, and allowed a demurrer to the bill,' and the Vice Chancellor proceeds to say that 'Lord *Cottenham*, in a case of concurrent jurisdiction, which arose before him, *North Eastern R. W. Co.* v. *Martin* (*b*), stated the principles on which this Court ought to act where there is a concurrence of jurisdiction. In that case there was an action at law to recover the balance of an account. There was a bill filed in this Court to have the account taken. The case was one in which there was a concurrence of jurisdiction, and Lord *Cottenham* stated that where there is a concurrence of jurisdiction, and this Court has to decide which of the two jurisdictions is to prevail, the convenience of the parties and the circumstances of the case, must indicate what the course of the Court should be.'"

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I should have doubted whether, as the jurisdiction of this Court is not ousted, but it is left to the Court in each case to say whether it is proper or not to exercise it, on a demurrer being filed for want of equity, the Court would allow it, or would rather permit the cause to go down to a hearing, and then, the facts appearing, deal with it as would be most con-

(*a*) L. R. 4 Ch. App. at 370. (*b*) Ph. 758

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ducive to justice; but the authorities are clear that, in such a case as the present, it is proper that a demurrer should be allowed. See *Close* v. *Mara* (*a*), and the cases there cited.

I am of opinion that in the present case all that is asked can be obtained in the Insolvent Court, which is the forum prescribed by the Legislature for the dealing with the matters raised by the bill, and that therefore there is no ground for coming to this Court, and the demurrer must be allowed.

WATTS v. MITCHELL.

Mortgage—Illegal consideration—Undue influence.

Where it was shewn that the wife of a person against whom criminal charges were about to be instituted, executed a mortgage on her lands in order to prevent such charges being proceeded with, the Court refused to enforce payment of the security, and dismissed a bill filed by the mortgagees for that purpose. The fact that the friends of the husband and wife were the persons who had urged her to give the security, did not validate the instrument.

Statement.

This was a suit instituted by *Alfred Watts* and *Robert Henry*, against *Mercie Jane Mitchell* and *Daniel Mitchell*, her husband, to enforce payment of a mortgage created by the defendants upon the lands of the wife, who by her answer, set up that she had been unduly influenced by threats of criminal proceedings against her husband, to execute the mortgage in question. On her examination at the hearing, she repeated this statement; the evidence shewed, however, that the representations made as to intended criminal charges being brought were so made to her by her friends, and not by the plaintiffs. The husband, it appeared,

(*a*) 24 Gr. 593.

had been in the employment of the plaintiffs, and one object, it was alleged, in giving such mortgage was to induce the plaintiffs to retain him in their service.

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Watts v. Mitchell.

The cause came on for hearing at the Brantford Sittings, in May, 1879.

Mr. *Boyd*, Q. C., and Mr. *Smyth*, for the plaintiffs.

Mr. *Moss*, for the defendants, objected to the relief sought, on the ground that no consideration was shewn to have existed for the mortgage aside from the mere settlement of the charges against the husband. It is clear from the statements of all parties that Mrs. *Mitchell* was apprehensive of criminal proceedings being taken, and if executed under such circumstances, the security cannot stand, even if the persuasion used was by her own friends only. She, it is clearly shewn, was apprehensive, in fact knew, that her husband would stand committed on a criminal charge unless the matter was settled; and for this purpose, and this purpose alone, was the security given: *Williams* v. *Bailey* (*a*), *Canada Mutual Insurance Company* v. *Watson* (*b*), *Clubb* v. *Hatson* (*c*), *Armstrong* v. *Gage* (*d*), *Smith* v. *Kay* (*e*), *Fisher* v. *Apollinaris Company* (*f*). *Doyle* v. *Carroll* (*g*), were, with other cases, referred to.

Judgment. Sept. 3rd.

SPRAGGE, C.—At the close of the argument, I commented upon the evidence at some length, and stated my impression to be, that a mortgage obtained under such circumstances, as was the mortgage in this case, could not be allowed to stand.

I was referred to a number of cases, which I have

(*a*) L. R. 1 E. & I. App. 200.
(*b*) 25 C. P. 1.
(*c*) 18 C. P. N. S. 414.
(*d*) 25 Gr. 1.
(*e*) 1 H. L. C. 750.
(*f*) L. R. 10 Chy. 297.
(*g*) 28 C. P. 218.

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The plaintiffs' bill is dismissed, with costs.

I have not the pleadings, and do not know whether the answer prays by way of cross-relief that the mortgage should be delivered up to be cancelled. If the answer so prays, the decree should direct accordingly.

The Grand Trunk Railway Company v. The Credit Valley Railway Company.

Injunction—Right of way—License of occupation—Parties—Practice.

The principle upon which the Court interferes by injunction is to preserve property in its actual condition until the legal title thereto can be established; and although under the present practice this Court can determine legal rights, it will not do so upon interlocutory application. Therefore, where two railway companies were in actual possession of a strip of Ordnance land 100 feet in width, along which their tracks were laid, and a third railway company, proceeded to lay their track on the same strip, when an injunction was obtained at the instance of one of the first-named companies restraining such third company from further proceeding with their works, whereupon they applied for and obtained from the Government of the Dominion a license of occupation of the same strip for the purpose of running their track thereon, the order in Council authorizing such license stating that it was not to "operate to imply any covenant or agreement on the part of the Crown to give possession to the licensees, but that such license shall be accepted by them subject to any legal rights, which either the Grand Trunk or the Northern Railway [the two railways so in possession] may hereafter establish in respect of the one hundred feet or any part thereof." A motion was then made to dissolve the injunction, which was (by Proudfoot, V. C.) refused, with costs, and on re-hearing his order was affirmed by the full Court, with costs.

Although the rule is, that on a motion to dissolve an injunction, the plaintiff cannot support the writ on grounds not set forth in his bill, still where a defendant moves to dissolve because he has acquired a title subsequent to the filing of the bill, the plaintiff may resist such application by any means in his power, whether stated in the bill or not.

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This was a bill by *The Grand Trunk Railway Company of Canada* against *The Credit Valley Railway Company* and *The Northern Railway Company of Canada*, which was filed on the 11th day of June, 1879, setting forth that for twenty years past the plaintiffs had been in undisturbed and undisputed possession of the lands on which the track for the purposes of their railway was constructed, and of the lands between their track and a fence on the south thereof, extending from a point on Queen street, in the city of Toronto, where the railway crosses the street, and running in a south-easterly direction to a point called the Diamond crossing, where the same crosses the Northern Railway track; that *The Credit Valley Railway Company*, without the knowledge or consent of the plaintiffs, had trespassed on the said lands and intended to construct and place their railway thereon, unless restrained, thereby causing great loss and damage to the plaintiffs; that plaintiffs had caused notice to be given to the said defendants to desist from such acts of trespass, and they had promised to desist therefrom, but had not done so, and unless restrained they would take and hold possession of the said lands. Statement.

The bill prayed an injunction to restrain such proceedings of *The Credit Valley Railway Company*, and a motion having been made for such writ, the same was granted in the terms of the prayer of the bill.

By an amended bill, filed on the 23rd September, 1879, the plaintiffs stated that since the obtaining of such injunction, and about the 22nd of July last, the said defendants had obtained from the Minister of the Interior for the Dominion of Canada, a license to occupy the said land as and for a right of way for their railway.

The bill charged that the said Minister of the Interior had no jurisdiction or right to grant such license of occupation; but in any event the said license was

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granted subject to any legal rights which either the plaintiffs or the Northern Railway Company might have to such land.

The additional facts necessary to an understanding of the points involved appear in the judgment of Vice-Chancellor *Proudfoot*, before whom a motion was made by the defendants *The Credit Valley Railway Company*, to dissolve the injunction on the 12th day of August.

Mr. *Ferguson*, Q. C., Mr. *R. M. Wells*, and Mr. *McDougall*, for *The Credit Valley Railway Company*.

Mr. *Blake*, Q. C., and Mr. *H. Cassels*, for the plaintiffs.

Mr. *G. D. Boulton*, for *The Northern Railway Company*.

The points relied on by counsel, appear sufficiently in the judgment of

Judgment. August 15.

PROUDFOOT, V.C.—On the 11th June an injunction was granted restraining the Credit Valley Railway Company from trespassing upon the lands upon which the track of the plaintiffs' railway is constructed, and upon the lands between their track and a fence to the south of it extending from a point on Queen street, where the plaintiffs' railway crosses the street, to the diamond crossing where it crosses the track of the Northern Railway Company, until the 17th June, and until the motion then to be made to continue the injunction should have been disposed of. The motion to continue the injunction had been ordered to stand over till after vacation.

A motion is now made on behalf of the Credit Valley Railway Company to dissolve that injunction.

If the injunction should be dissolved, the Credit Valley Railway Company will be no nearer the attain-

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ment of their object, viz., to lay their track on the land in question than they are now, as my order would not operate like a judgment in ejectment, or a decree for possession, and their entrance on the land, I am assured, will be vigorously resisted by those in possession, until the title of the Credit Valley Railway be established and judicial authority given for its enforcement. But if the injunction ought to be dissolved they are entitled to move for that purpose *valeat quantum*.

The bill claims title simply by possession in the plaintiffs for more than twenty years, a title amply sufficient against wrong doers, such as the Credit Valley Railway Company were then alleged to be. But they have now procured a license of occupation from the Committee of the Privy Council which they claim to give them a title to the land in question, or at all events an easement over it. In reply to this the plaintiffs produce evidence to shew that they have a title under the Ordnance Department. The Credit Valley Railway say you cannot do this: it is not the case made by the bill, and you cannot go out of it. Some cases were cited to shew that on a motion to dissolve an injunction the plaintiff cannot support it on grounds not stated in the bill. *Cresy* v. *Beavan* (*a*), *Burdett* v. *Hay* (*b*), *Barker* v. *North Staffordshire R. W. Co.* (*c*). But certainly none of these cases establish that where a defendant moves to dissolve because he has acquired a title subsequent to the filing of the bill that the plaintiff may not resist this new title by any and every means in his power, whether stated in the bill or not. The defendants, besides have not yet put in their answer, and their title is not asserted under any record of the Court. When it is, the plaintiffs will have an opportunity of amending their bill so as

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(*a*) 13 Sim. 39. (*b*) 4 D. J & S. 41.
(*c*) 5 Ra. Ca. 401 ; 2 DeG. & S. 55.

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to put in issue the validity of the new title acquired by the defendants. If it were necessary to amend the bill now to enable the plaintiffs to meet this case, I would grant leave to do so as necessary in the furtherance of justice.

The Credit Valley Railway Company then produced the license to occupy given to it by the Privy Council, and claimed that I must assume that the Government would not assume to grant what was not in their power to grant, and that the Credit Valley Railway Company had thereby acquired a title. I need not consider what presumption may properly be made in favour of the acts of Government, or orders of the Privy Council, for the proceedings upon the application to the Council have been put in, and the Order in Council authorizing the granting the license, has also been produced. During the progress of the hearing before the Committee of the Privy Council, the Minister of the Interior, Sir *John A. Macdonald*, remarked,

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(p. 39): "One thing is quite clear, it is going to be a complicated matter as to the title. If the Northern Railway or the other railways have any legal or equitable title the Government cannot interfere with that, and no matter what the Government might do the Court would over-ride any decision they might arrive at as to getting across the Ordnance property. No grant, or patent, or license of occupation will be of any value if the title is elsewhere, either legally or equitably." And in accordance with this clear expression of the inability of the Crown to interfere with the rights of property, the order authorizing the issue of a license states it to be on the clear understanding "that the giving of such license of occupation shall not operate to imply any covenant or agreement on the part of the Crown to give possession to the licensees, but that such license shall be accepted by them, subject to any legal rights which either the Grand Trunk or the Northern Railway Company

might hereafter establish in respect of the 100 feet or any part thereof." This understanding defines the position of the Credit Valley Railway with the Crown, absolving the latter from any liability it might otherwise have incurred for issuing a license to occupy land to which it had no title, but without it the license could have had no effect in destroying or in any way affecting rights that had been previously legitimately acquired.

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It remains therefore to consider whether the Credit Valley Railway have shewn such a title to the property or easement as to warrant me in dissolving an injunction for the protection of those in possession of the property. The title of the possessors is to some extent involved in this inquiry, but the chief subject of investigation must be the title of the Credit Valley Railway Company itself. The counsel for the Credit Valley Railway Company candidly stated that this title depended upon intricate questions of law and the construction of obscure statutes, and in this I agree with him. And if that be the case, it seems difficult to interfere with the possession until the case has been heard, and the title ascertained. The principle upon which the Court interferes by injunction is to preserve the property in its actual condition until the legal title can be established. Formerly that had to be decided in a court of law, and the order for the injunction contained a direction to put the question in a course of legal inquiry. Under the present practice however legal rights are determined in this Court, but not upon interlocutory applications—the case must be brought to a hearing, and the evidence taken, and witnesses examined in open Court. A reference to a few cases will illustrate the jurisdiction and the mode of exercising it: In *Harman* v. *Jones* (*a*), the suit was instituted by the directors of the Sun Fire Office

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(*a*) C. & P. 299.

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against certain persons who represented the Commissioners of Sewers, and who were proceeding under the powers of certain Acts of Parliament, to appropriate for the purposes of the Acts a piece of land upon which the Sun Fire Office carried on its business. An injunction was issued to prevent the commissioners from proceeding under the Acts, but the order for the injunction contained no direction to put the legal right in a course of trial. Upon a motion to discharge the order the argument turned entirely upon the construction and effect of the Acts of Parliament under which the commissioners derived their powers. The Chancellor reviewed the several Acts, expressed no opinion upon the effect of them, but sustained the injunction and gave a direction for trying the legal question.

Judgment.

All that is required in one who seeks the aid of the Court by injunction is to shew a fair *primâ facie* case in support of the title he asserts. He is not required to make out a clear legal title, but must satisfy the Court that he has a fair question to raise as to the existence of the legal title he sets up, and that there are substantial grounds for doubting the existence of the legal right, the exercise of which he seeks to prevent. *Kerr* on Injunctions 2nd ed., 13, 14. The law is so stated by Lord *Cottenham* in *The Great Western R. W. Co.* v. *The Birmingham and Oxford Junction R. W. Co.* (*a*), and has been repeated by other Judges of great eminence in the cases cited by Mr *Kerr*. Lord *Cottenham*, in that case said: "It is certain that the Court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having, the means of forming any opinion as to such rights. * * It is true that the Court will not so interfere, if it thinks

(*a*) 2 Phill. 597, 602, 603.

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that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the Court to decide upon the merits in favour of the plaintiff." Is there then a substantial question to be decided here—and do the plaintiffs shew a *primâ facie* right to protection until it is decided?

Judgment.

The land originally formed part of the Ordnance property, which was vested in the principal officers of Her Majesty's Ordnance by the Canada Stat. 7 Vict. ch. 11. By the 15th section of that Act, it was provided that nothing in it should be construed to prevent the Parliament of Canada from authorizing the construction of a railroad upon or over any lands which by it were vested in the principal officers of the Ordnance. The 12 Vict. ch. 196, incorporating the company now known as the Northern Railway, section 10, gave them power to enter into and upon the lands of the Queen's Most Excellent Majesty, and of any person or persons, bodies, or body politic, corporations aggregate or sole; and to survey and take levels of the same or any part thereof; and to set out and appropriate for the purposes of that Act, such parts as they were empowered to take or use; the company making full satisfaction in manner thereinafter mentioned to all persons and corporations interested in any lands which should be taken; and I think the right reserved to the Parliament, would be well exercised by a general statute, such as the Railway Act; but at all events this private Act incorporating the company, should receive this construction, as it authorized expressly the entrance upon Crown lands; and that phrase I see no reason for limiting to lands other than Ordnance lands. The title of the principal officers was derived from the Parliament of Canada, and the reservation of a right in favour of the grantors, should, in such a case, be

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liberally construed; and when the Parliament uses the expression *Crown* lands in the charter of the company, I think it means any Crown lands. But it is not necessary to express any decided opinion, it is sufficient if it raises a fair question. The 16th section of the charter of the Northern Railway, provides for ascertaining the price of lands taken, and that upon payment of the price the company might enter upon the lands and take possession, and the lands shall be and become vested in the company. The 10th section quoted above, had already given them power to enter and to set out and appropriate the lands required, *i. e.*, to take as their own, paying the price as afterwards provided; and it may be that, had the principal officers desired to prevent the company taking possession until the price was paid, they might have succeeded; and if the price be not paid, it is possible that the legal title may be still outstanding. But the principal officers permitted the company to take possession, to build their road, to make their stations and depôts, and to occupy and use these lands for more than 20 years. It is quite probable that no Statute of Limitation may apply in this case, but I am satisfied that under such circumstances this Court would not permit the possession of the company to be interfered with, or their title impeached by the principal officers to any greater extent than might be necessary to secure payment of the purchase money. I do not recollect any evidence having been read to me to shew that the money had not been paid; and in that case a presumption would arise at this distance of time that it had been paid.

Judgment.

The Act transferring the Ordnance estates, 19 Vict. ch. 45, sec. 7, which seems to be general enough in its terms to cover the land in question, provides that nothing in that Act should be taken to affect the right of any parties claiming any of the lands transferred to the Provincial government. If the Northern Railway Company had a title it would not be affected by the Act.

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By the Act of 1859, 22 Viet. ch. 89, when the Northern Railway Company were in difficulties, the road, with all the appurtenances and appliances, was transferred to and vested in the Crown, to be worked or sold, and must be taken to have applied to the road as it then existed, including the part on the Ordnance land. And by the 23 Viet. ch. 105, (1860) the whole was revested in the company. The natural inference from these statutes would seem to be that the Northern Railway owned the line of its road over this Ordnance property, and that the Legislature recognized this right.

It was contended, however, that the plaintiffs, the Grand Trunk Railway, could not purchase, and the Northern Railway could not sell, any portion of the land within the limits of the 100 feet. This is a question of considerable nicety, and it may perhaps be ultimately found that authority is wanting to sanction such a sale; but the Grand Trunk Railway Company is affected by the provisions of the General Railway Act. The company was incorporated in 1852, (16 Viet. ch. 37) and the provisions of the General Act relating to powers, *inter alia* were incorporated with it. These powers are contained in section 9, (C. S. C. ch. 66) and sub-section 5 gives power to construct, maintain, and work the railway, across, along, or upon any stream of water, water course, canal, highway, or railway which it intersects or touches. If the company could run upon a railway, it would seem to affix a meaning to the word *along* as something different—as meaning alongside; and if it could do this compulsorily, it might do it by agreement. The 15th sub-section gives power to unite with other railways to cross, intersect, join, and unite with any other railway, and upon the lands of such other railway, which would seem ample enough to include the use of a track on its lands; and this may be done by agreement; in case of disagreement the amount of compensation is to be ascertained by arbitration. It would be rather strange if the Grand

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Trunk Railway had power to take the land, and the Northern Railway had no power to sell it. The sections 130 and 132, passed in 1858, however, make this sub-section 15 apply to all railways, but not to anything done before the 30th June, 1858. Whatever arrangement there was between the Grand Trunk Railway and the Northern Railway Company was before that date, and cannot be affected by it. But this General Railway Act, while it says it shall apply to companies incorporated by Acts passed after the 30th of August, 1851, and subsequent Acts, does not say that it shall not apply to companies incorporated by earlier Acts, and the special Act of the Northern Railway Company (12 Vict. ch. 196, sec. 51) enacts, "That nothing herein contained shall be construed to exempt the railroad by this Act authorized to be made, from the provisions of any General Act relating to railways, which may be passed during the present or any future session of Parliament." From such language, I would suppose that any General Act would not need to refer to previous railways by name; but that the general provisions should apply as if incorporated in the Special Act. If this be so, then the Grand Trunk Railway and the Northern Railway Company might agree upon the union of the lines, or running alongside each other. The arrangement whatever it was between the Grand Trunk Railway and the Northern Railway Company, was prior to 1858, and no agreement then required the sanction of the Board of Railway Commissioners, (22 Vict. ch. 4,) and it may perhaps be ultimately found that authority is wanting to sanction such a sale. The cases referred to of *Regina* v. *South Wales Railway Company* (*a*); *Ex parte* v. *Smith* (*b*), *Bostock* v. *North Stafford, &c., Railway* (*c*), to which add *Norton* v. *London and North Western Railway* (*d*), were all cases where the

Judgment.

(*a*) 14 B. R. 902.
(*b*) 16 L. T. N. S. 611.
(*c*) 3 S. & G. 283.
(*d*) L. R. 9 Ch. D. 623.

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acts of the companies were outside the purposes for which they were incorporated. If the apparent construction of these Acts be correct, then the act was authorized by the power of the company. But as I have pointed out the injunction was granted to protect the possession, and the *onus* is on the Credit Valley Railway to show a right to disturb the possession; and supposing the argument valid, it would not prove a title in the Credit Valley Railway, but in the Northern Railway Company; and the Northern Railway Company is not opposing, but furthering and assisting in maintaining this injunction. I do not know that a third party is entitled to attack transactions between other two parties, unless he can shew a right that is affected by it. These are evidently matters that ought to be decided at the hearing, and not upon a motion of this kind.

Judgment.

There is only one other subject that I think was discussed, viz., the balance of convenience and inconvenience, to the one party and to the other. If the granting or continuing this injunction were to inflict irreparable injury on the Credit Valley Railway, or injury so serious as to be looked on in that light, while the dissolution of it would only cause inconvenience to the plaintiffs, then this motion should be granted. If the receipt of the bonus from the city of Toronto were to depend upon getting a line to a point that could only be reached by going over this ground in a certain time, it would be a proper matter for consideration, but the city has relieved the company from that obligation. And the inconvenience and loss the company suffers, or will suffer, is the probable loss of fares in bringing passengers to the fair next month, who, it is thought would not care to come at all, or to come by this line, if compelled to walk a mile to get into the city. On the other hand the plaintiffs' alleged right of property would be infringed, and the tracks now down would have to be shifted. Besides the dissolving of the

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injunction, as I have already stated, would not enable the Credit Valley Railway to enter the city. I do not think this is a case where the argument is in favour of this motion.

While the Credit Valley Railway now says that there never was any agreement between the Ordnance Department and the Northern Railway Company, nor any correspondence proved, I cannot avoid noticing that on their application to the Privy Council they have printed the correspondence. Perhaps not much weight is to be attached to this, and it would not supply the want of proper proof at the hearing, but it is sufficient to shew that the plaintiffs' case is not a fiction, that they assume, resting upon transactions of which there is believed to be evidence in writing and which, though not strictly proved, are believed to be capable of proof, to have a legal title, or at all events, an equitable one, and one that is a proper subject for investigation by the Court.

Judgment

Without deciding, therefore, in whom the title to this property rests, it is sufficient for me to say that the Credit Valley Railway has not shewn such a clear and satisfactory title as would warrant me in dissolving the injunction granted to protect the possession of the plaintiffs, and that, to use Sir *John A. Macdonald's* language, it "is quite clear it is going to be a complicated matter as to title," and therefore one that can only properly be decided at the hearing.

I refuse the motion, with costs.

The Credit Valley Railway Company thereupon reheard the motion, before the full Court.

Mr. *McCarthy*, Q.C., and Mr. *Ferguson*, Q.C., for *The Credit Valley Railway Company.*

Mr. *G. D. Boulton*, for *The Northern Railway Company*.

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Mr. *Blake*, Q.C., and Mr. *W. Cassels*, for the plaintiffs.

Sept. 23rd.

STRAGGE, C.—I incline to think it competent to the applicants to shew that, under existing circumstances, it is proper that the injunction should be dissolved, although under the circumstances existing at the time it was granted, it was proper that it should be granted.

If we assume that in their favour, what do they shew?

A license of occupation from the Dominion Government.

But that license is granted under an order in council which makes it subject in effect to the legal rights, whatever they may be, of the railways then in possession of the ground.

Judgment.

I take this to mean all lawful rights—not legal, as distinguished from equitable rights—an express reservation probably was not necessary, as it would be assumed that the Crown did not intend to override the rights of the subject in the property in question, whatever those rights might be.

The other two railways do make title.

The Credit Valley Railway impeaches the title they make, but it cannot be denied that the title they make, has a good deal to support it; and what is shewn in its support, shews that it may be strengthened with evidence not at present procurable. The *locus in quo* is 100 feet wide, lying between Queen and Bathurst streets—the Northern was authorized to take a strip 120 feet wide.

It appears that there was a contract between the Ordnance officers and the company, but it is contended that the Ordnance officers held this land as trustees for purposes of military defence, and that it was a breach of trust to part with it for railway purposes.

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I do not accede to this contention.

It is, moreover, said the purchase money was not paid to the Ordnance officers, and has not been paid to the Canadian Government, and that until payment the railway company was not entitled to take possession.

We may assume that the money was not paid. Possession of the land was taken by the railway in 1852, road-bed constructed, rails laid, and the land used for the ordinary purposes of a railway from that, or about that, date to the present time.

All this was done, so far as appears, without objection by the Ordnance officers or the Government.

If either could have exacted forfeiture, neither has done it.

Between subject and subject there could be no forfeiture under the circumstances—only a lien for unpaid purchase money.

Judgment.

By this objection the Credit Valley Railway are setting up a *jus tertii*. It is urged that whatever the rights of the Northern may have been to hold and use, they could not sell and transfer to the Grand Trunk Railway Company; that in so doing they abandoned the portion so transferred, admitting that they did not need it for their own purposes, and that it reverted to the Crown.

But the Northern had taken their charter subject to future railway legislation; and by the General Railway Act, railway companies were empowered, with the assent of a department of the Government, to use the lines of other railways. The Grand Trunk might have acquired and exercised that right over this part of the land of the Northern. It is not necessary to say that they would, but the transfer in question must be looked at in the light of that being the state of the law, and may be regarded as done by compact when it might have been done *in invitum*, and this divests it of the character of an ordinary transfer or of abandon-

ment by the Northern, because they had no use for it for railway purposes. 1879.

These considerations shew that there is, at any rate, to put it at the lowest for the two companies in possession, a serious question of title. Grand Trunk R. W. Co. v. Credit Valley R. W. Co.

Counsel for *The Credit Valley Railway Company* agree that the Court will not decide the question of title upon this interlocutory application, but they say the Court will consider the question of convenience, and will dissolve the injunction if the balance of convenience appears to be in favour of that course. But there has been a long and continuous possession of this land, and its inclosure between fences, by the two railway companies unchallenged by the Crown, or by any one in any shape representing the Crown. I think none of the authorities cited sanction an interference by the Court with such possession upon such application. In *Greenhalgh* v. *The Manchester and Birmingham Railway Company (a)*, a case a good deal relied upon by the Credit Valley Company, the Court only refused to interfere at the instance of the owner of the land, where by silence and conduct he had encouraged a railway company to proceed in the belief that they were entitled. The reason for non-interference in that case has no existence in this. Judgment.

There might be a case where the title of the party applying was so clear that there was no room for doubt upon that point—where the opposition to the use of the *locus in quo* was palpably vexatious—where a great detriment to the party applying and to the public would be the consequence of the Court protecting the possession of those in possession, and no detriment could accrue to those in possession; the balance of convenience might be so manifestly in favour of abstaining from protecting the actual possession that a refusal to protect it might be proper. But looking at the

(a) 3 M. & C. 784.

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piece of land in question—that lying between Queen street and what is called the Diamond crossing—it seems to me to be clear that this is not such a case. My opinion is, that the injunction should not be dissolved.

I have to add that the plaintiffs ought to use every endeavour to carry their cause to a hearing at the next sittings, and that the Northern ought to co-operate with them in doing so.

BLAKE, V. C.—I think the reasonable conclusion from the evidence adduced before us on the re-hearing is, that by an arrangement with the Ordnance department, made by the Ontario, Simcoe, and Huron Railway Company, now represented by *The Northern Railway Company*, the company took possession of 100 feet of the land of the department, being the land brought into question in this suit. The railway company were empowered to take for their line 120 feet, and the department, no doubt, had the power to allow them to take the land demanded.

Judgment.

In 1852 the department being empowered to give, and the railway to take this land, the latter entered into and remained in possession thereof until 1860, when *The Grand Trunk* needing a portion of it, an arrangement was made whereby this latter company, for certain considerations by it awarded to *The Northern*, was permitted to enjoy a portion of the 100 feet. This possession and user has thence hitherto continued, and it represents the position of these companies when the Credit Valley Railway sought by force to possess itself of a portion of this land.

After this lapse of time, and under the circumstances of the case, it must be taken for granted that what was done was done with the assent of the parties entitled to raise objection to the acts of *The Northern* and *The Grand Trunk*.

The correspondence with the department, the various

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Acts passed by the Legislature, the undisturbed possession, would now preclude the Crown from turning out of possession, the companies that had, since 1852 and 1860, acted on the faith of the assent thus testified.

The license given by the Crown, and the order-in-council on which it is based, shew that the Crown did not intend to disregard the position of the companies who for so many years had acted on the agreement and assent of those representing the only interest in the land other than that held by them.

The right given by this license does not dislodge the other companies from the rights they had acquired. It certainly does not permit the company that has obtained it forcibly to enter upon the lands possessed by the other companies. It enables the Credit Valley Railway to enjoy certain rights which the Crown might have in the premises, and the company may have the power, by proceedings lawfully taken, to acquire the privilege for which it seeks; but I am clear that my brother *Proudfoot* was bound under the circumstances to prevent this company, meantime, forcibly intruding on the lands of the other companies, and to require them to establish by legitimate means its right to enter upon this land.

Judgment.

I think the order should be affirmed, with costs. The delay, if any, which may arise in the way of the Credit Valley Railway entering the city, cannot be charged to the Grand Trunk or Northern Railways, for the Credit Valley Railway might long since have taken steps to acquire the right of way they demand, if it be possible to procure the same. The injunction granted does not prevent any such steps being taken or continued. It merely prevents the companies resorting to a more than probable breach of the peace, and to a course of action which may be dangerous to the travelling public. The moment the Credit Valley Railway establishes its title to what is demanded by it, the injunction should be dissolved.

1879.

MOFFAT v. THE BOARD OF EDUCATION OF CARLETON PLACE.

School trustees—Change of school site—Specific performance.

The Board of Education, formed by the union of High School and Public School Trustees, contracted for the purchase of land from the plaintiff for the purpose of changing the site of the school: *Held*, that the plaintiff was entitled to call for a specific performance of the agreement for purchase, although no by-law of the Council authorizing the purchase had been made, nor had the Lieutenant Governor in Council approved of the change; and proceedings had been instituted by a ratepayer to restrain the change of site. *Malcolm* v. *Malcolm*, ante vol. xv, p. 113, referred to, and not followed; *Re Perth*, 39 U. C. R. 34, referred to, approved of, and followed.

Examination of witnesses and hearing at Brockville at the Sittings in the Spring of 1879.

Mr. *Bethune*, Q.C., and Mr. *Jamieson* for the plaintiff.

Mr. *Hodgins*, Q. C., and Mr. *Greig*, for the defendants.

Judgment. Sept. 4. PROUDFOOT. V. C.—The bill is filed for the specific performance of a contract by the defendants to purchase a piece of property from the plaintiff, dated 22nd December, 1877.

The answer of the defendants says, that they are the Board of Education of Carleton Place, formed by the union of High School and Public School trustees. That the object of making the contract was to change the place of the school; that no by-law authorizing the change was made by the county council, nor did the Lieutenant-Governor in council approve of the change; that before the contract with the plaintiff, a suit had been instituted by a rate-payer against the defendants to restrain the change of site, and notice

served on the defendants, who with undue haste signed the contract; that plaintiff knew of the proceedings and an injunction was granted on the 26th December, 1877, to restrain the change of site.

In the *Perth Case* (*a*), the intricate and obscure enactments of our school laws were examined with great industry and care by the late learned Chief Justice of the Court of Queen's Bench, and his opinion was concurred in by the other members of the Court. If that decision is to be followed it determines the case now before me. There, as here, a Board of Education formed by the union of the grammar or high school, and the common or public school trustees, contracted for the purchase of a school site for a high school in a different situation in the town, without the sanction of the county council or the approval of the Lieutenant-Governor, and it was held they were entitled to a mandamus to compel the municipality of the town to levy an assessment to enable them to complete the purchase. It was therefore not a mere expression of opinion, but an actual decision that R S. O. ch. 205, sec. 5, (the same as 37 Vict. ch. 27, sec. 36), enabling the county council to change the place of holding any high school by by-law, approved by the Lieutenant-Governor, did not apply to a change from one site to another in the same town, but rather to a change from one place to another in the county. The power of the Board of Education to contract for the purchase of the site was established. Judgment.

In the case before me, I have not to consider what body is liable to make the payment on the requisition of the board, but only to determine if they had the power to contract, so that Carleton Place having been set apart as a school district by the county council in 1872, in which respect it differs from the *Perth Case*, is of no importance, as that is only for the purpose of

(*a*) 39 U. C. R. 34.

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Moffatt v. Board of Education of Carleton Place.

determining by whom the money is to be raised or provided.

Mowat, V. C., in *Malcolm* v. *Malcolm* (*a*), which was not cited in *Re Perth*, took a different view, and on a clause (Consol. Stat. U. C. ch, 63, sec. 3,) somewhat similar, held that for a change of site in a local division the county council was the power to make the change. That case was decided in 1868, *Re Perth*, in 1876. One was a decision by a single Judge, the other by a full Court of three Judges.

I concur generally in the conclusion arrived at by the Queen's Bench, upon the construction of the statute, although not without some hesitation as to the construction of section 5, so that even if not bound to follow the decision in the *Perth Case*, yet I think I ought to do so.

It would be a waste of time to comment on the various clauses of the statutes which has been so fully done in *Re Perth*. I am unable to distinguish that case in principle from the one now before me; and adopting that judgment, I think the plaintiff here entitled to a decree for specific performance, with costs.

Judgment.

(*a*) 15 Gr. 13.

RE YARMOUTH. 1879.

Welsh mortgage—Statute of Limitations.

A conveyance was made by way of security declaring that the mortgagee should retain possession until the sum of £75 should be paid. *Held*, that the title of the mortgagee did not become absolute under the Statute of Limitations, the conveyance in effect amounting to a Welsh mortgage, under which the possession of the mortgagee gives no title under the statute, as every receipt of rent or every year's occupation of the premises is in effect a receipt of interest under the mortgage, and the right of redemption is thus kept alive.

This was a proceeding under the Quieting Titles Act, and during the conduct thereof a petition was presented by *John Butler*, claiming to be absolutely entitled to the lands in question under the circumstances stated in the judgment, and thereupon an order was made directing an issue to be tried in order to establish whether the petitioner was entitled absolutely, or was liable to be redeemed.

Mr. *Hodgins*, Q. C., for the petitioner.

Mr. *Moss*, contra.

PROUDFOOT, V. C.—The petitioner in effect claims title under the Statute of Limitations, as a mortgagee in possession for twenty years without acknowledgment of the title of the mortgagor. Judgment. Sept. 4th.

The contestants are the heirs of the mortgagor, who contend that the security was either a Welsh mortgage or a *mortuum vadium*, and the right of redemption has not yet been barred.

The security was made by the Rev. *James O'Flyn*, a Roman Catholic priest, to *John Butler* his brother-in-law, on the 15th July, 1847. An ordinary printed mortgage form such as those in use, had been taken and certain parts were erased. In consideration of £75,

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O'Flyn granted the land to *Butler* in fee, subject to a proviso to be void on payment by *O'Flyn*, his heirs, executors, or administrators, unto *Butler* his executors, administrators, or assigns, of (the blank is filled up in writing) *Seventy-five pounds unto the wife of the said party of the second part, Bridget Butler*, (the clause as to paying interest in the printed form is erased) in manner following; that is to say, (in writing) *the just and full sum of Seventy-five pounds of lawful money of the Province aforesaid, to be paid by the said party of the first part, his heirs, executors, administrators, or assigns, unto the said party of the second part, his heirs, executors, administrators, or assigns, at such time when he the said party of the second part, or his heir or his wife Bridget Butler, shall be dispossessed, removed, or put out of the said above described land, farm, and premises, or their executors, administrators, or assigns, shall be dispossessed of the possession of the said premises.* The printed proviso that till default the mortgagor should pay taxes and rates is erased, as *Butler* was then in possession; and by the last clause in the deed it will be seen that he was to retain possession.

Judgment.

Then follows a covenant by *O'Flyn* to pay the £75, (without interest) at the day and time and in manner above limited for payment. There is also the ordinary printed covenant left undisturbed except as to interest, that after default in payment &c., *Butler* might enter and hold possession; and that after default *O'Flyn* would execute further assurances. The printed proviso that until default the mortgagor should remain in possession is struck out. A written clause is added that it was the true intent and meaning of these presents, that *Butler* should retain peaceable possession of the said premises free from all incumbrances and without interruption of any kind whatever until the said sum of £75 were fully paid and satisfied.

It is difficult to place an intelligible construction

upon this clumsy and almost insensible instrument. The solicitor who drew it was examined, apparently in the hope that he could give some explanation of it. He does not explain it. And even if he had, I do not think his evidence would have been admissible. For the ambiguities and absurdities are all apparent on the face of the instrument and scorn concealment. The evidence of the solicitor so far as it shews the relation of the parties is admissible. Mrs. *Butler* was the sister of *O'Flyn*, he owed her and her husband $300, the consideration in the mortgage, for board.

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The deed amounts then to a conveyance in fee, to be void on payment of £75 without interest, when the mortgagee or his heir, or his wife, shall be dispossessed of the land, whatever that may mean, with a covenant for payment of the £75, at that time? and the mortgagee who was then in possession was to remain in possession till paid. No provision is made in regard to the rents, while the mortgagee is in possession.

In regard to the time of payment, it seems to amount to an agreement that the mortgagor might pay *at any time*; he covenants that he was the owner in fee, and no one could dispossess the grantee but himself or those claiming under him, and whenever he or they chose to exert this power, they must pay the £75. The covenant to pay does not alter this, for it would on this construction be to pay when the mortgagor chose to dispossess the mortgagee, *i. e.*, at any time.

Judgment.

The stipulations in the printed form as to payment of interest having been struck out, and a written clause added permitting the mortgagee to remain in possession without obstruction till payment of the principal, I think the fair construction to be placed on the deed is, that there was an agreement to set the rents off against the interest.

If that be the true construction of the instrument, it seems to me to amount to a Welsh mortgage, which is defined by *Coote* as "A conveyance of an estate

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redeemable at any time on payment of the principal, with an understanding that the profits in the meantime shall be received by the mortgagee without account in satisfaction of interest :" *Coote*, p. 175.

In *O'Connell* v. *Cummins* (*a*), a mortgage was made subject to a proviso for redemption upon payment *at any time* of the mortgage money and interest up to the time of redemption, and a demurrer was allowed to a bill for foreclosure.

The possession by the mortgagee in these cases, can give no title under the Statute of Limitations; every receipt of rent, or every year's occupation of the premises being a receipt of interest under the mortgage, the right of redemption is kept alive: *Fisher* sec. 498, 2nd ed. *Browne* on Limitations, 521: and the period of limitation does not commence against the mortgagee so long as he is in such receipt, nor against the mortgagor until the principal has been satisfied.

Judgment.

I think the claimant has not made out his title.

(*a*) 2 Ir. Eq. 251.

1879.

HEPBURN v. PATTON.

Injunction—Debtor and creditor.

This Court will not restrain a debtor from dealing with his chattel property at the instance of a party representing himself to be a creditor, but who is not in a position to ask for a decree establishing his claim against the defendant.

This was a motion by Mr. *Arnoldi*, for the plaintiff, to continue an *ex parte* injunction under the circumstances stated in the judgment.

The defendant did not appear.

Judgment

SPRAGGE, C.—The plaintiff in this case is a mortgagee of land, the mortgage containing the usual covenant for the payment of the mortgage money. The prayer is for the usual remedies given in this Court; and, in addition, for an injunction to restrain the defendant from selling or otherwise disposing of a large quantity of staves, not cut upon the mortgaged premises; and he now, upon an interlocutary application, asks for an injunction in terms of this prayer of the bill.

It appeared to me upon the application being made to be simply the case of a creditor who has not obtained judgment asking to restrain his debtor in the use and disposition of certain specified chattels; but I was referred to a case of *Fleury* v. *Fleming*, where such an injunction was granted by my brother *Proudfoot*, following, it was said, a case decided by myself of *Abell* v. *Morrison* (*a*).

My learned brother was out of town, and I granted an interim injunction in this case, following his case of *Fleury* v. *Fleming*. Upon conferring with him I find that he granted only an interim injunction to keep the property in *medio;* and that no application to continue it or to dissolve it was made before him.

(*a*) 23 Gr. 109.

1879.

Hepburn v. Patton.

Abel v. *Morrison*, was clearly distinguishable from that case, and from this. It was not the case of an injunction granted upon an interlocutory application, but a decree made at the hearing, the bill being taken *pro confesso*. What was alleged and taken as confessed, was a debt due from the defendant to the plaintiff; next that the defendant was equitably interested in manner set out in the bill in certain land.

There was no injunction; but upon the case made by the bill and taken as confessed, a debt was established; and a decree equivalent to a judgment at law was made directing its payment; and a case being alleged and confessed, which made an equitable execution proper, the decree went on to direct a sale of the equitable estate.

The plaintiff would probably have been entitled to all this without the aid of the Administration of Justice Act, as the debt was upon lost promissory notes. Under the Administration of Justice Act the plaintiff was clearly entitled to that relief. The case is reported only upon one point. I have thought it well, therefore, as it has been cited for that which was not determined, or intended to be determined by it, to give the grounds of my decision. And I have stated what has occurred in this case in reference to *Fleury* v. *Fleming*, to explain how it was that following that case I granted an interim injunction, and upon the same materials before me have refused to continue it.

Judgment.

I should not have granted that injunction, but for the precedent of *Fleury* v. *Fleming;* and I refuse to continue it, because there is no practice, and I think no sound reason for restraining a debtor from dealing with his chattel property at the instance of a plaintiff alleging himself to be a creditor, but who is not in a position to ask for a decree establishing his debt against the defendant.

1879.

COOK v. ROGERS.

Insolvent Act—Preferential assignment.

C. & P., carrying on business in partnership, being indebted to the plaintiff's firm for money advanced to carry on their business, in consideration that the firm would indorse a note held by *C. & P.* agreed to execute a mortgage securing their indebtedness, and for the indemnity of the firm against this and other indorsements. Eighteen months after the execution of such mortgage *C. & P.* became insolvent:

Held, in the absence of evidence of knowledge on the part of the mortgagees of the inability of *C. & P.* to meet their engagements or of any *mala fides* in entering into the agreement, the security could not be impeached under either the 130th, 131st, 132nd, or 133rd section of the Insolvent Act.

The bill in this cause was filed by *John Larkin Cook* against *Joseph Rogers*, assignee, &c., *Mary Casselman*, widow of *Zachariah Casselman*, and *Esther Plewes*, wife of *James S. Plewes*, praying, under the circumstances stated in the judgment, the rectification of two indentures of mortgage created by the said *Casselman & Plewes*, payment of the amount due thereon, and in default of payment a foreclosure of the equity of redemption.

The facts are fully stated in the judgment.

The cause was heard at the sittings of the Court at Barrie, on the 18th of June, 1879.

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

Mr. *McCarthy*, Q. C., for the defendant *Rogers*.

PROUDFOOT, V. C.—The plaintiff is a mortgagee of certain lands, and of agreements for the purchase of timber on other lands by virtue of two indentures of mortgage, dated the 23rd of May, 1877, made by *Z. Casselman* and *J. S. Plewes*, and their wives to bar their dower, each of the mortgages purporting to secure

Judgment.

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$16,285, but there was only one debt of that amount, and one mortgage is collateral to the other.

The bill is filed against *J. Rogers*, the assignee in insolvency of the mortgagors who were partners, and against the wives of the mortgagors, for the purpose of having a mistake in the description of some of the properties mortgaged corrected, and for foreclosure, and for a writ to obtain possession of the property.

The answer of the assignee requires proof to be given of the alleged mistake in the mortgages. It alleges also that the mortgages were given by the mortgagors in contemplation of insolvency, and by way of fraudulently preferring the plaintiff to the other creditors of the mortgagors, and with the intention of defeating, delaying, and hindering such other creditors, and that the plaintiff was aware of, and made himself a party to such fraudulent intention of the mortgagors.

By a supplemental answer the assignee charges that the mortgages were made by the mortgagors at a time when they were unable to meet their engagements, and operated to injure, delay, or obstruct their creditors; and that the plaintiff had, when he took the mortgages, probable cause for believing that such inability existed. Further, that the mortgages were given with intent fraudulently to impede, obstruct, or delay the mortgagors' creditors in their remedies, and with intent to defraud their creditors, with the knowledge of the plaintiff, and have had the effect of obstructing and injuring the creditors.

Judgment.

The writ of attachment was issued on the 12th of November, 1878.

I think the evidence clearly establishes the mistake in the description of the properties mortgaged, and the plaintiff is entitled to have the mortgages corrected.

The substantial defence was, that the mortgages were void under some or one of the sections of the Insolvent Act referred to in the answer, viz., sections 131, 132, and 133.

1879.

Cook v. Rogers.

It appears that *Casselman* is a cousin of the Messrs. *Cook* of the firm of *Cook & Bros.*, for whose benefit the securities were given. In 1872 he owned some land and chattels which were incumbered, and he says he was then insolvent. In that year he and *Plewes* entered into partnership as lumberers, and an agreement was made with *Cook Bros.* to make advances to them. Advances were made as follows:

27th August, 1872	.....	$300 00
9th October, "	.....	500 00
30th " "	.....	800 00
28th November, 1872	.....	1000 00
Total	.....	$2,600 00

And on this last date, 28th of November, 1872, an agreement in writing was made between *Cook Bros.*, of the one part, and *Casselman & Plewes* of the other part, which recited that *Casselman & Plewes* were about erecting a saw mill to engage in the manufacture of lumber, and that *Cook Bros.* had agreed to advance not more than the sum of $10,000 to them for the purpose aforesaid, the advances to be made from time to time, as required to carry on the work of erecting the mill and getting out of saw logs during the coming winter, providing the work progressed to the satisfaction of *Cook Bros.*; but if the work was not proceeded with in as satisfactory a manner as the amount already advanced would warrant, then the advances were to be discontinued till the work was made satisfactory. *Casselman & Plewes* agreed to insure the mill while in course of erection, and to transfer the policy to *Cook Bros.*, and to give them any further security they might require as security for money advanced. *Casselman & Plewes* to have the privilege of selling lumber, and *Cook Bros.*, to have the receiving of all moneys for lumber sold, and to have control of all lumber that might be cut until they

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received back all moneys advanced, with interest and commission, *Cassleman & Plewes* were to pay *Cook Bros.* bank interest and commission, and five per cent. commission in addition on all moneys advanced.

Cook Bros did not insist on their right to receive proceeds of sales under this agreement, but permitted *Casselman & Plewes* not only to sell but to collect the money, and the commission was reduced from five to three per cent.

In 1875 or 1876 the *Cooks* asked for the security provided for under the agreement of 1872, and it was agreed in the winter of 1876 to give them the security on the lands and limits now in question. In 1875, 1876, and 1877, the lumber business was very much depressed, and difficulty was experienced in making sales, and letters were written by *Casselman & Plewes* to *Cook Bros.* (21st of September, 1875, 22nd of October, 1875), complaining of the hardness of the times, and difficulty in getting money. This continued through 1876 and 1877. *Casselman & Plewes* had a large stock of lumber but did not wish to sacrifice. They kept their account in the Bank of Toronto, and were permitted occasionally to overdraw to small amounts; and while in that position they could not get discounts. In April, 1877, they had *McKenzie Bros.'* note for $1,000. which was to fall due on the 15th of July, 1877, which they could not get discounted. They applied to the *Cooks* to indorse it, which they consented to do if they got security for what was then due to them, and unless they obtained that they would not indorse. On the 12th of April, 1877, *Casselman & Plewes* signed a receipt in the following terms:

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"Received from *Cook & Bros.* their endorsation on *McKenzie Brothers'* note for $1,000 due at St. Thomas on 15th July next, in consideration that we pay $500 of money obtained on said note on *George J. Cook's* endorsation, due at Bank of Toronto in Barrie, for

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$800, on 8th May next; and we also agree to execute a mortgage in favour of *Cook & Bros.* on our mill property and land attached thereto in township of Tay, and our right to all lands and timber purchased by us in said townships of Tay and Tiny, as per statement sent *Cook & Bros.*; the mortgage we agree to execute on or before the 25th inst. The mortgage on the property is in consideration of money owing to said *Cook & Bros.*, and for their endorsation on our notes discounted at the Bank of Toronto in Barrie."

"Barrie, 12th April, 1877."

The indorsation of the *McKenzie Bros.*' note by *Cook Bros.* was obtained, the note discounted, and the mortgages now in question executed in pursuance of that agreement.

The facts as to the circumstances of the firm of *Casselman & Plewes*, at and prior to the date of the mortgages, I take from my own notes of the evidence of *Plewes*, who was produced by the defendants, and was by no means friendly to the plaintiff, though I think he intended to give honest testimony. He says, "We were hard up when the mortgages were given. The banks charged us 8 and 9 per cent. for discounts, and 10 per cent. for renewals. We paid *Cook Bros.* 3 per cent. per annum; we agreed to give them 5 per cent. but they lowered it. In 1875–6 we were not doing very well. In 1877, we paid off a good bit; I was then at Courtwright, (he gave the items shewing $5,867 paid in 1877.) In the spring of 1877, our total liabilities I estimated at $23,000. We had assets, the property mortgaged, &c. I do not recollect *Cooks* asking the state of our affairs. They knew we were hard up. I thought if the *Cooks* would hang on to us we could pull through." On cross-examination, he says, "We received a letter from *George Cook*, dated 20th January, 1877, requiring security before any more renewals. It was always understood we were to give

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security. I might have told *George Cook* in the summer of 1876, that our limits contained 10,000,000 or 11,000,000 feet, worth $1 a thousand. No statement of affairs sent to *Cooks* shewing what our condition was. They knew of *Goldie* and *McCulloch's* claim; do not know if they knew of more. When the advance was made in 1877, *Cook Bros.* insisted on our sending a portion to *Goldie* and *McCulloch*. It was because they were pressing that we required the advance. We paid off a good deal in 1877, but can't tell whether we contracted new debts to a larger amount. In 1877 we were hard up, but had no notion of being in an insolvent condition. Do not know that the *Cooks* knew our circumstances. We gave the mortgage for what we owed them, and for what other purpose is specified in the assignee's hands—it is attached to the account of *Cook & Bros.* Our liabilities outside of *Cook & Bros.* when the mortgage was given, were $7,543. We had assets outside the mortgaged properties, to $8,685, showing a surplus of $1,142. If put under the hammer they would not have realized enough to meet the liabilities; at fair prices they would. * * In 1876, we were hard up because we could not make sales of our lumber. In 1877, we sold a large quantity of lumber. * * We were sued by some creditors in 1876 and 1877, which we afterwards paid. We were pressed for money that fall and winter. I never represented to the *Cooks* that our liabilities outside theirs and *Goldie & McCulloch's* were only about $200. I did not tell *Cooks* of our liabilities beyond theirs and *Goldie* and *McCullochs*. I won't swear I did not say to *Cooks*, that besides *Goldie* and *McCulloch's* the accounts were small. The *Cooks* knew of *Hunter's* account—that we dealt with them—but I do not know if they knew of the amount."

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Casselman says, that when the mortgages were given he believed they had enough besides the property in the mortgages to pay all their liabilities leaving the

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debt to the *Cooks* out. He did not tell the *Cooks* of outside debts he owed. They knew of our liability to *Goldie* and *McCulloch*. "We supposed we could pay all our creditors, and gave a mortgage to the *Cooks*, because we had agreed to do so."

George A. Cook, one of the firm of *Cook & Bros.*, says, "I refused to indorse *McKenzie Bros.'* note until the security was given. When the agreement of the 12th of April, 1877, was signed, I indorsed the note. I would not have done so without the agreement. We advanced to enable the insolvents to carry on the business, and we were to get security. I thought *Casselman & Plewes* solvent when the mortgage was taken. I would not have made further advances if I thought otherwise. After the mortgage, we made further advances and renewed notes. *Plewes* always told me they owed nobody but us and *McCulloch*, and a few small debts—not more than $200 around the place. He also told me of the stock they had. I had no intention of injuring other creditors, nor did I think *Casselman & Plewes* intended to go into insolvency. * * * In 1875, I thought the insolvents ought to have reduced the amount of their indebtedness. In 1876 I thought them solvent but negligent." And the correspondence between the parties is consistent with this belief. "*Plewes* always assured me they owed only very small sums outside of our account. The last he told me was in December, 1876, or January, 1877. Between 1872 and 1875, lumber fell $1½ to $2 a thousand; from 1875 to 1877, it was stationary—since then declining."

Judgment.

The sections of the Insolvent Act that seem to be intended to be referred to in the answer, are the 131st, 132nd, and 133rd, but in argument the 130th was also relied on.

Section 130 enacts that, all contracts by which creditors are injured, obstructed, or delayed, made by a debtor unable to meet his engagements, and after-

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wards becoming an insolvent, with a person knowing such inability, or having probable cause for believing such inability to exist, are presumed to be made with intent to defraud his creditors.

Section 131 avoids conveyances made to a person ignorant of inability to pay within 30 days next before the insolvency. This section does not apply here, as the mortgages were made nearly 18 months before the insolvency.

Section 132 avoids conveyances made to defraud creditors with the knowledge of the person acting with the debtors. This is a re-enactment of the Statute of Elizabeth. This clause also may, I think, be laid out of consideration. The evidence disproves any intent to defraud creditors or to obstruct, hinder, or delay them. The witnesses on both sides deny it: *Casselman & Plewes* had assets sufficient to meet their liabilities, and taking the security was in pursuance of a prior agreement.

Judgment.

With reference to section 130, it is necessary for the defendant to shew that the plaintiff knew of the inability of the insolvents to meet their engagements, or had probable cause for believing it. The evidence, in my opinion, fails to establish any such knowledge or reason to believe it. It is shewn that the plaintiff was always assured by the insolvents that their liabilities outside of that to him were trifling, and that there were assets to meet them. The difficulties of the firm arose from a decline in the lumber market and their inability to make sales except at a sacrifice they were unwilling to incur. He was told there was lumber on hand; and both the mortgagors and the mortgagee believed in the solvency of the mortgagors when the mortgage was given. The plaintiff therefore had no reason to believe they were unable to meet their engagements. From the beginning the business had been supported by the plaintiff, and he was assured that by the continuance of his assistance these diffi-

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culties would be overcome. He was willing to continue upon getting security. He then indorsed the paper to enable them to procure an advance. This was not actually an advance of money, but I think it may fairly be placed in the same category, and entitled to all the benefits of an advance. The money could not be procured without his indorsation. The indorsation was given, and upon it the money was obtained. Nor, although half of it was to be applied upon a note then under discount, do I think that the balance of $500 should not be considered a substantial sum in enabling the insolvents to carry on their business—in fact they were enabled to continue the business for 18 months. The inability to pay the plaintiff, should not, under the circumstances here, be deemed sufficient to affect him with notice. His advances were made under an agreement to give security, and under an agreement by which he could have insisted upon receiving the proceeds of sales. The state of the lumber market sufficiently accounts for his not desiring to enforce the latter term of the contract out of consideration for the mortgagors, and being aware of his right to security from them otherwise. The nature of the business also was such that the plaintiff expected to renew the paper due to him, until from the proceeds of the business or such securities as he could get it could be retired.

Judgment.

In reference to the indorsation of the *McKenzie* paper, by which money was obtained, it is said in *Kalus* v. *Hergert* (*a*), that the cases all shew that the crucial test is the existence of a *bonâ fide* intention to carry on the business. Applying that test here, where the business was in fact carried on for eighteen months, these mortgages may be supported.

But the principal defence was based on section 133, which avoids securities given by a person in contem-

(*a*) 1 App. R. 75, 79.

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plation of insolvency. It was said that the mortgagors must have known the desperate state of their circumstances; that they had no means to pay their liabilities; that they could not hope to carry on the business; and so they must have contemplated insolvency as the necessary result to which they were tending. And if the evidence had established this, it is probable the defence would be good. The burden of the proof is upon the assignee, and the date of the transaction is not so near the thirty days as to lead to any presumption adverse to it. A period of eighteen months had elapsed and it will require very cogent evidence to shew that for such a long time they had in contemplation so remote a contingency. In fact, however, I deduce from the evidence that there was no such contemplation. At the date of the mortgages the mortgagors considered themselves solvent, and the facts upon which their belief was based seem to justify it. According to the evidence for the defendant, after paying all liabilities,

Judgment.

there was a surplus of over $1,100. It is true that if a forced sale had then taken place the property not mortgaged to the plaintiff might not have produced enough to leave a surplus at all, there might indeed have been a deficit, but at fair prices there was enough. There was no prospect of a forced sale being had—it was not had, and therefore I think the mortgagors were only forming a reasonable belief when they thought themselves solvent. They cannot be affected with the result arising from the subsequent decline in the lumber market, they could not suppose it was to continue to fall; they might well assume that it would return to former prices and former stability.

I have assumed throughout that the construction of the statute contended for by the defendant was correct, but, even on that assumption, I think the evidence fails to shew that these mortgages offend against any of the provisions of the Act.

Another reason, which has only been incidentally

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mentioned hitherto, seems to me to validate these securities if not wholly, at least in part, and that is the agreement of 1872 contemporaneous with the advances that they should be secured. The advances under that agreement were not only for erecting the mill, but for "getting out saw logs the coming winter;" and the *Cook Bros.* were to have "any further security (besides the policy of insurance) they might require as security for money advanced." Had nothing been done in pursuance of this till within thirty days of the insolvency, and no specific security required or given before then, it is quite possible the plaintiff might have a difficulty in maintaining his charge. But where in pursuance of that agreement security was required, and security given eighteen months before the insolvency, I think it is entitled to the protection afforded by *Allan* v. *Clarkson* (*a*), and cases of that kind.

Judgment.

Suter v. *The Merchants' Bank* (*b*) was cited as opposed to this. In that case when the insolvent opened his account with the bank he promised the agent "always to keep him well supplied with collaterals." For about two years the account was kept in the ordinary way of bank accounts, discounting customers' paper, &c., and it was attempted to establish a specific lien on certain notes by virtue of an agreement within the thirty days. I thought the original agreement too vague to entitle the bank to a lien. There was no test by which the supply was to be estimated; and, I did not think an agreement was proved within the thirty days giving a lien on the notes in question. But that case does not decide that if an agreement had been proved, even if within the thirty days, to give the lien in pursuance of the original contract, that it would have been void.

If to any extent the mortgages are sustainable under

(*a*) 17 Gr. 570.

(*b*) 24 Gr. 365.

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that agreement, it is sufficient for the disposition of this case, leaving the amount to be determined by the Master. The construction of that agreement was to some extent discussed, but as I think the mortgages valid on the other ground I need not enter upon this question.

It was contended further, that the giving of the mortgages was in itself an act of insolvency, under section 3, sub-sec. 1, which declares that a debtor shall be deemed insolvent if being unable to meet his liabilities in full he makes any conveyance of the whole or main part of his stock in trade, or of his assets without the consent of his creditors, and it was said that leaving security for the other creditors would not protect the transaction, as all the creditors were entitled to share in all the property. I do not think that is the true construction. I cannot imagine the Legislature meant to declare a man insolvent if he makes a conveyance even of the main part of his assets, if enough is left to satisfy the other creditors. And in this instance, I think, enough was left for the other creditors. But section 8, affords an answer that seems to me to dispose of the objection—that no proceedings are to be taken to place the estate of an insolvent in liquidation unless they are taken within three months next after the act relied upon. If it were an act of bankruptcy no proceedings were taken under it within three months or at all, and any objection to the security must depend on the other sections of the Act.

Judgment.

I may observe in regard to *Leys* v. *McPherson*, (*a*), which was cited as establishing the general proposition that notice of insolvency to avoid conveyances must be actual and not constructive, that it was decided upon a clause in the Act of 1874, equivalent to the 132nd section of the present insolvent law, which avoids conveyances made to defraud creditors, if so made with

(*a*) 17 C. P. 266.

the knowledge of the person receiving them. But it can have only a limited application to the clauses where "reason to believe" is added as a ground of avoidance. Constructive notice may often be such as to give a person reason to believe the matters to which it refers. 1879. Cook v. Rogers.

Upon the whole, I think the plaintiff entitled to a decree reforming the mortgages; and it will be referred to an officer of the Court (Master or Registrar), to take an account of what is due upon them.

The defendant asks a sale instead of a foreclosure. I have some doubt on this matter. It has been held, I believe, that a mortgagee cannot ask a sale, and prove for any deficiency against the mortgagor's estate in insolvency. If the defendant does not choose to redeem and seeks to compel a sale, it would seem reasonable, if a deficiency should be the consequence, that the plaintiff should have the right to prove for it.

The matter was not argued, and if the parties desire, they can speak to it again. Judgment.

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O'Sullivan v. Cluxton.

Covenants—Costs—Parties—Practice.

Where new trustees of a corporation are made parties to a suit for specific performance, with a surviving trustee, who alone is liable on the covenants contained in the instrument, the former in order to obtain costs against the plaintiff must take the objection by their answer, or at all events before the cause is brought to a hearing; and where the object for which a bill was filed has been obtained during the progress of the cause it should not be brought to a hearing on the mere question of costs, without an offer to settle that question otherwise.

Where the covenants in a deed are silent as to the removal of buildings or obstructions on property conveyed thereby, the fact that in an advertisement for the sale of the property it was stated they would be removed, and representations to that effect were made by the vendors at the sale, does not entitle the purchaser to a decree for their removal; for any relief he may be entitled to in this respect he must rely on his deed. But where a conveyance describes lands conveyed as abutting on a lane, and the plan by which the lands are sold shews such lane, notwithstanding which the vendors allow obstructions in the shape of buildings to continue thereon, the Court will grant relief by directing a removal of such obstructions.

Statement.

On the 12th of June, 1875, the plaintiff purchased from the trustees of the Peterborough Congregation of the Methodist Church of Canada two out of the nine lots into which the property of the congregation had been sub-divided. The property was sold, pursuant to advertisement according to a registered plan which represented a lane fourteen feet wide, running at the rear of the plaintiff's lot. At the time of the sale, part of the old Methodist Church building was standing on the lane shewn in the plan. The trustees at the time of the sale undertook that the lane should be opened in the then following November. The deed of conveyance to the plaintiff was from the trustees, of whom only one, the defendant *Cluxton*, was alive. He and the present trustees were made parties defen-

dant. The deed referred to a lane on the premises, but there was no covenant as to removal of the buildings thereon, though the advertisement stipulated for their removal within a few months after the sale.

The bill was filed to compel specific performance of the above undertaking. Pending the suit the obstruction was partly removed and the lane opened, whereupon Mr. *O'Sullivan*, the plaintiff's solicitor, wrote and sent to the defendants' solicitor the following letter:—

"DEAR SIR,—For the sake of peace I am willing on behalf of plaintiff to waive her strict rights, and dismiss the bill without incurring further expense, leaving it to one of the Judges of the Court to say (on the facts of the case to be submitted on affidavits), who should pay the costs of litigation. It is unreasonable to press the case to a hearing merely on the question of costs, and I shall use this letter, if you insist on the case going down to the next sittings. I await your reply before filing replication."

The proposition contained in this letter having been rejected, the case came down to a hearing at the sittings of the Court held at Peterborough.

Mr. *Boyd*, Q. C., and Mr. *Edwards*, for the plaintiff.

Mr. *Dennistoun*, Q. C., and Mr. *Dumble*, for the defendants.

At the conclusion of the case,

Judgment.

BLAKE, V. C.—I should have doubted whether the plaintiff had any right to require the removal of the buildings that do not stand on the lane. We find that as between the trustees and the persons who might purchase the buildings a very reasonable provision is made. The vendors did not know that the same person would purchase the land and buildings, and it was thought necessary to define the period of time within which the person purchasing the building should remove it, in order that the person purchasing the

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land might enjoy it; and therefore they put in the ordinary provision in the terms of sale, that the person purchasing the buildings would be obliged to remove them in a reasonable time, and so far as the advertisement and sale and agreement for purchase are concerned, there is nothing whatever shewn on which the plaintiff could demand relief over against the vendors or against the purchaser of the building. I do not say that there would be no right on the part of the plaintiff to have the buildings removed if she purchased the land on which the buildings were situated. She probably would be entitled to the advantage of the provision limiting the time within which the buildings should be taken away, that the person purchasing the land might enjoy his purchase.

At the sale there were representations made that the lane would be at once opened, and, no matter what might be the technical rights as between the plaintiff and the trustees, it is clear that they were bound as honest men to open that lane, because, as Mr. *Cluxton*, one of the trustees, very fairly says in his evidence, and there is no doubt of the truth of the fact, that this was announced at the sale, and there is no doubt it had a good effect as an additional inducement to purchasers, and there is no doubt that the lane was not opened before the bill was filed. Mr. *Cluxton* says further in his evidence, that he considered it their duty to open the lane.

Judgment.

We have it, therefore, proved that these gentlemen advertised this land for sale, and as a means of getting as large a price for it as possible, informed the purchasers that they would have the use of this lane. As honest men they were bound to give that which they held out as an inducement to bidders: the lane was to be opened.

Mr. *Cluxton* says it was a means whereby they got a larger price for their land. They got a larger price and induced the plaintiff to purchase, and then they

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turn round and virtually say, "You can do as you please, we will not trouble about the lane." She purchased the land in 1875, and in 1877 the obstruction is still there upon the lane. They got an increased price upon these very representations, and then they do not carry these representations out; and the question is, whether they can go free, or whether they are bound to remove these obstructions.

Now everything in the shape of morality requires this to be done, and the only question is, whether they have brought themselves within the arm of the Court.

Although the defendants happen to represent a religious body, they should not stand in a better position than ordinary individuals.

There is a difference between an executed and an executory contract. Where the matter remains *in fieri* the Court will more readily interfere than if the contract has been carried out: then generally the parties must rely on the covenants in the deed.

Judgment.

This case differs to my mind from the ordinary cases in which the Court refuses to give relief. The deed itself refers to the lane, and it says that the property has been sold by a plan, and upon that plan there is a lane; and thus the persons agree to give to the plaintiff a particular piece of land, and agree also to give the lane.

A good deal of that touched upon this morning might be material if the trustees of the church had dealt with this lane after the sale. But it is not shewn they have done so, and apparently they still are owners of it, subject to the rights given to purchasers at the sale.

Laying aside entirely the right to remove the building from the land that has been sold, and not dealing with any rights there may have been in regard to that building, but dealing alone with this question of the lane, and suppose we have only before us the sale in 1875, the sale by the plan, that sale in which it is said,

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"I give you a piece of land, and I give you the right to that lane," and instead of giving that lane, and allowing the vendee to use it, the vendor retains the building there, which blocks up the lane, I do not think it could be questioned that the person would have a right to proceed against him, thus making an agreement, thus defining by his deed what he was selling, and still retaining upon that lane a building that is blocking it up. There is no doubt he is entitled to come to this Court and say, "You agreed to sell me the lot and the lane as a means of egress and ingress; and instead of giving me that, you keep upon it a building. You are not entitled to do that. I gave you $500 more than I would have otherwise done; and now, by your own act, you block up that lane, and prevent me using it; and still retain the extra purchase money you got from me for the use of this lane." We find the plan and the deed, which shews the agreement between the parties, and the evidence proves that instead of the person who has agreed to give this lane allowing it to be used, he retains on it a building which prevents the use of the lane: that remains so from 1875 to 1877: then there is a letter written, and, very slowly, indeed, proceedings are taken for the removal of it.

Judgment.

I think, upon the weight of evidence, that it was not until the bill was filed that anything substantial was done towards removing the obstructions, so that I think the plaintiff has the right to come to the Court, and shew the agreement entered into without any mistake or misapprehension—the agreement which Mr. *Cluxton* says was the agreement he had entered into—and ask simply that the Court should compel them to do that which they admit themselves under oath they thought they should do, and that they were bound to do.

Then the only question here virtually is, who should bear the cost of the litigation, as the lane has been

in the meantime cleared? I think the plaintiff was right, and entitled to have this lane. I do not think the defendants should have retained this building there until, at all events, the 1st of November; and I think that when the plaintiff offered to the defendants, instead of carrying her case down to a hearing, to have the matter disposed of at the expense of a few dollars, it would have been much wiser to have assented to that than incur the expense of coming down to an entirely unnecessary hearing of the cause.

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I think from the mode in which the defendants have acted, no effort having been made by them to have this matter disposed of at a merely nominal expense as they might have done, I cannot charge the plaintiff with the costs of coming to the Court for that relief to which she was clearly entitled. Mr. *Cluxton* does not raise the defence that other trustees should be added, and it is only fair that he should be charged with the expense of the litigation, he not having raised the objection of want of parties. He, at all events, in 1875, was bound, as he admits, to see that the plaintiff obtained what he or the trustees agreed that she should get; and he, at all events, must pay the costs of the litigation.

Judgment.

Mr. *Boyd*.—And as to the other defendants, the costs follow the event?

BLAKE, V. C.—They may arrange that among themselves.

1879.

DEWAR v. MALLORY.

Fixtures—Freehold or chattels.

The owner of a mill, originally constructed for the purpose of sawing, afterwards added to it machinery for planing the lumber, and subsequently executed a mortgage of the land and a chattel mortgage of the machinery, treating and calling it "chattels."

Held, that the mortgagee of the realty had no right to look to the machinery as security for his claim, although in the absence of the acts of the owner in severing the machinery from the realty it would have been considered part of the freehold.

By mortgage, bearing date in May 1877, *Peter McMaster*, being the owner of the land in question, on which was situate a saw-mill with its machinery, mortgaged the same to the plaintiff to secure payment of certain promissory notes, payable at times extending over a period of more than two years. This mortgage was taken by the plaintiff to secure a portion of the purchase money of the lands with the buildings and machinery therein, which the plaintiff had some time prior to its date sold to *McMaster*.

Statement.

By various mesne conveyances subsequent to said mortgage the estate and interest of *McMaster* became vested in the defendant *William M. H. Mallory*.

Contemporaneously with such mortgage *Peter McMaster* executed to the plaintiff a chattel mortgage upon a planing machine and other machinery in the mill and upon the premises appurtenant thereto, in which he described such planing machine and machinery as "goods and chattels."

By a prior indenture, dated the 29th of March, 1877, *Peter McMaster* had mortgaged the same lands to one *W. M. Barrie*, the machinery comprised in the subsequent chattel mortgage then being upon the premises.

By an assignment, dated the 5th of April, 1878, *Barrie* assigned his mortgage to the plaintiff.

Default was made in payment of the moneys secured by these mortgages, and the plaintiff filed his bill for

foreclosure, and also to restrain the defendants from removing or interfering with the above mentioned machinery, portions of which had a few days before the bill was filed been severed from the premises by the defendants. 1879. Dewar v. Mallory.

The value of the machinery had been a material part of the security, and the removal thereof had made the land an insufficient security for the sums remaining due on the mortgages.

The case came on for the examination of witnesses and hearing at the Spring Sittings of 1879, at Cornwall.

Mr. *D. B. Maclennan*, Q. C., for plaintiff.

Mr. *James Maclennan*, Q. C., for defendant.

Sept. 3rd.

SPRAGGE, C.—Upon the question of the character of the articles in question, whether part of the freehold or chattels, I entertain no serious doubt. They were placed in the mill by the owner of the mill, and are outside of the rule that prevails in relation to trade fixtures. Then is there anything in the circumstance (if the fact were so) of the mill as originally constructed being only for the sawing of lumber? Assuming it to be so, the owner of the mill adds to it machinery for planing the lumber that he saws. Some saw mills have this as an adjunct to their sawing and some have not. It is a branch of the same business, or rather a perfecting of the same material for market. Judgment.

But if it were not so, I do not see that it would make any difference. It is machinery for carrying on the business of the same owner on the same premises. If he had built a new factory there and put in it appropriate machinery, the intendment would be that it was intended to be a part of the freehold. These observations will apply to the planing machinery and the shingle mill. I will speak of the circular saw presently.

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So far as to the legal intendment, apart from any other fact in the case. Then, has there been anything in the acts and dealings of the parties indicating a different intent? What was done on the sale by *Dewar* to *McMaster*, indicated a different opinion as to the character of these pieces of machinery. It indicated an opinion that in law they were chattels, and in the chattel mortgage they are called chattels. The purchase money was divided so far as this, that for a certain portion security was given on the land, and for a certain other portion security was given on the articles of machinery in question as chattels; they were described as chattels in a chattel mortgage. The mortgagee does not now seek to hold them as security for that amount, but the position he takes is, that they were in fact and in law a part of the freehold, and that he is entitled to hold them as such, as comprehended in the mortgage given on the land.

Judgment.

If there had been no chattel mortgage, I should hold him so entitled. There being a chattel mortgage in fact, Mr. *Maclennan* uses the fact in this way: two of these pieces of machinery were added to the original saw mill by the plaintiff himself when he was owner; it is a question of intention when machinery is put in a building on land, whether it shall become part of the freehold, or retain its character of chattels; and he argued that by treating them as chattels in taking a chattel mortgage he has shewn that his intention was that they should still be chattels.

The same point arose in the case of *Carscallen* v. *Moodie* (*a*). It is thus put by Sir *John Robinson*: "Then we are further to consider that both parties to the assignment, that is, the plaintiff and *Caldwell*, the debtor, treated these machines as chattels, separate and distinct from the real estate, for in the deed of assignment the grantor after conveying certain land and

(*a*) 15 U. C. R. 304.

other real estate particularly described, with their appurtenances, conveyed and assigned also 'all the goods and chattels, stock in trade, plank road stock, and steamboat stock, set forth in a schedule attached to the deed,' and in this schedule the several machines which are now in question are set down as so many chattels, and thus are classed with the personalty in the deed itself. It has been said that this was done without any direction from *Caldwell* or the plaintiff, and was merely the idea of the attorney who prepared the deed So it may have been, but we could hardly deny weight to the fact that these things were expressly conveyed as chattels, upon the ground of any parol declaration of the intention or want of intention with which the language in the deed was used."

The other learned Judges were of the same opinion. Mr. Justice *Burns*, at p. 332, expressed himself thus: "It is sufficient for this case that we can see that the owner of the fee himself never considered or treated the machinery in any other light than as chattels, and as such conveyed them to this plaintiff in trust for payment of debts. If the case had been that the debtor was only tenant of the premises, and would have had a right to remove the machinery in question as trade fixtures, there could have been no question whatever that as against him the sheriff could have sold the fixtures separately and distinctly from the lease of the premises. I do not see that any difference should exist between that and the case which we have before us, namely, the case of the owner of the building putting machinery into it, which he himself appears to have always treated and considered, and which in fact he afterwards sold and transferred as mere goods and chattels. In a case where the owner thought he might consider chattels affixed as part of the freehold, and had treated them as such, there might be reason, when the transaction is *bona fide*, for holding them to

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be so in order to effectuate and carry out the intention, but when the owner has never considered the chattels as affixed to the freehold, and in fact has treated them otherwise, I confess I do not see any sufficient reason, in a case like this, where it is a contest between one class of creditors and another class of creditors of the debtor, why we should hold an opinion different from that of the person who professed to convey them as chattels."

In that case there was no distinction between the building and the machinery, other than that the one was styled land and the other goods and chattels; and that it was said by the mistake of the conveyancer. In this case there are separate instruments, and each, land and machinery, is made a security for a particular sum; and it is not shewn or suggested that this was not the intention of the parties This case, therefore, contains stronger indications of intention that the machinery should be held to be and be treated as chattels, than does the case of *Carscallen* v. *Moodie*. The decision in that case, it is true, did not proceed wholly upon that ground, for the Court inclined to the opinion that the articles of machinery in question in that case were chattels, but the fact that in the assignment they were treated as chattels, and that that was to be regarded as an indication of intention, was one ground of the decision of the Court.

Judgment.

The case of *Waterfall* v. *Penistone* (*a*) is also in point. The part of the head note which relates to this point, is as follows: "In 1847, the freehold of a mill was mortgaged by *J.* to *M.*, and a further charge on the same premises, with the machinery then thereon, was made by *J.* to *M.* in 1850. By deed of the 14th of September, 1853. *J.* charged his equity of redemption in the premises so mortgaged to *M.*, and certain other machinery then erected thereon, as a security to

(*a*) 3 Jur. N. S. 15.

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defendant; and by deed of the 14th August, 1854, *J.*, assigned the machinery then on the premises to defendant, to secure a further advance of £500, made by him, and further charged his equity of redemption in the premises before charged to defendant to secure this £500."

Mr. Justice *Erle*, in delivering the judgment of the Court after expressing the agreement of the Court with the decision in *Mather* v. *Fraser* (*a*), added: "But we think it does not apply to the indenture of the 14th of August, 1854, which first created a primary charge on the machinery now in question, distinct from the lands, by way of bill of sale; and afterwards created a separate secondary charge on the equity of redemption by another part of the same instrument;" and it was held that the machinery was in effect personal chattels. This case again is, like *Carscallen* v. *Moodie*, less strong than the case before me, in there being in that case one instrument for securing one sum of money. It cannot but be *a fortiori* an indication of the like intention, where, as in this case, there are two instruments, each for securing a distinct sum of money. My opinion, therefore, is, that the learned counsel for the plaintiff is right in his contention; and that the mortgage on the realty cannot stand as security for the sum secured by the mortgage on the machinery. The circular saw I understand not to be now in question the defendant having given it up or submitted to give it up to the plaintiff.

Judgment.

In a case of *Rose* v. *Hope*, (*b*) a case somewhat similar, *Hagarty*, C. J., intimated an opinion that, "if the chattel mortgage debt had been paid off, released, or extinguished" it might be assumed "that the mortgagees of the realty would then be considered as entitled to such property; as the 'severance' had ceased, and the things had re-assumed their original

(*a*) 2 K. & J. 536.

(*b*) 22 U. C. C. P. 432.

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character of fixtures passing with the freehold." The Court held that the chattel mortgage was a still subsisting security; the observation that I have quoted was, therefore, not necessary to the decision of the case; it was intimating only what might have been the case if the facts had been other than what they were. The learned Chief Justice proceeded on the ground of the severance of the land and the goods; and argues therefrom, that when the severance should cease the land and goods should again take their original character; but the cases to which I have referred treat of what was done by the owner as an evidence of intention, the owner doing what he had an undoubted right to do in dealing with the machinery; it was of the realty or it was personalty, according as the owner of both the land and the machinery intended it should be. The character he impressed upon the machinery was that of personalty; that was his intention, and unless by some act he manifested a change of intention, the machinery would retain that character. I am unable, therefore, to agree with the learned Chief Justice, for whose opinion I entertain the most sincere respect, in the suggestion that he has thrown out in *Rose* v. *Hope;* but if I did, I should still have to follow the two cases I have cited, which are decisions upon the same point.

Judgment.

The bill is for foreclosure, the question being, whether the articles in dispute were of the realty or chattels. The decree will declare them to be chattels, and will be for foreclosure as to the lands only; the plaintiff to pay the costs occasioned by the contention on which he has failed. The other costs will be as upon an ordinary decree of foreclosure.

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In November, 1861, the defendant made his promissory note in favour of the plaintiff for $510 payable on demand, with "interest to be paid at the rate of $10 per week." There being other dealings between the parties, defendant, in March, 1867, paid plaintiff $2,000 upon his indebtedness generally, and by an agreement in writing the plaintiff extended the time for paying the balance for 1, 2, 3, and 4 years, but in default of payment of any instalment the whole might be sued for. Default having been made in payment of the instalment due in 1868 the plaintiff, in 1872, appropriated a portion of the $2,000 to the discharge of the $510 note, no appropriation of the money so paid having been made by the defendant. *Held*, notwithstanding the fact that the plaintiff on receipt of the $2,000 had entered the same in his books to the credit of the defendant generally, that he was at liberty to apply the payment to such note.

St. John v. Rykert, 249.

NOTE.—This case was subsequently carried to Appeal, and on the 20th May, 1879, the present decision was varied, the Court holding that the evidence warranted them in finding that the note for $510 had been paid. The Court also directed the sum of $912.70 received by *St. John* from one *Servos*, whose mortgage had been assigned to him by *Rykert*, as collateral security for a note of *Rykert*, to be carried to the credit of *Rykert*, at the date of its receipt; or that interest should be computed thereon at the same rate as the Court allowed to *St. John* on a mortgage held by him for $3,000, not on the judgment recovered by *St. John* on the collaterals held by him.

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Any communication between one of the parties to an arbitration and an arbitrator on the subject of the reference, of which the other party and the other arbitrators are not aware, and at which they are not present, is illegal, and renders the award invalid—an arbitrator being a judge, whose duty it is to be indifferent between the parties. Therefore where it was shewn that one of several arbitrators had held interviews with the defendant pending the reference, and that the arbitrator in one at least of such interviews consulted the defendant as to the modes in which the award might be framed, and asked the defendant which he preferred, these facts being withheld from the other arbitrators, the Court set aside the award, and ordered the defendant to pay the costs.

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Campbell v. The Northern R. W. Co., 522.

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After the distribution of the personal estate, and the allotment to the devisees of the real estate of a testator, an action was brought against the executors on a covenant of the testator, in which a judgment was recovered, the amount of which the executors paid out of their own money. Twenty-seven years afterwards, and after the greater number of the devisees had died, and all but one had sold their property to *bonâ fide* purchasers without notice, the executors who eleven years previously had instituted proceedings in this Court against the heirs of that one, brought on their cause for hearing on further directions, seeking to compel them to recoup the executors.

The Court, under the circumstances, refused to make a decree against any one share for more than a proportionate share of the demand, leaving the executors to litigate the question with the parties liable to contribute to the payment of the debt, as owing to their delay in suing, the obstacles in the way of the defendants recovering were quite as great as they were to the plaintiffs enforcing the claim.

Emerson v. Canniff, 149.

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The provision under the statute that requires corroborative evidence to be adduced, where one of the parties to an alleged contract is dead, is not that the evidence of the party setting up the claim must be corroborated in every particular; it is sufficient if independent support is given to the party's statements in so many instances that it raises in the mind of the Court the conviction that such statements may be depended on even in respect of those matters in which there is no corroboration.

McDonald v. McKinnon, 12.

COSTS.

1. Where a cause was carried to a hearing in a defective state through an error common to all parties, diverse interests of infants being represented by one guardian and one counsel, no costs of that hearing were given to either party on the final disposition of the cause.

Munro v. Smart, 310.

2. The manner in which deeds had been drawn was such as to invite inquiry as to the power of trustees to convey; and, therefore, although the Court had not any doubt of the effect and operation of the conveyances, no costs were given to either party, on an investigation of title under the Vendor and Purchaser's Act.

Lucas v. The Hamilton Real Estate Agency, 384.

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1. Although the general rule is, that a vendor must pay the costs of shewing a good title, a different rule may be applied as to the expense of investigating the title in the Master's office.

Wardell v. Trenouth, 245.

2. On a sale of land, the purchase money was payable by instalments, which were paid into Court as they fell due, and the purchaser had gone into possession and was not entitled for some time to a conveyance. Without calling for an abstract, or affording the vendor an opportunity of clearing up the title, he filed a bill for specific performance. The Court, on further directions refused the purchaser the costs of investigating the title in the Master's office ; (and)

On re-hearing, the Court being of opinion that this was not an appealable matter, affirmed the order, with costs. *Ib.*

COVENANTS.

1. Where new trustees of a corporation are made parties to a suit for specific performance, with a surviving trustee, who alone is liable on the covenants contained in the instrument, the former in order to obtain costs against the plaintiff must take the objection by their answer, or at all events before the cause is brought to a hearing; and where the object for which a bill was filed has been obtained during the progress of the cause it should not be brought to a hearing on the mere question of costs, without an offer to settle that question otherwise.

O'Sullivan v. Cluxton, 612.

2. Where the covenants in a deed are silent as to the removal of buildings or obstructions on property conveyed thereby, the fact that in an advertisment for the sale of the property it was stated they would be removed, and representations to that effect

were made by the vendors at the sale, does not entitle the purchaser to a decree for their removal; for any relief he may be entitled to in this respect he must rely on his deed. But where a conveyance describes lands conveyed as abutting on a lane, and the plan by which the lands are sold shews such lane, notwithstanding which the vendors allow obstructions in the shape of buildings to continue thereon, the Court will grant relief by directing a removal of such obstructions. *Ib.*

See also "Mortgage," &c., 1.

COVENANT IN RESTRAINT OF TRADE.

The defendant agreed to serve the plaintiffs in their business of milkmen, and in case of any breach by him of the agreement entered into between the parties, and signed by them, that he would forfeit the sum of fifty dollars, to be recovered by the plaintiffs as stipulated damages, and not as a penalty.

Held, that this did not enable the defendant, on payment of the $50, to do the prohibited acts: and in a bill seeking to enforce the agreement the plaintiffs prayed for payment of the amount of the liquidated damages, and for an injunction to restrain the defendant from acting in breach of his agreement, on the motion for injunction coming on, *held* that the plaintiffs were at liberty to waive their claim for damages and elect to have relief by injunction.

Toronto Dairy Company v. Gowans, 290.

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A bill to set aside a conveyance as fraudulent against creditors, was filed by five distinct parties or firms who held overdue notes upon which the alleged fraudulent grantor was indorser, "on behalf of themselves and all other the creditors of the defendant." *Held*, on demurrer, that there was no misjoinder, and that the bill sufficiently shewed it to be on behalf of all creditors.

Turner v. Smith, 198.

See also "Creditors, suits by."
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DEPOSIT BY INSURANCE COMPANIES.

An insurance company had been licensed under the statute, 31 Vict. ch. 48, to transact fire and inland marine insurance business, although its original charter authorized the transaction of fire and marine insurance, without distinction of ocean from inland marine. The holders of ocean marine policies, though resident in Canada, are not entitled to rank as creditors on the fund deposited with and remaining in the hands of the Government, in the event of the company becoming insolvent.

Green v. The Provincial Insurance Co., 354.

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A testator possessed of several freehold properties, each of which was subject to an incumbrance, devised to a trustee all and singular his real estate, and the rents, issues, &c., due or to become due and payable to him, upon trust to receive the same and therewith pay all his personal debts, funeral and testamentary expenses; and, also, thereafter from time to time pay and discharge therewith all debts, dues, and incumbrances upon his estate. And after providing for payment of all his just debts and the incumbrances on his estate, he made specific devises of his lands.

Held, that the devise in each case was not of the equity of redemption merely, but that all the lands were bound to contribute to the paying off of all the mortgages; not that each parcel should bear its own burthen; and that in order to avert a sale of one of the parcels in a proceeding upon the mortgage, the trustee should raise by mortgage of all the lands, a sum sufficient to pay off all the incumbrances thereon; the rents and profits of the whole to constitute a fund wherewith to pay the interest and ultimately liquidate the principal.

Sproatt v. Robertson, 333.

[After Payment of Debts.]

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DEVISE SUBJECT TO ANNUITY.

Where a devise of real estate is made subject to the payment of an annuity, and the devisee accepts the devise, he will be deemed to have assumed a personal liability to pay the amount, which will be enforced by this Court.

Carter v. Carter, 232.

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The testator during his last illness handed to his wife the key of a cash-box containing sundry papers, together with a promissory note for $400, which he intended to give to her for her own benefit, but the box and its contents remained as much in the possession of the testator as before the alleged gift; and the note, with other papers, came to the hands of the executors after the death of the testator:

Held, that there had not been a valid *donatio mortis causa*.

Young v. Derenzy, 309.

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EPISCOPAL CHURCH.

By one of the canons of the Episcopal Church in this Province it was provided "that on the vacancy of any rectory, incumbency, or mission within the diocese * * the appointment to the vacancy shall rest in the Lord Bishop of the diocese; * * provided that before making such appointment the Bishop shall consult with the churchwardens of said parish or mission, and with the lay representatives of the same."

Held, that the consultation, here referred to, was not intended to be by correspondence, but in a personal interview with the churchwardens and lay representatives, so as to afford an opportunity of stating reasons for or against any nominee to fill such vacancy, the suggestion and discussion of other names, the state of the congregation, its likings and dislikings, what would be for the advantage of the Church, the circumstances of the locality, and all the numberless particulars that might or ought to have an influence in guiding the opinion of the Bishop in filling such vacancy. But *quære*, if after such consultation it is not left dis-

cretionary with the Bishop to comply with the wishes of the delegates, and exercise his own judgment as to what is best for the congregation, even in contravention of the wishes of the delegates.

Held, also, that the facts in this case did not shew that any consultation had been had with the representatives of the congregation as to the appointment of the plaintiff to the incumbency, before it was made.

Johnson v. Glen, 162.

ESCHEAT.

Held, on demurrer (1), that the doctrine of escheats applies to lands held in Ontario; (2) that the Attorney-General of Ontario is the proper party to represent the Crown, and to appropriate the escheat to the uses of the Province; (3), that this Court has jurisdiction in such cases; and (4), that it was proper for the Attorney-General, if he saw fit, to file a bill in this Court to enforce the escheat.

The Attorney-General v. O'Reilly, 126.

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FAMILY SETTLEMENT.

The owner of land, by a letter written to his mother, directed that she should have the power to dispose of his property, and she by her will devised portions thereof to some, to the exclusion of others of her children. *Before reading this will*, the executors named therein called her several heirs together, and suggested that they should sign an agreement to submit to and acquiesce in the provisions of such will, and which they did sign.

Held, that this being in the nature of a family agreement or settlement, the parties to it were bound thereby, and would be compelled to carry out the provisions of the will.

[Affirmed on rehearing, 22nd February, 1879.]

Melville v. Stratherne, 52.

FIRE INSURANCE.

1. By an additional condition indorsed on a policy of insurance against fire, covering chattels, it was declared that "when property (insured by this policy) or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or any interest therein without the consent of the company, first indorsed thereon, or if the property hereby insured shall be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or in equity, this policy shall cease to be binding on this company."

Held, that this did not prevent the owner from creating a mortgage on the property covered by the policy, without notice to or assent of the company.

Sands v. The Standard Insurance Co., 113.

2. By ch. 162, sub-sec. 4 R. S. O., it is provided that conditions on fire insurance policies, differing or varying from the statutory conditions, "shall be added in conspicuous type, and ink of a different colour." Conditions of this character were printed on a policy in the same type as the statutory conditions, which was small, and in ink of a blue colour, not differing much in appearance from the black of the statutory conditions.

Held, not a sufficient compliance with this provision of the statute to enable the company to set up such conditions in answer to a suit on the policy. *Ib.*

3 A married woman to whom a stock of goods had been bequeathed by her brother, insured the same as her own property, although the executor to the will (her husband) had not formally assented to the bequest:

Held, that this was not any breach of the first statutory condition as to the ownership of property insured being truly stated in the application for insurance.

Butler v. The Standard Fire Ins. Co., 341.

4. By an additional condition it was provided that if in the application the assured made any erroneous or untrue representations material to the risk, or made any untrue statement respecting the title or ownership, the policy should be null and void:

Held, that if the above statement as to ownership, though not to the prejudice of the company, could be construed to avoid the policy the Court would hold such condition not just and reasonable, and therefore null and void under "The Fire Insurance Policy Act." *Ib.*

5. The plaintiff, a legatee of a stock of goods, acquiesced in her husband (the executor of the will), carrying on business in the same manner as the testator had done, in the course of which the greater portion of the original stock had been disposed of, and other goods had been purchased; so that at the time a fire occurred the stock had been somewhat increased:

Held, that under these circumstances the plaintiff was entitled to recover the full amount of her policy, though greatly in excess of the value of the original goods remaining unsold. *Ib.*

FIXTURES.

The owner of a mill, originally constructed for the purpose of sawing, afterwards added to it machinery for planing the lumber, and subsequently executed a mortgage of the land and a chattel mortgage of the machinery, treating and calling it "chattels."

Held, that the mortgagee of the realty had no right to look to the machinery as security for his claim, although in the absence of the acts of the owner in severing the machinery from the realty it would have been considered part of the freehold.

Dewar v. Mallory, 618.

[Reheard 12th December, and stands for judgment.]

FOLLOWING MONEY FRAUDULENTLY OBTAINED INTO LAND.

See "Fraudulent Conveyance," 2.

FORESTERS, ORDER OF.

Where an association has a code of laws, as also rules for the government of members, which point out what course a member shall pursue if he finds himself aggrieved, he must exhaust the remedies thus provided before applying to the Courts of Law for redress; and such rules of the association may require to be more rigidly enforced in the case of a secretary, treasurer, or other officer of the association, than they would be in the case of an ordinary member.

Field v. The Court Hope of Ancient Order of Foresters, 467.

FRAUDULENT ASSIGNMENT.

1. *Held*, affirming the judgment of *Blake*, V. C., that the plaintiffs were not at liberty to rely on a judgment at law recovered since the filing of the bill, for the purpose of setting aside an assignment of a claim as fraudulent, but must stand on their position as creditors when the proceedings were instituted in this Court.

St. Michael's College v. Merrick, 216.

2. The official assignee of an insolvent's estate is appointed for the conservation of the estate, and his powers and duties are only those pointed out in section 16 of 38th Vict. ch. 16. Where, therefore, a person claiming to be a purchaser of the asssets petitioned the Judge in insolvency to have them restored to him, to which petition the official assignee appeared, and on discussion the Judge ordered a restoration of the estate to the alleged purchaser.

Held, that the insolvent estate was not represented in such proceeding, and that there had not been any valid adjudication upon the questions raised in the suit.

Smith, Assignee v. McMillan, 300.

FRAUDULENT CONVEYANCE.

1. A suit for alimony having been instituted against the plaintiff, he, for the purpose of protecting his lands from process conveyed the same to his solicitor for a money consideration, and the solicitor afterwards made a conveyance of the same lands back to him, but which the solicitor retained in his own possession, and subsequently by the desire of the plaintiff struck out his name as the grantee, and inserted as such the name of the sister of the plaintiff. The Court being of opinion that this had not the effect of divesting the title which had been reconveyed to the plaintiff, and that even if it had had that effect there would be a resulting trust in favour of the plaintiff, decreed relief accordingly, but under the circumstances, without costs.

Wilson v. Owens, 27.

2. The owner of land, subject to a mortgage created by himself and his wife, being in insolvent circumstances sold the equity of redemption therein to a *bonâ fide* purchaser, the wife joining in the conveyance, and the larger portion of the consideration being paid her in the shape of a promissory note which she subsequently paid over to *J. N.*, upon a purchase from him of his equity of redemption in other lands; the conveyance of which was made to the wife. On a bill filed by an execution creditor of the husband

impeaching the transaction as fraudulent under the Statute of Elizabeth.

Held, that it was a fraudulent devise to defeat creditors and that the plaintiff was entitled to follow the consideration paid to *J. N.* into the lands conveyed by him to the wife.

Fleury v. Pringle, 67.

3 The owner of real estate, six months before attaining majority, applied to effect a loan on the security thereof alleging in answer to a question, that he was then of full age. A mortgage was accordingly executed and the money advanced; this the mortgagor expended in the purchase of other lands which, together with the land so mortgaged he, on the day after he attained twenty-one, conveyed to his mother for a nominal consideration.

Held, that the minority of the mortgagor could not be set up in answer to a bill to enforce payment of the mortgage, but the same remained a valid and subsisting charge upon the land held by his grantee.

Goyer v. Morrison, 69.

4. A man who had been carrying on business in partnership agreed to buy out the interest of his co-partner, for the purpose of continuing the business on his own account, and subsequently made a purchase of property and took the conveyance thereof in the name of his wife, the husband swearing that at that time he did not owe a dollar, and that the money expended in the purchase of the property belonged to his wife, having been obtained on the sale of lands belonging to her. This statement, however, was shewn to be incorrect, and a judgment having been recovered against the husband, upon which nothing could be realized under execution, the Court, on a bill filed by the judgment creditor, following the decision in *Buckland* v. *Rose*, *ante* vol. vii., page 440, declared the transaction fraudulent as against creditors, and ordered a sale of the lands in the usual manner, and payment of the proceeds to creditors.

Campbell v. Chapman, 240.

5. A bill to set aside a fraudulent deed by a simple contract creditor, whether the debtor is living or dead, should be filed on behalf of the plaintiff and all other creditors.

Colver v. Swayze, 395.

See also "Demurrer."
"Husband and Wife."

FRAUDULENT REPRESENTATION.

[As to Age.]

If a minor fraudulently represents himself to be of age, for the purpose of effecting a loan of money, he will not be permitted afterwards to set up the fact of his infancy as a defence to a suit to enforce payment of a security created by him on effecting such loan.

Goyer v. Morrison, 69.

See also "Fraudulent Conveyance," 3.

FRAUDULENT SETTLEMENT.

1. The owner of blackacre and whiteacre created a mortgage on blackacre in favour of a loan society to secure an advance of $2,000, the estimated value of the mortgaged premises being $3,000 at least. The mortgagor subsequently, being not indebted otherwise, voluntarily settled in good faith whiteacre on his wife. On a bill fled by a subsequent creditor the Court set aside the settlement as fraudulent against creditors, it being shewn that blackacre was not sufficient to pay the loan society at the time of the settlement, although the loan society was not a party impeaching the settlement. [Proudfoot, V.C., *dubitante.*]

Masuret v. Mitchell, 435.

2. An equitable mortgage by deposit of title deeds had been created for $1,000 by a son in favour of his mother, who had advanced him that sum. The mother subsequently delivered the title deeds to the party in favour of whom a voluntary settlement had been created, but it was not intended to be a transfer of the $1,000 due to the mother:

Held, that the effect of the delivery of the deeds was to extinguish the claim on the land for the $1,000, and that in a decree declaring the settlement void as against creditors, the beneficiary under the settlement was not entitled to any lien in respect of this amount. [Proudfoot, V.C., dissenting.] *Ib.*

FRAUDULENT TRANSACTION.

See "Husband and Wife."

"Mortgage," &c., 2.

FREEHOLD OR CHATTELS.

See "Fixtures."

common with the infant, although there has not been any ouster or exclusion of the infant, or any denial of his title.

Courcier v. Courcier, 307.

[MORTGAGE BY.]

See "Fraudulent Conveyance," 3.

[SIGNING AGREEMENT.]

See "Specific Performance," 2.

INJUNCTION.

1. An injunction was obtained restraining the sale, under a writ of *ven. ex.*, of a married woman's inchoate right of dower, subsequently to which an Act was passed rendering such estates saleable at law, and the plaintiffs in the action, without procuring a discharge of the injunction, sued out an *alias fi. fa.*, and were proceeding to a sale of the widow's dower, the husband having, after the injunction had been granted, died. The Court, under these circumstances, granted a sequestration to enforce the injunction; although, upon an application for that purpose, the defendants might have been entitled to be relieved from the operation of the injunction.

Allen v. Edinburgh Life Assurance Co., 192.

2. A railway company who take possession of land under the compulsory powers conferred by the statute are bound to erect fences for the proper separation of the railway from the remainder of the land within six months from the time of possession being taken, not from the time of notice being given requiring such fences to be constructed, which need only be a reasonable notice to fence; and if they neglect to do so they may be enjoined from further using the line of railway. In such a case the owner is not required to erect the fences at his own expense, and depend on his recovering damages from the company.

Masson v. The Grand Junction R. W. Co., 286.

[Reversed on appeal, see note, page 289.]

3. The principle upon which the Court interferes by injunction is to preserve property in its actual condition until the legal title thereto can be established; and although under the present practice this Court can determine legal rights, it will not do so upon interlocutory application. Therefore, where two railway companies were in actual possession of a strip of Ordnance land 100 feet in width, along which their tracks were laid, and a third railway company, proceeded to lay their track on the same strip,

when an injunction was obtained at the instance of one of the first-named companies restraining such third company from further proceeding with their works, whereupon they applied for and obtained from the Government of the Dominion a license of occupation of the same strip for the purpose of running their track thereon, the order in Council authorizing such license stating that it was not to "operate to imply any covenant or agreement on the part of the Crown to give possession to the licensees, but that such license shall be accepted by them subject to any legal rights, which either the Grand Trunk or the Northern Railway [the two companies so in possession] may hereafter establish in respect of the one hundred feet or any part thereof." A motion was then made to dissolve the injunction, which was (by PROUDFOOT, V. C.) refused, with costs, and on re-hearing his order was affirmed by the full Court, with costs.

The Grand Trunk Railway Company v. The Credit Valley Railway Company, 572.

4. This Court will not restrain a debtor from dealing with his chattel property at the instance of a party representing himself to be a creditor, but who is not in a position to ask for a decree establishing his claim against the defendant.

Hepburn v. Patton, 597.

See also "Covenant in restraint of trade."
"Practice," 13.

INSOLVENCY.

See "Fraudulent Assignment," 2.

INSOLVENT ACT.

The object of the Legislature in creating the Insolvent Court is to administer the estates of insolvents, and this Court will not, unless in a very exceptional case, interfere with the jurisdiction thus created. Therefore, where a bill was filed for the purpose of winding up the affairs of an insolvent insurance company, a demurrer for want of equity was allowed, although the bill prayed, amongst other things, for the appointment of a receiver to get in the assets and wind up the affairs of the company.

McNeil v. Reliance Mutual Fire Insurance Co., 567.

See also "Preferential Assignment."

INSOLVENT COMPANY.

See "Insolvent Act."

INSURANCE COMPANIES, DEPOSIT BY.

See "Deposit," &c.

INSURANCE, MEMORANDUM OF EFFECTING.

See "Marine Insurance."

INTEREST ON NOTE AFTER MATURITY.

Where a promissory note is made payable with interest at a certain named rate until paid, the holder will be entitled to enforce payment with interest at that rate, after the maturity of the note, notwithstanding the fact that he had recovered judgment at law upon collateral securities held by him.

St. John v. Rykert, 249.

INTEREST, RATE OF.

See "Building Society."

INTESTACY AS TO PERSONALTY.

[NOT SPECIFICALLY BEQUEATHED.]

See "Will," &c., 3.

JOINT TENANT.

See "Lessor and Lessee," 1.

JUDICIAL ACTS.

See "Lessor and Lessee," 2.

JURISDICTION,

See "Es heat."
"Insolvent Act."

LAPSE OF TIME.

See "Contribution."

LAPSED LEGACY.

See "Will," &c., 5.

LATENT AMBIGUITY.

The testatrix devised and bequeathed all her real and personal estate (*except her ready money*) to one *M.* for life; and upon the death of *M.*, she directed that all her real and personal estate should be sold; and the proceeds thereof, *together with all her other moneys*, she bequeathed to (among others) the sons and *daughter* of her sister *M. A.* There were at the date of the will two daughters of *M. A.* living: *Held*, that parol evidence was admissible to shew that the testatrix intended to benefit only one of the daughters, and that the evidence shewed that she intended to exclude the other.

Held, also, that the division of the *ready money* was postponed until the death of *M*, the tenant for life.

McIntosh v. Bessey, 496.

LAWS AND RULES OF AN ASSOCIATION.

See "Foresters, Order of."

LAY DELEGATES.

[CONSULTATION WITH, BY BISHOP.]

See "Episcopal Church."

LEGACY TO INFANTS.

See "Loco Parentis."

LESSOR AND LESSEE.

1. *A. B.* created a lease in favour of *C. W.* and *W. W.*, brothers and partners in trade, of certain premises in Toronto, in which the partnership business was carried on, reserving the right to the lessor of determining the lease by giving six months' notice, "limited to the act of *A. B.* himself or his certain attor-

ney." A notice, for the purpose of determining, was, during the currency of the lease, served by *A. B.*, which was in ample time, but was served on *W. W.* only, who signed an admission of service for himself and *C. W.*, who was at the time absent from the Province, but the fact of such service it was shewn had been communicated to him by his brother, whether within the six months or not did not appear. *Held*, sufficient within the terms of the lease: And *semble*, that a notice served upon one of two joint tenants would be sufficient.

Barrett v. Merchants' Bank, 409.

2. On the same day, but subsequent to the service of such notice, a writ of attachment in insolvency issued against a trading firm, of which *A. B.* was a member. *Held*, notwithstanding the rule that a judicial act relates back to the earliest moment of the day on which it is done, that the notice so given by *A. B.* was effectual. *Ib.*

LETTER WRITTEN WITHOUT PREJUDICE.

Although a letter written "without prejudice" by a party in the course of a cause cannot be read against him, it may be read by him on the question of costs, in order to shew that he had made such an offer as rendered the further prosecution of the suit unnecessary.

Boyd v. Simpson, 278.

LIABILITY OF TREASURER FOR MONEY DESTROYED BY FIRE.

The defendant, being treasurer of a municipality, kept his moneys in his house, there being no proper place for depositing the same provided by the municipality, and there being no bank in the county within a distance of thirty-five miles: *Held*, that under these circumstances the treasurer was not liable to make good to the corporation the amount of loss sustained by the accidental burning of his house, and the destruction therein of the moneys of the municipality; and that his own statements under oath, which appeared satisfactory to the Court, were sufficient evidence to exonerate him from liability.

The Corporation of Houghton v. Freeland, 500.

LIBERTY TO MOVE.

See "Practice," 3.

LICENSE OF OCCUPATION.

See "Injunction," 3.

LIEN FOR WHARFAGE.

See "Wharfinger."

LIFE ESTATE.

Lands subject to mortgage were devised, "after payment of debts," to the widow for life, remainder to the plaintiff, who accepted from the widow a lease for her life of the premises. The widow having refused to pay the interest accruing on the mortgage, the plaintiff paid the same, and also the principal money secured thereby:

Held, that these facts did not entitle the plaintiff to call upon the widow for payment out of the rents reserved by the lease or out of the personal estate bequeathed to her; the only relief to which he was entitled being to have the mortgage debt, together with the interest on the sum secured until it became due, raised out of the land.

Burk v. Burk, 195.

LIMITATIONS, STATUTE OF.

See "Appropriation of payments."

LIMITING ESTATE.

See "Will," &c., 1.

LIQUIDATED DAMAGES.

See "Covenant in restraint of Trade."

LIST OF LANDS LIABLE TO SALE.

See "Tax Sale."

LOCO PARENTIS.

A testator bequeathed $4,000 to his grandson, payable on his attaining twenty-one, and in case of his death before that period,

the amount was to revert to the residuary estate, and it had been decided (*ante* vol. xxv., page 253) that in the events that had happened the grandson was absolutely entitled to one-half of the residuary estate, the income of which was amply sufficient for his maintenance.

Held, that although the testator had been in *loco parentis* to the infant, the infant was not entitled to claim interest on the legacy for his maintenance; but that being entitled to one-half of the residue as next of kin, and there being a *quasi* intestacy as to the interest on the legacy, one-half of it should be paid into Court to the credit of the infant; the legacy itself to be paid into Court upon the trusts of the will.

Rees v. Fraser, 233.

MAINTENANCE.

See "Loco Parentis."

MARINE INSURANCE.

B, who was the agent in Montreal of two insurance companies, had authority from one to accept marine risks to a sum not exceeding $5,000. An application having been accepted by *B.* to grant an insurance for $7,700, he immediately directed his clerks to enter a memorandum of application and acceptance in the books of the other company of a re-insurance for $2,700, which was done, thus limiting the liability of the first company to $5,000; but no notice was given of the re-insurance to the re-insuring company until after a loss occurred:

Held, that the fact of there having been an entry made of the application for, and acceptance of, the risk by the clerk of the agent was sufficient, and the amount so re-insured having been paid the company could not recover back the amount, although no certificate of insurance had ever been issued by one company to the other; the evidence in the cause negativing entirely anything like *mala fides* on the part of the agent in the transaction.

The Canada Fire and Marine Insurance Company v. The Western Insurance Company, 264.

MARRIED WOMAN.

1. *Quære*, whether a married woman, under the R. S. O. ch. 106 sec. 6, can devise or bequeath her separate property to one of several children to the exclusion of the others.

Munro v. Smart, 37.

2. *Held*, that under the R. S. O. ch. 106, sec. 6, a married woman could not devise or bequeath her separate property to one of several children to the exclusion of others. *S. C.*, 310.

MECHANIC'S LIEN.

This Court will not direct the sale of lands required for the use of a railway company to enforce the payment of a mechanic's lien for work done on the property; in such a case the decree will only be for payment of the amount found due with costs.

Breeze v. The Midland R. W. Co., 225.

MILL OWNER.

See "Riparian proprietor."

MISJOINDER.

See "Demurrer."

MONEY FRAUDULENTLY OBTAINED.

[Following it into Land.]

See "Fraudulent Conveyance," 2.

MORTGAGE, MORTGAGEE, MORTGAGOR.

1. The purchaser of land gave back a mortgage to secure part of the purchase money, with absolute covenants for payment, &c. In fact a part of the land had been sold for taxes accrued before the vendor acquired title, and the time for redemption had elapsed at the time of the sale. *Held*, no answer to a claim for the full amount secured by the mortgage, although the conveyance by the vendor contained covenants limited to his own acts only.

In re Kennedy—Wigle v. Kennedy, 33.

2. *C.* created two mortgages in favour of *M. B.* and her two sisters to secure repayment of moneys advanced by them. *C.* subsequently sold the lands comprised in these mortgages to different parties, and after the death of the two sisters procured *M. B.* alone to execute discharges of these mortgages, conveying to her other lands by way of security, which, however, were

wholly insufficient in amount. After the death of *M. B.* the personal representatives of herself and her sisters filed a bill, seeking to charge the lands embraced in the original mortgages with the amount remaining due on these securities, and the Court, under these circumstances, made a decree for payment of the shares which should have been coming to the two sisters, with costs.

Dilk v. Douglas, 99.

3. The rule that an assignee of a mortgage takes, subject to all the existing equities and the state of accounts between the mortgagor and mortgagee was acted upon and applied in a case where, in 1875, a married woman created a mortgage, in which her husband joined, and it was agreed that any balance then due by the mortgagee to the husband as soon as ascertained should be applied on the mortgage, and that any future accounts that might become due to the husband for lumber and work supplied to or done for the mortgagee should also be so applied, and this mortgage was about fifteen months afterwards sold and assigned by the mortgagee to a purchaser without notice of such understanding or agreement, he having obtained such assignment as security for any deficiency that might be found to exist upon the realization of a mortgage then held by the purchaser against the mortgagee, and having taken the assignment without inquiring as to the state of accounts, or to the title to the lands.

Pressey v. Trotter, 154.

4. Under these circumstances the Court on further directions refused to allow the plaintiff costs against the assignee of the security, although it was shewn on taking the accounts in the Master's office that the mortgagee was indebted to her husband at the inception of the mortgage in a sum exceeding that mentioned in the mortgage; restricting her right to recover her costs from the mortgagee alone, though, had the mortgage money been satisfied by payments, costs would have been given against the assignee as well. *S. C.* 295.

5. The plaintiff was the holder of two mortgages, and in June, 1870, obtained a decree of foreclosure, whereby he was declared entitled to priority over one *F.*, who was the holder of a fourth mortgage thereon, and after the decree the plaintiff bought up the third mortgage thereon, which was prior to that held by *F.*; and he had also, before the date of the decree, procured from the mortgagor a release of the equity of redemption.

Held, on appeal from the Master, following the decision of *Barker* v. *Eccles*, *ante* vol. xviii., pp. 440-523, and *Hart* v. *McQuesten*, *ante* vol. xxii., p. 133, that the Master, had cor-

rectly found the plaintiff entitled to priority over *F.* in respect of all the three mortgages.

Forrester v. Campbell, 212.

6. Where a power of sale in a mortgage provides that after default of payment for a month, and a month's notice of sale, the mortgage premises may be sold, the month's default and notice of sale cannot run concurrently.

Gibbons v. McDougall, 214.

7. In October, 1863, the owner of real estate created a mortgage thereon in favour of *J. M.* to secure $20,000, which was duly registered on the day of execution, and was in 1875 assigned to a bank to secure a liability of the mortgagee, there having been a prior mortgage on the same estate, created in 1861, securing $4,000. In 1866 another mortgage was created in favour of the plaintiff for $4,000, which was intended to be substituted for the prior mortgage for that amount, and the money obtained thereon was applied towards the payment thereof, *J. M.* giving a written consent that the latter mortgage should have priority to his own notwithstanding its prior registration, such consent, however, not being registered. The mortgaged estate proved insufficient to pay the mortgage assigned to the bank, who had taken the assignment thereof in good faith and without notice of *J. M.'s* consent to be postponed to the plaintiff:

Held, that these circumstances did not create an equity in favour of the plaintiff to call upon *J. M.* to make good his loss by reason of *J. M.'s* neglect to notify the bank of his priority.

The case of *Slim* v. *Croucher*, 3 Giff. 37, considered and distinguished.

Campbell v. McDougall, 280.

8. A creditor of a mortgagee who has sued out an attaching order against the mortgage debt, is not an incumbrancer within the terms of the General Order 448, of whose claim the Master is to take an account.

Crosbie v. Fenn, 283.

9. The rule laid down in *Donovan* v. *Bacon*, *ante* vol. xvi., p. 472, that the sheriff cannot sell, under common law process, the equity of redemption in lands upon which two several mortgages have been created, was held to apply where the second mortgage was in the hands of the plaintiff, an execution creditor who had recovered judgment in an action upon the covenant contained in the second mortgage.

Kerr v. Styles, 309.

10. Where it was shewn that the wife of a person against whom

criminal charges were about to be instituted, executed a mortgage on her lands in order to prevent such charges being proceeded with. the Court refused to enforce payment of the security, and dismissed a bill filed by the mortgagees for that purpose. The fact that the friends of the husband and wife were the persons who had urged her to give the security, did not validate the instrument.

Watts v. Mitchell, 570.

See also "Devise of Mortgaged Lands."
"Fire Insurance," 1.
"Fraudulent Conveyance," 3.
"Life Estate."
"Vendor and Purchaser," 2.

MUTUAL INSURANCE COMPANIES.

By the Act of the Legislature of Ontario (31 Vict. ch. 52), The Toronto Mutual Fire Insurance Company (which afterwards became united with the Beaver Insurance Company), was empowered to issue debentures in favour of any person, firm, &c., for the loan of money. and in pursuance thereof debentures of the company were issued to the amount of $83,808, all of which remained outstanding and unpaid. One of these debentures for $5,800 had been issued to the plaintiffs for money loaned to the company. and the defendants *The Federal Bank* held debentures to the amount of $18,000, for securing the payment of which premium notes to the amount of $33,915, were by resolution of the directors of the company pledged to the Bank, and the Bank had obtained possession of the notes and collected large sums thereon, which they claimed the right of applying in liquidation of the debentures held by them. To a bill filed by other debenture holders seeking to have their priority declared, a demurrer by the Bank for want of equity was over-ruled with costs, giving the Bank liberty to answer in two weeks, the Court holding that under Consol. Stat. U. C., ch. 52, and 32 Vict., ch. 52, O., and 32 and 33 Vict., ch. 70, D., the pledge to *The Federal Bank* was not authorized.

The Bank of Toronto v. The Beaver and Toronto Mutual Eire Insurance Co., 102.

MUTUALITY.

See "Specific Performance," 2.

PAID DIRECTORS.

See "Railway Companies."

PAID VALUATOR.

[LIABILITY OF.]

1. A paid valuator is not liable to make good any loss sustained by the person employing him, by reason of his over-valuing the property, where he has been led into making such over-estimate by the improper conduct of the agent of the employer.

Silverthorn v. Hunter, 390.

2. On a balance of evidence the Court refused to order a paid valuator to make good a loss sustained by a party advancing money upon his certificate of valuation, the valuator swearing that he intended to certify the value at $2,000, whereas, by the fraud of the lender's agent, he was induced to certify at $3,000, notwithstanding the alleged agent denied the charge, and the plaintiff, who advanced the money, swore that but for such certificate he would not have done so: but the Court, in consequence of the negligent manner in which the valuator had discharged his duty, on dismissing the bill refused him his costs. *Ib.*

3. A paid valuator estimated the value of certain property at $4,980, stating in the certificate of value that he held himself "responsible to you for the correctness of this report and valuation," which was enclosed in a letter stating "the houses are unfinished, and my valuation of $4,980 is on the supposition that they will be finished in a manner similar to those adjoining. A final inspection should, I think, be made." The houses never were finished similarly to those adjoining, nor was the defendant ever called upon to make any final or other inspection, and at a subsequent sale the property, which had been taken possession of by the mortgagees and allowed to become greatly out of repair, realized only $1,800.

Held, that under these circumstances, there being no *mala fides* imputable to the appraiser, that he was not answerable for the loss sustained by the lender.

Scottish American Investment Co. v. Hope, 430.

[See further as to the liability of valuators, *Gowan* v. *Paton*, *post* vol. xxvii. p. 48.]

PAROL EVIDENCE.

The father of the plaintiffs and the defendant were brothers, and the defendant obtained a deed in his own name of 100 acres

of land, in which it was alleged his brother was jointly interested. It was shewn distinctly that the defendant had at one time made a deed to his brother of some land, although the defendant, after his brother's death, denied having given any deed, but on the hearing he admitted giving a deed of an adjoining property for which no patent had issued, although the defendant's name had been entered in the books of the Crown Lands Department as an applicant for purchase. It was shewn that a box containing the deeds in reference to the property had been stolen, and the contents had never been seen since. The Court, under the circumstances, notwithstanding the denial of the defendant, whose evidence was not consistent:

Held, that the plaintiffs were entitled to an account of the purchase money received by the defendant upon a sale of the property, and ordered the defendant to pay the costs to the hearing.

Curry v. Curry, 1.

[Affirmed on appeal, 10th March, 1879.

Since argued in Supreme Court, and stands for judgment.]

See also "Fraudulent Conveyance," 1.

PART PERFORMANCE.

See "Specific Performance," 1.

PARTIES ENTITLED TO CLAIM.

[On Deposit made by Insurance Company.]

See "Deposit," &c.

PARTIES.

See "Covenants."
"Practice," 8, 9, 10.

PARTITION.

See "Infant."

PARTY EXONERATED BY HIS OWN OATH.

See "Liability of Treasurer for money destroyed by fire."

PATENTS.

Where the plaintiff had, more than one year previous to his application for a patent in Canada, obtained a patent in the United States disclosing the same invention, though not containing all the claims contained in the Canadian patent.

Held, under section 7, Patent Act 1872, that such foreign patent amounted to a publication of the whole invention in the United States, and imported a disclaimer of all parts not claimed in the foreign patent:

Held, also, that such defence was sufficiently raised by the pleadings in this case.

Held, also, that a patent in Canada granted to an independent inventor, after the plaintiff's foreign patent, but before his application for a patent in Canada, was valid against the plaintiff's subsequent patent.

Held, also, that evidence of such prior Canadian patent to an independent inventor was admissible under a general denial that the plaintiff was the first inventor.

Barter v. Howland, 135.

See also "Specific Performance," 3.

PAYMENT FOR IMPROVEMENTS.

See "Sale for Taxes," 6.

PLEADING.

See "Demurrer."
"Patents."

POWER OF APPOINTMENT.

See "Trust Deed."

POWER OF RAILWAYS TO ARRANGE WITH EACH OTHER.

The Railway Act of 1868, enacts that "The directors of any railway company may at any time make agreements or arrangements with any other company, either in Canada or elsewhere, for the regulation and interchange of traffic passing to and from their railways, and for the working of the traffic over the said railways respectively, or for either of those objects separately,

and for the division and apportionment of tolls, rates, and charges in respect of such traffic, and generally in relation to the management and working of the railway or railways in connection therewith, for any term not exceeding twenty-one years, and to provide either by proxy or otherwise for the appointment of a joint committee or committees for the better carrying into effect any such agreement or arrangement with such powers and functions as may be necessary or expedient, subject to the consent of two-thirds of the stockholders voting in person or by proxy," the word "traffic" being interpreted by the Act as meaning "not only passengers and their baggage, goods, animals, and things conveyed by railways, but also corn, trucks, and vehicles of any description adapted for running over any railway."

Held, that the powers of a railway company to make such arrangements were not qualified by a subsequent Act, which conferred similar powers with others, and "provided also that the powers hereby granted shall not extend to the right of making such agreements with respect to any competing lines of railways."

Campbell v. The Northern R. W. Co., 522.

PRACTICE.

1. At the hearing a decree was pronounced in favour of the plaintiff with costs generally, but on moving to vary the minutes, statements and admissions in the answer were pointed out, to which the attention of the Court had not been drawn at the hearing, which would have enabled the plaintiff to have obtained the same decree on bill and answer. The Court varied the decree by directing that only such costs should be taxed as would have been incurred by a hearing on bill and answer.

Johnson v. School Trustees of Howard, 204.

2. *Held*, that the debt alleged in the bill being under a bond to the defendant's wife, and not to the defendant himself, was not such a claim as could be garnished under the Common Law Procedure Act.

St. Michael's College v. Merrick, 216.

3. *Held*, also [on rehearing, affirming the ruling of *Blake*, V. C.], that where costs of interlocutory motions were reserved "until the hearing or other final disposition of the cause," and on a demurrer being allowed, the order drawn up directed the plaintiff to pay the costs thereof, "together with the further costs of this cause, forthwith after taxation thereof;" that whether or not such interlocutory costs would fall within the definition of

further costs in the cause, the omission to provide for them in the order allowing the demurrer was "a mere mistake;" and that under the general order 186 the parties had a right to apply without liberty for that purpose being reserved. *Viney* v. *Chaplin*, 3 DeG. & J. 281, considered and acted on. *Ib.*

4. At the hearing the defendant was found answerable to the plaintiff for a breach of duty in respect of shares of stock bought by the plaintiff through his agency, and subsequently the Court, on motion, added to the decree a direction that the defendant should indemnify the plaintiff against future calls on such stock, but refused costs of the application to either party; to the plaintiff because the relief would have been granted at the hearing if then asked; and to the defendant because he resisted that, to which the plaintiff was clearly entitled.

Machar v. Vandewater, 319.

5. The decree ordered payment of a sum of money by a railway company, and in default that a Receiver should be appointed, from which the company gave notice of appeal, and moved to stay the appointment of a Receiver and the enforcement of the debt until after judgment in appeal. The Court refused the application unless security was given for payment of the debt in case the decree should be affirmed; and, in any event, ordered the defendants to pay the cost of the motion.

Fox v. The Toronto and Nipissing R. W. Co., 352.

6. Where a notice had been served by one of the parties (the defendant) to an arbitration of his intention to move against the award in due time after publication, and the plaintiff thereafter served notice consenting to the award being set aside, but the defendant did not proceed with the motion, the Court, under these circumstances, held that the defendant could not afterwards set up delay as an answer to an application by the plaintiff for the purpose of having the award set aside.

Pardee v. Lloyd, 374.

[Since argued in Appeal, and stands for judgment.]

7. At the hearing a decree was pronounced declaring a deed void to the extent of the interest reserved in favour of the grantor and his wife, and the children of a daughter of the grantor, but in drawing up the decree the deed was declared void as to the children of an intended marriage of the son of the grantor. Under this decree a sale of the trust estate was had at the instance of the plaintiff, a creditor who had filed the bill impeaching the deed as fraudulent. The Court, under these circumstances, refused to carry out the sale, and ordered the decree to

be corrected, and a new sale had, in which the interests of the children of the marriage should be protected.

Thompson v. Dodd, 381.

8. Where the tenant for life was trustee, and after the cesser of other estates, was to hold the estate for the benefit of the children of *P. C.*

Held, that the trustee sufficiently represented their interests, and that they need not be parties to a bill impeaching the trust deed as fraudulent against creditors. *Ib.*

9. Although it would seem that in this Province every bill by a creditor against the assets of a deceased debtor, whether so expressed or not, should be taken to be on behalf of all the creditors, and that it is the duty of personal representatives in every case where a deficiency of assets is apprehended to ask for a general administration, and if they do not ask for it it would be the duty of the Court to direct it; and although there may not exist any cogent reason for requiring the bill to be in that form in this country, still the practice of the Court having been uniform in following the English rule it would now require the decision of a higher tribunal to alter it.

Colver v. Swayze, 395.

10. The same reasoning which requires that in proceeding against a living debtor, a creditor without a lien must sue on behalf of all others, applies with equal force where the suit is against the representative of a deceased debtor.

Longeway v. *Mitchell*, *ante* vol. xvii., p. 190, observed upon and followed. *Ib.*

11. After the decree which had the effect of creating an interest in the land of the defendant in favour of the plaintiff, as also of their infant children, had been pronounced in an alimony suit, the plaintiff died, whereupon the suit was revived in the name of the infants, and subsequently the defendant died.

Held, under these circumstances the executor of the defendant had no right to object to the solicitor of the plaintiff reviving in his own name against the estate of the defendant making the infants defendants instead of plaintiffs in order to recover his costs.

Elvert v. Elvert, 448.

12. By a paragraph of the plaintiff's bill an ouster was alleged at such a date, and continued possession since as would, if true, have defeated the plaintiff's claim to relief, but this statement was not proved; on the contrary the fact was shewn to be otherwise, and the Court being of opinion that the title of the

plaintiff was clearly made out, directed the objectionable paragraph to be expunged. it being evident from the course the suit had taken that the defendant would not be placed at any disadvantage thereby.

Foley v. Foley, 462.

13. Although the rule is, that on a motion to dissolve an injunction, the plaintiff cannot support the writ on grounds not set forth in his bill, still where a defendant moves to dissolve because he has acquired a title subsequent to the filing of the bill, the plaintiff may resist such application by any means in his power, whether stated in the bill or not.

The Grand Trunk R. W. Co. v. The Credit Valley R. W. Company, 572.

See also "Covenants," 1.

"Covenant in Restraint of Trade."

"Devise subject to Annuity."

"Letter written without prejudice."

"Liability of Treasurer for money destroyed by fire."

PREFERENTIAL ASSIGNMENT.

C. & P., carrying on business in partnership, being indebted to the plaintiff's firm for money advanced to carry on their business, in consideration that the firm would indorse a note held by *C. & P.* agreed to execute a mortgage securing their indebtedness, and for the indemnity of the firm against this and other indorsements. Eighteen months after the execution of such mortgage *C. & P.* became insolvent:

Held, in the absence of evidence of knowledge on the part of the mortgagees of the inability of *C. & P.* to meet their engagements or of any *mala fides* in entering into the agreement, the security could not be impeached under either the 130th, 131st, 132nd, or 133rd section of the Insolvent Act.

Cook v. Rogers, 599.

PRESBYTERIAN CHURCH OF SCOTLAND.

In 1836, by letters patent, lands were granted to trustees in fee, to hold the same to and for the benefit of the Presbyterian minister for the time being, incumbent of the Presbyterian Church of Scotland then erected in the township of Eldon. The defendant who had always been a member of such Presbyterian body, was duly inducted as incumbent of the said church and

so continued when in 1875, an Act of the Legislature of Ontario was passed for the union of the several Presbyterian Churches then existing in Ontario, but the members of this Church voted themselves out of the union as provided by the Act, notwithstanding which the defendant gave in his adherence to the union:

Held, under these circumstances, that the lands granted by the patent, as also the church and other buildings erected thereon, belonged to and were the property of the congregation; and that the defendant having joined the union was no longer entitled to hold possession or receive the benefits of the same.

McPherson v. McKay, 141.

[Since argued in Appeal, and stands for judgment.]

See also "Presbyterian Union Act."

PRESBYTERIAN UNION ACT OF 1874, 38 VICT. CH. 75.

1. *Held*, under the circumstances appearing in this case, that the anti-unionists had not properly voted themselves out of the union within the six months prescribed in the statute respecting the Union of Presbyterian Churches, 38 Vict ch. 75, O., and that the property in question, St. Andrew's Church, Dalhousie Mills, belonged to the "Presbyterian Church in Canada," the meeting at which they had assumed to vote themselves out having, according to the practice of the Church, been irregularly called by an announcement from the pulpit on Sunday for the following Tuesday; and which announcement was made by a minister who had formally dissented from the union, then performing divine service therein, though not duly appointed to the Church, the congregation being what is termed a "vacant congregation."

McRae v. McLeod, 255.

2. Observations on the meaning of "the practice of the church," and the "constitution of the congregation" mentioned in the 2nd section of the Act. *Ib.*

3. *Semble*, that immediately upon the consummation of the Act of Union, the congregational property of the various churches composing the union became subject to the jurisdiction of the united body, and that the right of dissentients was merely one of withdrawing the property from the union in the manner indicated in the Act. *Ib.*

4. In pursuance of notices duly given from the pulpit by the officiating clergyman, a member of the United Presbyterian body and belonging to the presbytery, a meeting of the congregation

was held, at which the members unanimously passed a vote of dissent from the union. *Held*, that such dissent entitled the congregation to hold its property as it had held it before the Act of the Legislature was passed for the purpose of uniting the several bodies of Presbyterians in Canada.

Deeks v. Davidson, 438.

PREMIUMS, NON-PAYMENT OF.

See "Reinsurance."

PREMIUM NOTES.

See "Mutual Insurance Company."

PRINCIPAL AND AGENT.

1. When a person sells property of his own, and acts as the agent of his vendee in procuring other property of the same kind different considerations apply as to the amount of information the agent is bound to give his principal in the two transactions.

Machar v. Vandewater, 83.

2. The plaintiff having expressed to the defendant, who was the local agent of an Insurance Company, a desire to purchase fifty shares of the stock, the defendant said he owned thirty shares which he would sell him, and the plaintiff requested the defendant to ascertain what the stock could be purchased for. The defendant wrote to the head office for information and the manager answered stating that the stock had always sold at a premium. This the defendant communicated to the plaintiff; but did not disclose the further information, communicated by the manager, that the company had during the then past year lost $32,000 over and above receipts. The plaintiff believing the price to be as stated, directed the defendant to procure him twenty shares and took from him a transfer of his own thirty shares at par. In reality the stock was valueless.

Held, that the defendant having withheld information, which might and probably would have affected the plaintiff's determination as to entering into the speculation at all, was guilty of such a concealment as rendered him liable to make good the loss sustained on the twenty shares; but as to his own thirty shares he was only bound to communicate truthfully the information he had been directed to procure, namely the price at which the stock could be purchased. *Ib.*

3. The plaintiff before intimating any intention of becoming a purchaser of stock, asked the defendant as to the standing of the company, who spoke of it as being in a good position.

Held, that this could not be treated as a representation binding on the defendant. *Ib.*

PRINCIPAL AND SURETY.

1. A wife at her husband's request executed a mortgage of her separate lands to a creditor of her husband to secure his debt. After the wife's death, leaving several children (of whom the plaintiffs were two) the creditor commenced a suit for the sale of the wife's lands to which the husband and all the wife's children except the plaintiffs were parties, the plaintiffs having made an assignment under the Insolvent Act, and by arrangement the husband became the purchaser in his own name upon advantageous terms of credit, which enabled him to pay off the purchase money out of sales of portions of the lands. Upon a bill filed by the plaintiffs claiming that the husband was bound to pay off the debt himself, and therefore could not purchase for himself, the defendants insisted that the husband had become the nominal purchaser, but in reality for the benefit of the children, other than the plaintiffs, and in trust for them only:

Held, that the plaintiffs were entitled to the benefit of the husband's arrangement with the creditor, equally with the other children, and that under the circumstances the purchase could not be for the benefit of the latter only.

Dougall v. Dougall, 401.

2. The sale by the creditor to the husband was made in June, 1867. This bill was filed in September, 1875. In the meantime sales had been made of portions of the lands, as was alleged, with the plaintiffs' knowledge, and the defendants insisted that the plaintiffs' acquiescence had debarred them from questioning the transaction. The Court being of opinion upon the evidence that the plaintiffs believed the sales were being made by or with the authority of the creditor for the purpose of paying off the mortgage, and not by their father as owner, and that the defendants could be readily reinstated in the position they occupied before the arrangement with the creditor:

Held, that in the absence of clear proof of knowledge by the paintiffs of the arrangement with the creditor, and that it was claimed to be for the benefit of the other children only, the defence of acquiescence could not be maintained. *Ib.*

PRIOR DISCLAIMER.

See "Patents."

PRIORITY.

See "Sale for Taxes," 2.
"Mortgage," &c., 7.

PRIORITY OF ACTS.

See "Lessor and Lessee," 2.

PROOF OF EXECUTION OF CONVEYANCE.

Where the signature to a deed under which the plaintiff claimed was spelled in a manner different from that in which it was shewn the alleged grantor had spelled his name, and other circumstances of suspicion were shewn, and his sister gave evidence tending to prove the signature to be a forgery; the only evidence in support of the genuineness of the signature being that of the solicitor who prepared the instruments, who had no recollection of the circumstances, but swore he must have been satisfied, at the time, with the identity of the grantor or he would not have allowed the deed to be executed; the Court *held*, that the execution of the conveyance had not been proved.

Duffy v. Smith, 428.

PUBLIC SCHOOL TRUSTEES.

In proceeding to select a site for a public school-house, no notice of the proceeding to arbitrate upon the question of compensation was given to a lessee in possession of property selected, and in consequence he did not name an arbitrator, neither did he attend before or take any notice of the arbitration; and the arbitrators in fact did not take into consideration the value of his interest, neither did they find that such interest was not of any value. The Court, at the instance of the lessee, declared that his interest had not been affected by the arbitration, and directed an inquiry as to damages sustained by him, and ordered the trustees to pay him his costs of suit.

Johnson v. The School Trustees of Howard, 204.

PURCHASE MONEY PAID BY INSTALMENTS.

See "Vendor and Purchaser," I.

PURCHASE OF RIGHT OF WAY.

[By Railway Company.]

The bill alleged that tenants *pur autre vie* had sold and conveyed to a railway company land for their roadway. After the cesser of the life estate the parties entitled in remainder filed a bill against the vendors and the company, seeking discovery as to what estate or interest the vendors had conveyed, stating that the company *alleged* they had paid the vendors the full price of the fee in the land, and that they (the vendors) were liable to account for the price so paid, and prayed for an account and payment to the plaintiffs of a proper share or proportion thereof:

Held, on demurrer by the vendors, that no sufficient ground of equity was alleged against them; the plaintiffs, however, to be at liberty to amend their bill as they should be advised.

Owston v. The Grand Trunk R. W. Co., 93.

RAILWAY ACT.

The provisions of the Railway Act R. S. O. ch. 165, apply as well to cases where a sole arbitrator is appointed by the Judge, as where the owner names an arbitrator on his own behalf, to value lands taken for railway purposes. Therefore, where the owner had omitted to name an arbitrator, and a sole arbitrator was appointed by the Judge of the County Court, without notice of the intended application for his appointment having been given to the owner, and the arbitrator proceeded to ascertain the amount of compensation to be paid by the company:

Held, that the owner was not bound by the act of the arbitrator so appointed, and the company was restrained from proceeding with their works on the land until a proper application was made upon notice.

McGibbon v. North Simcoe Railway Co., 226.

RAILWAY COMPANIES.

By a special Act incorporating a railway company, it was enacted that the board of directors might "employ one or more of their number as paid director or directors," and by a resolution under the seal of the company, the board of directors appointed the plaintiff, one of their number, a paid director, as manager at a salary of $1,000 a year, under which appointment $500 accrued due to the plaintiff, but this the company refused to pay, contending that they were liable for expenses and disbursements only:

Held, that, although under the General Railway Act (C. S.

C. ch. 66), a director could not hold any office under the company, yet under the words of the Special Act and the resolution of the board, he was entitled to recover; and a reference was directed to take an account of what was due to the plaintiff together with costs to the hearing.

Reynolds v. Whitby, 519.

See also "Competing Lines."
"Injunction."
"Mechanic's Lien."
"Power of Railways to arrange," &c.

RECEIVER.

See "Practice," 5.

REGISTRATION.

See "Sale for Taxes," 1, 2.

REINSURANCE.

The agent of the plaintiffs effected a reinsurance with the agent of the defendants, but did not pay the amount of the stipulated premium, the plaintiffs alleging that it was the custom of agents to give each other credit for such premiums, and settle at the end of the month, when the balance, if any, was paid by the one to the other. The existence of this custom was denied by the defendants, and it was shewn that the defendants required all premiums on reinsurances to be paid to their agents in cash, the same as in ordinary insurances, before the insurance should be considered binding, and this was known to the agent of the plaintiffs. A loss having occurred, the plaintiffs sought to compel payment of the amount of such reinsurance, but the Court, under the circumstances, *held* that the defendants were not bound by what had taken place between the agents, and dismissed the bill with costs.

The Western Assurance Company v. The Provincial Insurance Company, 561.

See also "Marine Insurance."

REMAINDER.

See "Life Estate."

2. The owner of the banks and bed of such a river made a tail race through his land drawing water for the purposes of his mill from the river, which he by means of this tail-race returned to the river at a point lower down the stream, but where the bed of the river owned by him. Subsequently the owner conveyed the land through which the tail-race ran: *Held*, that such tail-race could not be diverted, but that the owner of the bed of the river was entitled to have the water in the tail-race discharged into the river at the point where it orighally was discharged. *Ib.*

3. Such a proprietor made a conveyance of a portion of the property to a manufacturing company, reserving the "free use of two watercourses over the said parcel of land for conveying away the water from his grist mill * * one of the said watercourses entering the said parcel of land on the side next the grist mill * * and the other watercourse running along the south end of said factory, and passing under the flume, and being twenty feet in width * * with the exception of the space occupied by piers, or abutments, for supporting the flume, which, however must not be so built as to obstruct the free passage of the water as aforesaid." It appeared that at the time of the conveyance the watercourse in question at one point was of the width of twelve feet only.

Held, that this did not entitle a party claiming by mesne conveyance from such proprietor to have such watercourse of the width of twenty feet throughout its entire length. *Ib.*

RIVAL INVENTORS.

See "Patents."

SALE FOR TAXES.

1. One *H.* being indebted to a bank, mortgaged his lands thereto as security for his indebtedness, and the bank subsequently foreclosed his interest, but continued to allow *H.* to negotiate sales of the lands, and consulted him respecting sales effected by the bank. Some of the lands were specifically pledged to indemnify a certain indorser, and the notes upon which his name appeared had all been retired. One of the lots so mortgaged was afterwards sold for taxes, but the purchaser omitted to register his deed for more than eighteen months after the sale, as prescribed by the statute 31 Vict. ch 20, sec. 58, O. Meanwhile *H.*, the mortgagor, sold and conveyed the land to a *bonâ fide* purchaser, without notice, which sale was subsequently ratified and confirmed by the bank, and the conveyance duly registered, before the purchaser at the tax sale registered his deed.

Held, that the purchaser at the tax sale had thus lost his priority; and a bill filed by him impeaching the sale by the mortgagor was dismissed, with costs.

Smith v. McLandress, 17.

2. The provision of the Statute 31 Vict. ch. 20, sec. 58, O., as to the registering of a deed given upon a sale for taxes, applies as well between several purchasers at successive sales for taxes, as between a purchaser thereat and the vendee of the owner.

Aston v. Innis, 42.

3. The plan of a survey of a portion of a town plot, was registered in the proper registry office, but without being properly authenticated in the manner required by the Statute (R. S. O. ch. 111), not being duly certified by a surveyor:

Held, notwithstanding this irregularity, that the municipality had the right to assess these lots, and levy taxes assessed by sale in the usual way. *Ib.*

4. In such survey the land was divided into blocks, with streets running through them, and the blocks were sub-divided into lots, which were numbered in all from 1 to 174 inclusive:

Held, that a sale of any such lots by their numbers only, would be a sufficient description, and that if named incorrectly as being on one of the streets, it would not vitiate a private sale, as anything beyond the numbers in such sub-division would be surplusage; and the same would apply to a tax sale. *Ib.*

5. Under the circumstances stated, the municipal authorities at first assessed some of the lots as lying on Thomas street, sold them for non-payment, and conveyed upon non-redemption by that description. Upon their again becoming liable to sale for arrears of taxes, the authorities made a change designating the lots as being on side road, without any by-law authorizing such change, or anything to shew that it was made otherwise than upon the assessment rolls and other documents in relation to the collection of taxes:

Held, that the owner of such lots was bound to pay the taxes upon them by whatever designation they were entered on the roll, and it was at his peril if he omitted to pay. *Ib.*

6 A purchaser at a sale of land for taxes after the time for redeeming, went into possession, and improved the property, but omitted to register his deed within the period prescribed by the statute, and the owner sold the same to a *bona fide* purchaser, who registered, and filed a bill to set aside the tax sale deed as a cloud on title:

Held, that under the circumstances the defendant was entitled to be paid for his improvements, which the Court, in order to prevent further litigation, settled at $200; but in the event of the plaintiff preferring that the defendant should retain the land paying him the value thereof, a reference was directed to ascertain its value. *Ib.*

7. On a sale of two adjoining town lots for taxes, the treasurer sold the easterly seven-eighths of the westerly lot and the westerly seven-eighths of the easterly lot:

Held, a sufficient description to enable the parties to ascertain and define the land sold. *Ib.*

8. In a suit by the owner of land impeaching a tax sale deed as a cloud on title, the defendant disputed the right of the plaintiff which was decided in his favour. The Court ordered the defendant to pay the costs of the suit notwithstanding the amount to which the defendant was found entitled as compensation for improvements was estimated at double the value of the land, and which the Court ordered the plaintiff to pay in the event of his preferring to take back the land rather than allow the defendant to retain it, paying its value; although had the defendant submitted on the question of title, and claimed only compensation under the statute, the costs would have been apportioned. *Ib.*

See also "Tax Sale."

SALE OF EQUITY OF REDEMPTION UNDER EXECUTION.

See "Mortgage," &c., 9.

SALE OF PATENT.

See "Specific Performance," 3.

SALE OF RAILWAY LANDS.

See "Mechanic's Lien."

SAVING AND LOAN SOCIETY.

See "Building Society."

one, against parties who had obtained the benefits of the will intended for them, notwithstanding the want of mutuality at the time of the agreement.

Melville v. Stratherne, 52.

3. *C. P.*, who had for some time been carrying on the business of pumpmaking, in partnership with *B. & C.*, was the holder of a patent for an improved pump, which would expire on the 19th of July, 1877, but was renewable under the Patent Act for two further terms of five years each. On the 1st of June, 1877, *C. P.* agreed to sell to the defendant *Peck* his interest in such partnership business, together with the land and buildings in which it was carried on, for $4,500; and by the instrument evidencing the agreement executed, on the 23rd of June, "he agreed to assign his interest in his pump patents to Mr. *Peck* for the Counties of," &c. After the expiry of the patent (19th July, 1877,) *C. P.* filed a bill seeking to enforce payment of $3,000 balance of purchase money, due in respect of the sale of his interest in the partnership, and of the right as b fore stated, insisting that all he had sold, or intended to sell, was his interest in the then current patent; one object which he had in view in so doing, it was proved, being to prevent *Peck* and his partners, as assignees, afterwards disputing the validity of any renewal of the patent, although it was shewn in evidence that *C. P.*, in speaking of the patent he held, said it was good for ten years. The Court being of opinion that what the defendants intended to purchase was the right for ten years, and that the belief that they were purchasing such right was induced by the representations of *C. P.*, who knew how the fact was, and was therefore bound to specifically perform the agreement by executing such an assignment as would effectually convey the right for the counties named, whether at the time of the original contract the patent was really good for ten years, or afterwards became so, made a decree for that relief at the instance of *Peck*, and his partners, in a suit instituted by them for that purpose, and ordered *C. P.* to pay the costs of both suits.

Powell v. Peck—Peck v. Powell, 322.

4. The rule that, in the absence of fraud on the part of a vendor of land, a deficiency in quantity—small in proportion to the quantity sold and not necessary to the enjoyment of what the vendor can make title to—is not a bar to specific performance at the suit of the vendor with compensation to the purchaser, applies also to sales of stock or shares in a trading company. Therefore, where a contract was entered into for the sale and transfer of 360 (out of 400) shares of stock in such a company, and upon a bill being filed on behalf of the vendors, which in effect was to enforce the sale and purchase, it appeared that the

plaintiffs could validly assign 343 out of the 360 shares, the Court at the hearing held the vendors entitled to a decree for the sale and payment of the number of shares they could so make a good title to.

The Canada Life Assurance Co. v. The Peel General Manufacturing Co., 477.

5. The Board of Education, formed by the union of High School and Public School Trustees, contracted for the purchase of land from the plaintiff for the purpose of changing the site of the school: *Held*, that the plaintiff was entitled to call for a specific performance of the agreement for purchase, although no by-law of the Council authorizing the purchase had been made, nor had the Lieutenant Governor in Council approved of the change; and proceedings had been instituted by a ratepayer to restrain the change of site. *Malcolm* v. *Malcolm*, *ante* vol. xv, p. 113, referred to, and not followed; *Re Perth*, 39 U. C. R. 34, referred to, approved of, and followed.

Moffat v. The Board of Education of Carleton Place, 590.

See also "Costs of Shewing Title."

STATUTE OF LIMITATIONS.

1. The plaintiff was jointly interested in the estate of her father who died in 1865, and she continued to reside upon the homestead with her brother, who exercised sole control as to renting and working the property up to within ten years of the filing of a bill for partition:

Held, that such residence with her brother was a joint occupation by both, and as such sufficient to prevent her right being barred by the Statute of Limitations.

Foley v. Foley, 463.

2. The plaintiffs for the purpose of obtaining ready access to the upper part of their house, constructed a platform, stairway, and landing on the outside of their building, and the defendant, the adjoining owner, on whose land these structures were placed, never took any proceedings against the plaintiffs or made any protest against their user of the premises. *Held*, that after the lapse of ten years, the plaintiff had acquired not only an easement in the premises but a title to the land covered by the platform, stairway, and landing; and the fact that during the time the plaintiffs were in possession the defendant had, for the purpose of carrying out some works on his own premises, temporarily taken up the platform and removed a portion of the stairway, had

not the effect of stopping the running of the statute, the acts referred to not being shewn to have been done in assertion of any right on the part of the defendant.

Griffith v. Brown, 503.

See also "Appropriation of payments."
"Welsh Mortgage"

SUBSEQUENT CREDITOR.

See "Fraudulent Settlement." 2.

STATE OF ACCOUNTS.

See "Mortgage," &c., 3.

STATUTE OF FRAUDS.

See "Parol Evidence."
"Specific Performance," 1.

TAX SALE.

Where a township treasurer had neglected to furnish the clerk of the municipality with a list of lands liable to sale for taxes, and no such list or copy thereof was delivered to the assessor as provided by section 108 of ch. 180. R. S. O., and by reason thereof a lot worth $1,500 or $1,600 had been sold for $5.53, taxes due thereon, the Court on a bill filed impeaching the sale, set it aside, with costs, less the amount of taxes paid with interest thereon, and the expenses attending the purchase.

McKay v. Ferguson, 236.

TEMPERANCE ACT OF 1864

1. The Act 39 Vict. ch. 26, O., in relation to the Temperance Act of 1864, is not unconstitutional, and the Provincial Legislature has power to appoint commissioners for the purposes mentioned in the Act, and (under 41 Vict. ch. 14, O.,) to provide for the charges attending the execution of their duties even when previously incurred; and the provisions of the Act apply to a municipality in which the Temperance Act is in force.

License Commissioners of Prince Edward v. County of Prince Edward, 452.

2. The audit of accounts against the municipalities is not final and binding on the municipalities, it being open to them to shew that charges have been allowed in such accounts for which they are not liable, although it would not be necessary or proper to require evidence of matters in detail where an audit has been had. *Ib.*

3. The auditing of such accounts need not appear to have been done by the Provincial Treasurer personally; it is sufficient if they have been so audited by a subordinate officer in the department, whose duty it is to attend to such matters *Ib.*

TENANT FOR LIFE, REPAIRS BY.

1. A tenant for life is bound to keep the premises in repair; and the Court will not apply the undisposed of personalty in effecting such repairs.

Holmes v. Wolfe, 228.

2. The fact that the tenant for life (the widow) has not the means of making the repairs, and that the premises are deteriorating in consequence of non-repair, are proper matters for trustees with power of sale to take into consideration in determining whether or not they will sell. *Ib.*

TENANT OF LAND SELECTED.

[For School Site.]

See "Public School Trustees."

TENANT PUR AUTRE VIE.

See "Purchase of Right of Way by Railway Company."

TIME OF THE ESSENCE.

[Of the Contract.]

See "Vendor and Purchaser," 1.

TITLE.

See "Mortgage," &c., 1.

TRADING COMPANY.

See "Specific Performance," 4.

TREASURER, LIABILITY OF.

See "Liability of Treasurer," &c.

TRUST BY OPERATION OF LAW.

A suit for alimony having been instituted against the plaintiff, he, for the purpose of protecting his lands from process, conveyed the same to his solicitor for a money consideration, and the solicitor afterwards made a conveyance of the same lands back to him, but which the solicitor retained in his possession and subsequently by desire of the plaintiff struck out his name as the grantee, and inserted as such the name of the sister of the plaintiff, the consideration money being paid by the plaintiff.

Semble, that if in the circumstances stated no consideration money had passed between the parties, there would have been a trust by operation of law in favour of the plaintiff.

Wilson v. Owens, 27.

TRUST DEED.

T. C. K., by a deed of 7th April, 1870, conveyed lands to two trustees to and for the sole and absolute use of his wife, *C. E. K.*, for and during the term of her natural life, to and for her own separate use and benefit, or for the use of such person or persons, and for such estate and interests as she, notwithstanding her coverture, should by any deed or writing under her hand and seal, or by her last will, appoint. By a deed made two years afterwards, *T. C. K.* conveyed other lands to the same trustees, upon the same trusts as were set forth in the former deed. One of the trustees having died, and the other having removed from this Province, *C. E. K.*, professing to be acting in pursuance of the power contained in the first mentioned deed, by a deed made in 1877, appointed the plaintiffs trustees of the lands, to hold upon the trusts of the deed of 1870. By a deed poll made in July, 1878, *C. E. K.*, after reciting these several conveyances appointed the several premises upon trust to permit *C. E. K.* to use, &c., the said lands for life, or until she should require the trustees to sell, and after her death without such requisition to sell, to permit *T. C. K.* to use and enjoy the same premises for his life, and, on his request, to sell, &c., and upon the death of *T. C. K.* and *C. E. K.* upon trust for their children in such proportions as *C. E. K.* should appoint, &c. *T. C. K* died.

Held, that the power in the deed of 1870 to appoint new trustees was a trust, and as such was incorporated by reference in the deed of 1872; and that under these conveyances the plaintiffs could, on the request of *C. E. K.*, make a good title to the lands in question in fee.

Lucas v. The Hamilton Real Estate Association, 384.

See also "Costs, 2.
"Will," &c., 6

TRUST TO RAISE MONEY.

The powers of a trustee, who is directed to raise or to pay money out of rents and profits, to sell the trust estate considered and acted on.

Sproatt v. Robertson, 333.

ULTRA VIRES.

The holding of shares by one trading corporation in the stock of another trading corporation is not *ultra vires*.

The Canada Life Assurance Co. v. The Peel General Manufacturing Company, 477.

See also "Temperance Act," 1.

UNDUE INFLUENCE.

See "Mortgage," &c., 10.

UNION.

See "Presbyterian Church of Scotland."

UNJUST AND UNREASONABLE CONDITIONS.

See "Fire Insurance," 4.

VALUATOR, LIABILITY OF PAID.

See "Paid Valuator," 1, 2, 3.

VARYING MINUTES.

See "Practice," 1.

VENDOR AND PURCHASER.

1. The defendant on the 31st of August, 1874, by writing under seal agreed to purchase certain chattels from the plaintiff at the price of $1,078, payable $350 down, $100, on the first day of October, November and December, and $59 on the first day of January following, and $9.00 on the first day of each and every month thereafter, until the full sum of $1.078 without interest was paid, and in case of default all payments made thereunder to be forfeited to the vendor; and time was declared to be of the essence of the contract. The defendant took possession of the property and paid punctually all the instalments falling due up to and inclusive of the 1st of April, 1875. The instalment due on (Saturday) the 1st of May was through oversight not paid or tendered, but was tendered on the 3rd, when the plaintiff refused to accept it.

Held, that under the terms of the agreement the plaintiff had a right, though a piece of very hard dealing on his part, to insist upon the default in payment of the $9, as a forfeiture of the bargain and of the money paid; and that notwithstanding the defendant swore, and there was some evidence to corroborate the statement, that the real bargain was a sale of the chattels for $700, and a renting of the premises (a bowling alley) in which they were placed at $9 a month during the period the vendor was entitled to hold the same under a lease from the owner of the fee.

Whelan v. Couch—Couch v. Whelan, 74.
[Affirmed on rehearing 26th February, 1879.]

2. Where lands are sold upon which there is a subsisting mortgage, of which the purchaser is aware, and the vendor covenants that he will pay it off, the purchaser cannot set off the amount of such mortgage against the amount due upon a mortgage given by himself for unpaid purchase money, which has been transferred to a *bona fide* purchaser. His only recourse in case of damage is to proceed on the covenant of his vendor.

Eagleson v. *Howe*, 15 U. C. L. J., p. 45, and vol. 3 of Appeal Reports, p. 566, referred to and acted upon.

Wood v. Page, 305.

See also "Costs of shewing Title."
"Principal and Agent," 1, 2, 3.
"Will," &c., 1.

VESTING.

See "Will," &c., 5, 7.

VOLUNTARY CONVEYANCE.

See "Fraudulent Conveyance," 3.

WELSH MORTGAGE.

A conveyance was made by way of security declaring that the mortgagee should retain possession until the sum of £75 should be paid. *Held*, that the title of the mortgagee did not become absolute under the Statute of Limitations, the conveyance in effect amounting to a Welsh mortgage, under which the possession of the mortgagee gives no title under the Statute, as every receipt of rent or every year's occupation of the premises, is in effect a receipt of interest under the mortgage, and the right of redemption is thus kept alive.

Re Yarmouth, 593.

WHARFAGE, LIEN FOR.

See "Wharfinger."

WHARFINGER.

It is not necessary that the proprietor of a wharf or quay upon navigable waters, used for the loading and unloading of vessels, should have a warehouse or shed or other convenience for the storage of goods and protection thereof from the weather; and as such wharfinger he is entitled to a lien on goods unloaded at his wharf, for money due to him for wharfage.

Sills v. Bickford, 512.

WILL, CONSTRUCTION OF.

1. Land was devised to the vendor after the death of her mother, the testator having directed in the event of the devisee not coming to live thereon that it should be rented, and the rent paid to the devisee, the land to come to her heirs afterwards.

Held, that these words did not operate to make the devise contingent, or to interfere with her estate in fee; and that under

any circumstances the language was too indefinite, if the clause was not invalid, to create a forfeiture.

Re Lot 27, 18th Concession of East Williams—Hamilton v. McKellar, 116.

2. A testator directed his executors to sell and realize all his estate in such manner as they should think proper, and the residue, after sundry devises and bequests, he desired them to apportion into certain shares, one of which he directed to be equally divided among the daughters of his son *S. V.*, deceased, to be paid to them on attaining twenty-one, or sooner if the trustees should think it to their advantage; and in the event of the death of any of his said granddaughters without leaving issue, her or their shares to be equally divided among their surviving sisters or their heirs.

Held, that this operated as a conversion of the estate into personalty and the words "dying without leaving issue" referred to the period of distribution—that is, when the legatees attained twenty-one; and, therefore, that the share of one of them who died without issue after the testator, and after having attained twenty-one, went to her personal representative; and the Court being of opinion that the difficulty was occasioned by the testator, independently of the fact that the bequest was of residue, ordered the costs of all parties to be borne by the estate.

Gould v. Stokes, 122.

3. The testator directed all his just debts, &c., to be paid; and devised and bequeathed to his wife for life, his real estate, and his "household furniture, plate, linen, and china." After her decease, he gave the proceeds of the sale of the land, and also all and singular the residue of his personal estate that might be in her possession at the time of her decease, to other parties: *Held*, that there was an intestacy as to all the personalty not specifically bequeathed to the wife.

Holmes v. Wolfe, 228.

4. A testatrix by her will devised all the rents and profits of her estate to *C.*, an unmarried daughter, so long as she remained unmarried; and upon her marriage, the whole to be divided between her and her four sisters, but if she died unmarried the division was to be amongst her four sisters; and in case of either of those four dying before the marriage or death of *C.*, the share of the one so dying, to go to her children; and in case of the death of any of her said daughters without leaving child or children, the share of such daughter to be divided among the surviving daughters or children of deceased daughters.

Held, that the division intended, on the marriage or death of *C.*, was of the income only, not the *corpus* of the estate; and that the five daughters took only life-estates.

Munro v. Smart, 310.

[Reversed on Appeal, 1st December, 1879.]

5. A testator, after sundry bequests and devises, amongst others an estate for life in all his lands to his widow, devised the same lands to trustees upon trust, within two years after the death of his widow, to sell and dispose thereof; to execute deeds, and to give receipts, &c., and "after the sale of my said real estate I give and bequeath the proceeds of such sale or sales to my nephew *G. B.*, son of my brother *Joseph*, and to the following children of my brother *George*, (naming them) equally share and share alike, male and female, without exception, when they respectively attain the age of twenty-one, to them their heirs and assigns; and in the event of any of my legatees dying before getting their share or portion as aforesaid leaving child or children, in such case the child or children of any so dying shall inherit the share of the deceased parent." One of the nephews died during the lifetime of the widow without issue.

Held, that there was no bequest of anything until the sale had taken place; that the bequest was one of personalty, not of realty; that no interest vested in such deceased nephew, as he did not live till the time of sale; that the gift was not a gift to a class; and there being no residuary clause in the will, that the share of such deceased nephew lapsed and passed to the next of kin of the testator, and not to the legatee of the nephew.

Bolton v. Bailey, 361.

6. A testator devised his real and personal estate to his wife for life, for the benefit of herself and their children) and directed that, upon the death of the widow, his property should be equally divided among the children. *Held*, that only such of the children as survived the widow, were entitled to participate in such partition of the estate: and one of the sons, as personal representative of the testator, having purchased land with the moneys of the estate, and executed a declaration that he held the lands so purchased (except as to his own interest) in trust only for the other parties interested under the will, and afterwards died during the life of his mother. *Held*, that his children were not entitled to any share in such land, the only persons entitled being such of his brothers and sisters as should survive their mother. (BLAKE, V. C., dissenting, on the ground that these questions were not properly raised by the pleadings.)

Baird v. Baird, 367.

7. A testator bequeathed £2,000 of bank stock, which stood in the name of trustees, to his daughter *Jane*, the interest of which was "to be allowed to remain, and no part thereof to be raised or drawn out of the bank until she comes of age, and that the amount of interest so accumulated should, from and after the aforesaid time, when she comes of age, be added to, and form part of the aforesaid principal, and thenceforth be and remain an additional amount of bank stock, and from and after the period when she shall come to age, as aforesaid, she may draw the amount of interest yearly, and every year, so arising from the before-mentioned sums during her own natural life, and that no part of the principal be raised by her at any time; but if she marry and have children to the number of four or less, that the said sum or principal shall be equally divided amongst them, and be at their disposal, and under their own control and management at any time they come to age, after her death but not sooner. But if she have no children, then after her decease the aforesaid principal to be at the disposal of my son *Robert*, provided he be twenty-five years of age, or upwards, or to his heirs after him in case of his death; but if she shall have more children than four, then and in such case, she shall be at liberty to will the aforesaid principal after her death to her children respectively in way and manner she may think proper." *Jane* married, and had three children, all of whom died in infancy during the life of the mother.

Held, that no interest vested in the children, and that on the death of their mother, the testator's son *Robert* became absolutely entitled to the fund.

Re Bank of Montreal and Imperial Statutes, 420.

See also "Devise of Mortgaged Lands."

"Latent ambiguity."

WILLS' ACT.

Quære, whether a married woman, under the R. S. O., ch. 132, sec. 6, can devise or bequeath her separate property to one of several children to the exclusion of the others.

Munro v. Smart, 37.

Held, that she could not.—S. C., 310.