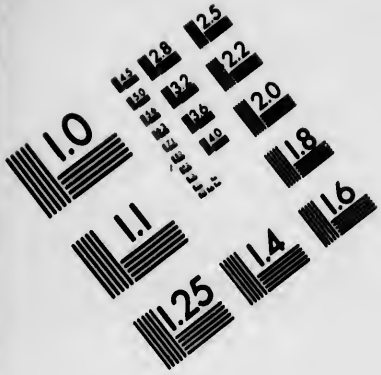

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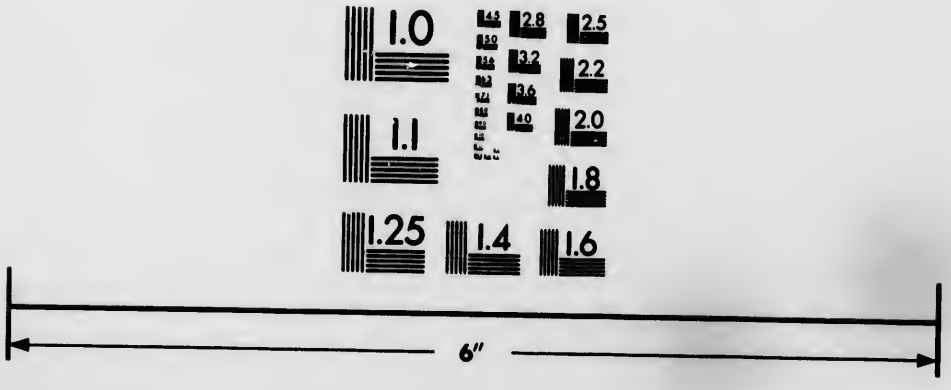

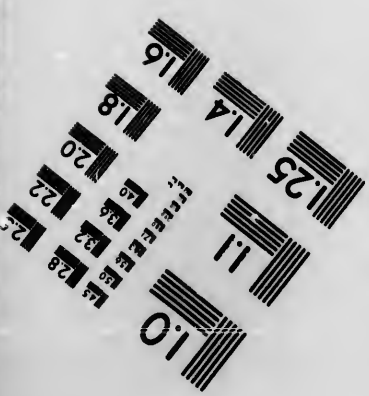

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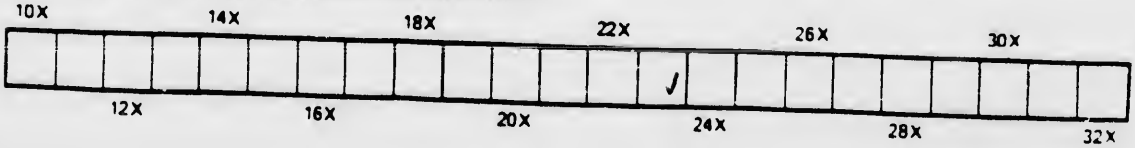

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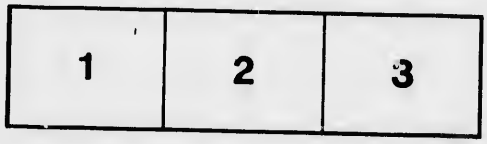

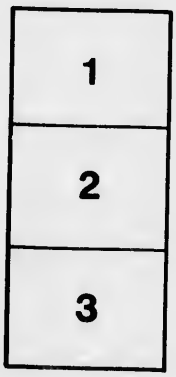

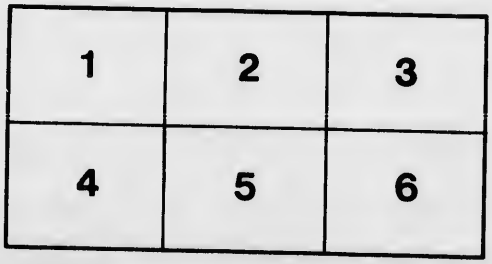

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

ONTARIO,

BY

ALEXANDER GRANT, BARRISTER,

REPORTER TO THE COURT.

VOLUME XX.

TORONTO:
ROWSELL & HUTCHISON,
KING STREET.

1874.

ROWSELL & HUTCHISON, LAW PRINTERS, TORONTO.

THE HON. J. GODFREY SPRAGGE, *Chancellor.*

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

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

MEMORANDA.

On Tuesday, the 16th day of June, 1874, WILLIAM PROUDFOOT, Esquire, Q.C., was sworn in as one of the Vice Chancellors of this Court, in the room and stead of The Hon. Vice Chancellor STRONG, appointed one of the Justices of the Court of Error and Appeal.

On Wednesday, the 17th day of June, 1874, The Hon. SAMUEL HENRY STRONG, GEORGE WILLIAM BURTON, Esquire, Q. C., and CHRISTOPHER SALMON PATTERSON, Esquire, Q.C., were severally sworn in as Justices of the Court of Error and Appeal.

A TABLE

OF

CASES REPORTED IN THIS VOLUME.

Versus is always put after the plaintiff's name.

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

ONTARIO,

DURING PORTIONS OF THE YEARS 1873 AND 1874.

COOK v. THE ROYAL CANADIAN BANK.

Lien on Stock.

A bank agent being about to make advances on the security of certain stock of another bank, applied to the bank officers to ascertain what claims the bank held against such stock, when he was informed that there was overdue paper to the amount of $500; but before completing the arrangement as to the transfer of the stock, another claim which was then current in one of the agencies of the bank was returned unpaid:

Held, that the bank had a right to retain its lien on the stock for the additional sum before allowing the transfer of the stock to be carried out in their books.

The owner of bank stock being about to assign the same, procured from one of the agents of the bank a memorandum on the back of a power of attorney for the transfer of the stock in the words: "No liability at Galt office:"

Held, that this was not such a representation, made to the intending transferee, as bound the bank; and the bank were entitled to hold the stock for the amount of a draft of $550, which had been discounted at the Galt office, and then in the hands of an agency in Montreal.

Examination of witnesses and hearing. Argument.

Mr. *Moss*, Q. C., and Mr. *Rae*, for plaintiffs.

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

1873.

Cook v. Royal Canadian Bank.

June 27th.

BLAKE, V. C.—Prior to the 16th of December, 1872, one *Robert Wallace* was the holder of forty-two shares in the capital stock of the defendants, the Bank, hereafter called the defendants. At that date the defendants held two promissory notes for $250 each, made by *Tuttle, Date & Co.*, on which *Wallace* was liable. The one matured on the 12th of December last, and the other on the 30th of the same month. These notes were discounted and held at the Toronto or Head Office of the defendants. On the 16th of December, the defendants held likewise a draft of *Wallace* on Messrs. *White & Slip* of St. John, New Brunswick, for $550, which had been discounted at the Galt Branch of the defendants, and protested for non-acceptance. This draft was drawn against certain flour which *Wallace* was to forward to cover it. It matured the 5th of December, and about the 19th of the same month was returned to Galt from St. John, with a memorandum "that flour had not gone forward." *Wallace* remained liable on that draft which has never been paid. On the 7th of February last, the defendants at their Galt Branch, discounted a note for $450, and on the 11th of the same month, a note for $350; both of which notes were made by *Wallace*; they matured before the 20th of February, and are still unpaid. On the 16th of December, the plaintiffs, the Bank, hereafter called the plaintiffs, discounted for *Wallace* at their Galt agency, a note for $750, and then agreed to discount for him another note, the amount of which was not then arranged. But on the 20th of the same month, it was settled at $985; and on that day a note for this amount was, at the same agency, discounted for *Wallace*. The proceeds of these notes were chiefly applied in retiring two notes due on the 16th and 20th of December, on which *Wallace* was liable. Before the 16th, it was arranged that *Wallace* was to provide funds for these notes then about to mature, by putting in his own firm's paper, and giving a transfer of the shares in question. The paper maturing on the 16th and 20th, was then retired, and on the

Judgment.

17th of the same month a power of attorney signed and sealed by *Wallace*, appointing *Thomas McCracken*, the cashier of the defendants, to sell, assign, and transfer this stock to "*William Cook*, of Galt, Ontario, Manager, Merchants' Bank of Canada," was brought to *Cook* by *Wallace* with a certificate, indorsed thereon and signed by *J. Cavers*, the agent of the defendants at Galt, in the words following:—"No liability at Galt office." This power of attorney was enclosed to *McCracken*, at Toronto, in the following letter, which was received the next day:— 1873. Cook v. Royal Canadian Bank.

"Merchants' Bank of Canada.

Galt, 17th December, 1872.

T. McCracken, Esq.,

Cashier Royal Canadian Bank, Toronto.

I enclose power of attorney in your favor, to transfer forty-two shares from *Robert Wallace* to my name, which you will kindly do on the re-opening of your books. If there is any irregularity in the transactions, please inform me at once. Judgment.

Yours truly,

WILLIAM COOK."

On the 18th of the same month, *McCracken* acknowledged its receipt in the following letter:—

"Toronto, 18th December, 1872.

Wm. Cook, Esq.

Manager, Merchants' Bank, Galt.

Dear Sir,—Your favor of the 17th inst., received with enclosures as stated. The transfer to *Allenby* is in order, and will be made on the opening of the books. The transfer from *Wallace* cannot be made until the past due paper upon which his name appears, is removed.

Yours truly,

T. MCCRACKEN, *Cashier*.

Cook at no time made inquiry at the Galt office as to how *Wallace* stood there, because, as he says, "*Wallace* brought me the power of attorney with the certificate

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indorsed on it," but after the recept of the letter of the 18th of December, he asked *Wallace* as to his liabilities to the defendants at Toronto; and it appears *Wallace* did not inform *Cook* of the *White & Slip* draft. Nothing passed between *McCracken* and *Cook* in reference to the matter from the 18th of December, to the 18th of February. About the 8th of January, however, *Cook* called at the office of the defendants in Toronto, and did not see the cashier who was at the time busy, but he saw Mr. *Knapp*, the accountant, who then told him that the amount of paper the bank claimed against *Wallace*, was $500, being the *Tuttle, Date & Co.* notes. *Cook* says he then, and prior to that, knew the stock would not be transferred to him until some claim the defendants had against *Wallace* was paid off, and which claim, he says in the meantime, we had been endeavouring to get *Wallace* and *Rodden* to discharge. Matters stood in this way until the 10th of February, when the *Tuttle, Date & Co.* paper not having been retired, the defendants wrote *Wallace*, threatening to sell sufficient of the bank stock in question, to cover this debt, interest, and costs. Thereupon, and on the 18th of February, the following letter was sent by *Cook* to the defendants :—

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"Kindly send me a telegram on receipt of this, and let me know if the *Tuttle, Date & Co.'s* note (or notes) indorsed by Mr. *Wallace*, referred to in your letter of the 18th December last, has been paid, and if not, what amount would now have to be paid in order that the transfer of shares may be carried into effect."

And on the 20th, the following telegram :—

"What amount would now require to be paid in order that the transfer of shares by *R. Wallace* may be carried into effect. Please telegraph to me in answer to my inquiry of Tuesday last."

Which was answered on the same day as follows, by telegram :—"$552, besides a claim at our office there, which see," and by letter.

"Dear Sir—Your favor of 18th instant, is received with enclosures as stated. In reply to your inquiry what amount would now require to be paid in order that the transfer of shares (by *R. Wallace*) may be carried into effect—we telegraphed as requested—'$552 besides a claim at our office there, which see.' This claim is a matter of $550, interest and costs: the exact amount of which can be ascertained there." 1873. Cook v. Royal Canadian Bank.

On the 20th of Febuary, *Cook* wrote the defendants:

"Dear Sir,—Wrote you on 18th instant, telegraphed you this morning, and am just in receipt of your telegram reply. I enclose my cheque $552, and will thank you to forward to me (uncancelled) the overdue notes of *Robert Wallace* referred to, as amounting to that sum, together with a transfer of the forty-two shares from *Robert Wallace* to me by power of attorney for which (with your Galt agent's indorsement), was forwarded to you on the 17th December, 1872." Which was answered:—

"Your favor of yesterday received with enclosures as stated. Enclosed herewith the two notes of $250 each, of *Tuttle, Date & Co.*, indorsed by *R. Wallace*, overdue. When we hear from our Galt manager that he has no claim against Mr. *R. Wallace*, we shall be ready to transfer the whole forty-two shares to your name. Please refer to him as to this." Judgment.

On the 17th of February, Mr. *Cavers*, the defendant's agent at Galt, wrote to the Head Office, the following letter of explanation:—

"Dear Sir,—Your favor of the 14th instant, is received. Our $550 bill in suit, is the B. L. that was attached to our B. D. R. 761, *R. Wallace* on *White & Slip*, St. John, N. B., dated 18th October, 1872, and due 5th December, $550. This draft was not accepted; and I instructed the Bank of Montreal, St. John, to place the flour in other hands for sale for our account. The flour did not go forward. We, as usual, charged B. D. R. 761 to Montreal Office on the day on which it became due. About two weeks after this date, the bill of lading was returned to us by Bank Montreal,

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St. John, with memorandum: 'that flour had not gone forward.' We then credited Montreal Office, and charged local banks to keep it out of P. D. B. at the end of the month. It remained in that account until the beginning of this month, when our attempts to have a settlement with the Grand Trunk Railway Company by correspondence seemed to be of little avail. I am aware that the most regular way to be, would be to have got payment of our bill from the drawer, and re-transfer the bill of lading, but he said he had not the money, and I was unwilling to discount for it then."

The defendants insisted that they were entitled to hold the stock until payment of the *White & Slip* draft; and the plaintiffs contended that they were entitled to a transfer thereof without any such payment, whereupon the present bill was, on the 14th of March, filed. On the part of the defendants, it was not denied that if they, upon being informed that the plaintiffs were about to deal with the stock upon the faith of the answers then to be made to them, gave information as to the amount needed to be paid, in order to set it free from their claims, they would be bound by such statement; and if, as a matter of fact, more were due than they then represented such additional amount could not be claimed to the detriment of the plaintiffs. The rule is thus laid down in *Evans* v. *Bicknell* (*a*), "It is a very old head of Equity that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false." This has been somewhat extended, as shewn by *Moffatt* v. *Bank of Upper Canada* (*b*). There the Solicitor of the mortgagees gave to a mortagor a memorandum in writing of the amount due on a mortgage, which the mortgagor took to an intending purchaser. Relying upon this statement, he purchased the equity of redemption, and then filed a bill to redeem on payment of the amount

Judgment.

(*a*) 6 Ves. 182.

(*b*) 5 Gr. 374.

thus stated to be due. The memorandum given by the solicitor, was as follows:— 1873.

Cook v. Royal Canadian Bank.

"B. U. C. v. SWITZER." "The balance due in this matter with interest and costs, amounts to £135. Upon payment of which satisfaction will be entered.

C. GAMBLE,
Solicitor, B. U. C."

The effect of such a representation is thus laid down: "Now, had this paper been furnished by the defendants with a knowledge of the plaintiffs' intention to purchase the estate, and in reply to an inquiry on their behalf, as to the amount due upon the mortgage, it is quite clear, I apprehend, that the statement would have been conclusive; the defendants would not have been allowed to question the accuracy of a representation on the faith of which the plaintiffs had been induced to purchase."

Judgment.

But if, on the one hand, the effect of a representation made is under certain circumstances to conclude the person making it, on the other hand, it is incumbent on the person seeking the information to notify the person of whom the inquiry is made for the purpose for which the question is asked, in order that he may have the opportunity of making such investigation as will enable him to reply correctly and with due caution and care to a question, the answer to which is binding upon him to such an extent. In *Moffatt* v. *Bank of Upper Canada*, the Court thus proceeds to consider this point. "But admitting the law to be so, the defendants argue that it is wholly inapplicable to the present case. First, because no communication whatever took place between these parties; and, secondly, because the document upon which the plaintiffs insist, was not a representation made to them, or to any person on their behalf, but was a memorandum furnished to the mortgagor himself, for his own information, and without any reference whatever to

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the plaintiffs' purchase; and, therefore, inconclusive in the present suit;" and the finding of the Court was in favor of the defendants on the ground that the *onus* was upon the plaintiffs to shew there had been a representation made to them by the defendants, with a knowledge of their intention to purchase the estate, whereas the representation as a matter of fact was made to the mortgagor, and there was no knowledge on their part of the plaintiffs' intention to purchase. I do not think the plaintiffs here have brought themselves within the rule as laid down in this case. It is not shewn that there was any statement made to *Cavers* as to the purpose for which the memorandum was required, nor was this furnished by him to the plaintiffs, but to *Wallace*, the owner of the stock. If in place of *Wallace* going to *Cavers*, *Cook* had called upon him and informed him that he was about to deal with the stock upon the faith of the statement he then received from him, and he had thus made him alive to the need of caution, it is impossible to predict what would have transpired between these parties, to have shewn the true position of *Wallace* with the defendants. The rule is not to lay hold of statements made under all circumstances, and on all occasions, without giving an opportunity of weighing their effect, and to hold persons bound thereby: and I think it most reasonable that such a liability as that sought to be enforced here should be limited to cases where the applicant has shewn the person to whom he is applying the need for correct information. I am of opinion that the *onus* was upon the plaintiffs to shew they had thus warned the defendants before they could make them responsible for statements made, and that they have failed in establishing this branch of their case.

Judgment.

I am also unable to come to the conclusion that the defendants made an untrue representation to the plaintiffs in the matter. They sought information only at the Toronto office of the defendants, and of *Wallace*. When

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inquiry was made at the head office the answer was, "the transfer from *Wallace* cannot be made until the past due paper upon which his name appears is removed." This was a vague statement that might well have been followed up by further inquiry, which might have resulted in information as to the *White & Slip* draft. When *Wallace* produced the certificate with "no liability at Galt office," as a matter of fact this was then correct. The draft had not been returned to Galt: it had been sent to St. John, New Brunswick, with a bill of lading; and when acceptance was refused, instructions were given to place the flour, which was to have furnished the funds to retire the draft, in other hands. When the draft matured, the Galt branch charged the Montreal office with it, and so matters remained until after the certificate in question was given. It turned out the flour did not go forward; there were no funds to pay the draft, and it was returned to Galt by the Montreal office, and thereafter the Galt office made such entries in its books as shewed this a liability of *Wallace*. But, I think, the Galt branch was justified while the draft and bill of lading were with the Montreal office, in treating the draft as one to be answered by the proceeds of the bill of lading, and to be looked upon, at all events, after its maturity and until retired, as a matter for which the Montreal branch was responsible. If, upon proper application to the head office, it had made a return of the liabilities of *Wallace*, and had omitted this draft, I think the defendants could not now claim for it as against the stock; but I do not think a statement of the agency at Galt that they then had there no liability, would be binding upon the defendants to exclude a claim situated as this draft then was. It may be doubted whether the answer of the agent at Galt would in any event bind the defendants so as to deprive them of their rights in the premises unless a fraudulent representation were made by such agent.

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In *The Western Bank of Scotland* v. *Addie* (*a*), Lord *Cranworth* says, "An attentive consideration of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited from these frauds; but that they cannot be sued as wrong-doers, by imputing to them the misconduct of those whom they have employed." I am, however, of opinion that the defendants did not through their agents, or otherwise, make any misrepresentation to the plaintiffs.

The plaintiffs are not entitled to relief on account of the statement made on the 8th of January to *Cook* by *Knapp*, the accountant of the defendants at their head office, as it is not pretended that on the faith of this they in any way altered their position.

Judgment.

The sections of the Act 34 Victoria (Dom.) cap. 5, which affect the question of the position of the defendants in respect to this stock are as follows:

Section 19.—"The shares of the capital stock of the Bank shall be held and adjudged to be personal estate, and shall be assignable and transferable at the chief place of business of the Bank, or at any of its branches, which the directors shall appoint for that purpose, and according to such form as the directors shall prescribe; but no assignment or transfer shall be valid unless it be made and registered and accepted by the party to whom the transfer is made, in a book or books to be kept by the directors for that purpose, nor until the person or persons making the same shall, if required by the Bank, previously discharge all debts or liabilities due by him,

(*a*) L. R. 1 S. C. App. 145, at p. 167.

her or them, to the Bank, which may exceed in amount the remaining stock, if any, belonging to such person or persons. 1873. Cook v. Royal Canadian Bank.

Section 20.—"A list of all transfers of shares registered each day in the books of the Bank, shewing the parties to such transfers and the number of shares tranferred in each case, shall be made up at the end of each day, and kept at the chief office of the Bank for the inspection of its shareholders."

Section 40.—"The Bank shall not, either directly or indirectly, lend money, or make advances upon the security, mortgage, or hypothecation of any lands or tenements, or of any ships or other vessels, nor upon the security or pledge of any share or shares of the capital stock of the Bank, or of any goods, wares, or merchandize, except as authorized in this Act."

Section 51.—"The Bank shall not make loans or grant discounts on the security of its own stock, but shall have a privileged lien for any over due debt on the shares and unpaid dividends of the debtor thereof, and may decline to allow any transfer of the shares of such debtor until such debt is paid, and if such debt is not paid when due, the Bank may sell such shares after notice." Judgment.

I am of opinion that when a Bank is informed of the fact that a transfer of certain of its stock is about to be made, and it objects to such transfer on account of past due liabilities of the owner of the stock, and the matter remains in suspence, the Bank is not bound at a future day to accept from the proposed transferee a sum equal to such liabilities at the time the inquiry was made, if, in the meantime, others have matured; the person dealing with the Bank must be taken to know the law, that as the paper matures the right to hold the

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stock until it is removed accrues; and that a certain risk attaches to delay in procuring the completion of the transfer. I cannot satisfy myself that any reason exists to deprive the Bank of this right given by the Act in question. I am of opinion that a statement by the Bank of the amount for which stock is held on account of past due liabilities, without any further representation, or any agreement in respect thereof, does not bind it at a future day to accept such sum where other liabilities incurred at the time the inquiry was made, have meanwhile matured and remain unpaid (*a*).

I do not think, however, under the circumstances of this case the defendants are entitled to retain the stock until the notes discounted for *Wallace* by them in February are retired. They knew in December that there were some dealings between *Wallace* and *Cook* in reference to this stock. They had been sent a power of attorney with a request to make the transfer from *Wallace* to *Cook*, and they had a power of attorney to enable their cashier to accept it. They had answered this request by saying the transfer could not be made until the past due paper on which *Wallace's* name appeared was removed. They retain these powers of attorney. They lead the plaintiffs to suppose that upon satisfying the liabilities then existing, and that may be past due when the needed amount is remitted, the stock will be transferred. I do not think under this state of facts the defendants can further charge the stock in their own favor. Whatever liability was incurred at the time the power of attorney was remitted remains as a liability which may, under the Act, become a lien upon the stock, but it is quite another thing to say we shall not only enforce that right which existed when the transfer was asked, but we will hold the powers of attorney, lead you

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(*a*) Reese v. The Bank of Commerce, 14 Md. 271, Maryland Digest See Angell and Ames on Corporations, secs. 571 to 574; Morse on Banking, p. 442.

to think that upon a certain payment you can claim the stock, and at the same time continue to grant discounts which we will charge upon it. It is clear that notice to the cashier of these circumstances would be notice to the Bank; and I think the defendants should have notified the plaintiffs of what they proposed to do and have returned the powers of attorney before they could charge the stock with these further advances. I think the principle laid down in *Rolt* v. *Hopkinson* (*a*) applies here.

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After completing my judgment in this case I found the following passage, which strengthens my view, in *Morse* on Banking, at page 443: after dealing with the question of what constitutes a valid transfer, the writer proceeds: "But it has been declared that the bank is bound to give effect to an equitable assignment, of which it has notice, to this extent; that it can no longer regard the shares as security for any subsequently created indebtedness of the assignor. They are available only upon his debts which have already arisen. But for debts of the assignee the Court may thereafter enforce a lien which will be perfectly valid, though the transfer has not yet been made, and which will only be secondary to the lien for the assignor's debts. But it must be confessed that this rule, which has only been enunciated in one Western Court, does not seem wholly satisfactory. Another ruling which though somewhat similar, yet avoids the unsatisfactory element in the preceding case, and is certainly not open to criticism, asserts that if the bank has notice that the shares are held only in trust by the nominal owner, it can thereafter hold them to secure the indebtedness of the *cestui*, and of him alone."

Judgment.

It is true there was not any assignment in favor of the plaintiffs or *Cook* produced. There had been only a

(*a*) 25 Beav. 461; affirmed in 9 H. L. 514.

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verbal assignment made. The defendants might have considered the transaction as only a contemplated one; that *Cook* had abandoned it, and therefore that they were entitled to deal as they pleased upon the strength of the stock being still there the property of *Wallace*. It is also true that the discounts here were by a branch that knew nothing at the time about what had transpired at the head office. The Galt agent simply knew an inquiry had been made of him on the 17th December as to *Wallace's* liability. He saw the stock still standing in the name of *Wallace*, and he may very reasonably have said, I will discount to the extent of a $1000 for a man who holds $1600 of our stock paid up. Notwithstanding this position taken by the defendants, I think the facts in the possession of the head office were, for the reasons I have given, sufficient to disentitle them to deal, as they attempt to do, with the stock; and, as the office at Toronto could not have charged the stock with these discounts when overdue and unpaid, the transferee of the stock cannot be in a worse position, because the discounts took place at a branch of the Bank. If it were the duty of the Bank to return the powers of attorney, and notify the person interested in the stock before a further charge could be made on it, it was equally their duty to have warned their agent; and if they have not done so, this can be no reason for incumbering the stock with these discounts.

Judgment.

I am of opinion that the defendants can claim a lien on the stock for the *White & Slip* draft and interest, and that upon payment of this sum the defendants are bound to transfer the stock to the plaintiffs with the dividends which may meantime have accrued.

The defendant *McCraken* is an improper party to the suit. There is not any relief asked against him. The charges of fraud and collusion between him and the defendants are without foundation. He could not trans-

fer the stock, as the Bank would not allow the transfer to be made until the removal of the liabilities which created a lien upon it. He has not been guilty of any impropriety or misconduct in the transaction, or in his defence. The only suggestion that could be made for bringing him before the Court was, that the plaintiffs were entitled to have him as a defendant for the purpose of discovery; but this no longer furnishes a reason in favor of the plaintiffs, as Order 63 provides that no officer of a corporation, such as the defendants, is to be made a party for the purpose of discovery. The bill must be dismissed, as against him, with costs.

I had, at first, a doubt as to the disposition proper to be made of the other costs of the suit, but further consideration and an investigation of the authorities lead me to the conclusion that the plaintiffs must pay these costs also.

Judgment.

The plaintiffs tender this issue: were the defendants bound, at the date of the filing of the bill, to transfer the stock to us? I hold they are not, and thus find the question raised against the plaintiffs. The plaintiffs did not succeed in any part of the case they made by their bill. It is not as if a partial relief had been given to them in respect thereof. The costs should follow the event, unless there be some special circumstance to interfere with this rule. The only circumstance apparent here is, that the defendants by their answer claim they should hold the stock until payment of the disputed draft of $550, and also until payment of another sum of $1000. This further claim of $1000 had, however, nothing to do with the filing of the bill. It is not alluded to by the plaintiffs in their pleading, and it has in no way added to the costs of the cause. The plaintiffs have failed completely in the case made by their bill, which was, that without the payment of the $550 they were entitled to a transfer of the stock. Upon the filing of

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the bill the defendants allege an additional claim which they cannot sustain, but upon the principle laid down in *Clowes* v. *Beck* (*a*), *Jones* v. *Farrell* (*b*), *Bower* v. *Cooper* (*c*), the costs should depend upon the result of the issue raised by the plaintiffs, and which being found against them decides the manner in which the costs should be disposed of.

If the plaintiffs desire it they can take a reference to ascertain the amount due on the *White & Slip* draft instead of treating it as $550 and interest.

CARROLL v. CASEMORE.

Railway Station—Specific Performance.

Prima facie the term "Railway Station," in a contract, means the station house.

J having been ascertained that a railway company intended to have a station on the defendant's land, he contracted to sell to the plaintiff a quarter of an acre next to the railway station as soon as laid out. The company having afterwards located the station ground, but not the position thereon of the intended station house, it was *held* that the plaintiff's parcel could not be ascertained until the locality of the station house was determined, and that until then a bill to enforce specific performance was premature.

Hearing at Goderich.

Mr. *Moss*, Q. C., and Mr. *Davison*, for plaintiff.

Mr. *Blake*, Q. C., and Mr. *Seager*, for defendants.

Judgment. June 27th.

BLAKE, V. C.—On the 16th of September, 1872, the plaintiff and defendant entered into the following agreement in writing:—

(*a*) 2 DeG, M. & G. 731. (*b*) 1 DeG. & J. 208.
(*c*) 2 Ha. 408.

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"September 16th, 1872.

"Agreement between *George Casemore* and *William Carroll*.

"Bargain or agreement entered into this day between *George Casemore* of the first part, and *William Carroll* of the second part. I, *George Casemore*, agree to sell to *William Carroll*, one quarter of an acre of land, being lot next to the railway station, on lot 31, first concession, Morris township; said lot to have eight rods front on side line, between lots 31 and 32. The said *William Carroll* agrees to pay *George Casemore* the sum of $75, $5 in hand paid. The balance of $70 to be paid two months from date, when he will receive from *George Casemore* a clear deed of all incumbrance; clause—if said station is not laid out, the deed will be given whenever it is.

Witness,
William Messer.

GEORGE his ⋈ mark CASEMORE.

WILLIAM CARROLL."

Judgment.

On the 13th of November following, this bill was filed, asking for a specific performance of this agreement, alleging that on the 16th of November, 1872, the purchase money was tendered, and a conveyance demanded, and, although frequent applications had been made by the plaintiff to the defendant, to perform specifically the agreement, he had refused to do so. The plaintiff does not state there are any difficulties about defining the premises to be conveyed; nor, does he shew any reason for non-compliance with the agreement on the part of the defendant. The defendant in answer, admits the agreement, but says, that at the time of the filing of the bill, there was not and never had been any railway station on lot 31, in the first concession of Morris, nor was such station at that time located, fixed, or laid out; and that he was not bound to convey until it had been located. The defendant further states that the plaintiff desired

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the lot in question for a tavern stand, and for this reason wanted to have it nearest the station house to be erected; and if this is not the true reading of the agreement as it stands, he asks that it may be reformed in such manner as to cover this lot, which he is ready and willing to convey to the plaintiff. The plaintiff contended that the words "railway station," meant railway station grounds; and in his evidence in chief, he sought to shew, subject to an objection then taken by the counsel for the defendant, as to its admissibility on the bill, as it stands, that by the acts of the parties, it must be taken to have been clearly their intention thus to construe the agreement. I stated at the close of the argument of the case, that I thought the plaintiff had failed in establishing this, and a reperusal of the evidence has strengthened me in that conclusion. The portion of the station ground to be taken from the defendant's property, was located in the month of November last, although the land was not actually purchased until a few days before the cause was argued. The position of the station itself was not defined by the railway authorities, until the 28th of last April. The defendant in his evidence states that when the bargain was being made, the plaintiff said he wanted the lot next the station building, so that he might have a room where the people might, during the short time the train remained, procure refreshments from him; that he agreed to this, and never intended to or said that he would give any other lot. The plaintiff did not deny that these representations were made at the time the bargain was discussed between them; nor that his desire and intentions were such as the defendant describes them to be. The plaintiff, who lived about thirty miles from the property, states that three weeks after the agreement, he returned to Bluevale, where he met the defendant, who said he had written to him informing him that the station ground was laid out; that he might go home and sell out and return and build as soon as he liked. The defendant denies he wrote this letter, which

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was not produced. He likewise denies this conversation. The plaintiff went home and sold out and returned, and thereafter he, the defendant, and a Mr. *Thynne*, a schoolmaster, went down to the property and measured out the lot which the plaintiff now claims; and they then settled upon the best place to build the house—which, however, was not commenced until sometime in January or February, and after the bill was filed. Plaintiff tendered the defendant the purchase money and demanded a deed, which the defendant refused to give. Plaintiff admitted in his examination that although the deed was refused, the defendant offered him a bond for a deed of a quarter acre, stating that as they did not then know where the station was going to be, he could not give a deed.

Mr. *Thynne* states the defendant came and asked him to measure a peculiar shaped piece of land for him, in the corner of the piece where the station ground was laid out. He measured a piece with a frontage of eleven rods, in place of eight. Both parties understood that measurement and agreed to it. Some observations were made as to the best place for the house, but no stake was put down.

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Mr. *Farrow* was the conveyancer to whom the parties first went after the measurement made by *Thynne*, and he says the plaintiff demanded this triangular shaped piece, and the defendant said something about the station house not being located; and he, *Farrow*, then told them he could not draw a deed until they settled upon the land to be conveyed, and so they left.

The parties after leaving Mr. *Farrow*, went to Mr. *Scott*, a conveyancer in Wingham, upon the suggestion that, although Mr. *Farrow* could not draw such an agreement as they wanted, perhaps Mr. *Scott* could. Mr. *Scott's* examination is as follows :—"I know the parties, and was present at a conversation between them."

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It was about the 16th of last November. Both parties came to my office—the defendant was there, and then the plaintiff came in, in a very blustering way and tendered the money. I counted the money over. I think he said the amount to be given, was $70. I asked the defendant why he did not give the deed, and he said the station had not yet been laid out; that he was prepared to give him a deed of the land nearest the station, and if the land plaintiff wanted happened to be this, he was willing to give it to him; and he was prepared to give him a bond in $1000, to carry out this, when the station was placed. The plaintiff said the station grounds were laid out, and this was the lot next, and he would have that and none other. I don't remember whether plaintiff said station 'grounds' or 'buildings.' That was the controversy between them."

Cross-examined.—"They referred to the corner lot—that was the lot plaintiff wanted and which defendant refused until the station was fixed."

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Joseph McKenny says, about the middle of November, he had a talk with plaintiff and defendant about this lot. Defendant said he would give plaintiff a bond to give him a deed when the station was laid out; the lot was to be nearest the station ground, with a frontage of eight rods on the side road. The plaintiff was not satisfied with this—he wanted the corner lot, and he wanted it then.

The defendant, in his examination, says, he agreed to give plaintiff the lot next to the railway station; but that he would not bind himself to give a deed until the station was laid out; to this, plaintiff assented. In talking over the agreement, it was understood the station meant building. The plaintiff seemed to think the station would be nearest the corner lot, and therefore that this would be his; that he got *Thynne* to run over the

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lot to ascertain whether, if this turned out to be the lot, it would answer what was called for by the deed. Then plaintiff wanted a deed which he refused; and upon plaintiff saying he would make him give him a deed, and defendant saying he could not, plaintiff asked him for a bond, which they went first to *Farrow*, and afterwards to *Scott* to have prepared, when, what the witnesses have stated, then took place. The plaintiff then refused the proffered bond and left the office and filed the present bill. It is impossible for me to conclude on this evidence that the parties have further defined the premises in question. If, on the one hand, the act of employing *Thynne* to measure, is indicative of an intention of defining the word station as meaning station ground; on the other hand, what took place at Mr. *Farrow's* and Mr. *Scott's*, goes at least equally to shew the defendant never intended to waive the position he from the first took, which was, that he would give a reasonable assurance that he would thereafter carry out his agreement with the plaintiff, although he would not give a deed until the land could be described by reference to the station when located.

Judgment.

I am left, therefore, to consider what is the meaning of the words, "Railway Station," and to construe the agreement with the light thrown upon it by the fact deposed to by the defendant, and not denied by the plaintiff, that he wanted the lot for the special purpose of a refreshment room for railway passengers.

In the Imperial Dictionary the word 'station,' is thus defined, "a halting place, intermediate between the termini of a railway where passengers are taken up and let down; also, though less appropriately, a railway terminus."

In the same authority under the head of railway, there is the following statement, "The various places

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along the line of railway where carriages stop for taking up or depositing goods or passengers, are termed stations, with the prefix of goods or passengers as they are allotted to the one or the other, and they are termed road stations when they occur at the crossing of a public road where goods or passengers are transferred to other kinds of conveyance." So that from this work it would appear that the ordinary acceptation of the term 'station,' as appplied to railways, is a passenger station. It cannot properly mean the railway grounds, and in legal phraseology, a different signification is not given to the word. In the Consolidated Statutes of Canada, chapter 66, section nine deals with the powers of railways. The earlier sub-sections of this section, define the powers of railways as to the lands they may require. Sub-section seven, begins as follows: "To erect and maintain all necessary and convenient buildings, stations, depots, wharves, and fixtures, and from time to time to alter, repair, or enlarge the same." From the context here, the word station must be treated as meaning an erection of some kind. In *Hood* v. *The North Eastern Railway Company* (*a*), the railway company covenanted with certain land owners, that a piece of the land purchased should thereafter be used as "a first class station," Lord *Hatherly* in his judgment, thus defines this term, "one thing, however, in the agreement appears sufficiently clear for the Court to act upon, which is, that there was to be at Cowton, a station or place for the purpose of taking up and setting down passengers, and not only a station, but a first class one." See also *The Provost and College Royal, Eton* v. *The Great Western Railway* (*b*).

Judgment.

I am of opinion that the plaintiff is entitled under the agreement to a conveyance of a quarter of an acre of the defendant's land nearest the passenger station located

(*a*) L. R. 5 Ch. Ap. 525.

(*b*) 1 Railway Ca. 200.

there now; the lot to have a frontage of eight rods on the side line referred to in the document in question. There may be a difficulty in defining this quarter of an acre, and when ascertained, it may not answer the views of either the plaintiff or the defendant; as they may have anticipated with some degree of certainty, that the station which was to be the guide in determining this lot, would have been located elsewhere. But this is the agreement between the parties, and the only one the Court can enforce, and no reason exists sufficiently strong for not carrying it out. The filing of the bill was premature, as at that date the land could not be ascertained; but as the defendant submits to convey, a decree for a specific performance of the agreement may be made, the lot to be conveyed being described as above set forth.

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As the plaintiff was not entitled to a decree, he must pay the costs of the suit, which will be taxed on the lower scale; there will be a reference to the Master to settle the conveyances in case the parties differ about the same; and in order to save the expense of a hearing on further directions, let the Master, in case he settle the conveyances, also determine by whom the costs of such settlement be paid; and let the present decree order such taxation and payment.

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Tenants in common—Insurance.

One of several tenants in common being in sole possession of the premises and claiming to be solely entitled, insured the buildings on the property; the buildings having been destroyed by fire the insurance moneys were paid to the party insuring, and new buildings were erected by a person to whom he had contracted to sell the property:

Held, varying the decree pronounced, (*ante* volume xix., page 155,) that the party insuring was entitled to appropriate the insurance money to his own benefit.—[Spragge, C., *dubitante.*]

Held, also, varying the original decree, that he was not entitled to any allowance in respect of the new buildings.

This was a re-hearing, at the instance of the *Bank*, of the decree pronounced in this cause, as reported *ante* volume xix., page 155. The re-hearing was limited to so much of the decree as charged the defendant *William McIntosh* with the amount of insurance money received under the policy effected by him on the mill, which had been destroyed by fire.

Statement.

The facts and circumstances of the case appear fully in the previous report.

Mr. *Moss*, Q. C., and Mr. *Maclennan*, for the *Bank*.

Mr. *Crooks* Q. C., and Mr. *A. Hoskin*, contra.

On behalf of the *Bank* it was contended that *William McIntosh* had insured only his own interest, which alone he could insure; and if he insured any further or greater interest the insurance company might have refused payment of the policy. If on the other hand no loss had arisen, his co-tenants could not have been called upon to contribute any share of the premiums paid by him; neither could he have been compelled to expend the money in re-building. It is evident he supposed himself entitled as heir-at-law; not as acting on behalf of his co-tenants in any degree.

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The money so received by him could not form any lien or charge on his land, in absence of contract to that effect; and even if as between him and his co-tenants this could have been directed, the *Bank* had no notice of his having received them; nor had the *Bank* notice even of other persons being interested in the estate, except so far as notice could be attributed to them by reason of their agent having been aware that there was in fact a will; and this was the only fact they had notice of by which notice could be imputed to them: *Gottlieb* v. *Cranch* (*a*), *Bellamy* v. *Brickenden* (*b*), *Brooke* v. *Stone* (*c*).

For the plaintiffs it was insisted that the bill being for partition and the *Bank* having had notice of the will, they must be taken to have had notice of the co-tenancy; and inasmuch as they had such notice they took only whatever interest *William McIntosh* had a right to convey, subject to all equities; and this interest could only be ascertained on the taking of accounts between *William* and his co-tenants: *Sandford* v. *Ballard* (*d*), *Tyson* v. *Fairclough* (*e*), *Parry* v. *Ashley* (*f*), *Courtenay* v. *Wright* (*g*), *Morland* v. *Isaac* (*h*).

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STRONG, V. C.—The case as to the insurance moneys is, as I understand the evidence, shortly this. *William McIntosh*, being one of several tenants in common, under his father's will, though believing himself to be the sole owner as heir-at-law, insured the mill, paying the premiums himself. At the same time he had in his hands moneys received for rents, for which he was accountable, under the Statute of *Anne*, to his co-tenants. The mill having been burnt, *William McIntosh* received the insurance money, for which the plaintiffs now insist he is

(*a*) 4 D. McN. & G. 440.
(*b*) 2 J. & H. 137.
(*c*) 34 L. J. Ch. 251.
(*d*) 33 Beav. 401.
(*e*) 2 S. & S. 142.
(*f*) 3 Sim. 97.
(*g*) 2 Giff. 337.
(*h*) 20 Beav. 389.

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accountable to them. I take it to be clear, that neither in an action of account by the plaintiffs to recover the rents, nor under a decree of this Court for a like account, could *William McIntosh* have insisted on charging his co-tenants with the premiums of insurance. A mortgagee insuring without the concurrence of his mortgagor, is not accountable for insurance moneys, on the ground that he could not charge the mortgagor, in account, with the premiums, the contract being considered one for the mortgagee's own personal benefit, which there is nothing in the relationship of mortgagor and mortgagee to incapacitate him from entering into: *Dobson* v. *Land* (*a*), *Bellamy* v. *Brickenden* (*b*), *Brooke* v. *Stone* (*c*).

The same principle, in my opinion, applies with even greater force to the present case. There is nothing of a fiduciary character in the relationship of tenants in common; such a tenant is not even accountable for an occupation rent, and he can in no sense be considered as a trustee for his co-tenant, though the Statute of *Anne* does make him legally liable to account as bailiff for rents and profits received.

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I think, therefore, that *William McIntosh* ought not to have been charged with the insurance moneys.

On the other hand, it appears to me that Mr. *Hoskin's* objection, that *William McIntosh* ought not to have any allowance in respect of the improvements made by *Wagstaff*, must prevail. Not being charged with the insurance moneys, it cannot be considered that those funds were laid out in building the new mill, and the case is therefore the naked one of a tenant in common assuming to sell the whole estate to a purchaser who makes improvements and then abandons his purchase. This is totally unlike cases where the expenditure having

(*a*) 8 Hare 216.
(*b*) 2 J. & H. 137.
(*c*) 34 L. J. Ch. 251.

been by a tenant in common of his own moneys in improvements, he has had the benefit of the outlay given to him on a partition. I can see no equity which this defendant can claim in respect of *Wagstaff's* improvements. As well might the defendant set up a claim to be allowed for permanent improvements made by his tenant and afterwards abandoned; or to the increased value of the property occasioned by any other accident. I think the decree should be varied in both the respects indicated.

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There should be no costs, and the deposit should be returned.

BLAKE, V. C.—The judgment of the Chancellor finds that the defendant *William McIntosh*, is, as co-tenant, entitled to seven-fifteenths, and that the co-defendants, the *Ontario Bank* and *Dixon*, as mortgagees, can claim a charge only upon this portion of the premises in question.

Judgment.

The parties assent to this portion of the decree, but the *Ontario Bank* and *Dixon* contend that certain moneys received by *William McIntosh*, before he gave the security to the *Bank* and *Dixon*, upon an insurance of the whole of the premises, should not be charged against his share and the interest mortgaged to them be thus incumbered.

The true position of the parties must be taken to have been, as is declared by this decree, that from the death of the testator, *William McIntosh* was, as co-tenant, entitled to the interest above mentioned; and in his dealings with the premises, the plaintiffs cannot ask that *William* should be viewed otherwise than as is insisted upon by them, namely, a co-tenant with them.

A contract of insurance against fire is, as a general rule, a mere personal contract between the assured and

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the underwriter to indemnify the former against the loss he may sustain: *Russell* v. *Robertson* (*a*), *Dobson* v. *Land* (*b*), *Bellamy* v. *Brickenden* (*c*).

Where a mortgagee insures the mortgaged premises against damage by fire, he is entitled to receive the amount of the policy, in the event of loss, for his own benefit, without giving credit therefor upon the mortgage. In the case of *White* v. *Brown* (*d*), in the Supreme Court of Massachusetts, the following language is used: "The defendants alone effected the insurance, and are exclusively entitled to the benefit of it, and the amount received by them under their policy could not properly be taken into account in adjusting the amount for repairs between them and the plaintiff. If a mortgagee gets his interest insured, and receives the amount of the insurance under his policy, it does not affect his claim against the mortgagor." If this be so with a mortgagee, who, under certain circumstances, is trustee for the mortgagor, and whose interest in the property mortgaged is limited to a security for his debt, I cannot see what there is in the position of a tenant in common that enables him to call on his co-tenant for a portion of insurance money received under a policy effected by the co-tenant in his own name and at his own risk and expense, upon the premises liable to be partitioned. Here *William McIntosh* could not charge against the co-tenants any portion of the premiums paid by him. He could not, it is true, by rights effect the insurance he actually did, nor could he, in my opinion, have claimed the insurance money from the Company, as he represented to them that he had an interest which he did not possess; but he chose to speculate in the matter, he insured the whole premises instead of his interest in them, the Company paid him the money, and I fail to see what right they have to any

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(*a*) 1 Ch. Ch. Rep. 72.
(*b*) 8 Ha. 216.
(*c*) 2 Joh. & H. 137.
(*d*) 2 Cush. 412.

portion of the insurance money, who have in no way contracted for any insurance in the matter, and who were not responsible for or chargeable with the premiums paid. It is true that an action would lie against *William McIntosh* for the share of the rents to which his co-tenants were entitled, but as the premiums paid would not form the subject of a set-off in such an action, so I think where the account is taken here, in place of at law, the premiums would not and could not form an item in the account; and, if these be thrown out of the account on the one side, that which the premiums earned, namely, the insurance money, should be thrown out on the other. The case cannot be placed more strongly for the plaintiffs than that, as the mill in question formed a part of the freehold, and, when it was destroyed by fire and the defendant received this insurance money, he thus received that which represented the freehold, and in this way obtained his share or a portion of his share of the premises about to be partitioned, he should give credit for this on a division. But in the case of mortgagor and mortgagee, where the land mortgaged is only a security and is held until repayment of the debt, if the mortgagee insures, and the house be destroyed by fire, the insurance money is received by the mortgagee, without any credit to the mortgagor in respect thereof. Now, there it might as well be said the mortgage debt is paid out of that which represents the property mortgaged, the mortgagee has received a part of the premises of the mortgagor, and to the extent of the amount thus received the mortgage must be discharged. Yet in such a case the authorities shew clearly that the mortgagee can claim the insurance money and also the whole amount due on the mortgage. If the mortgagee can thus claim the insurance money, and also the mortgage money, I cannot see why a co-tenant has not the right to claim the insurance money earned by the premiums he paid, and also his share of the premises to be divided. He chose, as I said, to speculate on the chances of

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his receiving a return for the money he expended in insuring. He could not make any claim against his co-tenants in respect of these premiums—there was no duty cast upon him to keep insured the premises—and I cannot find any principle or authority that would warrant the placing a tenant in common in the position in which the plaintiffs contend *William McIntosh* should stand. If the rent received by the tenant in possession be large compared with the value of the property, he may desire to effect an insurance for a greater sum than he could insure his interest for, and for such a sum as, if the property be burned, would, when invested, produce an amount equal to the share of the rent coming to him. Should he arrange with the Insurance Company to accept a risk as if he were the owner of the whole premises, I cannot see what equity there arises out of such an insurance in another who, with the right to insure, is satisfied to run his risk, or to be his own insurer.

Judgment.

If there had been any representation on the part of *William* that he was, in effecting the insurance, acting for the co-tenants, or if by some act of his the others were deterred from insuring, the Court would readily lay hold of this to procure for the persons thus injured by the acts or representations of *William*, a share in that benefit which, but for him, they would have received. Here, however, there is not anything of the kind, nor is there any reason satisfactory to my mind for taking from *William* any portion of the insurance money. It matters not that one of the policies was in force at the time of the death of the testator, and that this has been kept alive, and was one of those under which the money was paid to him—this policy terminated with the life of the person whose property was covered by it—no one representing the estate of the deceased could compel the Company to continue it in his favour,—and because they chose to make an arrangement with the son of

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the testator some years afterwards to consider for the future this policy as one effected by him, I fail to see what right is thus gained in favour of the other members of the family. I am of opinion that *William* is entitled to all the insurance money received by him, and that the plaintiffs cannot make any claim in respect thereof.

I do not think that *William* is entitled to any allowance for the increase of the value of the estate by the mill placed thereon by *Wagstaff*. This is not an improvement made by *William*, nor were his money or means expended in it. He simply makes an agreement for the sale of the premises to *Wagstaff*, which proves abortive. *Wagstaff* improves the premises, which revert to the estate. If this sale were adopted by all parties interested, each would share in all the benefits to be derived from it. *William* could not demand a special benefit from the sale, and what was done to the premises by *Wagstaff* must enure to the benefit of all the co-tenants. There was no expenditure on the part of *William*; there was not anything to raise an equity in his favour, such as we find in *Biehn* v. *Biehn* (*a*), *Hovey* v. *Ferguson* (*b*), and cases of that class, where allowances have been made when partition has been sought. Judgment.

In my judgment the insurance money should not have been charged against *William*, and the so-called improvements should not have been allowed him. I understand that the charge for the rebuilding of the mill was only allowed in the view that it should be considered as having been erected out of these moneys to which the decree declared the plaintiffs entitled to share in. As the matter raised before us was not discussed in the Court below, and as the parties rehearing obtain what they ask only upon the disal-

(*a*) 18 Gr. 497.

(*b*) 18 Gr. 498.

1873. lowance of part of that which has been given to them by the decree, I think there should be no costs of the rehearing given, and that the deposit should be returned.

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SPRAGGE, C.—I agree with the judgment of my learned brothers that the moneys expended by *Wagstaff* in putting up the grist mill, taking that transaction by itself, cannot be considered as money expended by *William McIntosh* : or to the benefit of which he is entitled beyond his share as a tenant in common.

I am not so clear as to the other point. *William McIntosh* might have insured his interest as a tenant in common. He had in his hands rents and profits of the premises, and he did, in fact, insure the whole premises. He had not an insurable interest in his own right beyond a certain proportion, but he insured the whole—for whom? Granted, that he was not bound to insure, yet, as a fact, he did insure, and I cannot free myself from the doubt that it does not lie in his mouth to say that the insurance was wholly on his own account.

Judgment.

It does not seem to me that the fact of his not being bound to insure is an answer, when in fact he did insure. It is not unlike a case which occurred in bankruptcy *ex parte Andrews* (*a*). There a person assigned to creditors his contingent interest in a certain fund, the contingency being his wife surviving her brother, and the creditors without the privity of the debtor effected an insurance on the life of the wife. The wife died, and the creditors received the insurance money. The husband became bankrupt, and the question was, whether they were bound to account for the insurance money received, and it was held that they were. The judgment of Sir *Thomas Plumer* contains this passage, " the trustees then acting in part for

(*a*) 2 Rose 410.

themselves, in part for the bankrupt do an act beneficial to both parties, at their own expense ameliorating the property, laying out money for the benefit of themselves and their *cestui que trust.* The result of the act is that the estate is benefited £400. Shall they be allowed exclusively to appropriate this benefit?"

This was a case of express trust, but with no obligation to insure.

In *Bailey* v. *Gould* (*a*) it was held by Baron *Alderson*, that executors are not bound to insure or re-insure; but it is assumed throughout the case that they were at liberty to do so. The case of a tenant in common in possession, and receiving rents for which he is bound to account, is virtually that of a constructive trustee, the other tenants in common being *cestuis que trust.* A mortgagor is in no sense a trustee for his mortgagee, nor is a lessor for his lessee, or a lessee for his lessor. This case is in one respect stronger than that of *ex parte Andrews* inasmuch as *William McIntosh* had in his hands rents and profits belonging in part to his co-tenants, and did in fact insure the whole interest in the estate.

Judgment.

I incline to think that in accounting for rents and profits he could have charged the premiums paid for insurance, but if he could not I still incline to think that having insured, and insured the whole interest as he did, he is accountable to his co-tenants for a proportion of the insurance moneys received commensurate with their interests.

I am not at all events prepared to agree with the opinion of my learned brothers that they are not.

(*a*) 2 Y. & C. Ex. 221.

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THE ATTORNEY-GENERAL v. THE NIAGARA FALLS INTERNATIONAL BRIDGE COMPANY.

Demurrer—Nuisance—Parties—Information—Railway—Suspension bridge—Ultra vires.

The Attorney General of the Province is the officer of the Crown who is considered as present in the Courts of the Province, to assert the rights of the Crown, and of those who are under its protection.

The Provincial Attorney General, and not the Attorney General of the Dominion, is the proper party to file an information, when the complaint is not of an injury to property vested in the Crown as representing the Government of the Dominion, but of a violation of the rights of the public of Ontario.

The Provincial Attorney General is the proper person to file an information in respect of a nuisance, caused by interference with a Railway.

The respective Legislatures of the State of New York and Canada incorporated certain parties for the purpose of constructing a suspension bridge across the Niagara River, for Railroad and other purposes, with power to take lands, charge tolls, &c,, and the two Companies joined in conveying to one railway Company the exclusive use of the railway portion of their structure, with power to make arrangements with other railway companies: *Held*, that such assignment was *ultra vires* and void.

Demurrer for want of equity by the defendants, *The Great Western Railway Company*.

The statements of the information filed and the grounds of demurrer appear clearly in the judgment of the Court.

Mr. *S. Blake*, Q.C., and Mr. *S. Barker*, in support of the demurrer.

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

Judgment. STRONG, V. C.—This is an information filed by the *Attorney-General* of Ontario, at the relation of the *Erie and Niagara Railway Company*, conjoined with the bill of that Company against the *Niagara Falls International Bridge Company* (a foreign corporation, incor-

porated by an Act of the Legislature of the State of New York), *The Niagara Falls Suspension Bridge Company*, and *The Great Western Railway Company*. 1873.

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The information states the incorporation of the *International Bridge Company*, by the New York Legislature, with powers to build a railroad and carriage bridge, and that it was further authorized by itself, or in union with the Canadian Company to enter into any contract or agreement with any individual railroad company or railroad companies, with reference to the terms of crossing locomotives and cars, passengers and freight, over said bridge; and the construction, repairs, insurance, and maintenance of the same, upon such terms and conditions, and for such time or times as might be agreed upon by and between the parties. It also states the incorporation of the Canadian company under the statute of Canada, 10th Victoria, chapter 112, which recited that the promoters of the Act had by their petition set forth the great facility and convenience which a suspension bridge would offer to the public, and by which powers were given to the company to unite with any other persons, company, or body, to construct a suspension or other bridge across the Niagara River, with the necessary approaches thereto with rail, macadamized, or other roads, and to connect the same with any other road then or thereafter to be made. That both companies were authorized to take lands by compulsory process, and to establish and demand rates and tolls. The information further states that by indenture of the 9th of November, 1847, entered into between the two Bridge Companies, general regulations were established for constructing, maintaining, and managing the bridge. That by indenture of the 1st of October, 1853, made between the *Bridge Companies* of the first part, and the *Great Western Railway Company* of the second part, the *Bridge Companies* assumed to lease to the *Great Western Railway Company* the upper or railroad floor

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to be for their entire use and under their control for and during the continuance of the charters of the *Bridge Companies*; the said railway company paying the rent thereby reserved; and this indenture contained amongst others, a stipulation in these words: "That the said railroad floor was to be under the control and for the use of the *Great Western Railway Company* for their railroad purposes." The information further alleges that this agreement gave the *Great Western Railway Company* the exclusive right to extend to other companies and persons in its option the privilege of crossing said railroad bridge on such terms as the *Great Western Railroad* and such other companies and persons might agree upon, and to appropriate the revenues so arising to their own use, and in fact by the said indenture the said *Bridge Companies* assumed to transfer, and it was their intention and object to transfer to the *Great Western Railway Company* all their rights and fran-

Judgment.

chises in the said railway floor, and its approaches and appurtenances, and without any reservation except the payment of rent, and the maintenance of the said railroad floor. By the said indenture it was also stipulated that the *Erie and Ontario Railway Company*, which afterwards became incorporated in or with the plaintiffs, the *Erie and Niagara Railway Company* should have it in its power to arrange with the *Great Western Railway Company* at five cents per head for their railroad passengers, and a proportionately moderate fare for freight. By agreement dated the 18th of January, 1872, the *Bridge Companies* assumed to abrogate the clause relating to the *Erie and Ontario Railway Company*. This change is alleged to have been brought about by the *Great Western Company*. The defendants have refused to permit the *Erie and Niagara Railway Company* to carry their traffic over the bridge, and this refusal is highly inconvenient and injurious to the public, as well as to the *Erie and Niagara Railway Company*.

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The information charges that the agreement between the *Bridge Companies* and the *Great Western Railway Company* is *ultra vires*, and it prays that it may be declared that the *Erie and Niagara Railway Company* is entitled to use the bridge on paying reasonable tolls and submitting to reasonable regulations without the *Great Western Company* being entitled to any preferential or exclusive privilege over the said *Erie and Niagara Railway Company*; that the agreements of the 1st of October, 1853, and 18th of January, 1872, may be declared to be void; that the defendants may be restrained from preventing the *Erie and Niagara Railway Company* from passing locomotives, carriages, cars, passengers and freight over the bridge, and generally from the free use of the bridge, subject to reasonable tolls and regulations.

To this information and bill the *Great Western Railway Company* have demurred for want of equity.

Judgment.

On the argument of this demurrer two objections were urged: first, that the information was improperly filed by the *Attorney-General* for this Province; it being contended that the proper officer to complain of the injury to the public which is the subject of the suit, was the Attorney-General for the Dominion, and secondly that the agreements between the *Bridge Companies* and the *Great Western Railway Company*, were within the powers of the former companies.

The first objection is, in my opinion, without foundation. The *Attorney-General* files this information, not complaining of any injury to property vested in the Crown, as representing the Government of the Dominion, but in respect of a violation of the rights of the public of Ontario. The *Attorney-General* of this Province is the officer of the Crown, who must be considered to be present in the Courts of the Province to assert the rights

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of the Crown and those who are under its protection. If an *ex-officio* information in respect of a nuisance caused by illegal interference with a railway, which is a public highway, were to be filed in a Court of Common Law, there would, I should think, be no doubt but that the Provincial Attorney-General was the proper officer to prosecute. Then on what principle could it make any difference that the railway in the supposed case, as the bridge here, belonged to a class of works over which, as extending beyond the limits of the Province, the British North America Act had conferred legislative powers on the Parliament of the Dominion? I can discover nothing incongruous or inconvenient in the *Attorney-General* for the Province being admitted to sue on behalf of the public, even in respect of the violation of rights created by an Act of the Parliament of the Dominion. So far from that being so the whole system of the administration of criminal justice furnishes an analogy to the contrary, The power of making criminal laws is in the Legislature of the Dominion; but it has never been doubted that the *Attorney-General* of the Province is the proper officer to enforce those laws by prosecution in the Queen's Courts of justice in the Province.

Judgment.

For the purpose of obtaining redress for any injury to, or for restraining undue interference with public property vested in the Crown, for the purposes of the Government of the Dominion, I can conceive that it might be argued with much force that the *Attorney-General* for the Dominion should be admitted to sue by information. That, however, is a totally different case from the present. In the case of a public nuisance caused by an illegal obstruction of a railway, as I have already said, the Provincial *Attorney-General* would be the proper officer to prosecute in a Court of Law. A Court of Equity, however, would also lend its aid on an information being filed by the proper officer to restrain such a nuisance. Would it not be a strange anomoly that

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whilst the criminal information could be preferred by the Provincial *Attorney-General*, the information in the Court of Chancery must be filed by the *Attorney-General* of the Dominion? Such a conclusion would not result from the exclusive legislative power being given to Parliament, and there is nothing else in the Imperial Act, which can be suggested as authorizing such a mode of proceeding. My judgment, therefore, is against that ground of demurrer.

Upon the second point I am also against the defendants who demur.

The Act of the New York Legislature cannot possibly have any effect on the decision of the Court. It can have no operation beyond the boundary of the State, and the Canadian Act does not, either expressly or by implication, adopt any of its enactments. The consideration must therefore be confined to our own Statute of 10 Victoria, chapter 112, which, I may say, is extraordinarily meagre in its provisions. The preamble recites that the promoters have stated in their petition that the bridge would offer great convenience and facility to the public. By the 12th section it is provided that if any toll-gatherer shall unreasonably, and without cause delay or hinder any passenger, or the passage of any property, agreeably to the rule prescribed in such a case, he shall be liable to a prosecution. By section 13, power is given to the company to make by-laws touching the management and disposition of the stock, property, estate, and effects of the Corporation.

Judgment.

From these and the other provisions of the Act set forth in the information, especially that which conferred the right of compulsorily taking private property for the purposes of the work, it cannot be doubted, although the Act does not expressly so declare, that *prima facie* and subject to any powers the company

1873. might have under the Act to derogate from that right, the public were to enjoy a right of passage across so much of the bridge as should be within the Province, subject to the payment of tolls, as freely as if it had been declared that the work should be deemed to be a public highway.

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It must however be borne in mind that the first section of the Act contains a provision in these words, "with power to unite with any other persons, company, or body politic, to construct a suspension or other bridge across the Niagara River, with the necessary approaches thereto, with rail, macadamized, or other roads, and to connect the same with any other road now or hereafter to be made." If the *Bridge Company* had authority to enter into the agreement of the first of October, 1853, it must have been by virtue of the powers thus conferred "to connect with any other road now or hereafter to be made" for there is nothing else in the Act which can be resorted to for that purpose. It is contended on behalf of the defendants, that by this the Legislature intended to authorize the *Bridge Company* to amalgamate with any railway company with which they might agree, and to give to such a company the exclusive use of the bridge, leaving the public to look to the railway company to afford them any accommodation to which they might be entitled. On the other hand it is contended that these words merely have reference to the description of works which the company were authorized to construct, and were introduced for the purpose of giving the corporation power, not merely to build a bridge with approaches, but also to construct such other roads and ways as might be necessrry to effect a junction with any other road. I think the latter is the proper construction. Reading this passage by the light of the context it has, in my opinion, only reference to the construction of connecting roads or ways, and does not authorize a dedication of the bridge to the exclusive use of the proprietors of any other road. I cannot suppose

Judgment.

that the Legislature could have intended in such an obscure manner as this would have been to have conferred on the company the right at their pleasure to exclude the public from the free use of the proposed works. The power to unite with any other company or body had been expressly given in appropriate language, and if it had been intended to confer power to give the right to an exclusive use, it is reasonable to supppose that it would have been expressed at least as clearly as the power to unite had been.

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Further, if the interpretation which the defendants claim were to be put on these words, the company would have had the power, as soon as the bridge was constructed, to have handed over the whole work, including as well the lower as the upper or railway floor, under a lease to the proprietors—whether a corporation or individuals—of any neighbouring road. Surely no such powers could be derived by implication from an authority merely to connect with other roads. The defendants' contention on this point therefore fails. And, if this be the correct view, I apprehend that the indentures of the 1st of October 1858, and the 18th of January, 1872, were in excess of the powers of the *Bridge Company*, as unduly restricting the use of the railway floor of the bridge to the *Great Western Railway Company*. A right of passage having been conferred on the public, the company clearly could not have given to any particular individual or individuals, the exclusive use of the ordinary floor of the bridge for the purpose of passage on foot or with vehicles. And that being so, I can see no reason why a different principle should apply to the user by a corporation of the portion of the structure appropriated to the purposes of railways. In the latter case, as in the former, a monopoly of user is created, and that free right of enjoyment on equal terms by the public which the law prescribes, is obstructed. I suppose no one could doubt, that if an Act

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of Parliament authorized the making of an ordinary road by a corporation, having power to take private property by compulsory process, the Act declaring that the road should be a public highway, subject to the right of the company to take tolls, without more, that in such a case the whole public would have a right to make use of such a road on equal terms as to the payment of tolls. I can suggest no distinction between that case and the present. Then the lease of the 1st of October, 1858, does something more than give the exclusive use of the railway floor to the *Great Western Railway Company*. It assumes, as the information states it, to delegate to the Railway Company the powers of the *Bridge Company*, by giving to the former the whole control of the railway floor, including the right to admit other railway corporations, on such terms as they might think fit to impose, to share in their privilege. In this point of view also the agreement seems to be in violation of the well-known principles which regulate the management by corporate bodies of works like this bridge, in which the public have an interest. In these cases it is considered that a duty of management and control is for the public benefit imposed on the corporation, which cannot therefore delegate those powers, or in any other way divest themselves of the obligation thus laid upon them by the Legislature. This principle is illustrated by numerous cases in which it has been applied to railway and canal corporations; and, it is so well understood, that it will be enough to cite one case, the latest as far as I can discover, in which it has been enforced here, *Hinckley* v. *Gildersleeve* (*a*). This case is an authority covering every question which can arise on this demurrer; when once it has been established that the public have the rights which I hold they have as regards this bridge.

Judgment.

The information being sustainable on demurrer, if it appears to the Court that there is a right to any portion

(*a*) 19 Gr. 212.

of the relief prayed, it is not material now to consider what are the exact rights of the public, or of the *Erie and Niagara Railway Company;* that is a question for the hearing when the frame of the decree must be considered. 1873. The Attorney General v. Niagara Falls Bridge Co.

It may be possible, for the *Bridge Company*, to make such a case as to justify their course in confining the use of their structure for railway purposes to one railway company, but such a defence would require to be put in issue by answer, and to be supported by evidence, as it would depend on facts which I could not presume on the argument of a demurrer. I shall therefore, in accordance with what I conceive to be the practice of the Court in overruling a demurrer, where the same question of law as that raised by the demurrer may be again presented at the hearing, in conjunction with facts which may warrant the Court in regarding it in a different aspect, make the order I am about to pronounce without prejudice to any question which may arise at the hearing: *Daniel's* Practice, (ed. 4, p. 552.) Judgment.

At present, placing upon the Act of incorporation the construction I do, and testing this pleading by well established rules of law, I have no alternative but to overrule the demurrer, which I do with costs.

The Great Western Railway Company thereupon set the cause down for the purpose of re-hearing, and the same came on for argument before SPRAGGE, C., and STRONG, V. C.; MOWAT, V. C., having, in the interim, left the Bench.

Mr. *Blake*, Q. C., for *The Great Western Railway Company.*

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It would appear that the learned Vice Chancellor, when disposing of this demurrer, had excluded from his consideration altogether the provisions of the Statute of the New York Legislature, as not affecting the rights of parties, the Canada Act not having adopted any of its provisions;—although it is admitted that this Court can investigate as to the validity of these contracts, which can be efficacious only so far as they are within the Statutes.

The railway companies, not the public, are interested in this question, as the public can obtain access to the bridge by any one or more of the several railway companies doing so.

The roadway of a railway company is not the same as a public highway. It is true that when railways were first introduced it was considered that any one had a right to use it, but this view has long since been exploded.

Argument.

[STRONG, V. C.—It must be that all railways are entitled to the use of this bridge, not that any one or more have such right, but that all have the right, or else that the *Bridge Company* may select one railway company, as here they have done.]

The Court cannot assume, in the absence of allegation, that a railway is the same as other roads, and that the public has the same right to use the one as the other. Here, also, the information does not allege or pretend that avoiding the contract as to the Canadian company would be of any benefit unless the Court could declare the contract with the American company also void; the jurisdiction of the Courts of this Province only extend to the middle of the bridge, while the object the *Erie and Niagara Railway* has in view, is to get across the bridge; and ordering them to be

allowed to proceed to the middle of the bridge would in reality be no relief at all. 1873.

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The Act passed by the New York Legislature gives the company power to enter into just such a contract as has been here made, and this Court is therefore without jurisdiction to get the *Erie and Niagara Railway Company* further than half way across. The result is, that this Court can grant no effectual relief: this being so, the Court will not attempt to make any decree.

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

The objection taken by the defendants, is placed on two distinct grounds—1st. It is argued that the *Bridge Company* could under its charter make any agreement it pleased. Let us suppose that the bridge had been constructed with two floors, one for foot, the other for passengers in carriages, it would be impossible to contend that the company would have a right to contract with one person or set of persons to give them the use of the carriage way to the exclusion of all others. So here they cannot give the exclusive use of the railway floor to one railway company to the exclusion of all others. Under the charter we contend the *Bridge Company* is bound to give to all railways the right to cross the bridge, subject, of course, to any reasonable rules and regulations they might see fit to adopt; and, at all events, if even the Court should adopt the view that the *Bridge Company* had a right to contract with one railway company exclusively, they certainly had not the power to grant to such railway company the powers and franchises enjoyed by the company itself. Argument.

The second ground taken by the defendants is, that the Court cannot grant any effectual relief, as it cannot secure to the plaintiffs a passage across the bridge

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further than to the middle thereof; but the Court will not assume that the right to proceed to the middle of the bridge would be nugatory: *Thayer* v. *Brooks* (*a*), *Case* v. *The Midland Railway Company* (*b*).

The *Erie and Niagara Railway Co.*, strictly speaking, has no right to convey passengers or freight further than its terminus at Suspension Bridge; the *Bridge Company* is then the party to transport to the centre of the bridge, whence the other company takes them the remainder of the way. The charter of the *Bridge Company* compels them to convey all passengers arriving at the bridge across, no matter by what railway they reach there.

Argument.

The Act of 1847 contemplates the construction of a bridge, which for reasonable hire is to allow passengers to cross, just in the same way as a ferry is bound to convey passengers on being paid a reasonable toll and subject to reasonable conditions; and here the provisions of the Act are as broad as to the user by the railway companies of the upper bridge as of the other bridge by foot passengers or passengers in carriages. However, for the purposes of conveyance it may be considered that, *pro hac vice*, the cars, locomotives, and other appliances of each railway company are those of the *Bridge Company*. What we complain of is, the exclusion of one company entirely from the use of the bridge, not the mode of user by any other company which is permitted to use it: *Bloodgood* v. *The Mohawk & H. R. R. Co.* (*c*).

[STRONG, V. C.—How it struck me was, that once establish that this is a public work, then the *Bridge Company* could not adopt or accept one to the exclusion

(*a*) 17 Ohio 489.
(*b*) 28 L. J. N. S. 727; S. C. 5 Jur. N. S. 1017.
(*c*) 18 Wend. at 22.

of other railways, any more than the proprietor of a ferry would be able to say that he would carry one class of passengers to the exclusion of all others.] 1873.

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SPRAGGE, C.—The Act of the Legislature of the State of New York, incorporating the *International Bridge Company*, was passed on the 23rd of April, 1846, and was afterwards amended by an Act passed 21st July, 1857. The Canadian Act, after having been reserved, was assented to by proclamation promulgated in December, 1846. The indenture of union entered into between the two companies, is dated the 9th November, 1847. The fifth section of the information sets forth that by an indenture of agreement between the *Bridge Companies* and *The Great Western Railway Co.*, dated the 1st October, 1853, it was recited that the *Bridge Companies* were then engaged in the construction of the bridge with two floors—the upper floor being intended for railway trains, to be laid with rails of three different guages,—and the companies thereby leased the upper floor to *The Great Western Railway Company*, "to be for their entire use, and under their control during the continuance of their charters;" that is, the charters of the *Bridge Companies; The Great Western* paying the rent thereby reserved; that this should give to *The Great Western Railway Company* the exclusive right to extend to other companies the use of this floor; and this indenture also stipulated that *The Erie and Ontario Railway Company* (afterwards amalgamated with *The Erie and Niagara Railway Company*), should have power to arrange with *The Great Western* at five cents per head for their railroad passengers, and a proportionately moderate fare for freight; and provided that nothing therein contained should be contrary to the charters of the *Bridge Companies;* which provision, however, by an agreement entered into on the 18th January, 1872, the *Bridge Companies* assumed to abrogate, and which agreement the information alleges, was entered into for

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the purpose of excluding *The Erie and Niagara Railway Company* from using the bridge, and was brought about by *The Great Western Railway Company*. Section ten of the information states that the defendants refuse to allow *The Erie and Niagara Railway Company* to use the bridge or allow them to carry their traffic across the same. The relators insist that this agreement with *The Great Western Railway Company* is *ultra vires* and void; this may be so in respect of the Canadian Company and not of the American Company.

If *ultra vires*, it must, it would seem, be upon the ground that the *Bridge Companies* were bound to afford every reasonable facility to the public; they were so bound and would be so from the nature of their charter; and the act incorporating the Canadian Company contains several provisions indicating that such was the intention of the Legislature. I refer particularly to the 12th section, this can apply only to that part of the bridge which was intended to be open to all comers, and from its terms could not be intended to apply to railways. It is doubtful indeed whether it was at that time intended that railway trains should pass over the proposed bridge.

Judgment.

If a railway over a bridge can be open to all comers as an ordinary road, *i. e.*, to all trains presenting themselves at the bridge, the *Bridge Companies* would be wrong in excluding all but one railway company. It is conceded by counsel for the informant, that railways cannot stand upon the same footing as other roads; but it is contended that the largest accommodation possible, should have been afforded to the public; and that confining the use of the railway floor to one railway company, is an abridgement of the rights of the public.

It seems to resolve itself into the question upon which side the onus of allegation and proof lies, whether upon

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the informant to shew that what has been done, is in derogation of the public right, or upon the defendants to shew that from the nature of railway traffic, a limitation of the right of user to one railway company is necessary and proper.

The information states only the fact of the construction of the bridge with the railway floor, and the grant of exclusive right of user to one railway company, and draws the conclusion that such grant is *ultra vires*, upon the ground, as I suppose, that it is an abridgment of the public right. Either the information should have shewn that some other mode of user of this railway floor which would have been more beneficial to the public, was practicable; or, it lay upon the defendants to shew that no other mode of user was practicable, or the Court must take judical notice that some other mode of user was practicable.

Judgment.

Other modes of user have been suggested—*e.g.*, that the *Bridge Company* should themselves regulate by a time table, the passage of the several trains—appointing the times in each day when the trains of the several railway companies using the bridge, should pass over it. This may be practicable—I am not prepared to say that it is not; but it is obviously not unattended with difficulties, inasmuch as the practice of railway companies is to regulate their own time tables with reference to the general traffic of their lines; and possibly to their connections with other railways. If several railway companies used the bridge, the *Bridge Company* could only make a time table for them all, by concert with all, and though the carrying out of such an arrangement may be quite practicable, I cannot say, judicially, that it is so; and this is what the Court is asked to do. Once admit that the railway floor of the bridge cannot be open to all trains that present themselves, at whatever hour they may present themselves, in the same way as

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an ordinary road is open for traffic, or as the lower floor of the bridge is open for traffic, it is not, as it appears to me, a conclusion that the Court can draw, that the restriction of the use of the railway floor to one railway company, is an infringement of the rights of the public; we do not judicially know enough to be able to see that any other mode of user is practicable. If any other user is practicable, having regard to the safety, as well as the convenience of the public, I think it should have been alleged, and if alleged and proved, it would be *ultra vires*, just as it would be in the case put by Mr. *Moss*, of restricting the use of the bridge by carriages to any particular people or class of people—*e.g.*, the vehicles of some livery stable keeper.

If the demurring defendants had answered, they might have alleged that no user other than by one railway company is practicable, but they can only be bound to set this up by way of answer, if the Court must assume without such allegation, that some other mode of user is practicable; and that, as I have said, the Court cannot, I think, see judicially.

Judgment.

The information puts it, that any agreement made by the *Bridge Company*, whereby the *Erie and Niagara Railway Company* is excluded from the use of the bridge "on equal terms with any other railway company," is *ultra vires*. This seems to proceed on the assumption that all railway companies have a right to pass the bridge with their trains. Can we see that such user of the railway floor would be practicable? I agree, however, that if we can see that the restriction to one is *ultra vires*, we must overrule the demurer.

Mr. *Crooks* contends that it is apparent from the language of the Act that it contemplated that the *Bridge Company* should convey railway passengers as well as all other passengers across the bridge. I agree

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that the Act indicates that passengers by railway as well as others, were to have access to the bridge to cross it; but I see nothing to indicate that it was to be the duty of the company to provide vehicles, railway or other carriages, to convey them across. But, at any rate, the information makes no case against the *Bridge Company* on that score. It does not allege a refusal to perform such service, or that such service was a duty of the *Bridge Company*. The single case made, is the granting to the *Great Western Railway Company* the right to cross the bridge to the exclusion of all other railway companies. I had some doubt at the argument, whether there is any sufficient allegation that the *Bridge Company* has transferred to the *Great Western Railway Company* its franchise as to the railway floor of the bridge. The allegation of fact is, that the *Bridge Companies* assumed to lease to the railway company, the upper or railway floor, to be for their entire use and under their control during the continuance of their charters; the railway company paying a rent reserved, and with the right of extending to other railway companies the privilege of using the railway floor. The allegation that follows this, to the effect that the *Bridge Companies* thereby assumed to transfer, and that it was their intention and object thereby to transfer to the railway company all their rights and franchises in the railway floor, is not an allegation of a substantive fact, but a statement by the pleader of his conclusion of law from the facts previously alleged.

Judgment.

The question upon this point then is, whether the letting by the *Bridge Company* to one railway company of the railway floor of the bridge, with the power of making arrangements, in the discretion of the latter, with other railway companies, is a transfer *pro tanto* of its franchise; and I can see no escape from the conclusion that it is so.

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I agree with the judgment of the late Vice Chancellor *Mowat*, in *Hinckley* v. *Gildersleeve* (*a*), which is, I think, fully supported by the authorities to which he refers. In that case a canal company had leased their canal, with the rights, powers, tolls, fines, claims, and privileges of the company, for the term of sixteen years, and it was held by the learned Vice Chancellor that the lease was void. If in this case the *Bridge Company* had leased to any individual or company, the whole of the bridge, whether consisting of one or two floors, there could be no doubt that it would be an illegal transfer of their franchise. So if the floor devoted to general traffic and use had been so leased, the result would be the same. I see no distinction in principle between such leases and the one in question. As a chartered company it was their duty to serve the public. They have divested themselves of the power of doing this by committing the entire control of the railway floor during their whole corporate existence to a company whose interest is almost necessarily in conflict with that which is the duty of the *Bridge Company*. On this point, therefore, I think that the information makes a case against the defendants, and that the demurrer must be overruled.

Judgment.

Conceding that as a general rule the Court will not interfere by injunction in cases where it cannot interpose usefully, it is a question whether that rule can apply where the Court is asked, at the instance of the Attorney General, to restrain acts of a corporate body which are *ultra vires*; and further, I do not know that we are able to say that access to so much of the bridge, as is within Canadian jurisdiction would not be useful to railway companies. We should not assume, I think, that they would be allowed to proceed no further; and if they were stopped there, it does not necessarily follow that the right to go so far would be a useless one. But in

(*a*) 19 Gr. 212.

my view of the case as it stands, that question does not arise; and there is this further objection, that the case made by the information, is a right to cross the whole bridge; and it is a right which is sought against both of the *Bridge Companies*.

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I agree that if it is practicable that other railways, besides the *Great Western*, should be admitted to the use of the railway floor of the bridge, it is in derogation of the public right, that the user should be limited to one railway. The point upon which I differ with my Brother *Strong*, is just this, that I think the party coming to complain of a right withheld, should state everything that is necessary to constitute his right; and this, I think, the informant has not done. Upon another point, however, that the lease to the *Great Western Railway Company*, was a transfer by the *Bridge Companies* of their franchise, and therefore *ultra vires*, I agree with my brother *Strong*. The order made by him overruling the demurrer is therefore affirmed, and with costs.

Judgment.

STRONG, V. C.—I have little to add to my former judgment in this cause, for subsequent consideration has not led me to change the opinion which I then expressed.

Two grounds of objection to the order allowing the demurrer, not touched upon at the first argument, have been urged by the learned counsel for the defendants.

It is contended, in the first place, that this Court has no jurisdiction upon the facts stated in the information, inasmuch as part of this bridge is without this Province in a foreign country.

The answer to this, I conceive to be, that the *Attorney-General* asks this Court to restrain a corporation having

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certain duties to perform towards the public from violating those obligations; and that this being so it can make no difference that the rights of a foreign corporation in property having a foreign *situs*, may possibly be indirectly affected by the order of the Court, restraining this corporation, the creation of the Canadian Legislature, from dealing with property within this jurisdiction in a manner which appears to be in excess of its powers.

The second point urged by Mr. *Blake*, and not before argued, was, that the burthen of alleging and proving that the grant of the right of exclusive user to the *Great Western Railway Company*, was *ultra vires*, lay upon the *Attorney-General*, and that for all that appeared on the face of the information the *Bridge Company* were, by reason of the nature of their structure, and from other circumstances connected with the use of the railway floor of the bridge, compelled to restrict that right to one particular railway company.

Judgment.

Speaking with deference to the opposite view entertained by his Lordship the Chancellor, I cannot accede to this argument.

The bridge is a public way, and, as such, the *Bridge Company* ought to permit the use of it by all—by corporations as well as natural persons—on equal terms, on payment of tolls.

If for the reasons suggested, or others, the company could not afford accommodation to all railway companies on equal terms, it lay upon the defendants to allege and prove the facts upon which they claim to be released from the primary obligation referred to, for I cannot agree that the Court can take judicial notice of any inconveniences which would result from a less exclusive use of this bridge by railways, than that which the defendants have restricted it to.

It was with the view of giving the defendants an opportunity of raising such a defence that I made the order overruling the demurrer, without prejudice to any question of law which the defendants might be advised to raise at the hearing of the cause, a term, which I observe, has been omitted from the order as it has been drawn up.

The other questions argued on the rehearing are referred to in my former judgment, to which I adhere.

I am of opinion that the order should be affirmed with costs.

MONRO v. RUDD.

Tax sale—Purchase without notice—Constructive notice.

One *Tripp* being owner of certain land, executed a marriage settlement, under which his wife was entitled to the land for her life; the taxes afterwards fell into arrear, and the land was sold by the Sheriff to pay them; by arrangement with the purchasers *Tripp's* widow became entitled to their interests in the property; and she having sold it to the defendant *G*, the purchaser at Sheriff's sale conveyed to *G*. In a suit by the assignee of *Tripp's* heirs to set aside this sale, *G* claimed to be a purchaser for value without notice. The same solicitor acted for the vendors and vendee *G*, in the transaction of the sale to *G*, and this solicitor knew then and before that *Tripp* had been the owner, and that he had executed a marriage settlement under which his wife was tenant for life: but he did not know or suspect she was bound to pay the taxes for which the land was sold, and he did not communicate to *G*, that she was under any such obligation:

Held, that *G* was not affected by constructive notice of the liability; and the bill against him was dismissed with costs.

Examination of witnesses and hearing at London.

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

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

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BLAKE, V. C.—On the 16th day of November, 1864, the lot in question was put up for sale by the Sheriff of Lambton, for non-payment of taxes, and on that day twenty acres thereof were sold to *Peter Taylor* for $75.88, the amount due thereon in respect of taxes and costs. *Taylor* paid this sum and the usual certificate issued to him by the Sheriff. He assigned this certificate to the defendant *Rudd*, and to him the Sheriff, on the 11th of January, 1866, issued the usual Sheriff's deed, which was registered on the 17th of the same month.

On the 21st of October, 1869, the lot was put up for sale by the Treasurer of Lambton for non-payment of taxes, and on that day it was sold to *Julius P. Bucke* for $102.17, the amount due in respect of taxes and costs. *Bucke* paid this sum and assigned his interest in the premises to the defendant *Rudd*, to whom the Warden and Treasurer on the 1st of November, 1870, issued the usual deed, which was registered on the 8th day of that month.

Judgment.

On the 12th day of the same month the defendant *Rudd* mortgaged the lot to the defendant *Gray* for $550, to be paid in five years, with interest, meanwhile, payable annually at nine per cent. This instrument was registered on the 19th of November.

On the 1st day of August, 1871, the defendant *Rudd*, by a deed of quit claim for the consideration of $1, conveyed the lot, excepting four acres to the defendant *Almira Jane Cooke*.

On the 16th of October 1871, this defendant and *James R. Cooke*, her husband, by a deed duly executed to pass the estate, for the expressed consideration of $900, conveyed the lot to the defendant *Gray*.

Upon the execution of the mortgage to *Gray* he advanced $550 in cash to the mortgagor, and on the execu-

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tion of the conveyance to him he advanced a further sum of $350, and he now claims to be the owner of the premises as the purchaser thereof for this $900. The plaintiff claims title to the premises by a conveyance said to be executed by the heirs-at-law of one *Charles Nelson Tripp*, deceased, but which was not proved; and he impeaches the title of *Gray*, first: upon the allegation that *Rudd* purchased the twenty acres as agent for Mrs. *Cooke*, who, it is said, can only claim a life estate in the premises; second: that when *Bucke* purchased at the tax sale he acted as agent for Mrs. *Cooke*, as did also the defendant *Rudd* in accepting an assignment of the certificate from him; that when *Bucke* purchased at this tax sale he stated he was purchasing the premises for the owner thereof, and thus obtained the lot, and cannot therefore take advantage of such purchase as against the true owner whom the plaintiff pretends to represent; third: that before the time for redemption had elapsed, the lot was redeemed by payment to the Treasurer of the amount due.

Judgment.

The present bill was filed on the 14th of October, 1871, and a *lis pendens* issued on the 18th of the same month. The third ground is easily disposed of as there was no evidence to shew payment of taxes as alleged, and therefore the plaintiff is driven to rely on the first and second grounds mentioned. The plaintiff did not attempt to prove that the defendant *Gray* had actual notice of any of the matters upon which he relied to impeach the sale, but he sought to shew that *Gray* is not a purchaser for value without notice, upon the allegation that the solicitor who acted for him, had a knowledge of all the facts above mentioned, and thus, constructively, *Gray* had such notice as prevented him availing himself of this plea. The two points I have to consider are first, what knowledge had the solicitor of *Gray* at the time of the transaction between *Gray* and *Rudd*, of the facts upon which the plaintiff relies to

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impeach the sale, and second, can notice thereof be imputed to *Gray* through his solicitor.

Mr. *Macmillan*, of London, did not act for Mrs. *Cooke* until after the second tax sale; he did not get *Rudd* or *Bucke* to purchase, nor was he present at either of these sales. Inquiries were made as to purchasing this lot, and *Rudd* stated that if Mrs. *Cooke* were to obtain the benefit of such sale he would let her have it and thereupon *Macmillan* wrote the following letters, dated the 6th and 9th of September, 1870:

LONDON, Sept. 6, 1870.

T. D. LEDYARD, ESQ.

SIR,—Mr. *Charles B. Rudd* has handed me a letter inquiring what he will take for a certain portion of lot 21 in the second concession of Enniskillen, written him by you, and as I have been acting for the actual owner he has handed it to me.

Judgment. I would like on behalf of Mrs. *Cooke*, who is the real owner of the 100 acres (W ½ of 21 in 2 Con.), to know whether you would be willing to pay $1000 for the 100 acres upon getting a satisfactory title, and if not, what amount you would be willing to pay for it if for yourself; and if not, what you could sell it for.

I am instructed to offer a fair commission for the sale of it. Please let me hear from you as soon as convenient.

Yours very truly,

D. MACMILLAN.

LONDON, Sept. 9, 1870.

T. D. LEDYARD, ESQ.

MY DEAR SIR.—Mrs. *Cooke* has just handed me your letter asking her how she obtained her title, and asking me to answer you.

She is the widow of the late Mr. *Tripp* who was the owner, and who made a marriage settlement on her for her life. The whole lot has been sold for taxes, and you get the tax deed with every evidence of regularity as well as a release from Mrs. *Cooke* and her husband.

Yours very truly,

D. MACMILLAN.

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Mr. *Macmillan* states that it was about the date of these letters he acted first for Mrs. *Cooke* about this land. He represented *Rudd* and *Gray* when the mortgage and conveyances to *Gray* were executed. The moneys received in these transactions were paid to Mrs. *Cooke* for whom also *Macmillan* was then acting. From the letter of Mrs. *Cooke*, dated the 12th September, 1870, it appears she was then anxious to dispose of the lot. *Rudd* in his examination says that he purchased the twenty acres for himself and not for Mrs. *Cooke;* that he gave *Taylor* four acres of the lot and $50 to procure the assignment of the tax certificate; that Mrs. *Cooke* came to him and stated her husband had given her the lot; it was all she had, and thereupon that he, *Rudd*, thought that as he could do without it he would let her have it. He did not do anything further in the matter than execute the deeds which *Macmillan*, as solicitor for Mrs. *Cooke*, asked him to sign. Mr. *Bucke*, in his examination, says he was instructed by Mr. *Stewart*, of Ottawa, to purchase the lot at the second tax sale, for, as he believes, Mrs. *Cooke*. The case of actual notice to *Macmillan* entirely fails. It is clear he knew nothing of the circumstances under which *Bucke* bought, or as to the representations made at the sale. But it was urged on the part of the plaintiff, although not taken specifically in the Bill as one of the grounds for impeaching the transaction, that *Macmillan* must be held to have had notice that Mrs. *Cooke* could not claim the estate under the sheriff's deed, because, as she was tenant for life, it was her duty to have kept down the taxes; and, as she allowed the premises to be sold when she should have paid the taxes she cannot take advantage of her own wrong and claim the estate by virtue of those proceedings which would have been avoided by an observance of her duty. The instrument which it is said creates the estate in favor of Mrs. *Cooke*, subject to the liability to pay the taxes on the land is not produced, nor has it been in any manner proved before me. The only evi-

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dence furnished on this head is the before mentioned letter of the 9th of September; and if I am able to look at that document at all, against the defendant *Gray*, as evidence of a marriage settlement and its contents, the whole of it must be read. There Mr. *Macmillan* in explaining the position of the title to the proposed purchaser states the fact that *Tripp* made a marriage settlement upon his then wife, the present Mrs. *Cooke*, but he adds the lot has been sold for taxes, and Mrs. *Cooke* is taking advantage of this tax title to dispose of the premises. In the former of these two letters, Mr. *Macmillan* had informed Mr. *Ledyard* that, although *Rudd* appeared to be the owner of the lot, Mrs. *Cooke* was its real owner, by virtue of these tax sales. If, as a matter of fact the supposed settlement contained any such condition as would have made it incumbent on Mrs. *Cooke* to have paid these taxes, it is most unlikely that Mr. *Macmillan* would have referred to it; or, if he had done so, he would not have treated Mrs. *Cooke* as the real owner thereunder, but he would have sold by virtue of the tax title vesting the premises in *Rudd* as an adverse purchaser, and thus have avoided the question of duty on the part of Mrs. *Cooke*. It is evident that Mr. *Macmillan* did not know at this time that any duty lay on Mrs. *Cooke* to pay these taxes, or that any suspicion was cast upon the tax title by the fact of her occupying the position which it is urged she is placed in by allowing the sale to take place and then attempting to reap a benefit from it. I think the evidence fails in establishing such a state of facts as would warrant a finding in favor of the plaintiff on the question of notice, constructive or otherwise, to *Macmillan*.

Judgment.

But, if I am wrong in this conclusion, and the true result be that *Macmillan* had notice, as shewn by the facts disclosed in these letters, and that he must be taken to have known it was the duty of Mrs. *Cooke* to have paid the taxes, I yet am of opinion that the

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plaintiff fails in proving his case against *Gray*. In *Cameron* v. *Hutchinson* (*a*) the present Chancellor thus deals with this subject, "Now in the case of a solicitor, the doctrine of notice to the principal proceeds upon the presumption that the knowledge will be communicated because it is the duty of the solicitor to communicate it; in the case of a trustee it is presumed that he will give true information because it is his interest to do so. In both cases the rule proceeds upon presumption, and it was only in accordance with a general principle, that presumptions may be rebutted, that Sir *Richard Kindersley* decided *Brown* v. *Savage*, and I gather from the language of Sir *George Turner* that he decided *Hewitt* v. *Loosemore* upon the same principle. The inclination of my opinion certainly is, that where motives exist in the mind of a solicitor, or agent, sufficient with ordinary men, to induce them to withhold information, the presumption that it will be communicated is rebutted. In this case there was, I think, such a sufficient motive; *Hutchinson's* plan to secure *Rivers* would have been defeated if he had informed *Beddome* of the object of the assignment to *Rivers*." The Chancellor adds, "I think the tendency of modern decision is, to curtail the doctrine of constructive and of imputed notice. I should be sorry if the tendency of any decision of mine were to extend it." Now, here *Macmillan* was acting for Mrs. *Cooke*, and was desirous of raising money upon and selling the property. The object to be attained might have been defeated if he had gone into a history of, and led *Gray* to conclude there must be something wrong or suspicious about the title. The probabilities and presumptions are strongly against the view that anything on this head passed between *Macmillan* and *Gray*. See also *Rykert* v. *Miller* (*b*).

Judgment

In *Ware* v. Lord *Egmont* (*c*), Lord *Cranworth*

(*a*) 16 Gr. 526 and at page 532.
(*b*) 14 Gr. 1.
(*c*) 4 D. M. & G. 460.

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thus discusses the question of constructive notice: "It is highly inexpedient to extend the doctrine so as to make it apply to cases to which it has not hitherto been held applicable. Where a person has actual notice there can be no danger of doing injustice and he is held to be bound by all the consequences of that which he knows to exist; but when he has not actual notice he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say that not only he might have acquired, but also that he ought to have acquired the notice with which it is sought to affect him, and which he would have acquired but for his own gross negligence in the conduct of the business in question. The question by which it is sought to affect a purchaser with constructive notice is not whether he had the means of obtaining, and might by prudent caution have obtained knowledge, but whether not obtaining it was an act of gross or culpable negligence;" and the case of *McDonald* v. *McDonald* (*a*) shews the Court is not prepared to extend this doctrine. I think, therefore, that under the authorities *Gray* is a purchaser for value of the premises without notice and that he is entitled to hold them as against the plaintiff.

Judgment.

There are some further difficulties in the way of the plaintiff. It is hard to say Mrs. *Cooke* and the trustees of the trust deed, if it exists, should not be before the Court. It is impossible to say who, in case of the tax sale being set aside, would represent the estate in the land other than that which it is alleged Mrs. *Cooke* had. I do not think it possible for the plaintiff, alleging the trust deed, to get on without proving it. It is not a case in which any indulgence should be granted to the plaintiff. The defendant *Gray* has in good faith paid $900 for this property. The plaintiff has paid $50 for the chance of being able to find some flaw in his

(*a*) In Appeal, 16 Gr. p, 37.

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title. I entirely agree with the remarks of the Chancellor in *Cook* v. *Jones* (*b*): "If there are objections to a sale to which the Court must give effect, the Court will decree against the sale, but it will do so *strictissimi juris*. It certainly will not aid him by granting any indulgence. Mr. Justice *Wilson*, in *Cotter* v. *Sutherland*, describes those in the like position with these plaintiffs as speculating on some defect discovered, or which they hope may be discovered in the course of litigation, and who had paid but little, if any, more for the chance of the suit, than the persons whose titles they dispute have paid in taxes. The former Statutes of Maintenance and Champerty might properly be re-enacted and enforced against such persons, for they are in no sense entitled to legal favour."

Judgment.

I think the bill should be dismissed with costs.

Hodder v. Turvey.

Riparian proprietors—Keeping stream clear—Enforcing award.

The plaintiff and defendant owned adjoining lots through which a stream flowed freely in its course until the defendant threw logs and refuse wood into it, which had the effect of damming back the water on the plaintiff's land, whereupon the plaintiff instituted proceedings at law, which action, with all matters in difference between the parties, was referred to arbitration, when the arbitrators decided that defendant should remove all the timber across the creek, and pay one-half the costs of the action at law. The defendant having refused to obey the award the plaintiff filed a bill for the purpose of compelling obedience thereto.

The Court under the circumstances [illegible] he decree as asked, and ordered the defendant to pay the co[illegible] the suit.

Examination of witnesses and hearing.

Mr. *Blake*, Q. C., and Mr. *Seager*, for the plaintiff.

(*a*) 17 Gr. 488 at p. 492.

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Mr. *Moss*, Q. C., and Mr. *Malcolmson*, for the defendant.

BLAKE, V. C.—The bill in this cause, which was filed on the 18th of October, 1872, states in substance as follows: The plaintiff for many years prior thereto was the owner of lot 20 in the 3rd concession of Morris, and the defendant owned lot 19 in the same concession, adjoining that of the plaintiff. A stream, called Brown's Creek, runs through these farms with a considerable current: the farm of the plaintiff being higher up on the stream than that of the defendant. Until the year 1868, when the defendant threw timber, logs, and refuse wood into, and permitted the same to remain in the stream, its course was free, and it was confined within its banks. At this period the defendant thus obstructed the stream, and dammed the water back on the land of the plaintiff, and now renders unfit for cultivation about five acres thereof. The bill further states that plaintiff commenced an action in the Court of Queen's Bench in this Province in respect of these matters, which, with all things in dispute between him and the defendant, were left to the award of the arbitrators named, who thereupon made their award, by which they decided that the defendant should remove all timber across the Creek. The plaintiff performed his part of the award, but the defendant has neglected to perform his. The plaintiff asks that the defendant be compelled to remove these obstructions, and for an injunction restraining the defendant from permitting any obstruction to the free course of the stream to remain on his land.

Judgment.

The reference to arbitration is as follows:—

"Know all men by these presents, that whereas *Simeon Hodder* and *George Turvey* have had differences, and a Queen's Bench suit is pending in reference thereto, and the parties have agreed to refer the whole of the matters in difference to *John Messer*, *Thomas Garniss*,

and *Patrick Kelly*, as arbitrators chosen by the parties; Witnesseth that the said parties hereby agree to abide by the decision arrived at by the above named arbitrators, and to do whatever they shall order and direct in the matter. 1873. Hodder v. Turvey.

"Dated at Blythe, this 27th day of April, A.D. 1872.

"SIMEON HODDER. [L.S.]
"GEORGE TURVEY. [L.S.]
"Witness, S. MALCOLMSON."

And the award made thereon is in these words:

"Know all men by these presents, that we, the undersigned, have finally decided that *George Turvey* do remove all timber that is across the creek now in dispute between said *Turvey* and *Hodder;* and that each party pays an equal proportion of *S. Malcolmson's* costs in relation to the suit now pending in the Court of Queen's Bench, at Goderich, which we suppose to be about fifty dollars; and that each party pays his own costs that have been otherwise incurred in this case; and that said costs be paid by both parties within seven days from this date; and upon payment of said costs, further proceedings be stayed in this case. Judgment.

"Dated at Blythe, this 27th day of April, 1872.

"P. KELLY.
"THOMAS GARNISS.
"JOHN MESSER."

The answer denies that the defendant has ever obstructed the stream in the manner alleged, and states that the plaintiff knew he must fail in his action at law, and therefore he agreed to abandon the same, but as they were unable to settle how the costs of the action were to be paid, they left this question, and it alone, to arbitration; that if the submission covers anything besides this question it is erroneous, and should be reformed; that the arbitrators took no evidence as to alleged obstructions, and gave the defendant no notice of their intention to take this matter into consideration; that it was not intended by the submission to cover the

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right to remove obstructions in the stream, but different matters involved in the suit in the Queen's Bench, and the award made by the arbitrators is *ultra vires*. The defendant submits that if the award does cover the matters alleged by the plaintiff, it was made under a mistake, and ought not to be enforced. At all events that the timber mentioned in the award must be timber damming back the water, and as all such was removed before the bill was filed, the plaintiff has no right of suit; that plaintiff was never injured by the act of the defendant in reference to the stream.

A good deal of evidence was given in the cause and, as is usual in such cases, it was conflicting, the evidence of the plaintiff shewing that about five acres of his land were injured by the alleged obstruction, while the witnesses of the defendant shew the land is not now more overflowed than it used to be before 1868.

Judgment.

The witnesses prove clearly that the difficulties between the parties were talked over at the time of the arbitration; that the parties and arbitrators knew the action at Common Law then pending was brought to recover damages against the defendant, based upon his not having the right to allow the trees to remain in the stream where it passed through his lands. That the defendant said he would clear out the creek and pay his own costs, with the exception of $25 which plaintiff was to pay towards these expenses. It is evident these matters were discussed in the presence of both parties and the solicitor of the defendant, and before the arbitrators, who were men who knew all the circumstances of the case, and that with the perfect knowledge and agreement of the defendant the award was made. The arbitrators first decided that the creek must be cleared, and this was made known to the parties, and thereafter they discussed how the costs were to be borne, and when they found they amounted to as much as they did, they

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ordered plaintiff to pay $25 towards the defendant's costs, and to pay his own. Mr. *Garniss*, the defendant's own witness, says when the award was made it was read over, and understood and agreed to by both plaintiff and defendant. It was intended to cover the timber in the creek, and the defendant then and there agreed to remove it. Amongst other trees a large hemlock lay across the stream, and it was particularly mentioned as one of the obstructions to be removed. Mr. *Malcomson*, the then attorney and present solicitor of the defendant, drew the submission to arbitration: he was present when the award was read and heard, and himself made, no objection to it; and in fact the evidence of the defendant on his examination before the Court, notwithstanding what he set up in his answer on this point, does not differ materially from this statement. The sum of $25 was, within the time specified in the award, paid to Mr. *Malcolmson* by the plaintiff, and he discontinued his action at law.

Judgment.

It was submitted on the part of the plaintiff that he was entitled to a decree on both the grounds taken by the bill; that the defence raised as to the award was not sustained in evidence, and that even if there were objections that could have been urged against it, the acceptance of the $25 payable thereunder precluded the defendant from now taking them.

The defendant insists that the plaintiff cannot complain of injuries caused by natural causes, such as trees blown down by the wind, and wood drifting down the stream and jamming on his land; but that there must be something done by the defendant to cause this damage in order to entitle the plaintiff to succeed; and that the award cannot be enforced: the arbitrators having exceeded their powers, as no such judgment as that given by the arbitrators could be pronounced by the Court of Queen's Bench, and therefore the Court will not by mandatory injunction compel the fulfilment of the terms of the award.

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It is admitted the timber has not all been removed, and therefore that if the award can be enforced it should be, as its terms have not been complied with. Looking at the submission, the award, and the circumstances attending the making of it, I am of opinion that the arbitrators under the submission were warranted in the finding they arrived at: see *Russell* on Awards, 4th edition, pages 239, 248, 545. At page 255 this writer says: "The Courts are always inclined to support the validity of an award, and will make every reasonable intendment and presumption in favor of its being final, certain, and a sufficient termination of the matters in dispute. See also *Smalley* v. *Blackburn* (*a*)."

But even if there had been some matters that might have been objected to in the award, the defendant should not have acquiesced in it, in order now to take advantage of these objections. Mr. *Russell* says, at page 541, "Though an award be not good in strictness of law, yet if there have been an assent, and a part performance, the Court of Chancery has sometimes enforced it," quoting *Norton* v. *Mascall* (*b*). See also *Kennard* v. *Harris* (*c*).

Judgment.

As to the power of this Court to deal with awards, it is thus laid down at page 414, of *Fry* on Specific Performance: "The Court has in many cases, and in some of them early ones, decreed the specific performance of awards, though not made rules or orders of the Court, for the performance of some specific thing, as to convey an estate, assign securities, or the like; but not, it would seem, awards simply to pay money. The Court thus decrees their performance; because, to use Lord *Eldon's* language, 'the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person.'"

(*a*) 2 H. & N. 158.

(*b*) 2 Vern. 24.

(*c*) 2 B. & C. 801.

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I think it was most reasonable for these parties to leave to three of their neighbors the settlement of this really trifling matter about which there has been so much litigation. The arrangement proposed by these gentlemen was an easy solution of the difficulties existing, and a very small expenditure of money or labour would have carried out the award. Their conclusion involved the finding, first: that the defendant was not justified in allowing the timber to remain in the stream; and second: that the defendant was bound to remove this ground of complaint by taking out of the stream the timber in question; and I think I am bound to enforce the result arrived at by the tribunal appointed by the plaintiff and defendant to arrange the matters in dispute. The answer of the defendant is not what it should have been touching the award, and the circumstances under which it was made; differing as it does from the story told by him in his own examination before the Court. I think he should pay the costs of the suit, but as the amount involved is so small, let them be taxed on the lower scale. Deciding the case, as I do, upon the question of the award, I do not touch the other branch of the case, as I am convinced if the timber in the stream be once removed, that which causes the jams and obstructions will cease to exist. I found no authority upon the question, whether the defendant would be bound to remove jams arising in the stream on his land, not caused by any act of the defendant, but injurious to the plaintiff.

Judgment.

1873.

LIDDELL v. DEACON.

Trustee and cestui que trust—Parties.

The Court discountenances unnecessary or useless suits against trustees.

The plaintiffs having become embarrassed in their business, made an assignment of all their effects to the defendant, for the purpose of realizing the same and paying all their creditors, a list of whom was handed to the defendant on the execution of the deed of trust. Subsequently the plaintiffs furnished another schedule of their liabilities, embracing several persons not mentioned in the original list of creditors. The defendant had paid several of those named in the first list, and in doing so had expended a sum greater than he had collected, and had become answerable for more than the residue of the estate would realize. The defendant refused to recognize the claims of the additional parties mentioned in the second list, and thereupon the plaintiffs filed a bill praying for an account of the defendant's dealings with the estate, and for an execution of the trusts of the deed; alleging that they had not any estate other than that assigned to the defendant, and that they were insolvent and personally unable to pay anything. The Court, in view of the fact that no fraud or improper conduct was alleged, and that even if the whole estate were realized the defendant would still be a loser in the transaction, and that all the defendant had done, up to a date shortly before the filing of the bill, had been approved of by the plaintiffs; that he had received but a small sum since, and not enough to repay himself,—refused the relief prayed, and dismissed the bill with costs.

In such a case the defendant sought to shew that the creditors mentioned in the original schedule were the only ones he had agreed to pay, and that such was the agreement between himself and the plaintiffs on his acceptance of the trust:

Held, that he was not at liberty to shew this, not having asked for a reformation of the deed of trust; and that even if he had done so, the absence of the parties sought to be excluded from the benefits of the trust was an insuperable barrier to the defendant's being permitted to do so.

Hearing at London.

Mr. *Moss*, Q.C., and Mr. *McMahon*, for the plaintiffs.

Mr. *Becher*, Q.C., and Mr. *Street*, for the defendant.

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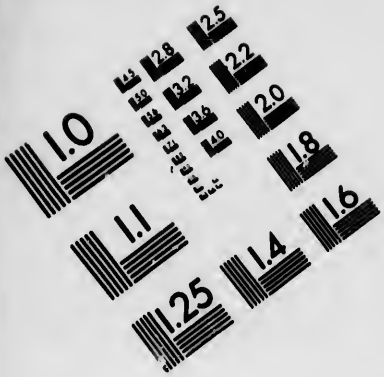
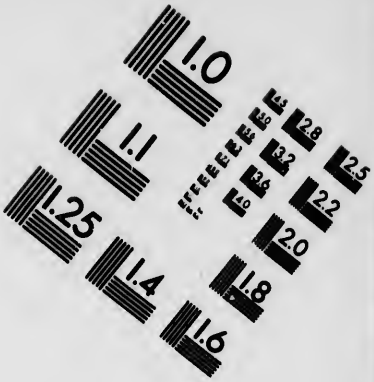
BLAKE, V. C.—The plaintiffs who were merchants carrying on business in partnership at Iona, in the County of Elgin, by an instrument in writing, bearing date the 28th day of February, 1871, assigned their personal property (with certain exceptions) to the defendant, upon trust to apply the proceeds arising from such estate, after deducting all neces[illegible] expenses, towards the payment of their liabilities, and, after payment thereof in full, to pay the balance, if any, of such proceeds to the plaintiffs, and to transfer to them the residue, if any, of such estate remaining unconverted. The defendant accepted the trust, and the plaintiff *Chisholm* at once went into the employment of the defendant, as his clerk, in which capacity he continued until September, 1872, when he left the defendant. All the collections, receipts, and payments that took place up to that date, were either made by or under the supervision, and with the concurrence of *Chisholm*, who seems from his knowledge of the business to have been selected to wind it up.

Judgment.

The plaintiffs allege that the defendant has made certain payments in pursuance of the trusts of the deed in question, but they state he refuses to pay certain other creditors who are entitled to share in the trust estate; they further say, that the estate in question is the only property out of which their creditors can be satisfied, as they themselves are not possessed of any other means, and they pray for the usual accounts and for the execution of the trusts of the deed.

The defendant in his answer states, that a schedule of the creditors of the plaintiffs was handed to him when the deed was executed, and he undertook to pay these creditors and no others. That afterwards another schedule was prepared shewing creditors not embraced in the first schedule, and the plaintiffs then said this latter schedule shewed truly their creditors. The defen-





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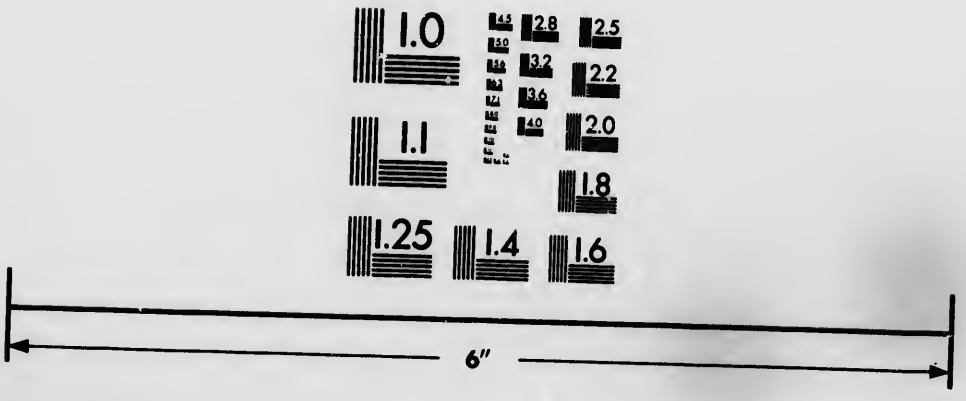

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dant denies that he ever agreed to pay any creditors other than those named in the first schedule, and at the hearing his counsel asked for liberty to shew that was the agreement between him and the plaintiffs.

I then held, and am still of opinion that, as the deed of trust provides for the payment of all the creditors of the plaintiffs, and the defendant has not in his answer asked for a reformation of the instrument, or sought to limit its effect, by a declaration, that it enures to the benefit only of the creditors set forth in the first schedule, this evidence should be rejected. The question of parties alone presents to my mind an insuperable barrier in the way of the defendant on this point, as the creditors whom the defendant desires to exclude are not before the Court, and if I acceded to the proposition of the defendant, I would, behind the backs of those persons, be depriving them of the rights given to them by the trust deed, and would be doing so without anything on the record calling the attention of the parties to the fact that such relief was sought for in the suit.

Judgment.

The only witnesses examined were the plaintiff *Chisholm* and the defendant. The former in his evidence says, "Up to the time I left, defendant had paid out all he had collected. I do not know that I ever asked the defendant for any information which he refused to give me. I took part in carrying out the assignment—as a clerk or employee of the defendant—what the defendant did was pretty well known to me. I made out a a list of the creditors for the half-yearly payments." In the evidence of the defendant there are the following passages: "I became their (the plaintiffs') assignee, the co-plaintiff was in my employment as book-keeper and clerk, and he had full knowledge of all that was done. *Chisholm* made all the entries in the books—he knew all I did and more too. He left me in September—then he went to Sparta. I had no intimation of the

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filing of the bill until it was filed; there was no demand; no letter written to me. *Liddell*, the plaintiff lived within a short distance of my house; he knew what was going on. There is not a debt paid, or a sum collected, that *Chisholm* did not enter himself in the books. Up to the time *Chisholm* left I had paid from $3,000 to $4,000 more than I had collected. Up to January 22nd, and since last September, I received $78.95. Since *Chisholm* left I have not been asked for any account. The Exhibit 'D' shews all my receipts since September. Before the filing of the bill I had no intimation of the plaintiffs being dissatisfied with my dealings with the estate. Mr. *Chisholm* kept the accounts. I have paid over $12,000, and have received about $9,000 of the estate; the assets now in my hands amount to about $2,000, so that I must in any event be a loser by my transactions with the plaintiffs. There are still outstanding assets of the estate not collected." I have only paid certain of the creditors, all of those mentioned in the schedule given me I have paid, except about $2,700."

Judgment.

It is clear that the plaintiffs have not an absolute right to obtain an account in this Court against the defendant under all circumstances. The rule is thus laid down in Vol. I., at page 857, of the last American edition of *Daniel;* and to much the same effect at page 753 of the last English edition: "The Court should be satisfied that the plaintiff is entitled to have an account taken. He (the Chancellor) not only may, however, but ought to refuse an account, if he is satisfied upon the evidence that nothing is due the plaintiff, or that from any cause an account ought not to be decreed."

Now in the present case the plaintiffs had knowledge of, and acquiesced and concurred in, the dealings of the defendant with the estate up to some time in September, 1872; up to that period the plaintiff *Chisholm* received the moneys of the estate, and made out the schedules

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shewing the defendant, who were the creditors entitled to payments; not a single remonstrance was made to the defendant in regard to his dealings with the estate, either as to his collections, his payments, or any other act in connection therewith; the defendant had then no funds of the estate in his hands, but had paid out more than he collected. It seems, therefore, out of the question that the present plaintiffs can ask for an account of this estate up to September, for to that date they are bound by the acts of the defendant, and have made them their own so as to preclude their now finding fault with them. See *Lewin* on Trusts, pp. 329, 491, 659: *Clarke* v. *Ormande* (*a*).

The present bill was filed on the 17th of last January, and the defendant produces the books of the estate, and a schedule shewing that between September and the filing of the bill he has only collected $78.95; a sum not sufficient to recoup the defendant the amount he had paid out over and above his receipts from the estate. There is nothing to shew the defendant has been dilatory or neglectful during these four mont[illegible] getting in the assets. He has realized about $9,[illegible], and has paid out over $12,000 on account of the estate; the assets uncollected amount to about $2,000, and there is yet due to the creditors mentioned in the first schedule, about $2,700.

Judgment.

It appears plain that these plaintiffs have nothing to gain by this suit; there cannot be sufficient realized to pay the creditors;—so far from there being any surplus. The plaintiffs desire to make the defendant liable for not paying certain creditors, omitted from the first schedule; that liability must be based upon the proposition, that acting under this general assignment for the benefit of all the creditors of the plaintiffs, it would be a breach of trust on the part of the trustee to make payments to cer-

(*a*) Jacob, pp. 108, 120.

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tain of the creditors and exhaust the assets in satisfying such creditors, and leave others unpaid. Whatever may be the position of such creditors on a bill filed by them. I am of opinion that the plaintiffs for the reasons I have mentioned, cannot find fault with such payments.

I should feel it hard if I were obliged to come to the conclusion that the plaintiffs were entitled to this account. They admit they are without means; the defendant has advanced to the creditors more than he can receive from the estate, and the costs of the proposed account coming out of the estate, would virtually be coming out of the pocket of the defendant, who seems to have been guilty of no wrong in the matter. It is to be observed also, that the plaintiffs, before suit, made no demand for information as to how the estate stood before the bill was filed, nor did they ask for an account. I think every possible means should have been exhausted for obtaining the required information, before the proceedings were commenced in this Court. It is true the plaintiffs, a week or ten days before the bill was filed, asked the defendant for the assignment in question, when he told them it was with their solicitor; this statement turned out to be incorrect, as the document was then with the solicitor of the defendant. I am satisfied the defendant gave the answer he did to this request under a mistake; the plaintiffs do not appear to have made further search or inquiry about it, and I cannot see that the filing of the bill was caused by the non-production by the defendant of this deed. The defendant was the hand chosen by the plaintiffs for receiving and distributing the assets in question. It is not reasonable that they should be at liberty, without any cause shewn to cancel at their pleasure the arrangement thus made. If the trust be abused or the fund endangered, the Court will render all assistance necessary for its protection and the due execution of the duty neglected. but until this is done, I am of opinion the trustee cannot

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be interfered with by the author of the trusts. In this respect a creditor of a person deceased stands in a different position from a creditor where the debtor is still alive. Chancellor *Vankoughnet*, in *Barrett* v. *Young*, was of opinion that a creditor was not entitled to call a trustee to account unless a special case were made out. He considered it was not a matter of right. I have failed to find any case in which a contrary view has been taken; and, as the policy of the Court is to limit in place of increasing the cases in which estates are administered under its supervision, I think the present bill should be dismissed with costs.

McLean v. Grant.

Mortgagor and mortgagee—Purchaser for value—Notice.

The plaintiff being owner of land, after having created a mortgage thereon, emigrated to Australia, and he subsequently remitted money to his agents in this country with which to pay off the incumbrance; but, instead of doing so, they applied the money to their own use. Subsequently the holder of the mortgage to whom it had been assigned instituted proceedings in this Court to foreclose, to which suit an answer was put in on behalf of the plaintiff, but without his knowledge or consent, admitting the allegations of the bill, and that the full amount of principal and interest was due; whereupon a final order of foreclosure was, in due course, obtained; and the plaintiff in that suit conveyed to the defendant *A* for the consideration of $1002, the value of the property; and on the same day the defendants *M* and *S*, as attorneys of the plaintiff, conveyed the premises to *A*, who was ignorant of any fraudulent practices in the matter. The plaintiff having returned to this country, and ascertained the frauds which had been practised upon him, filed a bill against his agents and the purchaser (*A*):

Held, that the plaintiff, so far as the purchaser was concerned, was bound by the statement in his answer, and was not entitled to relief as against him; that the fact of the purchaser having heard before his purchase that the plaintiff had remitted money to pay the mortgage was not sufficient to charge him with notice that the foreclosure was wrongful; but, in view of the fraudulent conduct of the attorneys, the Court made a decree against them for the amount realized on the sale of the land, and directed them to pay the costs of the suit, including the costs of the purchaser.

Examination of witnesses and hearing at Goderich.

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McLean v. Grant.

Mr. *Moss*, Q. C., and Mr. *Davison*, for the plaintiff.

Mr. *Blake*, Q. C., for defendant *Aikenhead*.

Mr. *Garrow*, for the defendant *Grant*.

The bill was taken *pro confesso* against the defendant *McLean*.

BLAKE, V. C.—The facts of this case appear to be as follows: In 1853 the plaintiff was the owner of the premises in question, and then desiring to go to Australia, in order to raise money for that purpose, he mortgaged them for the sum of £55 to one *Betsy Wallis* by an indenture dated the 24th day of March, 1853. The mortgage money was payable in three years from that date, the interest being in the meantime payable half-yearly. On the 26th of the following month of April the plaintiff appointed the defendants *McLean* and *Grant* his attorneys for the purposes in the instrument of that day set forth, and, amongst others, for the disposing of the premises in question under certain circumstances. By an instrument dated the 5th of April, 1858, this mortgage was duly assigned by the mortgagee to Messrs. *Smith* and *Fisher*. On the 7th of the same month *Smith* and *Fisher* assigned the mortgage to the defendants *McLean* and *Grant*, and they, on the 12th of February, 1867, assigned it to [illegible] *T. Garrow*. Thereafter *Garrow* commenced proceedings to foreclose this mortgage against the present plaintiff, claiming a sum of over $400 as due for principal money and interest. An answer was put in on the part of the now plaintiff, not setting up any ground of defence either as to payment of the mortgage or the inability of *McLean* and *Grant* to take or make an assignment thereof; but on the contrary, admitting the whole of the allegations contained

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1873. McLean v. Grant.

in the bill, and that the principal money and interest as claimed by the plaintiff *Garrow* were unpaid and were due to him. Thereafter a final order for foreclosure was made against the present plaintiff, and on the 19th day of June, 1868, *Garrow* conveyed the premises to one *William Grant* for the expressed consideration of $670. On the 23rd of October of the same year *William Grant* conveyed to the defendant *Aikenhead* for the expressed consideration of $600, but for the real consideration of $1002; and on the same day and for the same expressed consideration the defendants *McLean* and *Grant*, as attorneys of the plaintiff, purported to convey the premises to the defendant *Aikenhead*. It is admitted that the assignment from *Mc Lean* and *Grant* to *Garrow* was without consideration, and was made to him when he was clerk of the solicitors for *McLean* and *Grant* to enable a foreclosure to be obtained for the benefit of *McLean* and *Grant;* and afterwards, by instructions of *McLean* and *Grant*, the deed was executed to *William Grant*. It is also admitted that the answer in the foreclosure suit was put in without the consent of the present plaintiff, and that he knew nothing about it. The defendant *Aikenhead* paid $1002 for the property. This sum was paid in cash when the deeds to him were executed. Upon the evidence I find this to be a fair cash price for the premises, although less than the witnesses of the plaintiff value them at. It is the price five witnesses for the defendant *Aikenhead*, who seemed capable of judging of the worth of property, place upon it. I do not find any suspicion can rest on this defendant, on the ground that, as urged, he purchased at an undervalue. The plaintiff alleges that some years after he left this country he remitted the amount due upon the mortgage to the defendants *McLean* and *Grant;* that the mortgage being thus paid they had no authority to sell under the power of attorney; that they had no right to proceed to foreclosure; that the whole proceedings are a fraud upon him: that he

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is entitled as against *McLean* and *Grant* to open the foreclosure, and to obtain a reconveyance of his property from them; and that, although the property has found its way into the hands of the defendant *Aikenhead*, they can follow it there as, notwithstanding *Aikenhead* paid a fair value therefor, he took it with full notice and knowledge of all the above mentioned facts. But all that *Aikenhead* was aware of was this one fact, that many years before his purchase he had heard that a sum of money, less than the amount due on the mortgage, had been sent over by the plaintiff to the defendant *McLean* to pay on the mortgage. Now I think this was sufficient to have put *Aikenhead* on inquiry, and if it stood alone I should come to the conclusion that he was bound by the notice of the payment of the mortgage if it had been thus discharged. But, before *Aikenhead* completed his purchase, he went to his solicitor to investigate the title. He was told by him and by the defendant *McLean* that he would be given a perfect title through Chancery. Amongst the papers there is found the answer of the present plaintiff, admitting the whole amount was due on the mortgage. The solicitor and *Aikenhead* were justified in concluding that the money intended to be paid on the mortgage had been, with the assent of the plaintiff, applied for other purposes; and that in 1867 the whole amount of the mortgage was unpaid; that the present plaintiff had no cause to shew to a foreclosure being obtained, and therefore the foreclosure proceedings taken with the knowledge of the plaintiff were acquiesced in and assented to by him. *Aikenhead* had not notice of any irregularity or impropriety, and was justified in considering these proceedings as regular. The effect of the knowledge, therefore, that money had been ten years before remitted for the purpose of applying it on this mortgage is done away by the solemn admission made by the plaintiff in his answer in the Chancery suit in 1867, where he states in effect, notwithstanding the fact that at one time he remitted money

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which he intended should be applied on this mortage, he admits the whole amount is yet due. *Gunn* v. *Doble* (*a*) shews that a person purchasing from one who has obtained a final order of foreclosure stands in as good a position as one who purchases under a sale in this Court, and is equally entitled to be protected. The Court takes for granted when a solicitor acts for a client in a suit that he has been duly instructed, and holds the proceedings as conclusive, leaving the party to his remedy against the solicitor who has assumed to act: *Chisholm* v. *Sheldon* (*b*). Between the parties to the suit, except under special circumstances, the steps taken are binding. A person who, without notice of fraud or impropriety in the conduct of the case, purchases upon the faith of a decree of the Court, is as much entitled in this respect to the consideration and protection of the Court as would be a party to the suit innocent of any collusion in the conduct of the cause. I am of opinion that *Aikenhead* is, on this ground, entitled to protection here, and therefore do not consider what right there may have been under the power of attorney to sell, although this might furnish an additional answer to the plaintiff's claim. No justification can be offered for the fraudulent conduct of the defendants *McLean* and *Grant* towards the plaintiff, whose rights they were bound to preserve. I cannot say, under the circumstances, that it was unreasonable for the plaintiff to have sought to recover the property with which the defendants have been so improperly dealing; and, as I think so, I am of opinion that upon these defendants must fall the costs of the suit. They must pay the costs of the plaintiff and of the co-defendant *Aikenhead*. There must be an account of the amount due on the mortgage, including an account of rents, profits and taxes; an account of the $1002 and interest, and a payment of the balance due by the defendants *McLean* and *Grant*, forthwith to the plaintiff.

Judgment.

(*a*) 15 Gr. 655. (*b*) 1 Gr. 294.

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McGillicuddy v. Griffin.

Practice—Costs—"Subject matter involved."

Prima facie the sum realized on a sale under a power contained in a mortgage is the subject matter of the suit.

A mortgagee exercised the power of sale contained in his security and realized $350; on a bill filed by the mortgagor for an account, it appeared that after deducting the amount due on the mortgage at the time of sale, together with the costs of the sale and of an action of ejectment, as also a payment made to the plaintiff before suit, the balance coming to the plaintiff was reduced to $130, the plaintiff was still held entitled to his full costs, "the subject matter involved" being the $350.

The plaintiff filed his bill claiming an account of moneys received by the defendant under a power of sale contained in a mortgage dated 1st of April, 1850, by which the defendant realized $350. The plaintiff and defendant disputed as to the amount the defendant was entitled to deduct from this sum, in consequence of which the bill was filed. A decree was made referring it to the Master to take the proper accounts, and directing the costs of the suit to be paid by the party whom the Master should find to be the debtor at the time of the filing of the bill. Under this decree the Master found $74.40 due on the mortgage at the time of sale, and allowed to the defendant the costs of sale and ejectment, and $60 paid by him before suit, by which the sum due by the defendant to the plaintiff at the filing of the bill was reduced to about $130. On this the Master determined to tax to the plaintiff his costs of the suit; but as the sum due at the filing of the bill was under $200, he decided that the plaintiff was only entitled to costs on the lower scale. From this decision the plaintiff appealed, contending that under subsection 8 of section 34, Consolidated Statutes of Upper Canada, chapter 15, "the subject matter involved" in this suit was the $350, and not the balance found due after Statement.

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McGillicuddy v. Griffin.

Mr. *Hodgins*, Q. C., for the appeal, referred to *Hyman* v. *Roots* (*a*), *Seath* v. *McIlroy* (*b*), *Forrest* v. *Laycock* (*c*), *The Generous* (*d*), *Hall* v. *Curtain* (*e*), *In re County Judge of Northumberland and Durham* (*f*).

Mr. *T. Ferguson*, contra, referred to *Gould* v. *Dummett* (*g*), *Judd* v. *Plum* (*h*), Consolidated Statutes of Upper Canada, chapter 22, section 328.

SPRAGGE, C.—The decree gives the costs of the suit against the party whom the Master should find indebted to the other party, at the time of the filing of the plaintiff's bill. I infer from this that each party claimed the balance to be in his favor. The Master has not yet reported, but it is admitted that the accounts as settled by the Master shew a balance in favor of the plaintiff. It will be as I gather from the papers, somewhere about $70. The exact amount is not material. The defendant was a mortgagee with power of sale; he exercised his power; and the amount realized was $350. For that sum he had to account, and after deducting certain expenses, costs, and moneys paid, he paid to the plaintiff shortly before suit commenced, the sum of $60. The further balance that I have stated remains due from him. The only question before me is whether the plaintiff is entitled to full costs, or only costs upon the lower scale.

Judgment.

The clause of the Act applicable to the case is, section 34, Consolidated Statutes of Upper Canada, subsection 8, the language of which is: "Any person

(*a*) 11 Gr. 202.
(*b*) 2 Ch. Cham. 93.
(*c*) 18 Gr. 622.
(*d*) L. R. 2 Ad. & Ecc. 57.
(*e*) 28 U. C. Q. B. 533.
(*f*) 19 U. C. C. P. 299.
(*g*) L. R. 2 Eq. 609.
(*h*) 29 Beav. 21.

seeking equitable relief for or by reason of any matter whatsoever, where the subject matter involved does not exceed the sum of $200. In such case the County Court had jurisdiction. 1873. McGillicuddy v. Grime.

The short question is, what is the proper interpretation of the words, "the subject matter involved." If it is the amount realized by the sale, the plaintiff could not under the Act giving equity jurisdiction to the County Court, have brought his suit in a County Court, however much less than $200 might be the balance due to him. The opposite party might have objected, the want of jurisdiction.

Prima facie, the subject matter of this suit was, the sum realized by the sale, and its being accounted for. I have examined the papers in the Master's Office to see whether it appeared that the parties had by the dealings between them narrowed down this subject matter, so as to reduce it to a sum less than $200. I find nothing to shew this, and I presume, if there had been, Mr. *Ferguson* would not have failed to point it out to me. Judgment.

My conclusion is, that the plaintiff is entitled to full costs, and the cases to which I have been referred lead to the same conclusion.

Successful party to have costs of appeal.

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MASON V. SCOTT.

Deed of settlement—Compromise of prosecution—Valid consideration.

A married woman had left her husband, and had for some time been living apart from him on account of his alleged adultery, and the husband had not contributed in any way to the support of her or her children, whom he allowed to remain with their mother; under these circumstances the wife was advised to take proceedings against her husband, under the Statute for not providing her and her children with food, &c., and also to file a bill against him for alimony. In order to compromise these threatened proceedings the husband made a settlement in favor of the wife and children. The husband in fact was then insolvent, but neither the wife nor the trustees had any knowledge thereof.

Held, that the settlement could not be impeached under the Statute 13 Elizabeth.

This was a bill filed by the assignee in insolvency impeaching a settlement made by the defendant *Thomas O. Scott* in favor of his wife and children, on the ground that at the time of executing the deed of settlement the settlor was in a state of insolvency, the deed having been executed on the 2nd of March, 1871, and the insolvency having occurred on the 1st of May following.

The other facts of the case appear in the judgment.

The cause came on for hearing before Vice Chancellor *Strong*, at the sittings of the Court in Hamilton.

Mr. *E. Martin*, for the plaintiff.

Mr. *R. Martin*, for the defendant.

Judgment. STRONG, V.C.—I think this settlement was such a withdrawal of tangible assets that, whether with the notes and book debts of *Scott*, enough would be left if all were realized to pay creditors in full or not, it amounted to hindering and delaying. The determination of the case must therefore depend upon the question

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whether or not the settlement is to be taken to have been made voluntarily or for valuable consideration, for it cannot be said that it was a preference, or in the nature of a preference under the Insolvency laws, since it was undoubtedly the result of direct pressure and moreover was not made in favor of a creditor, or for a past consideration. It cannot either be said that there was any collusion between the husband and wife, the learned counsel for plaintiff, Mr. *Edward Martin* having very properly disclaimed any intention to impute any fraudulent design either to Mrs. *Scott* or to her trustees. As to the question of valuable consideration, I am clearly of opinion that this instrument must be upheld. It is beyond all question that the parties supporting it are entitled to prove a valuable consideration other than that appearing on the face of the deed—*Gale* v. *Williamson* (*a*), *Clifford* v. *Turrell* (*b*), *Pott* v. *Todhunter* (*c*), *Mulholland* v. *Williamson* (*d*). Then in the first place there is the consideration of the abandonment of the suit for alimony. The facts proved, and not disputed, shew that Mrs. *Scott* was in a position to compel her husband by a decree of this Court to pay her alimony; his conduct had been such that she was released from the marital obligation of cohabiting with him, and a suit for alimony was threatened by Mr. *Carscallen*, and I am convinced would have been instituted and vigorously prosecuted if this settlement had not been executed. The authorities establish that the relinquishment of this threatened suit is a sufficient consideration. In *Hobbs* v. *Hull* (*e*), the facts were very similar, and Lord *Kenyon* held that the giving up of the right to alimony was a valid consideration. *Nunn* v. *Willsmore* (*f*) was to the same effect. In *Wilson* v. *Wilson* (*g*), a suit for nullity of marriage was pending, and it was held

Judgment.

(*a*) 8 M. & W. 405.
(*b*) 1 Y. & C. C. C. 138.
(*c*) 2 Col. 76.
(*d*) 12 Grant, 91.
(*e*) 1 Cox. 445.
(*f*) 8 T. R. 521.
(*g*) 1 H. L. C. 538.

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that the stopping of this suit was a sufficient consideration for a deed, assuring to the wife a separate maintenance, although the deed contained no covenant to indemnify against the wife's debts, and although, from the very nature of the proceeding, the suit being for nullity and not for divorce *a mensâ et thoro* no alimony could have been recovered. Moreover, there the ground for sentence of nullity was disputed by the husband, whilst here the offence which would warrant a decree for alimony was shamelessly avowed. Lord *Cottenham* there says: "One part of the consideration is the stopping the suit in the Ecclesiastical Court. The stopping of these proceedings seems to have been an important object to Mr. *Wilson* of the reason for which he was the best judge, and that alone was a sufficient consideration." A late text writer (*a*) points out that alimony is only decreed against the husband personally, and the rights of the creditors are paramount to those of the wife, and as the law stands in England, this seems to be a correct view to take of the rights of the wife; but it must be remembered that by our law, since the Act 28 Victoria, chapter 17, section 4, a decree for alimony being registered binds the lands of the husband, and has the same effect as if the husband had charged the lands with a life annuity. But whether this is a sufficient distinction to make the alimony a sufficient consideration is not material to be considered now, as it is clear, upon the highest authority as the writer referred to considers, that the abandonment of the litigation is sufficient to support the deed; and it cannot on principle make any difference whether or not the suit was actually commenced, provided the Court is satisfied that there really was the abandonment of an intention to commence proceedings which would, but for the settlement have been instituted.

Judgment.

(*a*) May on Voluntary Deeds, page 292,

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I also incline to think too that the compromise of the threatened prosecution under section 25 of 32 & 33 Victoria, chapter 20, was a valuable consideration. The case of *Keir* v. *Leeman* (*a*), lays down the law as follows: "We shall probably be safe in laying it down, that the law will permit a compromise of all offences though made the subject of a criminal prosecution for which offences the injured party might sue and recover damages in an action. But if the offence is of a public nature, no agreement can be valid that is founded upon the consideration of stifling a prosecution for it."

Although no action for damages could have been maintained by the wife against the husband. Yet a suit in this Court founded not on any peculiar equity, but on the positive enactment of a statute was a remedy which she was in a position to avail herself of for the very offence which the statute considers a misdemeanor. I think therefore that this comes within the principle, if not within the decision in *Keir* v. *Leeman*. Judgment.

I therefore dismiss the bill with costs.

The plaintiff thereupon set the cause down for rehearing before the full Court, composed of *Spragge*, C., *Mowat* and *Strong*, V.CC.

Mr. *E. Martin*, for the plaintiff.

Mr. *Moss*, Q. C., and Mr. *R. Martin*, for the defendants.

SPRAGGE, C.—The plaintiff, as assignee in insolvency of the defendant *Thomas O. Scott*, files this bill to set aside a post-nuptial settlement made by *Scott* in

(*a*) 6 Q. B. 308.

1873. favour of his wife and children, as void under the Statute 13th Elizabeth.

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It is conceded by counsel for the defendants, that by the settlement, there was a withdrawal of assets sufficient to bring the case within the Statute of Elizabeth, unless it can be supported as a deed for valuable consideration: and it is admitted by plaintiff's counsel that the deed was obtained from the husband by pressure brought to bear upon him by his wife, and by a brother of his wife.

The settlement is dated 2nd March, 1871; and the wife then was, and for some time previously had been, with her children, living apart from her husband; her reason for leaving him, being his alleged adulterous intercourse with another woman.

She consulted solicitors in Hamilton, Messrs. *Martin* Judgment. *& Carscallen*, the latter her brother; and by their advice proceeded to lay an information before a Justice of the Peace, against her husband, under Statute 32-33 Victoria, chapter 20, section 25, for not providing necessary food, clothing, and lodging, for herself and her children. The solicitors also advised that a suit for alimony should be instituted in this Court. Mr. *Carscallen* saw the husband, and informed him what was about to be done; and he seemed anxious, as Mr. *Carscallen* says, that the proceedings threatened, should not go on. He admitted the adultery; but when pressed for a settlement providing for a separate maintenance he agreed to it very reluctantly. He expressed regret for his misconduct, and wished that his wife could be induced to return and live with him.

The plaintiff now, on behalf of the creditors, objects that the settlement was made to stifle a prosecution for a criminal offence: that that being at least a part of the consideration, it vitiates the whole: and that the settlement is therefore void.

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Without expressing any opinion, whether under the circumstances, the neglect of the husband to provide necessaries for his wife and children, is a misdemeanour within the statute; I think it clear that a compromise of the offence in question is not against the policy of the law.

In *Keir* v. *Leeman* (*a*) the authorities on the subject of the compromise of prosecutions for criminal offences were reviewed by Lord *Denman*. The offence which had been compromised in that case was an assault *accompanied with riot:* and his Lordship held that it could not be compromised, for this reason, that "it is not confined to personal injury, but is accompanied with riot and obstruction of a public officer in the execution of his duty. These are matters of public concern; and therefore not legally the subject of a compromise." His Lordship referred with approbation to the language of *Gibbs*, C. J., in *Baker* v. *Townshend* (*b*) and of *Le Blanc*, J., in *Edgecombe* v. *Rodd* (*c*). In the former there had been a conviction on an indictment for an assault in relation to a claim for land; and this matter and all matters in dispute had been referred to arbitration, and *Gibbs*, C. J., said, "The parties have referred nothing but what they had a right to refer. They have referred the several assaults, these may be referred," &c. In *Edgecombe* v. *Rodd* the offence was a misdemeanour, the disturbing the religious worship of a dissenting congregation; and there was an agreement to compromise, which was held to be unlawful, as an obstruction to public justice. *Le Blanc*, J., putting it upon this ground that it was a prosecution for a public misdemeanor and not for any private injury to the prosecutor. *Elworthy* v. *Bird* (*d*) was also referred to in *Keir* v. *Leeman*. There was a deed of separation between husband and wife in which

Judgment.

(*a*) 6 Q. B. 308.
(*b*) 1 Moo. 120.
(*c*) 5 East 294.
(*d*) 2 S. & S. 372.

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was contained a compromise of an indictment and conviction for an assault committed by the husband and his apprentices and workmen upon his wife; and Sir *John Leach* observed in his judgment that "all the authorities concur that the policy of the law does permit the compromise of indictments for assaults." As to indictments for misdemeanor Lord *Denman* observed, "the result of the cases makes it clear that some indictments for misdemeanor may be compromised; and equally so, that some cannot," and he adds, "we shall probably be safe in laying it down, that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action,"—by which I understand an offence or injury for which he has a civil remedy. "It is often the only manner in which he can obtain redress. But if the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling a prosecution for it;" and in the case of *Williams* v. *Bayley* (*a*), it was forcibly put by Lord *Westbury*, that parties giving up forged bills to the father of the forger, upon a compromise, the substance of which was that he should pay them, were "thereby violating their duty and placing the parties in a situation in which the demands of public justice could not, by any possibility, be complied with."

Judgment.

Mr. *Edward Martin's* position, that it is against public policy that any criminal offence should be compromised, is certainly untenable; and the question that remains is, whether the private wrong, which is constituted a criminal offence by the Act of 1869, is of a nature that "the demands of public justice," to use the words of Lord *Westbury*, require that it should be prosecuted. I am clearly of opinion that it is not of such a nature; but that, on the contrary, it is of such a

(*a*) L. R. 1 E. & I. App. 200.

character that it is in the interest of society, in the interest of good morals, that it should not be prosecuted. The object of the Act is, I take it, not so much to inflict punishment as to compel the performance of social duties, by very stringent provisions; and that, not for the sake of society in general so much, as for the sake of those for whose protection these provisions are made. A prosecution would cause public scandal, and destroy the peace of families; and if the object of the Act can be obtained without these evils, it is surely in accordance with the policy of the law, instead of against it, that there should be a compromise, rather than a prosecution.

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In the cases before the Courts, on articles and deeds of separation, we find the propriety of keeping differences between husband and wife out of the Courts used as a reason for supporting their compromise. And so, in *Wilson* v. *Wilson* (*a*), we find Lord *Cottenham* asking, "Why is not the compromise of such a suit (a suit for divorce) to afford consideration for an agreement? Is it desirable that the parties should be compelled to bring such complaint in the Ecclesiastical Court to public discussion?" And Lord *Brougham*, upon the same case coming again before the House of Lords, speaks of "the great regret we naturally feel at seeing a family dispute ripen into a contest in the Courts of Law and Equity (*b*)." It would, in my opinion, be reversing the policy of the law to hold that a prosecution of the nature of that in question in this case cannot lawfully be compromised.

Judgment.

Another point made in this case is, that a deed of separation such as was entered into between these parties is void, for the like reason, being against the policy of the law. This deed does not provide for a future separa-

(*a*) 1 H. L. C. at 574. (*b*) 5 H. L. C. at 57.

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tion, but the husband and wife were already living separate, the wife having left her husband for a reason which fully justified her in so doing. His adultery was not only confessed by himself, but is proved *aliunde*.

So far from a deed of separation entered into under such circumstances being invalid, the Court has decreed specific performance of agreements for the execution of such deeds. *Wilson* v. *Wilson*, to which I have already referred, is a leading authority upon that point. In that case, as in subsequent cases, it was objected that they were against the policy of the law; and they certainly had been disapproved of by eminent judges in former times, as varying the rights and duties growing out of the marriage state, and upon the case of *Wilson* v. *Wilson* coming a second time before the Lords, Lord *Brougham* reiterated the objections to it, which he had expressed in other cases, but nevertheless treated the law as settled upon the question; and Lord *St. Leonards*, upon the same occasion, spoke of the law "as perfectly well settled as regards deeds of separation." *Gibbs* v. *Harding* (*a*), was also a case of specific performance of an agreement to enter into a deed of separation, and a decree was made, Sir *John Stuart* observing that "the authorities are clear as to the jurisdiction, and it is too late to urge any argument as to policy." This was affirmed in appeal by the Lord Chancellor, and Lord Justice *Giffard*. It is obvious that if specific performance will be enforced in such a case, it is *a fortiori* to support such a deed already executed.

Judgment.

It is next objected that a deed of separation cannot be supported as against creditors; but that the rights of the wife are subordinate to those of creditors. If it be without consideration such would be the case. It would be only a voluntary post nuptial settlement; and its pro-

(*a*) L. R. 8 Eq. 490.

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viding that the husband and wife should live separately would not operate to set it up as a deed for valuable consideration. That was the case in *Fitzer* v. *Fitzer* (*a*), before Lord *Hardwicke*. That case was relied upon by the creditors in *Hobbs* v. *Hull* (*b*), but Lord *Kenyon* distinguished it from the case before him, upon the grounds upon which, as I think, this case is distinguishable. In *Hobbs* v. *Hull*, the settlement was impeached by creditors upon the ground that the husband was indebted at the time of the making of the settlement. The report of the case states that "The defence was (and which was fully proved in the cause) that Mr. *Hull* had, before the time of the separation lived in a state of adultery, which the defendants contended, entitled the wife to a divorce in the spiritual Court, *a mensa et thora*, and to an allowance in consequence of that divorce; and that this provision made by the settlement was only in lieu of the remedy which could be obtained by such proceeding." Lord *Kenyon* adopted this reasoning, and said, "I am now bound to decide the question whether the husband having behaved so ill as to entitle the wife to obtain a divorce in the spiritual Court *a mensa et thora*; and to have a proper allowance from him; if the wife, instead of strictly prosecuting that right, meets the husband in the threshold, and says she will accept the maintenance proposed by him without litigation, whether this can be said to be such a voluntary act as to be fraudulent against creditors. Surely this settlement can never be said to be without consideration; a husband and wife may certainly in particular situations treat together effectually, if they treat upon fair and reasonable terms. When the wife in this case agrees to accept this settlement, instead of resorting to enforcing her rights in the Ecclesiastical Court, surely she is giving up something for it. I am therefore very clearly of opinion that this

Judgment.

(*a*) 2 Atk. 51.

(*b*) 1 Cox 445.

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is not one of those agreements which the statute of Elizabeth meant to prevent. I do not go upon any motives of compassion, when I decree as I am now about to do; nor upon the conduct of the parties, but upon the rights in law which I take to exist between them." The bill was dismissed.

That case is really on all fours with the one before us, upon this branch of the case. It was followed by *Nunn* v. *Wilsmore* (*a*); that was a stronger case certainly for supporting the settlement, for provision was made for the payment of the then creditors of the settlor. There had been ill-usage by the husband, and one of the considerations was, that the wife should not institute a suit against him in the Ecclesiastical Court; and all the Judges, Lord *Kenyon*, and JJ. *Grose*, *Lawrence*, and *Le Blanc*, agreed in that being a valuable consideration, *Lawrence*, J., observing "with regard to the supposed want of consideration; the wife had a right under these circumstances to apply to the Spiritual Court for alimony; but it was not necessary for her to take that step if the husband were inclined to make a provision for her without."

Judgment.

Both these cases are referred to by the learned and able counsel for the defendant, in *Wilson* v. *Wilson* (*b*), Sir *Fitzroy Kelly* and Mr. *Turner*, afterwards Lord Justice. They were referred to among others, in which deeds of separation were supported because they were founded on compromises of adultery or cruelty, which would warrant a divorce in the Ecclesiastical Court; or they contained covenants by third persons for maintenance of the wife, and indemnity to the husband against her debts; and the learned counsel distinguished them on that ground from the case of the plaintiffs against which they were appealing.

(*a*) 8 T. R. 521.

(*b*) 1 H. L. C. at 55.

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Mason v. Scott.

One of the arguments against the settlement in this case is, that it contains no such covenant. Such covenants have been relied upon to take agreements out of the category of voluntary agreements; but it is clear, I think, that they are not necessary where there is a valuable consideration of the nature that existed in *Hobbs v. Hull*, and in *Nunn* v. *Wilsmore*, and that exists in this case.

There is also force in the argument of Mr. *Moss*, that a decree of this Court for alimony is placed by the Legislature upon the footing of a charge upon land. That is proved in this case, which shews that the wife was entitled to such a decree. The husband only averted such a decree by the settlement in question.

I observe the settlement in this case is not for the support of the wife only, but of the children, and for their benefit absolutely after the death of the wife. It is not measured by what the wife would be entitled to in a suit for alimony, but goes greatly beyond it. The same was the case, however, in *Hobbs* v. *Hull*, and no point was made of it, as no point has been made of it in this case. Judgment.

It is said that the Court will not weigh the consideration of the settlement in over nice scales, *Fitzer* v. *Fitzer* (*a*), *Middlecombe* v. *Marlow* (*b*), *Nunn* v. *Wilsmore* (*c*), and the same has been said in several other cases; with the proviso of course that the transaction be an honest one, and there seems no reason to doubt its honesty in this case, for it appears that the wife and the trustees had no idea that the husband was otherwise than solvent.

(*a*) 2 Atk. 511.

(*b*) *Ib.* 521.

(*c*) 8 T. R. 529.

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Mason v. Scott.

In this case probably the question could hardly arise, as the property appears to have realized only $1000 beyond the mortgages; not an immoderate sum for the support of the wife alone. I refer to the nature and extent of the provision made in this case, because I desire not to be understood as expressing any opinion, as to how far a provision for children can be supported; in cases, that is, where the alimony would not be allowed upon a more liberal scale, by reason of its being proper that they should live with the wife rather than the husband. The settlement must always be as intimated by Lord *Kenyon*, a fair and reasonable one.

I think the decree should be affirmed with costs.

Judgment.

STRONG, V.C.,* concurs.

MORLEY v. DAVISON.

Partition—Trust by parol—Statute of Frauds—Married woman.

A testator having devised his real property to such of the persons named as should be living at the death of his widow, the parties interested came to an agreement for partition during the widow's lifetime; there were several questions between the parties; the plaintiff, who was one of the devisees, was induced to consent to the partition upon a distinct understanding with another of the devisees, that the latter should, after partition, hold a portion of her share in trust for the plaintiff; this agreement was not known to the other devisees; the partition deed was executed by all the parties; the partition would not have been agreed to by the plaintiff but for the promise stated.

Held, that the promise was not binding, both because there was no writing within the Statute of Frauds; and because the party making it was a married woman.

Examination of witnesses and hearing at London.

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* Vice Chancellor MOWAT, retired from the Bench before judgment was given.

The facts out of which the case arose and the evidence adduced appear distinctly in the judgment. 1873.

Morley v. Davison.

Mr. *Mowat*, Attorney General, and Mr. *Hodgins*, Q. C., for plaintiff.

Mr. *Becher*, Q. C., and Mr. *Street*, for defendant.

BLAKE, V. C.—On the 2nd of October, 1868, Mrs. *Pomroy*, Mrs. *McKinnon*, Mrs. *Baker*, (then Miss *Mathews*,) and the plaintiff, the then surviving children of the testator, *Edward Mathews*, entered into an agreement for the division between them of the residue of his estate. It consisted of real property, and, under the will, the division could not, except by consent, be made until the death of the testator's widow, those only, alive at her death, being entitled to share in the estate. She and all the parties interested under the will, then alive, consented to the partition whereby the remainder of the estate was to be divided into four shares, one for each of the children above mentioned. In pursuance of this agreement a formal deed of partition was prepared and executed about the 6th of December, 1869. Before this agreement was concluded, there were disputes between the parties as to their position in respect of the estate. It was contended that Mrs. *McKinnon* and Mrs. *Baker* were primarily entitled to large sums of money, as they had not received out of the estate nearly as much as their sisters; and, in consideration of these admitted overpayments, there were first charges created in their favor to the extent of $32,000. It was further contended that, as Mrs. *Pomroy* had assigned all her interest under the will to her husband, who had conveyed it to trustees for the benefit of his creditors, she should not share in the division, as, independently of the claims of the creditors, her husband's indebtedness to the estate would more than eat up both his own and his wife's interest under the will. It was urged on behalf of Mrs. Judgment.

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Pomroy, that there was no valid assignment of her interest; that she could still claim a share under the will, and that Mrs. *Morley*, her full sister, should not raise this objection, but should assist in obtaining her rights as against their half sisters Mrs. *McKinnon* and Mrs. *Baker*. Mrs. *Morley* assented to Mrs. *Pomroy's* sharing in the estate, and upon this it was proposed that each of them, Mrs. *McKinnon* and Mrs. *Baker*, should have thirty shares in the estate, and each of them, Mrs. *Morley* and Mrs. *Pomroy* should have twenty shares. To this Mrs. *Morley* and Mrs. *Pomroy* consented, but finally it was arranged that the agreement as signed should be the one to be carried out. Mrs. *Pomroy* died in October, 1870, and the defendant *Davison* duly represents her.

On the negociation for the settlement arrived at, all parties were represented by their solicitors: Mr. *Parke*, acting for Mrs. *Pomroy*, and Mr. *Hodgins*, for Mrs. *Morley*.

Judgment.

It is contended on behalf of the plaintiff that there was a distinct agreement entered into between her and Mrs. *Pomroy*, whereby she, the plaintiff, in consideration of her abandoning her opposition to Mrs. *Pomroy's* claim, and aiding her in making it good, was to receive from Mrs. *Pomroy* a portion of the amount falling to her share. The understanding of the plaintiff's solicitor as to this arrangement is thus conveyed to her husband, on the 5th of October, 1868: "1. Miss *Mathews* and Mrs. *McKinnon* each to receive $16,000 of property to make them equal to Mrs. *Pomroy* and Mrs. *Morley*. 2. The balance of the estate is to be divided into four portions equally—one to Mrs. *Pomroy*, one to Mrs. *Morley*, one to Mrs. *McKinnon* and to Miss *Mathews*. But in regard to this division it is understood and agreed between Mr. *Parke*, acting for Mrs. *Pomroy*, and myself, that the special agreement, as telegraphed to you, shall be carried out; namely, that Mrs. *Morley's*

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share is to be as twenty-two is to eighteen; that is, in effect, that the shares shall be as follows: Mrs. *McKinnon* 25 per cent., Miss *Mathews* 25 per cent., Mrs. *Morley* 27 per cent., and Mrs. *Pomroy* 23 per cent. But as the others, that is Mr. *Roaf* and Mr. *McKinnon* kick against Mrs. *Morley* having more than the others; we (that is, *Parke* and I,) agree that the proportions shall be carried out between ourselves independently of the others, so you will understand that this special agreement is not to be spoken of to any one; it is strictly confidential." Mr. *Parke* does not deny that there was an agreement whereby the plaintiff was to receive from his client a portion of the property that fell to her share on the general division. He says, however, the only arrangement he or his client made was to take the estate as represented by one hundred shares, and of these to give thirty shares to each of them Mrs. *McKinnon* and Mrs. *Baker*, and twenty to each of the other sisters; that out of her twenty shares Mrs. *Pomroy* was to give Mrs. *Morley* two, thus giving Mrs. *McKinnon* and Mrs. *Baker* thirty shares each, Mrs. *Morley* twenty-two shares, and Mrs. *Pomroy* eighteen shares. He says, he did not consider the arrangement as fully carried out by the signed agreement. He did not tell Mr. *Hodgins* he considered it at an end, although he complained that he had not made so good a bargain for him as he promised, and he was dissatisfied that Mrs. *Pomroy* did not get as much under the agreement carried out, as she was to have obtained under the promised one.

Judgment.

Owing to the death of Mrs. *Pomroy* we are deprived of the benefit of her statement as to her understanding of the transaction.

I find upon the evidence that Mrs. *Morley* came into the agreement that was concluded on the express understanding, that she was to receive from Mrs. *Pomroy* a

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portion of her share. I find that Mrs. *Pomroy* agreed to this, and also that it was settled that this arrangement was to be kept secret from the other members of the family, as it was thought the general agreement would not be carried out if this private one were known. Mrs. *Morley* urges that, upon the faith of this agreement being carried out, she abandoned her opposition to her sister's claim, and she consented to an immediate division of the estate, neither of which matters would she otherwise have agreed to, and, that the result of the transaction has been, that Mrs. *Pomroy* has obtained property to which, as she predeceased her mother, she would not have been entitled to, except for that arrangement; and therefore, whether married or not, she must carry out her part of it.

Judgment.

On behalf of the defendant *Davison* it is urged, that the written agreement and deed of partition cannot be impaired by oral testimony, that the case is within the Statute of Frauds, and, as there is no memorandum in writing to support the plaintiff's contention, the lands are not bound; that the alleged agreement is uncertain in its terms, and the one insisted on was never assented to; that Mrs. *Pomroy*, a married woman, is not in any case bound by the agreement; that the fraudulent concealment from the other members of the family of the private arrangement vitiates it, and renders it incapable of enforcement; that the alleged agreement was at most a merely honorary engagement, which the plaintiff was informed Mrs. *Pomroy* distinctly refused to put into writing, and, having accepted the assurance which she did, the plaintiff cannot now ask the Court to make for her a binding agreement in the place of the one she chose to enter into; that Mrs. *Pomroy* received no consideration for the agreement, and therefore it will not be enforced by this Court.

The solicitors seem to have been alive to the necessity

for having a written agreement, but, in answer to the various demands made upon Mr. *Parke* by Mr. *Hodgins* to reduce it to writing, Mr. *Parke* continued his refusal, Mr. *Hodgins* in his evidence, upon this point says, "The reason it was not put in writing was, that Mr. *Parke* refused to have it in writing. It was not carried out in writing because Mr. *Parke* refused to have it in writing. It was after the meeting on that day that Mr. *Parke* said he wished the understanding between us to be confidential." 1873. Morley v. Davison.

Mr. *Parke* says, "The understanding was that Mr. *Hodgins* was to procure the consent of the other parties to Mrs. *Pomroy's* claim; we both thought it better to keep the arrangement a secret, because, if known, it would not be carried out. It was fully understood that the younger daughters were to receive thirty per cent. each, and Mrs. *Morley* and Mrs. *Pomroy* twenty-two and eighteen per cent. I do not recollect anything being said at the time of this agreement, as to its being put into writing, my impression is, that this was spoken of later; my impression also is, that I said, that as Mrs. *Morley* and Mrs. *Pomroy* were sisters, Mrs. *Pomroy* would, I was sure, always do what was right with Mrs *Morley*. I have no doubt I said that Mrs. *Pomroy* would carry out this arrangement, and I think, if she had lived, she would have been guided by me in the matter; and I hope would have done as I advised." Judgment.

On the argument it was admitted that, but for the alleged fraud, the case would come within the Statute of Frauds, and be incapable of enforcement, as not being in writing. It was urged that the same fraud prevented the coverture of Mrs. *Pomroy* from being pleaded as a bar to the carrying out of the agreement entered into.

The bill asks that of the real estate which was conveyed to Mrs. *Pomroy*, a sufficient portion to answer

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this private arrangement may be conveyed to the plaintiff, or may be sold, and the proceeds handed over to her. It in effect alleges that a partition of the estate in question was agreed to and carried out; that one of the parties obtained an interest in the premises upon the express understanding that she should hold a portion thereof in trust for the plaintiff; that there is no agreement in writing in respect of the arrangement, but, as the partition would not have taken place except upon the strength of this promise, it would be a fraud to allow the defendant to hold the land which is clothed with this trust. The plaintiff asks the Court to give her relief, and to disregard the Statute of Frauds. This Act declares that the plaintiff, in order to her success, must prove her case by a memorandum in writing; she produces no writing, but says, in place of that, I will shew you such a case of fraud as will entitle me to relief. But the Statute makes no such exception, nor does it, that I can see, permit this Court to do so. So far as fraud is concerned, in every case in which a trust has been declared by parol it is a fraud on the part of the trustee to deny it; and yet it is not pretended but that this simple plain case is just that which the Statute covers. By what means is this Court to gauge the fraud, and to arrive at the conclusion, that whereas in the one case the fraud is so slight, so little complicated, the Statute is to be followed, and, in another, because the fraud is grosser the Statute is to be treated as a dead letter? There is not a provision in the Statute of Frauds requiring an agreement to be evidenced by writing, which might not thus be rendered nugatory. It was thus put by the Court of Error and Appeal, in *Holmes* v. *Mathews* (*a*): "Every one of the provisions of the Statute of Frauds which requires written evidence in certain cases, might be nullified in the same way; that is, by calling it a fraud to insist on a writing, and then admitting parol evidence in order to disappoint the assumed fraud."

Judgment.

(*a*) 5 Gr. 35.

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When the Statute was passed it must have been in the mind of the Legislature that, while closing the door to the frauds and perjuries arising from attempts to prove, by parol evidence, agreements said to have been entered into, they were opening it to another class of frauds and perjuries, namely, that arising where a trust has actually been created, but, not having been evidenced by writing, the trustee is enabled by pleading this Statute, to defraud his *cestui que trust*. Yet Parliament, weighing the one class against the other, and feeling doubtless the difficulty that arises in defending persons against both evils, considered that which it did (although as imperfect a protection against fraud, as many enactments are), as making the most useful provision for the public that could under the circumstances be devised; and thereupon it declared it necessary that the matters referred to, to be enforced, must be in writing.

Judgment.

While I am bound to follow any authority in point, although I may think it invades the Statute, yet, holding the views I do, I shall endeavour most sedulously not in any manner to extend those decisions which I conceive subvert a law, which I am bound to carry out.

It seems impossible to reconcile the cases upon the point in question. Lord *Eldon* went upon the principle "that the Statute shall not be used to cover a fraud," and he acted upon this amongst other cases in *Muckleston* v. *Brown* (*a*), and *Strickland* v. *Aldridge* (*b*), this seems also to have been Lord *Hardwicke's* view in *Young* v. *Peachy* (*c*). *Langstaffe* v. *Playter* (*d*) is more like the present than any case I have been able to find. There was there a partition of the estate: the *Dunwich* lands were conveyed to the defendant, Mrs. *Playter*, upon

(*a*) 6 Ves. 52.
(*b*) 9 Ves. 516.
(*c*) 2 Atk. 254.
(*d*) 8 Gr. 39.

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the understanding that the proceeds of the sale were to be divided between her and Mrs. *Langstaffe;* upon a bill filed to compel the performance of this agreement, it was held that it was proved by parol, but the bill was dismissed with costs on the ground thus stated in the judgment of the present Chancellor. "The general question, whether a trust could be shewn by parol, arose directly in *Leman* v. *Whitley* (*a*), and was distinctly negatived by Sir *John Leach*, in a case, where, as he said, there could be no doubt of the moral honesty of the claim made by the bill. The case of *Podmore* v. *Gunning* (*b*) is more recent, but it was only an expression of opinion the other way, not a decision; and in this state of the authorities we are at liberty to follow *Leman* v. *Whitley*, and, in my judgment, to do so is the sounder course."

Judgment.

In the present case there is no part performance, no fact, as in *Cripps* v. *Jee* (*c*), no fraud in preventing the alleged agreement from being put into writing: circumstances which have been held in some cases sufficient to take the case out of the Statute; and I therefore think I am justified in following the decision above referred to in our own Court, which does not seem to have been overruled by any more recent decision, and, doing so, I dismiss this bill.

I am also of opinion, that owing to the coverture of Mrs. *Pomroy*, the agreement could not be enforced. *Bagley* v. *Humphries* (*d*), *Royal Canadian Bank* v. *Mitchell* (*e*), *Chamberlain* v. *McDonald* (*f*), *Lett* v. *Commercial Bank* (*g*) *Emerick* v. *Sullivan* (*h*). The alleged misrepresentation is not of that class which in *Savage* v. *Foster* (*i*) and *Vaughan* v. *Vanderstegan* (*j*), was con-

(*a*) 4 Russ. 423.
(*b*) 7 Sim. 644.
(*c*) 4 Bro. C. S. 426.
(*d*) 11 Gr. 118.
(*e*) 14 Gr. 412.
(*f*) 14 Gr. 447.
(*g*) 24 U. C. Q. B. 550.
(*h*) 25 U. C. Q. B. 105.
(*i*) 9 Mod. 35.
(*j*) 2 Drew 408.

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sidered as binding a married woman. There she concealed the fact of her coverture. Here there was no pretence of any such or the like misrepresentation. The plaintiff knew well of her sister's marriage; she also knew of the advisability of having the agreement in writing, and, with a full knowledge of all the facts and circumstances of the case she chose to accept, in place of a binding agreement, the word of her sister; as her sister has not chosen to make good her promise, I think the plaintiff must take the consequence of the course of conduct which she, with her eyes open, chose to pursue. I do not think it necessary to consider the other defences raised.

The bill must be dismissed with costs. Had the plaintiff, when the defendant pleaded the defence on which he succeeds, dismissed her bill, I think there would have been some ground for a dismisal without costs; but, as she has taken the cause down to a hearing, after full notice of the defence that was to be made, and has not succeeded in the suit, she must suffer the penalty that ordinarily follows failure in litigation.

Judgment.

1873.

TRAVERS v. GUSTIN.

Will, construction of—Profession—Trade—Election—Executors—Sale—Remote contingency.

A testator directed his executors to collect and get in all his outstanding estates, and after payment of debts and funeral expenses to expend the proceeds in building on his property, and also after two years, with the consent of his widow, authorised them to sell his homestead or any part thereof in village lots, and to invest the proceeds in land or Government stocks as his widow might desire; and the yearly income of all his estate, real as well as personal, he gave to his wife for her support and the support of his children, for the term of her natural life, provided she remained his widow, but no longer than during the minority of his children if she should cease to be his widow, or enter into another marriage alliance or contract; nevertheless she was to be guardian of the children during their minority, and receive said incomes for their support and clothing until each became of age, and when the youngest became of age then the property was to go share and share alike, between his surviving children or their heirs.

Held, 1st, that the children took estates tail with cross-remainders in the realty.

Held, 2nd, that the widow had the power of making the estate realty or personalty at her discretion.

3rd, *Held*, also, that the power of sale having been given to the executors *qua* executors, and not by name, they could not, after having once denounced, execute such power.

A testator authorized his executors to sell his real estate consisting of his homestead and property in St. Thomas, but stated that it was not his will to have his property in St. Thomas disposed of until the proceeds of it could be laid out in real estate to a fourth better advantage and with the consent of the heirs. On a bill filed to have the rights of the parties declared and the affairs of the estate wound up, the Court referred it to the Master to inquire as to the propriety of selling both the homestead and the St. Thomas property.

A testator devised his real estate to his children in tail with cross remainders; and in the event of their dying without issue he gave the same to his brother; and directed his widow to receive the whole of the rents, &c., during widowhood; and in the event of her marrying she was to receive one-half thereof during her life:

Held, that the contingency of the widow surviving all the children was too remote to put her to elect between her dower and the provision under the will.

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Travers v. Gustin.

A testator directed that one of his sons, *W R*, should be educated for one of the learned professions over and above a child's share, and if brought up to a trade he was to receive £250 over and above a child's share. *W R* did not receive a professional education, but entered into the employment of a bank as a clerk:

Held, that he was entitled to receive £250 over and above a child's share.

Motion for decree declaring the rights of the several parties to the cause under the will of the late *Richard Walsh Travers*, which was in the words following:—

"Know all men by these presents that I, *Richard Walsh Travers*, of the Village of Fingal, Township of Southwold, and County of Elgin, Physician and Surgeon, being sound in mind and judgment doth make this my last will and testament, in manner as follows, viz.: In the first place that my executors *Phineas Barber*, Esq., and *Amasa Wood*, Esq., both of this Township, shall collect all my outstanding debts in notes of hand, book accounts, &c., and that they shall also dispose of my chattel property as soon as convenient after my decease, either conjointly acting, or either of them in case the other should decline, and the proceeds of such auction, after having defrayed my funeral expenses which are not to exceed ten pounds, Halifax currency, and all my other just and lawful debts, to be expended either in a building on my property in St. Thomas, opposite Mr. *Boggs's* present abode, or in real estate or bank stock, according to the wish of my widow; I also hereby authorize my said executor or executors, with the consent of my widow or relict, any time after the expiration of two years from my decease, to sell this my homestead, being comprised of forty-nine acres of land, more or less, with the buildings thereon, and situate on the Port Stanley Union Gravel Road, and lying on the westerly side between the Fingal House, now kept by *William Froom*, north, and *Patrick Kilday's* farm on the south, in village lots or any part thereof, the proceeds of such sale or sales, to be invested either in

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real estate or in Government stock, according to the wish of my said relict, in order that a yearly income may be derived therefrom; and I hereby will and bequeath all the incomes (that is to say of the chattels and real estate sales, that is what is derived therefrom, and the rents of the St. Thomas property, or any property of mine not herein mentioned) in trust to my widow or relict for her support and the support of my children until the term of her natural life, provided she remains my widow, but no longer than during the minority of my children if she should cease to be my widow, or enter into another marriage alliance or contract, nevertheless it is my will and wish that she should be guardian of my children during their minority, and receive said incomes for their support and clothing until each of them becomes of age; and when the youngest becomes of age, then the property is to go share and share alike between my surviving children or their heirs; but to my son *William Richard*, or in other words, I will or order that he should or shall be educated for a learned profession, either for medicine, law, or the Church, as he may prefer, and when his preliminary education is complete, then he is to be instructed until his completion in either of which he prefers; but if his mental capacity is not equal to a learned profession, then he is to be instructed in some useful trade, which learned profession he is to receive over and above a child's share, but if he is to be brought up to a trade, he is to receive two hundred and fifty pounds, Halifax currency, in lieu of such profession, or over and above a child's share payable to him when of age, or invested for him in real estate, according to the wish of his mother and my executors; and furthermore, I will that no husband of either of my daughters is to have any power over their dowry or portion, nor are they to receive the principal, but each one to receive the yearly income during her natural lifetime, and to dispose of it, to her heirs or heir as she may think fit; and in case of my children dying

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without issue, then I will and appoint my brother *Edwin Roche Travers* to be my heir, and my relict or widow to receive half the income during her natural lifetime, even if she should be married again; but if my widow remains my widow, as before stated, she is to receive the whole of the income during her lifetime, except what my son *William Richard* is entitled to over and above a child's share; and if the income is not sufficient for the completion of the same, then sufficient of the property already made disposable (with due regard to economy) is to be used for the same, as it is not my will to have the property in St. Thomas disposed of until it can be laid out in real estate to a fourth better advantage, and with the consent of the heirs, said premises or buildings always to be kept safely insured and in good repair; furthermore, my widow is to have any of the household furniture she may require for keeping house with, and two of the cows, if she requires them; also the piano forte, if she wishes."

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Mr. *Street*, for the plaintiff.

Mr. *J. A. Boyd*, for the defendants *Gustin* and wife.

Mr. *Bailey*, for the infant defendants.

STRONG, V. C.—I am of opinion that the testator's widow took an estate *durante viduitate* in the whole real and personal property subject to a charge for the maintenance of the children, which estate upon her re-marriage was cut down to a right to receive the income of the personalty, and the rents and profits of the realty, subject to the maintenance of the children until the youngest child should come of age.

Judgment.

This limited interest of the widow includes the homestead property; the words "all the incomes" would certainly comprise the rents and profits of this property; and I do not think the words in the parenthesis "that

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is to say, if the chattels and real estate sales, that is what is derived therefrom, and the rents of the St. Thomas property and any property of mine not herein mentioned," are sufficient to cut down the *prima facie* import of the preceding words. Moreover the testator in the subsequent part of his will gives the clue to his intention when he says "but if my widow remains my widow, as before stated, she is to receive the whole of the income during her lifetime." Mrs. *Gustin* is not accountable for what she has received from the income of the property since her second marriage provided she has maintained the children, which I understand to be admitted: *Browne* v. *Paull* (*a*), *Costabadie* v. *Costabadie* (*b*), *Byrne* v. *Blackburn* (*c*).

The children clearly take estates tail with cross remainders in the real estate with a remainder over to the testator's widow for life in a moiety of the income and an ultimate remainder in fee to the testator's brother *Edwin Roche Travers*. The rule of construction by the application of which this result is attained, is so well settled that it needs no demonstration or authority to support this view. The first gift to the children and their heirs is cut down by the subsequent words "and in case of my children dying without issue" to an estate tail, and then the gift over being only in the event of the failure of the issue of all, cross remainders are necessarily implied.

Judgment.

As to the personalty, however, the children take absolute interests. The words "dying without issue" cannot be read as importing anything but an indefinite failure of issue, consequently all subsequent limitations are as regards the personal property void for remoteness. Words applied to personalty which would expressly give an estate tail in realty, confer an absolute interest,

(*a*) 1 Sim. N. S. 92. (*b*) 6 Hare 410. (*c*) 26 Beav. 41.

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and it is now also well settled that words which would create a fee tail by implication in real estate give the absolute property in personalty (See the numerous cases collected in *Tudors* L. C. Real Property notes to *Leaventhorpe* v. *Ashbie*, p. 764). It can make no difference that by this will real and personal property are comprised in the same gift. The well known case of *Forth* v. *Chapman* (*a*) shews this very strongly. The case of *Gwynne* v. *Muddock* (*b*), which was cited at the bar, has no application here, there the gift was of mixed realty and personalty to the testator's daughter for life, remainder to the testator's right heir, and it was held that the word "heir" was to be taken as to personalty as *designatio personæ*, and that the heir at law and not the next of kin was intended to take. The distinction is, that there the word "heir" was used as a word of purchase as regarded personalty, here the word "heirs" is used as a word of limitation. There is no similarity between the two cases. As to the homestead property the executors had over this part of the estate a power of sale with the consent of the widow, postponed until after the expiration of two years from the testator's death, this power being coupled with no imperative words clearly does not work an absolute conversion from the time of the testator's death. No sale having as yet taken place this property remains at present subject to the limitatations of the real estate, already pointed out. Should there be a sale the purchase money must be subject to the limitations of the personal estate. This case in truth belongs to the class of which Mr. *Jarman* speaks, as follows: "sometimes the exercise of trustees' option to convert regulates not merely the devolution of property as between the real and personal representatives, respectively, of the beneficial objects, but also determines its destination under the will itself, *i. e.*, until conversion it belongs to one and when actually converted to another.

Judgment.

(*a*) 1 P. W. 663.

(*b*) 14 Ves. 488.

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Large and inconvenient as such a discretion is, yet if the intention to confer it be clearly manifested the construction must prevail in spite of any suspicion that the testator has misapprehended the effect of the terms he has employed:" *Jarman* on Wills, vol. i., p. 569, (3rd ed.) *Elwin* v. *Elwin* (*a*). The St. Thomas property is also subject to a discretionary power of sale, but the produce in the event of that power being exercised is expressly directed to be re-invested in the purchase of land, the exercise or non-exercise of the authority to sell can therefore have no influence on the interests of the parties taking under the will so far as regards this land at St. Thomas. The proceeds of the homestead property if sold are at the option of the widow, to be invested in real estate or government stock, which therefore gives the widow the power to make it realty or personalty at her discretion. The power of sale having been given to the executors *qua* executors and not by name it cannot now, after disclaimer, although the point is not free from doubt, be executed by them. See *Williams* on Executors, 6th ed. p. 275 in note citing *Perkins* 548, *Yates* v. *Compton* (*b*), *Keates* v. *Burton* (*c*), *Ford* v. *Ruxton* (*d*), *Brassy* v. *Chalmers* (*e*).

Judgment.

The question then arises whether this power given to the executors and to be exercised with the consent of the widow, although in a sense a discretionary power is yet to be considered as of that class which this Court considers so far in the nature of trusts that it will not allow them to fail by reason of the disclaimer of those originally appointed to execute them. The sale which the executors were empowered to make was one manifestly for the benefit of the widow and children of the testator, and was therefore in the nature of a trust for them. Had there been in this will no devise of this land but merely

(*b*) 8 Ves. 547.
(*c*) 14 Ves. 434.
(*e*) 4 D. M. & G. 528.
(*b*) 2 P. W. 308.
(*d*) 1 Coll. at 407.

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the power to sell, the land being left to descend to the heirs and the produce of sale alone being given to the children as personalty, it could not be doubted that the bequest would not be permitted to fail in consequence of the renunciation of the executors, *Williams* on Executors, 6th Ed. p. 894, and passage from *Hargrave's* Co. Litt. there quoted. I think, therefore, that it is a proper mode of carrying out the directions of this will to order the proposed inquiries to be made as to the propriety of selling both the homestead and St. Thomas properties. I understand that Mrs. *Gustin* agrees to this reference which removes all objection on the score of her consent being necessary. The period of distribution of the personalty is the coming of age of the youngest child: the words of the will leave no doubt on this point and until that period there is benefit of survivorship amongst the children as regards personalty. The testator's son *William Richard* is entitled to the £250. The testator does not contemplate his adopting any other employment than that of a profession or a trade. The son has entered a bank and is at present employed there as a clerk, this cannot, it is true, be strictly called a trade, but I gather from the context that the testator used the word "trade" inaccurately and that what he really meant was some occupation different from any of the learned professions which he specifies, for he says that the £250 is to be in lieu of the cost of the education which his son would require for one of the professions. I have therefore no hesitation in determining that this legacy ought to be paid. The widow is entitled to her dower. No case for election is raised by the powers of sale, *Ellis* v. *Lewis* (*a*), *Gibson* v. *Gibson* (*b*), *Bending* v. *Bending* (*c*).

Judgment.

To say that the gift to the testator's wife in the remote contingency of all the cross remainders failing is enough

(*a*) 3 Hare 313. (*b*) 1 Drew at 57. (*c*) 3 K. & J. 257.

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to put her to elect would be an extension of the much doubted case of *Chalmers* v. *Storil* (*a*) entirely unwarranted; for this executory interest so given to the wife is not of one half of the corpus of the real estate but of one half of the aggregate income arising from such of the realty as may be still remaining in specie; and from the produce of that portion of the lands which may have been converted under the powers. To point this out is to take the case out of the authority of *Chalmers* v. *Storil*. Further there is no ground for holding the widow barred by reason of jointure. Equitable jointure there can be none, for that always depends on contract; and it has not been pretended that Mrs. *Gustin* has ever agreed to waive her dower. As to legal jointure the benefits given Mrs. *Gustin* fall far short of the requisites to constitute such a bar as that. What these requisites are I need not further point out than by referring to *Tudor's* L. C. R. P. p. 63.

Judgment.

I do not see any necessity at present for settling the shares of the daughters. They are now wards of this Court, and the marriage of any of them cannot take place without the sanction of the Court, whose duty it will be to see that, on such an event, a proper settlement is executed, if any is required.

The will undoubtedly gives the shares of the daughters to their separate uses, but further protection in the way of a settlement may be required on their marriages. I think Dr. *Gustin* entitled to the reference asked for as to any expenditure by him for maintenance of the testator's children beyond the sum received by Mrs. *Gustin* from the estate. I should have thought a special direction for this unnecessary, but for the case of *Fielder* v. *O'Hara* (*b*).

(*a*) 2 V. & B. 222.

(*b*) 2 Chy. Cham. 255.

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DAVISSON V. SAGE.

Husband and wife—Separate use.

A husband and wife were respectively residuary devisees under a will and they together with the other residuary devisees united in a conveyance purporting to transfer the property to the wife and her heirs so that none of the other parties should have any estate right, title, or interest therein:

Held, that the conveyance, was inoperative at law so far as it assumed to pass the interest of the grantee's husband, but that it had the effect of constituting the husband a trustee of the legal estate in favor of the wife: that in equity the wife had an absolute estate in the whole property to her separate use, and had therefore the same power of devising it as if she had been a single woman.

This was a special case stated for the opinion of the Court under the Statute 28th Victoria, chapter seventeen, in the words following:—

Statement.

1. "By an Indenture made on the sixth day of December, in the year of our Lord one thousand eight hundred and sixty-nine, made between one *Catharine Mathews*, of the first part; one *Samuel Sexton Pomroy* of the second part; one *Thomas Scatcherd*, one *Edward Adams*, and one *John Birrell*, of the third part; one *Jane Pomroy*, the wife of the said *Samuel Sexton Pomroy*, of the fourth part; one *Samuel Morley* and *Annie Catharine Morley*, his wife, of the fifth part; one *John M. McKinnon* and *Sophia Williams McKinnon*, his wife, of the sixth part; one *Hugh C. Baker* and *Marion Mable Baker*, his wife, of the seventh part; one *Joseph R. Morley*, of the eighth part; and one *John Cooke Meredith*, of the ninth part; the said parties of the first, second, third, fifth, sixth, seventh, and eighth parts being seized in fee simple in possession of certain lands and premises in the said indenture mentioned and described, did grant, convey, release, remise, and forever quit claim unto the said *Jane Pomroy*, her heirs and assigns, with other portions of the said lands, a certain

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portion thereof known and described as follows, that is to say, lot number eleven, in the fourth concession of the township of North Dorchester, in the county of Middlesex, as described and with the reservation contained in a certain conveyance thereof from the Canada Company to one *Edward Mathews*, bearing date the fourth day of January, in the year of our Lord one thousand eight hundred and forty-five, and registered in the Registry Office of the said County of Middlesex, on the 16th day of August, in the year of our Lord one thousand eight hundred and forty-five, except that part thereof conveyed to the Great Western Railway, "together with all rights, members, and appurtenances to the same belonging; and all the estate and interest of the said parties therein and thereto, to have and to hold the said lands and premises unto the said *Jane Pomroy*, her heirs and assigns forever; and so that neither they the said parties of the first, second, third, fifth, sixth, seventh and eighth parts, nor their nor either of their heirs, nor any other person or persons having, or claiming to have a claim by, from, through, under, or in trust for them, him, or her, shall have any estate, right, title, or interest of, in, to, or out of the said hereditaments and premises so mentioned to be released to the said *Jane Pomroy*, her heirs and assigns, but thereof and therefrom shall be, by these presents, utterly precluded and barred."

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2. The said persons so granting and conveying the said lands as in the preceding paragraph mentioned, were all of full age and competent in other respects to convey the said lands: and the said *Annie Catharine Morley*, *Sophia Williams McKinnon* and *Marion Mabel Mathews*, executed the said indenture in the manner and with the formalities prescribed by law upon the conveyance by married women of their Real Estates.

3. The said *Jane Pomroy* at the time of the execution

of the said indenture, was the wife of *Samuel Sexton Pomroy* named therein, as the party of the second part; she was married to him before the fourth day of May, in the year of our Lord one thousand eight hundred and fifty-nine, without any marriage settlement. 1873. Davisson v. Sage.

4. On the third day of October, in the year of our Lord one thousand eight hundred and seventy, the said *Jane Pomroy* departed this life, leaving surviving her, her husband, the said *Samuel Sexton Pomroy* and several children, issue of her marriage with the said *Samuel Sexton Pomroy*, all of whom were then infants under the age of twenty-one years; and having first made and published her last will and testament in writing, signed by her in the presence of two credible witnesses, who, in her presence, at her request, and in the presence of each other, subscribed their names as witnesses thereto; which said last will and testament is in the words and figures following—that is to say:— Statement.

"In the name of God, Amen. I, *Jane Pomroy*, of the city of San Francisco, in the State of California, one of the United States of America, wife of *Samuel Sexton Pomroy*, and one of the devisees under the will of the late *Edward Mathews*, Esquire, formerly of London, Upper Canada, now the Dominion of Canada, do make and publish this my last will and testament in manner following: I give, bequeath and devise to my executor hereinafter named, all the estate, real, personal, and mixed, and wheresoever situated, whereof I may die seized or possessed, to have and to hold, upon the trusts, and to and for the uses, interests, and purposes following:—First, To convert the same and every part thereof into money, as soon after my death as conveniently may be; and after paying my funeral expenses, and expense of administration of my estate, to invest the balance in such manner as to said executor shall seem best for the interest of my children. Second,

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The executor hereof is hereby authorized and empowered to sell the whole or any portion or portions of my estate at public or private sale for cash or on credit, and without the order or authorization, and not subject to the approval of any Court. Third, The executor hereof is hereby authorized and empowered to pay over to my husband, *Samuel Sexton Pomroy*, during his natural life, in trust for the support and education of my children, all moneys received by him, the said executor, for interest and uses of moneys invested; and upon the decease of my said husband, I hereby authorize and empower said executor to divide what may be remaining of my estate equally among my surviving children who may be of age; and should any of my children not have arrived at the age of twenty-one years, then the portion due said child, is to be invested according to the judgment of my executor, and paid over upon arriving at the age of twenty-one years. I hereby revoke all former and other wills by me made. Having the greatest confidence in the ability and judgment of my friend *Robert G. Davisson*, of the city of San Francisco, merchant, I hereby nominate and appoint him to be the executor of this my last will and testament. I desire that no bond or other security be required of the said executor, for the faithful performance of any of the duties or trusts hereby reposed in him, or arising or growing out of the same. In witness whereof, I have hereunto set my hand and seal at the city of San Francisco, this twenty-eighth day of September, in the year of our Lord one thousand eight hundred and seventy.

Statement.

"JANE POMROY. [*Seal.*]

"Signed, sealed, and declared by the said *Jane Pomroy*, on the day of the date thereof, as, and, for her last will and testament, in the presence of us, who, at her request, and in her presence and in the presence of each other, have subscribed our names as witnesses thereof.

"GEO. R. MCKENZIE,

"JOHN GRIFFIN."

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5. The said *Robert G. Davisson* in the said will named, is the plaintiff in this suit, and has taken upon himself the burden of the trusts in the said will declared.

6. On the nineteenth day of August, in the year of our Lord one thousand eight hundred and seventy-two, the said *Samuel Sexton Pomroy*, did grant, release, and convey unto the said *Robert G. Davisson*, his heirs, and assigns, all his right and title, if any, in and to the said lands, whether as tenant by the courtesy thereof or otherwise.

7. On the eighteenth day of October, in the year of our Lord one thousand eight hundred and seventy-two, the said plaintiff contracted and agreed with the said defendant to sell to the said defendant the lands hereinbefore particularly described; and the defendant agreed to purchase the said lands from the said plaintiff at the price of fifteen dollars an acre. The lands in question are wild lands. Statement.

8. Upon the investigation by the defendant of the plaintiff's title to the said lands, the defendant objected that the devise of the said lands to the said *Robert G. Davisson*, by the said *Jane Pomroy*, being a devise by a married woman having children living, issue of her surviving husband, passed no estate in the said lands, to the said *Robert G. Davisson*, or passed only an equitable estate, and that the legal estate therein descended to the children of the said *Jane Pomroy* as her heirs-at-law.

9. The plaintiff submits that under the said will and conveyance in the sixth paragraph mentioned, he is entitled to a legal estate in fee simple in possession in the said lands, subject to the trusts of the said will.

10. The question for the opinion of the Court is, what estate, if any, in the said lands, passed by the

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said will of the said *Jane Pomroy* to the said *Robert G. Davisson?*

It is agreed by the parties hereto, that if the Court shall be of opinion that under the said will and the conveyance in the sixth paragraph mentioned, or either of them, the plaintiff is entitled to a legal estate in fee simple in possession in the said lands, the defendant shall be ordered to pay the plaintiff's costs hereof, but that if the Court shall be of opinion that, under the said will, no estate or only an equitable estate passed to the plaintiff; and that under such will and conveyance, the plaintiff cannot convey a legal estate in fee simple in possession, the plaintiff shall be ordered to pay the defendant's costs hereof.

Mr. *Leith* and Mr. *Street*, for the plaintiff.

Mr. *Campbell* (of London), for the defendant.

Judgment

STRONG, V. C.—On the naked statement of the deed of 1869 contained in this special case, I must determine that Mrs. *Pomroy* took under it the following estates. It passed to Mrs. *Pomroy* the legal interest in the respective shares of all the grantors, except her husband. So far however as it assumed to pass the interest of the grantee's husband, *Samuel Sexton Pomroy*, it was inoperative at law, though in equity it had the effect of constituting a trust of the legal estate remaining in him in favor of his wife. All these interests Mrs. *Pomroy* held to her separate use by virtue of the limitation in the *habendum* expressed in the following words: "To have and to hold the said lands and premises unto the said *Jane Pomroy*, her heirs and assigns forever, and so that neither they the said parties of the first, second, third, fifth, seventh, and eighth parts, nor their, nor either of their heirs nor any other person or persons having or claiming to have a

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Davisson v. S. ...e.

claim by, from, through, under, or in trust for them, him, or her shall have any estate, right, title, or interest of, in, to, or out of the said hereditaments and premises so mentioned, to be released to the said *Jane Pomroy*, her heirs and assigns, but thereof and therefrom, shall be by these presents utterly precluded and barred." Numerous authorities shew that this limitation is sufficient to exclude the legal interests of the husband, and to give Mrs. *Pomroy* in equity an absolute estate to her separate use: *Wagstaff* v. *Smith* (*a*), *Margetts* v. *Barringer* (*b*), and *Glover* v. *Hall* (*c*), are all cases in which the words were not so strong as in the present case. The consequence is, that at Mrs. *Pomroy's* death, she had the legal fee in all but her husband's original share, the legal estate in which Mr. *Pomroy* retained; but in respect of which he was a trustee for his wife for her separate use. The testatrix had therefore in equity a full power of disposition over the whole estate, for the legal interest which was vested in herself, she held to her separate use, and therefore as the law now stands since Lord Westbury's decision in *Taylor* v. *Meads* (*d*), she had in equity the same right to devise and convey the land as if she had been a single woman. The legal estate vested in the testatrix descended to her heirs-at-law, who are trustees of it for the plaintiff. I therefore answer the first question appended to this special case, by determining that the executor named in the will, took an equitable estate in fee in the lands devised to him upon trust, to sell the same, and to execute the further trusts clearly pointed out by the will. Any legal interest remaining in the testatrix's husband, whether as tenant by the curtesy or by reason of the want of legal operation of the deed of sixth December, 1869, as regards Mr. *Pomroy's* own share, is held by him in trust for the plaintiff, the trustee under the will, who is entitled to call for a conveyance of such interest.

Judgment.

(*a*) 9 Ves. 520.
(*b*) 7 Sim. 482.
(*c*) 16 Sim. 568.
(*d*) 11 Jur. N. S. 166.

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With reference to the second question put by the special case, it is apparent for reasons already stated, that I must hold that the plaintiff has not, and never had, and cannot convey an estate in fee simple in possession in these lands.

Judgment.

It therefore becomes immaterial to consider the extremely important question which was so ably and elaborately argued before me as to the operation of the Consolidated Statutes, Upper Canada, chapter seventy-three on this will.

In accordance with the submission in the case, the plaintiff must pay the costs.

GARROW v. MCDONALD.

Joint and several liability—Pleading—Parties—Administrator ad litem.

In a suit against one of two sureties of an assignee in insolvency and the administrator *ad litem* of the assignee, the bill alleged that *P*, (the other surety,) was "without means or other estate of any kind that the plaintiff can discover, and is in fact, as the plaintiff believes, insolvent," as a reason for not making *P* a party defendant:

Held, that these allegations were not sufficiently distinct to dispense with the necessity of joining him as a defendant.

Sureties were jointly and separately bound; but a general account being necessary, the Consolidated Order 62, allowing proceedings to be taken against one of two or more persons jointly and severally liable, does not apply to such a case; and the allegation as to the insolvency of one of them is not sufficient to dispense with him as a party. That Order is only available where the suit is for a liquidated sum or for a single breach of trust.

Whether in such a case the administrator *ad litem* sufficiently represents the estate of the principal debtor—*Quære.*

Demurrer for want of parties.

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Mr. *Blake*, Q. C., for the demurrer.

Mr. *Moss*, Q. C., contra.

BLAKE, V. C.—The bill states that *VanEvery & Rumball* on the 31st December, 1864, executed under the Insolvent Act an assignment in favor of one *John Bell Gordon* now deceased. At a meeting of the creditors subsequently held *Gordon* was appointed assignee on his giving security for the faithful discharge of his duties. The defendant *McDonald* and one *Piper* agreed to become sureties for *Gordon*, and they were accepted by the creditors and executed a bond along with *Gordon* in the penal sum of $8,000 to the creditors of *VanEvery & Rumball* which was duly filed. This bond is the joint and several bond of the parties to it, and is conditioned for the faithful discharge of his duties as assignee by *Gordon*. Immediately upon the execution of the bond *Gordon* entered upon the discharge of his duties as assignee, collected large sums of money, wilfully neglected to collect other sums which were thus lost to the estate, misapplied other moneys and died intestate in the month of December, 1871, indebted in a very large amount to various persons, and leaving no assets. The bill further states that no general administration of his estate has been granted, but that the defendant *Robertson* has duly taken out letters of administration limited to the purposes of this suit. That the plaintiff was duly appointed after the death of *Gordon*, and he now is, under the provisions of the Insolvent Act of 1869, the assignee of the estate in question, and that although he has frequently attempted to come to a settlement with *McDonald*, he cannot succeed in obtaining one. The bill further alleges that "the said *William Piper* is without means or estate of any kind that the plaintiff can discover, and is in fact as the plaintiff believes insolvent, and the plaintiff is therefore compelled to seek payment of the whole amount of the default of

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the said late *John Bell Gordon* as such assignee as aforesaid from the said defendant *McDonald* alone." The plaintiff asks that an account of the dealings and transactions of *Gordon* as such assignee may be taken; that such account may be taken with wilful default and neglect; and that *McDonald* may be ordered to pay the balance to be thus found due.

To this bill the defendant *McDonald* demurs for want of parties alleging that under the facts set out in the bill *Piper* is a necessary party. There can be no doubt, apart from our general order and the question of the insolvency of *Piper*, that *Gordon*, *McDonald*, and *Piper*, or their representatives, would be necessary parties to a bill such as the present. See *Lewin* on Trusts (*a*), *Thorpe* v. *Jackson* (*b*), *Haywood* v. *Ovey* (*c*), *Seidler* v. *Sheppard* (*d*), and cases there cited; *Cox* v. *Stephens* (*e*). Then as to the question of insolvency. I do not think it is properly raised by the pleadings; the statement in the bill is, that "the said *William Piper* is without means or estate of any kind that the plaintiff can discover and is in fact as the plaintiff believes insolvent." This allegation is not of the positive nature that each statement necessary to support the bill should be; a statement upon the information or belief merely of a plaintiff has been held upon demurrer to be an insufficient allegation of a fact which is necessary to be stated positively, and although the plaintiff may not have been able without the intervention of a Court to discover any assets belonging to one who if solvent should be a party to the cause, it cannot be taken for granted that such person is insolvent. It cannot therefore be taken on this pleading that there is any statement of the insolvency of *Piper*. See *Story's* Eq. Pl. section 169; *Lewis'* Eq. Pl. 115; *Yarrington* v. *Lyon* (*f*).

Judgment.

(*a*) pp. 707, 709.
(*b*) 2 Y. & C. 560, 563.
(*c*) 6 Mad. 113.
(*d*) 12 Gr. 456.
(*e*) 38 L. Jr. Ch. 62.
(*f*) 2 Ch. Cham. Rep. 22.

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Counsel for the plaintiff did not indeed urge that this allegation was sufficient, but he argued that whether *Piper* was solvent or insolvent made no matter as the bond in question was joint and several and the principal debtor and one of his sureties were before the Court, and therefore, under General Order 62, *Piper* the co-surety need not be added. This order is a transcript of the English order which is as follows: "Where the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable:" *Cox's* Orders, p. 52. As to this order Mr. *Daniell* says, "It has been decided that the order does not apply to cases where the general administration of the estate is sought; nor where accounts of the trust fund have to be taken:" 1 *Daniell* 234. And Mr. *Lewin*, at page 714, says, "And where the case is not one of breach of trust, merely, but a general account is also sought, the order does not apply."

Judgment.

In *Coppard* v. *Allen*, in appeal from the decision of Vice-Chancellor *Stuart* (*a*), Sir *George Turner*, in speaking of the former decisions under this order, says: "In none of them, so far as I can find, was there a case of general account superadded to the question of breach of trust, on the contrary where this has been the case it seems to have been uniformly held that the course of the Court was not altered by the general order. Upon the authorities, therefore, I think it must be considered as settled, that where the case is not one of breach of trust merely, but a general account is also sought, the general order does not dispense with the necessity of all the trustees being represented in the suit; and, I think this is both the best and most convenient construction to be

(*a*) 2 DeG. J. & Sm. 173.

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put upon the order, for the order does not in terms apply to cases of account, and it seems to point to demands which must result in liability to pay; but where a general account is to be taken there may in the result be no such liability, and if suits be permitted to be brought against one of several trustees for a general account, there can be little doubt that the trustees so sued will immediately institute a further suit, bringing his co-trustees before the Court in order that they may be bound by the accounts to be taken, by which, of course, they could not be bound if taken in their absence."

Judgment.

In *Biggs* v. *Penn* (*a*) to a bill filed for administration of the estate of the deceased the surviving executor alone was made a defendant, and, it was argued that the breach of trust alleged was one for which the executors were jointly and severally liable, and therefore the plaintiff was entitled to proceed against one or more of the persons severally liable. The cases of *Perry* v. *Knott* (*b*), and *Kellaway* v. *Johnson* (*c*), were cited in support of this position. The Vice-Chancellor, however, said that "where the case was one of a specific claim or injury which could be separately dealt with, it would be sufficient under the order to bring one or more of the parties severally liable before the Court; but, in this case the charge as to the breach of trust in the particular matter of the sale was only incidental to the general admininistration of the estate, and that administration could not be had in the absence of the executors of *Bromley*." In *Hall* v. *Austin* (*d*), these same cases from 5 *Beavan* were cited to the Vice-Chancellor, who says in reference to them, "I understand the Master of the Rolls to have decided that this order applies to a breach of trust and that if three men commit a breach of trust, a person complaining of that breach of trust may now sue two

(*a*) 4 Ha. 469.
(*b*) 5 Beav. 298.
(*c*) 5 Beav. 319.
(*d*) 2 Coll. C. C. 570.

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without the third. That, however, does not dispose of the present case. This is an administration suit, and it has been said, that as a general rule, where there are several executors who have acted, and one of them dies before any suit is instituted, a person interested in the administration of the estate cannot file a bill for the general administration of the estate making the surviving executors alone parties." The bill was there held on this ground defective for want of parties.

In *Penny* v. *Penny* (*a*), Sir *George Turner* says, "The question had been frequently under the consideration of the Court, whether, under the 32nd order of August, 1841, an administration suit could be maintained against one of several executors in the absence of the others, or of the personal representatives of those who were dead, and in several cases it had been determined by the Court that the 32nd order did not apply to such a suit." See also upon this point *Shipton* v. *Rawlins* (*b*), *Chancellor* v. *Morecraft* (*c*), *Fowler* v. *Reynal* (*d*), *Lenaghan* v. *Smith* (*e*), *Devaynes* v. *Robinson* (*f*), *Atkinson* v. *Mackreth* (*g*). I think the proper deduction to be drawn from these cases is, that the order on which the plaintiff relies does not apply to cases of general account but only to suits for a liquidated sum, or for a single definite breach of trust. As this order, if it applied, forms the only ground upon which the absence of *Piper* could be justified, and I hold that it does not apply to the present case, it follows that the bill is defective for want of this party, and that the demurrer is allowed. It may be questioned also whether the bill be not defective in respect of the limited administration to the estate of *Gordon*; as the case of *Clough* v. *Dixon* (*h*) would seem to shew that for the purpose of such an

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(*a*) 9 Hare at 43.
(*b*) 4 Hare 619.
(*c*) 11 Beav. 262.
(*d*) 2 DeG. & Sm. 754.
(*e*) 2 Ph. 301.
(*f*) 24 Beav. 86.
(*g*) L. R. 2 Eq. 570.
(*h*) 10 Sim. 564.

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account as is here sought general administration to the estate in question should be taken out. As the demurrer for want of parties has been allowed, it renders it unnecessary to consider the demurrer *ore tenus* for want of equity, and upon this I give no judgment *Westbrook* v. *The Attorney General* (*a*), *Malcolm* v. *Malcolm* (*b*).

The plaintiff thereupon brought the demurrer on before the full Court by way of rehearing, when the same Counsel appeared for the parties respectively.

SPRAGGE, C.—The judgment of my brother *Blake* upon the argument of the demurrer before him, gives a statement of the pleadings. The allegation in respect of the alleged insolvency of *Perry*, the co-surety of the defendant, being confessedly insufficient to excuse his being made a party under the former practice of the Court, the naked question is presented, whether in a case where there is one trustee, and there are two sureties for his due execution of the trust, a bill can be filed against one of the two sureties under our General Order 62, upon such a case of breaches of trust as is made by this bill. These alleged breaches of trust are summarized in the judgment of my brother *Blake;* and it is evident that an account of the administration of the trust estate by the trustee will be necessary, in order to fix the estate of the trustee, or the sureties of the trustee with any liability.

Judgment.

If the interpretation of the General Order were *res integra*, I think I should incline to the opinion that it applied to such a case as this, but the construction put upon the corresponding order in England has narrowed its application from what is its *prima facie* apparent meaning. I have read all the cases to which we have been referred, and several others. There has been some

(*a*) 11 Gr. 264. (*b*) 14 Gr. 165.

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difference of opinion among the English Judges as to the proper construction of the Order. Lord *Langdale* was inclined to give a wider application to it than it has since received. He said in *Kelloway* v. *Johnson* (*a*), where the case was that two trustees had been guilty of a breach of trust, and one only was made a defendant, "I think it is not necessary to have all the persons liable before the Court; for under the new Orders, if one trustee only was present I should make a decree against him, leaving him to seek contribution from the other trustees." I am not prepared to say that such should not be the rule now, where the breach of trust complained of is one isolated transaction; but it certainly is not the rule where an account is necessary. The marginal note to *Coppard* v. *Allen* (*b*), states correctly what was determined in that case: "Where a bill by a *cestui que trust* is not confined to seeking relief in respect of a particular breach of trust; but a general account of the trust estate is also sought, the General Order does not dispense with the necessity of all the trustees being represented in the suit." That case and the cases referred to in it seem to have proceeded upon the principle of the remedy over, which one of several trustees has against his co-trustees, and the inconvenience which would result from applying the rule where an account would be necessary, and the remedy over be complicated by its being taken in the absence of co-trustees, and so, Lord Justice *Turner* observes (*c*): "If suits be permitted to be brought against one of several trustees for a general account, there can be little doubt that the trustee so sued will immediately institute a further suit, bringing his co-trustees before the Court, in order that they may be bound by the accounts to be taken, by which of course they could not be bound if taken in their absence."

Judgment.

(*a*) 5 Beav. at 325. (*b*) 2 D. J. & S. 173.

(*c*) Page 181.

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Morrow v. McDonald.

Mr. *Moss* contends that *Coppard* v. *Allen*, and cases of that class do not apply, because there was in them an original joint liability; while here there was a liability by a single trustee, who alone dealt with the trust estate; and with whose dealings with the estate his sureties had nothing to do; and who are now brought into Court by reason of a joint and several liability which they incurred by contract. I see nothing in any of the cases to give color to such a distinction. If it exists, the rule enunciated in *Coppard* v. *Allen* would not apply, however complicated the account of a trust estate, where the trust deed creates a joint and several liability, as it often does, in the trustees; and, *pari ratione*, where the like liability arises by operation of law from the relative position of the parties.

Judgment.

I confess I see no reason in such a distinction. The argument for the narrower construction of the Order, on the score of convenience and avoiding multiplicity of suits, applies with as much force to this case as to the cases to which it is applied by the Lord Justice. It applies in short, in principle, to all cases in which, in order to establish liability, and the amount of liability, it is necessary to take an account, and in which there exists the right to call for contribution from others, who are liable on the same account, whether their position be that of trustees or sureties.

Nothing was said upon the rehearing as to the insufficiency of an administrator *ad litem* to represent the estate of the trustee. Speaking for myself I should say that such an administrator does not, as a general rule, represent the estate of the trustee for such purposes, as the sureties are entitled to have it represented. Whether the allegations as to the insolvency of the trustee take the case out of the general rule I express no opinion, as the point has not been argued.

I think that the order of my brother *Blake*, allowing the defendant's demurrer for want of parties, is right, and should be affirmed with costs. 1873. Garrow v. McDonald.

STRONG, V. C., concurred.

BLAKE, V. C.—I think the authorities shew that the order in question is limited in the manner I found it was, when the demurrer was argued before me. I still am of opinion the order in the Court below was correct, and I agree in the judgment that the rehearing should be dismissed with costs.

INGOLDSBY v. INGOLDSBY.

Will—Soundness of mind—Testamentary capacity.

The question as to what degree of unsoundness of mind will incapacitate a person from executing a will, considered.

A party who had at one time been insane, afterwards made a will. It was shewn that though he continued to be eccentric in his habits, he had a clear appreciation of the value and extent of his property; as also of the objects of his bounty.

Held, therefore, that he was in such a state of mind as qualified him to make a valid disposition of his estate within the ruling in the case of *Banks* v. *Goodfellow*, L. R. 5 Q. B. 543.

Statement.

The bill in this case was filed by *Michael Ingoldsby* against *Peter Ingoldsby*, *Thomas Ingoldsby*, and others, seeking to set aside the will of *Peter Ingoldsby*, deceased, on the ground that the testator was at the time of executing the same of unsound mind, and that such execution was procured by the defendant *Peter Ingoldsby*, while the testator was so unfit to execute a will, and prayed a declaration to that effect; an injunction to restrain the said defendants, *Peter* and *Thomas Ingoldsby* from cutting down and removing timber from the lands devised, and for other relief.

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Ingoldsby v. Ingoldsby.

The cause came on for hearing before the Chancellor at the sittings at Guelph.

Mr. *Moss*, Q. C., and Mr. *D. L. Scott*, for the plaintiff.

Mr. *Fletcher* and *Mr. Flemming*, for the defendants.

SPRAGGE, C.—At the close of the case, I thought it proved that the testator had at one time been insane; that he was so in about the year 1854.

Two instances are mentioned as proving insanity on the part of the testator; one, the placing of meat in the horses' mangers; the other, the fact of his placing rails over a mare that had fallen into a hole, and burning her to death.

Judgment.

In the later year, of his life, there is no doubt that he was eccentric; and it having been proved that he had been insane, his eccentricities might be attributed to insanity. He was mentally weak; and his attempts to frame a will from the draft furnished to him by his brother, indicate mental weakness and want of coherency in thought and expression.

In giving my views of the case at the close of the argument, I proceeded upon the law as laid down in *Waring* v. *Waring* (*a*) and *Smith* v. *Tebbitt* (*b*). I had not seen the later case of *Banks* v. *Goodfellow* (*c*). In that case the principle enunciated in the two previous cases is thus summarized:—

"We come now to the case of *Waring* v. *Waring*, since followed by that of *Smith* v. *Tebbitt*, in which the doctrine now contended for on behalf of the plaintiff was

(*a*) 6 M. P. C. C. 341. (*b*) L. R. 1 P. & M. 398.
(*c*) L. R. 5 Q. B. 549.

for the first time laid down. It may be shortly stated thus: to constitute testamentary capacity, soundness of mind is indispensably necessary. But the mind, though it has various faculties, is one and indivisible. If it is disordered in any one of these faculties, if it labours under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound. Such a mind is unsound, and testamentary incapacity is the necessary consequence."

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The judgment of the Court, composed of the Chief Justice and JJ. *Blackburn*, *Mellor*, and *Hannen*, was delivered by the learned Chief Justice, and is a very elaborate and able one.

The will in that case was executed in December, 1863; it was impeached by the heirs of the testator, and the jury found in favour of the will: a new trial was applied for on the ground of misdirection by the learned Judge, Mr. Justice *Brett*, before whom the cause was tried; and that the verdict was against the weight of evidence. A copy of the direction is given at page 550 of the report; it was as follows: "It is admitted that from time to time the testator was so insane that he was incapable of making a will. The question is, whether on the 2nd of December, 1863, or on the 28th of December, 1863, or on both, the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions, free from delusions, as would enable him to have a will of his own in the disposition of his property and act upon it. The mere fact of his being able to recollect things, or to converse rationally on some subjects, or to manage some business, is not sufficient to shew he was sane. On the other hand, slowness, feebleness, and eccentricities, are not sufficient to shew he was insane. The whole burden of shewing that the testator was fit

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at the time, is on the defendant in this case. In order to determine whether the testator had a lucid interval when the wills, or either of them, were made, it may be important to consider what was the extent and nature of his admitted general insanity."

The alleged misdirection was, "that the learned Judge in leaving to the jury the question whether at the time of making the will the testator was free from delusions, did not proceed to tell them that though the delusions, under which the testator had undoubtedly before laboured, might not have been present to his mind at the time of making the will; yet, if they were latent in his mind, so that if the subject had been touched upon the delusions would have recurred, he was of unsound mind, and therefore incapable of making a will."

Judgment.

This raises much the same question as was raised in *Waring* v. *Waring* and *Smith* v. *Tebbitt*. The learned Chief Justice after noticing the point raised, proceeds to discuss the general question; first premising that "for the present purpose, it must be taken as a fact that the testator, though generally of weak intellect, was able to manage his own affairs; and apart from the delusions under which he labored, was at all events at the time of executing one or both of the testamentary instruments in question, of sufficient testamentary capacity. We must also take it that no delusion manifested itself at the time of making the will. On the other hand, there is ample proof that the delusions existed in the interval between the making of the will and the death of the testator, as they had done before; and it is therefore quite possible that these delusions may have remained at the time of making the will, uncured and latent in the testator's mind, and capable of being evoked and reproduced at any moment, if anything had occurred to lead his thoughts to the subject.

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"The inquiry not having been directed to this point, it is quite possible that all that the jury meant in finding in the affirmative of the question, whether the testator was free from delusions at the time of making his will, was that the delusions were not present to his consciousness, not that they were eradicated from his mind; and that if the question had been specifically put to them whether the delusions still remained latent in the testator's mind, and his mind was to the extent of these delusions unsound, they would have found in the affirmative.

"It therefore becomes necessary to consider how far such a degree of unsoundness of mind as is involved in the delusions under which this testator laboured, would be fatal to testamentary capacity; in other words, whether delusions arising from mental disease, but not calculated to prevent the exercise of the faculties essential to the making of a will, or to interfere with the consideration of the matters which should be weighed and taken into account on such an occasion, and which delusions had in point of fact no influence whatever on the testamentary disposition in question, are sufficient to deprive a testator of testamentary capacity and to invalidate a will."

Judgment.

In the case before me, there were little or no "delusions" in the ordinary sense of the term, but I thought the conduct of the testator on several occasions, not consistent with soundness of mind.

To return to the judgment in *Banks* v. *Goodfellow*:—

"We must assume, for the present purpose that the testator laboured under the insane delusions ascribed to him; but on the other hand, that these delusions had not, nor were calculated to have any influence on him in the disposal of his property, and that irrespective of these delusions, the state of his mental faculties was

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such as to render him capable of making a will. For whatever may have been the evidence as to general insanity, the verdict of the jury, which there was ample evidence to support, and in which the learned Judge who presided at the trial states that he concurs, establishes that at the time of making the will, irrespectively of the delusions referred to, the testator was sufficiently in possession of his faculties.

"The question whether partial unsoundness, not affecting the general faculties, and not operating on the mind of a testator in regard to the particular testamentary disposition, will be sufficient to deprive a person of the power of disposing of his property, presents itself here for judicial decision, so far as we are aware, for the first time. It is true that, in the case of *Waring* v. *Waring*, the judicial committee of the Privy Council, and in the more re-

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cent case of *Smith* v. *Tebbitt*, Lord *Penzance* in the Court of Probate, have laid down a doctrine, according to which any degree of mental unsoundness, however slight and however unconnected with the testamentary disposition in question, must be held fatal to the capacity of a testator. But in both these cases, as we shall presently shew, the wide doctrine embraced in the judgment, was wholly unnecessary to the decision, and we therefore feel ourselves warranted, and indeed bound to consider the question as one not concluded by authority, and on which we are called upon to form our own judgment. The question is one of equal importance and difficulty, and we have given it our best consideration;" and Lord *Kenyon*, in the case of *Greenwood* v. *Greenwood* (*a*), in charging the jury, remarked: "I take it, a mind and memory competent to dispose of property, when it is a little explained, perhaps may stand thus: having that degree

(*a*) 3 Curt. App.

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of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it. If he had a power of summoning up his mind, so as to know what his property was, and who these persons were that then were the objects of his bounty, then he was competent to make his will."

To quote further from the judgment in *Banks* v. *Goodfellow*, the learned Chief Justice proceeds, at page 559 of the report: "As has already been observed, neither in *Waring* v. *Waring*, nor *Smith* v. *Tebbitt*, was the doctrine thus laid down in any degree necessary to the decision. Both these were cases of general, not of partial insanity; in both the delusions were multifarious, and of the wildest and most irrational character, abundantly indicating that the mind was diseased throughout. In both there was an insane suspicion or dislike of persons who should have been objects of affection; and what is still more important, in both it was palpable that the delusions must have influenced the testamentary disposition impugned. In both these cases, therefore, there existed ample grounds for setting aside the will without resorting to the doctrine in question. Unable to concur in it, we have felt at liberty to consider for ourselves the principle properly applicable to such a case as the present. We do not think it necessary to consider the position assumed in *Waring* v. *Waring*, that the mind is one and indivisible, or to discuss the subject as matter of metaphysical or psychological inquiry. It is not given to man to fathom the mystery of the human intelligence, or to ascertain the constitution of our sentient and intellectual being. But whatever may be its essence, every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The senses, the instincts, the affections, the passions, the moral qualities, the will,

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perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac; in other instances one or more only, of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed; that while the mind may be overpowed by delusions which utterly demoralize it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions, which, though the offspring of mental disease and so far constituting insanity, yet leave the individual in all other respects rational and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. No doubt when delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound; just as the body if any of its parts or functions is affected by local disease, may be said to be unsound though all its other members may be healthy and their powers or functions unimpaired. But the question still remains, whether such partial unsoundness of the mind, if it leaves the affections, the moral sense and the general power of the understanding unaffected, and is wholly unconnected with the testamentary disposition, should have the effect of taking away the testamentary capacity.

Judgment.

"We readily concede that where a delusion has had, as in the case of *Dew* v. *Clark* (*a*), or is calculated to have had an influence on the testamentary disposition, it must be held to be fatal to its validity. Thus if, as occurs in

(*a*) 3 Add. 79, and Haggard's Report of the Judgment.

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a common form of monomania, a man is under a delusion that he is the object of persecution or attack, and makes a will in which he excludes a child for whom he ought to have provided; though he may not have adverted to the child as one of his supposed enemies, it would be but reasonable to infer that the insane condition had influenced him in the disposal of his property, but in the case we are dealing with, the delusion must be taken neither to have had any influence on the provisions of the will, nor to have been capable of having any, and the question is, whether a delusion thus wholly innocuous in its results as regards the disposition of the will is to be held to have the effect of destroying the capacity to make one."

The learned Chief Justice then refers to the civil law and to the law of foreign countries on the same subject, observing at page 565 of the report:—"It is unnecessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious in either case, that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power, that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it, which, if the mind had been sound, would not have been made. Here, then, we have the measure of the degree of mental power which should, be insisted on. If the human instincts and affections, or the moral sense become perverted by mental disease;

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1873. Ingoldsby v. Ingoldsby. if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions and to lead to a testamentary disposition, due only to their baneful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand. But what if the mind, though possessing sufficient power undisturbed by frenzy or delusion, to take into account all the considerations necessary to the proper making of a will, should be subject to some delusion, but such delusion neither exercises nor is calculated to exercise any influence on the particular disposition, and a rational and proper will is the result, ought we, in such a case, to deny to the testator the capacity to dispose of his property by will?

udgment. "It must be borne in mind that the absolute and uncontrolled power of testamentary disposition conceded by the law, is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself. If, therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposal of property, why it may be asked, should it be held to take away the right. It cannot be the object of the legislator to aggravate an affliction in itself so great by the deprivation of a right the value of which is universally felt and acknowledged. If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind, is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties ne-

cessary for such an act, nor is capable of influencing the result ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right."

"No doubt where the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust and every presumption should in the first instance be made against it. Where insane delusion has once been shewn to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made under such circumstances becomes additionally strong where the will is, to use the term of the civilians, an inofficious one, that is to say, one in which natural affection, and the claims of near relationship have been disregarded. But where in the result a jury are satisfied that the delusion has not affected the general faculties of the mind and can have no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or, why a will made under such circumstances should not be upheld."

Judgment.

I have referred at great length to the very learned and able judgment in *Banks* v. *Goodfellow*. It must be taken now as the authoritative exposition of the law, and judging of the testamentary capacity of the testator in the case before me, by the rules propounded in that case, my conclusion is, that he was of testamentary capacity. I think the proper conclusion from the evidence is, that the testator was in such possession of his faculties as is described in the passage I have last quoted from the judgment of Sir *Alexander Cockburn*. If I had before

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me only the evidence of Mrs. *McQuaid*, I should hesitate certainly to come to such a conclusion; but I think the evidence of *Thomas Ingoldsby*, a brother of the testator, and a witness to the will, entitled to at least as much weight. I thought he gave his evidence intelligently and dispassionately, and I give credence to what he says as to the part taken by the mother in relation to the making of the will.

It is a circumstance entitled to some weight, that the mother and brother of the testator, the former in constant, and the latter in frequent intercourse with him, and who could have no motive for supporting such a will as he was making, both thought him of sufficient capacity to make a will.

Upon the whole, my opinion is, that upon the whole of the evidence, and taking the law to be as enunciated in *Banks* v. *Goodfellow*, I must pronounce in favour of the will, and dismiss the plaintiff's bill, and with costs.

Judgment.

PAYNE v. HENDRY.

Insolvency—Unjust preference.

Two mortgages were created by a debtor in favor of a creditor, whose claim consisted of promissory notes then current. It appeared that the debtor was in insolvent circumstances, and the Court considered that both the debtor and creditor contemplated the debtor going into insolvency, which he did shortly afterwards. On a bill filed by the assignee in insolvency to set aside these mortgages, the Court *held* them void as an "unjust preference" under the Insolvent Acts of 1864 and 1869.

Examination of witnesses and hearing at Cobourg.

The bill was filed to have certain mortgages executed by *William D. Easton* to the defendant declared void,

as having been an unjust preference of the defendant under the Insolvent Acts of 1864 and 1869. It appeared that when these instruments were executed *Easton* was in insolvent circumstances, and was indebted to defendant on certain promissory notes then current, and that the defendant was aware that *Easton* was in insolvent circumstances; and the Court considered that his becoming insolvent was in the contemplation of both parties.

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Mr. *J. D. Armour*, Q. C., for the plaintiff.

Mr. *Price* (Kingston), for the defendants.

The authorities cited are mentioned in the judgment.

SPRAGGE, C.—This case was heard before me at Cobourg. At the close of the argument I gave judgment upon the facts of the case appearing in evidence; I held it proved that the insolvency of the debtor was in the contemplation of the debtor, *Easton*, and also of defendant *Hendry*, the creditor; and that the mortgages which are impeached in this suit gave to *Hendry* a preference over other creditors, and I said I inclined to think it an unjust preference within the meaning of section 89, of the Insolvent Act of 1869, inasmuch as the evident policy of the Act was to place the general body of creditors upon an equal footing; that any preference which contravened that policy, would be an unjust preference *prima facie;* and that the onus was thrown upon the creditor preferred of shewing some reason why it was just that he should be preferred. The inclination of any opinion I stated was in favor of the plaintiff, but I said I would, before disposing of the case, examine the cases to which I was referred. I have since carefully examined those cases, and a number of others.

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The cases of *McWhirter* v. *Thorne* (*a*), *Campbell* v. *Barrie* (*b*), and *Archibald* v. *Haldan* (*c*), proceed upon the authority of cases in England, decided upon the provisions of the English Bankruptcy Acts, which are materially different from the provisions of our Insolvency Acts. The English cases referred to are, with the exception of one or two of the older ones, decided upon the Bankruptcy Consolidation Act, passed in 1849, 12 & 13 Victoria, chapter 106. This Act was followed by the Bankruptcy and Insolvency Amendment Act of 1861, 24 & 25 Victoria, chapter 134. Neither of these Acts contain any provisions corresponding with section 8, sub-section 4 of our Insolvency Act of 1864, or with section 89, or section 86, of our Act of 1869, or provisions of similar tenor or effect.

Judgment.

The English decisions proceed upon section 67 of the Act of 1849, aided in its interpretation by section 133 of the same Act, and the provisions avoid only fraudulent preferences, with intent to defeat or delay creditors. They are in effect similar to other provisions of our Acts, sub-section 3 of section 8 of the Act of 1864, under which *Clemmow* v. *Converse* (*d*), which was before me, was decided, and section 88 of the Act of 1869.

There is, however, one of the English cases, *Smith* v. *Cannon* (*e*), to which I desire to direct particular attention. It was in the Exchequer Chamber, before Sir *John Jervis*, C. J., Chief Baron *Pollock*, Lord *Wensleydale* (then Baron *Parke*), Judges *Cresswell*, *Platt* and *Williams*, and *Martin*, B. It had been held in previous cases that an assignment by a trader of all his effects was evidence of a fraudulent intent. In *Smith* v. *Cannon* the whole had not been assigned, and it did not appear that there was not sufficient to satisfy,

(*a*) 19 U. C. C. P. 302.
(*b*) 31 U. C. 279.
(*c*) 31 U. C. 295.
(*d*) 16 Gr. 547.
(*e*) 2 E. & B. 35; S. C. 17 Jur. 911.

eventually, all the creditors. The assignment was held void. The judgments given, contain a clear and broad exposition of the law. I cannot do better than quote some of the passages:— 1873. Payne v. Hendry.

Chief Justice *Jervis*, in his judgment (*a*), says: "The first remaining question is, whether, independently of any proposition of law, there was any evidence to go to the jury,—because if there were, we should presume on this bill of exceptions that it was left to the jury—that *Garnham* made or caused to be made a fraudulent conveyance with intent to defeat and delay his creditors. The fact being that *Garnham* had conveyed to the plaintiff in error all his property, except two shares of small value in the East of England Bank, I am of opinion that it was clearly evidence to be left to the jury, on which they were justified in finding that he had made a fraudulent conveyance, with intent to delay his creditors. And I am inclined to think, that inasmuch as such a conveyance must have the effect of defeating or delaying creditors, and every man must be taken to intend the necessary consequences of his own acts; the party who executed it must be presumed to have had the intent; and therefore there was no question for the jury. Judgment

"Then it is said that, construing the Act with reference to the earlier cases, the assignment was not within the Act, because the trade of the assignor was not stopped. But the language of the judgments in those cases is to be taken with reference to the subject matter then in discussion, and the attention of the Judges was directed to the effect of an assignment of stock-in-trade; also, no question was made in those cases, whether the deed had the operation of stopping the bankrupt's trade, and therefore those judgments were not intended to control

(*a*) At page 913.

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the operation of the Act, which is much larger in its scope, for it applies to all creditors, and if they are defeated or delayed, even though the stock-in-trade is not conveyed, and the trade is not stopped, the trader becomes a bankrupt.

"It was further said, that the creditors were not defeated or delayed, because the property conveyed exceeded by two-thirds the amount of the claim which the assignee could have against his debtor; but that makes no difference, because though ultimately the conveyance may not defeat the creditors, it delays them, inasmuch as though they should be armed with a *fieri facias*, they cannot have the fruits of it, for the resulting trust in favor of the assignor cannot be taken in execution. The test of the effect of the deed is, whether a man is insolvent and has not the means of satisfying his creditors, not whether he is insolvent in the popular sense of the word, that is, will never be able to pay them."

Judgment.

Pollock, C. B., in his judgment (*a*), observed: "Then it was contended that the assignment could not be treated as fraudulent, unless it was shewn that trade creditors were delayed. But if a trader makes a fraudulent assignment of his private property with intent to defeat or delay his creditors, I am of opinion that we are not to inquire what class of creditors is defeated or delayed: it is sufficient if any creditors are defeated or delayed. It was also said, that we may consider a man in two characters; and because the assignment excluded trade property the trader might do what he liked with the rest of his property. But there is no foundation for that distinction.

"There was no ruling by the Judge that the deed of assignment made *Garnham* insolvent or stopped his

(*a*) At page 914.

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trading, and therefore I hardly know why we have spent so much time in examining previous cases. I am of opinion, that there was evidence to go to the jury that this assignment was an act of bankruptcy, and that the exception of the trading property from the deed did not prevent the bankrupt laws from being applied to the assignment of his other property, and was not sufficient to prevent it from being a fraudulent assignment of his property within the Act."

And *Parke*, B., concludes his judgment as follows: "The contention to the contrary has been founded on expressions of the Judges in the older cases. But in considering what constitutes an act of bankruptcy, the true question is, not whether the effect of the assignment is to oblige the assignor to cease to carry on his trade, but whether it makes him incapable of paying his creditors in the ordinary way, and in the words of Lord *Ellenborough*, in *Newton* v. *Chantler* (*a*), 'prevents them from pursuing their present ordinary remedy against him for the payment of their demands.'" Judgment.

In *Newton* v. *The Ontario Bank* (*b*) the question was but little discussed, and the decision of the case did not, either in this Court or in the Court of Appeal, turn upon it (*c*).

My own opinion is, that the construction placed by the Court of Queen's Bench, in *Adams* v. *McCall* (*d*), upon subsection 4 of section 8, of the Act of 1864, is the true one. The present Chief Justice of Appeal, then Chief Justice of Upper Canada, said in that case. "Then, under the 4th subsection of section 8, above quoted, the knowledge of the plaintiff of *Shoemaker's* (the insolvent debtor) inability to pay his debts, or of a fraudulent in-

(*a*) 7 East 138.
(*b*) 13 Gr. 652.
(*c*) 15 Gr. 283.
(*d*) 25 U. C. 219.

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tention on his part to impede, obstruct or delay his creditors, is not material to make the transfer null and void; and even the existence of a fraudulent intent is not necessary under this subsection. It presents, as applicable to this case, no other question than, whether *Shoemaker* in contemplation of insolvency gave this timber by way of payment to the plaintiff; whereby he obtained an unjust preference over the other creditors. We take the policy of the Act to be to distribute the insolvent's effects ratably among all his creditors, and that if one of them obtains payment in full by the means stated in this fourth subsection, while the others get nothing, it is an 'unjust preference,' contrary to its letter and true spirit." It is substantially the view which, as I have said, I took at the hearing of this case.

Judgment.

In *McWhirter* v. *The Royal Canadian Bank* (*a*), which was before the late Vice-Chancellor *Mowat*, there were two mortgages given by the debtor to the Bank, upon the application of the Bank; and both, as is said in the judgment, "in consequence of urgent pressure." When the first mortgage, which did not cover the whole of the property was given, he was insolvent, but this was unknown to the Bank; but his insolvency became known to the Bank before the giving of the second mortgage, and this second mortgage covered, so far as appeared, all his property with the exception of his book debts, and had the effect, in connection with certain previous proceedings of the Bank, of stopping the business of the debtor. The learned Vice-Chancellor held the first mortgage valid, and held the second invalid. It does not appear in the case whether or not the debtor was aware of his own insolvency.

The judgment saving the first mortgage seems to have proceeded upon the circumstance of pressure having

(*a*) 17 Gr. 480.

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been exercised by the creditor upon the debtor; and the presumption that would otherwise arise of a fraudulent intent on the part of the debtor being thereby rebutted. This supposes that the debtor was himself aware of his insolvent condition. A large number of English cases are referred to in the case, but *Adams* v. *McCall* does not appear to have been cited; nor does it appear to have been noticed that the English Bankruptcy Acts contain no provision similar to that upon which that case was decided.

I should have come to the conclusion with less hesitation that the mortgages impeached by this bill should be avoided, but for the ruling of the Privy Council in a case to which I was not referred, *The Bank of Australasia* v. *Harris* (*a*). The appeal was from a Colonial Court in Queensland. The judgment in the Colonial Court proceeded upon the Insolvency Act of the Colony, the 8th section of which avoids all alienations, transfers, &c., made by a debtor in contemplation of insolvency, "and having the effect of preferring any then existing creditor to another." The words in our Act are, "whereby such creditor obtains, or will obtain, an unjust preference over the other creditors." The word "unjust" is not in the Queensland Insolvency Act; but in the Privy Council it was held that looking at the whole Act, and especially at the 5th, 6th, 7th, 9th, and 12th sections, as well as the 8th; the preferring, spoken of in the 8th, meant a fraudulent preferring. Lord Justice *Knight Bruce*, by whom the judgment was delivered, said, "The better opinion, they think, is that according to the true construction of the Act those words indicate fraudulent preference, and were not intended to refer to any case of preference not fraudulent;" and he then goes on to say, "but whether this be so or not, in the full sense of fraudulent preference, as gener-

Judgment.

(*a*) 15 Moo. P. C. C. 97.

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ally understood, their lordships are satisfied that the words in question were not intended, and ought not to be construed to extend to a case in which not only there was no intention to prefer, but in which the preference (if such there were) arose merely from the circumstance that *Harris & Co.*, when they accepted the bill, were creditors of *Lloyd & Co.*, whereas by accepting the bill they had represented themselves to be debtors; and had authorized third persons dealing with the bill to consider them as such. * * There is, in their lordships' opinion, nothing in the evidence to show or lead to the inference, that the delivery or indorsement of the bill to the appellants (the Bank) by *Lloyd & Co.*, or the discount of the 11th of July, was by way of fraudulent preference, or was otherwise than a fair transaction in the ordinary course of business."

Lloyd & Co., the insolvents, put into the Bank a bill drawn on *Harris & Co.*, who carried on business at a different place. The Bank sent the bill to *Harris & Co.*, who returned it accepted; and the Court thought it not proved that the Bank had any notice of the insolvency of *Lloyd & Co.*, or any notice of their suspension of payment before August or September.

Judgment.

Such was the case with which the Court had to deal. The discount of the 11th of July was not only, not by way of fraudulent preference, but it was not, so far as the Bank was concerned, by way of preference at all. The most that could be said of the transaction was, that its effect was, that the Bank was thereby preferred to *Harris & Co.*, who appear in the guise of debtors, but who were in fact creditors. If the word "unjust" had found a place in the Queensland Act, or if the like transaction had occurred in Canada, it must have been held that any preference obtained by the Bank was not an unjust preference. The question seems to have been treated as a question between the Bank and *Harris*

& Co., the Bank having sued them; and they having pleaded the Insolvency Act. 1873.

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All that it was necessary for the Privy Council to decide was, that the Act did not apply to the transaction in question; and that was all that was really decided, it being at the same time intimated that, in the opinion of the Court, the preference mentioned in the Act meant a fraudulent preference; and that opinion is, of course, entitled to the greatest deference.

There is this to be said in reference to the difference of the language in the two Acts. The Privy Council imported the word "fraudulent" into the clause. That word must apply to the Acts done, which are thereby avoided. There is no such thing as a fraudulent effect. It can only be a fraudulent preference where the acts by which it is brought about are fraudulent. In our Act the language points to the effect. A debtor in contemplation of insolvency does certain acts, it may be without any fraudulent intent, and it may be without concert with any creditor but if the effect be an unjust preference over other creditors, it is avoided by the Act. Judgment.

The case before the Privy Council and this case, differ in character and in almost every essential particular, and it by no means follows from what was held in that case, that a fraudulent intent would be held necessary to the avoidance of such transactions as are pointed at by the 89th section of our Act.

I think indeed, in this case, that the 89th section may be put out of the case, for the transaction impeached by this bill seems to me to fall clearly within the provisions of section 86; that section enacts, *inter alia*, that "all contracts by which creditors are injured, obstructed or delayed, made by a debtor unable to meet his engagements, and afterwards becoming an insolvent, with

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a person knowing such inability, or having probable cause for believing such inability to exist, or after such inability is public and notorious, whether such person was his creditor or not, are presumed to be made with intent to defraud his creditors."

The words "whether such person be his creditor or not," appear for the first time in the Act of 1869. The clause, with those words must apply to acts whereby the general body of creditors are injured; and it treats such acts as a fraudulent preference. The transaction in this case fulfils all the conditions specified in this clause of the Act.

Judgment.

The plaintiff is, in my opinion, entitled to a decree, with costs.

MULHOLLAND v. MERRIAM.

Informal instrument—Trustee—Portions—Subsequent gift.

The proper definition of a portion considered.

A man by an informal instrument assigned to a trustee all his estate and effects on the condition of the trustee paying to each of the children of the assignor $400. Subsequently the grantor conveyed to one of his sons a house and premises valued at $200.

Held, that the trustee could not set this up as part satisfaction of the $400 mentioned in the first deed; and that declarations of the father, made subsequently to the assignment in trust, and the conveyance to, and in the absence of, the son, were inadmissible to shew the conveyance was made, and intended to be in part satisfaction of the sum so secured to the son.

The decree in this case, reported *ante* vol. xix., page 288, affirmed on rehearing.

Rehearing by defendant of decree, as reported *ante* vol. xix., page 288.

The facts giving rise to this suit appear in the former report.

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Mulholland v. Merriam.

Mr. *E. B. Wood*, for the defendant.

Mr. *Hodgins* and Mr. *A. Hardy*, contra.

STRONG, V. C.—The question of jurisdiction which was the principal topic of discussion at the hearing, has been little argued on the rehearing, and I have heard nothing to shake in the least degree the opinion formerly expressed by me upon that point.

The decree has been principally impugned on the ground that it does not charge the plaintiff with $200, as the value of the house and land at Branchton, conveyed to him by his father subsequently to the execution of the instrument of the 6th of November, 1868. The defendant puts this contention on two grounds; first, he says that this property at Branchton was included in the assignment of the 6th November; and secondly, that even though it was not so included, yet the conveyance of it to the plaintiff, having regard to the declarations of *John Mulholland*, which he insists are admissible in evidence, constituted *pro tanto* a satisfaction of the plaintiff's share or portion. Judgment.

The first of these grounds is very easily disposed of. As was pointed out by Mr. *Hardy*, the defendant in his answer does not claim that the house and land conveyed to the plaintiff were intended to have been comprised in the transfer by *John Mulholland* to himself. The 5th paragraph of the answer is as follows: "I say that the plaintiff has received the full benefit of the provision made in his favor by the said bond and agreement; subsequent to the execution of the said instrument it was agreed between the plaintiff and the said *John Mulholland*, his father, that $200 parcel of the moneys payable to the said plaintiff under the said bond and agreement should be satisfied and discharged by the conveyance of a parcel of land in the village of

1873. Mulholland v. Merriam. Branchton, and the said *John Mulholland*, accordingly, in pursuance of such agreement, on the 23rd day of November, 1868, executed a conveyance of the said parcel of land to the plaintiff, and the plaintiff accepted of such conveyance in satisfaction of the said sum of $200 parcel of the moneys aforesaid, and entered into the possession of the said lands, and in such possession has ever since continued."

This clearly puts the defence as regards this Branchton property, exclusively on the ground of partial satisfaction by *John Mulholland*.

The defendant, as proof of this satisfaction, relies on the evidence of witnesses who speak of declarations to that effect made by *John Mulholland*, after the conveyance to the plaintiff, and in the plaintiff's absence.

Judgment. These declarations I determined to be inadmissible as evidence against the plaintiff, and I remain of that opinion.

By the general rule of evidence a declaration made by the grantor in a deed subsequently to its execution, and in the absence of the grantee is not of course receivable.

The defendant, however, invokes certain exceptional rules, peculiar to Courts of Equity, governing the admission of parol testimony in cases where there arise for decision questions relative to the satisfaction of portions. That these rules have any application here is, I think, by no means clear. Can it be said that the sum of $400 which was given to the plaintiff, not directly, either by will or *inter vivos* by the father himself, but was to be paid by the defendant in pursuance of stipulations entered into for valuable considerations, was a portion? A portion, so far as I can find any definition

of its meaning, imports a direct gift from parent to child, which this certainly was not. I incline therefore to think, that it is a concession to the defendant to consider whether this evidence can be received on the only ground on which its admissibility can possibly rest. I will however do this. 1873. Mulholland v Merriam.

The rule with reference to the satisfaction of portions is well established to be that two successive gifts of subjects not *ejusdem generis*, whether both or either are made *inter vivos* or by will, are *prima facie* cumulative (*a*). Therefore no presumption of satisfaction would have arisen, even had there been a bond direct from the father to the son to pay the $400, merely by reason of the conveyance.

Then it appears to be well settled that Courts of Equity will, when parol evidence is properly admissible on the question of satisfaction of portions, receive proof of declarations made by the donor subsequently to the second gift, and in the absence of the person to be benefited. Judgment.

Parol evidence is, however, only admissible in a class of cases which does not comprise the present. Where by a comparison of the two instruments of gift a presumption in favor of substitution is raised, parol evidence is receivable to rebut that presumption, and in favor of the simple construction of the written instruments, and such evidence being thus introduced to repel the equitable intendment, it is, in like manner, also receivable to support it. But I understand it to be settled that where no such presumption can be raised in the first instance without the aid of extrinsic proof, parol evidence is not admissible, inasmuch as to admit such evidence would

(*a*) Spence Eq. Jurisdiction, vol. 2, p. 433; Barrett v. Beckford, 1 Ves. 519; Masters v. Masters, 1 P. W. 421, Crompton v. Sale, 2 P. W. 553; Eastwood v. Vinke, 2 P W. 613.

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not be to rebut any presumption but to destroy the effect of a written instrument.

Mr. *Taylor*, in his Treatise on Evidence, says (5th edition, page 1056): "If the circumstances on the face of the instrument are such as to rebut the presumption drawn by the law, or if the Court does not raise any such presumption at all, parol evidence to fortify the presumption in the one case or to create it in the other, will be alike inadmissible; because in either event the effect of the evidence would be to contradict the apparent meaning of the writing."

This statement of the law is fully borne out by the following authorities: *Palmer* v. *Newell* (*a*), *Hall* v. *Hill* (*b*), *Spence's* Equ. Jur. vol. ii., pages 445–447; and several decisions of Sir *John Leach* to the contrary, must now be considered as overruled by the later cases just quoted.

Judgment.

I adhere, therefore, to my first decision, that the evidence consisting of declarations alleged to have been made by *John Mulholland*, the settlor, to various persons subsequent to the conveyance of the Branchton property were not receivable.

These declarations were, however, even if the evidence had been let in, neutralized by other and directly contradictory declarations made to other persons. And, had I been obliged to receive and act on the evidence, I should certainly have held that the plaintiff's witnesses who proved these last statements of the settlor were worthy of credit, and that being so, it would have been necessary to deal with a case in which conflicting declarations were made by the settlor at different times;

(*a*) 20 Beav. 32; affirmed in appeal, 8 De G. McN. & G. 74.
(*b*) 1 Dr & War. 94.

how otherwise could I have dealt with such a state of the evidence, especially having regard to all the circumstances which will be pointed out in the judgment of my brother *Blake*, otherwise than by wholly disregarding the grantor's declarations, and giving effect to the deeds. 1873. Mulholland v. Merriam.

Had I, however, been driven to choose between the witnesses, I should have preferred those of the plaintiff, and my finding on the facts would have been against the defendant on that ground.

The decree, I think, should be affirmed with costs.

BLAKE, V. C.—The facts of this case are, so far as they are material, set out in the judgment of the Vice-Chancellor who tried the cause. The first point raised is, that there is no trust created, by the instrument in question, in favor of the plaintiff, and consequently that this Court is without jurisdiction in the matter. I am of opinion that this must be decided in favor of the plaintiff. Looking at the whole of the agreement entered into between the defendant and *John Mulholland*, deceased, I think it is clear that when the defendant accepted the property assigned to him thereby, on the condition that he should pay the plaintiff a certain sum of money, he then became bound to carry out, in favor of the plaintiff, that stipulation upon which the property was assigned to him; and further, I think the plaintiff became entitled to the aid of this Court to compel the defendant to comply with the terms on which he obtained that which was deemed a sufficient consideration for the promise made for the benefit of the plaintiff. In short that the relation [illegible]ustee and *cestui que trust* was then formed between the defendant and the plaintiff. The remark of Lord Justice *James*, in *Locking* v. *Parker* (*a*), "That it is not for a Court of Equity to Judgment

(*a*) L. R. 8 Ch. Ap. at 39.

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be making distinctions between forms instead of attending to the real substance and essence of the transaction," should not be forgotten. In *Hill* on Trustees, and *Lewin* on Trusts, there are many examples given of the inartificial wording which has been taken to create a trust in favor of the object of the bounty of a testator or settlor; at page 98 of the work on Trustees, we find the rule thus laid down (*a*): "It is by no means necessary that this declaration should be made by a formal deed or will, a simple letter or memorandum, or any writing of a similar untechnical and informal character, will be sufficient if it clearly express the gift to be in trust, and sufficiently connect the trustee with the subject matter of the trust (*b*). The cases on this point have usually arisen on the construction of gifts by will; although in deciding upon the effect of an executory and informal instrument, not of a testamentary nature, the Court will adopt the same principles of construction as have been established respecting wills; any expression manifesting that the donee of property is not to have the beneficial enjoyment of the whole or some part of it, will be binding on the conscience of the trustee, and will in equity effectually exclude any claim by him to the beneficial interest. For this purpose it is by no means necessary that the donee should be expressly directed to hold the property to 'certain uses,' or 'in trust,' or 'as trustee,' although such terms, having a defined and technical meaning, are more usually as well as more properly employed. It is one of the fixed rules of equitable construction that there is no magic in particular words; and any expressions that shew unequivocally the intention of the parties to create a trust, will have the same effect."

Judgment.

At page 112, of *Lewin* on Trusts (5th edition), he says: "If a person by will direct his realty to be sold,

(*a*) Hill on Trustees, 3rd American edition, page 98. (*b*) Page 99.

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or charge it with debts and legacies, or with any particular legacy, the legal estate may descend to the heir, or it may pass to a devisee; but the Court will view the direction as an implied declaration of trust, and will enforce the execution of it against the legal proprietor; so in many cases if a person devise an estate with words of condition annexed, the conditional words are not construed to impose a legal forfeiture on breach, so as to give a right of entry, but are viewed as trusts affecting the conscience of the owner, and so enforcible in a Court of Equity; as, if a house be devised to 'A' for life, 'he keeping the same in repair,' or if an estate be given to 'A' in fee, 'he paying the testator's debts within twelve months from the testator's death" (*a*). The principle laid down in *Shaw* v. *Shaw* (*b*) is borne out by the authorities, and is entirely applicable to the present case; and I feel no doubt of the right of the plaintiff to file such a bill as the present. A representative of the estate of the settlor should ordinarily be before the Court, but I agree in the reasons assigned in the Court below for dispensing with the presence of such a party under the order which enables the Court to do so. In adopting this view of the case I adopt that which was held by the defendant, who in his answer to the bill says, in paragraph 7, "I have in all things fully performed the trusts and covenants in the said bond and agreement on my part to be performed."

Judgment.

I have far more difficulty in arriving at a satisfactory solution of the other point raised, namely; whether the Branchton lot is to be taken by the plaintiff as a satisfaction *pro tanto* of his claim under the agreement in question. The documentary evidence and the undisputed facts in the case, are in favor of the contests of the plaintiff, and militate against that of the defendant; while in respect of certain statements alleged to have

(*a*) See also Story's Equ. Jur. 10th ed., sec. 1244.
(*b*) 17 Gr. 282.

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been made by the settlor before and after the execution of the agreement under which the plaintiff claims, the Vice-Chancellor, if he admits the evidence, places much more confidence in the witnesses of the plaintiff than in those of the defendant, and than in the defendant himself. The Branchton lot, it is clear, was bought some six years before his death by *John Mulholland* for his son the plaintiff, who went into possession of it when bought, and lived there at the time of the father's death; the conveyance of these premises, although taken in the name of the father, was always retained by the son. The agreement of the 6th of November, 1868, was not intended to, nor did it, I think, affect this lot. It was not then looked upon as part of the father's property. The defendant, in his examination says: "I negociated a sale of his homestead farm for my father-in-law; this was all my father-in-law's property;" and the defendant's witness, *Joshua Mulholland*, says, in speaking of what took place at the time the agreement was entered into: "If *George* chose to take it (meaning the Branchton lot), my father was to make the deed to him." Then, if the defendant's story be true, how is it that nothing is said in the agreement about this lot? There the defendant agrees to pay the plaintiff $400 absolutely: according to his statement he was not to do this, if the plaintiff chose to take this piece of land: and no provision is made for the defendant obtaining the land, supposing the plaintiff said he would not take it, but preferred the $400 in cash. If the defendant's account of the transaction be correct, he was in any case to have had the benefit of this lot, and provision should have been made for the acceptance or refusal of it by the plaintiff, and the property, in order to make good his story, should have been transferred to the defendant; so that, in the one event, he could convey to the plaintiff, and in the other, retain it for himself. But the established facts, to my mind, entirely disprove any such idea. There was no reason for delay. Were the arrangement made that if the

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plaintiff accepted the lot, $200 as its value, was to come out of his share, he was as well able to say when the agreement was made, as at any other time, whether he preferred the lot or the money: there could be no ignorance of its value and capabilities, as it had been for years the home of the plaintiff, and no reason is assigned, even in argument, for this unaccountable postponement. Then a short time afterwards, and on the 23rd of November, of the same year, the father conveys the lot to the plaintiff, and there is no question raised by the defendant as to that disposition of it by the father; no objection is made to this conveyance; no receipt is asked from the plaintiff; no acknowledgment sought by the defendant from the plaintiff or the deceased; no request that the defendant should join in or assent to the conveyance. These facts lead me almost irresistibly to the conclusion that between the plaintiff, the defendant, and the father, it was not intended this lot should be touched by the agreement; that the defendant considered it a matter between the plaintiff and his father, with which he had nothing to do; that consequently he took no interest in their dealings in respect of it, and did not, until after the father's death, form the idea of attempting to charge the defendant with its value. It must also be borne in mind, that there was a sufficient amount of property assigned to the defendant to enable him to pay each of the shares to be given to the children of *John Mulholland*, (including his, the defendant's wife's share,) and to leave an amount to answer for some time his maintenance.

Judgment.

There is nothing, therefore, that I can see, to throw any doubt upon the arrangement being such an one as is evidenced by the documents, and I am convinced that the intention of all parties to the arrangement is carried out by this view of the matter. The Court is asked to allow this state of facts to be displaced by the evidence

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of certain witnesses who depose to some declarations said to have been made by *John Mulholland*; the effect of which would be to sustain the case made by the defendant. In order to do away with, or materially vary the effect of a written instrument, the evidence adduced for the purpose must be conclusive (*a*). It is not sufficient that the mind may be led to doubt whether the paper truly sets out what the agreement of the parties to it may have been. Here, I think, if I looked at the documents on the one side and contrasted them with the evidence adduced on behalf of the defendant, and this evidence of the defendant and his witnesses was admissible and to be relied on, I should have determined that there was sufficient to shew that the instrument did not truly express the agreement of the parties, and that the plaintiff should give the defendant credit for $200, the value of the Branchton lot. But the Judge who took the evidence was not impressed favorably with the witnesses examined on the part of the defendant; he could not place confidence in them, and I therefore think it impossible that on such testimony the transaction, as it plainly appears without this evidence, can be varied as is here sought (*b*). There are cases, no doubt, in which it is proper for the Appellate Court to consider on which side is the weight of evidence, and to vary a decree based upon what it may conceive to be a misapprehension in that respect; but it is impossible for this Court, in such a case as the present, to review the impression made upon the Judge before whom the witnesses were examined, and to say, notwithstanding the demeanour and appearance of the witness, and his manner in giving his evidence, which impressed the Court below with his untruthfulness, want of candor, or forgetfulness, we will give a credit to his testimony refused by him who has had peculiar advantages to aid in a correct conclusion upon its worth.

Judgment.

(*a*) Lewis v. Robson, 18 Gr. 395.
(*b*) Sanderson v. Burdett, 18 Gr. 417.

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I think the plaintiff has shewn himself entitled to the decree as pronounced, and that the defendant has not proved anything to disentitle him to this relief, and therefore that the decree should be affirmed with costs.

SPRAGGE, C., concurred.

Per cur.—Decree affirmed with costs.

OWEN v. KENNEDY, [IN APPEAL.]*

Advancement—Parol trust—Resulting trust—Statute of Frauds.

A man by arrangement with his wife and his two daughters—by a former marriage, one of whom was a minor—purchased lands and built thereon, and paid for the property out of moneys produced by the joint labour of himself, his wife, and the daughters; the deed for the property was taken in the name of the wife, upon the understanding that she should hold the same for the benefit of herself and husband during their lives, and after their decease that it should go to the daughters. By his will the husband declared he had no real estate, but desired the wife to direct her executors to sell the property so purchased, and divide the proceeds between his two daughters and a daughter of his wife by a former husband.

Held, on appeal, affirming the decree of the Court below, that the purchase could not be treated as an advancement to the wife; that there was a resulting trust in favor of the testator, and that the trusts in favor of the daughters, if declared, having been so by parol only, were within the Statute of Frauds and therefore void.—[GWYNNE, J., dissenting.]

The bill in this case was filed by *Caroline Charlotte Owen*, by *William Bowlby*, her next friend, against *Elizabeth Northrup Kennedy*, *George Kennedy* (her husband), and *Alfred Owen*, husband of the plaintiff, and alleged that *Lewis Burwell* died in April, 1865, having made a will, which among other things

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

* Was absent when judgment was given.

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contained as follows: "I am not the owner of any real estate in fee simple in my individual right. The property on which I reside consists of lot No. 10, on the north side of Darling Street, and the rear twelve feet of lot No. 10, on the south side of Wellington Street, in the aforesaid town of Brantford, with the buildings, tenements, and appurtenances thereto belonging. * * * * This property was purchased and improved by the proceeds of the joint industry of myself and my beloved wife, and by an understanding between us to enable her the better to provide for her own sustenance, and the support of our own family, when, by the providence of God I should be taken from them; the title deed of the said above-named lands and premises was taken in her name, and remains in her name, and in pursuance of the said understanding, I hereby devise all my right, title, property, and interest in the said hereinbefore-

Statement.

mentioned lands and premises with all the appurtenances thereof, to my said beloved wife *Adelia Mary Burwell*, her heirs and assigns. * * * My will further is, that my said beloved wife shall keep our own property insured in a sum not less than two thousand dollars, in the Gore Mutual Insurance Company, or in some other safe insurance company. * * * My will further is, that my beloved wife shall, at her demise, direct and empower her executors to sell the above-mentioned lands and premises upon which we now reside to the best advantage, and divide the proceeds thereof between the plaintiff, one of the testator's daughters, *Eliza Swartz Burwell* (now *Gulpin*), another of testator's daughters, and the defendant, *Elizabeth Northrop Kennedy*, a daughter of testator's wife by a former husband; "and their heirs, share and share alike."

The bill further stated that the testator's widow, *Adelia Mary*, died intestate in March, 1867; that the

defendants, *Elizabeth Northrup Kennedy* and her husband, had paid to *Eliza Swartz Burwell* a sum of money in satisfaction of her claims on the estate, and that she had released to them. 1873. Owen v. Kennedy.

The bill prayed a declaration that the widow of the testator held the lands in for her husband, and that the defendant *Elizabeth*, who was heiress-at-law of the said widow, held the same as such trustee, save as to the interest of *Eliza Swartz Burwell*; and prayed a sale and division of the proceeds according to *Lewis Burwell's* will.

Both defendants denied the existence of any understanding, as in the bill alleged, that the widow, *Adelia Mary*, should hold the lands as a trustee; or that they ever admitted the right of the testator to dispose of the lands; and they claimed the benefit of the Statute of Frauds. They also insisted that *Eliza Swartz Burwell* was a necessary party.

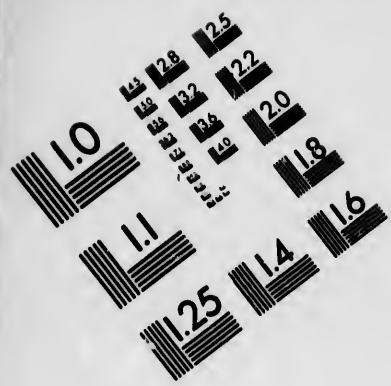
The cause came on for examination of witnesses and hearing at the sittings of the Court at Brantford.

Mr. *C. S. Patterson*, Q. C., and Mr. *Dunscombe*, for the plaintiff and her husband.

Mr. *E. B. Wood*, for the defendants *Kennedy*.

SPRAGGE, C.—This is a bill by a married woman as one of several devisees of the late *Lewis Burwell*. Judgment.

By his will he desires his wife by her will to direct and empower her executors to sell the land in question, and divide the proceeds between the plaintiff, a daughter, her sister, and a daughter of his wife by a former husband. The lands were purchased by *Lewis Burwell* in 1851, and, it is alleged, with the money of *Lewis*



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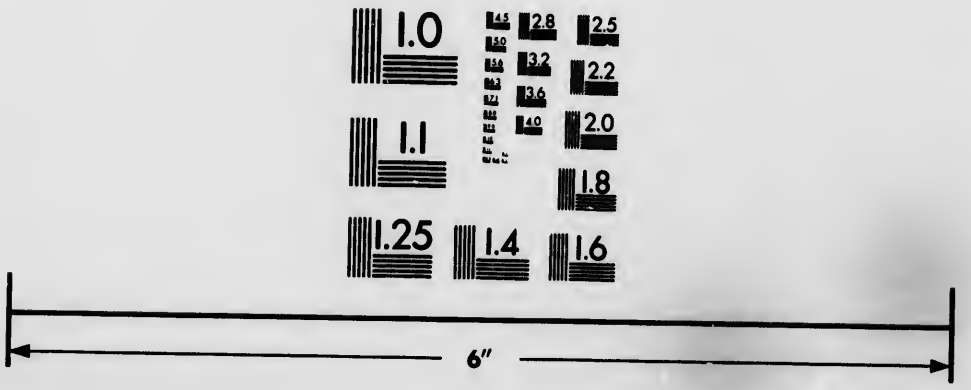

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Burwell, i. e, money provided by the joint labor of his second wife his two daughters and himself. The conveyance was made to his second wife, the mother of the defendant *Elizabeth Northrup Kennedy*.

It would seem that there were two reasons for this; one that he had some old debts hanging over him; the other that a portion only of the purchase money was to be paid down, and a mortgage had to be given for the residue, and one of the daughters was under age.

The plaintiff's position is, that there was a resulting trust in favor of *Burwell*. The conveyance was to a wife, and the presumption is, that it was by way of advancement; but this presumption may be rebutted by parol by a declaration made by the settlor before or at the time of the conveyance. The plaintiff 's contention is, that such declaration was made by *Burwell;* and that resulting trusts and the law in relation to them are not within the Statute of Frauds.

Judgment.

I think the contention of the plaintiff is substantially correct, that the presumption that the conveyance was intended by way of advancement to the wife may be rebutted by parol, and if this is shewn, then there is a resulting trust in favor of the settlor, and I think it is shewn with sufficient clearness that the conveyance was not intended by way of advancement to the wife simply, but as a provision for the husband and wife for life, with remainder to the children of the settlor. She is entitled to the decree she asks and with costs.

From the decree thus pronounced the defendants *Kennedy* and wife appealed on the following, amongst other grounds, viz: that the plaintiff had not in and by her bill made and stated such a case as entitled her in a Court of Equity to any relief against the appellants as to the matters contained in the said bill, or any of such

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matters, in this, that she alleges that there existed between *Adelia Mary Burwell* and *Lewis Burwell* in the bill mentioned an express trust in respect of the lands in the bill mentioned, without alleging that the said trust was declared by any writing or memorandum, or note in writing, as required by the Statute of Frauds; and claimed the benefit of a demurrer in this behalf; that even if the plaintiff, by her bill, had made and stated a proper case, the alleged trust must be manifested by some writing or memorandum, or note in writing as required by law in that behalf by the said Statute of Frauds, and no such writing or writings, memorandum or note in writing was proved or produced at the hearing of this cause; and the Statute of Frauds is, therefore, a complete answer to the said bill; that no evidence whatever was given at the hearing of the cause in support of the trust alleged in the plaintiff's bill; that no resulting trust in favor of *Lewis Burwell* in the bill mentioned, or the heirs or devisees of the said *Lewis Burwell*, is stated in the said bill, nor was any such resulting trust proved on the said hearing, nor were nor are there any facts proved whereby (assuming all the purchase money of the said lands to have been that of *Lewis Burwell*) any such trust is or can be established or inferred; that parol evidence is inadmissible to prove an express trust, and such evidence was erroneously received at the hearing: that parol evidence was erroneously held to displace or rebut the presumption of law that the conveyance to *Adelia Mary Burwell* of the said lands was a provision for, or for the benefit of, the wife; that a resulting trust cannot be established upon, nor can any such a trust result from, an agreement between the trustee and *cestui que trust*, nor is parol evidence admissible to prove any such agreement, and any such evidence was improperly received at the said hearing, for the purpose of establishing such an agreement; and that a married woman, under the facts and circumstances appearing on the evidence, cannot be a trustee for her husband.

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The respondent contended that she had properly stated and established, by evidence, a proper case for the relief asked, and that therefore the decree which had been pronounced was right and proper.

Mr. *Crooks*, Attorney-General, and Mr. *E. B. Wood*, Q. C., for the appellants.

The decree in the Court below proceeded on the assumption that a trust, either resulting or express, was created by the deed to Mrs. *Burwell*, and the question really in issue is, whether the transaction created a resulting trust, or was an advancement to her, and it is conceded that under proper limitations parol evidence is admissible for this purpose.

From the evidence the proper inference is, that the purchase money was the money of the husband, and then the only trust that could arise would be a resulting trust in his favor.

Judgment.

It is not necessary to mention in the bill that the trust was created by writing, *Davies* v. *Otty* (*a*), but it must be established in proof by some writing. The presumption of the transaction here having been an advancement to the wife, is so strong as to require positive evidence to rebut it: *Dyer* v. *Dyer* (*b*), *Ray* v. *Ray* (*c*). The testator having enjoyed the full benefit of the premises during his life is a strong fact to shew that the conveyance was intended by way of advancement; and although the presumption that it was intended by way of advancement may be rebuttted by parol evidence, still such parol evidence must be part of the *res gestæ*, and in this case no such evidence is adduced: *Damper* v. *Damper* (*d*), *Hepworth* v. *Hepworth* (*e*).

(*a*) 33 Beav. 540. (*b*) 1 Wh. & Tu. 197-203.
(*c*) 3 Swans. 306. (*d*) 2 Giff. 583. (*e*) L. R. 11 Eq. 10.

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Here we have no evidence whatever of any matter contemporaneous with the execution of the conveyance to Mrs. *Burwell*. Mrs. *Owen's* evidence is not of matter contemporaneous, and the evidence to establish a trust is not of a trust in favor of the testator but of a trust for the benefit of the wife and the testator's own daughters. If that were the trust the Statute of Frauds is an answer. Were Mrs. *Burwell* now alive, and refused to allow the daughters anything, and in answer to any suit by them set up the Statute of Frauds, she would succeed. There is no doubt the testator expected his wife would dispose of the property for the benefit of the daughters, and it believed she meant to do so. On the whole evidence it was contended that the deed was clearly intended as an advancement, and, being so, the appellants were entitled to an order reversing the decree of the Court below. *Childers* v. *Childers* (*a*) was also referred to.

Judgment.

Mr. *C. S. Patterson*, Q. C., and Mr. *S. H. Blake*, Q. C., for the respondent.

Our position is, that there was a resulting trust in favor of the testator: that the conveyance was not an advancement. If the conveyance had been to a stranger, the presumption of a resulting trust arising might here have been rebutted; and if the conveyance is to a wife or child, the presumption is of an advancement, but this may also be rebutted. *Dummer* v. *Pitcher* (*a*) shews that the rule as to advancement is the same in regard to a wife as in respect of the advancement of a child.

One broad question arises here: was the property purchased with the money of the husband? We contend it was. It is true, the labour of the wife and daughters was spoken of by them as their contribution,

(*a*) 3 K. & J. 310. (*b*) 2 M. & K. 262.

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but the money, the result of such labour, or at all events the greater portion of it, was the money of the testator. *Hoyes* v. *Kindersley* (*a*) shews that, under the circumstances here appearing, the wife was a trustee for the husband.

The appeal has not been argued on the grounds assigned by the appellants, but they now rely on the insufficiency of the evidence. We contend that we have rebutted the presumption of an advancement, and doing so, there must be a resulting trust.

Childers v. *Childers*, relied on by the appellants, has been reversed on appeal, as reported in 1 DeG. & J. 482. They also referred to *Sidmouth* v. *Sidmouth* (*a*), *Taylor* on Evidence, sec. 930: *Dart's* V. & P., page 854; *Snell* on Eq. 93.

Sept. 7, 1872.

Judgment.

DRAPER, C. J.—The whole question turns upon the sufficiency of the parol evidence; for its admissibility cannot be denied. In Sir *John Peachey's* case, cited in *Sugden* V. & P. 577 (*n.* 1, 13th edition), it was said by the Master of the Rolls that if *A* sold an estate to *C*, and the consideration was expressed to be paid by *B*, and the conveyance made to *B*, the Court would allow parol evidence to prove the money was paid by *C*; and this is affirmed by several other cases cited in the note in *White* and *Tudor's* Leading Cases to *Dyer* v. *Dyer*. *Lench* v. *Lench* (*a*) shews that the death of the nominal purchaser is not an obstacle to the admission of such proof. There may be some doubt whether the whole of the purchase money was the money of the testator strictly speaking; but I do not think I could with propriety question the conclusion of fact arrived at by the learned Chancellor, and adopting that conclusion the decree appears right.

I think the appeal should be dismissed with costs.

(*a*) 2 Beav. 455. (*a*) 10 Ves. 511.

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SPRAGGE, C.—I retain the opinion that I expressed at the hearing of this cause.

The bill appears to be correctly framed. A purchase of the property in question was made by the late *Lewis Burwell*, and the conveyance was by his direction made to his wife; of whom the defendant *Elizabeth Northup Kennedy* is the heiress-at-law. The presumption of law would be that the conveyance was intended by way of advancement to the wife. The bill seeks to rebut this presumption.

Lewis Burwell made a will. In the passages which are referred to by his Lordship the Chief Justice, he affects to deal with this property.

The will, of course, is no evidence against the heiress-at-law. The bill then proceeds to allege, "that the said lands and premises mentioned in the said last will and testament, and thereby devised as aforesaid, had some years prior to the making of the said last will and testament, been purchased and paid for by the said *Lewis Burwell* as in said will set forth, and the conveyance thereof had been by mutual consent taken in the name of the said *Adelia Mary Burwell* on the understanding, intention and agreement, that she, the said *Adelia Mary Burwell* should hold the said lands and premises as a trustee for the said *Lewis Burwell*, and that the same should be within his order and disposition by will, in as full and ample a manner as if the conveyance thereof had been taken in his own name, and this right of the said *Lewis Burwell* was fully recognized and admitted by the said *Adelia Mary Burwell*, both during the lifetime of the said *Lewis Burwell* and subsequent to his death, and the said *Adelia Mary Burwell* never pretended to have, or claimed to have any other right, title, or interest in the said lands and premises than as such trustee."

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I held the plaintiff entitled to rebut the presumption that the conveyance to the wife was intended by way of advancement to her, by parol. I believe the correctness of this is not questioned.

The parol evidence established satisfactorily to my mind that the conveyance to the wife was not intended by way of advancement to her, and I decreed accordingly. The question now made is, that what the evidence establishes is not that the purchase moneys were provided by *Burwell*, by reason of which a resulting trust would arise in his favor; but that the purchase moneys were provided in part by *Burwell*, in part by his wife, and in part by his daughter, the plaintiff, or by his daughters; and that an agreement was made that the land should be conveyed in trust for their benefit.

Judgment.

My first observation upon this is, that no such issue is raised upon the pleadings; but the single point presented for adjudication is, whether there is enough to rebut the presumption that the conveyance was by way of advancement; and this point assumes that the purchase moneys were the moneys of the husband. No point is made as to contract, or as to declaration of trust, by the bill or the answer. I have read passages from the bill shewing how the case is put by the plaintiffs. The answers simply deny that there was anything to rebut the presumption of advancement; and take the ground that it could only be shewn by writing under the Statute of Frauds.

As to the parol evidence. The principal witness, the plaintiff, (whose evidence is borne out by that of other witnesses,) gives a narrative of the circumstances under which the purchase was made, and how the purchase money was made up, and what passed in the family in relation to it. It is all material upon the point really raised by the pleadings; and, assuming for a moment that it would establish a contract and a trust,

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if parol evidence were admissible for that purpose, that is no reason for rejecting it as evidence of that for which it is admissible.

With regard to part of the purchase moneys not being the moneys of *Burwell*, the only exception could be the earnings of the eldest daughter, and as to that, it was put into a common fund, composed of the earnings of her stepmother, her sister (a minor), and herself; and the earnings themselves were not separate, but the proceeds of their joint labor, and they joined in placing it in the hands of the husband and father to be used by him in a way which they all concurred in designating. The plaintiff does not claim in this suit that any portion of these moneys was hers; nor does she say in her evidence that it was hers; nor did she in this transaction treat any of it as hers, in any sense other than that in which she spoke of the money earned by them jointly as belonging to the three; she makes no exception in her own favor. They all three spoke and acted as if they had an equal moral claim, to say something as to the disposition of these moneys; but there was no claim of legal property in them by the plaintiff, any more than by the wife or the younger daughter, by whom of course there could be no such claim; and in fact no party to the suit, plaintiff or defendant, has ever set up that such a claim or such a right existed.

Judgment.

HAGARTY, C. J., concurred in dismissing the appeal, although unable to say that the case was entirely free from difficulty; still he could not see that there was anything clearly wrong in the decree which had been pronounced in the Court below.

GWYNNE, J.—I regret that I have been unable to bring my mind to concur in the judgment of the Court. The case made by the plaintiff's bill is that the property

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in question had been purchased and paid for by *Lewis Burwell*, as in his will set forth, and that the conveyance thereof had been taken by mutual consent in the name of his wife, on the understanding, intention and agreement that she should hold the said land and premises as a trustee for the said *Lewis Burwell*, and that the same should be within his order and disposition by will, in as full and ample a manner as if the conveyance had been taken in his own name, and this right, namely, of disposing of the property by will, was fully recognised and admitted by the wife, both during the life and after the death of *Lewis Burwell*.

But the bill is expressly based upon the allegation that the land was purchased by *Lewis Burwell* as stated in his will which is set forth in the bill. Now in the will *Lewis Burwell* says: "I am not the owner of any real estate in fee simple in my individual right. The property upon which I now live consists of * * * This property was purchased and improved by the proceeds of the joint industry of myself and my said beloved wife, and by an understanding between us to enable her the better to provide for her own sustenance and the support of our family when by the Providence of God I should be taken from them, the title deed to the above named lands and premises was taken in her name." With this preamble, the testator proceeds to say that in pursuance of the said understanding upon which the property, was purchased he devises all his right, title, property and interest in the lands to *Adelia*, his wife, her heirs and assigns. Now this allegation in the will which the bill adopts as the foundation of the plaintiff's equity, states a purchase for the benefit of the wife in pursuance of an agreement between husband and wife, in virtue of which the wife was to have absolute enjoyment of the property for her own sustenance, and the support of the family, which the testator calls "*our*" family, upon the death of the husband. This, I

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confess, appears to me to be a clear statement of a beneficial interest in the wife quite inconsistent with a resulting trust in the husband, and in the presence of such a statement, which the plaintiff in her bill adopts as true, I do not think that any parol evidence can be received for the purpose of establishing a resulting trust for the benefit of *Lewis Burwell*. The evidence, as it appears to me, does establish no such case, but is, on the contrary, quite subversive of the idea of there having been any such resulting trust.

Judgment.

The plaintiff herself, in her evidence, says: "At the time of the purchase my stepmother, my sister (who was under age), and myself, who was over age, were working at dress-making, and keeping boarders. My father spoke of renting a house. My sister, my stepmother, and myself, said we would go to work and purchase a house: we had some money of our own at the time. The lots in question were purchased from *Strobridge* at my suggestion. We told my father that if he would secure the property to us, that we never would be without a home again: we would work to assist to pay for the property. He had some old debts and it was spoken of that this property should not be taken to pay these, and to secure it against my brother, who was thriftless." By this latter observation I do not understand her to mean there was any intention in the proposed transaction to defraud her father's creditors; but that, as was reasonable and natural, a bargain was made that, as it was the work of her stepmother and the children which was chiefly to purchase the property it should not be purchased in the father's name at all, lest thereby the just interests of the stepmother and the daughters should be defeated. She goes on to say: "This was before the bargain was made with *Strobridge*. It was understood by my stepmother upon what condition the property was to be bought. It was distinctly understood that Mrs. *Kennedy* was not included in the arrangement. A mortgage was

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given to secure the purchase money. When the first payment on account of the purchase was made $80 from the savings of the dressmaking was paid on it. Money was borrowed from the Building Society to build a house. This money was repaid in monthly instalments of $10 each. When these payments were being made we continued the dressmaking, and keeping of boarders. I was married in 1854. I would have been married nearly two years before I was; but I remained at home until all the payments were made. I was married about two weeks after the last payment. When my father gave up his own property to Mr. *Street*, Mr. *Street* gave my stepmother within two years of the purchase £50 for barring her dower in it. This went towards paying for the property in question. * * * The first payment made on the purchase was made out of a lot of old debts collected by my father. * * * The property was purchased and improved for the benefit of the whole family, except Mrs. *Kennedy*. * * * It was distinctly understood that if my sister and I outlived my father and stepmother, and assisted to pay for the property, it should be ours at their death. The agreement was, that the property should be purchased, and that my father and mother should have it to live on during their lifetime, and after that it should be mine and my sister's. I always understood that the deed was in my stepmother's name for the benefit of myself and my sister."

Judgment

According to this evidence the property was purchased at the joint expense, in varying proportions, of *Lewis Burwell*, Mrs. *Burwell*, and *Lewis Burwell's* two daughters; *Lewis Burwell* consenting that his wife and daughters should have the benefit as of their own property of the proceeds of their industry, and the wife of the £50 received from *Street;* and the daughters and stepmother contributed to the purchase upon the faith of the express stipulation that *Lewis Burwell* should have no interest in the property further than that he

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and his wife should have it to live on while they respectively lived, and that after their deaths the two daughters contributing should have it in fee, and to secure this end the property was conveyed to the wife not as the trustee for *Lewis Burwell*, but for the benefit of the daughters contributing to the purchase.

The witness *Matthews* in his evidence says that the title was to be in Mrs. *Burwell's* name in order to have a home for the family, and that it was to go to the girls. He says: "I recollect definitely that the girls were to have the property after Mr. and Mrs. *Burwell's* death; the girls were to have it."

Mrs. *Gulpin* says: "The property was purchased for a home for my father, my stepmother, my sister, and myself, and, after the death of my father and stepmother, it was to be mine and my sister's."

Judgment.

According to this evidence the title of the plaintiff is referrible solely to the agreement stated upon the faith of which the property was purchased, and all idea of a resulting trust for the benefit of *Lewis Burwell* is excluded, nor can there be any resulting trust in favor of the plaintiff as one of several purchasers in the name of one of whom only the conveyance was taken, because the interests of the several purchasers arise not by operation of law from the fact of the purchase being direct, but the contract alleged upon the faith of which the property was purchased, purported to assure to the different purchaser's interests referrible wholly to the contract, namely, to the father and stepmother for life, and to the two daughters after their death; and this contract being parol fails.

I regret the conclusion at which I have felt bound to arrive, and am glad that the majority of the Court has arrived at a different conclusion, but in my judgment the appeal is well founded and should be allowed.

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STRONG, V. C.—The evidence establishes that the money with which the property in question in this cause was purchased by *Lewis Burwell* was in point of law, at the time of the purchase, his own money. It is indeed shewn to have been provided, in part at least, by the labour of his wife and daughters; but that it was his money, at the time of the purchase either by loan or gift of so much of it as belonged originally to his daughters, and by virtue of his marital right as to the portion which had been acquired by his wife, there can, I think, be no room for doubting. I consider the case to stand as if it were a purchase by a man with money which he had borrowed for the purpose, in which event it is clear that he would be treated as having purchased with his own money for his own benefit.

Judgment.

The land having thus been bought with the money of *Lewis Burwell*, and the conveyance having been made to his wife, there would, in the absence of proof to the contrary, be a presumption arising from the relationship of husband and wife, sufficient to counteract the trust which ordinarily results when property is purchased and paid for with the money of a person other than that one to whom the conveyance is made. It is, however, open to the plaintiff claiming under *Lewis Burwell* to rebut the presumption of advancement by parol proof that such was not the intention of the purchaser at the time the conveyance was made; and I am of opinion that the evidence shews very clearly that the intention to advance did not exist.

In my judgment therefore the appeal should be dismissed with costs.

Per Curiam—Appeal dismissed with costs [GWYNNE, J., dissenting.]

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BROWN v. MCNAB.

Municipal corporations—Mortmain—Rectifying deed—Acquiescence.

Municipal corporations are within the Statutes of Mortmain.

Where a mortgage on land was executed to a municipal corporation for the purpose of securing a debt due to the corporation by its treasurer, and by the mistake of both parties the mortgage did not cover a part of the land which it was intended to mortgage, it was *held*, that the corporation was not entitled to a decree rectifying the mortgage, though a private person under the circumstances would have been so entitled.

Where the owner of property had executed a mortgage and release thereof to a municipal corporation, and the corporation afterwards sold the property with the knowledge of such owner and without objection by him until, as was alleged (though as to this the affidavits were contradictory), the purchaser had had seven years' quiet possession, during which time he had improved the property, the case was held a proper one for granting an injunction to the hearing restraining an action of ejectment against the purchaser.

Motion for injunction to restrain an action of ejectment, brought by the defendant against the plaintiff, under the circumstances stated in the head-note and judgment.

Mr. *Morphy*, for the plaintiff.

Mr. *Kennedy*, contra.

Judgment.

BLAKE, V. C.—In 1863 the defendant, being a defaulter in his office to the municipality of which he was then treasurer, executed a mortgage on the west half of the north half of lot 12, in the township of Derby, to secure the balance due, and thereupon his sureties were discharged. The amount due on this mortgage not having been paid, ejectment was brought thereon in 1864, when the defendant was turned out of possession. In 1865 the defendant was paid by the municipality a sum of $100 for

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his equity of redemption in the premises in question, and thereupon he executed a release thereof to the mortgagee, and the premises were advertised for sale, and in October, 1866, they were sold to the plaintiff, who went into possession thereof, and has made valuable improvements thereon. The mortgage and the release do not purport to cover all that, as I find on the evidence before me, the parties intended to pass thereunder; they omit four and a half acres on which are the farm house and orchard appurtenant to the farm. The defendant has commenced an action of ejectment against the plaintiff to obtain possession of this portion of the lot, and I held yesterday that, apart from the point on which I reserved judgment, as the plaintiff shewed himself on the motion entitled to have the mortgage and release reformed, an injunction should be granted to prevent the possession being changed until the hearing of the cause. The question

Judgment.

which I wished further to consider is, whether the corporation could take this mortgage and release, or whether the Statutes of Mortmain are not a bar in the way of their so dealing with real estate. It must now be here admitted, until a higher Court overrules such decision, that these statutes are in force in this Province. I have only to decide whether the corporation in question is within these Acts or not. *Blackstone* says, "By a great variety of statutes, their privilege of purchasing from any living grantor is much abridged; so that now a corporation, either ecclesiastical or lay, must have a license from the King to purchase before they can exert that capacity which is vested in them by the common law: nor is even this in all cases sufficient. These statutes are generally called the Statutes of Mortmain; all purchases made by corporate bodies being said to be purchases in mortmain." (*a*) In *Coke* upon *Littleton* (*b*)

(*a*) 1 Chitty's Blackstone, sec. 479; 2 *Ib.* 268.
(*b*) 1 Inst. 2*b*.

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the statement is to the effect that, all corporations must have a license from the King to enable them to purchase and hold lands in mortmain. Mr. *Williams*, in his work on Real Property (*a*), lays down the rule, that "No conveyance can be made to any corporation unless a license to take lands has been granted to it by the Crown." "Bodies corporate," says Mr. *Crusie* (*b*), "Whether individual or aggregate, ecclesiastical or lay, may hold those freehold estates that have been transmitted to them by their predecessors. They are however prohibited by several ancient and modern laws, usually called the Statutes of Mortmain, from purchasing more lands without a license from the Crown; so that, although the capacity to purchase is, at common law incident to lay corporations, yet it seems to be now settled that they must have a license from the Crown before they can exert that capacity to purchase."

Judgment.

Lord *St. Leonards* lays it down, that the incapacity to purchase is of three kinds; 1st. An absolute incapacity. 2ndly. An incapacity to hold, although an ability to purchase; and 3rdly. An incapacity to purchase except *sub modo*. Corporations are by him placed in the second class, and of them he says: "Corporations, individual or aggregate, either ecclesiastical or temporal, cannot hold lands without the authority of Parliament or due license for that purpose." Mr. *Dart's* statement is (*c*), "Corporations, of whatever description, may purchase, but cannot in their corporate capacities hold land, except under a license to hold in mortmain, or under the special provisions of an Act of Parliament."

(*a*) Page 61.
(*b*) Cruise's Digest, Vol. I., page 37.
(*c*) 1 Dart's V. & P. page 16.

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In *Grant* on Corporations, at page 100, it is laid down, that a corporation aggregate or sole, when once created, may without a license to hold in mortmain, take lands and tenements granted to them or him in mortmain, for they have at common law a capacity to do so. At section 152, in *Angell & Ames* on Corporations, there is this statement: "There can be no doubt that if a corporation be forbidden, by its charter, to purchase or take lands, a deed made to it would be void, as its capacity may be determined from the instrument which gives it existence."

The question is further discussed in *Dillon* on Corporations, section 434, and the following sections.

I have gone over these authorities principally to ascertain whether or not there is an exception in favor of any class of corporations, but I do not find that any such exists. These laws, which were originally aimed at religious corporations whose heads seemed desirous of growing fat by no less a process than the devouring the whole lands of the realm, were extended to all corporations, whether ecclesiastical or not. The local Legislature does not seem to have considered that corporations such as that in question here had a power of dealing with land other than that possessed by ordinary corporations; for in the Act respecting municipal institutions (*a*), it is deemed necessary to provide for the obtaining the real property required for the use of the corporation; and, by clause 243, this is limited to the purposes therein specified.

Judgment.

The question as to the power of municipal corporations to deal with real estate has been several times raised and argued before the Courts in this Province;

(*a*) Cap. 54, C. S. U. C.

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but I do not find that on any occasion it has been found necessary to express an opinion on the subject In *The Municipality of Orford* v. *Bailey* (*a*), a mortgage had been taken by the plaintiffs, which they sought to enforce in this Court, and it was there held that under the provisions of 27 Victoria, chapter 17, the municipality had the power to invest the money loaned on mortgage in the way they had done, and that the second section of the Statute in so many words validated the act of the corporation. In *The Corporation of Belleville* v. *Judd* (*b*), in answer to an action on a covenant in a mortgage, it was pleaded that the plaintiffs had no power to take the mortgage, and therefore that they could not recover thereon. The Court held that the question whether the corporation could take a grant of land did not arise on the pleadings; that the action was one upon a covenant to pay £500, being an indebtedness that arose in the legitimate business of the plaintiffs, and therefore that they were entitled to recover.

Judgment

Kinloss v. *Stouffer* (*c*) does not touch the question raised in this case, although there are there some general observations which, however valuable, would be restricted to the class of cases to which it belongs.

The Commercial Bank v. *The Bank of Upper Canada* (*d*) was disposed of on the peculiar wording of the Act incorporating the defendants.

The best opinion I can form on the question is, that the municipality had not power to dispose of the premises in question, and therefore that it cannot now demand from the defendant a conveyance of a portion of the premises omitted from the mortgage and the release;

(*a*) 12 Gr. 276.
(*b*) 16 U. C. C. P. 397.
(*c*) 15 U. C. 414.
(*d*) 7 Gr. 250 and 423.

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for that is what virtually the present bill demands. Whatever may be said as to the land inserted in the mortgage, and release and conveyance, and with which the corporation has dealt, there is much less to be urged in respect of the parcel omitted, and as to which this Court is asked, notwithstanding the Statutes of Mortmain, not only to sanction a conveyance, but actually to compel the defendant to convey it to the vendee of the corporation, in order that it may carry out a sale which it has entered into.

Judgment.

There is a ground, however, on which I think it my duty to restrain the proceedings at law until the hearing of the cause. The acts of the defendant may be such as to preclude his raising the defence as against the plaintiff, which he now seeks to set up. Upon the affidavits it is impossible for me to decide this question. I find on the one side the statement that the defendant, upon possession being demanded by the sheriff, willingly gave it up; that he afterwards released his interest in the premises; that he saw them advertised for sale and never objected; that at the auction sale he did not protest; that he allowed the plaintiff to buy the premises and live there for seven years unmolested, and to erect a brick dwelling on the portion of the lot now claimed by defendant, and otherwise to improve it. On the other hand, the defendant alleges he notified the plaintiff of his claim, and warned him against dealing with the premises. This is again much qualified by the affidavits in reply. I cannot say that the statements of the defendant are such as to lead me to the conclusion that the plaintiff is not entitled to relief in this Court on the principle laid down in *Leary* v. *Rose* (*a*) and *Re Shaver* (*b*), a principle somewhat

(*a*) 10 Gr. 386. (*b*) 3 Chan. Cham. Rep. 379.

similar to that approved of by the Court of Error and Appeal in *Heenan* v. *Dewar* (which affirmed the decree reported in 17 *Grant*, 638,) and *English* v. *Hendrie* (*a*). I therefore grant the injunction on this latter ground: the plaintiff to give judgment at law. 1873. Brown v. McNab.

MEYERS v. MEYERS.

Judgment creditors—Registration of judgments.

While the law respecting the registration of judgments was in force two judgment creditors having registered their judgments, the second one, in point of time, proceeded with his suit; the other did not, although his bill was filed in time, and he proved his claim in the Master's office in the other suit:

Held, that he had not lost his priority; and that it was unnecessary to revive his suit, which had abated meantime by reason of the death of some of the parties.

This was an appeal from the report of the late Master (*Boyd*) of this Court, finding *The Bank of British North America* entitled to priority over the defendant *Brush*, who had recovered judgment against *Meyers*. Statement.

The grounds of appeal appear from the head-note and judgment.

Mr. *Fitzgerald*, Q. C., and Mr. *Proctor*, for the appeal.

Mr. *Maclennan*, Q. C., Mr. *S. G. Wood*, and Mr. *Bain*, contra.

(*a*) 18 Gr. 119.

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Meyers v. Meyers.

SPRAGGE, C—Under the direction of the late Vice-Chancellor *Mowat* and the order made by the Referee in Chambers, the question is before me as if the facts appearing upon the order of the Referee were stated in the report of the Master.

Independently of the bills filed in this Court by *Brush* and by the Bank before the passing of the Act of 1861, the priority would be with *Brush*. The bills of each were filed 17th May 1861, the day before that named in the 11th section of the Act, excepting suits then pending from its operation. The Bank obtained the usual decree on the eighth of March following, which was carried into the Master's Office on the 24th of the same month. Nothing has been done in the way of prosecution of the decree. The bill filed by *Brush* was not served till 31st March, 1863, and nothing has been done in the suit since.

Judgment.

It is first contended on behalf of the Bank that *Brush* not having served his bill till more than a year after it was filed, his cause was after the expiration of the year out of Court. The same point was raised before me in *Tylee* v. *Strachan* (*a*) where I held the cause not out of Court.

The next contention on the part of the Bank is founded upon the circumstance of the subsequent death of both the plaintiff *Brush* and the defendant *Meyers*, by by either of which events that suit would become abated. The suit has not been revived. It struck me when this objection was made that there was something in it, but upon reflection I think that there is not. The provision in the 11th section of the Act of 1861, is that nothing contained in the Act shall be taken, read, or construed to affect any suit pending in any Court in Upper Canada in which any judgment creditor was then a party.

(*a*) 1 Ch. Cham. 319.

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Under the Acts and parts of Acts by that Act repealed a registered judgment was a lien upon the lands of the judgment debtor in the county in which the judgment was registered; and but for that act registered judgments would have continued to have been a lien upon such lands. Put that Act out of the case, as not applying to *Brush's* judgment by reason of the bill filed in respect of it, his rights were preserved, and continued to subsist to the time of his death; and the judgment and the rights accruing from it passed to his personal representatives; and they make the claim in respect of that judgment and those rights upon the estate of the judgment debtor. The statute did not make it a condition that the suits then pending should be prosecuted, and there might be circumstances under which it would be not only unnecessary but improper to continue their prosecution. For instance, if this very competing creditor, the Bank, had prosecuted its decree in the Master's Office; *Brush's* proper course would have been to carry his claim into the Master's Office in that suit; or suppose he were dead at that time, his executors could have done the same, and I do not see upon what reasonable ground it could have been objected that he must revive his suit in this Court against *Meyers*. *Cui bono* revive it? It was not a necessary part of his title to recover upon his judgment; nor do I see that it was necessary in order to give him priority. The fact of his having a suit pending at the date mentioned in section 11, was the fact that under that section he preserved his rights under his registered judgment.

Judgment.

It is true that section 11 only in terms provides that pending suits shall not be affected by the Act; but that must mean, I apprehend, that the suitors and their status and the subject matter of the suits then pending shall not be affected. It could not mean that useless proceedings should be taken in order to preserve the rights of such suitors; that they should be prosecuted to dec and

1873.

Meyers. v. Meyers.

subsequent proceedings taken where according to the practice of the Court the object of the suit is obtained without an actual further prosecution of the suit pending. For instance there might have been twenty registered judgments against one debtor and suits commenced upon all of them: it could scarcely have been intended that in order to their not being affected by the Act, they should all be prosecuted or all kept alive, when the object to be attained in all could be accomplished in one or by the further prosecution of one. The general effect of the Act was to abolish a particular kind of lien. Some suits had been commenced to obtain the fruit of that lien. Those suits were not to be affected by the Act. The lien necessarily remained, otherwise the suits would have been affected. It is not a mere remedy that is abolished by the Act, not at any rate a mere matter of procedure, but the Act was to have no effect in cases where suits had been commenced for obtaining that which was by the Act abolished. This is the necessary effect of the saving clause. The lien then continued to subsist as well as the suit which had been instituted for obtaining the benefit of it, otherwise the saving clause would be merely illusory. If this be a correct view of the effect of the saving clause, and if I was right in my decision in *Tylee* v. *Strachan*, it was not necessary that the suit then pending in which *Brush* was plaintiff should be revived, and I should say further that if it were necessary I think it would be reasonable to allow a revivor now. There is no particular merit in the case of the Bank to entitle it to reverse the priority which at the passing of the Act was in favor of *Brush*. If the Bank, having obtained the first decree had prosecuted it in the Master's Office, *Brush* would have been called in as a registered judgment creditor, and would have had priority over the Bank. If these priorities are now reversed it will be because from a very technical reading of the saving clause in the Act of 1861, it is not the then status and the then existing rights of these competing creditors that

Judgment.

must govern, but because it was necessary for technical, not for any practical reason to keep alive the suit under which at that date *Brush* had priority to the Bank. 1873. Meyers v. Meyers.

I still think, as I intimated at the argument, that the rights saved by section 11 did not expire by reason of there being no re-registration. I adopt the reasoning of the late Vice-Chancellor *Esten*, in *The Montreal Bank* v. *Woodcock* (*a*), "The Legislature could not have meant that the rights which it had saved should expire for want of an act which it had rendered impossible." The judgment of the learned Vice-Chancellor upon that point has not been impeached.

It is contended further that any rights that *Brush* might have, under the saving clause of the Act of 1861, are abrogated by the Registration Act of 1865; which repeals *inter alia* the Act of 1861, and the saving clause of which does not save the rights preserved by section 11 of the Act of 1861. The Act of 1865, introduced a new mode of registration, and repealed former Acts on the same subject, and it provided that all Acts and parts of Acts repealed by the Acts thereby repealed, should remain repealed: then followed this proviso: "that all registrations, official acts, records, matters and things, done in pursuance of any or either of the said repealed Acts shall, where they are valid and effectual at the time of the passing of this Act, remain and continue to be valid and effectual to all intents and purposes." If the words "the said repealed Acts" comprehend the Acts which had been repealed by the Acts, which are repealed by the Act of 1865 the rights of persons in the position of *Brush* would be preserved inasmuch as he had a something—a judgment registered, done in pursuance of one of the Acts repealed and which was in my opinion valid and effectual at the time of the passing of the Act Judgment.

(*a*) 9 Gr. 142.

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of 1865. *This* point was but little argued. I incline to think that the words "repealed Acts" comprehend both the classes to which I have referred, and that construction would best effectuate the intent of the Legislature; which must, I take it, have been general, *i. e.*, to save all rights which were subsisting at the time of the passing of the Act. I do not feel by any means free from difficulty or from doubt upon the questions involved in this appeal, but, upon the whole, my conclusion is, that the estate of *Brush* is entitled to priority. I therefore allow appa l but without costs.

Judgment.

THE HAMILTON AND PORT DOVER RAILWAY CO. v. THE GORE BANK.

Corporations—Corporate seal—Sheriff's poundage.

A Bank having executions against a Railway Company in the hands of the sheriff, the secretary of the Company, in order to avert a seizure of a quantity of railway iron, signed a letter agreeing that the Bank, out of moneys coming to their hands from certain garnishee proceedings taken by the Bank against debtors of the company, might retain "a sufficient amount fully to cover all your solicitors' costs, charges, and expenses against you or against you and us, as between attorney and client or otherwise; as well as the costs, charges, and expenses of your Bank, of what nature or kind soever, and after the payment of such, in the second place, to hold the surplus, if any, to apply on your executions against us." This letter was signed without any authority from the Board of Directors of the Company, although two members of the Board were aware of it and one of them, the Vice-President of the Company authorized it:

Held, that this was not such an act as the officers of the Company were authorized in the discharge of their duties to perform; and that although the Bank granted the time asked for, they could not enforce payment of the amounts stipulated for.

A Railway Company being indebted to a Bank, the officers of the Company arranged that the Bank should proceed to garnish certain debts due to the Company, the costs of which as between attorney and client the Railway Company was to pay:

Held, that the officers of the Company had authority, without a resolution of the board of directors, to enter into such an agreement, and that the same need not be under the corporate seal.

A sheriff is only entitled to poundage on the moneys actually passing through his hands. Where therefore the parties to a suit arranged outside the sheriff's office for the payment of $3000 on account of an execution in his hands, and the plaintiffs in the cause paid his poundage, on that amount as well as the moneys actually paid to the sheriff, the Court refused to allow them to charge the amount against the defendants.

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Appeal from the report of Mr. *Leggo*, late Master at Hamilton, by the defendants.

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

Mr. *Moss*, Q. C., contra.

SPRAGGE, C.—During the period covered by the transactions out of which this appeal has arisen the late Sir *Allan MacNab* was President of the plaintiffs' Company, Mr. *Burton* was Vice-President, and Mr. *McKendrick* was Secretary; while Mr. *Steven* was President of the Gore Bank, and Mr. *Crawford* was Cashier. Before November, 1859, the Gore Bank had recovered judgments for considerable amounts against the plaintiffs, and executions were in that month in the hands of the Sheriffs of the United Counties of Frontenac, Lennox, and Addington, and of Wentworth, under which a quantity of railway iron designed for the plaintiffs' railway was under seizure. The plaintiffs' railway was at that time in course of construction, and it was a great object with the plaintiffs to save this iron from actual sale. They were at the time applicants to the Government for aid, and they hoped to obtain it in time to save the iron from sale, if the Bank would give time upon its executions. There were at the same time a number of persons indebted to the plaintiffs, and the plaintiffs were desirous of having these debts garnished by the Bank.

Judgment.

These two things desired by the plaintiffs were, in fact, done by the Bank. The hands of the Sheriffs were stayed upon the executions, and garnishee proceedings were taken by the Bank against the debtors of the

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plaintiffs; and it is contended on behalf of the Bank, that these things were done at the instance of the plaintiffs; and that they, in consideration of these things being done, or being agreed to be done by the Bank, entered into certain engagements; and it is upon these alleged engagements that the questions arise which are the subjects of this appeal.

There is no doubt that the desire of the plaintiffs upon these points was communicated to the Bank; and that the Bank acted upon such communications, and did so in the belief that the engagements entered into would be carried out. The question is, whether the plaintiffs are bound by the engagements professedly entered into on their behalf; and a further question is, whether they have ratified them.

Judgment.

I do not propose to discuss the oft-debated question whether the plaintiffs' corporate seal was necessary in order to bind them to these engagements. I will assume that it was not. The question remains whether what was done was sufficient, A letter was written by Mr. *Buchanan*, a director of the plaintiffs' Company at the time, addressed to the President of the Bank and dated 5th November, 1859, in which he says "I would on behalf of the Board of Directors apply to you to delay the executions at Kingston and elsewhere on the property of the Hamilton and Port Dover Railway, in so far as will not affect the interest of your Bank."

Mr. *Buchanan* had not the formal authority of the Board of Directors to write this letter, or to make this application. I think this is the result of his evidence. It amounts to this; that all or nearly all the Directors lived in or near Hamilton; and that he thinks he must have seen all the Directors then in Hamilton, and have obtained their assent to the writing of such a letter. He says he "would not have written so important a letter

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without the consent of the other Directors." He saw the President of the Bank on the subject; and he assented to time being given upon certain terms which were embodied in a letter dated 12th November, 1859. The letter is dated at the office of the Railway Company and is addressed to the President of the Bank, and is in these terms:

"You are authorized by this Company to retain out of such debts as you may have garnished or attached or may garnish or attach (under your judgments against us) as being due to us, a sufficient amount, firstly to cover all your solicitors' costs, charges, and expenses against you, or you and us, as between attorney and client or otherwise, as well as the costs, charges, and expenses of your Bank of what nature or kind soever, and after the payment of such, in the second place, to hold the surplus if any, to apply on your executions against us. In consideration of your, and your officers' forbearance towards us, we undertake and agree to relieve you from all and every loss or expense which you have been subjected to by reason of any proceedings which have been had by your officers or solicitors in the matters of your claim against us.

Judgment.

Yours truly,

J. McKENDRICK, *Secretary*.

A. STEVEN, ESQ., President of the Gore Bank, Hamilton

Mr. *McKendrick* says of this letter that it was brought to him by Mr. *Steven* already prepared; and that before signing it he went to Mr. *Burton* who authorized him to sign it, which he did. Mr. *Burton* says that the fact of the Bank pressing the executions was frequently up before the Board of the Company, and discussed at their meetings in an informal way, and that this letter was prepared by the Bank solicitor, and handed by him to *McKendrick*, and by him brought to Mr. *Burton* to know whether or not he should sign it; and (he adds) "I, thinking there was no alternative, advised him that there

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was no objection to his signing it as the Secretary of the Company." He goes on to say "I cannot say that his letter was subsequently brought before the Board, but I am aware that the Board of the Company was aware that garnishee proceedings were being taken."

From all this it is evident that this letter was not written by the direction of the plaintiffs' Board. There is an absence of proof that its terms were even discussed at the Board, or even that the directors individually or that a majority of them, even informally gave their assent to them. Mr. *Buchanan* probably did so, and Mr. *Burton* did so in the way that he has stated. Some other letters were written and there is some other parol evidence, but there is nothing that carries the proof of agreement on the part of the plaintiffs to the terms embodied in the letter I have quoted, further than an assent by two of the Directors.

Judgment.

The plaintiffs were, it is true, a trading corporation, and it is not necessary to go so far as to say that it was not competent to officers of the Company to do any acts in the course of the business of the Company that would be binding upon the Company; but the engagements purporting to be entered into by the letter of 12th of November, 1859, were certainly not in the ordinary course of business. They were proper for the discussion and deliberation of the Board of Directors. I have seen no case that goes the length of binding a corporate body, trading or otherwise, by an agreement entered into by some individual directors. What authority there is, is the other way. *Reuter* v. *The Electric Telegraph Company*, is so (*a*). In that case the agreement had been entered into by the Chairman of the Company, but it was upon its ratification by the Company that the Court acted. Lord *Campbell* in giving judgment asked "might not the contract entered into by the Chairman, al-

(*a*) 6 E. & B. 341.

though originally without authority, be ratified by the Company?" and he proceeds to shew acts of confirmation. A similar question arose in *Perry* v. *City of Ottawa* (*a*), one item of claim by the plaintiff rested only upon an order given by the Chairman of a Committee, and Mr. Justice *Hagarty* observed "unless I can satisfy myself that the evidence points to a direct recognition of this alleged service by the defendants as a council, I see grave reasons against allowing it. I deem it all-important to prevent claims being advanced against municipal bodies, for services rendered at the request or order of any one or more members individually."

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In this observation I entirely concur, and though it applies probably with more force, to members of Municipal Corporations than to directors of trading companies it is by no means inapplicable to the latter; and there is besides, this plain principle that the law commits the management of the business of railway companies, as of other trading companies to a Board of Directors, and while there may be much of routine business that is managed by one or more under the name of managing director or some other name, the Company is not bound, and it would be unsafe that it should be bound in matters out of the ordinary course, by any other than the regularly constituted authority. To hold the plaintiffs' Company bound to such engagements as are embodied in the letter of the 12th of November, assented to at no Board meeting, but by two only out of the whole number of Directors, would in my opinion, be at once unprecedented and unsafe.

Judgment.

It is, however, contended for the Bank that there was ratification in this case, and also that it is a case of executed consideration. I find no evidence of ratification. The only thing in that direction is, that the letter

(*a*) 23 U. C. Q. B. 391.

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book was, so far as the Secretary recollects, always produced at the meetings of the Board; but what evidence there is, rather negatives the fact of the letter in question being brought under the notice of the Board. Mr. *Burton* says that he cannot say that it was, and the Secretary is silent as to it; and does not say indeed that it was the practice to read to the Board the letters that had been written, or to draw the attention of the Board to them in any shape; and there is withal no single *act* of ratification.

Then as to this being a case of executed consideration, the case differs essentially from those in which it has been held that by reason of the consideration being executed it is taken out of the general rule, with the exception perhaps of *The Fishmongers' Company* v. *Robertson* (*a*). In the *East London Waterworks Company* v. *Bailey* (*b*), it was put upon this, that where a contract is executed the law implies a promise. In *Pym* v. *The Municipal Council of Ontario* (*c*) our first Chancellor, Mr. *Blake*, summarized two of the English cases as follows: "In *Hall* v. *The Mayor of Swansea* (*d*), Lord *Denman* rests the judgment of the Court of Queen's Bench, which has not I believe been questioned, upon the ground of necessity; and that language of Lord *Denman* has since been translated by Lord *Campbell* to mean 'no other than a moral necessity, that the defendants should pay their debts,' or as Mr. Justice *Erle* has expressed the same sentiment 'that it was absolutely necessary that the defendants should be compelled to do that which common honesty required,'" and applying this principle to the case in judgment the learned Chancellor said "Now if the necessity in *Hall* v. *The Mayor of Swansea* was the moral necessity of compelling the defendants to do what common honesty required, assuredly that necessity exists to as great an extent at least, in cases circumstanced like

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(*a*) 5 M. & G. 131.
(*b*) 4 Bing. 287.
(*c*) 9 U. C. C. P. 304.
(*d*) 5 Q. B. 525.

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the present, where the consideration has been executed, and the corporation has received all that it could have required, if there had been a formal contract under the corporate seal." A Court House commenced by a contractor had been finished by the plaintiffs working under the architects of the defendants, and the Council entered upon the completed building and it was used for County purposes for years. In *Sanders* v. *The Guardians of St. Neot's Union* (*a*) the absence of the corporate seal was objected. In overruling the objection Lord *Denman* said "We think that they could not be permitted to take the objection, inasmuch as the work in question after it was done and completed was adopted by them for the purposes connected with the corporation." The work done in that case was the making and erecting of iron gates for the workhouse of the Union. In *Doe Pennington* v. *Taniere* (*b*), there was a lease by a Dean and Chapter under which rent was received, although the lease was not strictly regular; and the language of the Court was "To enforce an executory contract against a corporation it might be necessary to shew that it was by deed; but where the corporation have acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties; they having had all the advantage they would have had if the contract had been regularly made."

Judgment.

In all these cases the corporation had accepted and adopted what had been done, there was no room for question that it was work done with the expectation of its being paid for; it was common honesty that it should be paid for; and as a matter of moral necessity the Court refused to allow corporations to make the absence of their corporate seal a reason for refusing to do that which common honesty required of them.

(*a*) 8 Q. B. 810. (*b*) 12 Q. B. 998.

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The case of *The Fishmongers' Company* v. *Robertson* was a very peculiar one. The defendants were applying to Parliament for a Bill to authorize the draining and reclaiming of certain waste lands in Ireland; their application was opposed by the plaintiffs and one *Ogilbie*. After awhile a compromise was effected. The opposition of the plaintiffs and *Ogilbie* was withdrawn, upon an agreement being entered into by the defendants to pay certain money and do certain acts; and an agreement to that effect was signed by the defendants, and by one *Towse*, the agent of the plaintiffs, and thereupon the bill was allowed to pass. The defendants afterwards refused to carry out their part of the contract; and upon action being brought by the plaintiffs, they objected that the plaintiffs were not bound by reason of the absence of their corporate seal, and that there being no mutuality the plaintiffs could not maintain their action; and in that way it fell upon the corporation itself to shew that it had on its part executed the contract which it sought to enforce against the defendants. The question arose upon the pleadings, the Court holding that upon the face of the declaration there was an averment of the performance by the corporation of every matter that was a condition precedent on their part. Chief Justice *Tindal* said, "Whatever may be the consequences where the agreement is entirely executory on the part of the corporation; yet if the contract, instead of being executory, is executed on their part; if the persons who are parties to the contract with the corporation have received the benefit of the consideration moving from the corporation; in that case we think, both upon principle and decided authorities, the other parties are bound by the contract, and liable to be sued thereon by the corporation." The Court was indeed prepared to decide the case upon another ground, that even if the contract had been executory only, there would have been mutuality of remedy, as their suing upon the contract would amount to an admission on record that such contract

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was duly executed by them so as to be obligatory upon themselves; and that they would be estopped from setting up in a cross-action that the agreement was not sealed with their common seal. The ground of decision however was, that there was an executed consideration on the part of the corporation; and the decision could well be sustained on the same ground of the moral necessity to enforce honesty, upon which the other cases to which I have referred are put; a defence more technical and less meritorious could scarcely be conceived, for that the defendants themselves entered into a contract, as well as that they had received the stipulated benefits from the plaintiffs, was clear.

When a case involving the same principle as was involved in *Pym* v. *Ontario*, came before our Court of Queen's Bench,—*Perry* v. *Corporation of Ottawa* (*a*),—the present Chief Justice of Appeal followed the earlier case very reluctantly, and only upon the authority of the earlier case.

Judgment.

The question now appears to be, whether in every case of executed consideration a corporation may be sued without regard to the nature of the consideration, or how it was created or brought about; or, whether the Court will look at all the circumstances and fix the corporation with liability only where it would be dishonest in the corporation to resist payment. Is it a rule founded upon the kind of necessity which is explained in the cases to which I have referred, and limited to cases of that class; or an inflexible rule to be applied to all cases? I confess myself, that while I yield of course to the authority of those cases, I find it difficult to follow the reasoning upon which they proceed; they seem to me to fasten a legal liability upon a breach of morality, and that, where there is no fiduciary or other

(*a*) 23 U. C. Q. B. 391.

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relation, except business dealing between the parties. The doctrine if pushed to its legitimate consequence, and applied to other than corporate bodies, would tend I apprehend, to the unsettling of the law.

I rather incline to think that if the doctrine in question is to be taken as an established principle, it would follow logically that it should be applied generally, although the reason of its adoption originally was of limited application. But on the other hand I have found it applied, so far at least as I have seen, only where the reason for its original adoption applied; and it certainly might lead to dangerous consequences if it were applied universally.

The case before me is a fair illustration of this. It was probably known to the directors of the plaintiffs' company that the Bank was not pressing its execu-

Judgment.

tions. There is nothing before me to shew that the directors knew more than this, nothing to shew that they were aware that the Bank had agreed to give time, at the instance of officers or members of the plaintiffs' company, though this may have been known to some of them; and there is certainly nothing to shew that it was known to them that the price to be paid for the forbearance of the Bank was, the engagements that are embodied in the letter of the 12th of November; nor can I possibly know that the terms embodied in that letter would not have been rejected if laid before a board meeting of the directors. Again if I hold the plaintiffs bound, on the ground of executed consideration I should necessarily hold them bound, though the terms of that letter were ever so much more onerous; and however little the directors were acquainted with its contents.

In this case there was nothing from which an assent was to be presumed; it differs in that respect from the cases to which I have referred.

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I cannot say that there would be an absence of common honesty in the plaintiffs declining to fulfil the engagements contained in the letter in question. It would have to be a case of flagrant dishonesty to warrant the application of the doctrine, unless it is to be applied universally. The directors as a body might think that hard and unreasonable terms had been dictated by the Bank, and assented to by two of its directors upon their own authority, without calling a meeting of the board; and that in the interest of the company which they represented they ought to resist them, especially as the Bank had not been prejudiced by the delay they had granted. I do not say, as it is unnecessary to say, that that was not the case, but I cannot say that it was not the case, or that such opinion was not honestly entertained.

The conclusion, therefore, at which I arrive, after a good deal of consideration, and I confess, after some hesitation, is, that the Bank can found no claim upon the engagements contained in the letter of the 12th of November, 1859; and this will apply probably to all costs between solicitor and client not taxable on the ground of legal liability, except the costs of the garnishee proceedings.

Judgment.

The costs of these proceedings appear to me to stand upon a different footing. The Bank was a large creditor of the plaintiffs, and was pressing its claim. The plaintiffs on their part were anxious to reduce that debt, and probably were desirous also of giving evidence to the Bank of their anxiety to reduce it. There was a considerable amount due to them on account of stock and otherwise; and this they were desirous of getting in and applying on their debt to the Bank. It is in evidence that a schedule or schedules of these debts, were from time to time furnished by the officers of the plaintiffs' company to the Bank, in order to garnishee proceedings being taken upon them; and that such

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proceedings were taken by the Bank, and that these proceedings were not hostile to the plaintiffs, but taken at their instance. Between individuals, costs incurred in taking proceedings under such circumstances, would, I apprehend, be chargeable by the creditor against his debtor; and, if so, the only question is, whether it required the use of the corporate seal or a formal resolution of the board of directors to authorize the officers of the plaintiffs' company to do what they did in this respect. I think it would be against the current of modern authority to hold that it did. What was done was only a mode of getting in debts, and in a way that would probably serve also, indirectly, the interests of the plaintiffs. It is not suggested that the plaintiffs were in this way put to any more costs than they would have been put to if they had taken proceedings directly against their debtors, or that the Bank took any proceedings unnecessarily, or that were not authorized by the officers of the plaintiffs' company. I think these officers were not acting beyond the scope of their duty and authority in acting as they did act, under the circumstances that existed in regard to these debts. The Bank, however, can only claim against the plaintiffs such costs, charges, and expenses as were properly incurred by them in relation to these garnishee proceedings.

Judgment.

With regard to the sheriff's poundage it seems clear from the cases of *Buchanan* v. *Frank* (*a*), and *Michie* v. *Reynolds* (*b*), that a sheriff is entitled to poundage only on the sum that he makes and has to pay over. I suppose, from the evidence and the argument before me, that the sheriff at Kingston charged poundage on a sum of $3,000, which was credited by the execution creditor upon the executions in the sheriff's hands, upon some arrangement outside of the sheriff's office. If the Bank paid this, they did so in their own wrong. And even if I had held the plaintiffs bound by the letter of 12th of

(*a*) 15 U. C. C.P. 196. (*b*) 24 U. C. 303.

November, I do not think that I could have held that it relieved the Bank from shewing that such costs, charges, and expenses as they paid, were such as were properly chargeable against them.

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The result is, that the plaintiffs succeed in their appeal, as to the costs between solicitor and client, and as to the sheriff's poundage; and fail as to the costs of the garnishee proceedings.

Under the circumstances, it is reasonable that there should be no costs to either party upon the appeal.

Ross v. Ross.

Will, construction of—Revocation in equity.

A testator devised his real estate and personal property to two persons. After making his will the testator contracted to sell a portion of the real estate, but the contract was never carried out, and, after his decease in October, 1862, the parties interested under the contract agreed to rescind the same, which was done accordingly:

Held, that the contract operated in equity as a revocation of the will as regarded the beneficial interest in the real estate; that the interest in the contract passed to the legatees under the residuary clause; that the devisees being also legatees of the personal estate were entitled to the land, and that it did not go to the heirs-at-law.

This was a bill to obtain a construction of the will of the late *Donald Ross*, and to declare the rights of the parties interested thereunder, in consequence of a contract for sale entered into by the testator after execution of the will.

The bill was taken *pro confesso*.

Mr. *J. A. Boyd*, for the plaintiffs.

The defendants did not appear.

The cases cited are mentioned in the judgment.

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BLAKE, V. C.—This is a bill filed by *Jane Ross* and *Alexander Ross*, devisees and legatees under the will of the late *Donald Ross*, who died on the 15th day of of October, 1862, having first duly made and published his last will and testament in the words following: "I, *Donald Ross*, of the Township of East Nissouri, in the County of Oxford and Province of Canada, Farmer, being of sound and disposing mind and memory do make and publish and declare this my last will and testament in the manner following, to wit: My last will and testament is, that my just debts and funeral charges shall be paid by my executors hereinafter named. The residue of my property, both real and personal, I dispose of as hereinafter provided, namely: my will is, that should my beloved wife, *Jane Ross*, survive me, that during her natural life, she shall enjoy all my property hereinafter mentioned, and have full and absolute control of the same during her natural life as aforesaid;

Judgment.

and after her death and mine, my will is, that all my property both real and personal, shall go to, be possessed and enjoyed by *Alexander Ross*, my adopted son, he having been raised by me, the said *Donald Ross*, and in consequence of my love and esteem for him and of his services rendered to me, I bequeath to him all my real estate, namely: the south west quarter of lot number sixteen, in the thirteenth concession of the township of East Nissouri, in the County of Oxford and Province of Canada, containing by admeasurement fifty acres, be the same more or less, with all the appurtenances thereto belonging; and I hereby bequeath to him the said *Alexander Ross*, all my personal property, consisting of farming utensils, cattle, horses, sheep, and other kinds of stock as well as all my personal property of whatever name and nature, debts, bonds, bills, notes, demands, and choses in action, all of which property is to be enjoyed by my beloved wife, *Jane Ross*, during her life; and I further declare it my will and desire that, until the said *Alexander Ross* shall become twenty-one years of age,

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he shall have fifty dollars for the year succeeding the date hereof, and the sum of one hundred dollars per annum thereafter until his majority; the said *Alexander Ross* is to pay funeral expenses of myself and my beloved wife upon our decease, and all other debts and charges against me at my decease."

The defendants are the heirs-at-law of the testator, against whom the bill has been taken *pro confesso*. The bill states that, at the time of the making of the will, the testator was seised in fee of the south half of the east half of lot 16, in the 12th concession of East Nissouri, as well as of the lands set out in the will; that the testator before his death had agreed to sell this lot to one *Roderick Williamson;* that subsequent to the death of the testator, the agreement for sale had been rescinded, and the plaintiffs submit that under the will they are entitled to the lot in question, *Jane Ross* as tenant for life, and *Alexander Ross* as remainderman.

Judgment.

The bill asks for a declaration as to the true construction of the will, and that if it be found that the legal estate is in the defendants, the heirs-at-law, they may be ordered to convey to the plaintiffs according to the interests above-mentioned.

Apart from the agreement to sell the property made subsequent to the will, under the residuary clause the lot would pass to the plaintiffs for the interests they claim (*a*).

Under the circumstances that have arisen, the following points were argued, and upon them the opinion of the Court has been asked:—

(1.) Did the agreement for sale revoke the devise in favor of the plaintiffs so far as this lot is concerned?

(*a*) Schloss v. Stiebel, 6 Sim. 1.

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(2.) To whom did the legal estate therein pass?

(3.) Did the person on whom it devolved take beneficially or merely as trustee?

(4.) Upon rescission of the agreement, who became entitled to the lot?

Mr. *Jarman*, in the first volume of his Treatise on Wills, at page 150, says: "Notwithstanding the contract for sale, the legal estate passes under the devise, and the devisee is bound to convey it to the purchaser in pursuance of the contract."

At page 38, Mr. *Hawkins*, lays it down that "Lands which the testator has contracted to sell, are lands of which he is a trustee, and the legal estate in them passes therefore, under a general devise of the testator's lands, unless an intention appear to the contrary."

Judgment.

In *Redfield* on Wills, volume 1, page 335, after laying down that partial alienations will produce a revocation *pro tanto*, the author proceeds, "And where the estate devised is contracted to be conveyed, and the purchase money remains due, in whole or in part, the legal estate only remains subject to the operation of the devise and the amount due on the purchase money becomes a part of the general personal estate, or is held in trust for the devisee, as real estate not converted."

"A general devise," says Mr. *Dart* (*a*), "of all his real estates by the vendor, after the contract will, *prima facie*, and in the absence of any limitation or other matter inconsistent with such an intention, pass the legal estate in the property contracted to be sold."

Lord *St. Leonards* says: (*b*) "From the time of the

(*a*) 1 Dart, V. & P. p. 243. (*b*) 1 Sugden, V. & P. 186.

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contract the purchaser, and not the vendor, being the owner of the estate in equity, it followed that if a man devised his estate, and afterwards contracted for the sale of it, the devise would thereby be revoked in equity."

In *Curre* v. *Bowyer* (*a*) there was a will and an agreement for sale, the benefit of which was lost by the laches of the vendee, and Sir *John Leach* held that the estate belonged to the next of kin, and not to the heir-at-law; this case is cited in *Farrar* v. Lord *Winterton* (*b*), in which the testatrix made her will, and afterwards entered into an agreement for the sale of property devised by her. The Master of the Rolls held that it must be looked at in this Court, as if she had parted with the land, and instead of her beneficial interest therein, she acquired a title to the purchase money, and at her death what she really had was the right to so much money, not the land, and that the devisees took neither the land nor the money.

Judgment.

In *Andrews* v. *Andrews* (*c*), Vice-Chancellor *Stuart* declared that by the agreement for sale entered into by the testator, he revoked his will, so far as respected the premises comprised in the agreement, and that he died intestate in respect thereof, which descended to his heir-at-law. On the rehearing of this cause (*d*), Lord Justice *Turner* says, at p. 353, "It is quite settled by the authorities that whatever may be the effect of an abandonment of the contract in the lifetime of the testator, the will is certainly revoked if the contract be subsisting at his death." In this statement Lord Justice *Knight Bruce* did not concur. In the case of *Bennett* v. Lord *Tankerville* (*e*), Sir *William Grant* states as follows: "It is perfectly settled that a binding and valid contract for

(*a*) 5 Bea. 6.
(*b*) 5 Bea. 1.
(*c*) 3 Sm & G. 180
(*d*) 8 D. M. & G. 336.
(*e*) 19 Ves. 170.

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the sale of lands devised is, in equity, as much a revocation as a conveyance of the land would be at law. * * The question must be decided as if it had occurred the day after Lord *Tankerville's* death. * * If at that period the will stood revoked with regard to these lands by his death, how by any subsequent event can that devise again become operative and effectual? * * Being revoked, at the time of his death, by a valid subsisting contract it is immaterial to the devisee what becomes of the land, his only title being gone by the revocation of the devise."

In *Tebbott* v. *Voules* (*a*), there was a declaration "That the contracts entered into for the sale of his real estate operated as a revocation in equity of the devise of such real estate contained in his will, and that the same descended to the defendant, *W. J. Voules*, as the testator's eldest son and heir-at-law."

Judgment.

In *Knollys* v. *Alcock* (*b*), Lord *Eldon* states: "There is no equity upon the part of the devisees disappointed by the revocation to call upon the heir, who takes, to compensate to those devisees so disappointed by the revocation of the will."

In *Moor* v. *Raisbeck* (*c*), it was held that the will, "Though revoked by the sale, has operation on the property in another form; for by the sale the testatrix changed the nature of the property from realty to personalty, and the money produced by the sale passes as part of her general personal estate."—*Drant* v. *Vause* (*d*), *Ex parte Hawkins* (*e*) *Lawes* v. *Bennett* (*f*), *Broom* v. *Monk* (*g*), *Wall* v. *Bright* (*h*), *Loughead* v. *Knott* (*i*), are cases which also throw light on the matters discussed before the Court.

(*a*) 6 Sim. 40.
(*b*) 7 Ves. 558.
(*c*) 12 Sim. 123.
(*d*) 1 Y. & C. C. C. 580.
(*e*) 13 Sim, 569.
(*f*) 1 Cox 167.
(*g*) 10 Ves. 197.
(*h*) 1 Jac. & W. 494.
(*i*) 15 Gr. 34.

Lord *Mansfield* observed in *Doe d. Gibbons* v. *Pott* (*a*), "All revocations which are not agreeable to the intention of the testator, are founded on artificial and absurd reasoning." The questions argued before me appear to be covered by authority, and whether arrived at by reasoning, absurd or artificial, the authorities are to be followed when applicable to the present case.

The following, I think, may be deduced from them:

First—Under the circumstances the agreement for the sale of the lot operated as a revocation of the devise thereof, so far as any beneficial interest in favor of the devisee by virtue of such devise is concerned.

Second—From the time of the agreement the purchaser, and not the vendor, was in equity, the owner of the estate, but the vendor having the legal estate, he became the trustee thereof for the purchaser, and his residuary devisee took this lot as trustee to answer the requirements of the contract binding the testator; that is, that although this lot, owing to the agreement for sale subsequent to the will, was not operated on so as to pass it beneficially to the devisee to whom it was devised by the will, yet the will did so far act upon it as to pass it to the devisee who holds as did the testator; namely, as trustee for the vendee. Judgment.

Third—That such devisee takes no beneficial interest under such a devise.

Fourth—That when the testator agreed to sell this lot, what Lord *St. Leonards* calls "a notional conversion" took place (*b*), and it was converted into personalty which passed to the legatee under the residuary clause of the will.

(*a*) Doug. 710.

(*b*) Sugden's V. & P. p. 187.

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Fifth—Thus the residuary legatee became entitled to stand in the position of the testator in so far as this contract is concerned, and to reap all the benefits that flow therefrom.

Sixth—That events which take place subsequent to the death of the testator, such as the rescission or the carrying out of the contract, cannot affect parties claiming under the testator so as to abridge or increase their rights.

Seventh—As the residuary legatee is entitled to the agreement, so all the benefits that may flow therefrom will enure to his benefit; and, therefore, if he filed a bill for the specific performance thereof, which resulted either in the performance or rescission of the contract, the money or the land would go to him, and the devisee would be trustee of the property either for the vendee or the legatee, as the person in whose favor the contract was rescinded: so when the legatee by arrangement with the vendee rescinds the same, the devisee is equally bound to hold the premises for him in whom has thus become vested the interests of both the vendor and vendee, that is the legatee.

Judgment.

Applying these deductions to the present case, I am of opinion that the defendants, the heirs-at-law, take no interest in the premises in question; that the plaintiffs, who are both legatees and devisees under the will, take the estate beneficially, and that the same is now vested in them.

By rights the executors should be parties to this litigation, as it is for them to claim the benefit of the agreement if needed for the carrying out of the trusts of the will; but I take it for granted that the requirements of the will, so far as they are concerned, have been carried out, and that they assent to the bequest in

favor of the plaintiffs. I take for granted also, that the agreement has been rescinded, a fact to which the vendee does not assent in these proceedings. Without prejudice to these rights, I make the declaration above set forth as to the persons in whom the estate in question is vested.

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WEST GWILLIMBURY v. SIMCOE.

Railway bonus—Petition—By-law.

By the statute incorporating a Railway Company, it was enacted that if fifty persons, at least, of the qualified ratepayers within the portion of the county affected by the Railway should petition for the passage of a by-law granting aid to the undertaking the council should pass such act, subject to the vote of the qualified ratepayers of such portion of the county:

Held, that it was not necessary that the petition should be signed by a proportion of the fifty persons from each locality in the portion of the county affected.

In giving notice submitting a by-law granting aid to a Railway Company for the approval of the ratepayers, the officers (whose duty it was to give such notice) had not posted up the clauses of the Municipal Act in reference to bribery, in the manner required by the Act:

Held, that this formed no ground for quashing the by-law.

A petition to a municipal council prayed for the passage of a by-law granting aid to a Railway Company, to be charged on a specified section of the county. In the section so specified were situated two villages both of which were incorporated, but they were not named in the petition or in the by-law:

Held, no objection to the by-law.

Statement.

The bill in this case was filed by the Municipal Corporation of the Township of *West Gwillimbury* against the *Municipal Council of the County of Simcoe*, the *Corporation of the said County*, *The Hamilton and North Western Railway Company*, and *John Hogg*, Warden of the County of Simcoe, praying under the circumstances therein set forth and which are statad in the judgment, that the by-law passed granting aid to the

1873. said Railway Company might be declared invalid, and that an injunction might issue restraining the issue of debentures in pursuance of the aid granted by the by-law.

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A motion was accordingly made for an injunction in the terms of the prayer of the bill by

Mr. *Blake*, Q. C., Mr. *Moss*, Q. C., and Mr. *Foster*, for the plaintiffs.

Mr. *Burton*, Q. C., and Mr. *Hoskin*, C. C., for the defendants the *Railway Company*, and

Mr. *McCarthy*, Q.C., for the County of *Simcoe*, contra.

BLAKE, V. C.—On this motion it is asked that the County of Simcoe be enjoined from issuing certain debentures, as it is alleged, the by-law under which they propose to do so is invalid for the following reasons:—

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First—Because the fifty ratepayers who signed the petition asking the defendants, the Council, to pass the by-law in question, do not represent the various localities affected by the by-law.

Second—That in place of the Council passing a by-law in accordance with the petition, one is passed differing therefrom in two particulars; the one, that whereas the petition asks for aid for the whole line of railway, the by-law grants aid for the line only as far as Barrie, and the other, that the petition includes Bradford and Stayner in, and the by-law omits them from, the portion of the County aiding the railway.

Third—That the passing of the by-law was procured by illegal votes.

Fourth—That the Company was guilty of bribery,

and by this means procured the votes of certain persons, and deterred others from voting against the by-law. 1873. West Gwillimbury v. Simcoe.

Fifth—That the share of the bonus to be paid by the Town of Collingwood will require the levying in that municipality of a greater annual rate then three cents in the dollar of its ratable property, which is the limit allowed by the 19th section of the Company's Act.

Sixth—That the Company entered into agreements for the locating their line, and building stations in certain localities which are invalid, and by means of which agreements voters were influenced unfairly.

Seventh—That in some localities knowledge of these agreements was withheld in order similarly to affect the voting on the by-law.

Eighth—That the clauses of the Municipal Act in reference to bribery were not posted up in conspicuous places as required by the Act, nor was the by-law duly advertised prior to the polling day. Judgment.

Section 15 of the Act incorporating the Company, provides for the petition, the basis of the by-law which has been passed; the words of this section material to the first point raised are: "If fifty persons, at least, of the qualified ratepayers within the portion of the County affected * * * do petition," &c. The only requirement here imposed as to the locality of the ratepayers is, that they are to be "within the portion of the County affected." I cannot add to this a clause that would have the effect of requiring the petition to be signed by a certain proportion of the fifty ratepayers from each portion of the County. Indeed the other method prescribed by the Act for the presentation of the petition, shews plainly this was not the intention of the Legislature. The same section provides that, "The majority of the reeves

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and deputy-reeves for those townships, towns, or incorporated villages, that may be asked to grant a bonus," may petition. Here the petition may be presented if there be a majority of the reeves and deputy-reeves. It may be that certain localities will not be represented at all in the petition, and others may have even opposed it through their head officer, but still the required number having been obtained, the petition is one on which the Council is bound to act. There cannot be any greater reason for insisting upon a request from each locality in the one case than in the other. This objection must be overruled.

Judgment.

I do not think there is anything in the latter of the two discrepancies said to exist between the petition and the by-law; the petition sets apart a section of the County of Simcoe, composed of nine townships, and the towns of Barrie and Collingwood. The villages of Bradford and Stayner, both of which are incorporated, are not included by name in the petition; but it is said they are included territorially in the townships of West Gwillimbury and Nottawasaga, which are embraced in the petition, and therefore they should not have been omitted in the by-law. I do not think they are included in the manner contended for. When they were incorporated they were set apart from these townships, and acquired territorial limits which they hold distinct from the municipalities with which they were at one time united. Barrie and Collingwood are set out in the petition; but it might equally be said of these towns, they should not have been mentioned in the petition as territorially they form parts of the townships in which they are situate.

The number of votes polled in favor of the by-law was 2,604, and the number against it 1,043. It is true there has been some evidence of illegal votes polled, both for and against the by-law; but it is not possible

to succeed in reducing the large majority that has been obtained. The evidence on this head would not warrant me even in granting an injunction to restrain proceedings until the hearing. I cannot therefore on the third ground taken assist the plaintiffs. 1873. West Gwillimbury v. Simcoe.

The fourth objection is, that of bribery; section 243 of chapter 48, 36 Victoria (Ontario), sets out that "Any by-law, the passage of which has been procured through or by means of any violation of the provisions of sections 153 and 154, of this Act shall be liable to be quashed."

There has been in this case some evidence of treating and hiring of teams, but the gentlemen who, on the part of the Company were actively engaged in procuring the passage of this by-law, Messrs. *Stuart*, *Young*, and *Saunders*, deny all improper practices, and swear they warned the persons canvassing for the railway that no money should be spent except for legitimate expenses. The evidence before me does not lead to the conclusion that the passage of the by-law was procured through any violation of the provisions of the sections against bribery, which are made to apply by this Act. But even if my opinion were in favor of the plaintiffs on this point, I am not prepared to say I should interfere to grant an injunction. Under section 244 of the present Municipal Institutions Act, a simple method is pointed out for investigating the question of bribery; the machinery of the Common Law Courts can be put in motion at once, the question could there be disposed of in a few weeks, whereas it could not be commenced here for nearly four months. In the meantime these Courts have power to stay the taking of proceedings under the by-law. Where time is a matter of such great moment as in this case, I think it would be a most unwise exercise of the discretion which I may have, if I were to allow the parties to pursue the most dilatory course in place of requiring them to adopt Judgment

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the speedy method pointed out by the Legislature. The relief granted in this Court in these matters is only in aid of the relief at law, and where the Common Law Courts have been given full power we should not interfere here. In *Carroll v. Perth* (*a*), on rehearing, the rule is thus laid down, "Our jurisdiction in such matters, it seems to me is essentially preventive, and therefore ancillary. It should only be invoked and employed when absolutely necessary."

Judgment.

The fifth objection fails for want of evidence. The present charges against the Town of Collingwood, including its share of the bonus in question, require a rate of little more than two cents in the dollar on its ratable property. It is said the ordinary expenses last year amounted to nearly two cents in the dollar and thus there would be required over four cents in the dollar, and in this way the limit would be exceeded. I cannot take for granted that Collingwood will this year need as much as last year for what is called ordinary expenditure. I rather should take for granted that they will so far controul their outlay as that they will not exceed the amount allowed by law to be levied annually.

It is to be observed as to the sixth and seventh objections, that no such agreements as those complained of were entered into between the Company and the plaintiffs. In some cases persons, in others municipalities, made agreements with the Company as to the location of the line and the stations; section three of the amended Act gives this power expressly. Those that insisted on having these matters defined before the by-law was passed, procured the documents they asked for. The Company asserts that in good faith it is determined to build its line along the route thus laid down; and that it matters not to them whether the persons with whom they

(*a*) 10 Gr. 65.

were negociating had the instruments they signed, drawn up with all the care, or formality, that is required by law or not. No improper use was made of the agreements in question, that I can ascertain from the evidence. The plaintiffs neither asked for nor received any thing of the kind, and it was not argued that they have been in any manner misled or injured by the arrangements come to by the Company and other municipalities. I cannot find the by-law invalidated on this ground.

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I think the by-law was advertised as required by the Statute. The sections of the Municipal Act relative to bribery I do not think were posted up in accordance with this Act. I do not find this a sufficient reason for holding the by-law not valid. It is a matter of discretion, and I am of opinion it would be a most unwise exercise of it under the circumstances of this case, if I were, for such a mistake as that, occasioned by the neglect of duty on the part of one of the officers of the Corporation, to quash a by-law on which so much seems to depend.

Judgment.

See *Gibson* v. *Bruce* (*a*) and cases there cited, and also *Connor* v. *Douglas* (*b*), for the rule laid down by the Court of Error and Appeal under the somewhat analogous provisions of the Tax Title Acts.

The last objection which I have to consider is one I was unable to dispose of in its order, as I was not at first furnished with a copy of the by-law as actually passed.

The petition presented by the fifty ratepayers asks that the debentures to be issued shall not be parted with until the Company shall deliver to the County of Simcoe an agreement to the effect that the trustees shall not be

(*a*) 20 U. C. C. P. 398. (*b*) 15 Gr. 456.

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at liberty to pay over the proceeds of such debentures except for work actually done, or materials provided therefor within the limits of the County of Simcoe, and then only *pro rata* on the certificate of the engineer as provided for in the said Act of Incorporation." The third section of the Act of Incorporation empowers the Company to construct a railway from some point near Hamilton through "Simcoe, to a point on one of the bays bordering on the township of Tay, and with power to continue the same towards, or to Lake Nipissing, and with power to extend the same to the waters of Lake Simcoe at or near to Barrie." By the by-law, as passed, the debentures are not to be parted with until the Company shall deliver to the County "an agreement to the effect that the trustees shall not be at liberty to pay over the proceeds of such debentures, except for work actually done, or materials provided therefor within the limits of the County of Simcoe, and then only *pro rata* in the proportion that the said bonus of

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$300,000, bears to the *bona fide* contract for the construction and completion of the road within said County, (save and except the part or portion thereof, between the Town of Barrie and the northern terminus on the Georgian Bay,) on the certificate of the engineer, as provided for in the said Act of Incorporation."

I am of opinion that, under the Company's Act the by-law must follow the petition. Section 15 says, upon the petition being presented, the Council of the County Municipality "shall pass a by-law," and submit it to the ratepayers. Sub-section 1 of this section states that this by-law is for raising the amount petitioned for, and "for the delivery to trustees of the debentures for the amount of said bonus at the times, and on the terms specified in said petition." I do not think the Municipal Council could add any condition to those imposed by the petition, nor could it omit one which the petitioners chose to impose.

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I am of opinion further, that there is a most material variance between the petition and the by-law in question. The petition, when taken in connection with the clauses of the Act therein referred to, amounts to this: a line of railway is being built through the County of Simcoe to the Georgian Bay; we will assist this line to the extent of $300,000, and this sum is to be paid out *pro rata* as the work progresses in the County of Simcoe. Now the result of this arrangement would be that, supposing the projected line from its entering Simcoe, until it reached its terminus in Tay were sixty miles in length, the Company would on each mile being constructed, receive $5,000; the petitioners did not ask for anything less than a continuous line through their County, nor did they propose to expend their money, or at all events, $300,000 of it, to obtain such a portion of this railway as the Municipal Council might think proper to determine. But the effect of the by-law is to give the sum granted, and to obtain only a line to Barrie; supposing the distance from Barrie to Georgian Bay were thirty miles, then the Company, in place of receiving $5,000 a mile, would be obtaining $10,000 a mile. The whole of the bonus would be paid over for thirty miles of the line running through this County, and the other thirty miles would be unbuilt. The petitioners might be willing to assist an undertaking to so large an amount as is in this case being furnished, in order to obtain connection with the Georgian Bay, whereas they might not be prepared to grant any bonus towards such a line as that contemplated by the by-law; as the petition did not thus limit the portion of the road to be aided, the by-law should not have done so.

Judgment.

Up to the present I have been dealing with the case apart from the amendments made to the Act of Incorporation by 36 Victoria, chapter 84;—section two of this Act, it appears to me, enables the Municipal Council, either by stating it in the by-law, or by agree-

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ment, after the passing of the by-law, to declare the trusts upon which the debentures are to be held irrespective of that which may have been asked in the petition. In that section, power is given to define certain trusts, "or to vary the said trusts in and by the said by-law, in such a manner as may be agreed on between the Council and the Company, or to do so by a separate agreement, specifying the terms on which the same may be converted into money or delivered to the Company; and generally to make such arrangements respecting the conditions or disposition of such bonus as may be found advisable; which agreements the said Municipal Councils and the directors of the Company, are hereby respectively authorized to make."

Judgment.

This section and sections 3, 4, 5, and 8, of this Act, seem to have been passed to meet such a difficulty as that which might otherwise have arisen in the present case, and in order to place such large powers in the hands of the Municipalities granting aid to railways, as will enable clause 15 to be worked out in such a way as to give an increased power to certain Municipalities to charge others with a share of railway undertakings which they do not desire to aid.

I, for some time, doubted whether, under the circumstances, it would not be my duty to grant an injunction to stay proceedings under the by-law until the hearing; but after weighing the matter with much care, I have come to the conclusion that, although there are matters raised by the bill, which are open to question, and which are well worthy of being discussed at the hearing; yet as my present impression upon them, is in favor of the defendants, I should refuse the motion. The railway must be commenced within a specified time. The obtaining a bonus in one locality depends upon the success in another, in a great measure; and it may be that the arresting the action of the County of Simcoe at the

present juncture, would, as it was urged, very much damage the undertaking, if it did not frustrate it. Matters would not, by granting an injunction in this case, be preserved in *statu quo*. A positive injury must be caused to the defendants by staying their action; and I think this greater than that which would arise to the plaintiffs, even if at the hearing, it turns out that I erred in my conclusion that the defendants are in the right. 1873. West Gwillimbury v. Simcoe.

I regret the hardship of the case of the plaintiffs, who are to be assessed for $40,000 towards the building of a line of railway, which, it is said, does not go through their township, and will be injurious to them; but clause 15 of the Act in question, seems, beyond all doubt, to give the power which, it is alleged, is being used to their detriment by the neighbouring Municipalities. The Legislature alone can free them from the burden of which they complain. I refuse the injunction. Judgment.

RICE v. GEORGE.

Tenants in common—Rents—Improvements.

A tenant in common being in actual occupation of the joint estate forms no ground for charging him with rent. It would be otherwise however if he had been in the actual receipt of rent from third parties.

One of several tenants in common, or joint tenants, making improvements on the joint estate, is not entitled to be paid therefor; unless, on the other hand, he consents to be charged with occupation rent.

Semble, that one tenant in common selling timber off the joint property is not chargeable with sums realized therefrom.

Hearing on further directions.

The facts of the case appear sufficiently in the report of the case on appeal from the Accountant's report, *ante* vol. xix., page 174, and in the judgment on the present hearing.

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Mr. *Morphy* and Mr. *Grahame*, for the plaintiff.

Mr. *Moss*, Q.C., and Mr. *C. Moss*, for the defendants *Agar* and wife.

Mr. *English*, for the defendant *Elizabeth Gray*.

SPRAGGE, C.—The principal question between the parties to this suit, who are entitled to a partition as tenants in common is, whether those who have been in possession of the land, or part of it, are chargeable in respect of the value of their occupation, in the absence of the actual receipt of rents in money or in kind; and whether they are chargeable in respect of the value of timber cut and sold by them. Both these questions were before Vice-Chancellor *Kindersley* in *Griffies* v. *Griffies* (*a*), and his judgment was, "as each party is entitled to enter upon the whole property, there can be no claim by one tenant in common against another for an occupation rent. As to cutting down trees, and the other acts of waste alleged in the bill, each tenant in common has a right to exercise acts of ownership over the whole property, and no charge can therefore be sustained in respect of such an act."

Judgment.

The first of these two questions had been solemnly decided in the Exchequer Chamber in the case of *Henderson* v. *Eason* (*b*), and the point has not, so far as I am aware, been mooted since. Cases have arisen since in which the Court has interfered on behalf of one tenant in common against another in actual possession; but that has been on the ground of there being such acts by the one in possession as amounted to the exclusion of his co-tenant. These cases do not at all impugn the rule settled in *Henderson* v. *Eason*, but are professedly exceptional cases. The rule established in *Henderson* v. *Eason* has been repeatedly acted upon in this Court.

(*a*) 8 L. T. N. S. 758.

(*b*) 17 Q. B. 701.

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It lies therefore upon the tenants in common seeking an account against their co-tenant, to shew exclusion by the tenant in possession. I am not indeed referred to any case where a tenant in common in possession has been made to account for a share of the value of his occupation, unless it be *Teasdale* v. *Sanderson*, which I will refer to presently. There are cases where the Court has appointed a receiver, one tenant in common having done acts amounting to an exclusion of his co-tenant. This was done in *Sandford* v. *Ballard* (*a*). And in *Tyson* v. *Fairclough* (*b*), Sir *John Leach* intimated his opinion that it would be done in a proper case.

In the case before me I do not find any exclusion on the part of *George Augustus Burn*, or those claiming under him. Assuming that after the death of his father the possession was in *George Augustus*, a fact which cannot be said to be proved, it was a possession under the circumstances stated in my judgment, on the appeal from the accountant (*c*), and his sale to *Cleghorn* was, under the circumstances, there also stated. There was never, so far as appears, any claim made by the co-tenants upon *George Augustus*, or upon *Cleghorn*, or upon those who succeeded them, in respect of this land: nor, on the part of those in possession, any act of exclusion of others. There was simply a sole possession on their part: and that under the cases does not render the tenant in possession liable to account.

Judgment.

If there has been an actual receipt of rents, there must as to that be an account.

But for the case of *Griffies* v. *Griffies* I should have more doubt whether a tenant in common cutting timber would not be liable to account under the Statute of Anne (*d*). Section 27 gives an action of account, *inter*

(*a*) 33 Beav. 401.
(*b*) 2 S. & S. 142.
(*c*) 19 Gr. 179.
(*d*) 4 Anne, c. 16, s. 27.

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alia, by one joint tenant and tenant in common, "against the other as bailiff, for receiving more than comes to his just share or proportion." Conceding that under *Henderson* v. *Eason*, a tenant in common is only chargeable where he actually *receives* from a third person, I do not, I confess, see very clearly that where he receives payment for timber sold off the land, it is not within the Statute of Anne. That was, however, the very case in *Griffies* v. *Griffies*. The bill charged the defendant with cutting down timber, and the judgment of Sir *Richard Kindersley* was that which I have quoted; and the language of Lord *Eldon* in *Hole* v. *Thomas* (*a*), and in *Twort* v. *Twort* (*b*), is a good deal in favor of the same view.

Judgment.

A question arises upon a claim made by *Agar* for an allowance to be made to him for improvements made by him upon lot 20. He has been in the personal occupation of lot 20; and it is upon that lot that he has made his improvements. Mr. *Morphy*, for the co-tenants, contends upon the authority of *Teasdale* v. *Sanderson* (*c*), before Lord *Romilly* that the value of *Agar's* occupation of lot 20, beyond his just share and proportion, should be set off against the value of the improvements made by him. Mr. *Moss*, for *Agar*, contends, on the other hand, that it is the practice of the Court, in making partition, to allot to a party who has made improvements, the portion of the common property, whereon he has made improvements, wherever it is practicable to do so; and he asks that this may be done in favor of *Agar*, without regard to the value of his personal occupation.

In *Teasdale* v. *Sanderson* there was one plaintiff and more than one defendant. One of the defendants had been in personal occupation of a part of the premises,

(*a*) 7 Ves. 589. (*b*) 16 Ves. 128.
(*c*) 33 Bea. 534.

and had expended, as he said, a sum of £60 in repairs and lasting improvements. The bill was for a partition, and for an account of rents and profits received by the defendants, who had, as the report states, been in exclusive possession for about fourteen years. The defendant who had been in personal occupation resisted being charged in respect of it, citing *Griffies* v. *Griffies;* and, as the report of the case says, "He asked, at all events, to be allowed for his repairs and improvements on the part of the property not occupied by him." And Lord *Romilly* said, "I think that these accounts must be reciprocal; and unless the defendant is charged with an occupation rent, he is not entitled to any account of substantial repairs and lasting improvements, on any part of the property."

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It is to be observed that no allowance was asked in respect of repairs and improvements made on the part of the property occupied by the party who had made them; and it does not appear to have been asked that in making partition, the part improved should be allotted to the party who had improved it; or that regard should be had to the circumstance of improvements having been made. It is to be observed too, that Lord *Romilly* does not adjudge that the party improving was chargeable with an occupation rent; but that he was not entitled to be allowed for repairs and improvements unless on the other hand he is charged with occupation rent. The shape in which the allowance was asked, seems to concede that the party could not ask for an allowance for repairs made on the land of which he had had the personal occupation; and with this Lord *Romilly* agrees, and goes further, nor for improvements made "on any part of the property." It was probably the case, and felt to be the case, that his personal occupation was an equivalent for the improvements made by him on the part that he occupied. In this case the improvements have been made on the land of which

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Agar, and those under whom he claims have been in personal occupation.

It does not appear that in *Teasdale* v. *Sanderson* any mode of compensation for improvements was suggested, and from the way in which the question arose, it is not probable that any mode of compensation was discussed; but the spirit of the decision appears to be, that if a tenant in common has been in the beneficial occupation of property, and has also made improvements, he must, if he asks for compensation in any shape for his improvements, account for the profits he has derived from his occupation. A party who has made improvements has no absolute right that they shall be taken into account in the making of partition. As a general rule it is just that they should be, but where there is a countervailing equity, that also must be taken into account, or it would be, what is indeed a contradiction in terms, a one-sided equity. My conclusion is, that *Agar* is not, upon partition, entitled to have improvements made by him taken into account in any shape, unless, on the other hand, he accounts for the profits derived from his personal occupation.

Judgment.

I understand that partition is asked of all the lands of which the parties are tenants in common, and not of lot 20 only.

Mr. *Morphy*, asks that partition be made between those deriving title under the original tenants in common, as well as between the original tenants in common themselves; and this seems to be reasonable and proper: *Story* v. *Johnson* (*a*).

The plaintiffs ask that the costs be borne by the other co-tenants as well as by themselves. So far as the

(*a*) 2 Y. & C. Ex. 586.

suit has been a suit for the common benefit of all the co-tenants, they should all contribute. So far as it has been hostile to *Agar*, or those under whom he claims, they will of course bear no portion of the costs; and costs already adjudged will not be disturbed.

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Rice v. George.

CLINE v. THE MOUNTAINVIEW CHEESE FACTORY.

Demurrer—Injunction—Parties—Pleading.

A bill was filed against a joint stock company (limited) to restrain the infringement of a patent, to which certain officers of the Company were made parties, and the bill alleged that "the defendants" were committing the acts complained of, and prayed relief against "the defendants." A demurrer on the ground that the officers were improperly made parties, was overruled with costs: these officers being charged personally with committing the acts complained of, and relief being prayed against them.

Demurrer for misjoinder of parties and for want of equity.

The points relied on, and the cases cited, are stated in the judgment.

Mr. *R. M. Wells*, for the demurring defendants.

Mr. *Moss*, Q. C., contra.

BLAKE, V. C.—The plaintiff by his bill claims to be the discoverer of certain new and useful improvements in the act of bandaging cheese, known as "Cline's Method of Bandaging Cheese." Letters patent were granted the plaintiff as the inventor of the process in question, under "the Patent Act of 1869." Paragraph seven of the bill is as follows: "The said *John Potter* is President, and *Gilbert Way*, *Thomas Giles*, *John Howell*, and *Sylvester Sprague*, are the directors of the said *The Mountainview Cheese Factory*; and the said defen-

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dant *James Kimmerly*, was, and is the foreman or manager thereof; and the said president and directors actively interfere in and control the business and affairs of the said company." The bill goes on to allege that "the defendants" are using at their factory his discovery; that "the defendants" are making large quantities of cheese, and in so doing, are infringing the plaintiff's patent, and are deriving large gains and profits therefrom; that the plaintiff has frequently requested "the defendants" to desist from the use of his discovery, and to come to an account for the profits by them made therefrom. The plaintiff prays that his right to his patent may be established; that an account may be taken of the profits made by "the defendants" by their use thereof, and of the damages sustained by the plaintiff thereby; and that "the defendants" may be decreed to pay the same; that the "defendants" may be restrained from using the discovery in question; and that "the defendants" may be ordered to pay the costs of the suit.

Judgment.

To this bill the Company and its president, directors, and foreman, are made parties; and the defendants other than the Company demur on two grounds: the first being that they are not proper parties to the suit; and the second, for want of equity. Upon the argument, it was urged, first: that as the parties demurring, were added only for the purpose of discovery, under order 63, they were improper parties. Second, that unless there be some special circumstance alleged in the bill, persons occupying the position of these defendants, could not properly be brought before the Court as parties. In support of the first ground of the demurrer, the following authorities were cited: *Fenton* v. *Hughes* (*a*), *Glascott* v. *The Copper Miners Company* (*b*), *Harvey* v. *Beckwith* (*c*), *Dummer* v. *The Corporation of Chippenham* (*d*). I do not think these cases shew that the de-

(*a*) 7 Ves. 288.
(*b*) 11 Sim. 305.
(*c*) 2 H. & M. 429.
(*d*) 14 Ves. 245.

fendants demurring, are not proper parties. Our order in distinct terms lays it down that persons occupying the position of the officers of the company in question, are not to be made parties "for discovery only," some of the cases cited, seem to support that, as the proper rule; but I do not find they go further. The very expression in the order referred to "for discovery *only*," seems to shew that for purposes other than discovery, these defendants can properly be made defendants. This deduction appears to me also to be the true one to be drawn from the authorities cited by the counsel for the defendants demurring, and above referred to. In *Fenton* v. *Hughes*, Lord *Eldon* says, "The demurrer is put upon the principle, that *Bate* ought not to be a defendant, being a mere witness. * * This is a mere bill for discovery. * * I cannot find an authority, that a person can be made a party to a bill for discovery, merely to aid the plaintiff in equity as defendant at law, upon the circumstance, that the production and inspection of goods may be better compelled here." That case is therefore merely authority for the proposition that where a bill is filed for discovery in aid of an action, a demurrer by a mere witness made a defendant, will be allowed.

Judgment.

In *Glascott* v. *The Copper Miners of England*, it was held that on a bill for discovery, officers of a corporation may be made co-defendants to a bill against the corporation; and it is worthy of note that in this case, counsel for the defendants admitted, that "a plaintiff cannot make an officer of a corporation a co-defendant to a bill which seeks for discovery only, although he may make him a party to a bill which seeks for relief against the company."

Harvey v. *Beckwith* assists but little the present case. There it was insisted that the secretary was a mere servant, and therefore an improper party. The Vice

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Chancellor does not deal at large with the question, but simply disposes of it on the special circumstances of that case, by saying, "By these rules his co-operation is rendered necessary to the plaintiff who can only reach the shareholders through him. I think, therefore, that that objection also is unfounded."

In *Dummer* v. *The Corporation of Chippenham*, the bill alleged that the plaintiff had been dismissed from his office of schoolmaster by the corporation, with the connivance of five of its members who were made defendants. These five defendants demurred on the ground that, so far as they were concerned, it was a bill merely for discovery. It was thus put by Lord *Eldon*, "The ground of the demurrer upon the record is, that these five defendants are persons against whom there can be no decree; that they are mere witnesses, who, therefore, should not be defendants; and the general rule, which is unquestioned, is insisted on, that persons standing in a situation in which all that the Court can demand, is their testimony in a cause between the plaintiff and the defendants, are not to be made parties. A rule certainly admitting exceptions, in some cases in which arbitrators may be made defendants; in others in which attorneys who prepared the deeds, though they have no interest to convey, give up, or receive, may be made parties, and *unquestionably the practice is settled admitting an exception in the case of a corporation whose officers and servants are made parties.*" There it was held that it would be proper to call on the defendants for an answer and the demurrer was overruled. Now, in none of these cases did the point raised before me arise, and therefore they cannot be said to be authorities binding me either in favor of the present plaintiff or defendants. But the expression of opinion of the Judges deciding them, is entitled to the utmost consideration; and I think the inference to be derived from the statements there made is, that the Court where relief is asked against the officers

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of a corporation, such as that here before me, as well as against the corporation itself in respect of the acts complained of in this bill, must hold such persons to be proper parties to the proceedings. It is evident here that these defendants are not made parties "for discovery only." The allegations as to infringement of the patent and as to the other acts complained of, are made against these defendants as well as the corporation; and it is asked that they should be made responsible for the damages which may be found in favor of the plaintiff and for the costs of suit. It is further alleged that these defendants "actively interfere in and control the business and affairs of the company. This bill, therefore, asks substantial relief against the demurring defendants; and under the cases which I have referred to, can be sustained so far as this objection is concerned against all the defendants. The case cited in support of the bill, seems to be precisely in point, and removes the only doubt resting on my mind, which was whether the defendants' company, being limited as to liability, it was possible that its members could have such liability in any way increased, or whether the directors could not say, "our liability is measured by our charter, as between our company and third parties. You cannot increase a liability which is answered by one paying up so much stock; there cannot, therefore, be such a claim against us as that made by the present bill, which accordingly must fail."

Judgment.

In *Betts* v. *De Vitre* (*a*), the bill was filed by the plaintiff as the patentee of an invention against a company and its directors to restrain them from infringing his patent. The company there was a limited one. A decree was pronounced in favor of the plaintiff. It was asked that the defendants, the directors, should be made to pay the costs of the litigation; and in disposing of

(*a*) 11 Jur. N. S., reheard L. R. 3 Ch. Ap. 429, In appeal. L. R. 5 H. L. 1.

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this branch of the case, the present Lord *Hatherley* makes the following remarks most pertinent to the present case.

"It is perfectly novel to me to hear it discussed, whether or not a corporation may sanction the acts of their directors, who have undertaken, by their direction, to do something wholly illegal, such as the infringement of a patent, or the cutting down of a whole wood, which would be exactly the same thing in effect. It is new to hear it said, that directors who have been guilty of such an act, and can be made responsible for it, are not to be made defendants to a suit—and can say they are not to be answerable for the consequences of their acts in that suit; because, forsooth, they have done it by the direction of a limited company. If so, there would be no end to the mischief and injury that might be committed by individuals choosing to act under the sanction of a company who had given those orders. This Court has always been in the habit of holding that anybody who takes part in a wrong of this description, is liable to be restrained from committing the wrong, and is answerable, although the form is to restrain the company, their servants and agents. I apprehend that every one of those agents might, if doing an actual wrong, be made a defendant to the suit, and personally and individually be made to pay the costs of it; and it is no justification for him to say that his master ordered him to do it. Generally speaking, the wrongdoers are persons in that rank of life, that it is not thought worth while to make them personally liable. It is no answer to say, because I did it on behalf of a limited company, I am not to be made responsible. The case being distinctly stated and proved, I have not the least doubt that the decree must be against them, both as to the injunction and account; and that they must be decreed personally to pay the costs."

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On re-hearing, this case was on this point carried further. It was then argued that, as any infringment which might have taken place, was contrary to the express orders of the directors of the company, they could not be made responsible. Lord *Chelmsford* thus delivers the judgment of the Court on that point: "Now, I will assume that the orders not to work in a particular manner, were given; and that the disobedience to those orders, was secret, although the evidence hardly warrants this conclusion. But granting all this to be the case, I should still hold that the directors would be liable. * * * The alleged infringement of the plaintiff's patent took place in the company's works, and in the course of the performance of the proper duties in which the workmen were engaged. Those who have the control of the working, are responsible for the acts of their subordinates; and it is not sufficient for them to order that the work shall be so done that no injury shall be occasioned to any third person. That, of course, must be avoided, whether orders to that effect are given or not; but the directors were bound to take care that their orders were obeyed; and if there was a violation of them, whether openly or secretly, they are liable for the consequences." This carries the responsibility of officers of a company, further than is necessary to support the bill against the present defendants. I should most unwillingly have come to the conclusion that while a plaintiff is entitled to relief against a company, those persons who are in fact responsible for the act, who set the machine in motion,—whereby the wrong complained of is accomplished, could not be reached by the proceedings in which the plaintiff succeeds in obtaining relief against the corporation, which without them, would have no existence. It would, to my mind, be a grevious wrong to enable these defendants, guilty of such acts as this bill complains of, to shelter themselves behind a company, because the liability under its charter is limited, or to leave the plaintiff to pursue the

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long and devious path whereby shareholders are, after judgment against a company, made responsible for sums that cannot be collected from the corporation. In cases such as the present, it appears to me, the defendants knowingly guilty of what they confess in this bill, should not be protected by any secondary liability, but should, in the first instance, be required to answer to the plaintiff.

In *Betts* v. *Neilson* (*a*), a case almost identical with *Betts* v. *DeVitre*, the House of Lords, while modifying the decree somewhat, did not interfere with the principle laid down in the Court below, which must now be considered as sanctioned by the highest authority.

The demurrer, for want of equity, was not argued, because, as I presume, counsel for the defendants considered it could not be sustained. In this view, I concur; and, therefore, do not deal further therewith. The demurrers must be overruled with costs.

Judgment.

GREEN v. CARLEY.

Will, construction of.

A testator by his will devised the real estate of which he should die possessed to his wife, "to hold the same forever, and to dispose of it in any manner she may think proper," and further "the residue of my estate both real and personal I give to my beloved wife to have and to hold the same for her sole use and benefit, during the term of her natural life, and that she may dispose of the whole or any part of the said personal estate, as she may think proper, and at her death the residue of my real estate or personal estate, if any," he gave to other parties:

Held, that the widow took an estate for life in the residue of the personal estate with an absolute power of disposition; but that the deposit in a bank to her own credit of the proceeds of notes and mortgages which the widow had collected was not such a disposition thereof as to withdraw them from the residue of the estate and give her an absolute title thereto; but that the same remained to be administered as part of the testator's estate.

(*a*) L. R. 5 H. L. 1.

Examination of witnesses and hearing at Kingston. 1873.

Green v. Carley.

Mr. *R. Walkem*, for the plaintiff.

Mr. *Britton*, for the defendant.

BLAKE, V. C.—The testator by his will devised the real estate of which he was possessed to his wife "to hold the same forever, and to dispose of it in any manner she may think proper." His will proceeds:—"The residue of my estate, both real and personal, I give to my beloved wife to have and to hold the same for her sole use and benefit, during the term of her natural life, and that she may dispose of the whole or any part of the said personal estate as she may think proper, and at her death the said residue of my real estate or personal estate, if any, I give and bequeath, &c."

The bill is filed by the representative of *Edward Green*, the testator against the representatives of *Ann Green*, the widow, asking for the construction of the will. The testator left farm implements, farm stock, furniture, notes, and mortgages. At the hearing of the cause I held that the farm implements, stock, and furniture, now in existence belonged to the estate of the testator, and must be accounted for by the defendants. It was admitted that the notes and mortgages no longer existed, but that their proceeds were represented by money on deposit in a bank to the credit of the widow. The plaintiff argued that these moneys belonged to him, as representing the estate of the testator, while the defendants claimed that there had been such a disposition of them as, under the will, made them the property of the widow. Upon this point I reserved judgment. Judgment.

It is evident that the testator did not intend by the second clause in the will to give the same rights in respect of the property then dealt with, as he did

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by the first clause of the will over the property there devised. He begins by devising the land without limitation and then adds, in order to express the absolute controul he desires to give, "to hold the same forever, and to dispose of it in any manner she may think proper." The interest given in the residue of the estate has some light thrown upon it by considering the words used when the testator intended that the object of his bounty should take absolutely the subject of his devise. The testator then proceeds "the residue of my estate, both real and personal, I give to my beloved wife, to have and to hold the same for her sole use and benefit, during the term of her natural life." To this paragraph, which would give the widow a life estate, and make her accountable for her dealings with the property, and for the forthcoming of the corpus of the estate, are added the words "and that she may dispose of the whole or any part of the said personal estate as she may think proper." It is a very nice question whether this would have the effect of enlarging the interest she took, and make her absolute mistress of the estate; or whether these words are not to be taken as simply dealing with her power of using the estate for life, and tantamount to the expression that "she is to have as full, free, and absolute disposition as a tenant for life can have." The latter appears to have been the view of Sir *William Grant* in the very similar case of *Bradley* v. *Westcott* (*a*).

Judgment.

The testator, in the next paragraph of the will, seems to have considered that he was only giving his widow a life estate, for he deals with the "said residue" referring to the same residue he had already given her, and says as to this that "at her death" it shall pass to certain other beneficiaries named in the will. This would assist materially in the construction of the will, but that after

(*a*) 13 Ves. 445.

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the "said residue" are introduced the words, "if any," again leading back to the idea that an absolute power of disposition, to be exercised in the lifetime was, intended. It does not appear to me, however, necessary to determine the exact nature of the estate the widow took. I find upon the will that whatever may be her power of disposition it was limited to her lifetime, and that, if not disposed of then, it does not pass under her will, but comes under the clause over, in the husband's will. It is said, however, by the defendants, that the notes and mortgages were collected, and the proceeds were deposited in the bank to the credit of the widow, and thus she disposed of them so as to give her an absolute title thereto. I cannot assent to this conclusion. The act of a tenant for life would be the collecting in of the estate as it became due, and the depositing the same in the bank, or investing it and drawing the income thereof. From the acts relied on by the defendant it cannot be collected that the widow disposed of or intended to dispose of these notes and mortgages so as to withdraw them from the effect of the husband's will. I think something more than what has been done here, must have pssed in order to the widow substantiating the claim now made by the defendants. In the Imperial Dictionary the following are given as the significations of the verb to "dispose of," "to part with; to alienate, to part with to another; to put into another's hand or power; to bestow; to give away or transfer by authority." The acts depended on to shew the disposition needed to give these moneys to the defendants are too vague and ambiguous to be relied on for any such purpose. I am of opinion they did not proceed from an intention to withdraw them from the effect of the husband's will, and that this question must be found in favor of the plaintiff. The point as to the true construction of the will was much discussed on the hearing and rehearing, in a case of *McLaren* v. *Coombs*, the report of which I have not been able to find. The cases of *Scott* v.

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1873. *Josselyn* (*a*), and *Henderson* v. *Cross* (*b*), were amongst the cases there cited.

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Let there be a decree for the administration of the estate of the testator, *Edward Green*, so far as may be necessary for the purposes of this suit. Let the inquiries include an account of what part of the estate has been disposed of so as to withdraw it fron the estate of the testator. Let a receiver be appointed unless the parties dispense therewith. Declare that the farm stock, implements, and furniture, now in existence; and the money in the bank to the credit of the widow, the proceeds of the testator's notes and mortgages, are not withdrawn from the estate of the testator, but must be accounted for in the accounts directed. Costs as usual out of the testator's estate.

Judgment.

HUGHSON v. COOK.

Crown lands—Sale of pine timber—Injunction.

The locatee of Crown lands located under the authority of the Act of 1868, has no power to sell or dispose of the pine timber growing thereon.

One *S.* was locatee of two lots of land, one a free grant, the other a purchase, which he transferred to the plaintiff. The agent of the plaintiff swore that some pine timber had been taken off these "lots in 1870–71 by some persons getting out square timber," and further that the defendant was the only person getting out square timber that season. After two years the Court considered this evidence too indefinite as to the locality of cutting and as to quantity cut; and the Act too old in date to warrant the Court in granting an injunction to restrain further cutting.

Examination of witnesses and hearing.

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

Mr. *Bethune*, for the defendant.

(*a*) 26 Beav. 174. (*b*) 7 Jur. N. S. 177.

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Hughson v. Cook.

SPRAGGE, C.—The principal question raised and discussed in this case is, whether under the Free Grant and Homestead Act of 1868, sales by locatees of lands within the tract or territory to which the Act applies, of pine timber growing upon lands of which they are locatees, are void.

Section 4, of the Act of 1868, authorized the Lieutenant-Governor in Council, "to appropriate certain public lands as free grants to actual setlers, under such regulations as shall from time to time be made by order in Council, not inconsistent with the provisions of this Act."

Section 10 enacts as follows: "All pine trees growing or being upon any land so located, and all gold, silver, copper, lead, iron, or other mines or minerals, shall be considered reserved from said location, and shall be the property of Her Majesty, except that the locatee, or those claiming under him or her, may cut and use such trees as may be necessary for the purpose of building, fencing, and fuel, on the land so located; and may also cut and dispose of all trees required to be removed in actually clearing said land for cultivation; but no pine trees (except for the necessary building, fencing and fuel, as aforesaid,) shall be cut beyond the limit of such actual clearing before the issuing of the patent; and all pine trees so cut and disposed of (except for the necessary buildings, fencing and fuel, as aforesaid,) shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw-logs. All trees remaining on the land at the time the patent issues shall pass to the patentee."

Judgment.

Section 12, is as follows: "Neither the locatee, nor any one claiming under him or her, shall have power to alienate (otherwise than by devise) or to mortgage or pledge any land located as aforasaid; or any right or interest, therein before the issue of the patent."

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By an Order in Council of the 4th October, 1871, the Commissioner of Crown Lands was "authorized to give public notice that the department of Crown Lands will recognize the right of all purchasers or locatees of Free Grant Lands, who shall have so purchased or located any lot in the said townships (of which Draper and Muskoka were two) on or before the 30th of September, 1871, and who shall on that day have been in the actual occupation of, and resident on the lots located, to sell or dispose of all pine trees, standing or being on the lots located, or purchased and occupied by them, subject to the payment of" certain duties specified in the Order.

A notice, dated 9th October, 1871, was published in pursuance of the above Order; and to the foot of it was appended this note: "*Note.*—No sale of timber made on or before the 30th of September, 1871, by any settler in the townships above referred to, will be recog-

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nized by the department unless confirmed by such settler subsequently to the Order in Council of the 4th instant." This note, or its contents, are not found in the Order, and form no part of it.

The first question, and that which lies at the root of the plaintiffs' case is, whether the provisions of the Act of 1868, are not such as to be prohibitory upon the locatee to cut pine timber except for certain specific purposes enumerated in section 10; because, if so, he could confer no right upon his alienee; and next, if the provisions of the Act, do not amount to a prohibition; and if they give a *quasi* license to the locatee to cut timber, whether section 12, does not prohibit the alienation of such license.

I think, both of these propositions must be answered in the affirmative. It is, however, sufficient for the disposition of this case if the second must be so answered.

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The plaintiffs come asking for the active interference of this Court in the protection of rights or interests acquired from locatees, *i.e.*, rights acquired by alienation before patent issued. If it is not a right or interest in the land, it is nothing, and it is that in the land, and that part of the land, which it is the manifest policy of the Act to preserve. It is quite intelligible that the Legislature should be content with the provisions of section 10, in regard to any timber cut for other than specified purposes when cut by the locatee himself: and yet provide strictly against alienation; for it is made the interest of the locatee to cut as little as possible, before patent issued, while an alianee has no such interest; he purchases the timber, and it is his interest to take the whole of it. But, whatever the reason for the restraint on alienation imposed by section 12, it appears to me clear that alienation is restrained; and that it applies to the subject upon which the plaintiffs' case is founded, their purchase of the pine timber.

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I think indeed, further, that the provisions of section 10 amount to a prohibition to the locatee to cut pine timber for any other than the purposes specified, before patent issued. His location carries with it only a qualified interest. All pine trees, with the exceptions specified, and certain metals and minerals are expressly excepted. They remain the property of the Crown, and therefore cannot, and do not pass to the locatee; that part of the section which allows trees to be cut for purposes specified, "may cut and use * * may cut and dispose of," leads to the same conclusion, and the maxim, *expressio unius est exclusio alterius*, applies.

It is true there is no penalty or forfeiture, as there is in certain cases of mere intrusion upon Crown lands. The Legislature has thought fit to make a difference, whether upon sufficient reason, is not for me to say: but the provision that is made, taken in connection with the

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rest of the section does, it appears to me, confer no authority upon locatees to cut pine trees except as provided. Such authority is, I think, by necessary implication denied to the locatee.

It follows, from the opinion that I have already expressed, that if the Order in Council of March, 1871, was intended to confer upon locatees a right to sell or dispose of pine trees upon their lots, that it was, in my judgment, *ultra vires*, as being inconsistent with the provisions of both sections 10 and 12 as I interpret them. The order does not indeed, in terms, give a right, or profess to confer authority; still it does not treat as already existing, any such right as that to which it refers. It may mean that in dealing with transferees of growing pine timber it will treat the locatees as having power to make transfers of it. If it meant more than this, I think it was *ultra vires;* but whatever it meant, if inconsistent with the Statute, it can give no *locus standi* in this Court.

Judgment.

I may add with regard to the provisions of those sections that if they were less clear than they appear to be, this Court ought not, in my opinion, to interpose in favor of the plaintiffs. At most the locatees from whom they purchased, had under their locations a power, not amounting to a right, to cut pine timber, and they transferred that power to the plaintiffs. The cutting of that timber beyond certain limits, if not absolutely forbidden, is against the policy of the Act, and alienation is also against the policy of the Act. The plaintiffs are alienees, asking the active assistance of the Court to protect them in that which is against the policy of the law, at least the then policy, as manifested by the provisions of the Act. It is a case in which they may properly be left to their rights at law, if they have any.

All the lots off which there is any evidence of timber

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being taken by the defendant, are free grant lots, with one exception. One *Albert Spring* sold to the plaintiffs the timber upon five lots, 11, 12, 13, and 14, in the 8th, and 13, in the 9th concession of Draper. Two of these, 13 and 14 in the 8th concession, were located by *Spring*, the others he acquired from other locatees; of the two located by *Spring*, one, according to the evidence of Mr. *Lount*, the Crown Lands Agent for the Muskoka District, was a free grant: the other was a purchase by *Spring*. He does not say which of the two was a free grant, and which was a purchase. The observations that I have made apply to all the *Spring* lots, except this one purchased lot. To fix the defendant with having cut timber on the purchased lot, it would be necessary to prove that he cut on both 13 and 14, in the 8th concession; and it would be also necessary to shew that the cutting was such, as to time and circumstances, that it would be proper to grant an injunction. None of this is established in evidence. An agent of the plaintiff says in his evidence, "Some timber was taken off *Spring's* lots in 1870-71, by some persons getting out square timber;" and he says that the defendant was the only person getting out square timber that season.

Judgment

This evidence is too indefinite as to locality of cutting, and as to quantity cut; and it is moreover too old in date to warrant an injunction. There is also against it the evidence of *McDonald*, defendant's agent, in getting out timber. He says that he did not cut any timber on the *Spring* lots to his knowledge. The defendant does not appear to have claimed any right to cut upon any of the *Spring* lots. My conclusion in regard to the alleged cutting on the lot purchased by *Spring* is, that the plaintiff fails to establish his case; and fails especially in establishing a case for injunction.

Other questions were raised which, in the view

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that I take of the Act of 1868, it is not necessary to detemine.

The plaintiffs' bill is dismissed, and it must be with costs.

COTTON v. VANSITTART.

Fraudulent assignment—Life policy.

A person in embarrassed circumstances proposed to assign a policy on his life, in trust, first to secure certain advances and then for the benefit of his wife. The advances were made and the assignment executed, but no trust in favor of the wife was declared or was required by the lender as a condition of the loan. Subsequently the trustee made further advances to the settlor, and in his evidence stated that the settlor might have absorbed the whole amount if he (the trustee) had seen fit to advance it. After the death of the settlor all the advances were paid and the residue of the insurance moneys invested for the benefit of the widow:

Held, that so far as the interest of the widow was concerned, the settlement was void.

Examination of witnesses and hearing.

Mr. *Boyd* and Mr. *Totten*, for the plaintiff.

Mr. *Moss*, Q. C., and Mr. *Smart*, for the defendants.

Judgment.

BLAKE V. C.—On the 13th of April, 1850, the late *John George Vansittart* effected an insurance on his life in the Canada Life Assurance Company for $4,000, payable three months after proof of his death. On the 26th of July, 1852, this policy was assigned to Messrs *Cottle & Barwick* "in order," as the insured says in a letter dated the 5th of April, 1862, "to give all I could as collateral security." On the 18th of August, 1862, this policy was valued at $1200, which sum was paid to Messrs. *Cottle & Barwick*, and they about that date assigned it to the Honorable *John Hillyard Cameron* by

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an instrument, not produced, but which was absolute on its face. Messrs. *Cottle & Barwick* did not pretend to hold the policy absolutely, and therefore they agreed to accept the redemption money, $600 of which was furnished by relatives of Mr. *Vansittart* in England, and the other $600 by Mr. *Cameron*; the repayment of which sums was to be a charge on the policy. Although the assignment to Mr. *Cameron* was, on its face, absolute, Mr. *Cameron* in his evidence thus states the verbal or secret trusts upon which he accepted it: "The assignment was made to secure Mrs. *Vansittart's* advance, my advance, and such advances as might be subsequently made, and the balance of the policy was for the benefit of Mrs. *John George Vansittart* and the children. * * I had nothing to do with the persons who advanced the £120 stg. I knew of no arrangement about it except what I myself made when the policy was assigned. Under the arrangement with *John George Vansittart* he might have absorbed the whole of the value of the policy if I had chosen to advance it. * * *John George Vansittart* was primarily liable to me for the payment of the premiums and I took security for this. * * Mr. *Robinson* acted for the English friends. When I got the assignment of the policy I made an arrangement whereby I could charge the policy with any advances I made. I held the policy as security for my advances. * * I told Mr. *Robinson* what the trusts were to be when the money was advanced. Any communication I had with the *Vansittart* family in England was through Mr. *Robinson*." The evidence of Mr. *Robinson* upon this point is as follows: "All that I stipulated with Mr. *Cameron* for was the repayment of the £120 stg., and interest, as a first charge on the insurance fund. I don't think I communicated to Mr. *Cameron* any desire on the part of the friends in England who advanced the £120 that the residue of the policy should be secured to Mrs. *Vansittart*. I have no recollection of doing so, and I believe I did not. What I did in the end was, to take the declara-

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tion of trust to secure the £120 stg., and nothing more. I did not think I was securing anything more than the repayment of the £120 stg. and interest." Mr. *Robinson* adds, "I knew at the time of the carrying out of this transaction that *John George Vansittart* was in embarrassed circumstances, although I cannot name any person to whom he was indebted."

In September, 1865, Mr. *Vansittart* borrowed, with the assistance of Mr. *Cameron*, $625 on this policy from the Company. Mr. *Cameron* also made an advance to Mr. *Vansittart* for the outfit of his son, on the same security to the amount of about $500. In October 1869, Mr. *Vansittart* died, and the defendant *Isabella Carrick Vansittart* administrated to his estate, and she is now the proper personal representative thereof. On the death of Mr. *Vansittart* the Assurance Company paid into this Court, under an order, the amount of the policy, and after paying the amount due them, Mr. *Cameron* and the relatives in England, there was a balance of $1,114.17 paid to Mrs. *Vansittart*, which is now represented by a mortgage held by a trustee for Mrs. *Vansittart*.

Judgment.

The deceased became indebted to the plaintiff in 1855, and in February, 1867, a judgment was recovered on this indebtedness for $422.78 damages, and $27.48 costs, which judgment is unsatisfied, and the bill asks that the mortgage may be made available for the payment of this and the other debts of the deceased, as it now represents a portion of the moneys of the life policy which it is alleged was assigned over in fraud of the creditors of Mr. *Vansittart*.

There can be no doubt of the position of Mr. *Vansittart* at the time of the assignment to Mr. *Cameron*. The evidence in the cause shews his embarrassments and the before-mentioned letter and a subsequent one of

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the 30th May, 1862, seem conclusive upon this point. In the former letter Mr. *Vansittart* says, "Eighteen months ago I was informed that the whole of my landed property was likely to be absorbed without fully protecting these gentlemen. * * The foregoing will explain the fact that I am without resources, beyond the sum first named for the life assurance. * * There can be no doubt my household effects will redeem the advance, if, as in all honor and reason I am entitled to do, I can thus legally make them represent it, otherwise some old claim yet undischarged, but for which I gave up everything, and far more than enough if properly applied, may possibly by law, not equity, dispossess me of them. Having stripped myself of everything it is now more than my right, it is my highest duty to protect, if possible, my wife from want by such a fair business proposition as the foregoing explains;" and in the latter one, "Indeed the negotiations must take place in his (Mr. *Cameron's*) name to secure the benefit to my wife, as there are yet outstanding claims intended to be covered by the assumption by these gentlemen of my liabilities, to secure which I made over the whole of my estate, which, however, remains unpaid, and could be brought down on this policy if in any way it could be brought home to me."

Judgment.

The following letters passed between the parties or their solicitors during the negotiation for the assignment of the policy:—

"On this 5th of April, 1862, on which day I enter my 50th year, I am about to give a statement of circumstances which have resulted in that which occasions me the deepest concern and anxiety.

"Just ten years ago I made a settlement of my property on my wife and family. Subsequently and before Mrs. *East's* death, I engaged in some speculations in

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land, with the hope of realizing a £1000 or so, against the loss inevitable on her death. An unexpected gain of £500, by the sale of a house and ground, that came into my possession for a bad debt, tempted me into this; and I invested that sum in new purchases, by paying a small sum only on each and giving mortgages for the remainders to be paid respectively in from five to eight years. Closely following this came the general crash in Canada—property was universally depreciated—no sales could be effected, and the 'personal covenant' in the mortgages held over all I possessed. It was then found that my previous settlement being *post nuptial* would not stand against such liabilities, and to save it, the trustees handsomely stepped in and offered, if I would convey *in fee* to them the whole of my property, to raise the money requisite to meet claims as they pressed, hold the property for sale till everything was cleared, and then settle the remainder for my wife's benefit. The whole of my liabilities were under £4000, and business valuers estimated my property at £8000. Thus it was expected, even allowing for interest and expenses, that over £3000 would be secured for her. In addition to the foregoing, I assigned my life assurance (£1000) in order to give all I could as collateral security, and because I believed it to be safer for her hereafter. A Mr. *Cottle*, and Mr. *Barwick*, and my brother *Henry*, were the trustees. *Henry* became released, by wish of the former, in consequence of his own embarrassments. Mr. *Cottle*, as the idle man, undertook the *active* management, from which Mr. *Barwick*, who was fully occupied with his own business, from the first claimed exemption, offering however to share the full responsibility and to give the benefit of his judgment. Eighteen months ago I was informed that the whole of my landed property was likely to be absorbed, *without fully protecting* these gentlemen. I therefore seized the opportunity which my aunt *Harriet's* money gave me, to endeavour to reclaim the life assurance at an equitable valuation, to which

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Mr. *Cottle* assented 'as the best thing I could do.' Mr. *Hillyard Cameron*, accordingly (and he was their own confidential legal adviser,) named the value at £275, and this estimate has been confirmed by actuaries here and in Scotland. Nevertheless, Mr. *Cottle*, to whose negligence and mismanagement I attribute the ruin of all, refused to accept, and has continued to reject the offer ever since, though the money has been waiting his acceptance and his coadjutor Mr. *Barwick*, consented to it as fair and reasonable. I have, however, just been informed that, through the intervention of a friend, he has agreed to accept an advance on that offer, which, together with amount of premiums borne by them in the interim, will require me to find a sum bordering on £120 stg. This amount I have not. Since our coming to Quebec I have supported my son *James*, while studying the law at Toronto. I have recently paid his fees of admission to the profession, and sundry expenses connected with his establishing an office of his own. I was also obliged when *John*, my eldest son, took the field as a Government surveyor, to assist in his outfit and to procure for him a new set of instruments. And further, out of aunt *Harriet's* money I paid some of the old claims assumed by the trustees with my property. The foregoing will explain the fact that I am without resources, beyond the sum first named for the life assurance.

Judgment.

I therefore am desirous to borrow, in a business way, the sum requisite to secure the £1000 for my poor wife at my death (which in this country could be made to yield £80 a year) viz., £120 stg. This I propose to have secured to the lender on my household effects, and further to make it chargeable on the life assurance itself, should the former fail to realize it, and I will pay five per cent. interest on it, half yearly, into any bank named in London, which should also be so secured, but which would be paid out of my official salary, without embarrassing me, during my lifetime. The Honorable

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John Hillyard Cameron, of Toronto, one of the best lawyers in the country, will see that these arrangements are perfected in a valid way, for which purpose a power of attorney should be sent appointing him to act. I need scarcely repeat the immense value any of my family who feel interest in me will be conferring by this investment, for such it would be, of £120 at five per cent., principal and interest being thoroughly secured; and the relief it would be to me from a most harrowing anxiety. It would secure a sum sufficient (pittance though it would be) to protect my wife from absolute want were I taken hastily away; whereas the minor sum in hand could not be invested so as to support her in any way. There can be no doubt my household effects will redeem the advance, if, as in all honor and reason I am entitled to do, I can thus legally make them represent it; otherwise some old claim yet undischarged, but for which I gave up every thing, and far more than enough if properly applied, may possibly, by law, not equity, dispossess me of them. Having stripped myself of every thing, it is now more than my right, it is my highest duty to protect, if possible, my wife from want by such a fair business proposition as the foregoing explains. I therefore have, on this score, no hesitation in laying it before my friends in England.

Judgment.

"J. G. VANSITTART.

"QUEBEC, 6th of April, 1862."

"26 QUEEN SQUARE, BATH, 1st May, 1862.

"Dear John.—Augustus and I have arranged so that we can manage to advance the £120 on the following conditions:—

"That the loan be secured on the assurance; that the assurance be so secured that it cannot in any way be made liable for any other loan or debt. And that you make some satisfactory arrangement to ensure the keeping up the assurance.

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"A letter was written yesterday to Mr. *Christopher Robinson*, asking him to act for us, and giving him authority, the conditions being all complied with, to draw for the £120.

"Had not Augustus joined I could not have raised this sum without incurring other debts, which I will not do. I hope these arrangements will be satisfactory, and as my eyes to day are very painful, I will not try them more.

"Your affectionate aunt,

"ANN MARY VANSITTART."

"John G. Vansittart, Esq."

"TORONTO, May 20th, 1862.

"My dear Sir,—By the last mail I received from your aunt, Mrs. *Vansittart*, a letter enclosing a statement, or the substance of a statement, sent home by you last month, and asking me to act for them in the matter. They agree to advance £120, "on condition that the loan be secured on the assurance—that the assurance be so secured that it cannot in any way be made liable for any other loan or debt; and that some satisfactory arrangement be made to ensure the keeping up the assurance;" and when these conditions are complied with, I am to be authorised to draw for the sum mentioned. I do not know as yet how far it may be practicable to carry out these conditions; and I gather from the statement that you desire also to give security upon your household effects, which in my instructions is not required: and as they suppose must be governed by the law of Lower Canada, so that some statutory enactments which might require consideration here could not apply.

Judgment.

"On hearing from you exactly how the matter stands, and in what office the insurance is, I shall be glad to do all in my power to carry out your wishes.

"Believe me yours very truly,

"C. ROBINSON."

"J. G. Vansittart, Esq., Quebec."

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Judgment.

"QUEBEC, 30th May, 1862.

"My dear Christopher Robinson,—I have been somewhat tardy in replying to your note of May 20, but waited until I could have a chat with *Hillyard Cameron*, in whose hands the life policy is, and who has kindly represented me in dealing with *Cottle & Barwick*; indeed the negotiation must take place in his name to secure the benefit to my wife,—as there are yet outstanding claims, intended to be covered by the assumption by these gentlemen of my liabilities, to secure which I made over the whole of my estate, which however remain unpaid, and could be brought down on this policy, if in any way it could be brought home to me. What I propose is, to make the advance from home a first and sole charge on the policy, to be held by *Cameron*, and secured in some way for my widow, I, to hypothecate or make over my furniture, &c., to secure the payment of premiums; which could be done either direct to Mrs. *Vansittart* (my aunt), which would require her power of attorney here, or to *Cameron*, in consideration of his joining in a bond for the payments. The furniture and plate is now insured for £550, and either the amount, less the plate, which I would rather reserve for my son, and which is comparatively a small part of it; or the whole, if required, may be made, and would be sufficient to represent the liability of payment for my probable term of life. *Cameron* undertakes to write to you, from whom you will gather a more business view of the matter.

"Yours obliged, and truly,
"J. G. VANSITTART."

"QUEBEC, 30th May, 1862.

My dear Christopher,—*Vansittart's* life policy is to be assigned to me as trustee for his wife, subject to the charge for the £120 sterling, and I therefore propose that the policy should be assigned to me upon trust, in the first place to secure the sum of £120, and all interest,

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&c., and after its payment, then for Mrs. *Vansittart*, and after her death, the children. *Vansittart* is to secure me in becoming surety for the premiums by an assignment of his furniture, &c., and I shall thus become bound with him for the premiums to his aunt. Let me know if this will do in your view, that the necessary documents may be prepared. * * *

"Yours truly,

"J. HILLYARD CAMERON."

"TORONTO, June 5, 1862.

My dear Vansittart,—I have your note, with Mr. *Cameron's* inclosed, and have written to him to say that I see no objections to his proposal, which is in substance what you mention, assuming that you have power to make the assignment as he suggests. If there is no difficulty on this point, the papers will, I suppose, be prepared at once.

"Believe me yours very truly,

"C. ROBINSON."

Judgment.

"J. G. Vansittart, Esq., Quebec."

From this correspondence and the evidence in the cause before referred to, the following facts are clearly proved. (1) That *J. G. Vansittart*, at the time of the assignment to Mr. *Cameron*, was insolvent, and so continued up to the time of his death. (2) That *J. G. Vansittart* being insolvent, entered into an arrangement whereby he was to preserve the policy in question so that it could not be touched by his creditors; that by the same transaction he was also to cover his furniture, and while securing the advance made by his English friends, was at the same time to hinder his creditors in making their claims out of what was his only remaining property. (3) That an absolute assignment was made to Mr. *Cameron*, with the understanding that the advances then made, and subsequent advances were to be charged upon the policy; and that *J. G. Vansittart*

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should pay the premiums from time to time. (4) That although the English friends stipulated that the policy should be so secured, as that it could not be liable for any future loan, Mr. *Robinson*, their solicitor, did not insist upon this, and insisted only on behalf of his clients for the security of the policy in respect of their loan. (5) That the premiums paid between the date of the assignment and the death of *J. G. Vansittart*, amounted to $704.67, all of which with slight exceptions, Mr. *Cameron* says, were paid by *J. G. Vansittart*. (6) That *J. G. Vansittart* procured advances on the policy subsequent to the assignment, amounting to over $1,200, which sums were expended for the benefit of his children; and upon these loans he paid considerable sums for interest.

Judgment.

By virtue of the arrangement, the debtor procures certain advances which he secures on the policy. He abstracts from funds which might have gone to pay his creditors the necessary sums to pay the premiums. He becomes the owner of this asset, year by year becoming more valuable. He obtains over $1,200 further upon it; and, after repaying all advances, he makes a present of over $1,100, still left, to his wife.

Apart from the rights which may be acquired by the circumstances under which the English friends made their advance, I think there can be no doubt but that the transaction in question is fraudulent within the statute under which it is impeached. Lord *Hatherly*, in *Neale* v. *Day* (*a*), dealing with that Act, says, "It appears to me that the real test is, whether or not a fraud upon the creditors was intended in the transaction." In *French* v. *French* (*b*), Lord *Cranworth* thus deals with the same statute: "What is to be an indication of a person making a settlement whereby he intends to delay

(*a*) 28 L. J. ch. 45. (*b*) 6 D. M. & G. 95.

creditors. * * * 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 wthin the statute." Here the debtor has abstracted from his creditors that which they were entitled to look to for payment of their debts, and which would have furnished a large amount of money, far more than sufficient to satisfy the plaintiff 's claim.

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But it was argued if the transaction be otherwise fraudulent, it cannot be impeached, because the friends in England have, in good faith, advanced $600. They became the purchasers of the policy for value, and upon the express stipulation that the policy was to be settled for the benefit of Mrs. *Vansittart;* and, therefore, the $1,100 in question, cannot be touched by creditors of the deceased. My impression at the hearing was, that the case of *Thompson* v. *Webster* (*a*), was an authority for this position of the defendant. I have since read over with care, the evidence and letters in the cause; and have perused the case in question, and have arrived at the conclusion that the view I formed at the hearing, is erroneous. In the first place, it is to be observed that although in his first letter *Vansittart* intimates that the policy, after securing advances, is to be held for the benefit of his wife; yet Mrs. *Vansittart* in her answer to this letter, does not insist upon this as a term of her advance, but in place asks "that the assurance be so secured that it cannot in any way be made liable for any other loan or debt." In the second place when Mr. *Robinson*, the solicitor of Mrs. *Vansittart*, closed the arrangement, he waived any such or the like stipulation, and only asked for security for the $600 on the policy. After this it can scarcely be thought that the Court (ten years having meantime elapsed) will come to the conclusion that Mrs. *Vansittart* purchased an interest in this policy, and settled it on the wife of *J. G. Vansittart.*

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(*a*) 4 Drew. 628, in App. 4 DeG. & J. 600.

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In the third place, when the arrangement was concluded, it was settled between Messrs. *Cameron* and *Vansittart*, in place of the restriction as to advances asked by Mrs. *Vansittart*, that further advances should be made, and upon this they acted; and, in place of the policy being held for the benefit of Mrs. *Vansittart*, it might all have been swallowed up in loans to the deceased.

It is also clear that Mrs. *Vansittart* and Mr. *Robinson* knew well the purpose of *J. G. Vansittart* in procuring the assignment, and that he desired to prevent creditors from recovering their claims out of the policy by the arrangement he proposed. The proposal originated with the debtor, and the object seems to have been on the part of all parties, in whatever way the policy was dealt with, not to allow the creditors to reach it. I refer to these various circumstances, because in *Thompson* v. *Webster*, while the transaction there impeached was upheld, the principles laid down are applicable to the present case; the points I refer to are mentioned as being those which should lead to the conclusion that the transaction is a fraud on creditors.

Judgment.

"The principle now established is this," says Sir *Richard Kindersley*, "the language of the Act being, that any conveyance of property is void against creditors if it is made with intent to defeat, hinder, or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the intention of the settlor in making the settlement was to defeat, hinder, or delay, his creditors." If this rule be adopted, the authority is one in favor of the plaintiff in place of the defendant; and the objections taken to the transaction and dealt with by the Vice-Chancellor, make this more clear. He says the effect of the settlement was to withdraw from creditors all the debtor's property except his life estate. "Those circumstances certainly do lead

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prima facie to the inference that he must have intended to defeat, hinder or delay creditors; and if there were nothing more, I certainly should feel bound to come to the conclusion, that this settlement is a conveyance of property made with intent to defraud creditors. That would be my conclusion if it had been the settlor's own spontaneous act.—but was it his spontaneous act? The evidence shews the contrary. * * Mrs. *Coupe* says, 'I will advance you what with the £210 will make up £400, on condition that, subject to my mortgage, you make a settlement of the property.' That was the condition or consideration; and it appears to me that the evidence shews that the condition was insisted on by Mrs. *Coupe*, and that settling his property had never, until it was made a condition of advancing the money by his mother, suggested itself to his, *Joshua Coupe's*, mind. It is perfectly true that in one sense, there was no consideration. No money passed other than that for which Mrs. *Coupe* took an ample security. But what I have to look at is the construction of the statute. I am to look at this transaction to see whether it shews an intent to delay, hinder, or defeat creditors. Now, in that view, it is a material consideration whether Mrs. *Coupe*, Mr. *Webster*, and the solicitor, who took part in this transaction, of pressing upon *Joshua* the making of a settlement, knew of any other debt than the particular one that was about to be paid. Did they know of the debt to the plaintiff? I think I have quite sufficient evidence that they did not know anything about it. What, then, am I to say as to the intention when I examine all the circumstances? Can I come to the conclusion that *Joshua Coupe* made this settlement with an intent to delay, hinder, or defeat his creditors. It appears to me that I cannot; and I think the transaction was perfectly *bonâ fide*." On rehearing, the Court came to the conclusion that the case was "clearly one of a settlement made *bonâ fide* for value, not within the statute, not impeachable at Common Law," and so the judgment was affirmed.

Judgment.

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I am of opinion that the transaction impeached is fraudulent within the statute; and that the creditors are entitled to satisfaction of their debts out of any benefit Mrs. *Vansittart* received out of the policy.

I do not think the recent legislation as to life assurance, can affect the case. The policy in question was not assigned or settled under the Act; and the defendants do not bring themselves within its provisions. The statutes are only useful in the present case, as shewing that outside of them, the law does not allow a debtor to deal with his life policy as the deceased attempted to deal in the present case.

The plaintiff is entitled to his costs of suit.

DEEDES v. GRAHAM.

Will, construction of—Appointment—Interest—Compensation to Trustees.

The rule as to the allowance of interest from one year after the death of a testator does not apply, in the absence of express directions, where the bequest is by way of appointment under a settlement.

A testatrix, who, under her marriage settlement, had the power of appointment over certain moneys invested on mortgage, appointed certain parts thereof to her two daughters, and, until payment, to pay them the interest secured by the mortgage:

Held, on appeal from the Master's report, that he had properly allowed interest on the sums so appointed from the death of the testatrix, and not from one year after the death.

The testatrix appointed to another daughter certain moneys, "the interest thereof to be for her sole use during her life, and the principal to be left to all or any of her children she may have at her death;" by the settlement the power of appointment was only among children, grandchildren not being objects of the settlement:

Held, notwithstanding, that the appointment was not absolute in favor of the appointee; that she took only the interest of the fund during her life; and that the principal went to the residuary appointee.

[Per SPRAGGE, C.—A trustee, created by deed, is, without express agreement, entitled to compensation for his services as such trustee. [STRONG, V. C., dissenting.]

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Deedes v. Graham.

This was an appeal by the defendant, *Fortescue Graham*, from the report of the Master at Woodstock.

The grounds of appeal are set forth in the judgment.

Mr. *Moss*, Q. C., for the appeal.

Mr. *Maclennan*, Q. C., for the plaintiff and Mrs. *Lay*.

Mr. *D. M. McDonald*, for other legatees.

SPRAGGE, C.—The first and second grounds of objection are that the Master is wrong in allowing interest upon the sums bequeathed from the death of *Mary Graham*, the testatrix, instead of from one year after her death, and in not limiting the rate of interest to six per cent.

Judgment.

The will is not a disposition of property of which the testratrix was the owner; but was an appointment by her, of settled property, under her marriage settlement, upon her marriage with *Philip Percival Graham*, who had pre-deceased her; and the clause of the will which governs this question runs thus: "Secondly, whenever the moneys now or at the time of my death invested in mortgages or otherwise are paid, to pay each of my unmarried daughters (naming them), the sum of £1,000, and until such payment, to pay to each of them the interest of the said sum of £1,000, whatever the amount of interest may be that the said principal sum of £1,000 each may produce." It is in evidence that the settled property existed at the date of the will, and of the death of the testatrix, in the shape of mortgage securities.

I think the Master was right in allowing interest at the rate borne by the principal, and from the death of the testatrix. I think the circumstance of this not be-

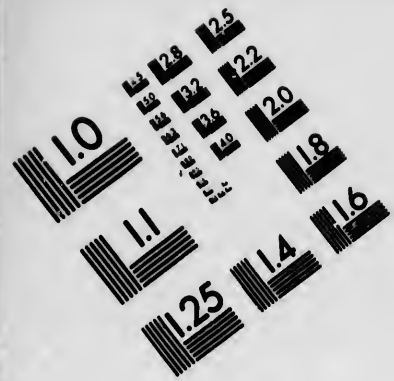
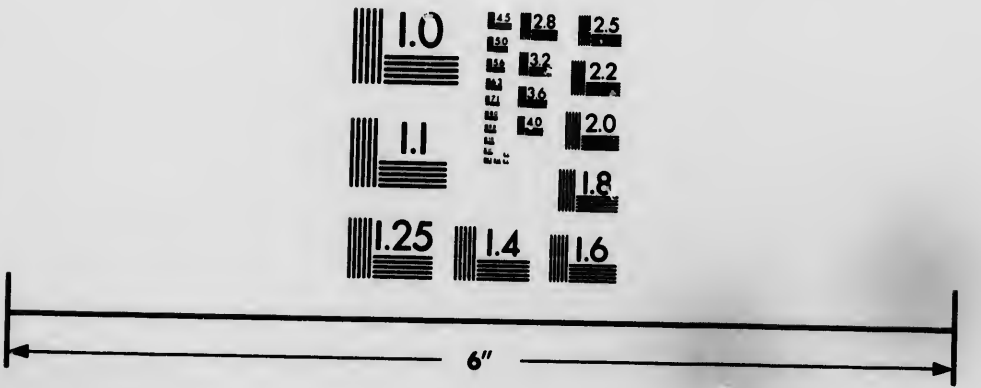
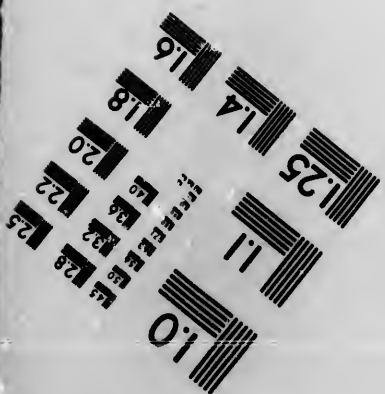
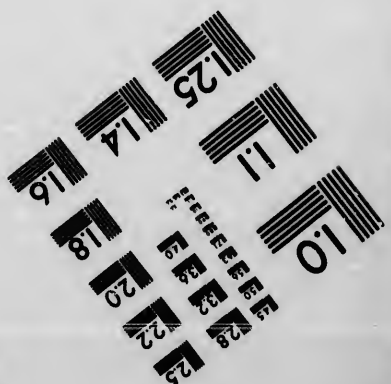


IMAGE EVALUATION
TEST TARGET (MT-3)







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ing a gift by a testatrix of her own property; but an appointment of settled property, makes all the difference. The will is only a mode of exercising the power of appointment: which power might have been exercised by other writing, duly attested according to the marriage settlement. It is not in any proper sense a legacy; nor does the reason upon which the payment of a legacy is postponed, and interest deferred for a year, apply. The reason given by Mr. Justice *Williams* (*a*) is, in order that the executor may have time to ascertain and settle the affairs of the testator. The point involved in this objection was directly raised in the Irish Court of Chancery, in *Murphy* v. *Murphy* (*b*), and adjudged in favor of the appointee.

Judgment.

I see no reason for limiting the rate of interest to six per cent. It would be in direct contravention of the appointment; and, as pointed out by Mr. *Maclennan*, to postpone the payment of interest, and to limit the rate to six per cent. would be to put into the pocket of the appointee of the residue the entire fruits of the whole fund for a year, as well that appointed to other appointees, as that appointed to himself; he is an appointee of sums of money in the same terms, as well as residuary appointee. The first two objections are overruled.

The question raised by the third objection arises from the language of the first and third codicils. In the first it is, "I also give and bequeath to my daughter, *Octavia Murray Sandys*, £100 instead of £50." In the third codicil it is, "I give to my daughter *Octavia* £400, in addition to the sum of £100 left by me to her in a former codicil, the interest thereof to be for her sole use during her life, and the principal to be left to all or any of her children, as she may leave at her

(*a*) Wms. Ex'rs, 1320. (*b*) 3 Irish Chy, 95, 101-2.

death." The power of appointment is only among children, issue of the marriage of *Graham* and his wife. Grandchildren are not objects of the settlement, and therefore Mr. *Maclennan* is forced to contend that the effect of the third codicil is to appoint to *Octavia* (Mrs. *Lay*) the additional £400 absolutely; that the appointment is in the first place absolute, and cannot be qualified by subsequent words; and that the subsequent words making an appointment over to grandchildren, must, being in excess of the power, be rejected as surplusage. The Master appears to have adopted this view. The appellant, conceding that the appointment is good as to the £100 absolutely, and as to the £400 for the life of the appointee, contends that beyond that, it is void; that there is no absolute gift of the £400 to the appointee.

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I have examined all the cases to which I have been referred, and several others; and they no doubt establish the principle that where there is an absolute appointment, and afterwards some limitation is superadded, which is not warranted by the power of appointment, the superadded appointment is void. The question always is, as put by Lord *St. Leonards*, in his book on "Powers" (*a*), whether there is such an absolute appointment, or whether the superadded terms constitute an essential part of the gift itself. The Courts in some of the cases, it would almost appear, have struggled to hold the first appointment absolute, rather than that the appointment after the first-taker, should fall into the residue, or that the fund should go unappointed. But there are cases in which the superadded words so plainly constitute an essential part of the appointment, that the appointment in the terms in which it is first expressed could not be held to be absolute. Among these is *Reid* v. *Reid* (*b*), before the present Master of the Rolls. *Ann Reid* had a power

Judgment.

(*a*) 8 Ed., p. 118.

(*b*) 25 Bea. 469.

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of appointment among her children. The question in the case arose upon the language of her will, appointing certain of her trust property to her daughter *Ann*; and it is thus stated in the report, "She gave to her daughter *Ann* the house in Goodge Street left by the testator, 'likewise the whole of the residue of my property of every description (including some and excepting some), leaving her my residuary legatee, the whole of which property shall be settled upon her for her own whole and sole separate use, not subject to the debts and control in any way of any future or after taken husband.'" She then appointed two trustees "for the fulfilment of the same," and proceeded thus: "The whole of the above left in trust for her use to be divided at her death equally among her children, but if she should die without issue, it shall then return to her surviving brothers, or the survivor of them, share and share alike." Upon this the Master of the Rolls says, "I think that there is no gift to the daughter except for her life. The testatrix gives the whole of her property to her daughter, without words of limitation, or stating in what manner she shall take it; and then directs that this property is to be settled on her for her sole and separate use, independent of her husband; and at her death to be divided amongst her children, and if she die without issue there is a gift over to her brother. In my opinion, therefore, the daughter *Ann* takes no further interest than that which she is to derive under the settlement, which is for life; and the gift over to her children being void does not enlarge the previous gift to her." By "settlement," must be meant "will," there was no other settlement. This is the judgment of a learned Judge who fully considered, and in other cases acted upon, the principle, which is invoked in this case in favor of this being an absolute appointment in favor of Mrs. *Lay*.

Judgment.

In the case before me there seems to me less room for doubt than in the case of *Reid* v. *Reid*. There is no

absolute gift with a limitation in derogation of it, superadded. The words spoken of as added, are merely descriptive of the quality of the estate conveyed; the previous words being as in *Reid* v. *Reid*, an appointment without words of limitation, or stating in what manner the appointee shall take. To divide them as is proposed, would be to cut the sentence in two, and do violence to its plain meaning. Some of the cases have perhaps gone rather far in order to support the appointment: but certainly none have gone so far as it would be necessary to go in this case to establish this as an absolute appointment in favor of Mrs. *Lay*. The third objection is therefore allowed.

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The fourth objection was in regard to the costs whether or not they should come out of the residue. I disposed of this objection at the hearing, holding that the Master had rightly interpreted the decree, that they should come out of the residue.

Judgment.

The fifth objection is upon the allowance by the Master to Mr. *Deedes*, of a sum of $[illegible]20, by way of compensation for his services in carrying out the will of Mrs. *Graham*. The Master makes no compensation for services rendered by Mr. *Deedes* as trustee, before the death of Mrs. *Graham*, but has allowed a commission upon moneys received and applied since her death.

Mr. *Deedes* is named as a trustee and executor, in Mrs. *Graham's* will; but I apprehend that the trust moneys came to his hands, and that he applied them as a trustee under the marriage settlement: the will being really and properly an instrument of appointment; and I doubt whether the Act allowing compensation to be made to trustees and executors under wills applies to it. I suppose the Master was of opinion that it did, as he has limited the allowance, to what was done under the will. The inclination of my opinion has always been

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that the Act should be taken as indicating, and effecting a change in the policy of the law in regard to compensation, to trustees generally; The observations of Mr. Justice *Story* (*a*), upon the principle of compensation to trustees are weighty; of more weight, I think, than those of another learned American jurist, Chancellor Kent, in two cases before him, *Green* v. *Winter* and *Manning* v. *Manning* (*b*). These cases were before the passing of the American Act of 1817. After the passing of that Act, the same learned Chancellor held the case of the committee of the estate of a lunatic "within the equity of the statute" (*c*). This was followed by Chancellor *Walworth*, *In re Livingston*, a lunatic (*d*), and the principle was applied by the same learned Judge to the case of a trustee appointed by deed in *Meacham* v. *Stearnes* (*e*).

Judgment.

Compensation has also been allowed in some English cases: *Exp. Fermor* (*f*), *Marshall* v. *Halloway* (*g*), *Newport* v. *Bury* (*h*). These were decided certainly as exceptional cases; the general rule continuing to be in England, that a trustee is not entitled to compensation.

I have noticed these authorities very briefly, because I think I ought to follow the case of *Wilson* v. *Proudfoot* (*i*), decided by my brother *Mowat*. I do not think that case is distinguishable in principle from the case before me. The *ratio decidendi* was that a trustee created by deed was not within our Provincial Statute. *Bald* v. *Thompson* (*j*), decided by the same learned Judge, is not in conflict with *Wilson* v. *Proudfoot*. Upon the authority of *Wilson* v. *Proudfoot* I allow the exception.

(*a*) E. J. sec. 1268, N. 4.
(*b*) 1 John, ch. 787; *Ib.* 534.
(*c*) *In re* Roberts, 2 John, Chy 43.
(*d*) 9 Paige 440.
(*e*) 9 Page 398,
(*f*) Jacob 404.
(*g*) 2 Sw. 432.
(*h*) 23 Bea 30.
(*i*) 15 Gr. 103.
(*j*) 17 Gr. 154.

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I do not think that compensation can be allowed upon the ground of contract between the trustee and *Fortescue Graham*. It falls within the objections stated by Lord *Hardwicke* in *Ayliffe* v. *Murray* (*a*).

I think there should be no costs of this appeal.

The plaintiff thereupon re-heard the order, in so far as the same disallowed him commission, before the full Court, composed of *Spragge*, C., *Mowat**, and *Strong*, V.CC.

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

Mr. *Moss*, Q. C., contra.

Judgment

SPRAGGE, C.—The point upon this rehearing is, whether a trustee appointed by some instrument, other than a will, is entitled to compensation for his services in the management of the trust estate; in cases where the like services rendered by a trustee appointed by will, would entitle him to compensation.

This question was before me (with several others) upon exceptions to the Master's report; and I felt bound to follow the decision of the late V. C. *Mowat* in *Wilson* v. *Proudfoot*, though, as I intimated, if the question had been *res integra*, I should probably have come to a different conclusion. The argument on rehearing and a further consideration of the case has not led to any change in the views which I then expressed.

I thought then, and I still think, that the reasons in favor of allowing compensation to trustees, whether trus-

(*a*) 2 Atk 58, 61.

* Left the Bench before judgment was delivered.

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tees in the strict and proper sense of the term, or others virtually invested with a fiduciary character, as executors and administrators, are sounder and stronger than the reasons against it. I do not, however, go upon the cogency of the reasons one way or the other, but upon this, that the Legislature has pronounced upon the principle involved in the question: and by directing that a fair and reasonable allowance shall be made to executors, trustees, and administrators acting under wills or letters of administration, for care, pains, trouble, and time expended, has affected a change in the policy of the law, in regard to compensation to express trustees generally.

If the provision to which I refer, were contained in an Act respecting trustees, or an Act respecting trustees, executors, and administrators, it might be taken as indicating the mind of the Legislature, that only personal representatives and trustees appointed by will, should receive compensation for their services. But the provision is contained in an "Act respecting the Surrogate Courts;" and is put in this shape: "The Judge of any Surrogate Court may allow to the executor or trustee," &c. The Legislature was dealing only with the Surrogate Courts, their constitution, powers, and procedure. Hence the shape in which the Legislature indicated its mind, in the matter of compensation to personal representatives and trustees.

Judgment.

Not long after the passing of the Act, it was made a question in this Court whether, where an estate was being administered in Court, it was competent to the Master to make such allowance, as by the Act, the Surrogate Judge was authorized to make; and it was held to be within the competency of the Master to do so. In 1868 the question came formally before me, in *Biggar* v. *Dickson* (*a*); and I find upon

(*a*) 15 Gr. 33.

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referring to the report of the case, that I took then substantially the same view of what is necessarily the effect of the Act, as I take now. I find that I said, "The Act establishes the principle that executors and trustees ought to be allowed such compensation. Under the law before the passing of the Act, it was a principle of the Court that executors and trustees were not entitled to compensation for personal services. The Act establishes a new principle; and it became a matter of course that the principle under which the Court formerly acted, was abrogated, and a new one substituted in its place; and that new principle necessarily became the law of the Court in place of the old one. The Court could not decline to adopt it and act upon it, and it became the duty of the Master, in taking accounts and making all just allowances, to make a just and proper allowance for compensation to executors and trustees:" I refer to what I said then instead of repeating it. It was also held in more than one case, and I think properly, that the Act applies to trustees of real, as well as of personal estate: and it is not questioned by Counsel in this case, that that was a sound decision.

Judgment.

The only question in this case then is, whether where the appointment is by deed instead of by will, that circumstance can in reason form a ground for the disallowance of compensation. The only reason suggested is, that, where the appointment is by deed, the trustee may stipulate for compensation. I do not think the reason a sufficient one. It is indeed more likely that communication would take place between the creator of a trust and the proposed trustee, where the appointment is by deed than where it is by will, though there is no good reason why it should be so. But the Act proceeds upon the principle that certain services ought to be compensated for; and if so, they ought to be compensated for, whether compensation be stipulated for or

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not. The Act seems to me to have done, what has in some instances been done by the creator of a trust, directed that compensation shall be made, but without declaring the amount or mode of compensation. The practice of this Court, in such a case, is, to direct a reference to settle the *quantum meruit*, according to the circumstances of the case. It is somewhat against the distinction suggested that a leading case in favor of the rule is that of *Robinson* v. *Pett* (*a*), the case of an executor; and I find in a judgment of that eminent American Jurist, Chancellor *Kent* (*b*), this passage: "If the rule (the English rule against the allowance of compensation to trustees), applied with more force and propriety to one kind of trust than another I should think it was that of an executor; who gives no security, and who is selected by reason of some special and sacred confidence resulting from the ties of kindred or friendship; and charged by the testator in his dying moments with interests of the nearest human concern, and which he is on the eve of renouncing forever." It is then in a case which, in the judgment of Chancellor *Kent*, is strongest against the allowance for compensation, that the Legislature has authorized its allowance. If he is right, *a fortiori* should the principle of the Statute be applied in other cases of trust.

Judgment.

The English rule, that a trustee shall have no allowance for his trouble and loss of time, rests only upon what Judges, in former times thought, in their judgment to be for the interest of the estate to be managed: in short a rule of policy. Suppose that rule declared by some competent tribunal, upon a case before it, to be unsound; that it would be true policy, and in itself just that a trustee should be compensated for his trouble and loss of time; and should direct compensation to be made accordingly; such decision would certainly be

(*a*) 3 P. Wm. 249. (*b*) Manning v. Manning, 1 John Chy. 538.

held to apply to all cases falling within the same principle. The decision might be in a case of a trustee of lands; or in the case of an executor; in whatever case the principle were enunciated, it could not but be held to apply to all. It would be a reversal of the old principle of gratuitous service, and the establishment of a new principle, that of fair and reasonable compensation for service rendered; and that is precisely what, in my opinion, has been effected by the provision in the Surrogate Court Act. 1873. Deedes v. Graham

I do not feel pressed with the consideration that the Statute does not in terms apply to trustees other than those created by will. I have said how I think that may reasonably be accounted for. I do find in the Statute all that it concerns me to find upon this question, an affirmance by a competent tribunal of the principle, that trustees are to be compensated, and I feel bound to apply this principle to all cases falling within it. To apply it to trustees appointed by deed is not in my judgment to assume legislative powers; but is only carrying out the declared mind of the Legislature to its legitimate consequences, and I am fortified in this by the opinion, to which I have adverted, of Chancellor *Kent*. Judgment.

That learned Judge acted upon this principle in a matter before him, *In re Roberts* (*a*), a Lunatic. A Statute was passed in the Legislature of New York, in 1817, authorizing the allowance of compensation in passing the accounts of "guardians, executors, and administrators;" and the Chancellor held the case of the committee of a lunatic to be within the principle of the Act. This was followed in a like case, *In re Livingston* (*b*), a lunatic, some years afterwards, by Chancellor *Walworth*, and the same learned Judge, in a case

(*a*) 3 John Chy. 43.

(*b*) 9 Paige, 440.

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of *Meacham* v. *Stearnes* (*a*), applied the principle to the case of a trustee appointed by deed.

In applying the Statute of 1817 to these cases the Courts proceeded upon what is termed in the reports the "Equity of the Statute." I think the term is not a very accurate one, inasmuch as it seems to imply that a Statute may receive a larger interpretation in a Court of Equity than in a Court of Law. I take it that what was meant, and probably what was said, was, that the principle established by the Act was applicable to all cases falling within it; and was not confined to the particular cases enumerated in the Act; and in that I entirely concur.

I do not, of course, quote the opinions and decisions of American Judges as *authority;* but I refer to them as the opinions of Jurists of high legal reputation, and as such entitled to respectful consideration at our hands.

Judgment.

STRONG, V. C.—After having given this case all the consideration in my power, I regret to say that I am unable to concur with his Lordship, the Chancellor, in the conclusion that the order appealed from ought to be discharged.

Whilst I agree that there is, as far as I can see, no sound reason why the rule against allowing compensation to trustees should be relaxed in the case of executors and trustees under wills, and yet retained as regards trustees under deeds *inter vivos*, the legislative repeal of the rule in the first class of cases does not seem to me sufficient to warrant the judicial abrogation of it in the second class. I need not say that such facts as are in question here cannot be brought within the purview of

(*a*) 9 Paige, 398.

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the Statute. The Legislature have thought fit to leave this case untouched. This being so I can find no authority for such a judicial extension of the principle upon which the Statute proceeds, as is sought by the plaintiff, except the New York cases which have been referred to. Of these *Re Roberts* (*a*), and *Re Livingston* (*b*), were both cases of an allowance made to the committee of a lunatic. This I should have thought it would have been competent for the Court to do in its discretion without infringing the rule in question, since the committee is an officer of the Court, as a Receiver is, and even in England allowances have been made in such cases, *Re Fermor* (*c*). In *Meacham* v. *Stearnes*, (*d*), however, Chancellor *Walworth* certainly did consider that the Statute of New York, permitting an allowance to executors, gave him authority to dispense with the rule forbidding compensation to trustees; and he ordered a commission to be allowed to a trustee under a deed.

Judgment.

I observe, however, that the learned Chancellor did not, in that case, profess to act upon the Statute alone, for he refers to the decision of Mr. Justice *Washington*, and those in other States, to shew that the doctrine had never been firmly fixed in the administration of equity in America; and I think his decision proceeded quite as much upon the supposition that he was not bound to enforce the prohibition as it did on the analogy to the legislation in the case of executors. Be that as it may, however, these American decisions, though entitled to great respect, are not binding on this Court. I must, therefore, act on what I consider as much a settled principle in this jurisdiction as at common law, namely, that a rule of equity, once firmly established by judicial decisions, can only be

(*a*) 3 John. C. C. 43.
(*b*) 9 Paige, 440.
(*c*) Jac. 404.
(*d*) 9 Paige, 398.

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annulled by legislative enactment, which was the view taken by Vice Chancellor *Mowat* in the case of *Wilson* v. *Proudfoot*.

Judgment.

I quite agree that good policy requires that trustees here should be allowed remuneration for their services; and in that respect I entirely concur with what his Lordship, the Chancellor, has said. I also think the present state of the law which permits such allowances to be made to trustees under a will, though not to those under a deed, is arbitrary and unreasonable; but I think the remedy must be sought from the Legislature. I regret that I should feel compelled to come to this determination, as the effect of it will be to withhold from Mr. *Deedes* an indemnity to which as between himself and his *cestui que trust*, he seems fairly entitled. As there is a division in a Court composed of two Judges, the judgment of the senior Judge being for the appellant, I think the deposit should be returned to the plaintiff, and that there should be no costs of the rehearing

CANADA CENTRAL RAILWAY COMPANY v. THE QUEEN. 1873.

Petition of Right—Railway Company—Parties.

An Act of the Legislature of Canada having provided that a railway company should be entitled to 4,000,000 acres of the waste lands of the Crown on completion of their road, and a proportionate quantity of such lands on completion in the manner specified of 20 miles of the line:

Held, that a petition of right presented to the Lieutenant-Governor of Ontario, addressed to Her Majesty the Queen, was the proper proceeding for the purpose of enforcing the claim of the railway company under the Act, against that Province.

The Legislature of Canada, by an Act, set apart a certain quantity of land along the line of a projected railway to be granted to the company on completion of the railway; and a proportionate part of such lands on the completion of 20 miles of the railway; the company having completed a portion of the line of railway to an extent of more than 20 miles, applied for a grant of the proportion to which, under the Act, they claimed to be entitled, which was refused. The company, thereupon, presented a petition of right against the Province of Ontario. It was alleged that the Province of Ontario had not along the line of the road sufficient lands to make the grant desired:

Held, that this formed no ground for the Province of Ontario insisting that the Province of Quebec should have been made a party to the proceeding.

Statement.

This was a proceeding under the Act of 1872, authorizing a subject to present a petition of right to enforce an alleged claim against the Crown.

The matter having been put at issue, the same came on to be heard before Vice-Chancellor *Strong*, when it was established to the satisfaction of the Court that the company had completed twenty-eight and a half miles of their road, and had the same in daily use, for the conveyance of both passengers and freight.

The facts of the case are fully stated in the judgment.

Mr. *Moss*, Q.C., and Mr. *Edgar*, for the petitioners.

Mr. *Attorney General Crooks*, Mr. *C. Robinson*, Q.C., and Mr. *Maclennan*, for the Crown.

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Canada Central R.W.Co. v. The Queen.

STRONG, V. C.—This is a proceeding in the nature of a petiiton of right, instituted in this Court, and addressed to Her Majesty the Queen, pursuant to the Statute of this Province, passed during the last session of the Legislature, and intituled "The Petition of Right and Crown Procedure Act of 1872."

The petition seeks a declaration that the suppliants are entitled to receive from the Executive Government of this Province a grant of lands, to which they claim title, under certain statutory provisions, which I will proceed to state.

On and prior to the 1st of July, 1856, there existed five distinct railway companies, each incorporated by Act of the Legislature of the late Province of Canada, and being respectively authorized to construct the following lines of railway, namely:—The North Shore Railway Company, a line from Quebec to Montreal; the Montreal and Bytown Railway Company, from Montreal to Ottawa; the Vaudreuil Railway Company, from Vaudreuil to the City of Ottawa; the Brockville and Ottawa Company, from Brockville to Arnprior, and thence to Pembroke; and the Bytown and Pembroke Company, from the City of Ottawa to Pembroke.

Judgment.

On the 1st of July, 1856, there was passed the Statute 19 & 20 Vic. cap. 112, intituled "An Act to provide for and encourage the construction of a railway from Lake Huron to Quebec."

The preamble of this Act is in these words: "Whereas it is of the utmost importance to the general interests of this Province that a main line of railway communication should be opened from Lake Huron to the Ottawa, and thence to Quebec, in the most direct line. And whereas the opening of such line from Arnprior, or some place between Arnprior and Pembroke, on the River Ottawa, to such point on Lake Huron as may be found best

adapted for the purpose, would secure for the said main line so large a proportion of the travel and traffic of the Great West, as to ensure the success of the remainder of the line from the River Ottawa to Quebec, while it would also open for settlement a most valuable tract of country, now unimproved and waste, and it is therefore expedient to grant special encouragement and aid to the construction of such railway as aforesaid." The important enactments of this Statute were as follows:— 1873. Canada Central R.W.Co. v. The Queen.

Section 1.—"The presidents, directors, and stockholders of the North Shore Railway Company, the Vaudreuil Railway Company, the Montreal and Bytown Railway Company, the Bytown and Pembroke Railway Company and the Brockville and Ottawa Railway Company shall be, and are hereby constituted a body politic and corporate, by the name of the Lake Huron, Ottawa, and Quebec Junction Railway Company, each for the share therein mentioned."

Judgment.

Section 2.—"The Montreal and Bytown Railway Company and the Vaudreuil Railway Company shall be entitled each to make half the railway from opposite Grenville to the City of Ottawa, dividing such railway between them; the Montreal and Bytown Railway Company taking the half nearest to Grenville, but with powers to the directors of the two companies to agree that the road shall be made and worked by the companies in common upon such terms and conditions as shall be made in such agreement."

Section 3.—"Each of the said companies shall have a share in the company hereby constituted, and hereinafter also called the New Company, proportionate to the length of so much of its own railway, as forms part of the general line from the Upper Ottawa to Quebec, but inasmuch as the distance from Montreal to Bytown ought only to be reckoned once in establishing such proportion; therefore (1), The Montreal and Bytown Rail-

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way Company and the Vaudreuil Railway Company shall only be entitled together to a share in the New Company, proportionate to the whole distance from Montreal to the City of Ottawa, and inasmuch as the last-named company has renounced any share in the capital of the New Company, founded on that part of its line between Vaudreuil to some point in the Township of Hawkesbury, opposite Grenville; therefore, (2), Dividing the whole capital of the New Company into one thousand parts, the number of parts to which each company will be entitled shall be as follows:—The North Shore Company, 441 parts; the Montreal and Bytown Railway Company, 240 parts; the Vaudreuil Company, 71 parts; the Bytown and Pembroke Company, 107 parts; the Brockville and Ottawa Company, 141 parts."

Section 5.—"The Company hereby incorporated, and their servants and agents, shall have full power under this Act, to lay out, construct and complete a railway connection between the River Ottawa at Arnprior, or some place between Arnprior and Pembroke, and the waters of Lake Huron at such point as may seem to the company best adapted to attain the objects mentioned in the preamble, with full power to pass over any portion of the country between the points aforesaid, and to carry the said railway through the Crown lands lying between the same."

Judgment.

Section 11.—"Whenever the whole capital of the said companies shall have been subscribed, including the amount required to pay the share of each of them in the New Company, and ten per cent. of the whole shall have been paid up and deposited in some chartered bank or banks, for the purposes of this Act and of the Special Acts of the said companies, and secured to be applied to such purposes only to the satisfaction of the Governor in Council, then and not before, the said company may commence the said railway and the works therewith con-

nected, and shall go into full operation in all respects: Provided always, that the survey for the said railway may be commenced and made by the said New Company at any time after the passing of this Act." 1873. Canada Central R.W.Co. v. The Queen.

Section 18.—"And in order to aid and encourage the said railway from the River Ottawa to Lake Huron, be it enacted that four millions of acres of the ungranted lands of the Crown, in the neighbourhood of the line of the said railway, shall be and are hereby set apart for the purposes of this Act, and whenever any portion of the said railway, not less than twenty-five miles in length, ahall be actually completed, in a good and permanent manner, equal, at least, to that in which the Great Western Railway is made, and with stations, rolling stock, and other appurtenances sufficient for the proper working of the said railway; then, upon the report of some skilled engineer, whom the Governor shall appoint for the purpose, and the approval of such report by the Governor in Council, and upon a similar report (made and approved in like manner), that each of the companies, forming the new company, has completed, in like manner, with proper rolling stock and appurtenances, a portion of its railway, forming part of the general line, and bearing at least as great a proportion to the whole length of such part as such company's share in the stock of the New Company bears to the whole of the stock; then there shall be granted to the said Lake Huron, Ottawa, and Quebec Junction Railway Company by the Governor in Council, a portion of the said 4,000,000 acres of land, lying adjacent to the portion of the said railway so completed, and bearing such proportion to the 4,000,000 acres, as the length of the portion of the railway of the said New Company so completed, bears to that of the whole of the said railway, and such grant shall be a free grant, and the company shall have full power to alienate the lands so granted, and to deal with them in such manner as they

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may think proper: Provided always, that the grants to be so made to the said company shall be of tracts of land fronting on the said railway, such frontage to be of ten miles each, and alternating with tracts fronting thereon of the same width and quantity, to be reserved as public land, and dealt with as such."

Section 20.—"The said railway from the Ottawa to Lake Huron shall be commenced, and twenty miles thereof completed within three years, and the whole line completed within seven years from the passing of this Act; otherwise the powers and privileges hereby granted shall cease: Provided always, that if within the three years aforesaid the said Montreal and Bytown Railway Company shall not have raised their share of the funds for the purpose of the company incorporated by this Act, and commenced their share of the said road from the Ottawa to Lake Huron, it shall in that case be lawful for the said Vaudreuil Railway Company to take and complete alone the said share, and the said company shall then be entitled to the proportion of the said lands forming the share coming to the said Montreal and Bytown Railway Company, for that part of the road which lies between Hawkesbury and the City of Ottawa."

Judgment.

It is to be observed that this Act of 1856, whilst it consolidated the five railway companies mentioned in it into a single company, did not nevertheless merge the separate franchises of these companies, but left them subsisting as independent corporations.

Nothing was done under this Act, and the powers of the Montreal and Bytown Company having been transferred to the Carillon and Grenville Company, and the corporate franchises of the Bytown and Pembroke Company having lapsed, on the 18th of May, 1861, another Act was passed (24 Vic., cap. 80), which by the first

section incorporated certain persons named therein, together with all such other persons, corporations and municipalities as should become shareholders in the company by the name of the Canada Central Railway Company, the corporate name by which the suppliants sue. The other important sections of this last Act (24 Vic., c. 80) are the 2nd, 4th, 6th, 22nd, and 24th, which are as follows:—

Section 2.—"The first, second, third and eleventh sections of the said Act 19 and 20 Vic., c. 112, in so far as they are inconsistent with the provisions of this Act, and so much of any other section thereof or of any other Act as is inconsistent with this Act are hereby repealed, and the said Canada Central Railway Company is hereby declared to be in the place and stead of the companies therein named, except as regards the Brockville and Ottawa Railway Company, the Carilion and Grenville Railway Company, and the North Shore Railway Company therein named, which last mentioned companies, together with the Canada Central Railway Company, shall hereafter be entitled to all franchises and privileges granted by the above cited Act, except in so far as they are by this Act altered, and all the remaining clauses and provisions of the said recited Act not inconsistent with this Act shall be the same as if incorporated herewith: Provided always, that in conformity with the Act 23 Vic., cap. 108, whenever the Montreal and Bytown Railway Company is mentioned in the said Act, the provisions referring thereto shall be held to apply to the Carillon and Grenville Railway Company, provided also that the North Shore Railway Company mentioned in this Act means the North Shore Railway Company and St. Maurice Navigation and Land Company."

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Section 4.—"The company may lay out, construct and finish a double or single track of railway from such

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point on Lake Huron as may be found best adapted for the purpose to the City of Ottawa, and from the City of Ottawa to the City of Montreal: Provided always, that without the consent of the directors of the said Canada Central Railway Company, the Carillon and Grenville Railway Company shall not have the power to construct the section of the said railway between Hawkesbury and Ottawa until the expiration of three years from the passing of this Act, nor afterwards, if the Canada Central Railway Company shall have commenced, and shall proceed with the construction thereof."

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Section 6.—"And for the better adjustment of the proportions of the said several companies in the lands appropriated and set apart in aid of the said lines of railway by the Act cited in the preamble of this Act, it is hereby enacted that they shall be regulated as follows to wit: setting apart in aid of the said North Shore Railway Company three-tenths thereof, and dividing the remainder thereof into as many parts as there are miles in the distance between Montreal and the extreme north western terminus, which could be reached by the main line of any of the five companies mentioned in the second sub-section of the 3rd section of the said Act, under their respective Acts of incorporation, namely: the Village of Pembroke, and appropriating one such part thereof to each, and every mile of such distance in aid of the construction thereof: Provided always, that the powers of the said North Shore Railway Company, the Brockville and Ottawa Railway Company, and of the Carillon and Grenville Railway Company, in respect of the portions of the said line of railway which they are empowered to construct by their respective Acts of incorporation, and by the Acts in amendment thereof, shall not be abridged by the provisions hereof, except in so far as they are abridged by the proviso in the fourth clause of this Act; and provided also, that in the computation of the said distance, the line of

railway contemplated by the Act cited in the preamble to this Act, shall be followed as nearly as may be in conformity with the third clause thereof, but without reference to the parts therein established, except that the distance between Vaudreuil and Hawkesbury, shall also be exempted as part of the said distance, and that no portion of the Grand Trunk Railway of which any of the said companies shall avail themselves to reach Montreal, shall be held to form a portion of the distance for which said company shall be entitled to aid under this Act: Provided always, that if within five years from the passing hereof, the Brockville and Ottawa Railway Company shall proceed with and complete the construction of the portion of the said railway lying between Arnprior and Pembroke, they shall be entitled to all the privileges in respect of the said appropriation which the said Canada Central Railway Company would be entitled to under the provisions of this Act, in constructing the said portion of the said railway: and provided also, that in the event of the Canada Central Railway Company failing to construct the said portion of the said railway between the City of Ottawa and Vaudreuil, or any part thereof within five years from the passing hereof, the Vaudreuil Railway Company under its Act of incorporation, which shall continue to be in force, shall have the right to construct the same, and thereupon shall have all the privileges hereby conferred upon the Canada Central Railway Company in respect of the said portion thereof."

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Section 22.—"The company may enter into any agreement with the North Shore Railway Company, The Grand Trunk Railway Company, or any other railway company whose line of operations may in any wise connect with the line of route of the company for the leasing of their railway or any part thereof, to such other company or for the using of the whole or any part of the railway or of the railway of such other com-

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pany in common by the two companies or generally may make any agreement or agreements with such other company touching the use by one or other or both of such companies of the railway, or movable property of either or both, or of any part thereof, or touching any service to be rendered by the one company to the other, and the compensation therefor; but no such agreement as aforesaid shall be valid and binding for more than one year from the date thereof, unless in the course of such year it be ratified by the shareholders of the company duly assembled at a general meeting thereof."

Section 24.—Which is of all these enactments, by far the most important in its bearing on the questions in the cause, is as follows:—"It shall not be necessary previous to the railway companies having a right to a share in the said land appropriation in virtue of this Act, or any one or more of them being entitled to have their respective proportions of the said lands, that any other railway or portion of railway should be made by any other company, but on the contrary, so soon as any portion of any of the said railways, not less than twenty miles in length shall be actually completed, in a good and permanent manner with stations, rolling stock, and other appurtenances, sufficient for the proper working of such portion of such railway, then and thereafter, from time to time, upon the completion of similar portions thereof, or of any other of the said railways, upon the report of the Inspector of Railways for the time being, the company which shall have constructed the same shall be entitled to a corresponding proportion of such grant of lands as they would be entitled to under the said Act, 19 & 20 Vic. 112, as amended by this Act, in the event of each of the companies forming the Lake Huron and Quebec Railway Company, complying with the conditions precedent to such grant provided for by this Act, incorporating the said last mentioned company, and if no ungranted lands of the Crown front on the said rail-

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way, then such grant of lands may be made from the vacant lands of the Crown lying within the watershed of the Ottawa River."

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Subsequently on the 18th of September, 1865, another Act was passed, 29 Vic. cap. 80, which after reciting that the Canada Central Railway Company had prayed for an extension of the time limited to them for the completion of the said railway, and that it was expedient to grant their prayer, enacted as follows:—"The time for the commencement of the railway which the company is authorized by its charter to construct is extended for the period of three years from the passing of this Act, and the period for the completion of the said railway is extended for the period of five years from the passing of this Act, and the said company during the said period, shall, and may, have, enjoy, exercise, and enforce all the rights, powers, claims, franchises, and privileges heretofore granted to or conferred on or held, possessed or enjoyed by the said railway company, by, under or by virtue of the Act relating to the said railway company, or any Acts in any wise affecting the same: Provided always, that nothing herein contained, shall infringe upon or in any wise vary or diminish the rights of the Vaudreuil Railway Company, under the provisions of section 6 of the Act 24 Vic. cap. 80, incorporating the Canada Central Railway Company."

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On the same day another Act was passed 29 Vic. cap. 83, enlarging the time for the completion by the Brockville and Ottawa Railway Company of the portion of the line between Arnprior and Pembroke for five years. No time being in this last Act fixed for the commencement of the work, and the words used being the same as those of the 29 Vic. cap. 80, which have been already set out in full.

The last enactment to which I have to refer is that of

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29 & 30 Vic. cap. 94, which is thus: "For the removal of doubts it is enacted that, provided the railway which the company is authorized to construct, touches at the points mentioned in the said Acts, the company is authorized to locate the line of the said railway in the manner most advantageous for its interests: Provided always, that the line so located shall not between Ottawa and Pembroke, diverge more than 25 miles from the Ottawa River, and provided also that the line of the railway from Vaudreuil to Ottawa shall be as enacted by the Act incorporating the Vaudreuil Railway Company."

Judgment.

The material allegations of the petition are as follows: That on the 26th of April, 1868, $800,000 had been *bona fide* subscribed in the capital stock of the Canada Central Railway Company, and 5 per cent. thereupon was duly paid into one of the chartered banks, and the company became and was thereafter, and on the 28th May, 1868, duly organized. That the Brockville and Ottawa Railway Company had theretofore constructed its line of railway to Arnprior and Sand Point, and the suppliants determined to prosecute the works which they were authorized to undertake, so as to secure the contemplated railway connection between Ottawa and Pembroke, and for that purpose to construct a railway from Ottawa to Pembroke intending hereafter to construct, as they are now constructing, a railway from Sand Point to Pembroke; and it was found most advantageous in the interests of the suppliants and the public to arrange for the construction of the line from Ottawa by taking Carleton Place on the Brockville and Ottawa Railway as the point of junction, and thence over the said railway to run trains to Arnprior and towards Pembroke; and that point was adopted accordingly.

That the suppliants proceeded with the construction of their railway from Ottawa to Carleton Place, and on

the 14th of September, 1870, they had completed the said section, being twenty-eight and a half miles in length, in a good and permanent manner, with sidings, railway stock, and other appurtenances sufficient for proper working, and that they did on that day open the railway, after having obtained the favourable report of the Inspector of Railways, and also the authority of the Board of Commissioners of Railways for opening the same after due examination and survey. 1873. Canada Central R.W.Co. v. The Queen.

That the line so constructed does not diverge twenty-five miles from the River Ottawa.

That the suppliants have leased the line of the Brockville and Ottawa Railway from Carleton Place to Sand Point for 999 years, and are now working the said line under such lease as part of their railway.

That since the 14th September, 1870, the said railway has continued to be and is now efficiently worked, and has proved to be of great advantage to the country, and especially to the people inhabiting the Ottawa Valley west of Ottawa City, its construction having placed the said city in direct communication by railway with Sand Point, a distance of fifty miles by the nearest practicable route, *via* Arnprior, and an actual distance *via* Arnprior by the said railway of fifty-eight and a half miles, and the railway will shortly be completed to Pembroke, being now actually constructed to Renfrew and under contract for construction from Renfrew to Pembroke. That the suppliants, upon the faith, credit, and pledge of the appropriation of the said lands by the hereinbefore mentioned Acts in aid of the construction of the said lines of railway, were enabled to obtain and did obtain the necessary means for the construction and completion of their line of railway from Ottawa to Carleton Place. These allegations of fact were all substantially proved and the suppliants charge as the legal Judgment.

1873. conclusions resulting from them;—that their railway is a section of the Canada Central Railway, in respect of the construction of which they are entitled to the grant of land provided for by the said Acts.

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That consequently, the Crown lands of the Province of Ontario adjacent to the section of railway and otherwise a sufficient additional quantity of the Crown lands lying within the watershed of the Ottawa River, in the said Province, are subject to a charge and direct trust in favour of the suppliants; and, further, that the public lands of the Province of Ontario passed to it under the British North America Act with and subject to the obligations which had been entered into by the Legislature of the late Province of Canada in respect of such lands, and that the Province of Ontario is bound to fulfil such obligations in respect of the construction of the said section of the said railway; and the petition prays that it may be declared accordingly, and that it may be decreed that the said grant be made to the said company out of the ungranted lands of the Crown lying within the watershed of the Ottawa River.

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The Attorney-General, by his answer to the petition, submits that by the British North America Act a portion of the lands referred to in the petition were vested in Her Majesty for the uses of the Province of Ontario, and the residue thereof were vested in Her Majesty for the Province of Quebec and that it is a question for the judgment of this Court whether the said lands so vested in Her Majesty for the public uses of this Province were and are subject to the claims of the suppliants.

Further, the Attorney-General charges that the suppliants have failed to comply with the conditions upon which alone by the terms of the said Acts they were to become entitled to a share or proportion of the said lands in this, that they failed to complete the railway

within the times limited for those purposes respectively by the several Acts passed before the said lands became vested in Her Majesty for the uses of the Province of Ontario. 1873. Canada Central R.W.Co. v. The Queen.

That the Acts of the Parliament of the Dominion of Canada referred to could not, and did not, in fact save or preserve to the suppliants the right to a share of the said lands beyond the times limited in and by the Acts of the late Province of Canada, but on the contrary expressly declared that it was not intended so to do.

Further, the Attorney-General submitted whether the position of the line of railway alleged to be completed is, or ought to be, regarded as in fact a part of the line of railway intended by the Legislature to be aided by the grant of the said lands and whether, for this reason, the suppliants are entitled to any part thereof:

And the answer concludes with the usual clause objecting that the suppliants shew no equity. Judgment.

As I have already said the allegations of fact stated in the petition were all sufficiently proved and it was moreover established by the evidence that the lease of the portion of the Brockville and Ottawa Railway lying between Carleton Place and Arnprior had been duly confirmed at meetings of the shareholders of the Canada Central and Brockville and Ottawa Companies respectively.

The argument at the hearing was confined to the discussion of three questions of law.

First,—It was said on behalf of the Crown that the suppliants had no equity against the Crown which could be enforced by a petition of right, in other words the jurisdiction of the Court was disputed.

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Secondly,—It was contended that the suppliants had not entitled themselves to the proportionate grant which they claimed in respect of the twenty-eight and a half miles constructed by them, having failed to comply with the requirements of the several statutes which have been referred to.

Lastly,—It was argued that, even though the Court should hold that the railway company had complied with all statutory conditions, they were nevertheless not entitled to relief inasmuch as the obligation to make the grant claimed was not one which, under the British North America Act, devolved upon this Province.

Judgment.

I will consider these contentions in the order in which I have stated them, but I should premise that I have made and intend to make no allusion to any legislation which has taken place in the Parliament of the Dominion on the subject of this railway company—for the reason that I agree with the Attorney-General that the rights of the suppliants must be held to remain as they were at the date of Confederation.

I may also at once clear the case of any question which can arise as to whether or not this piece of railway can be said to form part of the Canada Central Railway, for if the suppliants had a right to construct a part or section of their line it is beyond all doubt that the twenty-eight and a half miles which they have constructed has been made by a corporation having authority to build it and in the direction authorized by the Statutes, especially that of 1866. I notice this rather because it is raised by the answer than as a point made in argument, for at the hearing it was not contested by any of the learned counsel for the Crown.

Then I proceed to consider the question of jurisdiction which I do assuming, for the present purpose, that the

suppliants have made out their case by shewing compliance with all statutory pre-requisites essential to entitle them to the grant and that thay are properly seeking it at the hands of the Government of this Province. 1873. Canada Central R.W.Co. v. The Queen.

If a contract to give out of a larger quantity of lands a certain proportion as the price of works to be performed by the intended recipient had been entered into by an individual or a corporation there is no doubt, but that at this stage, after the completion of the works, equity would decree performance.

Thus if A agreed to give B, in consideration of the latter building a house, five hundred acres of land out of 5000 acres which A owned in a certain township, there could be no doubt but that B having built the house, and completely performed the contract on his part, could enforce his rights in equity. In such a case a Court of Equity would consider the party who had contracted to make the grant as bound in respect of the ands to be conveyed as by a constructive trust. Judgment.

The Act of the Legislature under which this petition has been filed, 35 Vic. cap. 13, recites that "it is expedient to make provision for proceeding by petition of right in this Province, and to assimilate the proceedings on such petitions and in proceedings on behalf of the Crown, as nearly as may be to the course of practice and procedure now in force in actions and suits between subject and subject." And the first section of the Act enacts "That a petition of right may, if the suppliant thinks fit, be intituled in any one of the Superior Courts of Common Law or Equity, at Toronto, in which the subject matter of such petition, or any material part thereof, would have been cognisable if the same had been a matter of dispute between subject and subject."

The object of this Act was, it clearly expresses, to

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entitle parties here to relief wherever they would in England have had a right to a decree against the Crown, on a petition of right endorsed with the established formula "let right be done" under the sign manual of the Sovereign.

When the petition was so endorsed, it was transmitted from the common law side of the Court of Chancery in which it was originally filed, and where it must have been verified by an inquisition of office, into a Court of Common Law, or to the equity side of the Court of Chancery, and thenceforward all prerogative rights as regards procedure were to be considered as waived and the cause proceeded as between ordinary suitors. The course of proceeding by petition of right could not have been adopted here, inasmuch as this Court has no common law side, and there were no means of verifying the petition by inquisition, and there would have been, if these insuperable difficulties had been overcome, other difficulties in adapting the proceeding to the forms of Colonial Courts of Justice.

Judgment.

However, the Act of the Legislature last referred to has put an end to all these difficulties of form.

That the Crown may be a trustee seems clear, the only question having been as to the mode of enforcing the trust, which, it has been determined, could not be done, by means of a decree made in a suit instituted against the Attorney-General; but it is laid down by the highest authority that, by a petition of right, a trust as well as a contract may be enforced against the Crown. In *Spence's* Equitable Jurisdiction, vol. 2, page 63, there is the following passage: "The character of Sovereign is not, it seems, incompatible with that of being a trustee, but as to the means by which the trust could be enforced, there was necessarily considerable difficulty according to the ordinary forms of law. In *Reeve* v.

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The Attorney General (*a*) (1751), where lands which were directed by will to be sold, had come to the Crown, the testator having died without an heir, Lord *Hardwicke* refused to make a decree for a conveyance as was asked, and dismissed the bill, saying this Court had no jurisdiction, though the Court of Exchequer might have, and the parties must proceed by petition of right. See 1 Ves. 445.

In *Lewin* on Trusts (*b*) it is said, "In a recent case it was decided that, though the Court of Exchequer could decree the possession of the property according to the equitable title, it had no jurisdiction to direct the Crown to convey the legal estate. The subject may undoubtedly appeal to the Sovereign by presenting a petition of right, and it cannot be supposed that the fountain of justice would not do justice."

In *Bowyer's* Constitutional Law, p. 139, occurs this passage: "Petition *de droit* is in use where the king is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the petition itself, and, unless the whole title of the Crown be stated, the petition shall abate, and thereupon this answer being underwritten or endorsed by the king, '*soit fait droit c partie*,' a commission shall issue to enquire of the truth of this suggestion, after which the king's attorney is at liberty to plead in bar, and the merits shall be determined on issue or demurrer as in suits between subject and subject."

Judgment.

The fiat may be withheld, and in that way the Crown may insist on its full prerogative rights, although, according to Lord *Cottenham*, there is a constitutional obligation to put in train for trial any question of a right

(*a*) Atk. 228.

(*b*) Ed. 3, p. 30.

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claimed by a subject against the Crown. *Baron de Bode's* case (*a*). The case of *Robertson* v. *Dumaresq* (*b*), is also an authority of much weight in the suppliants' favour on this question of jurisdiction.

In the case of *Holmes* v. *The Queen* (*c*), a petition of right in the nature of a suit to enforce a trust against the Crown in respect of lands in this country, failed, it having been held that the English Court of Chancery had no jurisdiction to enforce a trust of lands situated here, and it was not suggested that had the lands been in England there could have been any doubt of the jurisdiction.

It has also, I think, an important bearing here that, by the Act of 1837 (*d*) which first constituted a Court of Equity in this Province, jurisdiction was expressly conferred on this Court, "to decree the issue of letters patent from the Crown to rightful claimants." Although up to the passing of the Act of last session, it was, owing to the deficiency of remedy in consequence of a petition of right not being maintainable here, impossible to make such a decree directly;—there is no reason if the Lieutenant-Governor thinks fit to waive all objections founded on prerogative rights, by endorsing the petition, why effect should not be given to this provision, and I am unable to see how the Court now could refuse, on a petition of right, to decree the issue of a patent, provided the suppliant makes out his case upon the merits.

Judgment.

In connection with the question of jurisdiction, I have in addition to the cases and authorities already quoted, seen and considered the following cases:

Churchward v. *The Queen* (*e*), *Tobin* v. *The Queen* (*f*),

(*a*) 2 Phillips, 85.
(*b*) 2 Moore's, P. C. (N. S.) 66.
(*c*) 2 J. and H. 527.
(*d*) 7 W. IV. c. 2.
(*e*) 16 C. B., N. S. 310.
(*f*) L. R. 1 Q. B. 173.

Feathers v. *The Queen* (*a*), *Lord Canterbury's* case (*b*), *Kirk* v. *The Queen* (*c*). 1873.

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The result is, that assuming the construction of the Acts of Parliament, on which the suppliants found their claim, to be as they contend, I am of opinion that the Court has jurisdiction to make a decree on this petition.

I proceed next to consider whether the suppliants are entitled to a proportionate grant of land under the 24th section of the Act of 1861, which has been already stated *in extenso*.

It will be observed that under the Act of 1856, as amended by the Act of 1861, the construction of the line from Quebec to Montreal, was to be by the North Shore Railway Company; that from Montreal to Grenville by the Carillon and Grenville Company; whilst from Arnprior to Pembroke, the Brockville and Ottawa Company had the prior right to construct within the limited period of five years, the right of the Canada Central Company to make that part of the proposed line, being postponed until after the failure of the Brockville and Ottawa to do so within the prescribed time. In like manner the Vaudreuil Company had power to make the line between Ottawa and Vaudreuil, in case of the failure of the Canada Central Company to complete within five years. Judgment.

The Canada Central Company, therefore, had upon the passing of the Act of 1861, authority, after having entitled itself to the exercise of its corporate rights and franchise by an organization under the statute, power to proceed immediately with the construction of the line between Ottawa and Arnprior, and also between Vaudreuil and Ottawa, and between Pembroke and a point

(*a*) 6 B & S. 294. (*b*) 1 Phil. 306.
(*c*) L. R. 14 Equity, 558.

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on Lake Huron. No limitation of time for the commencement or completion of the works is in terms contained in the Act of 1861, but the 2nd section of that Act declares "that all the remaining clauses and provisions of the Act of 1856, not inconsistent with this Act, shall be the same as if incorporated herewith;" and this it has been contended on behalf of the Crown, and I think correctly, had the effect of importing into the latter Act. sec. 20 of the Act of 1856, which provided that the works should be commenced, and twenty miles thereof completed within three years, and the whole line completed within seven years.

Judgment.

Upon this provision requiring the line to be commenced, and twenty miles of it completed within three years, Mr. *Maclennan* founded his contention that the suppliants had failed to comply with the conditions, as they had not finished twenty miles within three years from the 18th September, 1865, the date of the passing of the Act renewing their powers. I am of opinion, however, that this argument cannot prevail. At the time of the passing of the Act of 1865, the powers conferred by the Act of 1861 had entirely lapsed by reason of the non-completien of the twenty miles of the line within the three years; then the Act of 1865 is the only enactment to look to, to determine the time for the commencement and conclusion of the works; and looking to it we find that it does not re-enact the provisions as to the completion of twenty miles within the three years, but imposes only the conditions of commencement within three years, and completion in five years.

It will be next convenient to consider how the rights of the suppliants stood immediately after the passing of the Act of 1865.

It must be remembered that two Acts of this date were passed, one giving renewed powers to the Canada

Central, the other giving co-extensive powers to the Brockville and Ottawa, as regards the completion of the line from Arnprior to Pembroke. This last Act suspended the powers which the Canada Central had previously possessed to construct between Arnprior and Pembroke, since it could not do so whilst the powers of the Brockville and Ottawa were in force, and contemporaneously with the expiration of those powers, the rights of the Canada Central Company would likewise come to an end.

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The Canada Central Company had, however, after this renewal of 1865, power to construct from Vandreuil to Ottawa, and from Ottawa to Arnprior, and from Pembroke to a point on Lake Huron; and having these powers, they have only completed within the limited time twenty-eight and a half miles of railway, being the distance from Ottawa to Carleton Place, and procured a lease of running powers for 999 years, over the Brockville and Ottawa line, between Carleton Place and Arnprior.

Judgment.

Upon this was based the important argument of Mr. Robinson, on behalf of the Crown. That even though under the 24th section, the Canada Central Company might, if it had completed this twenty-eight and a half miles sufficiently early to have permitted it to complete the whole of its works in due time, have had the right to the land grant; yet, that not having completed this portion until its powers were on the eve of expiring, it is not now entitled to the grant, after it has failed to complete the whole of such portions of the line as it fell to it to construct.

This argument was most clearly and forcibly put by the learned counsel, and at the time impressed me strongly; subsequent consideration has, however, convinced me that it ought not to prevail. I may here say

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that I think the suppliants had under the 22nd section of the Act of 1861 authority to procure the lease of running powers over the Brockville and Ottawa Railroad between Carleton Place and Arnprior, and that this by itself sufficiently covers their failure to construct between these two points. Much might also possibly be said to exonerate them from any default as regards the line between Vaudreuil and Ottawa founded on the particular provisions of the Act with regard to that portion. I do not, however, stop to discuss these questions as it is sufficient for Mr. *Robinson's* argument that there has been a failure to make the line from Pembroke westward to a point on Lake Huron.

Judgment.

The first answer to this contention is in my opinion to be found in the explicit enactment of the 24th section of the Act itself which being construed according to the plain meaning of the words authorizes the building of the road in independent sections of twenty miles in length and declares the company entitled on the completion of every twenty miles to a proportionate part of the land grant without regard to the question whether the Act does impose on the company the obligation of performing the whole of the works which are authorized.

In order to give effect to the construction contended for it would be necessary to import by implication into the section just referred to, the qualification or proviso to the right to receive the grant, that the company should be in no default. I know of no principle of construing Acts of Parliament on which it would be possible to do this even if the context did not expressly exclude such a supplementing of the language of the Legislature. But I think the words of the Act "the company which shall have constructed the same shall be entitled to a corresponding portion of such grant" are so absolute that to supply words of qualification would be not merely to add to the enactment; but to intro-

duce into it a provision positively repugnant. If, therefore, the company have failed in performing an obligation imposed upon them by their Acts to complete the whole of the works which they were authorized to perform, some other remedy must be found than that of withholding the grant which the Statute expressly declares them entitled to; as it was put by Mr. *Moss*, it can no more be said that the company have by their failure to complete the whole line disentitled themselves to receive the grant which the statute expressly entitles them to, than it could have been said if they had performed the same work and obtained the grant long before the expiration of their powers, that their subsequent default would have worked a forfeiture of the grant which they had obtained.

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There is, however, another and a still more conclusive answer to this argument. The proposition of the learned counsel necessarily presupposes that there was a legal obligation resting upon the suppliants to complete the whole of their works, or at least that it was obligatory on them having partly performed the work to carry it to completion. If there was not any such liability there is an end to the question, for they were then at liberty to exercise their rights partially.

Judgment.

I was, until I saw the authorities cited and hereafter referred to, under the impression that it was not competent to a railway company having a parliamentary authority to construct a line from point A to point B, to make it merely to the intermediate point C, abandoning the residue. This impression was probably derived from cases like *Cohen* v. *Wilkinson* (*a*), which have determined that it is not within the competence of directors against the will of their shareholders to construct a part only of their line abandoning the

(*a*) 12 Beav. 138.

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remainder. This, however, is a totally different question, and one which can have no bearing on this controversy. In *The Attorney-General* v. *The Birmingham and Oxford Railway Company* (*a*), it was expressly determined that if a portion only of a railway be made, the omission to complete the whole work is not a public injury, which will authorize an injunction at the suit of the Attorney-General, restraining the company from further exercising its corporate powers. This authority alone would be sufficient for the present purpose; but in a subsequent case of the highest authority, the same question from all points of view underwent close examination, and was made the subject of a very full judgment by Judges of great eminence. This was the case of *The York and North Midland Railway Company* v. *The Queen* (*b*), in the Exchequer Chamber, where Chief Justice *Jervis* delivered the judgment of the Court, reversing that of the Court of Queen's Bench. In that case which was one of mandamus at the instance of landowners on the proposed line, the railway company had been authorized by their Act to make a railway from York through M. and C. to Beverley. They made a portion of their line from York to M., but did nothing upon the remainder of it. The powers of their Act expired as to so much of the line as lay between C. and Beverley before the mandamus was applied for, but they obtained an Act authorizing them to abandon the line between M. and C. and to substitute in lieu thereof the line which it was sought by means of the mandamus to compel the construction of. There was no question as to the correctness of the mode of proceeding by mandamus if the company were liable to make the whole line, and this liability was the point on which the case turned.

Judgment.

Three propositions were laid down as law by the court,—*First*, that the terms of the Act being permis-

(*a*) 3 Mc.N & G. 453. (*b*) 1 E. & B. 858.

sive and not imperative, no legal obligation to complete the whole line was created. 1873.

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Secondly,—That a railway Act is not, by reason of the rights of interference with private property which it confers, to be considered in the nature of a contract on the part of the company with the public to make the line.

Thirdly,—That the railway company having exercised some of their powers, and made a portion of their line, were not by reason of this part performance bound to make the whole of the railway authorized by their statute.

The two last resolutions are conclusive authority against any arguments tending to establish the reverse in the present case, and need not therefore be further referred to. It remains, however, in order to apply the entirety of this decision to the questions under consideration, to inquire whether the Acts of Parliament by which the rights and liability of the suppliants are regulated, do or do not make the construction of the whole railway an imperative duty. Judgment.

Had the 20th section of the Act of 1856 remained in force, I can suppose that it would have been used to found an argument that the commencement within three years, and the completion of the whole road within seven years, was compulsory. But even if that provision had been kept alive, or if the company had after the Act of 1861, and before the passing of that of 1865, and whilst its powers were dependent on the section in question of the Act of 1856, re-enacted by the Act of 1861, completed a part of its line, and declared its abandonment of the remainder, I do not think a mandamus would have been granted to compel completion. I think to an application for that writ it might in such

1873. case have been successfully answered, that this 20th section was intended to limit the time within which the company might at their option exercise their powers, precisely as if it had been expressed in the form of a condition, that if the privileges and powers granted were not made use of within a limited time they should then cease, which would not have been considered as imperative, or as importing any legal obligation or duty, but as merely authoritative. I need not, however, speculate as to what would have been the construction to place upon this 20th section of the Act of 1856, since as I have already shewn, it is no longer in force, having lapsed, and the Act of 1865 having been substituted for it. This last enactment leaves not the slightest room for doubt, since it is beyond all question purely facultative. It is in these words, "The time for the commencement of the railway which the company is authorized by its charter to construct, is extended for the period of three years from the passing of this Act, and the period for the completion of the said railway is extended for the period of five years from the passing of this Act, and the said company during the said periods shall, and may have, enjoy, exercise, and enforce all privileges heretofore granted to, conferred on, held, possessed, or enjoyed by the said railway company, by, under, or by virtue of the Act relating to the said railway company, or any Acts in anywise affecting the same."

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Judgment.

It could not be argued that this created any imperative obligation—no language could be more exclusively permissive.

The result is, that, in the language used in the case of *York* v. *The Queen*, "I find no duty cast upon the company in any part of their Acts of Parliament."

I am therefore of opinion that the argument of the learned counsel for the Crown on this part of the case

fails, and that the suppliants have made out their right to receive a grant of lands proportioned to the mileage of the portion of the line they have constructed. 1873. Canada Central R.W.Co. v. The Queen.

Lastly there arises the question, Is the Crown, as representing the Executive Government of the Province of Ontario, liable to make good to the suppliants the grant to which they have in my judgment shewn themselves to be entitled? This must depend on the effect of the British North America Act, apportioning the public lands of the late Province of Canada.

The 18th section of the Act of 1856 provided that the grants to be made should be of tracts of land fronting on the said railway, such frontages to be of ten miles each, and alternating with tracts fronting thereon of the same width and quantity, to be reserved as public land, and dealt with as such.

Judgment.

The 24th section of the Act of 1861 enacts that if no ungranted lands of the Crown front on the said railway, then such grant of lands may be made from the vacant lands of the Crown lying within the watershed of the Ottawa River. The British North America Act, (Imperial Statute 30 & 31 Vic. cap. 5), contains this provision (sec. 109): "All lands, moneys, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof and to any interest other than that of the Province in the same." The grant in respect of the section of the line now in question was therefore in the first place to have been made out of the Crown Lands of Ontario fronting on the railway if any such lands had existed, and the resort to

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the vacant lands of the Crown in the watershed of the Ottawa River is necessitated by the inability to make it good out of lands fronting on the railway which was the first right of the suppliants. It follows that the Province of Ontario, being rightfully called on by the suppliants to fulfil this original obligation, and having no lands to enable it to do so, must grant such of its own lands as the Act of Parliament permits to be substituted in the case of a deficiency of lands lying contiguous to the railway, and thus the grant must be made out of lands in this Province, situate in the watershed of the Ottawa River. In other words, the original duty being cast on Ontario, it must also fulfil the supplementary obligation. Any other construction than this would probably lead to consequences very unjust to the Province of Ontario. It must be borne in mind that the statutory obligation to make this land grant applies to the portion of the line in the Province of Quebec, to be constructed between Quebec and Montreal, and between Montreal and Grenville by the North Shore, and the Carillon and Grenville Companies respectively. Now supposing that along these lines there should have been no ungranted lands fronting on the railway, whilst that portion of the line which was to have been made between Pembroke and Lake Huron, would have run through an almost unbroken tract of vacant Crown Lands; if, in that case, the lands of Ontario lying in the Ottawa Valley had been liable to make good the grants to the Quebec lines, Ontario would have had to bear a grossly disproportionate share of the whole land subsidy. But if the secondary liability is taken as being apportioned, on the same principle as the primary liability of which it comes in aid, complete justice will be done between the two Provinces. I am therefore of opinion that the equities between the Provinces, if I may use the expression, consequent on Confederation are that the liability to make the grant must be considered to be distributed in such a way that each Province must

Judgment.

find the lands to be given in respect of the portion of the railway constructed within its limits. But there seems to be another answer to any objection on this head. Granting that this supplemental trust or charge does bind lands in the Ottawa watershed in the Province of Quebec, there can be no pretence for saying that it does not also bind lands in Ontario. Then the suppliants have surely a right to ask that the trust be executed so far as the Province of Ontario is concerned. They could not have sued the Crown as representing the Province of Quebec in the Courts of this Province. They must necessarily have sought their remedy against one or the other of the two Provinces, and independently of the effect of the division of the public lands effected by the Confederation Act I consider that they had a right to elect to have their charge satisfied by a grant of lands in Ontario; and this Province, if it is entitled to any contribution, must seek it in some other manner.

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Judgment.

The decree which was asked for at the bar was one declaratory only:

Under the Consolidated Order of this Court, No. 538, an ordinary suitor shewing a right to relief may have a decree merely declaratory of his rights. The Petition of Rights Act, sec. 8, enacts that the rules, orders, practice, and course of procedure of the Courts of Law and Equity in suits between subjects shall extend to Petitions of Right. The suppliants are therefore in my opinion entitled to a decree declaring that they have, in accordance with the provisions of the Acts of Parliament already mentioned, constructed twenty-eight and a half miles of the Canada Central Railway, and that they are entitled in respect thereof to a proportion of the grant of lands assured to them by the Statutes in question: such grant to be made in tracts fronting on the railway, and if no ungranted lands of the Crown

1873. front on the railway that they are entitled to such grant of lands to be made from the vacant lands of the Crown lying within the watershed of the Ottawa River.

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The suppliants are entitled to their costs.

The matter was thereupon set down to be re-heard before the full Court at the instance of the Crown.

Mr. *C. Robinson*, Q. C., and Mr. *Maclennan*, Q. C., for the Crown.

Mr. *Blake*, Q. C., and Mr. *Moss*, Q. C., contra.

SPRAGGE, C.—The objection which was urged before my brother *Strong*, on the ground that the Court had not jurisdiction, is not raised on this re-hearing.

Judgment.

I have examined the following Acts :—

The Vaudreuil Railway Company Act, passed 23rd May, 1853.

The Lake Huron and Quebec Railway Act, passed 1st July, 1856.

The Brockville and Ottawa Amended Act, 10th June, 1857.

The Brockville and Ottawa Extension Act, 24th July, 1858.

The Canada Central Railway Company Incorporation Act, 18th May, 1861.

The Canada Central Railway Act, extending time for performing the work, 18th September, 1865.

The Brockville and Ottawa Act, extending time for performing the work, 18th September, 1865.

Although some of these Acts do not bear directly on the point in issue here, I have thought it well to read them all, as they are all in *pari materia*.

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At the time of the passing of the Act of 1856, there were five railway companies in existence; by that Act the president, directors, and shareholders of these five companies were constituted a body corporate and politic, by the name of the Lake Huron, Ottawa and Quebec Junction Railway Company.

The Vaudreuil Company was to have the right to make a railway from Hawkesbury, opposite Pembroke, to Ottawa.

The Montreal and Bytown Company, from Montreal to Grenville, which was transferred to the Carillon and Grenville Railway Company, as stated in the 5th paragraph of the petition.

The capital of the New Company was divided into 1,000 parts, and apportioned in the manner stated by my brother *Strong* in his judgment on the original hearing.

Judgment.

Before May, 1861, the powers and franchises of the Bytown and Brockville Company lapsed.

To come then to the Act of 1856:—

The recital to that Act is, that "it is of the utmost importance to the general interest of the Province, [then composed of Upper and Lower Canada], that a main line of railway communication should be opened from Lake Huron to the Ottawa, and from Ottawa to Quebec. That the opening of a line from Arnprior, or some place between Arnprior and Pembroke on the river Ottawa to Lake Huron, would secure for the said main line so large a proportion of the travel and traffic of the Great West as to ensure the success of the remainder of the line from Ottawa to Quebec, and open up the country for settlement."

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The idea here is, to construct a railway from Lake Huron to the River Ottawa, and the expectation that the success of the line east of that point would thereby be ensured by the travel and traffic of the Great West being drawn through it.

Section 5 gives power to the new companies to construct the line between Arnprior, or some place between Arnprior and Pembroke to Lake Huron.

Section 6. The capital is measured by the distance between those points—so much per mile.

Section 9 provides that the capital stock of each of the old companies is to be increased in the ratio pointed out in the Act.

Section 11—to carry out the scheme—directs subscription of old stock and sufficient new stock to make up the proportion of each in the new company.

Judgment.

Section 15. Calls are to be made by directors of new company.

It would seem, therefore, that the new company was not to have any stock of its own independently of what it would obtain through calling upon the several old companies—what the new company so calls for is in order to build the line between the Ottawa and Lake Huron.

The old companies, it was contemplated, should each build the piece of road for which it was incorporated, except that special provision was made as to the line from opposite Grenville to the City of Ottawa.

Section 21 enables the several companies to unite into one company.

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Section 18. The object of section 18 is thus stated, "in order to aid and encourage the said railway from the River Ottawa to Lake Huron 4,000,000 acres of Crown lands in the neighbourhood of the line of the said railway shall be and are hereby set apart for the purposes of this Act"—*i.e.*, in the neighbourhood of the line between the River Ottawa and Lake Huron.

Then, when is it to be appropriated, and to whom?

In the first place as to time. It was to be on completion of 25 miles of the railway between the River Ottawa and Lake Huron; which was to be done by the new company: and on the completion by each of the old companies of its proportion.

All was intended to proceed *pari passu*. If it did so proceed all might be completed together—the sections east of the Ottawa by the old companies, and that between the Ottawa and Lake Huron by the new company; but in case of failure by any one, no land could be received by any.

Judgment.

All the companies had a common object to procure the great feeder to supply travel and traffic from the west, and each had an object that each of the others should complete its link in the chain which was to connect the Great West with the Atlantic seaboard. It was hoped that all would work in furtherance of the common object.

The Act is quite distinct as to what was to be done as preliminary to any grant of land. Three things—twenty-five miles of new line to be constructed; each railway to make its proportion of railway; and each other railway to make its proportion.

The grant was to be to the new company, each of the

1873. old companies to have its proportion which it would have through the new company.

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The Act is quite distinct also as to the aid to be given, what was to be aided, and on what account.

There is no room for doubt as to the construction of this Act—of the 18th section or any other; of the general policy; and the means proposed for carrying it out.

We then come to the Act of 1861. That Act recites that the construction of the railway authorized by the Act of 1856 "has been attended with difficulty, in consequence of the want of a concentrated interest therein —that it is expedient to amend and extend the said Act and to change the name of the company." It then incorporates a new company, which is constituted differently from the former one, being composed of individuals named "with all such other persons, corporations, and municipalities as shall become shareholders in the company hereby constituted," to be called the Canada Central.

Judgment.

It repeals *inter alia* the dividing the whole capital into 1,000 parts and its apportionment. The Canada Central is declared to be in the place and stead of the several companies named in the Act of 1856, except three—the Brockville and Ottawa, the Carillon and Grenville, and the North Shore. The effect of this is, that the three companies named are preserved, and it would seem *all* would have been preserved, but that the other two of the five had ceased to exist. The three companies preserved and the Canada Central became entitled to all the benefits, franchises and privileges granted in the Act of 1856, except as altered by the new Act.

By section 4 the company was empowered to construct a railway from Lake Huron to the City of Ottawa by way of Pembroke and Arnprior, and from the City of Ottawa to Montreal. Special provision was also made as to a railway between Hawkesbury and Ottawa by Carillon and Grenville, but upon the questions now before the Court that provision is not material.

By section 5, provision is made as to the Canada Central, becoming united with the North Shore and the Carillon and Grenville, or any two of them, in the event of their desiring and agreeing so to do.

Section 6 provides, "for the better adjustmunt of the proportions of the said several companies in the lands appropriated and set apart in aid of the said line of railway" by the Act of 1856—they are regulated in manner prescribed; three-tenths are set apart in aid of the North Shore Company; tho remainder being divided into as many parts as there are miles between Montreal and Pembroke, and appropriating one part to each mile of the distance in aid of the construction thereof.

Judgment.

The powers of the three preserved companies are not to be abridged, except in the instance provided for by section 4.

Provision is also made as to computation of distance, and provision is also made in regard to the Brockville and Ottawa Company building the road between Arnprior and Pembroke. Provision is also made as regards the construction of the road between the City of Ottawa and Pembroke.

The declared object of this section is the better adjustment of the proportions of each of the companies, and refers to the former Act; and also, as it would seem, to the same lands.

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It becomes necessary to consider what is the meaning of "setting apart in aid of." It is not said, in aid of any company named building its section of road, but in aid of such and such a railway company. And the question is—does this relieve any company from what was made its duty under the former Acts? Under the former Acts, however, each separate company had only the duty cast upon it of building its own portion; it being the duty of the general company, of which the several companies were constitutent parts, to build the road between the River Ottawa and Lake Huron; each several company, by its additional stock and through calls made upon it by the general company, contributing its quota towards the building of that road. Thus, under the Act of 1856, each of the companies did contribute to two things—one the building of its own section of road; the other its quota towards building the road between the River Ottawa and Lake Huron; and its capital was increased so as to accomplish both objects.

Judgment.

The capital, as well as the constitution, of the Canada Central are placed upon a different footing. The capital of the former company was based upon so much per mile of the length of the railway between the River Ottawa and Lake Huron. The capital of the Canada Central is a gross sum named—$7,000,000.

In the constitution of the former company, each company was represented in the general company, and so had something to say as to the building of the road; upon the building of which its right to aid depended. In the Act of 1856 it is not so. It has no power or voice outside its own company.

The change contended for by the Canada Central upon the petition, is a very great one—much greater than is indicated by anything set out in the preamble,

and the change is one that would render far less certain the accomplishment of the declared object of the grant of land. Comparing the preambles of the two Acts, one would say that the leading object of both was the same, viz., the construction of the railway between the River Ottawa and Lake Huron, and aiding its construction by a large grant of land, the locality of the land being also along the line of that railway.

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If the Canada Central is right, one great inducement to it and to the other railways to build the road west of Pembroke is taken away, On the other hand, the right to say anything as to the construction of that line of railway is also taken away.

The position is a peculiar one. Five several companies were in existence before 1856. They were to construct each its piece of railway without Government aid. The scheme embodied in the Act of 1856 is then introduced, and each of those railway companies is to aid in the construction of a great feeder to the west of them; and it being of great public benefit, these several railways receive Government aid, each in proportion to the aid it has given to this new western section, in the shape of land lying along the western section. The Act of 1861, in its preamble and in section 6, indicates no change in these respects, but rather an affirmance and carrying out, with only some modification of the original design. Then comes section 24, which, as read by the suppliants, reverses the policy, not only of the Act of 1856, but of the Act of 1861 itself, so far as it can be gathered from the preamble and section 6. Companies which were to receive land for their aid in constructing a work of national importance, and for that reason only, are to receive it without contributing anything towards that work, and they are to receive not the same, but other land—not land between the River Ottawa and Lake Huron, but land lying along the

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section of railway constructed; a thing not contemplated before 1856, nor by the Act of 1856, nor indeed by the Act of 1861, until we come to section 24.

It is extremely difficult to understand how, consistently with all that had gone before section 24, the provisions of that section came to be enacted, if read according to the contention of the petitioners; but, after all, if section 24 can mean nothing else,—taking its language to express its meaning, as we must take it, than what is so contended, we must so construe it.

Judgment.

The judgment of my Brother *Strong* contains this section *in extenso*. Referring obviously to the provision contained in section 18 of the Act of 1856, that to entitle a railway company having a right to share in the land appropriation, the other railway companies should have constructed a sufficient proportion of their lines, it says that it shall not be necessary that any other railway or portion of railway should be made by any other company, So far this section dispenses with only one of the three conditions to any company obtaining a share in the land appropriation; and it is contended that, taking the whole section together, that is the only condition dispensed with; but it goes on to say that, "on the contrary," (to abbreviate the clause without altering its sense) as soon as any portion of such railway, twenty miles in length, shall be completed and equipped, then "the company which shall have constructed the same shall be entitled to a corresponding proportion of such grant of lands as it would be entitled to" under the Act of 1856, "as amended by this Act; in the event of each of the companies forming the Lake Huron and Quebec Railway Company, complying with the conditions precedent to such grant provided for by the Act" (of 1856.) After the words "on the contrary," the clause declares any of the railway companies entitled upon constructing twenty miles of road: it

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makes that the sole condition. What follows declares what such railway company shall be entitled to; it is a proportion of the grant corresponding to the length of railway constructed and equipped, and it is of such grant of lands as the companies would have been entitled to under the Act of 1856, upon complying with all the conditions prescribed by that Act. It is not exactly a logical sequence to dispense with one of three conditions, and then enact that upon performance of another one, the party who would be entitled upon the performance of three shall be entitled, as he would have been entitled if he had performed all the three. But the language is so explicit, that a company shall be entitled, upon the performance of the one condition, to be performed by itself, that I see no escape from it. If the language were ambiguous it would be otherwise; but it is distinct, and seems to me to leave no room for doubt as to its proper construction. "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound the words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver" (*a*). The language of Chief Justice *Jervis* (*b*), is apposite to the construction of this section: "If the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure; but we assume the functions of legislators, when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning."

Judgment.

The construction put upon this section by the counsel for the Crown would import a condition to a railway

(*a*) Broom's Legal Maxims, 573. 11 C B 391

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company receiving land which is not expressed or implied by the language of the Act; or, which is the same thing, retain a condition contained in a former Act in addition to the one condition prescribed by this section. The most that can be said in favour of this construction is, that unless the condition as to which this section is silent, is retained, the avowed object, as well of this Act as of the Act of 1856, may be disappointed; but that is a point which it is the function of the Legislature not of the judiciary to consider: and I cannot even say that it was not considered. A notion that it was not fair to hold a company responsible for the acts of others, was probably the motive to the first provision in this section, and may have been the inducement to the second.

Judgment.

I am unable to agree with the learned counsel for the suppliants, that the Act of 1861 indicates an entire change of view as to the best means of carrying out the proposed policy of the Act of 1856. Its preamble and the provisions of the 6th and of some other sections seem to me to indicate an adherence to the policy of aiding the construction of the section of the road between the Ottawa River and Lake Huron; and that, by an appropriation of lands along that section, and but for the explicit language of section 24, I should not hold the suppliants entitled to any lands unless the building of that section were also proceeded with. The question before us resolves itself, after all, into a question of construction of the 24th section. It can, in my opinion, receive but the one construction, which has been given to it by my Brother *Strong*. I may doubt whether its consequences were appreciated by the Legislature; but our duty is to interpret it; and that only is our function.

With regard to the *locality* of the lands to be appropriated, whether along the line of railway between the

River Ottawa and Lake Huron, or along the line of railway completed, Mr. *Robinson* contends that under section 24, as according to section 6, and the Act of 1856, the land is to be taken from the former line of railway; and he points to the language in the commencement of section 24, "a share in the said land appropriation in virtue of this Act." The words, however, are not the said lands, but the said land appropriation; primarily the words used would refer to the locality as well as the quantum of the appropriation, but they may be taken as meaning generally the appropriation of so many acres, and must be so taken if the context shows such to have been the meaning. The last clause of the section seems to show that such was the meaning of the words used. There is, indeed, no express direction as to the locality of the lands to be granted, as railways or portions of railways were completed, but the last clause provides that "if no ungranted lands of the Crown front on the said railway, then such grant of lands may be made from the vacant lands of the Crown lying within the watershed of the Ottawa River." The words "said railway" used in this clause do certainly not refer to the proposed line between the Ottawa and Lake Huron, but to any railway which, or a portion of which, has been completed in the manner provided for in the previous part of the section: and it is necessarily implied that in cases where there was ungranted land fronting on such railway the grant was to be made from that land.

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Mr. *Robinson* follows up his argument by contending that inasmuch as the line between the Ottawa and Lake Huron is not as yet allocated, there is in fact no line of railway there; and that it is therefore impossible to make a grant out of the land appropriation at the present time. I agree that if the learned counsel is right in his first position, he is right in his second. But then the manifest object of section 24 would be defeated.

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That object was, that as portions of railway should be completed by any company from time to time, equivalent grants of land should be made to the company, which had made such piece of railway. This could not be done if the railway company, otherwise entitled, were made dependent for its grant upon the action of some other company, over whom it had no control, and in whose proceedings it had no voice—the Act of 1861 differing in that respect from the Act of 1856. The leading provision in section 24 is itself a strong argument in addition to the langu ageof the section to show, not only that the Legislature could not have intended that the grants of land should be taken between the Ottawa and Lake Huron, but also that it should not be a condition of such grants that that line or any portion of it, should bo first built. It happens to be the Canada Central that is now applying; but suppose it were the Brockville and Ottawa, or one of the other old companies, its false position would be obvious if the contention of counsel for the Crown be correct. By the Act of 1861, all the railways, the Canada Central and the others, are placed upon the same footing, and the false position of any is an argument which applies to all; and is an aid in the construction of the Act.

Judgment.

In regard to the last clause of section twenty-four, Mr. *Maclennan* makes this contention:—that inasmuch as Ontario has not ungranted lands of the Crown fronting on the section of the railway in question, to answer the grant to which it is alleged the suppliants are entitled, so that resort must be had to other Crown lands lying within the watershed of the Ottawa river; and inasmuch as lands lying within the watershed of the river comprise lands in Quebec as well as in Ontario, Quebec is interested: and this Court has no jurisdiction in Quebec.

I agree entirely in my Brother *Strong's* view upon

this point; I agree for the reasons that he gives that Ontario is bound to make good out of its own territory, whatever lands the suppliants may be entitled to in respect of their construction of this section of railway. The question raised is in fact only a question of parties. If our opinion were that there was a joint liability, shared by Ontario and Quebec, or that Ontario was bound to furnish a portion of the land in question and Quebec another portion, it might create a difficulty, but as our opinion is, that the entire liability rests upon Ontario, it would be idle to make Quebec a party even if we could do so, in order to hear Quebec contend for the same thing.

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I have not so far alluded pointedly to the argument addressed to us by Mr. *Robinson* that even though the Canada Central might, under the twenty-fourth section have entitled itself to a land grant upon building the piece of railway which it has built if it had done so in sufficient time to have built the other parts of the line, which under the Act it was empowered to construct; yet not having built it in sufficient time, it is not entitled. I have not done so because I do not know that I can add anything to the reasoning of my brother *Strong* upon that point. I will only add that in my opinion the construction of this railway does not fall within the principle of the cases in which a performance of the whole of a work is a condition precedent to being entitled to compensation for that which has been actually done, but within that class where the work being divisible and capable of apportionment, the party performing a portion is entitled to compensation for what has been done. In this case there is not only nothing in the Act against compensation for a portion, but it provides in express terms for compensation by portions, in the progress of the work.

Judgment.

If indeed we could see that under section 24, or

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indeed taking that section with the whole of the Act, the building of the western section was the inducement to the compensation provided by that section of the Act, the case would admit of different considerations; section 24 and the explicitness of its language are the great difficulties in the contention on the part of the Crown.

I do not myself see any serious difficulty in the provision of the Canada Central Act of 1866, that it is only upon condition that the railway which the company is authorized to construct touching at certain points, *i.e.*, at Ottawa, Arnprior, and Pembroke, that the company shall have a certain latitude in the allocation of their line. Under powers given by the Act, the Canada Central has taken a lease from the Brockville and Ottawa Company of that part of their line which extends from Carleton Place to Sand Point, touching in its way at Arnprior, and the company is proceeding in the construction of its line westerly from Sand Point to Pembroke. It can hardly be meant to be contended by the Crown, that the leasing of a line of road for 999 years under the authority of a statute; as part of the line which, under certain circumstances the Canada Central was authorized to construct, is not a compliance with the Act of 1866, if the line leased does itself comply with the provisions of the Act. These provisions, moreover, were enacted *alio intuitu*—to give further latitude as to the line, and at the same time to prevent too great a divergence, and secure the railway touching at certain points; and the lines constructed observe these provisions. If application were being made for a land grant in respect of a piece of road in which these provisions were not observed, the objection that they were not observed would be a sound one; as it is, the objection ought not in my opinion to prevail.

Judgment.

I agree entirely in what is said by my brother *Blake*,

as to the 117th section of the General Railway Act, not applying where the time for the commencement or completion of a railway is prescribed in any Special Act. 1873. Canada Central R.W.Co. v. The Queen.

In regard to those points in the judgment of my brother *Strong*, which I have not particularly touched upon, I desire only to express my concurrence in the conclusions at which he has arrived; to do more would only be to reiterate what has been very clearly and forcibly put by my learned Brother.

I would observe of the two leading statutes which have been before us—that of 1856 and that of 1861—that the earlier one is incomparably better drawn than the other. There is an intelligible system throughout, and its different provisions harmonise; while of the later statute it is not too much to say that its provisions do not harmonise; and though I feel clear that the construction we put upon the clauses that are in question before us is the only construction that they will bear, I am by no means equally clear that those clauses express the real and true intention of the Legislature. Judgment.

I desire to add in reference to a suggestion thrown out by counsel that an impression had got abroad that the opposition of the Attorney-General to the claim of the suppliants was rather formal than real, that the arguments of the learned counsel for the Crown, marked as they were with earnestness as well as ability, ought to disabuse the public mind of any such idea.

STRONG, V. C., retained the opinion expressed by him on the original hearing.

BLAKE, V. C.—The importance which attaches to this application arises more from the amount of property involved and the novelty of the proceeding than from any difficulty in the case itself. We have been informed

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by the learned counsel for the Crown, several times during their lengthened arguments, that the respondent does not ask simply the sanction of this Court to the claim of the petitioner as one which it does not desire to resist, but, on the contrary, the Court has been given to understand most distinctly that the respondent makes no concession in favour of the suppliant, and acknowledges no right in it, unless such as may be declared in this litigation, which is to be treated as one hostile and adverse to the Crown. With this statement of the position of the respondent, I proceed to consider the objections taken to the judgment of the Court below, which may be shortly set forth as follows :—

Judgment.

First.—The grant of four millions of acres of land, mentioned in the Acts in question, was made for the building of a *line* of railway from Lake Huron to Ottawa, and, unless this object was effected, the company was not to be entitled to any part of this land.

Second.—Clause 24 of the Act of 1861 embraces the conditions set out in clause 18 of the Act of 1856, and, therefore, before any grant of land is made there must be built, at least, twenty-five miles of the road, called the New Road, and twenty miles of each of the other lines of railway referred to in the Acts in question.

Third.—The portion of railway, in respect of which the present claim is made, is not any part of the line contemplated by the Acts of 1856 or 1861.

Fourth.—This portion of railway was not commenced within the three years provided by the Act of 1865.

Fifth.—The ten per cent. required by section 117 of the General Railway Act, being chapter 66 of the Consolidated Statutes of Canada, was not expended thereon within three years from the passing of the Act of 1865.

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Sixth.—The section of railway, in question, should touch at Ottawa, Arnprior, and Pembroke, in order to bring it within the Acts which provide for the grant, and, as it does not do so, the petitioner is disentitled to the claim made.

Seventh.—As there has not been any location of the line of the proposed railway, there are not any lands set apart, by any of the sections of the Acts, under which the suppliant claims, and, therefore, no lands defined from which the 340,000 acres asked can be allocated, and this Court is thus without jurisdiction in the matter.

Eighth.—Quebec is a necessary party to these proceedings, and without this Province being before the Court, no order can be made adverse to the Crown.

Judgment.

These matters are almost all covered by the judgment delivered in the Court below, the reasons for which are so fully and plainly set forth that it renders it unnecessary on this rehearing, where agreeing in the conclusion arrived at, to do more than assent thereto; although we are not relieved, in any measure, from the necessity of investigating at length the matters involved in the judgment appealed from, to ascertain whether or not in our opinion they warrant the results arrived at.

I think it must be admitted on the part of the petitioner that by the Act of 1856, the Legislature intended to devise a scheme whereby such inducements should be held out to a company, as would ensure the accomplishment of that which is pointed out in the preamble of the Act. The object sought to be attained was the opening up of a line of railway communication between Lake Huron and Quebec; and of such importance to the welfare of the country was this considered that it was deemed expedient to grant special encouragement and aid to its construction.

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The Act shows that the apparent difficulty of building this line was in that portion of it extending from the River Ottawa to Lake Huron; and a complicated plan was adopted which, if carried out, would have effected the desired end.

The five railways in existence at the time of the passing of, and referred to in, the Act of 1856, still retained their corporate existence, and another company springing out of the five was formed. Each of the five railways had the power to construct the portions of road assigned to them respectively, and this enabled them to build a line of railway from Quebec to Pembroke. The company formed by the union of the five railways and called the New Company, had the power to construct the balance of the main line, being from a specified point on the River Ottawa to Lake Huron.

Judgment.

Then follow the sections which, while intended to guard against a parting with the inducement held out for the building of the road unless the benefit sought was rendered certain, in reality served as clogs and paralysed the undertaking. I allude to sections 11, 18, and 20. The first of these provided that the railway was not to be commenced until the whole capital of the before mentioned companies had been subscribed; including the amount required to pay the share of each of them in the new company, and until 10 per cent. of the whole stock had been paid up and deposited in some bank, and secured to be applied only for the purposes of the Act.

The second of these sections provided that, when not less than twenty-five miles of the line of the new company had been finished in a manner equal to that of the Great Western, with all the requirements for the working of the railway; and when each of the companies had in like manner completed a certain proportion of its

line of railway, then there should be allotted to the new company a certain portion of the grant of four millions of acres. So that in order to obtain any part of the land grant, there must have been built not only twenty-five miles of the line of the new company, but also such a portion of the lines of the five companies as would ensure the completion of the line of the new company, and that of each of the other five companies, and thus there must be completed a line from Lake Huron to Quebec, in order to earn the four millions of acres. The last of these sections limited the time within which the work on the new line was to be commenced and completed, and in addition it directed that twenty miles thereof should be finished within three years. In this way, each of the five companies had, by its position in the new company, a voice in its management, and had also a direct interest in its being built, as upon this depended the grants of land to be made; and the completion of the road would furnish a valuable feeder to these eastern lines. For a period of nearly five years nothing was done under this Act, and it was found, as appears from the preamble to the Act of 1861, that the construction of the railway in question was attended with difficulty, in consequence of the want of a "concentrated interest" therein. By this Act, "The Canada Central Railway Company" was incorporated, and this name is given to the new company, in place of the former one of the Lake Huron, Ottawa and Quebec Junction Railway Company. This new company absorbed, amongst other lines, the Bytown and Pembroke Railway Company, and is empowered to construct its road from Lake Huron to the City of Ottawa by way of Pembroke and Arnprior, and from the City of Ottawa to the City of Montreal.

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Independently of section 24 of the Act, it would be difficult to conclude what arrangement was proposed as to the land grant, and whether the Legislature intended

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it to be distributed when twenty miles of any of the lines were built, or when twenty or twenty-five miles of the Canada Central Railway were built, or whether it needed twenty or twenty-five miles of the Canada Central, and certain portions of each of the other lines, to be constructed before any part of the bonus was to be considered as earned. Section 6 of the Act seems to provide simply for a fresh adjustment of the interest of the several companies in the land set apart. Section 9 provides that in place of the whole of the contemplated stock being subscribed, and 10 per cent. thereof paid up, as required by the Act of 1856, there should be only one-tenth thereof subscribed, and 5 per cent. paid up, before the work was to be proceeded with.

Judgment.

This looks rather as if the Act did not contemplate so large an undertaking as that proposed by the former Act, and rather leads to the petitioner's view that the road might from that time be built, if the companies pleased, in single twenty mile sections. Then comes section 24, which in my judgment taken by itself, disposes effectually of the main grounds of defence urged. It begins with dealing with the want of "concentrated interest," which is stated to be the difficulty in carrying out the former Act; and which "concentrated interest" was, I take it, the need in each railway, before it was entitled to a grant, to see that those intended to be co-workers had also fulfilled the share required of them. In its commencement it negatives this position and declares that "it shall not be necessary previous to the railway companies having a right to share in the said land appropriation in virtue of this Act, or any one or more of them, being entitled to have their respective proportions of the said land that any other railway or portion of railway should be made by any other company." It shows then that a contrary rule is from thenceforth to be adopted by saying "but on the contrary so soon as any portion of any of the said railways

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not less than twenty miles in length, shall be actually completed in a good and permanent manner, with stations, rolling stock, and other appurtenances sufficient for the proper working of such portion of such railway, then and thereafter from time to time, upon the completion of *similar portions thereof* or of *any other of the said railways* for the time being, the company which shall have constructed the same shall be entitled to a corresponding proportion of such grant of lands as they would be entitled to under the said Act, 19 & 20 Vict. cap. 112, as amended by this Act, in the event of each of the companies forming the Lake Huron and Quebec Railway Company complying with the conditions precedent to such grant, provided for by the Act incorporating the said last-mentioned company."

That clause seems to lay down distinctly that a corresponding proportion of the land grant, to which a company would have been entitled on complying with the conditions provided for by the Act 19 & 20 Vict., shall now be given to any of these companies that chooses to build twenty miles of their line in the manner prescribed by the Act. The Legislature may well have considered that the building of twenty miles of any of these roads was such a substantial benefit to the country as justified a grant of land, and that having failed to complete the line as a whole, when it was broken up they might be more successful; and that as each section was finished the localities adjoining the section which had not railway communication would push on the undertaking, and thus complete the line. To this proposition it was answered, that admitting the above to be the effect of this section, when taken alone, yet, notwithstanding this being its evident meaning, it must be controlled by what appears to have been the intention of the Legislature by the Act of 1856—that this Act is not repealed—that the object to be carried out by it existed as much in 1861 as it did in 1856, and although

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certain clauses of the former Act are repealed, clause 18, which then indicated the system Parliament intended to adopt, in respect of the land grant, still stands, and must be taken as governing the present claim. But although clause 18 is not directly repealed, yet where it is not consistent with clause 24 it must be rejected, for according to paragraph 2 of the latter Act "so much of any other section thereof (meaning the former Act) or, of any other Act as is inconsistent with this Act are hereby repealed." As to the proposition that the general intention of the Legislature is to be drawn from the various Acts in question, although such intention may defeat the section under consideration, I say it is not the true rule for the construction of a Statute.

Judgment.

Mr. *Broom*, in his work on Legal Maxims, at p. 569, commences his discussion on the interpretation of Acts of Parliament with these remarks—"The construction of a statute, like the operation of a devise depends upon the apparent intention of the maker, to be collected either from the particular provisions, or the general 'contents,' though not from any general inferences drawn merely from the nature of the objects dealt with by the statute. The Courts are bound to give it effect whatever may be their opinion of its wisdom or policy: acting upon the rule as to giving effect to all the words of the statute, a rule universally applicable to all writings, and which ought not to be departed from, except upon clear and strong grounds." Mr. Justice *Byles* observes that "the general rule for the construction of Acts of Parliament is, that the words are to be read in their popular, natural, ordinary sense, giving them a meaning to their full extent and capacity, unless there is reason upon their face to believe that they were not intended to bear that construction, because of some inconvenience which could not have been absent from the mind of the framers of the Act, which must arise from

the giving them such large sense" (*a*). Chief Baron *Pollock* says, "In construing an Act of Parliament, when the intention of the Legislature is not clear, we must adhere to the natural import of the words; but when it is clear what the Legislature intended, we are bound to give effect to it, notwithstanding some apparent deficiency in the language used" (*b*). In delivering the opinion of the judges in the Sussex Peerage case (*c*), Chief Justice *Tindal* says, "The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound the words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law-giver—but, if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute and to have recourse to the preamble which, according to Chief Justice *Dyer*, is a key to open the minds of the makers of the Act, and the mischief which they intended to redress." "If," remarked the late Chief Justice *Jervis*, "the precise words used are plain and unambiguous, in our judgment we are bound to construe them in the ordinary sense, even though it do lead in our view of the case, to an absurdity or manifest injustice. Words may be modified, or varied where their import is doubtful or obscure; but we assume the functions of Legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning" (*d*). In *Biffin* v. *Yorke*, Mr.

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(*a*) Birks App. v. Allison, 13 C. B. N. S. at p. 23.
(*b*) Huxham v. Wheeler, 3 H. & C. at p. 80.
(*c*) 11 Cl. and F. at p. 143.
(*d*) Abley v. Dale, 11 C. B. 391.

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Justice *Cresswell* says, "it is a good rule, in the construction of Acts of Parliament, that the Judges are not to make the law what they may think reasonable, but to expound it according to the common sense of its words" (*a*). After referring to *Miller* v. *Salomons* and other cases, Mr. *Broom* thus sums up the result of his investigations: 'It may then safely be stated as an established rule of construction that an Act of Parliament should be read according to the ordinary and grammatical sense of the words (*b*), unless being so read it would be absurd or inconsistent with the declared intention of the Legislature to be collected from the rest of the Act."

Judgment.

Testing this Act by these authorities and looking at that clause which deals with the manner in which this grant is to be made, and taking the words in their "popular, natural, and ordinary meaning," taking "the common sense of the words" so far from their leading to "an absurdity and manifest injustice," I do not find anything on their face to lead to the belief that they were not intended to have the effect it is contended for; the most that can be said of this construction is, that it shews the Legislature between 1856 and 1861 had altered somewhat its railway policy. I think this section says as plainly as it could well be put, that, upon the company in question finishing twenty miles of its line, it might demand a portion of the promised land grant; and I am of opinion that this plain statement cannot be controlled by any general words in the preamble, or elsewhere appearing in the Act which tend to shew that the Legislature expected and desired that the effect of their legislation would be to open up railway communication between Lake Huron and Quebec.

There is another reason, to which no answer was given on the argument of the cause, for concluding that

(*a*) 6 Scott N. R. at 235. (*b*) 7 Ex. 475 In Error 8 Ex. 778.

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the Legislature did not contemplate a completing by the Canada Central Railway Company of the road from Ottawa to Lake Huron, as the term upon which the lands were to be given. On the 18th September, 1865, the Act was passed which extended the time for the commencement and completion of the Canada Central Railway. This is the Act which it is said required the whole line to be built within five years, in order that any demand for land could be made; and yet on the same day the same Parliament passes an Act depriving this railway of the power of building the whole line within that time, and gives to the Brockville and Ottawa Railway the exclusive right to construct during the whole of these five years that portion of the line extending from Arnprior to Pembroke. Each of the twenty mile sections was not only to be finished in the ordinary acceptation of this term, but it was to be fully equipped and supplied with rolling stock, and in full running and working order, thereby shewing that the Legislature looked upon each portion when finished as a complete line. Doubtless it was thought that along each twenty or thirty miles of the proposed line there would be found some convenient or advantageous stopping place, and that it might not be amiss to allow a five years' trial of this system of building railways. The first two grounds of appeal must, in my judgment, be disposed of against the appellant. The 3rd, 4th, 5th, and 6th objections may conveniently be discussed together. It is clear from the evidence that the portion of railway in question was commenced within the three years and finished and in running order as required by the statute, within the five years contemplated by the Act of 1865. By the Act of 1861, the company had the power to lay out its line from a point on Lake Huron to the City of Ottawa, by way of Pembroke and Arnprior—there was not anything to oblige the company to commence at Lake Huron: it might begin at Ottawa, and, doing so it should, under the Act, have worked from Ottawa to

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Lake Huron by way of Arnprior and Pembroke—this is just what the company has done. It was not compelled to take a more direct route to Arnprior than it has done. The Act says it shall not divergo more than twenty-five miles from the Ottawa River, and it has kept within this distance. It was not obliged to take the shortest line from Ottawa to Arnprior which would have compelled it, in this short distance, to cross the Ottawa four times—nor was it obliged to contend with the probable engineering difficulties, or the competition for the carrying trade which would have, in all likelihood, followed from a near approach to the course of the river along the line of the railway—whether this particular divergence was reasonable or the reverse is a matter with which we have nothing to do so long as it does not exceed the twenty-five mile limit prescribed by the Act—we cannot sit in judgment on the rules which Parliament has thought fit to lay down for the carrying out of the work it seeks to accomplish. The evidence shews that the shortest practicable route from Ottawa to Arnprior is forty-three miles, that taken by the petitioners is fifty-two miles. The company seems in good faith to have run its line as it has from Ottawa in the direction of Lake Huron, touching at Carleton Place. It has there tapped the Brockville and Ottawa railway, and has leased in perpetuity that portion of its line from Carleton Place to Arnprior, and thence to Sand Point, as it had a right to do under its Act. It cannot be said the object of the statute is not thus being carried out as we have already railway communication between Ottawa and Sand Point, and the line is now being pushed on to Pembroke. The contention could not be successfully made that the railway must touch at all the points on their line defined by the Act before it is entitled to a portion of the bonus: for this would oblige it to touch at Ottawa, Arnprior, Pembroke and Lake Huron before it could get an acre of land, and would oblige it in effect to complete the whole line before it could make any

claim to the grant. If the company had begun their operations at Lake Huron, and worked twenty miles in an easterly direction toward Pembroke, it would have been entitled, under my reading of the Act, to the bonus for this section; and, to my mind it cannot make any difference that it has commenced at Ottawa, and worked in a westerly direction towards Lake Huron. I think without procuring the portion leased from the Brockville and Ottawa Railway that the petitioner was entitled to claim for the twenty-eight and-a-half miles as part of the contemplated line of railway. All that the Legislature meant by referring to the points at which the railway should touch was that the places specified were not to be passed over in constructing the line, and doubtless this will be observed so far as Pembroke is concerned, as it has been in regard to Arnprior, for the obtaining a further bonus will doubtless be made to depend upon the continued observance of this requirement of the Act.

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The statute of 1856 limited the time within which the line was to be commenced, twenty miles of it built, and the whole finished. This limitation was imported into the Act of 1861, but as nothing was done under this Act within the specified time, the powers thereunder ceased, and the company had no right to proceed with the work thereby contemplated, until the Act of 1865, which extended the period for commencement to three years and the period for completion to five years from the time of its coming into force. We do not find here the additional limitation contained in the Act of 1856 as to the twenty miles, and I am of opinion that it was not under this last Act required that the company should complete twenty miles of its line within the three years. It is impossible to hold that section 117 of the General Railway Act, (C. S. C. cap. 66,) applies here and governs in this case. The clauses of that Act apply only where the provisions in it are not inconsistent with the Special Act. This company was only compelled,

1873. under its Act, to commence the line within three years. It would be adding a burden not contemplated by this Act, to compel the company within three years not only to begin, but to expend ten per cent. of its capital on its line. If the matters dealt with in clause 117 had not been touched by the Act in question, then this Section would form a part of the Act, but as it is otherwise, the company is not in this particular called upon to do more than the special Act of Incorporation calls for. You cannot import from the General Act a clause inconsistent with the rights thus obtained: if it were so, there would be no benefit in a Special Act, and the provisions of the General Act must in all cases prevail.

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In order to consider the 7th objection it is necessary once more to return to clause 24, the latter portion of which reads as follows: "And if no ungranted lands of the Crown front on the said railway, then such grant of lands may be made from the vacant lands of the Crown lying within the watershed of the Ottawa River." The railway spoken of in this clause is that railway which, having completed a section of its line, is entitled to a certain grant of land. The clause may be put shortly, as follows: "A railway, complying with the requirements of this section, shall be entitled to a grant of lands, and, if no ungranted lands of the Crown front on the said railway so constructed, then such grant may be made from the vacant lands within the watershed of the Ottawa," This seems to indicate clearly that as a section of any railway was completed, the contemplated grant was to be made out of the ungranted lands fronting on such section. The Province of Ontario took the lands situate within it, "subject to any trusts existing in respect thereof and to any interest other than that of the Province, in the same." The Crown lands of this Province, fronting on this twenty-eight and-a-half miles of railway, are therefore held subject to the promised grant, and if thereon the same cannot be made,

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that Province, the lands of which are thus made liable, must, out of its other lands specified in the Act, make good the claim, subject to which it has taken the lands of the Crown within its territory. I think Quebec has the same liability in regard to portions of the lines referred to in the Acts in question, which may be built within its limits. The lands, from which the grant is now claimed, in my judgment, are defined: the Crown holds them as trustee, and Quebec has nothing to do with the present demand, and is not a necessary party to the proceeding.

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After giving the cause the best consideration in my power, I have come to the conclusion that the decree in the Court below is right and should be affirmed, and this rehearing dismissed with costs.

I deem it but right to add, that the care taken by counsel in their preparation for the argument, and the able and lucid manner in which it was presented to the Court relieved, at all events, one member of it from the difficulties and complications which the pleadings seemed to foreshadow.

Judgment.

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HENDERSON v. MACDONALD.

Debtor and creditors—Deed of arrangement—Extension of time—Collateral security—Description of claim—Merchant's account.

The rule in respect of compositions between a debtor and his creditors is, that a creditor cannot appear to concur in the composition and sign the deed, and at the same time stipulate for a separate benefit to himself outside thereof. However, where upon an agreement between a debtor and his creditors for an extension of time for payment of his liabilities, the deed of agreement stated that it should not "affect any *mortgage, hypothec, lien,* or *collateral security* held by any such creditor as security for any of said debts:"

Held, that a creditor whose claim was fully secured by a mortgage on real estate and other collaterals, was not bound to communicate that fact to the other creditors at or before executing the deed of extension.

In a schedule of debts appended to a deed of arrangement between a debtor and his creditors, a claim was inserted under the head of "Merchant's Account:"

Held, that the claim was not improperly described, although at the time of entering into such deed the account was fully secured by a mortgage on real estate and other securities.

Statement.

The bill in this case was filed by *John Henderson* and others, creditors of the defendant *Fawcett*, suing on behalf of themselves and others, the creditors of *Fawcett*, against *John Macdonald*, *Fawcett* and *John L. Watkiss* the assignee of *Fawcett* in insolvency, praying, under the circumstances stated in the head note and judgment, a declaration that the defendant *Macdonald* was not entitled to the insurance moneys received or to be received by him under the policies of insurance held by him, nor to any benefit under the mortgage security executed to him by *Fawcett*, on account of *Macdonald's* dealings with the trust estate, and the appointment of a receiver to collect and get in the outstanding estate and effects of *Fawcett*.

The cause having been put at issue, evidence was taken before the Court, several creditors of *Fawcett*

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being called as witnesses, whose evidence chiefly tended to shew that had they been aware of the existence of the mortgage on the real estate; and the fact that *Macdonald* had obtained assignments of the policies of insurance to himself as collateral security for his claims against *Fawcett* they would not have agreed to or joined in the execution of the deed, extending the time for payment of the claims against *Fawcett*.

The other facts are fully stated in the judgment.

Mr. *Attorney-General Mowat*, and Mr. *Morphy*, for the plaintiffs.

Argument.

The effect of the schedule of *Fawcett's* assets was to lead the other creditors to suppose that the entire estate was available for the payment of his debts; that the plain literal meaning of such a document was to represent that all the assets were so available. In all such transactions the general rule is, that the strictest good faith is required and must be observed between the creditors. An agreement for a benefit to a particular creditor, though not with the debtor himself, is against public policy, and that too although it may be quite clear that the other creditors would not have received anything more had such agreement not been made.

They contended that *Macdonald's* claim being inserted in the schedule as a "Merchant's Account," was sufficient to produce the belief that it was simply an unsecured debt, and that having thus asserted the nature of his claim he could not now derive any benefit from the mortgage and policies of insurance: that registration was not, in such a transaction, notice to the other creditors; in such a case the creditors were not bound to search the registry any more than a mortgagor, when paying a mortgagee, is bound to search to see if any assignment of the mortgage has been registered. That

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Macdonald in his evidence said he had only told *Henderson* that he was fully secured, but he did not say that he held a mortgage on the real estate and an assignment of the insurance policies; and at all events it is not pretended that the plaintiffs, other than *Henderson*, had notice, even admitting that he did tell *Henderson* that he had security, which was denied; and that *Macdonald's* duty clearly was to communicate distinctly to the creditors signing the deed the fact that he had a preferred claim. The position of the other creditors was very different with *Macdonald's* claim, as it appeared in the schedule, from what it was under the facts as they really existed.

Cullingworth v. *Loyd* (*a*) was, with other cases, referred to.

Argument.

Mr. *Moss*, Q. C., Mr. *McMurrich*, and Mr. *J. H. Macdonald*, for the defendants.

The rule in respect to these transactions simply establishes the general principle that a creditor cannot stipulate for any special benefit to himself from the debtor, a rule which, in itself, is perfectly intelligible and must recommend itself to every one. Here, however, the creditor whose claim is now sought to be impeached stipulated for nothing more than the deed expressed; he held then, and long before that time held, in his hands the collateral securities now sought to be set aside, and these the deed expressly saved to him. *Macdonald* had no interest in having an extension of time granted to *Fawcett*, while the other creditors were interested in such being done; he was fully secured, and could enforce payment in full at any time; they had no security, and the only chance of being paid in full was the debtor's being allowed to carry on his business; so that, notwithstanding the statements of the witnesses now

(*a*) 2 Beav. 385.

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that they would not have joined in the deed had they been aware of *Macdonald's* position, we cannot help seeing that it was to their interest that the very thing that was done by them should have been so done. It is impossible at this date to draw any inference as to what the creditors would or would not have done if the instrument had contained all it is now contended that it should have contained.

Counsel distinguished the case of *Cullingworth* v. *Loyd* from the present, as there the creditors whose claim was disputed had professed to join with all the other creditors in accepting ten shillings in the pound in full of all their debt, while at the same time they had security on real estate, obtained for payment of the balance, thus clearly infringing the rule applicable in such cases.

Judgment

BLAKE, V. C.—On the 14th June, 1872, the defendant *Fawcett*, then carrying on the business of a general merchant in the village of Uxbridge, found himself in embarrassed circumstances, and applied to the plaintiff *John Henderson*, for advice. This plaintiff recommended the obtaining an extension of time from the creditors, and undertook to see the defendant *Macdonald*, the largest creditor, on the subject, whose determination, as representing two-thirds of the total claims against the debtor, would materially affect the course to be pursued. *Macdonald* assented to an extension of time, on certain terms then discussed, and agreed to procure the preparation of the necessary document by his own solicitors to carry it out. In pursuance of this arrangement an instrument was drawn up by these gentlemen, which, being approved of by their client, was executed by him and almost the whole of *Fawcett's* creditors, and went into force at once. This agreement was made between *Fawcett* of the first part, *Macdonald* of the second part, and the creditors of *Fawcett* of the third part. It

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provided that the party thereto of the first part should, from time to time, account to the party thereto of the second part, "for all moneys arising from the sale of his said stock-in-trade or in any wise being the produce of his said business, and to pay the same into his or their hands immediately upon receiving the same; and further, that as soon as a reasonable price can be obtained for his real estate he will convert the same into cash, or as much thereof as may be necessary to enable him to pay said indebtedness, and will apply the proceeds in liquidation of the said several claims, and will observe the provisioes herein contained"—and that the party of the second part should return to the party of the first part forty per cent. of the amount thus by him received, and should distribute the remaining sixty per cent. thereof among all the creditors *pro rata*, according to their claims as found in the schedule appended to the agreement. The document contained also the following clause—"and it is hereby expressly declared to be the true intent and meaning hereof, that the execution hereof shall not operate any change in the liability of any person secondarily liable to any of the said creditors for any of the said debts, either as drawer or endorser, of negotiable paper, or as guarantee, surety or otherwise; nor of any other person liable jointly or severally with the said party of the first part to any of said creditors for any of said debts, nor shall it affect any mortgage, hypothec, lien or collateral security held by any such creditor as security for any of said debts, and the said creditors hereby expressly reserve their right of action against any surety or person secondarily liable as aforesaid, or on any of the said securities." The creditors covenanted not to press for payment of their claims for a period of twelve or eighteen months with the proviso that unless payments to a certain amount were made each month the agreement would cease to be binding. There was annexed a schedule which purported to shew "the assets and liabilities

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of *Fawcett*, referred to in the within deed." The assets embraced "Stock in trade," "Book Debts" "Brick Block in Uxbridge," "Dwelling-house and Store in Uxbridge," "Farm and two Houses." The claim of the defendant was inserted in the schedule of liabilities as "merchant's account $11,242 95." The defendant *Macdonald* is mortgagee of certain premises included in the said schedule under a mortgage executed as a continuing security by *Fawcett* to him on the 20th of May, 1869; he is also the holder of policies of insurance on the buildings erected on the lands mortgaged to him, and of certain other policies on the stock in trade and other chattels of *Fawcett*. These policies cover risks to the amount of $7,100.

By two fires, which occurred within nine months of the execution of the agreement referred to, almost all the property of *Fawcett* was destroyed by fire. The monthly payments contemplated were not made, and the plaintiffs allege that the assets remaining will not suffice to discharge the claims of the creditors.

Judgment.

Upon this the plaintiffs claim that the defendant *Macdonald* cannot hold the mortgage and policies referred to for satisfaction of his debt alone, but that they must be realized for payment of all the creditors *pro rata*. Thereupon the present bill is filed, throughout the forty paragraphs of which several serious charges of actual fraud and misrepresentation are made against the defendant *Macdonald*. As to these it is only necessary to state that they were entirely unsupported by the evidence; and that they were abandoned as grounds for relief by the counsel for the plaintiffs, who rested his clients' right to a decree merely on the question of law, whether or not, if it should be found that *Macdonald* did not inform the creditors that he held the aforesaid mortgage and policies when the agreement for extension was executed, he can now hold them until his debt be paid in

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full. The plaintiffs urge that the effect of the arrangement is that *Macdonald* came into the agreement in question, abandoning any preference to which he might have been theretofore entitled, and agreed to share with them all the property of the debtor. It is evident that *Macdonald* had no such intention when he signed the paper of the 14th of June. Then he was amply protected. His securities covered him fully whether the property remained or was destroyed by fire—at any moment he could have proceeded to realise his debt. To the other unsecured creditors, however, it was a matter of moment to obtain for their debtor a period within which these proceedings could not be taken in order that their claims might be worked out in the meantime. Those who come here, to complain of the conduct of this defendant, may well consider how far it would be fair to take this advantage of an instrument executed under such circumstances, supposing it to have the effect contended for. But I am unable to come to the conclusion that the priority of the defendant *Macdonald* has been in any manner lost or impaired. When *Macdonald* tendered to *Henderson* the paper shewing what he was prepared to assent to, there were inserted there the words "nor shall it affect any mortgage, hypothec, lien, or collateral security held by any such creditor as security for any of said debts." Can I reject this clause in the agreement? or am I not rather bound to hold its effect to be that *Macdonald* thereby warned *Henderson* that what secured his debt up to the time he signed this document, should, notwithstanding his signature thereto, be still held by him unaffected. *Henderson*, upon his examination, admits that he then understood perfectly the effect of such a clause. It is one that business men like the plaintiffs must be conversant with, as it occurs frequently in instruments carrying out arrangements made where a debtor is in embarrassed circumstances. *Henderson* took the agreement to his office before signature, and if he did not then choose to read it intelli-

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gently or with care, I cannot conceive this to be a reason for depriving *Macdonald* of rights which he never intended to be affected otherwise than to be thereby preserved. I cannot hold either, that it was incumbent on *Macdonald* to set forth, or inform *Henderson* or the other creditors of the fact that he held securities for his debt or of their nature. If I did so, it would lead to this result: viz. wherever any creditor signs a composition deed, notwithstanding the fact that there is a general reservation in favor of creditors of their securities contained therein, it would be necessary for them to set the same out, in order to preserve them. I think if the creditors want information on these points they must seek it, and the onus does not rest on the secured creditors, to do more than see there be a general reservation under which they have the right to claim protection. It is urged further that not only did *Macdonald* withhold this information, but that he actually misled the creditors by stating in the schedule that the liability in his favor was a "merchant's account." I do not think there was here any misrepresentation;—as a matter of fact, it was a "merchant's account" which was secured. It made it none the less a merchant's account, that it may have been covered by a mortgage, bond or promissory note. The transaction as evidenced by the agreement, shews that there was a general statement of the assets of the debtor and also of his liabilities made out; an arrangement that the assets should be realized and his debts paid, but that the securities then held by the creditors, were not to be affected. I cannot put the strained interpretation on the instrument or transaction that I am asked; and I am of opinion that it would be most unfortunate if the view urged by the plaintiffs should be adopted, as it would have the effect of casting so much suspicion on arrangements made for extensions of time in favor of debtors, as almost to preclude their being made when any one creditor has an advantage over the others.

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But it has been argued that in any event, *Macdonald* must give up these securities as he had no right when signing the agreement, to stipulate for, or obtain any advantage which is not common to the other creditors; that he here stipulated for the retention of this mortgage and the policies, and they must be therefore handed over for the benefit of the general body of creditors. I would not have thought it necessary to consider this point, but that it was gravely and strenuously argued, and the case of *Cullingworth* v. *Loyd*, was cited as an authority incontrovertibly sustaining counsel's position. I had up to that time thought that what the legislature and this court sought to prevent in cases of this class, was the *secret* preference in favor of one creditor in order thereby to induce him to sign the deed, and thus that the other creditors might be led also to be parties to it—that particular creditors by means of secret bargains were not to be allowed to secure to themselves advantages while apparently sharing with all rateably the property of the debtor.

Judgment.

I cannot say that a careful perusal of the case cited, has caused me to alter this view. It was argued that, in that case as there was a reservation of securities in favor of the creditors, it could not be distinguished from the present; but the only reservation of the kind, in fact in that deed, was in respect of securities held against third parties. There the deed recited that the debtors *Addy* and *Cullingworth* being unable wholly to discharge their debts had proposed to pay their creditors a composition of ten shillings in the £, which the creditors had agreed to accept in full satisfaction of their several debts. And it purported to witness that each creditor executing the deed *released Addy and Cullingworth from the debt owing by them to him* and all interest due thereon, *and also from all securities given by Addy and Cullingworth or either of them for securing payment of such debt* provided that any creditor might be at liberty to execute

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the deed without prejudice to any other lien or security which he might have for the debt against any other person." The defendants executed this deed and at the same time stipulated that they should obtain and hold a legal mortgage on certain property of the plaintiffs, the title deeds of which had previously been deposited with them as a security for the balance which would be owing to them after the dividend had been received. The mortgage was given, the deed of assignment executed; the dividend thereunder paid, and thereafter the defendants proceeded to realize the balance on this security; whereupon the bill was filed alleging that by executing the composition deed the defendants had given up their security. But counsel in argument did not place the case higher than this, "that by the established rule of law, the defendants Messrs. *Loyd* being parties to the composition deed, could not retain any advantage over the other creditors not expressed in the deed, or distinctly and clearly communicated to the body of creditors." The Vice Chancellor, in disposing of the case, says: "It appears to me that the same principles of public policy which have governed other cases of this kind will deprive Mr. *Loyd* of his right to retain the advantage which his execution of the deed purported his intention to release." But these principles of public policy upon which the Vice Chancellor acted are thus laid down in the earlier part of his judgment: "it is established by a series of decisions that a creditor cannot ostensibly accept such composition and sign the deed which expresses his acceptance of the terms, and at the same time stipulate for, or receive to himself *a peculiar and separate advantage which is not expressed upon the deed.*"

Judgment.

In that case the creditors agreed to take 10s. in the £. Here the creditor is to accept certain dividends without prejudice to his security. There, there was the direct representation that 10s. in the £ was accepted in

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full satisfaction of the debt. Here such representation is entirely wanting. There there was a covenant that upon payment of this sum each creditor would release the debtor. Here such stipulation is wanting; on the contrary, it is evident each thought he would be paid in full. There upon receipt of the composition each credit or covenanted to release the debtor from all securities held for securing payment of such debt. Here the creditor is entitled to hold them under the agreement until payment in full of his debt. Although the main facts in that case differ widely from those in the present it is still here a useful decision as laying down the law in such plain language in favor of the rule stated by counsel for the defendants.

Judgment.

I should fail in my duty did I, in any measure, lower the standard from time to time adopted in dealing, in a Court of Equity, with mercantile transactions: at all times I desire to bear in mind the statement of Lord *Hatherley*, when as Vice Chancellor he stated in *Blissett* v. *Daniels* (*a*), "the view taken by this Court with regard to morality of conduct amongst all parties, most especially amongst those who are bound by the ties of partnership, is one of the highest degree. The standard by which parties are tried here either as trustees or as copartners, or in various other relations which may be suggested, is a standard, I am thankful to say, far higher than the standard of the world." I feel the vast importance of not lowering the test to be applied to such matters as those involved in the present litigation; none would suffer more than the business men of our country were there to be introduced a system which allowed deviations, no matter how slight, from that correct upright course which has made honorable the appellation of merchant. In their various negotiations and dealings there should not be found any suggestion of that which is false or suppression of that which is

(*a*) 10 Ha. 535.

true. An advantage that can be only obtained at the expense of, or by deceiving, him that deals with you, must be rejected as one which, purchased at the price of one's integrity, costs more than an honest man can ever afford to give. 1873. Henderson v. Macdonald.

I refer to these matters only to shew that I do not desire to and do not sustain the transaction here impeached by any lowering of the tests applied thereto by this Court; but that while putting them as high as they have been yet raised, I am still unable to conclude that the plaintiffs have a right to complain. I do not find that in this *forum*, nor yet indeed in *foro conscientiæ*, Mr. *Macdonald* stands guilty of the charges made against him, and therefore the bill must be dismissed with costs. Judgment.

In Re Foster and Griffith v. Patterson.

Administration order or suit—Practice.

Where, on a motion for an administration order, it appeared that the application was by a party claiming for the support and maintenance of the wife and children of the deceased, and the questions raised were substantially the same as would be raised had a suit been brought by the wife for alimony, the Court refused the order, and directed a bill for the purpose to be filed, and made the costs of the application costs in the cause.

This was an application for an order to administer the estate of *William Foster*, deceased, under the circumstances stated in the head-note and judgment.

Mr. *Boyd*, for the plaintiff.

Mr. *G. Murray*, contra.

Spragge, C.—I have conferred with my brother *Blake*, before whom this application was made before it

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came before me. He agrees with me that the questions raised upon this application are proper for the decision of the Court, and should not be referred to a Master; that unless it appeared clearly upon the affidavits that there was a liability, the case was a proper one for a bill; that if upon the affidavits it was an open question, which might be settled one way or the other upon oralt estimony whether the estate of *Foster* was liable for the plaintiff's claim, that oral testimony should be taken before the Court, and the Court should pronounce upon it; in other words, it would be a proper case for a bill.

Judgment.

In this case the questions raised, as to the maintenance f the wife at least, are the same as would be raised upon a bill filed by her for alimony; and as to the maintenance of the children the question would substantially be the same if living with the mother, inasmuch as by reason of their tender age the allowance to the mother would be increased. To make an order which would have the effect of raising these questions before the Master, would be delegating to an officer of the Court the hearing and disposition of questions which are obviously proper for the Court itself. And there is this further reason for their being heard and disposed of by the Court, that the Court finds great difficulty, for reasons which have been often explained, in over-ruling the finding of the Master upon questions of fact, and it might well happen that the Court and the Master might arrive at different conclusions upon the same *vivâ voce* testimony presented before them respectively; and yet, that the Court could not, consistently with the rules which it has laid down in such cases, reverse the finding of the Master upon a mere reading of the evidence taken before him.

They are not questions proper to be disposed of for any other than interlocutory purposes upon affidavit

evidence, and not questions proper for the Master—unless arising incidentally—but for the Court.

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In this case the wife left her husband, carrying with her her children, some years before his death. She instituted no suit for alimony, nor does it appear that any demand was made upon him for maintenance of wife or children, on behalf of the wife, or of her father by whom they were maintained. The personal representative of the husband might well hesitate before admitting the claim of the father, and put him to proof that the wife left under circumstances which made the husband liable for maintenance.

As to the costs of this application, I think that they may properly be made costs in the cause.

Judgment.

A bill was subsequently filed by *Griffith*, in respect of the same claim, and, after hearing evidence in the cause,

BLAKE, V. C., made a decree declaring the plaintiff entitled to be paid, and directing an administration of his estate, if assets were not admitted.

1873.

McIsaac v. Heneberry.

Mortmain—Deed void in part—Trustee.

A deed may be good in part, though void in part. Where, therefore, a conveyance was made of lands, and the grantees contemporaneously executed a declaration of trust in respect thereof, as follows: first, to lease the lands until sold, and to sell them; to pay the annual proceeds to the settlor for life, and after the death of the settlor to pay the same, or in the discretion of the trustees a portion thereof, to *A. M.* during his life; and that the trustees sold a portion of the estate, and after the death of the settlor a bill was filed impeaching the settlement as void under the Statute of Mortmain, which it admittedly was as respected the trusts declared of the *corpus* of the estate:

Held, that the trusts declared in favor of the settlor and *A. M.* were sufficient, however, to support the sale which had been effected, and the bill, as against the trustees, the purchaser from them, and *A. M.* was dismissed with costs.

Hearing at Guelph.

Mr. *Moss*, Q. C., and Mr. *Watt*, for the plaintiff.

Mr. *Blake*, Q. C., and Mr. *Drew*, Q. C., for the defendants.

Judgment. SPRAGGE, C.—The conveyance impeached by this bill was from *Margaret McIsaac* to the defendants *Heneberry* and *Murphy*, and they executed a contemporaneous declaration of trust. The trusts, shortly, were to lease the lands conveyed until they should sell them—and to sell them to pay the annual proceeds to the settlor for life, and after her death to pay the same, or, in their discretion, a portion thereof, to the defendant *Archibald McIsaac*, during his life; and the trust as to the *corpus* of the estate was for purposes which are undeniably void under the Statute of Mortmain. The parties who are made defendants in respect of these latter trusts have made no defence, and do not appear.

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McIsaac v. Heneberry.

The trustees, in pursuance of the trust, sold one of the parcels of land comprised in the trust deed to the defendant *Cushing*, for $3,300; of this *Cushing* paid on account $1,700, and gave a mortgage for the balance on the purchased land. The settlor died within a year after the execution of the trust deed.

The contention at the hearing was, that under the Statute the deed was wholly void. But at a later day, during the sittings, the learned Counsel for the plaintiff intimated to me that, having since the argument examined the Statute, he was prepared to concede that it avoids only so much of the instrument as is against its provisions, leaving so much of it as is not within the mischief of the Act intact; and in this, having myself referred to the Statute, I concur.

The trusts in favor of the grantor herself and of *Archibald McIsaac*, are sufficient to support the sale to *Cushing*; and the bill as against him and *Archibald McIsaac*, will therefore be dismissed with costs. The case fails as to the conveyance having been obtained by misrepresentation or fraud of any kind; and *Heneberry* and *Murphy* are also entitled to their costs. The bill will be dismissed as against them unless their presence is required for any purpose of conveyance.

Judgment.

The decree will declare the trusts void in respect of the provisions for churches or church edifices, but without costs to or against those made parties in respect of those interests.

1873.

O'Donohoe v. Hembroff.

Practice—Varying decree.

A bill was filed by a creditor against his debtor, to obtain the benefit of a vendor's lien, and the decree declared the lands (four parcels) subject to the lien for unpaid purchase money, and directed an account to be taken of what was due to the vendor and also to the plaintiff and other incumbrancers. It appeared that to one of the four parcels the vendor had not any title; and that the purchase had been of all at a gross sum of £2,000. After the accounts had been taken, one of the purchasers filed a petition praying for a reference back with a view of obtaining an abatement of the purchase money on account of such defect; but, as this would have been in effect a varying of the decree, which could only be obtained upon a re-hearing, the relief was refused: and whether, after the delay that had occurred and the proceedings that had been taken, it would have been proper to grant leave to rehear. *Quære.*

This was an application by one *John McNabb*, one of the purchasers of the lands in question, for a reduction of the amount found due by the Master's report, on the grounds stated in the head-note and judgment.

Mr. *Ewart*, for the petitioner.

Mr. *Cassels*, contra.

Judgment.

Spragge, C.—I cannot see my way to refer it back to the Master to open the account taken before him, in order to his making an abatement in purchase money, as prayed by the petitioner. The difficulty has arisen apparently from want of care and accuracy in drawing up the decree. The plaintiff comes into Court as creditor of a vendor of real estate consisting of four parcels, to have the benefit of the vendor's lien; and she alleges that to one of these parcels—a lot 18—the vendor had no title; and she declares that she seeks no relief as to that parcel; yet the decree declares that the lands and premises in the bill mentioned are subject to a lien for the balance of unpaid purchase money, and it directs an account of what is due to the plaintiff and to other in-

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cumbrancers; and an account of what is due to the defendant *Hembroff*, the vendor, for principal, interest, and costs of suit. A decree in short is issued to the plaintiff ignoring an allegation in the plaintiff's own bill which affected her rights, and giving to her and the vendor between them the benefit of the whole purchase money, when the bill shewed that she was not entitled to the whole. If there had been separate purchase money for each parcel, or separate purchase money for lot 18, there would not have been this difficulty, but the purchase was of the four several parcels at one gross price, £2,000. The vendor, indeed, says in his answer, that what he sold was his interest in the land, and that the purchasers accepted the title—he does not allege that he had title to lot 18. The purchasers allowed the bill to be taken *pro confesso*. I incline to think that it was not necessary to set up by answer that they were entitled to an abatement of the purchase money, because such a claim would naturally be prefaced by just such an allegation as is contained in the bill. Whether there was any evidence given in the case to negative the *primâ facie* right of the purchaser to an abatement, I do not know. I rather infer that there was not, for I suppose if there had been, I should have heard of it in answer to this application.

Judgment.

But the difficulty now is, in what is declared and directed by the decree. With the decree framed as it was, it was not, in my opinion, competent to the Master to make an abatement in the purchase money; and if I were to direct him to do so now, it would be, in effect, varying the decree.

The application should have been to rehear. Whether after the delay that has occurred and the proceedings that have been taken, it would be proper now to grant leave to rehear, and if so, upon what terms, I express no opinion. I must dismiss this application with costs.

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The point to which I have referred, is the only one spoken to before me. If since the report the state of the account has been changed by receipt of rents and profits or otherwise, that can be set right by an ordinary application (without petition) in Chambers.

DEAVITT v. SCANLAN.

Fraudulent deed—Trustee—Costs.

A bill was filed impeaching a deed as void under the Statute of Elizabeth, and the same was set aside with costs, as against the party beneficially interested; but without costs as against the trustees, as the ground upon which the same was set aside was not necessarily, and probably was not known to them.

Hearing at Barrie.

Mr. *Moss*, Q.C., and Mr. *Lount*, for the plaintiff.

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

Judgment. SPRAGGE, C.—At the close of the argument I gave judgment decreeing that the conveyance impeached should be set aside, and explaining the grounds upon which I proceeded. The only point reserved was, whether costs should be given against the trustees as well as against the defendant beneficially interested, and I was referred to the case of *Mackay* v. *Douglas* (*a*), where costs were given against trustees.

That was a case in which a settlement was impeached as void under the Statute of Elizabeth; and the trustees took a course in the case which Vice Chancellor *Malins* characterized as unusual. After expressing his

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(*a*) L. R. 14 Eqy. 106, 128.

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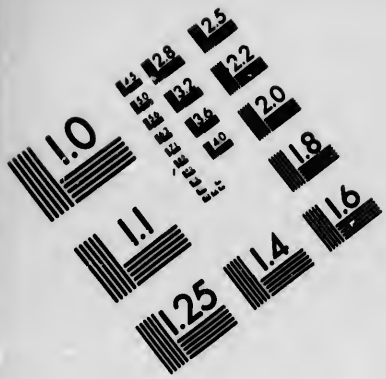
Deavitt v. Scanlan.

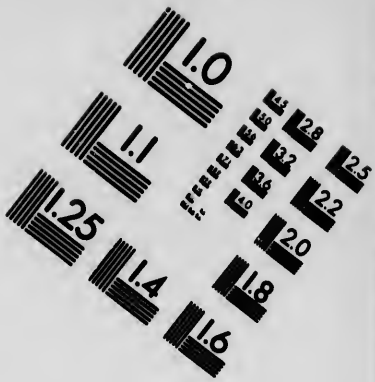
regret that he could see no ground upon which he could relieve either the settlor or the trustee, from the costs, he adds, "it is very unusual for trustees to come forward as these have done, actively to support such a settlement. They have thought fit to do so." He then alludes to a previous case before himself: *Crossley* v. *Elworthy* (*a*), which was also a case under the Statute of Elizabeth, and observes that in that case "the remarkable thing was, that the wife of Mr. *Elworthy* would not appear to defend that settlement. Mr. *Elworthy* himself, I think, did not appear to defend it, but the guardians of the infants appeared to support it, and I therefore made them pay the costs of the suit." The learned Vice Chancellor, in both these cases, seems to have thought that the trustees had put themselves forward to defend that which was really indefensible.

Judgment.

There was an earlier case, *Smith* v. *Draper* (*b*), before the Master of the Rolls. That was an assignment to trustees for the benefit of creditors, by one who afterwards became bankrupt, and which was void by reason of three-fourths in value of the creditors not becoming parties to it. One of the trustees insisted upon retaining his costs and expenses out of the trust estate, and thereupon a bill was filed against him, and it was adjudged that he could have no right to retain costs and expenses under a deed which was void and inoperative; and the costs of the suit were given against him. The principle of this decision is clear enough. His claim founded in error had made the suit necessary. Lord *Romilly* held that the trust deed being *void*, the parties named as trustees were really not trustees at all; and could have no rights in the estate of the assignor; and so the trustee, or person named as such, was making a claim which could not be supported; and that claim was a sort of misconduct, which occasioned the suit.

(*a*) 12 Eqy. 158. (*b*) 1 Eqy. 651.





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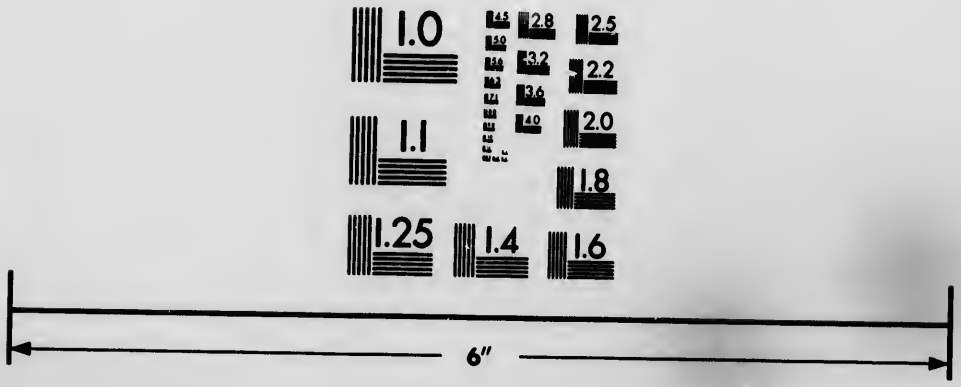

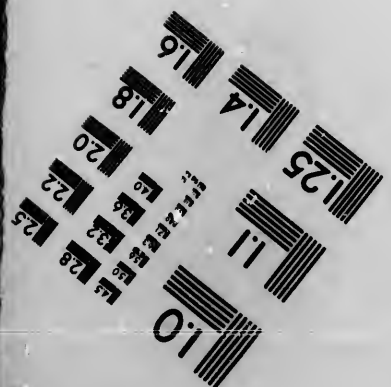

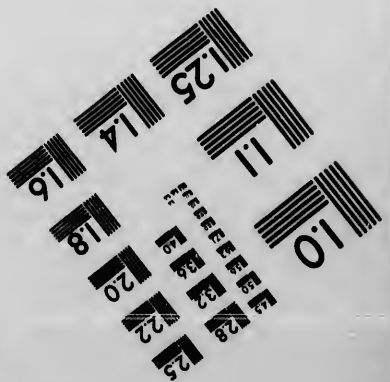

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In all of these cases the trust deeds were *void*, and the infliction of costs upon trustees was placed upon the grounds that I have stated. Whether costs are to be adjudged against trustees, *as a general rule*, who come into Court to support trust deeds that turn out to be void, it is not necessary to determine, and I am not prepared to do anything towards establishing such a rule.

It is sufficient in this case to say that the deed in this case was voidable only, not void; and that I set it aside upon a ground the foundation of which, as a question of fact, was not necessarily, and I may say not probably, known to the trustees.

Judgment.

There will be no costs against the trustees.

MEAGHER v. THE ÆTNA INSURANCE COMPANY AND THE HOME INSURANCE COMPANY.

Marine insurance—Abandonment—Salvage—Purchase by Insurers—Foreign law.

The plaintiff, being owner of a vessel, insured the same for $8,000 against total loss only. The policy provided, amongst other things, that no act of either party, in the event of disaster, with a view to saving the property, should be considered as a waiver or acceptance of abandonment, but that such acts should be done without prejudice to either of their rights, and that no right to abandon should arise in any event, unless the amount which the plaintiff would be liable to pay under an adjustment as of a partial loss, exclusive of general average, should exceed half the amount insured; and it was expressly stipulated that the plaintiff should not have any claim under the policy for general average loss or particular average loss. While in the regular course of her employment the vessel struck on a rock in the River St. Lawrence, the plaintiff being on board at the time, on the 30th of July, in calm water, and where she was protected from the action of the winds. On the 6th of August, the plaintiff, without attempting to rescue the vessel; but, as alleged, acting upon the advice of his captain and other disinterested parties, gave notice to the underwriters of an

abandonment; which, however they refused to accept, and ten days after they got the vessel off the rock, and carried her to a harbour in the United States, where they had her repaired at an expense of $3,000—one-fifth the declared value of the vessel—which sum the plaintiff neglected to pay. Thereupon the underwriters caused such proceedings to be taken against the vessel in the Courts of the United States as resulted in the sale of the vessel under process, at which the agents of the insurers became the purchasers in their own names, but in reality in trust for their principals. The insurers subsequently sold the vessel, and their vendee shortly afterwards resold her, and, owing to peculiar circumstances, at a very large advance. The plaintiff instituted proceedings at law to recover the amount of the policy, which resulted in favour of the defendants, and ten years afterwards filed a bill in this Court seeking to charge the insurers as trustees for him of the vessel:

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Held, without reference to the delay in proceeding in this Court, that the insurers were entitled to hold the property unaffected by any claim of the plaintiff, and the Court, although it considered the plaintiff entitled to any surplus that remained in the hands of the insurers after payment of the amount expended by them upon the vessel, were unable to grant him that relief, and dismissed his bill with costs.

It is not desirable, even with the consent of parties, that the Court should construe the law of a foreign country, instead of the fact of what is the law there being proved by lawyers of such foreign country.

Statement.

The bill in this case was filed by *John Meagher* against *The Ætna Insurance Company of Hartford*, and *The Home Insurance Company of New York*, setting forth that on the 10th of April, 1859, he had effected an insurance with the latter Company, on the Steamer *Boston*, of which he was owner, for $3,000; and on the 27th of the same month, another insurance with the other Company for $5,000, from the 16th of that month until the 30th of November following, when the policies were to cease; the vessel to be employed in the general freighting and passenger business on the River St. Lawrence to Quebec, such steamer with her tackle, furniture, &c., being valued at $15,000; the premium on such insurances having been paid by a note at four months, which the Companies respectively acknowledged; that in the

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event of loss or misfortune to the vessel, the plaintiff or his agents were to give notice promptly to the insurers of the disaster, and of the plan adopted for the recovery and saving of the property, and a survey should be held in manner mentioned in the said policies by the assured; and in case of neglect by the assured to do so promptly, the insurers were authorized to interfere and recover said vessel, and cause the same to be repaired, for and on account of the assured, to the expenditure whereof the insurers would contribute according to the proportion the sum insured should bear to the valuation so agreed upon; and the surplus (if any) advanced by said insurers (including the premium note if unpaid), should be a lien upon, and be recovered against the said vessel or against the assured at the option of the insurers. And it was further agreed and understood by an indorsement on the said policies, that the steamer was insured against total loss only, and that no claim for particular or general average loss should attach under the policies.

Statement.

The bill further alleged that, while in the regular course of her employment, the steamer was wrecked on the 30th July, 1859, by running on a sunken reef in the River St. Lawrence; that the plaintiff, after an attempt to raise the vessel in which he failed, and acting under the advice of the Captain and other disinterested persons skilled in navigation, concluded to abandon the vessel, and thereupon caused a formal notice of abandonment of the steamer to be served on the agents of the defendants; that the defendants thereupon took possession of said vessel, and succeeded in raising her and carrying her into the port of Ogdensburgh, in the State of New York, at an expense of about $1,500, and there repaired the vessel at an expense of about $800.

The bill further alleged that the plaintiff, after the abandonment by him, had instituted actions against the defendants in the Court of Queen's Bench and the Court

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of Common Pleas respectively, in which actions the defendants pleaded that the plaintiff was not entitled to abandon the vessel, and that the defendants had not accepted such abandonment, which issues so raised were found in favor of the defendants; and they recovered judgments against the plaintiff for the costs of said actions; that under these circumstances, the defendants became and were trustees of the vessel for the plaintiff; nevertheless they, contrary to their duty and with the intent of wrongfully acquiring an independent title to the vessel, caused proceedings to be instituted in one of the District Courts in the State of New York, by *David S. Holden* and *Erastus F. Holden*, who it was alleged had done work or provided materials for the vessel at the instance of the defendants; and also at the suit of the defendants, in pursuance whereof she was sold under writs of *venditioni exponas*, on the 5th of August, 1861, when she was knocked down to one *E. P. Dorr* and one *Dobbins*, the agents of the defendants, and who were the only bidders at the sale, at the sum of $4,500, no portion of which was ever paid to the plaintiff or any person other than the claimants, although such sum was greatly in excess of the claims against the vessel; that after their purchase, the defendants, instead of selling her for the best price that could be obtained, or employing her in some lucrative business, kept her lying idle at Ogdensburgh at a heavy expense for nearly two years, and managed her so negligently that she sank or ran aground in the harbour, and became and was seriously injured and depreciated in value; that a short time before the 16th May, 1863, the defendants sold the vessel, in such her damaged condition, to one *Benjamin Chaffey* for $6,000, a sum greatly below her actual value; that *Chaffey*, after hauling off the vessel and having her repaired at a comparatively trifling expense, on the said 16th of May, sold her to one *Loran Cochran* for $19,500, which was about her value at the time. The plaintiff charged that *Chaffey*, in the purchase from the defen-

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dants and sale to *Cochran*, acted as agent of the defendants; but if he were not such agent, that the defendants might, by the exercise of proper care and diligence, have sold the vessel to equal advantage; and were, therefore, chargeable in any event with the whole sum of $19,500 less the amount paid by *Chaffey* in fitting her for sea: and prayed a declaration that, after the raising of the vessel, the defendants became trustees thereof for plaintiff; an account of all moneys properly expended by the defendants, in respect of the vessel, and of all moneys received, or which, but for wilful default, might have been received by them, and that in taking said account the defendants might be charged with the amount of the profit (if any) obtained by *Chaffey*.

The defendants *The Ætna Company* answered, denying all fraud or collusion, and insisting that by virtue of the proceedings in the United States Courts and the sale thereunder the purchasers *Dorr* and *Dobbins*, as such agents, became the absolute owners of the vessel, in trust for them and their co-defendants, freed from any trust in favor of the plaintiff.

The cause having been put at issue, was brought on for the examination of witnesses and hearing before his Lordship the Chancellor.

The other facts appear fully in the report of the suit in the Queen's Bench, above referred to, in the 20th volume of the Reports of that Court, at page 607, and the judgment on the present hearing.

Argument.

Mr. *Maclennan*, Q.C., Mr. *Machar*, and Mr. *Bethune*, for the plaintiff, contended that the companies having taken possession, and made repairs, became trustees for the assured. The course taken by the assured was that pointed out by the policy, and acting on the advice of

his captain and others who were disinterested, he gave the necessary notice of having abandoned the vessel. The position assumed by the defendants, however, is that plaintiff had not any right of abandonment.

The purchase alleged by the bill, and proved in evidence, by *Dorr* and *Dobbins*, was in effect a purchase by the companies themselves, and thus the companies remain to all intents trustees for the plaintiff, and it cannot make the slightest difference, as regards their liabilities to the plaintiff, that the legal title remains in the purchasers, *Dorr* and *Dobbins*.

The position assumed by the defendants in their answer, that the sale having been made under execution, and according to the law of the State of New York, the vessel had become absolutely vested in the purchasers in trust for the companies, is untenable in this Court.

Argument.

By the provisions of the policies the companies, in case of disaster, were authorized to intervene, and they did so in their own interest, and thus prevented a total loss.

They contended also that the companies were liable to bear a proportion of the expense of salvage, notwithstanding the stipulation exempting them from liability for repairs; there being a distinction between salvage expenses and expenses of repairs.

They referred to *Fox* v. *Mackreth* (*a*), *Gregory* v. *Gregory* (*b*), *Roche* v. *O'Brien* (*c*), *Marriott* v. *Anchor Reversionary Co.* (*d*, *Graham* v. *Yeomans* (*e*).

(*a*) 1 W. & Tud. 104. (*b*) Coop. Temp. Eldon 201.
(*c*) 1 B. & B. 330. (*d*) 2 Giff. 457; S. C. 3 D. F. & J. 177
(*e*) 18 Gr. 238.

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Mr. *Moss*, Q. C., for the defendants *The Ætna Insurance Co.*

The case which the plaintiff assumes to set up here is, that from the time of giving notice of abandonment to the filing of his bill, the defendants were chargeable as trustees for him.

The statement in the tenth paragraph of his bill, alleging a demand by him for the restoration of the vessel, and his readiness to pay the amount expended by defendants is not only not proved, but is distinctly disproved.

The contention between these parties is, was there a total loss, or was there not; that there was not a total loss has been plainly demonstrated by the action of the insurance companies in having raised and repaired the vessel, and except in case of total loss there was no liability attaching to them. That there was not a total loss was distinctly decided by the Court of Queen's Bench. His Lordship, the Chief Justice, in his judgment (at page 623) remarked, "There was certainly not in this case an actual total loss. There was not abandonment accepted by the defendants, nor, do we think, such a constructive total loss as entitled the plaintiff to give notice of abandonment which could avail him though not accepted, * * * she was not at the time of the abandonment in imminent danger of total destruction."

Argument.

Expenses such as those incurred by the insurers here, come properly under the definition of general average. (*a*)

There might have been some accountability at law for a breach of duty on the part of the insurers, but if so, the remedy was at law, not in this Court. There is no

(*a*) Arnold on Marine Insurance, pages 918-9, 993, 1107, 1112.

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relation of principal and agent, or of trustee and *cestui que trust*. We contend that from the first to the last of these proceedings the insurers were in the right, the plaintiff in the wrong. *Dorr's* evidence proves this. He offered to return the vessel on the plaintiff paying the amount expended; this was before the trial at law; but this offer the plaintiff rejected, insisting all the while upon the right to abandon.

There can be no doubt, upon the facts here appearing, that the defendants from the time of the sale claimed to have, and thought they had acquired, the absolute property in the vessel; if so, it was clearly their interest to obtain the highest possible price for her. That part of the bill, therefore, which attempts to fix the company with any responsibility on the ground of negligence in selling, falls to the ground.

He referred, amongst other cases, to *Castrique* v. *Imrie* (*a*), *The Sloop Betsy* (*b*), *Waring* v. *Clarke* (*c*), *Jackson* v. *Magnolia* (*d*), *Philadelphia &c. R.* v. *Philadelphia &c. Tow Boat Company* (*e*), *The Eagle* (*f*).

The bill was taken *pro confesso* against the *Home Company*, and they did not appear at the hearing.

Mr. *Maclennan*, Q. C., in reply.

Judgment.

SPRAGGE, C.—This cause has been exceedingly well argued. The dealings which form the subject of this suit were before the Court of Queen's Bench in the year 1861, in a suit brought by the same plaintiff against the same defendants. I have not, of course, to consider any of the questions decided in that suit. They

(*a*) 4 E. & I. App. 414.
(*b*) 3 Dall. 6.
(*c*) 6 How. 441.
(*d*) 20 How. 296.
(*e*) 28 How. 209.
(*f*) 8 Wallace 15.

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are *res judicata*. The plaintiff's position now is, that he misconceived his remedy in bringing his suit in a Court of Law, that his remedy is in this Court, and he places his right to relief upon this, that the defendants are bound to account to him as trustees.

The plaintiff insured the steamer *Boston* with the defendants—with the Ætna for $5,000, and with the Home Insurance Company for $3,000. While so insured, she met with an accident which is thus described in the case at law: "On Saturday, the 30th of July, 1859, the *Boston* in coming up the River St. Lawrence, struck upon a shoal or reef, which runs out northerly towards point Iroquois on the Canadian side of the river in Upper Canada, where the river is probably from half a mile to a mile wide, the place being quite inland and many hundred miles from the sea.

Judgment.

"This accident occurred about two o'clock in the day, from some cause not clearly accounted for in the evidence. She had some cargo in her, and the plaintiff was himself on board. A large boulder at the point of the reef came under the vessel about amidships; she hung upon this, and sank at the bow and stern till the water became level within her. From the situation in which she was, she was not exposed to the action of any sea, and could easily be got off and taken to a place of safety, if the nature and extent of her injury should be found to admit of it."

The conduct of the plaintiff (whose case was that there was a total loss of the vessel), is thus described by the learned Chief Justice:—

"The vessel was fast on a shoal in the river a few hundred feet from the shore, at midsummer, the calmest season of the year, and where in any season there would be no danger from the agitation of the waters. She

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was in a situation which admitted of all means for getting her off being easily taken, and of removing her afterwards to a place of safety where she could be readily repaired. From the first, no one seemed to doubt that she could be raised and restored, as in fact she has been, after freeing her from water and applying eight or ten days' labor.

"But the plaintiff being present at the time of the casualty, seems, either then or very soon after, to have made up his mind to make no effort to relieve the vessel, but to force her upon the defendants as a total loss, on the principle that the policy, as he assumes, entitled him to abandon her if he could make it appear that the cost of floating the vessel, getting her to a place of safety, and repairing her, would exceed *half the amount insured*. The defendants, on the other hand, seem to have been consistent from the first in their resistance of such a claim. They called upon the plaintiff to take measures for saving the vessel, but he would do nothing. Either party was at liberty to exert himself in restoring the vessel without prejudicing his position under the policy, for that is expressly provided for; and the defendants having got off the vessel with little difficulty, and offered to restore her on being repaid the expense they had been at, have shown thereby very plainly that she was not an actual total loss."

Judgment.

In another passage, the learned Chief Justice states shortly what is the undoubted effect of the provisions of the policy, in regard to the rights and course of the parties in the event of disaster:—

"The defendants, without prejudice to their rights, were at liberty to get her off and repair her, so that they could restore her to the plaintiff, since he would take no steps to that end himself; and they did with ease, as it seems, float her and repair her, and offered her back to

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the insured, with her engines in her. Whether she was or was not, when so tendered to the plaintiff, as sound and sea-worthy as before she struck, is not a point that can determine the question of her being a total loss, for she had been recovered and restored, and was then afloat and in safety, having sustained an injury, for repairing which the plaintiff would be liable to the defendants so far as they had repaired it, and the rest of the injury, if it was not wholly repaired, the plaintiff must himself have borne, since he chose to run all risk of partial loss."

The duty of the *insured* it was not necessary to insist upon. It is clear from the evidence that he did not "make all reasonable exertions in and about the defence, safeguard, and recovery of the vessel," and to cause damages to be repaired, as he was bound to do under the provisions of the policy. The position of the insurers in the event of disaster is different; in case of refusal or neglect by the insured to take proper measures to recover the vessel and to repair her, the insurers are "authorized to interpose" to recover the vessel and to repair her. That the insured neglected to do what he was bound to do; and that the insurers did promptly, vigorously and effectually, that which they were authorized to do, is sufficiently evident from the passages that I have read from the case at Common Law, and the same is proved also in the evidence in the case before me.

Judgment.

The insurers having raised the vessel, took her to the port of Ogdensburgh, and there made certain repairs to her. Some question is made as to the amount of the expenditure incurred in doing this; but it is not proved, and I believe is not alleged, that anything that was done in these respects was done unnecessarily or injudiciously.

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In further dealing with the vessel, the insurers, it is scarcely necessary to say, were bound, while pursuing their own rights and remedies, to have due regard to the rights of the insured.

The plaintiff's case against the defendants as trustees, proceeds upon this in the first place: that after the judgment against the plaintiff at Common Law, they, the defendants, were bound to restore the vessel to him upon his repaying to them the cost of rescuing and repairing her. The duty of the defendants, and the offers made by the plaintiff, are thus put in the bill. After stating the adverse judgment at law, the bill proceeds: "Notwithstanding their said allegations, the defendants declined after the termination of the said suit to restore the said vessel to the plaintiff, or to furnish to him any proper account of their expenditure in respect of the same, although the plaintiff was always willing and repeatedly offered the defendants respectively to repay to the defendants the full amount of their lawful claim in respect of such expenditure, and all other their claims against the plaintiff, so soon as the amount thereof should be ascertained; and the defendants should declare their willingness to restore to him his said vessel."

Judgment.

The fault of these allegations is, that they are not only not proved, but that they are disproved by the evidence. There was no refusal by the defendants to restore the vessel upon payment of expenses incurred, nor any offer by the plaintiff to pay those expenses. The right of the plaintiff to have his vessel upon payment of these expenses was clear, and was never questioned by the defendants; so far from it, they were willing not only to receive payment, but to give the plaintiff time for payment; and it does not appear that there was any refusal to render accounts or any obstacle to the plaintiff obtaining every information. It is, indeed, stated by the plaintiff in evidence, that Captain *Dorr*, the agent

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of the Ætna Company, made it a condition to the restoration of the vessel, that the plaintiff should pay $5,000. Captain *Dorr* denies this, and says that no sum was named. I cannot find as a fact that the payment of this sum was exacted as a condition. It is said to have occurred some twelve years before the evidence given. The plaintiff is uncertain as to time and circumstances. If this demand was really made, I should have expected to see it alleged in paragraph ten; and it is most unlikely that it was made. With the terms of the policy so clearly limiting the right of the insurers under the circumstances to expenses incurred, for such a position to be taken by their agent would be simply absurd.

The 11th paragraph of the bill runs thus: "The plaintiff submits that under the circumstances hereinbefore set forth, and the terms of the said respective policies, the defendants became express trustees of the said vessel for the benefit of the plaintiff, as expressly stipulated in that behalf in the said policies respectively; and that it was, therefore, the defendants' duty to restore the said vessel to the plaintiff upon payment of the full amount of their lawful claims in respect of actual disbursements expended by them in raising and repairing the said vessel; or failing such payment, to sell the said vessel to the best possible advantage; and after retaining to themselves the full amount of their said claim, to account for and repay to the plaintiff any balance remaining of the proceeds of such sale."

Judgment.

The "circumstances" referred to, not being established, can do nothing towards constituting the defendants trustees; and I find nothing in the policies to constitute them trustees. If trustees at all, it could only be in the event of their exercising some right, in themselves dealing with the property in order to the recovery of the expenses incurred by them. It does not however appear that they did so deal with the property, if they had the right, as to which I express no opinion.

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What in fact they did, was to proceed by libelling the vessel in a District Court of the United States, as a Court having cognizance of such cases; and upon proceedings had in that Court, they were adjudged entitled to recover a certain amount, as the amount expended by them in the rescue and repair of the vessel, and for interest. To realize this amount and another amount recovered against the same vessel, in the same Court by another party, writs of *venditioni exponas* were issued, directed to the United States Marshall of the District Court; and the vessel was sold by the Marshall under that process; the plaintiff himself being present and making no objection. The purchaser at the sale was the same Captain *Dorr*, agent of the Ætna Company; and it is clear from the correspondence put in, and from other evidence, that he did not purchase on his own account, but on behalf of his Company, or rather on behalf of the two Companies.

Judgment.

No question is made in argument as to the regularity or propriety of the proceedings in the United States District Court. I except the question as to the jurisdiction of the Court. The plaintiff appears, indeed, to have had notice of the pendency of the suit, as early as the 12th of September, 1859, as he refers to it in his notice of abandonment of that date. The decree in the District Court bears date the 19th of March, 1861.

It does not appear to me to be material upon any question before me, whether the proceedings in the United States District Court were proceedings in *rem* or in *personam*. I incline to think that they were proceedings in *rem* (*a*). Under the policy the defendants had the option of proceeding against the vessel or the insured.

(*a*) Castrique v. Imrie, L. R. 4 E. & I. App. 414.

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Upon the sale and purchase on behalf of the defendants, the bill again raises the question of trusteeship.

By the 17th paragraph of the bill, "the plaintiff further charges that the proceedings above recited, and in particular the sale, were acts in gross violation of the trust held by the defendants for the benefit of the plaintiff after payment of their lawful claims, and submits that, under the circumstances hereinbefore set forth, the defendants in their said purchase became trustees of the said vessel upon the trusts declared by the said policies, as set forth in the 11th paragraph of this bill, and will not be permitted in this Honorable Court to appropriate to themselves the benefit of the said purchase."

Judgment.

I am not aware whether it has been decided that a party to satisfy whose execution goods or lands are sold by the sheriff, is disabled from being a purchaser. No authority to that effect was cited to me. There are, I think, some reasons of public policy against his being a purchaser, though of less force than where he is, in this Court, a *quasi* vendor. In Canada he is allowed to purchase at Sheriff's sale. In the United States, the Marshall is, as I judge from the form of writ of execution put in, an officer having analogous duties upon process of execution to those of Sheriffs with us. In the absence of evidence t he contrary, I assume as a matter of fact, that the law as to purchase by parties upon sale in execution is the same in the United States as it is with us; and if so, the purchase by *Dorr* was not open to any objection, and the defendants became owners of the vessel in their own right and did not become trustees for the plaintiff.

Further—assuming for the moment that this point is against the defendants, I do not find upon the evidence that the sale to *Chaffey* was a breach of trust. It appears from the evidence that they were anxious to obtain as

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good a price as they could for the vessel; and did obtain what was considered to be a good price; and it is not shewn that any better price could have been obtained. They appear to have sold in the belief that they were owners, when it was their interest to have obtained the best price that could be obtained. At most, their purchase was voidable, not void; and they acted in good faith in their purchase, and in their sale to *Chaffey*, and should not be held to an over strict account in regard to the sale. The plaintiff charges that *Chaffey* was the defendants' agent in the matter—this is disproved. *Chaffey's* was a real purchase for his firm, not a colorable purchase. His firm sold the vessel afterwards at a great advance, but it was during the late civil war in the United States; and she was purchased in order to be used as a blockade runner. The amount obtained for her under such circumstances, is not a fair criterion of value. According to the evidence of *Chaffey*, whose firm used her in trade for a considerable time and who had personal knowledge of her, of her condition and capabilities, she was by no means so valuable a vessel as she is represented to be by the plaintiff's witnesses; and in his judgment, was not worth more than the sum given for her by his firm, $6,000.

Judgment

During all this time, the plaintiff did not interpose in any way, not even by advice or suggestion. He made no objection, written or verbal, to any of the proceedings. While his case was pending in our Court of Queen's Bench, he might possibly have abstained advisedly, under the idea that any interposition by him in the proceedings in the United States might prejudice his case here, but he could have had no such idea after judgment given in the case at law. I find that judgment was signed on the 12th of July, 1861; and it was after that that the sale by the Marshall took place, that being on the 5th of August following, and the sale to *Chaffey* being on the 18th of September in the same year. There was a look-

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ing on, and a lying by, on the part of the plaintiff, that may, in my judgment, be properly taken into account by the Court, when considering the plaintiff's case; reduced as it is from a case of fraud and collusion, to a simple case of negligence by a constructive trustee.

The question of jurisdiction remains to be considered. It was contended by plaintiff's counsel, that the United States District Court, in which the proceedings referred to were had, had not jurisdiction to entertain the suit. It was not suggested that t is question does not arise if there was no trust. At the same time it was not conceded that it does arise. The vessel passed into the hands of the defendants upon her being rescued. She was in their hands during her repair; and was held by them until she passed in *custodiâ legis*, in virtue, I presume, of the lien to which they were entitled under the Policy. If the District Court had no jurisdiction the defendants are bound to account for her as if there had been no legal proceedings; and while they would, I apprehend, have a right to sell her to realize their lien, a sale by them might admit of different considerations from a sale under legal process. If they sold improvidently, the plaintiff would probably have a remedy at law by action on the case for negligence; but I am not prepared to say that he would not have a remedy in this Court.

Judgment.

Upon the question of jurisdiction, I was referred to the United States Statutes at large, and to several American, as well as some English authorities; it being agreed by counsel at the hearing, that the American Statutes and Reports should be referred to instead of the fact of what is the law in the United States, being proved by American lawyers. I acceded to this at the time, but I am by no means sure that I was right in doing so. Mr. Justice *Blackburn*, who delivered to the Lords the opinion of the majority of the Judges in

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Castrique v. *Imrie*, observed in that case, "There is great and obvious danger that any attempt to construe the written code of a foreign law, without the aid of foreign lawyers to explain it, might lead to error;" and he adds, "The Civil Tribunal of Havre in the collateral suit to procure a *main levée*, so attempted to construe our Ship Registry Acts, and very naturally made a mistake. If the French Law required the French tribunals to construe the English Acts for themselves, this was a misfortune for which the French tribunal was not to blame; but it affords an example of the danger of such a mode of proceeding."

I have myself, in this case, felt this difficulty. I am referred to the United States Statutes at large (*a*), and find that by a Statute passed in 1789, the "District Courts established by that Act, have exclusively of the Courts of the several States, cognizance *inter alia*" of all causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas." The District Court before which proceedings were had in respect to this vessel, is not one of those named in the Statute; but from a note to one of the Sections, it appears that there has been subsequent legislation on the subject.

Judgment

I should incline to interpret the Section from which I have quoted, as conferring jurisdiction generally upon the District Courts, in all causes of admiralty and maritime jurisdiction; and to hold the limitations to waters navigable from the sea by vessels of a certain burthen, to apply to seizures under laws of impost, navigation, or trade; but I cannot tell what interpretation may have

(*a*) Vol. 1, p. 76.

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been put upon this Section by the United States Courts. I am referred to several of the Reports of those Courts; but out of eight which have been cited, I find only two in the Law Society Library.

I should, therefore, not feel safe in deciding the question of the jurisdiction of the District Court, if I had to decide it upon American authorities; but I may safely proceed upon a principle enunciated in *Castrique* v. *Imrie*. After referring to a proceeding before the Tribunal de Commerce at Havre, Mr. Justice *Blackburn* says, "It was under that judgment that the ship was arrested and ultimately sold; and as we must (at least till the contrary is clearly proved), give credit to a foreign tribunal for knowing its own law and acting within the jurisdiction conferred on it by that law, it must, we think, be taken that the French law gave that tribunal of commerce jurisdiction to cause the ship to be arrested and through the intervention of the civil tribunal to be sold." This principle appears to me to cover the whole ground; and I prefer to act upon it, rather than to adjudge affirmatively upon my construction of American Statutes and cases, that the District Court which assumed to have jurisdiction in the matter of this vessel had such jurisdiction.

Judgment.

The only effect, I may add, of holding that the District Court had not jurisdiction, or of not holding that it had, would, in my judgment, be that the defendants would have to account upon the footing of the sale to *Chaffey* and to pay to the plaintiff any balance (if any balance should remain) after reimbursing themselves for all expenses in the rescue and repair of the vessel and other costs, charges, and expenses, with interest. I cannot direct in this suit that the defendants should so account, but I think it is only just that they should do so.

I have considered the case apart from the objection

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on the score of delay in bringing this suit. The bill was filed nearly ten years after the decision against the plaintiff at law. I have noticed incidentally the conduct of the plaintiff in this transaction. From the first he took a position which he could scarcely fail to see was an untenable one. He was himself on board the vessel at the time of the accident, and so had a better opportunity than owners of vessels usually have of forming a correct judgment. Taking any of the tests which are referred to in the judgment at law, there was really no ground for the position he took, and as appears to me no *bona fides* in taking it. The Policy of Insurance placed him in a sort of dilemma. He had to go for total loss or no compensation at all; and he was tempted to play what really was a desperate game.

This is the only explanation that I can give of his conduct, and it is not a satisfactory one. This is a very stale demand, and such demands are discouraged in Courts of Equity; and poverty is by no means an excuse as a matter of course. I refer to the comments of Lord *Romilly* in *Harcourt* v. *White*. (*a*)

Judgment.

The Bill in this case is dismissed with costs.

(*a*) 28 Beav. 309.

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SKINNER v. PALMER.

Pleading—Demurrer—Costs—Misjoinder.

The plaintiffs, who were severally interested in certain chattels, joined in a bill seeking to have an alleged sale and transfer of them to the defendant set aside, on the ground of fraudulent practices by the defendant. A demurrer, on the ground of misjoinder of plaintiffs, was allowed, and a demurrer for want of equity was overruled; but, following the rule in *Paine* v. *Chapman*, *ante* vol. vi. p. 838, without costs to either party.

Statement.

This was a bill by *Adolphus Skinner* and *Ezra Skinner*, against *John Palmer*, setting forth (1) that *Adolphus Skinner* being possessed of a certain waggon and harness delivered them to the plaintiff *Ezra* upon condition that if their price, $114, should be paid by the 1st of April, 1873, they were to be the property of the latter; but if not, they were to be returned to *Adolphus*; (2) that *Ezra* did not pay for them; (3) that the defendant was an innkeeper at whose house the plaintiff *Ezra* was accustomed to stop, and who was addicted to the use of intoxicating liquors; (4) and on or about the 10th of April of that year went to the house of the defendant having with him the chattels above mentioned, also a horse and other articles valued at $264.

(5) The defendant, in pursuance of a fraudulent scheme which he had formed for the purpose of possessing himself of the said goods and chattels, at a price greatly below their value, supplied the plaintiff *Ezra Skinner* with intoxicating liquors, and induced him to drink such quantities of the same that he became insensible, and totally incapable of transacting any business, and while so intoxicated the defendant induced the said plaintiff to accept the sum of $100, or thereabouts, for the said goods and chattels. (6) That the plaintiff *Ezra* only became aware of such pretended sale after he had been taken by the defendant to the City of Toronto some days afterwards. (7) That the plaintiffs imme-

diately repudiated such sale, and offered to return to defendant all moneys advanced by him as the consideration of the said sale, and demanded a return of the said goods, which was refused by the defendant. (8) The said alleged sale was for a price greatly below the value of the said goods and chattels, and was produced by the fraud of the defendant, while he well knew the plaintiff *Ezra Skinner* was entirely incapable of transacting any business. (9) The defendant was well aware that the said waggon and harness were the property of the plaintiff *Adolphus Skinner*; (10) that defendant had sold said chattels for a sum greatly below their value, though much in excess of the amount paid by him; (11) that the plaintiffs, owing to the interest of *Adolphus Skinner* in certain of the chattels, could not obtain adequate relief at law; and prayed that the sale to defendant might be declared fraudulent and void, and relief consequent thereon.

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Statement.

The defendant demurred for want of equity and misjoinder of plaintiffs, inasmuch as it appeared on the face of the bill that the plaintiffs had no community of, or joint, interest in the whole or any part of the said goods and chattels.

Mr. *Bethune*, for the plaintiff.

Mr. *G. Kerr*, contra. In addition to the cases mentioned in the judgment *Loucks* v. *Loucks* (*a*), *Glass* v. *Munsen* (*b*), *Crooks* v. *Smith* (*c*), *Thomas* v. *Hobber* (*d*), *Pyper* v. *Cameron* (*e*), *Jones* v. *Gracia Del Rio* (*f*), *Pollock* v. *Lester* (*g*), were referred to and commented on by counsel.

(*a*) 12 Gr. 343.
(*b*) 12 Gr. 77.
(*c*) 1 Gr. 356.
(*d*) 8 Jur. N. S. 125.
(*e*) 13 Gr. 131.
(*f*) T. & R. 297.
(*g*) 11 Hare 266.

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SPRAGGE, C.—Upon again reading the bill, it still seems to me to be clear, that no property in the waggon and harness is alleged as being in the plaintiff *Ezra Skinner* at the time of the fraud complained of, or indeed at any time. The allegation is not of a conditional sale vesting the property, which might become divested on failure to perform the conditions; but no sale of any kind is alleged. The allegation is, that the plaintiff *Adolphus Skinner* delivered a certain waggon and harness of which he was owner to *Ezra*, upon condition that if paid for, at prices named, "by the 1st of April, last past, they should be the property of the plaintiff *Ezra Skinner*, but if not then paid for they were to be returned to the plaintiff *Adolphus Skinner*." The bill then alleges that *Ezra* did not pay for these chattels by the 1st of April, and that they have not been paid for since. Upon these allegations it appears that *Ezra* had no interest in these chattels upon which he could maintain a suit in this Court; but that even his possession of them was wrongful, inasmuch as he was bound to return them to *Adolphus* after failing to pay for them by the first of April.

Judgment.

The gravamen of the bill is, that the defendant, by certain fraudulent practices, induced *Ezra* to sell to him these chattels the property of *Adolphus*, together with certain chattels which were his own property, upon the one occasion, and for the one price, which as the bill alleges was grossly inadequate. The defendant would not probably have been prejudiced if he had met this charge and answered it, without raising the question of misjoinder; but as he has raised the question, it has to be dealt with.

The position of the plaintiffs is shortly this, that one of them, *Ezra*, being in possession of two sets of chattels, one set his own, the other set the property of the other plaintiff, was induced by the fraud of the defendant to

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make sale of both of them to him. The objection, and it appears to me to be a fatal objection, is, that there is no community of interest in the plaintiffs in the two sets of chattels. *Adolphus* is solely interested in one set, and *Ezra* solely interested in the other set. It is not distinguishable from the case of *Westbrooke* v. *The Attorney General* decided by the late Vice-Chancellor *Mowat* (*a*), and which he decided as well upon principle as upon the authority of the case of *Hudson* v. *Maddison* (*b*), referred to in it. It has occurred to me that this bill might possibly be supported as to *Ezra* being a plaintiff, on the ground of his being liable under the circumstances as a bailee to account to *Adolphus* for the chattels, the property of *Adolphus* in his keeping; but *Ezra* is not made a party upon that ground, and if he were the bill would still be demurrable by reason of the joining of *Adolphus* in respect of a demand,—the chattels of *Ezra*,—in which he, *Adolphus*, has no interest: *Harrison* v. *Hogg* (*c*).

Judgment.

There is a class of cases where parties having distinct titles and independent interests may be joined as co-plaintiffs. I refer to suits respecting rights of common; of parishioners to establish a modus; to which may be added the case of several creditors filing a bill under the Statute of Elizabeth, but these are all treated as exceptional cases outside of the general rule. My conclusion is, that the demurrer for misjoinder must be allowed.

I am of opinion that the demurrer for want of equity should be overruled. The bill alleges the obtaining of these chattels by the fraud of the defendant in these terms: [His Lordship here read the 5th, 8th, and 9th paragraphs of the bill as above set forth.] Such a case of fraud is clearly cognizable by a Court of Equity. *Hill* v. *Lane* (*d*), followed I am told by my brother

(*a*) 11 Gr. 264.
(*b*) 12 Sim. 416.
(*c*) 2 Ves. Junr. 323.
(*d*) 11 Eqy. 215.

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Strong in *Jackson* v. *Bradburne*, a late case before him not yet reported. Granting that either of these plaintiffs might obtain a remedy at law, there is a concurrent jurisdiction to grant relief in this Court.

The costs will follow the general rule, that where there is a demurrer on two grounds, and one is allowed and the other overruled, no costs will be given to either party: *Benson* v. *Hadfield* (*b*), *Allan* v. *Houlden* (*c*), *Paine* v. *Chapman* (*d*). There is certainly no reason for making an exception in this case in favor of the defendant. The plaintiffs will have leave to amend.

The case of *Malcolm* v. *Malcolm* (*e*), cited for the defendant on the question of costs, does not apply. The demurrer there was for want of necessary parties defendants, and also for want of equity. Counsel for the plaintiffs conceding that necessary parties as defendants were not before the Court, the late Chancellor declined to hear the demurrer for want of equity argued, observing, "To argue the demurrer for want of equity in the absence of the proper parties to the suit seems contrary to all principle." It was not therefore a case, as this is, of demurrer allowed as to one ground and disallowed as to the other, but of demurrer allowed upon the one ground that was then, in the judgment of the learned Chancellor, ripe for argument.

Judgment.

(*a*) 5 Beav. 546.
(*b*) 6 Beav. 148.
(*c*) 6 Gr. 838.
(*d*) 14 Gr. 165.

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BASKERVILLE v. OTTERSON.

Mortgage—Practice.

Following the ruling in *Henderson* v. *Brown*, (Ante, Vol. XVIII. p. 79), and other cases in this Court, the Court held the assignee of a mortgage bound by all the equities affecting it in the hands of the mortgagee; and the mortgagor, in a suit to foreclose, having set up that before notice of the transfer he had, at the instance of the mortgagee, incurred liabilities for, and paid off debts of, the mortgagee, equal to the amount due on the mortgage, a reference was directed to the Master to inquire as to this; and if found to be so the bill was to stand dismissed with costs; but if not so found, further directions and costs were reserved.

Examination of witnesses and hearing at Ottawa.

Mr. *Maclennan*, Q. C., and Mr. *O'Gara*, for the plaintiff.

Mr. *Lees* for the defendant.

SPRAGGE, C.—I gave judgment at the conclusion of the argument in this case, subject to any change of opinion that might be effected by an examination of the cases to which I was referred by Mr. *Maclennan*. Judgment.

I have since examined those cases and several others, and they do not change the view of the law which I then took. *McPherson* v. *Dougan* (*a*) was one of the earliest cases in our Court upon the point. This was followed by *The Church Society* v. *McQueen* (*b*), by *Henderson* v. *Brown* (*c*),—a case closely resembling the present one, in which a majority of the Court held, in accordance with previous decisions, that the assignee of a mortgage took subject to all the equities to which the mortgage was subject, in the hands of the mortgagee,—and by other cases. I would refer also to the cases collected by Mr.

(*a*) 9 Gr. 258. (*b*) 15 Gr. 251. (*c*) 18 Gr. 79.

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Fisher in his book on Mortgages, sec. 1266, and to *Parker* v. *Clarke* (*a*). In *McPherson* v. *Dougan*, and in *Henderson* v. *Brown* I stated at some length the grounds of the conclusion at which I arrived, and do not repeat them here. I must now hold the point to be settled by the judgment on rehearing in *Henderson* v. *Brown*, so far at least as this Court is concerned.

In this case I held that the assignee took subject to the prior mortgage to the Building Society, and to any right accruing from the existence of that mortgage to the purchaser; and to any payment made and to any liabilities incurred by the mortgagor at the instance of the mortgagee before notice of the assignment. It seemed clear, I thought, as to the debt to *Robinson*; as to the other debts, I directed an inquiry. The mortgagor says that he paid them before notice of the assignment of the mortgage. If this is proved before the Master they will be allowed to him. If not the Master will report specially in regard to them.

Judgment.

As to costs, if the Master finds that the mortgagor has paid to the full amount due, the bill is to be dismissed with costs. If this not found, further directions and costs to be reserved.

(*a*) 30 Beav. 54.

FENWICK v. FENWICK. 1873.

Administration—Sale of infants' estate—12 Victoria (C. S. U. C. ch. 12, sec. 50).

Infant children of an intestato obtained an administration order against their mother—the administratrix—and the Master found as proper to be allowed for their maintenance a sum to meet which the personal estate was inadequate, and on further directions a sale was asked of the realty to satisfy the sum so allowed: but the Court refused to sanction such sale, being satisfied that the suit had been instituted for that purpose merely, and was an indirect way of doing what ought to be done under the provisions of 12th Victoria, and the order of this Court passed to carry that Act into effect; and as the report furnished only a small part of the information which would necessarily be laid before the Court under the Act and order referred to.

Hearing on further directions.

Mr. *McWilliams*, for the plaintiffs, and the adult brothers and sisters, made defendants.

Mr. *Evans*, for the widow, the administratrix.

SPRAGGE, C.—An administration order was obtained by infant children of the intestate against their mother, administratrix of the estate. Judgment.

The debts are few and of small amounts, one of $272, one of $109.33, and a third of $250, the latter secured upon two parcels of real estate.

The Report finds the administratrix indebted to the estate on account of personalty received...	$1398	88
On account of rents and profits of real estate after deducting arrears of dower	809	52
	$2208	04
Whole amount of debts	631	00
Assets received beyond amount of debts	$1577	40
Besides which are assets outstanding, furniture &c	622	00
	$2199	40

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As a special circumstance the Master finds as a proper allowance for maintenance a number of sums different in amount $3068 00
For advances for schooling, &c..... 635 00

$3703 00

And to satisfy this the Court is asked in an administration suit on further directions to order the real estate to be sold.

This real estate consists of seven parcels, three of them in the township of Markham. The description of them is very meagre. Lots and concessions and number of acres only—nothing as to value or improvements. I am satisfied that the Court ought not to grant what is asked.

What is asked is virtually to sell the real estate of the infants for the maintenance, past and future, of the infants, and the conclusion is irresistible that the administration suit has been instituted in the name of these infant children for that purpose. It is an indirect way of doing what ought to be done under the provisions of 12 Victoria, and the order of this Court passed to carry that act into effect.

Judgment.

The report of the Master in this case furnishes the only material upon which the Court can judge as to the propriety of directing a sale of these lands or of any of them, or whether a sale or leasing, or mortgage or other disposition of them may be most for the interest of the infants. It does not enable the Court to see with sufficient clearness whether any such disposition of the lands ought to be made. It furnishes but a very small part of the information which ought to be before the Court, and which would necessarily be before the Court under the act and the order of Court to which I have referred. If I should upon these proceedings order a sale of the lands I should be dispensing with nearly all the safeguards which the Legislature and the Court have thought

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to be proper before directing a sale or other disposition of the real estate of infants.

The course taken is an erroneous one altogether, and the only direction that can properly be given is, that an order be made declaring that the Court does not see fit to make any order for the sale of the real estate of the infants, upon the administration order and report made in this suit, and does not give costs to any party.

PEGLEY v. ATKINSON.

Will, construction of—Trustee—"Successor."

A testator, amongst other things, devised certain lands to his daughter *M A P*, upon certain trusts as to the application of the rents and profits in favor of his daughters so long as they remained single, and on the marriage of any the whole benefit of the trust to such of them as remained single, and the survivor of them till her death: and the testator further declared, "that in case of my said trustee or her *successor*, with the concurrence of my said daughters in said trust mentioned, and then surviving, may deem it prudent and expedient, they may sell and dispose of all said lands," and he further declared that none of his "married daughters, or any that may get married, shall, from time of said marriage, be participant, or have a control or claim on said trust estate or in the disposal thereof. * * * And I declare that in case of the death or marriage of my said daughter *M A P*, either before me or before the termination of the said trusts, then that my then unmarried daughters may and shall be, or those appointed under their hands and seals may and shall be, the trustees and executrixes or executors of this my will, and so on in like manner in case of the death of any such subsequently appointed trustees and executors, till the termination and completion of said trusts and final disposal of my said estate, it being my desire that no married daughter, on account of the influence that her husband might exercise over her, shall continue to act as my trustee or executrix." *M A P* married, and the plaintiff, who was the only surviving unmarried sister, had contracted with the defendant for the sale of a portion of the devised estate. On a bill filed by the vendor to enforce such contract:

Held, that the plaintiff had under the will power, as *successor* of *M A P*, to make a good title, and that it was not necessary for *M A P* to join in the conveyance.

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Pegley v. Atkinson.

Hearing at Chatham.

Mr. *Pegley*, for the plaintiff.

Mr. *C. R. Atkinson*, for the defendant.

SPRAGGE, C.—The testator *Robert Pegley* by his will, dated 24th December, 1862, makes certain dispositions of his real and personal estate in favor of five daughters and a son, named in his will. It is not alleged in the bill or answer, nor is it proved that the will was so executed as to pass real estate, but it was assumed in argument that it was so executed, and I shall take this to be the case—the bill being filed for specific performance against a not unwilling purchaser in order to obtain the judgment of the Court upon a question raised between the parties whether the vendor, *Matilda Pegley*, can make a good title under her father's will. It is admitted by the answer of the purchaser that the plaintiff is the only surviving unmarried daughter of the testator.

Judgment.

The testator devises certain real estate, including the land which is the subject of the contract of sale, and bequeaths certain personal chattels to his daughter *Mary Ann Pegley* upon certain trusts as to the application of rents and profits of real estate, "or in case of a sale of same out of the interest or increase thereof as hereinafter provided for, and out of said goods and chattels by sale or produce thereof as my trustee in concurrence with the majority of my said daughters, devisees and *cestius que trust* hereinbefore mentioned, may deem expedient." I assume that the concurrence of the daughters in the sale of real as well as personal estate is here intended. Then follows a provision that in the event of the marriage of any of the daughters the trusts in their favor should cease as they should respectively marry; and that the whole benefit of such trusts should go to such as remained single, and the survivor of them

till her death. Then follow provisions as to the appointment of the estate by the survivor, as to the event of the marriage of all the daughters, and as to marriage portions, which are not material to the question in issue.

Another passage in the will is as follows, "and I declare that in case my said trustee or her successor with the concurrence of my said daughters in said trust mentioned, and then surviving, may deem it prudent and expedient, they may sell and dispose of all said lands and invest the proceeds" in certain securities pointed out. In another clause he speaks of "my said trustee *Mary Ann Pegley* or her successor." In another, he declares that none of his "married daughters or any that may get married shall from time of said marriage be participant, or have a control or claim on said trust estate or in the disposal thereof," with the exception of their marriage portions.

Judgment

He appoints his daughter *Mary Ann Pegley* to be executrix of his will, and in a subsequent clause makes this provision, "And I declare that in case of the death or marriage of my said daughter *Mary Ann Pegley*, either before me or before the termination of said trusts, then that my then unmarried daughters may and shall be, or their appointee under their hands and seals may and shall be, the trustees and executrixes or executors of this my will, and so on in like manner in case of the death of any such subsequently appointed trustees and executors till the termination and completion of said trusts and final disposal of my said estate, it being my desire that no married daughter, on account of the influence that her husband might exercise over her, shall continue to act as my trustee or executrix."

The testator in this last clause puts his own interpretation upon the word "successor" used by him in the previous part of the will, empowering his daughter *Mary*

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Ann or her successor to sell real estate: and other provisions, that I have quoted, shew that in the events that have happened the concurrence of any other daughter of the testator is rendered unnecessary. The power of sale therefore has devolved upon the sole surviving unmarried daughter, who is the vendor in this case.

It is not necessary to hold that there is in this will an express devise to such person, other than the testator's daughter *Mary Ann*, who should in certain events which have happened fill the office of trustee in her place. This was decided in *Doe Greatrex* v. *Homfray*, (*a*.) This vendor is as much designated by the will as the trustee to sell this real estate as was the daughter *Mary Ann*, who was named trustee in the will. In *Watson and Spence* v. *Pearson* (*b*) there was a devise to the testator's wife and two others with power of sale. Of the two others one disclaimed and the other died. The widow of the testator contracted to sell and it was held that she could make a good title. Lord *Wensleydale* in giving judgment refers to the rule that where an estate is devised to trustees, even with words of inheritance used, it is taken to have been meant to be co-extensive only with the trust to be performed, and I understand him also to affirm the converse of the rule when he says "one of the duties imposed on the trustees is, if they should deem it expedient, to sell the estate, and in such a case even without words of inheritance, there would be strong reason for holding that they were intended to take the fee."

Judgment.

In the case of *Hamilton* v. *Buckmaster* (*c*), before Lord *Hatherley*, then Vice-Chancellor, decided in 1866, the will pointed more particularly to personal estate, and the question at the hearing was, whether a contract for the sale of a freehold house acquired by the testator

(*a*) 6 A. & E. 206. (*b*) 2 Ex. 581.
(*c*) L. R. 3 Eq. 323.

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after making his will could be sold by his executrix under a direction in the will to convert his estate into money. The will appointed an executrix and executor; the executrix, in the absence in India of the executor, who was the testator's heir-at-law, proved the will, and the heir-at-law afterwards died.

The principal question was, whether the will was anything more than a will of personalty. The position of the vendor's counsel that "although there was no gift of the legal estate to the executors, it was well settled that the legal estate would be held to pass under a direction for them to sell and convert the real estate," citing *Doe Greatrex* v. *Homfray*, was scarcely questioned by counsel for the purchaser, if indeed meant to be questioned at all. Their contention was, that the case was not so free from doubt upon the principal question, as I understand, that the Court would force the sale upon an unwilling purchaser, and Lord *Hatherley* expressed himself as clearly of opinion that the case was free from doubt.

Judgment.

This case is free from the difficulties that existed in the two cases that I have last cited, inasmuch as in this case there is no absence of trustees as in those cases there was. The only serious difficulty that has occurred is the devise of the legal estate to *Mary Ann*, but that difficulty seems answered by the rule referred to by Lord *Wensleydale* in *Watson and Spence* v. *Pearson*, that where an estate is devised to trustees, even with words of inheritance used, it is taken to have been meant to be co-extensive only with the trust to be performed; and in this case the trusts to be performed having under the provisions of the will passed out of the hands of *Mary Ann*, into other hands, it will be taken to have been meant *pari ratione* that the estate which was devised for the sole purpose of the performance of the trusts should not remain in *Mary Ann*.

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The case in the Exchequer and the case before Lord *Hatherley* seem to affirm the same principle, for in neither case was it held that the legal estate was in a disclaiming trustee, or in the heir of a deceased trustee.

At the most it would be a question of conveyancing whether *Mary Ann* should join. That point was not discussed before me and I think that her joining in the conveyance to the purchaser is not necessary.

I feel quite clear that *Matilda* the vendor in this case, is the proper person to make sale of the land in question, and I think that under the will she can make a good title. The authority to sell and dispose of the lands, and invest the proceeds, appears to me necessarily to comprehend an authority to make a conveyance, for without a conveyance the trust to be performed could not be performed effectually.

Judgment.

As to costs, nothing was said about them at the hearing, and I infer that they are matter of arrangement between the parties.

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In re Trusts of Will of Anne Parker.

Testamentary paper—Wills Act of 1868—*Conversion—Trustee.*

The fifth section of the Wills Act of 1868, which provides that no will shall be revoked otherwise than by "another will or codicil executed according to law, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is by law required to be executed," means a will, codicil or other writing executed with the same formalities as are required in the case of the will or codicil which it purports to revoke.

Where a testatrix, having duly made and published her will, subsequently executed a testamentary paper, not, however, so as to pass real estate: *Held*, that the disposition of personalty made thereby was substituted for the disposition made of it by the will, but the disposition made of the realty by the will was not affected.

Where there is no absolute direction to sell, but a discretion is given to a trustee to sell or not, there is no conversion; but the property remains of the character it possessed at the death of the testator until the trustee has seen fit in his discretion to change it by an execution of the power.

If under a will a trustee has a discretion to sell or not to sell real estate, the Court will not interfere by its advice or direction, but will leave the trustee to the exercise of his discretion.

This was a motion on the petition of the trustee under the will of one *Anne Parker* for the direction of the Court to sell the real estate devised in trust. The facts appear in the judgment.

Mr. *Proudfoot*, Q. C., for the petitioner.

Mr. *Cassels*, contra.

Spragge, C.—I agree with the learned Counsel who appeared before me in this matter, that the testamentary paper of the 19th February, 1872, which was not executed so as to pass real estate, was not operative as a revocation of the devise of real estate contained in the will of the testatrix of October, 1860, but is operative to change the disposition of personal estate so far as Judgment.

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Re Arne Parker's Will.

The words of the fifth section of the Wills Act of 1868 (*a*), where it speaks of "another will or codicil executed according to law, or by some writing, declaring an intention to revoke the same and executed in the manner in which a will is by law required to be executed," must mean, I apprehend, a will, codicil, or other writing executed with the same formalities as are required in the case of the will or codicil which it purports to revoke. The words "executed according to law," and "in the manner in which a will is by law required to be executed," cannot, it appears to me, have any other meaning: the intention of the Legislature being to require for the revocation of a will an instrument of as high and solemn authority as the will itself.

Judgment.

It follows that the disposition of personalty made by the testamentary paper of 1872, is to be substituted for the disposition made of it by the will of 1860, but the disposition of the realty is not affected. The case of *Francis* v. *Collier* (*b*), I agree, does not apply. In that case the disposition of the residuary personal estate was imported into the disposition of the proceeds of the sale of the freehold property just as if it had been repeated. There is nothing of the kind here.

So far I agree with the learned Counsel, but I am not prepared, upon this application, to hold that under the will of 1860 there is a conversion of the realty into personal estate. If there is a conversion, it must go according to the disposition made of personalty by the testatrix, which disposition is different from that made of it by the will, and hence arise conflicting interests which cannot be dealt with upon an application of this nature.

(*a*) 32 Vic. ch. 8, (Ont.) (*b*) 4 Russ. 331.

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Re Anne Parker's Will.

It seems to be a fair question whether there is in the will any absolute direction to sell the freehold property; or whether it is not left to the discretion of the trustee to sell or to abstain from selling. The language of the will, after giving an annuity and certain legacies, is, "I direct that the above mentioned annuity and legacies shall be paid by the said *George Taylor* out of my real and personal estate in Canada. And I hereby direct and declare that it shall be lawful for the said *George Taylor*, his executors or administrators, to sell or exchange for other lands or hereditaments all or any part of the said premises hereinbefore devised to him." Then follow trusts in relation to the varying of securities and dealing with and applying the funds; the testatrix contemplating, as appears by the provisions of her will, that her estate would or might consist of realty as well as personalty.

Judgment

I have looked at several cases upon the subject, among them that of *Polley* v. *Seymour* (*a*). The cases in which a will gives a discretion to executors to invest money in land, have a bearing upon the same point. If there is no absolute direction to sell, but a discretion is given to the trustee to sell or not, the property remains of the character that it possessed at the death of the testator, until the trustee has seen fit in his discretion to change it by acting in the execution of the power. I abstain from expressing any opinion one way or the other. If any parties interested in this estate desire to raise the question it must be done in the regular way. I think that I ought not to give any direction or any opinion upon it, upon this application.

If under the will the trustee has a discretion to sell or not to sell the real estate, it is for him to judge; and I cannot give the direction or advice asked for by his petition.

(*a*) 2 Y. & C. Ex. 708.

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EDWARDS v. EDWARDS.

Alimony—Domicile—Desertion.

A woman left her husband in consequence of disagreements, without any threats of personal violence, or any well founded apprehension on her part of violence; and the husband expressed his readiness and willingness to receive her back. The wife failed to return, however, and the husband left this Province and went to reside permanently in the United States. The wife, without any communication having passed from her to her husband, or any intimation of a desire on her part to renew their marital relations, and without any offer to live with him, or any expression of willingness to do so, filed a bill for alimony on the ground of desertion. *Held*, that in the absence of an offer on her part to return to her husband, and a refusal by him to receive her back, she was not in a position to claim alimony; that the domicile of her husband was her domicile also, and that his being resident in the United States afforded no ground for dispensing with an offer by her to return to and live with her husband, it not appearing that she was ignorant of his place of residence.

Statement. This was a suit for alimony, which came on to be heard before the late Vice Chancellor *Mowat*, at the sittings at Whitby, when a decree was made dismissing the plaintiff's bill, but ordering the defendant to pay the plaintiff's disbursements. The plaintiff thereupon set the cause down for rehearing, and the same came on for argument before the Chancellor and Vice Chancellor *Strong*.*

The circumstances under which the plaintiff claimed for alimony appear in the head note and judgment.

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

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

Lawrence v. *Lawrence* (*a*), *Thompson* v. *Thompson* (*b*) *English* v. *English* (*c*), *McKay* v. *McKay* (*d*), *Gregory* v. *Pierce* (*e*), *Deck* v. *Deck* (*f*), *Warrender* v. *Warren-*

(*a*) 2 S. & T. 575.
(*b*) 1 S. & T. 231.
(*c*) 6 Gr. 580.
(*d*) 6 Gr. 380.
(*e*) 4 Met. 478.
(*f*) 2 S. & T. 90.

* Blake, V. C., was concerned in the case while at the bar.

der (a), *Spering* v. *Spering* (b), *Whitcomb* v. *Whitcomb* (c), *Yelverton* v. *Yelverton* (d), *Wharton's* Conflict of Laws, sec. 212, *Westlake's* Conflict of Laws, p. 42, were referred to. 1873. Edwards v. Edwards.

SPRAGGE, C.—This is a suit for alimony. The case made by the bill is, that on or about the 15th of October, 1869, the defendant deserted the plaintiff without making any provision for her support and maintenance; and that he left Canada for the United States, where he has since resided in order to avoid supporting her; and that she is now dependent upon her friends and her own labor for her support. At paragraph eight of her bill, she says that she has always conducted herself properly; and has always been ready and willing to live with her husband; and has repeatedly offered so to do; but that he has refused and still refuses to receive her, or to live with her, or to contribute in any way to her support.

Judgment.

Desertion by the husband is the only ground made by the bill. She does not allege that she was ignorant of her husband's place of residence in the United States.

The cause was heard before the late Vice-Chancellor *Mowat*, who dismissed the plaintiff's bill. The evidence certainly does not support the case of desertion made by the plaintiff's bill, in October, 1869. They, the husband and wife, *parted* about that date, but it was the wife who left the husband, not the husband the wife. *Richard Edwards*, a brother of the defendant, gives a narrative of what passed. She went to his house and complained that her husband had been calling her ill-names; and she wanted him, *Richard*, to go to their house. He went, and they talked over their grievances; they quarrelled and were finding fault with each other. *Richard* said the best thing they could do was to try and

(a) 2 Cl. & F. 488.
(b) 3 Sw. & T. 211.
(c) 2 Curt. 351.
(d) 1 S. & T. 537.

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live together; but that if both were satisfied they could not live together, the best thing they could do, was to separate. She left her husband's house the same evening, and never returned to live with him. After she left, the husband continued to live in his house with a cousin of his, *Gomer Edwards*, and about two months after she had left, she went to her husband's house for "her things"; he and *Gomer* living there at the time, and *Richard*, the brother, seeing her upon that occasion. It does not appear what, if anything, passed. So far it is clear there is no case for alimony. The wife left her husband, and she does not shew any sufficient reason for doing so.

In February, 1870, the husband left Canada and went to the United States, where he has since resided; and where it is his intention, as he has declared, permanently to reside. There is evidence of his having said to his brother and to his cousin, that he and his wife could not live together; what he said to his brother was, that he did not think that he and his wife could ever live together; that he had left his house open for her to come back, and she had not come; and for that reason he thought they could never live together.

Judgment.

From the whole of the evidence, I think that the wife left with no intention to return; that she could have returned if she had been so minded; but that she deliberately preferred living apart from her husband. Her returning for "her things"—her clothing and personal belongings, I suppose—was a clear indication of her intention to live separately. On the husband's part, I see no unwillingness even, certainly no refusal, to receive back his wife; only a conviction, a natural one, from her conduct, that having left his house open for her reception, and she not returning, that they could not again live together. After what had passed, it was certainly her part to offer to return.

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His going to reside in the United States, does not, in my opinion, amount, under the circumstances, to desertion. His own declared reason for going was, that he thought he and his wife could not live together; and that it was better for him to go. Whether this was really his reason or not, is not very material. He had a right to reside abroad; and my only doubt in the case has been whether he was not bound to inform his wife of his place of residence abroad, in order that she might join him there if she thought fit; but upon reflection, I think he was not bound to do this. It was her duty to join him there, her husband's domicile being properly hers; and it does not appear that there was any obstacle to her joining him; that there was any concealment of his place of residence; or that it was not in fact known to her. No communication seems to have passed from her to him; no intimation of a desire on her part to renew their marital relations; but without any offer to live with him, or any expression of willingness to do so, she files her bill charging him with desertion. The original fault was hers. Her leaving her husband was a very grave fault; and it was her part to set herself right with him before coming to this Court.

Judgment.

It was urged that it would be useless for her to offer to return to her husband, inasmuch as he has commenced proceedings in the United States for a divorce. There is no proper proof of his having commenced such proceedings; and if there were, it does not follow that he would not abandon them if she offered to return to him, or that such an offer would not be an answer to a suit for divorce. It may be a suit for judicial separation, and her desertion of her husband the ground of suit. The law of the foreign Court in which that suit is instituted, if instituted at all, is a fact which is not made known to us. In my opinion, she has not shewn enough to relieve herself from the necessity of offering to return to her husband. I have examined the cases cited in

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argument, and in my judgment they do not support the plaintiff's case.

Per Curiam—Decree affirmed : deposit to be returned to the plaintiff.

WILLIS v. WILLIS.

Administration suit—Improper allowance—Practice—Rehearing by creditors.

An executor or administrator cannot, by paying off creditors of the estate, create a demand in his own favor, that will give him a right of retainer in priority to other creditors; all that he would, under such circumstances, be entitled to would be to stand in the place of the creditors he has paid off: and, if there prove to be a deficiency of assets, he will only be entitled to be paid *pro rata* with the general creditors of the estate.

A decree as drawn up in an administration suit directed the administrator to be charged with an occupation rent, "and that he should be allowed the various claims and allowances set up and asked for by his answer," the result of which was the allowance to him of several sums which, as against creditors, seemed to be improper, and the assets proved insufficient for payment of creditors in full. The Court at the hearing on further directions gave liberty to the creditors who complained of such allowance to rehear the cause, in order that the decree might be varied so as to give them an opportunity of disputing the claim, so set up by the administrator, in the Master's office.

Hearing on further directions.

Mr. *Boyd*, for the plaintiff, and *J. R. Willis*.

Mr. *C. Moss*, for *Jane Holland* and *Mary Ross*, creditors of the estate.

Mr. *J. H. McDonald*, for the administrator.

SPRAGGE, C.—When the decree in this cause was made the parties to the suit were the infant children of

the intestate *Castor Willis*, plaintiffs; and the adult children of the same intestate, defendants, to one of whom, *John Willis*, letters of administration had been granted. 1873. Willis v. Willis.

In his answer *John Willis* sets up a claim to be reimbursed certain costs incurred, and thereafter to be incurred by him in defending a suit instituted in this Court. He states his claim thus:—

"The said *Castor Willis* was, together with one *George McConnell*, an executor of the last will and testament of *William McConnell*, deceased, and after the death of the said *Castor Willis* and *George McConnell* (the said executors) a bill of complaint was filed in this Honorable Court by *Jane Holland* and *Mary Ross*, devisees and legatees under said will, against me (*John Willis*) as administrator of the estate of *Castor Willis*, and against *John Robert McConnell*, as administrator of the estate of the said *George McConnell*, by which said bill the said plaintiffs seek an account of the dealings of the said *Castor Willis* and *George McConnell* with a certain fund specifically devised and bequeathed to the said *Jane Holland* and *Mary Ross*. The said suit is still pending, and I have been put to considerable costs and expense in defending the said suit, and more especially in proving the accounts of the said executors, and I submit that I am entitled to be reimbursed my outlay in said suit and indemnified against any further outlay in said suit that may have to be necessarily made in protecting the said estate of the said *Castor Willis*." Judgment

There are certain allegations in the bill and in the answer in relation to the occupation by *John Willis* of a certain farm, and of the maintenance of the infants by *John Willis*. The decree declares *John Willis* chargeable with an occupation rent of the premises in the pleadings mentioned, "and that he should be allowed

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the various claims and allowances set up and asked for by his answer in this cause; and this Court doth order and decree the same accordingly."

It appears by the Master's report that the defence to the suit of *Holland* and *Ross* was unsuccessful; and that they have been allowed by an order of this Court to come in and prove as creditors of the estate; and that their claim has been allowed at the sum of $7,227.55; another creditor has proved to the amount of $399.40, and it appears that there will be a deficiency of assets. It appears further by the report that the costs, charges, and expenses of defending the suit of *Holland* v. *McConnell* amount to a very large sum—no less than $1,810—one-half of which is charged and allowed against this estate, the other half against the estate of *McConnell*.

Judgment.

The creditors resist the allowance of this claim on the ground that it is for moneys injudiciously expended, in defending unsuccessfully the suit of *Holland* and *Ross*; and that they are not bound by the direction in the decree allowing to *John Willis*, moneys so expended: and *Holland* and *Ross* take this further ground that inasmuch as there is a deficiency of assets, and there must be consequently an abatement *pro rata*, the effect of allowing these expenses would be that they would be contributing to the expenses of resisting the claim which they have themselves established. On the other hand, it is contended that they have come in under the decree and proved their claim under it, without moving to have it varied, so that the cause comes on for further directions, with a direction for the allowance of these expenses.

I feel quite clear that this direction is not binding upon the creditors as an adjudication. The question is, whether they should not have moved against it, or in some way have got it so varied as not to affect them.

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They could not have come in to move strictly, under orders 205 or 244, as they are not made parties; and I find that in *Mulholland* v. *Hamilton* (*a*), it was held by the late Vice Chancellor *Mowat* that the proper course to be taken by creditors who complained of a direction in a decree is to rehear the cause.

The question is not now before me in a shape in which I can finally dispose of it, at least in which I can dispose of it, otherwise than by allowing to the administrator all costs, charges and expenses properly incurred in defending the suit brought by *Holland* and *Ross*. I say *properly* incurred, for the sum claimed is so large that a very rigid examination into the propriety of the charges ought to be made.

Judgment.

I do not understand that evidence was given in the Master's office by any party upon the question whether the defence of that suit and the proceedings taken in it were judicious, or imprudent. The administrator relied, as I think he had a strict right to do, upon the direction in the decree; and the creditors relied, as I suppose, upon the grounds taken in argument upon further directions. I have not the material before me, even if the question were properly before me, upon which I can decide, that which is really the question between the parties, unless I decide that in no event can these costs be allowed against *Holland* and *Ross*, on the ground to which I have adverted, that they were incurred in resisting the claim made by them, which they have established; and that point was so little argued that I desire not to express any opinion upon it. It is a point that may be properly raised upon rehearing. But, however that point may be decided, the general question will still be left open between the other creditors and the administrator.

(*a*) 12 Gr. 413.

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No question is raised as to the rents and profits of real estate received by *John Willis*, and their application in the maintenance of members of the family. The cost of maintenance exceeded the amount of rents and profits received, and for the excess of the former *John Willis* makes no claim in priority to creditors.

The Master finds personal estate come to the hands of the administrator to the amount of $963, and "that he has paid, or is entitled to be allowed, the sum of $2276.25, leaving a balance due to him of $1313.25 on that account." Upon this it is claimed for the administrator that he is entitled to this excess in priority to creditors. On the other hand, it is contended that this balance is, as I have noted it, subject to the rights of creditors; that the utmost that the administrator can claim is, to rank *pari passu* with creditors as to the excess, and that it may be that he is not entitled to that, inasmuch as he may have become a creditor since the death of the intestate, and section 28 of the Property and Trusts Act, 1865, is referred to.

Judgment.

The case seems within the Act. The intestate died after the passing of the Act; there is a deficiency of assets. All payments beyond *pro rata* payments are a misapplication of funds. The administrator cannot by advancing funds of his own, to make such payments, be in a better position than he would be if he made them out of assets of the estate in his hands. If he could he would be able, by his own act, to defeat the *pro rata* administration of the estate provided by the Act. I see no ground, therefore, upon which the administrator can claim priority over creditors in respect of the excess of payments over assets received, he is entitled only *pari passu* with them.

I say this, of course, upon the assumption that the creditors paid have been paid in full. It is possible

that some may have accepted less than the full amount of their debts, some may have been settled with at rates that do not exceed what they would have been entitled to upon a *pro rata* distribution of the fund; regard must be had to this in settling what is due to the administrator in respect of payments made by him. 1873. Willis v. Willis

It was not argued before me on behalf of the creditors that they have a right to disturb the payments made, to the extent to which the administrator had in his hands assets to apply to the payment of debts. It was not asked that he should be charged in respect of such application of assets of the estate, and therefore I make no direction in regard to it. I must remark, however, upon the want of definiteness of expression in this part of the report. The finding is, that the administrator has paid, or is entitled to be allowed such a sum of money, leaving it uncertain how much he has paid, or why he should be allowed moneys that he has not paid. No objection, however, is taken on this score, and I infer that the solicitors for the creditors satisfied themselves that it was a sum of money properly to be allowed, contending only that the excess was not to be allowed in priority to, but only *pari passu* with creditors. Judgment.

Nothing was said in argument as to the costs of this suit. I infer that it is conceded that the administrator should have his costs out of the fund, and that the costs should be as between solicitor and client. The creditors should have their costs of the hearing on further directions. The creditors should have an opportunity to rehear in order to vary the direction of the decree as to the costs of defence to the suit of *Holland* and *Ross*, and it is desirable that the rehearing should take place at the next ensuing rehearing term, and that the decree on further directions should stand till after such rehearing.

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The cause was subsequently reheard at the instance of the creditors, *Jane Holland* and *Mary Ross*, and the decree varied in the manner suggested by the Court.

ATTORNEY-GENERAL v. BOULTON.

Demurrer—Pleading—Uncertainty.

An information to restrain a nuisance caused by the erection of a fence on a public highway, alleged that "*the defendants or some or one of them*," had put up such fence:

Held, bad on demurrer as being too uncertain an allegation as to who had committed the act complained of.

This was an information by *The Attorney General* of Ontario, on the relation of *Joseph Lesslie* seeking to restrain the defendants from permitting a certain board fence to remain on the soil of William Henry Street, in the city of Toronto, or so that the said street and the right to the use and enjoyment thereof by the public might be in any way hindered, obstructed, or interfered with.

Statement.

The allegations contained in the information, so far as material for the purposes of this report, were as follows:

"The defendants *John Boulton*, *John Hillyard Cameron*, and *John Cayley*, are seized in fee of that lot of land known as the cricket-field, situate on the west side of the said William Henry Street, and abutting on the said street; and the defendant, *Robert B. Blake*, is lessee for a term of years of the said land, from the said *John Boulton*, *John Hillyard Cameron*, and *John Cayley*, and is in possession thereof as such lessee; and the said defendant, *Robert B. Blake*, has assigned the said lot of land for the period of his term, by way of mortgage, to the defendants, the Building and Loan Association.

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"The defendants, *or some or one of them*, have surrounded the said lot with a board fence, and instead of conforming to the proper boundary line of the said street, have enclosed within their fence, a considerable portion of the soil of the said William Henry Street."

The defendants demurred for want of equity. All the defendants appeared by the same solicitor, and each of the defendants filed a separate demurrer, having been advised that by joining in one demurrer, they might thereby prejudice their right afterwards to set up separate grounds of defence.

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

Mr. *Snelling* and Mr. *Wardrop*, contra.

Cooke v. *Lord Courtown* (*a*), *Bothomley* v. *Squire* (*b*), *The Mayor of London* v. *Levy* (*c*), were referred to by counsel.

Judgment.

SPRAGGE, C.—The question seems to resolve itself into this, what parties defendants are proper parties, upon the case made by the information?

The cases cited from 3 Drewry & 6th Irish Equity are applicable only to this extent, that an allegation that acts done by several defendants, or some or one of them, is not a statement with sufficient certainty of the acts being done by any one of them. The allegation would be true if one of half-a-dozen defendants did the acts complained of; and if the acts were done by one only, all the others would in such cases as those referred to, be improper parties. Mr. *Snelling* is then driven to contend that all the defendants in this case are proper parties by reason of the interest that they have in resisting the informant's case; and he argues also,

(*a*) 6 Ir. Eq. 266. (*b*) Drew. 517. (*c*) 8 Ves. 898.

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that the maintaining of the fence complained of by the information is the act of all; and he refers to the 6th paragraph of the information in support of this latter contention; but that paragraph, as I said at the argument, is only a statement of the consequence of the act alleged in the third paragraph to have been done. It is not an allegation of any act being done by the defendants.

Then as to the defendants being, as contended, proper parties by whichever of them the act complained of was done. The allegation is, that three of the defendants, *Boulton*, *Cameron*, and *Cayley*, are owners of a piece of ground, known as the "cricket field;" which piece of ground abuts on the highway or public road, called William Henry Street; that *Blake* is their lessee of this piece of ground, and that the other defendants are mortgagees of *Blake*; and the allegation in the third paragraph is, that "the defendants, or some or one of them, have surrounded the said lot with a board fence, and instead of conforming to the proper boundary line of the said lot, have inclosed within their fence a considerable portion of the soil of the said William Henry Street."

Judgment.

Mr. *Maclennan* puts it properly when he says, that this may read as an allegation that the fence in question was put up by *Blake*. Suppose there were such an allegation in terms, would his lessors or his mortgagees be proper parties to an information against him for doing that act. It would be a naked case of nuisance committed, it may be, under colour of his possession of the field as lessee, but an act which the other parties to the suit have no interest in defending.

I think, therefore, that upon the allegations in this information, no equity is stated with sufficient certainty against the lessors and mortgagees of the defendant

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Blake; and that they are not proper parties to the information.

I have had some doubt whether the defendant *Blake* does not stand upon a different footing; and if the allegation as to his possession had been that he was in possession of all the ground that was surrounded by the fence, I should incline to think that he would. His position would then have been this: if he put up the fence he would be the proper party to answer for the act; and if the fence was put up by any of the other parties, he would be a proper party in respect of his possession and enjoyment of the land which is brought in question. The allegation as to his possession is, however, only that he is in possession of the ground of which he is lessee, *i.e.*, of the cricket field. I must take this most strongly against the pleader, and cannot read it as an allegation that he is in possession of any land outside of that demised. I think, therefore, that the defendant *Blake* stands upon the same footing as the other defendants.

Judgment.

With regard to costs. Mr. *Maclennan* asks only the costs of the one argument; and I think the costs allowed to the defendants should be only such costs as would be allowed if there had been only one demurrer by all the defendants. I think that all might have joined in the one demurrer without compromising the rights of any. I have no doubt that the course taken was taken advisedly, and from an apprehension that one demurrer by all might prejudice their case. I think it was a piece of over caution; and that I ought to give the costs as of one demurrer only.

The order finally drawn up gave the defendant the costs of one demurrer only; deducting therefrom the costs of setting down the other four demurrers in favor of the relator by whom the demurrers had been set down for argument.

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Subsequently, the information having been amended, the cause was brought on for examination of witnesses and hearing, when

BLAKE, V. C., dismissed the information with costs.

MOSSOP v. MASON.

Practice—Taxation—Costs of rehearing.

The decree in a cause gave the plaintiff the general costs thereof: *Held*, that this did not carry the costs of rehearing an interlocutory order made refusing an injunction, and which order was reversed on rehearing; the practice requiring that, where costs of rehearing are intended to be given they must be expressly mentioned in the decree or order giving the costs of the cause.

This was an appeal from the taxation of the Master (*Taylor*) by the plaintiffs. The proceedings referred to in the judgment on the present appeal are reported *ante* volume xvi., page 502, and volume xvii., page 360.

Mr. *C. Moss*, for the appeal.

Mr. *Cassels*, contra.

The authorities cited are mentioned in the judgment.

Judgment.

SPRAGGE, C.—The question in this case is whether the costs of the rehearing are, without being in terms given by any order in the cause, taxable as part of the general costs of the cause. I will consider the case as if the order refusing an injunction had been simply reversed upon rehearing and an injunction granted. What followed was a decree granting an injunction with other relief, and giving the plaintiff the general costs of the cause. This decree was appealed from, and was affirmed upon appeal with a variation and not on terms affecting the question of costs. Upon taxation the costs

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Mossop v. Mason.

of the original unsuccessful application for injunction were taxed to the plaintiff as part of the general costs in the cause, the costs of the successful rehearing of that order (as for the present I shall consider it) were refused by the Master upon taxation upon the authority I am told of the case of *Agabeg* v. *Hartwell* (*a*). In that case the re-hearing was unsuccessful, but the deposit was ordered to be returned and the order was silent otherwise as to the costs of the rehearing. It was what may be called an indulgence in that case to order the deposit to be returned, or for some reason an exception was made to the general rule: and the opinion of the sworn clerks was that the giving back the deposit was a disposal of the question of costs of the rehearing, and that an order giving to all parties their costs would not authorize the Master to include the costs of the rehearing because it would be giving the latter order the effect of giving costs, which by the previous order had been refused.

Judgment.

In this case it *was according to the general rule* that the deposit should be returned; and consequently ordering it to be returned was not a disposition of the costs of rehearing. I should say it would have been a matter of course if any question had arisen regarding them at the hearing of the cause, to direct that they should be taxed to the plaintiff with the general costs of the cause. They were clearly part of the costs of litigation in which the plaintiff was successful, and of which there was no reason to deprive him. The reason that the order made on rehearing was silent as to the costs, beyond the return of the deposit, was that the suit was an injunction suit in which costs of interlocutory applications in relation to injunctions are not as a rule given until the hearing. The reason which I have quoted from the certificate of the sworn clerks in *Agabeg* v. *Hartwell* appears

(*a*) 5 Beav. 271.

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therefore not to apply. But the sworn clerks go on to certify "It is a general rule that costs of appeals, rehearings and exceptions are not carried by the words costs of suit as between solicitor and client, but require to be specially mentioned in the order of taxation." The question then is, whether this is not still the general rule; and if it is whether rehearings in injunction cases are an exception.

It is quite a different matter whether the costs in question ought not to be paid by the defendant to the plaintiff; and it may be quite true as no doubt it is, that costs are given to successful appellants now, in many cases where formerly they were refused. They would have been given in this case, as I have said; but the question is, whether they are part of the general costs of the cause so that it is the function of the Master to tax them, where the order or decree giving the general costs of the cause is silent in regard to them.

Judgment.

Morgan & Davy give the rule certified to by the sworn clerks in *Agabeg* v. *Hartwell* as the present rule of taxation. In *Smith's* Practiec, a book of high authority, though now almost superseded by Mr. *Daniell's* larger work, the rule is laid down thus: "There are certain proceedings which, though incurred after the commencement of the suit, are not costs of the suit, unless given in express words. Thus neither costs of an appeal, nor of a rehearing, nor the expense of taking out letters of administration are allowed as costs of the suit, even when given as between solicitor and client," and in *Daniell's* Prac. 1st ed., p. 1359, after noticing the change from the former to the present practice in regard to giving costs to an appellant, it is added, "As a general rule costs of appeals, rehearings, and exceptions are not carried by the words 'costs of suit as between solicitor and client,' but require to be expressly mentioned in the order for taxation."

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Mossop v. Mason.

I have referred to the several cases collected in *Kerr* on Injunctions in which the Court has dealt with the costs of applications for injunction, but I do not find from them that appeals and rehearings in injunction suits are made exceptions to the general rule as to the costs of those proceedings. The costs of the original motion for injunction were no doubt properly taxed to the plaintiff as part of the general costs of the cause: *Finden* v. *Stephens* (*a*), *Stephens* v. *Keating* (*b*).

In considering the case as if the order made on rehearing had been simply a reversal of the order which was reheard, and as if an injunction had then been granted I put the case as high for the plaintiff as it can be put, and being of opinion that in such a case the costs of the rehearing could not be taxed under the decree, or order made on appeal it is unnecessary to consider the effect of the order that was made on rehearing. If they would have been given if asked for, as I incline to think they would, still they were not asked for, and so are not specially mentioned in the decree of this Court, or the order on appeal, and for that reason are in my judgment not taxable.

Judgment.

I must therefore dismiss this appeal of the plaintiffs, and it must be with costs.

(*a*) 17 L. J. Chy. 342. (*b*) 1 McN. & G. 659.

1873.

FITZGERALD v. FITZGERALD.

Irrevocable will—Representation binding on party.

The owner of property may make a representation in respect of giving the same so as as to form a contract sufficient to bind him to carry out the representation so made: and it will make no difference that the representation is, that the property is to be given by a revocable instrument, and the more so will this be the case, if in consequence of the representation the person to whom it is made changes his condition: where therefore a father wrote to his son stating that he had devised certain portions of his real estate to the son, and expressed a wish for the son to leave his then place of residence and settle beside the father, and that if he did so he would leave the land to the son at his death, and the son acting upon this expressed desire of his father, left his residence and went to live beside his father:

Held, that from that time the will was no longer revocable.

This was a rehearing by the defendant of a decree pronounced by Vice Chancellor *Strong*, giving the plaintiff the relief prayed by his bill under the circumstances stated in the head-note and judgment.

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

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

Judgment. SPRAGGE, C.—The equitable doctrine upon which this case proceeds is now, I think, well settled.

In *Hammersley* v. *De Biel* (*a*), Lord *Cottenham* stated it thus: "A representation made by one party for the purpose of influencing the conduct of the other party, and acted upon by him, will in general be sufficient to entitle him to the assistance of this Court for the purpose of realizing those representations."

It cannot, I think, be held to be the law of this Court, that it will aid a party only in cases where the

(*a*) 12 Cl. & Fin. 45.

representation is in regard to existing facts; though that seems to have been the opinion of the majority of the Law Lords in *Jordan* v. *Money* (*a*). The case seems to have gone off upon another point, viz., that the promise relied upon if it constituted a contract, was not a contract made in consideration of marriage, so as to bring it within the Statute of Frauds. 1873. Fitzgerald v. Fitzgerald.

On the other hand a mere representation of intention is not sufficient. If such a representation be acted upon, it is acted upon in the expectation only of the continued good will of the party expressing such intention. Of this nature was the case of *Maunsell* v. *Hedges* (*b*). In that case Lord *Cranworth* defined very clearly the difference between such a representation or expression of intention, and a representation which would amount to an engagement.

"A representation may be so made as to constitute the ground of a contract. But is it so here? Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representation being true, and who do act on it, equity will bind him by such representation, treating it as a contract. Suppose that this gentleman had on the eve of the marriage said to the appellant, 'You may safely enter into this marriage, for I have executed a deed by which I engage to leave you such and such estates.' If on the faith of that representation the nephew had married, the uncle would then have made a representation on which he knew that his nephew would act, and it would be a fraud on the nephew, or on those who dealt with him, and came after him, to set up as an answer that that was a mere intention which he Judgment.

(*a*) 5 H. L. C. 185. (*b*) 4 H. L. C. 1039.

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had entertained at the time. The uncle would, in fact, have made a contract, and he would be compelled to make it good, for he would have made a representation with a view to induce others to act upon it, and on the faith of it they had, at the moment, acted. That would be a representation which, under the circumstances I have stated, would be in fact a contract. There is no middle term, no *tertium quid* between a representation so made, to be effective for such a purpose and being effective for it, and a contract; they are identical. That which leads to the representation being made and acted on, determines its nature, gives it the character of a contract, or leaves it a mere representation."

This I take to be the law of this Court. If a party engages to do a thing upon the faith of which another to whom it is communicated acts, it is treated as a contract, and is in fact a contract binding upon the party making it.

Judgment.

Hammersley v. *De Biel* was the case of a representation by a father that he intended to make a will leaving his daughter, who was about to be married to Baron *De Biel*, the sum of £10,000. The representation was contained in proposals of marriage by the father, and were acted upon by the Baron, who, on his part, made a settlement upon his intended wife, and the father's representation of intention was held binding.

In *Loffus* v. *Maw* (*a*), a case more nearly resembling the one before us than, I think, any other that I have met with, the engagement was to make a will. Upon the faith of it the party to whom it was made acted, changing her condition. In reference to its being a will that was engaged to be made in that case Sir *John Stuart* observed, "In cases of this kind a

(*a*) 3 Giff. 592.

representation that the property is to be given by a revocable instrument is binding. It is the law of the Court which makes it binding, although it be of the essence of the representation that the instrument is to be of a revocable nature."

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The question then in this case I take to be, whether there was on the part of *Maurice Fitzgerald*, the father, an inducement held out to his son *Thomas*, amounting to an engagement, that if he would leave Brampton, where he was then residing, and remove with his family to the place where he, the father, was living, he would by his will leave to him the north halves of the lots. He had already made a will devising to *Thomas* the land in question, and his communication to *Thomas* through Mr. *C. Calligan* was as follows: "He (the father) thinks that you should sell by all means, and settle yourself here, that you would never be idle here for want of employment; that, at his death, in conformity with his will, you would have his place." This letter bears date 8th March, 1865. In May of the previous year a letter written to the plaintiff by his father contained this postscript: "I beg to inform you that you will ultimately have my part of the place, but whilst I live I cannot do it, but I'll have matters settled for you." In a previous letter, 8th February, 1862, there is this passage, "However, I am more grateful than you (alluding to his son's omission to visit him) because I am thinking of you continually, which I hope I will prove to you and to others at my death or sooner."

Judgment.

These two earlier letters certainly raise no equity on behalf of the son. They are representations of intention and nothing more. The third letter—the one to which I have first referred goes much further; it offers inducements to the son to change his position, with an evident wish that his son would act upon his suggestion.

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"You would find employment here:" that must mean, if you come here, and at my death you would still, as I read it, if you come here, have my place in conformity with my will. Mr. *Maclennan* contends that this was a mere letter of advice. It was a letter of advice certainly; but the father wished his advice to be taken, and holds out inducements, one as to a matter not within his power, being in fact only a matter of opinion; the other as to a matter certainly within his power; and amounting, as I read the letter, to an engagement that, if his wish is complied with, he would leave the land in question to his son. It had probably been his intention before, and for years, as his previous letters indicate, to leave this land to his son; and the actual making of a will devising it to him was as strong an expression of intention as could well be. Then comes the letter of March, 1865, which seems to me to come to this: "I have made a will devising the north halves of my lots to you, and if you comply with my wish to leave Brampton and settle here, I will leave that land to you at my death." Upon this expressed wish of the father being acted upon by the son, the will became, in my opinion, no longer revocable.

Judgment.

I took this view of the case when it was before me on an application for injunction. At the hearing my brother *Strong* took the same view. I still think this view of the case the correct one.

STRONG, V. C., concurred.*

Per curiam.—Decree affirmed with costs.

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* MOWAT, V. C., before whom also the cause was reheard, had left the bench before judgment was given.

1873.

ROBINSON v. WHITCOMB.

Practice—Pro confesso—Notice of proceedings.

In proceeding upon a decree *pro confesso*, the Master should exercise a discretion in requiring notice to be given to the defendants of such proceedings, or dispensing with notice thereof: as a general rule the defendant should have notice, although it may be that it is not requisite to serve him with all warrants issued by the Master.

This was a suit for an account of a partnership estate, the bill in which had been taken *pro confesso*, and came on to be heard for further directions on the report of the Master, at Ottawa.

Mr. *Wardrop*, for the plaintiff, asked an order to be now made directing payment by the defendant of the amount found due by the defendant to the plaintiff, together with the costs of the suit, but, after taking time to look into the authorities,

SPRAGGE, C.—There is nothing in this case to take it out of the general rule as to costs, in suits for an account of partnership dealings. The bill states shortly the commencement and duration of the partnership, and its expiry on a day named, and asks for an account. The decree contains the usual short directions to take the accounts, reserving further directions and costs; and the report, which is short, finds a certain sum, $5,860.06, to be due from the defendant to the plaintiff, and that there are not now any credits, property, or effects, belonging to the co-partnership. Judgment.

The rule is, to give no costs up to the hearing, except in cases of gross misconduct on the part of the defendants: *Hawkins* v. *Parsons* (*a*), *Parsons* v. *Hayward* (*b*). And the general rule as to the costs of taking the accounts, is stated by Mr. Lindley (*c*) to be, that they

(*a*) 8 Jur. N. S. 152. (*b*) 10 W. R. 531.
(*c*) Vol. II. p. 986, ed. of 1867.

1873.

Robinson v. Whitcomb.

are defrayed out of the partnership assets; and if necessary by a contribution between the partners. In this case there appears to be no partnership assets; and I do not see any way in which the partners can contribute, except by the costs being divided between them, I mean of course the costs of taking the account, one half being added to the amount found due by the defendant. I think the plaintiff entitled to interest from the date of the Master's report.

There is another matter connected with the taking of the accounts in this suit, in which it is proper that I should call for explanation. I infer from the terms of the report that the accounts have been taken *ex parte*, and without notice to the defendant. Whether or not the defendant was served with the bill personally does not appear. But assuming that he was, it does not follow that it was proper that the accounts should be taken without his having notice of them. It is true, that under our General Orders it is provided, that where a bill is taken *pro confesso*, further proceedings in the cause may be *ex parte*, and that the defendant is informed by the notice indorsed on the bill, that if served personally he will not be entitled to any further notice of the future proceedings in the cause. This notice, and the general order, are intended to put a defendant upon his guard; to inform him of the consequences that may follow from his omitting to answer. But it was by no means intended that the Master should proceed *ex parte*, without regard to the nature and circumstances of the case; and without exercising his discretion as to whether, upon such inquiries as he is directed to make, or such accounts as he is directed to take, it would not be proper that the party to be affected by them should have notice. There are many cases in which a defendant may have nothing to say against what is asked by a bill, and may therefore be quite content to let the cause go undefended, and who may

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yet be deeply interested in the carrying out of the decree in the Master's Office. And there can hardly be a better illustration of this than is afforded by this case. The partnership alleged in this bill was, I take it, a fact, and the plaintiff asked for an account of the partnership dealings. The defendant had nothing to say against the fact, or the right growing out of it; but it is not to be assumed that he had nothing to say in regard to the partnership dealings, but the contrary; and he should have been afforded an opportunity of appearing in the Master's Office and taking part in those proceedings in the cause in which he was interested in being present. The same may be said of accounts between principal and agents, trustees and *cestuis que trust*, mortgagee and mortgagor, accounts in administration suits, and in many other cases in which the real contest between the parties is in the Master's Office.

Judgment.

The substance of what I have now said has been expressed repeatedly, I believe, by other Judges of the Court, as well as by myself. The point was alluded to incidentally by the first Chancellor, Mr. *Blake*, in *Buchanan* v. *Tiffany* (*a*), and by myself, in *Jackson* v. *Matthews* (*b*). Whether it appears in any other reported cases I do not know, but it has certainly been observed upon from the Bench; and I am told that it was the practice of the late Master, Mr. Boyd, always to exercise his discretion in the matter, and to consider whether the reference before him was not of such a nature that the defendant should be notified of the proceedings in the Master's Office; and this has probably been the practice of the majority of the Masters, probably of all, or nearly so. I do not mean that it is necessary to serve all warrants upon a defendant against whom the bill has been taken *pro confesso*: as to that, the Master should, in each case, exercise his discretion.

(*a*) 1 Gr. at 103.

(*b*) 12 Gr. 47.

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It may be, indeed, that the Master to whom this case was referred did exercise his discretion, and that the defendant was notified. The terms of the report, however, lead me to think otherwise. I do not, at present, make any order on further directions; but I desire to be furnished with a certificate from the Master, stating how the reference was proceeded with in his office, and whether the defendant was notified.

MOONEY v. PREVOST.

Specific Performance—Infants—Costs.

The plaintiff under a verbal agreement, purchased certain lands from the ancestor of the defendants, to whom he paid his purchase money in full. The agreement provided that, upon payment of the purchase money, "a proper conveyance was to be executed" of the premises. It appeared that the vendor had given instructions to have a conveyance prepared in favor of the plaintiff, but that this was not communicated to the plaintiff, and formed no ground for his never having tendered any conveyance to the vendor for execution:

Held, that under the agreement the plaintiff was bound to prepare and tender a conveyance for execution; and that he was not entitled to his costs of a suit brought against the representatives of the vendor for specific performance of the agreement.

In such a case, some of the defendants being infants, the plaintiff applied for the appointment of a guardian *ad litem*, and one was appointed accordingly. The Court, following the general rule, ordered the plaintiff to pay the costs of the guardian, and refused to give the plaintiff any remedy therefor against the estate of the vendor.

Motion for decree under the circumstances stated in the head note and judgment.

Mr. *Bethune*, for the plaintiff.

Mr. *Cassells*, for the widow of the vendor.

Mr. *Arnoldi*, for the infant defendants.

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Mooney v. Prevost.

SPRAGGE, C.—The plaintiff's case is, that he was a purchaser of a lot of land in the City of Ottawa, from one *Amable Prevost*, on the 28th of October, 1870, for the sum of $500, by verbal contract, $125 to be paid in hand and the balance by instalments with interest; that "upon payment thereof a proper conveyance was to be executed of the said premises;" that he paid the purchase money, and that the vendor died without making him a conveyance, leaving a will but making no provision therein for the execution of a conveyance to the plaintiff. The case is stated a little differently in the affidavit filed in support of the case, but it is not material upon the questions raised at the hearing. The defendants are the widow and personal representatives of the vendor, and certain infant children, who are described as his heirs-at-law and interested in the land sold under his will. A guardian *ad litem* was appointed to the infants in the usual way at the instance of the plaintiff.

Judgment.

The plaintiff asks for his costs and objects to pay the costs of the infants. It has been settled in more than one case, that the circumstance of the vendor not making provision for the execution of a conveyance of land contracted to be sold by him, is not a ground for giving to the purchaser costs of a bill for specific performance against his estate; and I do not understand that the learned Counsel for the plaintiff asks for costs upon that ground, but upon this, that by the contract of sale the vendor was bound to convey—that is, to have prepared at his own expense and to execute a conveyance. The contract, as stated in the bill and in the affidavit used at the hearing, does not support this contention. They both use the word "execute" only, implying, more even than the word "convey," that the conveyancing expenses were to be born by the purchaser. The bill contains no allegation of a tender of conveyance for execution.

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Mooney v. Prev...

I see no reason for refusing to the guardian *ad litem* of the infants his costs. The infants were made parties and a guardian *ad litem* appointed by the plaintiff, because necessary to his suit; and the rule is, that he must pay to the guardian *ad litem* his costs. If there were unpaid purchase money, he might avail himself of the rule which entitles him in such case to retain his costs out of it, but he alleges that he has paid his purchase money in full. I do not know any instance of these costs being directed to be paid out of the estate. It would seem to be a logical sequence, that as the estate of the vendor in effect pays such costs when they are deducted from unpaid purchase money, so the estate should pay them when there are assets, in cases where it has had the benefit of the whole purchase money. But however that may be, it was the purchaser's own fault in this case that he did not get his conveyance; for if, as he says, he had paid his purchase money in full, he should thereupon have prepared a conveyance and tendered it for execution. It appears, indeed, by the affidavit of Mr. *O'Connor*, who was agent of the vendor, that he was "instructed by the vendor to prepare a conveyance to the purchaser;" but if so, it was doing more than he was bound to do; and it does not appear that this was communicated to the purchaser, or that he was for any reason induced to abstain from preparing a conveyance himself. The vendor appears to have died at a time when two of the instalments had yet to accrue due; but the affidavits of the vendor's own agent seem to shew that the purchase money was paid in full, and, as I understand it, before the death of the vendor, and so by anticipation.

Judgment.

The widow of the vendor is made a party defendant, and puts in an answer admitting the title of the purchaser to a specific performance of the contract. She does not in terms submit to join in a conveyance so as to release her dower; but, from the terms of her

answer, I incline to think that she intends it. I should desire to be informed, before the decree is drawn up, how this is. 1873. Mooney v. Prevost.

WYLIE v. MCKAY.

Demurrer for want of parties—Trustee and cestuis que trust—English General Order 14, of October of 1861—Costs.

Where a bill is filed to impeach a conveyance to trustees for the benefit of creditors, whether such assignment is or is not in Insolvency the trustees are necessary parties; therefore where the cause of demurrer assigned was that one *G*, to whom it was alleged in the bill that *M* had conveyed his estate and effects for the benefit of his creditors, was not made a party, the Court allowed the demurrer.

And, *Quare*, whether the bill was not also demurrable on the ground that it did not distinctly shew the relation of trustee and *cestuis que trust* between *M* and his creditors to have been created by the conveyance to *G*, or that such conveyance was anything more than a deed of management.

Semble, That although a defendant fails on the ground of demurrer assigned, and succeeds on a ground of demurrer taken *ore tenus*, the plaintiff will not be entitled to his costs, the English Order 14, of 1861, not having been adopted by this Court.

Statement.

The bill in this case was filed by *George G. Wylie* against *Ann McKay* and *Hugh McKay*, and stated, (1.) that in and prior to 1868, the defendant *Hugh McKay* carried on the business of hotel-keeper in the village of Durham; (2.) that during such time he was in embarrassed and insolvent circumstances, and on or about the 20th June, 1868, he executed a deed of assignment whereby he purported to convey all his estate and effects to one *George James Gale*, in trust for the benefit of his creditors, such estate and effects being set out in the schedule of assets annexed to the said assignment; (3.) that the said *Hugh McKay* represented that the lands and properties set out in said schedule of assets constituted *the entire estate and effects* which he then owned or was entitled to, and by reason of such representation induced the plaintiff and others his cred-

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itors to compound their claims against him, and to execute a deed of composition and discharge, dated the 2nd March, 1869, whereby the plaintiff and others, the creditors of said *Hugh McKay*, agreed to accept 50c. in $1, in full satisfaction and discharge of their claims; (4.) that the said *Hugh McKay* was justly and truly indebted to the plaintiff in the sum of $700, together with interest thereon from 1st July, 1868, on which he had not received any composition under and by virtue of said deeds of assignment and composition, but the whole of said sum of $700 and interest remained wholly due and unsatisfied. (5.) The bill further alleged that the plaintiff had lately learned that the properties and effects set out in the said schedule of assets, did not constitute the entire estate and effects which the said *Hugh McKay* then owned or was entitled to; but, on the contrary, he then owned and still continued to own certain specified lands in the Township of Bentinck and village of Durham, and the houses and buildings thereon; (6.) that *Hugh McKay*, prior to the making of the said asssignment, purchased from one *Laughlan McKinnon* all his right, title, and interest in lot thirty-two, in concession ten, of the township of Bentinck aforesaid, and paid him therefor the sum of $300, and at the same time procured his wife to give to said *McKinnon* a mortgage upon said land and premises for $412, the balance of purchase money; which said mortgage *McKay* had since paid off and discharged, and he then was the *bonâ fide* owner of and absolutely entitled to said lands and premises, though the plaintiff was unaware whether the conveyance of the same had been taken in the name of the said *Hugh McKay* or of his wife, the said *Ann McKay*, but the plaintiff believed it to be in the name of the latter; (7.) that neither of these several lots of land and premises were included in said deed of assignment, but the said *Hugh McKay* fraudulently concealed his title and interest in the same from the plaintiff and others, his creditors, in order to procure the

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execution of the deed of composition as above mentioned. (9.) The plaintiff charged that said deed of composition and discharge was fraudulent and void, and ought to be set aside; and that the plaintiff was entitled to enforce the full amount of his said claim against said *Hugh McKay*. The bill further stated that the plaintiff had applied to the said *George James Gale* to proceed under said assignment and sell or otherwise realize upon said properties, and apply the proceeds in liquidating the claims of the plaintiff and others, the creditors of said *Hugh McKay;* that the said *George James Gale* refused so to do, but anthorized the plaintiff to do so. The prayer of the bill was: 1. That the deed of composition and discharge might be declared fraudulent and void, and might be set aside. 2. That the plaintiff might be paid the full amount of his debt. 3. That said *Ann McKay* might be declared a trustee of said lands and premises above mentioned, for the benefit of the creditors of said *Hugh McKay*. 4. That said lands and premises might be sold and the proceeds applied in payment of the claims of the plaintiff and others, the creditors of said *Hugh McKay;* and for further and other relief.

To this bill the defendant *Hugh McKay* demurred, on the ground that it appeared by said bill that the said *George James Gale* was a necessary party.

Mr. *Kennedy*, in support of the demurrer.

Mr. *Moss*, Q. C., contra.

Brooke v. *Bank of Upper Canada* (*a*), *Longeway* v. *Mitchell* (*b*), and *White* v. *Hillam* (*c*), *Mitford's* Eq. Pl., p. 398, and *Lewis* on Eq. Pl., p. 196, were referred to.

SPRAGGE, C.—It is not denied in argument that the bill is demurrable: but demurrable, it is contended only, Judgment.

(*a*) 16 Gr. 249. (*b*) 17 Gr. 190. (*c*) 3 Y. & C. Ex. 597.

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on one or more grounds taken *ore tenus* ; and it is conceded to be so on another ground also, but not on the special ground taken ; and the plaintiff claims that he is entitled to his costs under the English General Order 14, of orders of 1861, and that the defendants are not entitled to their costs.

The demurrer was argued by counsel for defendant, as if the case made by the bill were of an assignment in insolvency ; and counsel for the plaintiff pointed out that no case was stated under the insolvency law ; and so far I agree with him ; but on reading the bill and the cause of demurrer assigned since the argument, I observe that the cause assigned is as silent as is the bill as to the assignment being in insolvency. The cause of demurrer assigned is, that *George James Gale* to whom, as it is alleged in the bill, *Hugh McKay* in the bill named conveyed his estate and effects for the benefit of his creditors, is not made a party.

Judgment.

If an assignee in insolvency would be a necessary party, and a trustee for the benefit of creditors, not in insolvency, would not be a necessary party, the distinction taken by plaintiff's counsel would be correct. But as in my opinion a trustee, not in insolvency, would be a necessary party, the bill is demurrable for the cause assigned as well as on grounds taken *ore tenus*.

At the same time it appears to me to be at least doubtful whether the bill is not demurrable on the broader ground that I suggested at the argument, namely, whether the bill shewed the relation of trustee and *cestuis que trust* to have been created between *McKay* and his creditors, or that the instrument of June, 1868, was anything more than a deed of management. Upon this, however, I express no decided opinion ; and it would make no difference as to the costs. Even if the plaintiff's counsel were right in his contention I am not

prepared to say that he would be entitled to his costs. The English Order of 1861 has not been adopted in this Court, and independently of that order I doubt if the plaintiff would, under the circumstances, be entitled to costs: *Morgan's* Chancery Orders 425, n. c. 1873. Wylie v. McKay.

I think the defendants entitled to succeed on the cause of demurrer assigned as well as on other grounds, and that the demurrer must therefore be allowed with costs.

GOODFELLOW v. RANNIE.

Maintenance—Corpus of infants' estate—12 Victoria, ch. 72.

The Court will sanction the use of the *corpus* of an infant's estate, for his past as well as future maintenance, where the doing so is shewn to be for his benefit; and the Court will also do so.

Where it is satisfied that the question of maintenance arises incidentally in a suit, and that it was properly instituted in order to the administration of an estate, and not as an indirect mode of doing what ought to be done under the provisions of 12 Victoria, and the orders of this Court, made to carry out the same, as the question of maintenance past as well as future can properly be dealt with, inasmuch as a great deal of the information required by the Statute and orders referred to can be evolved in taking the accounts in such suit; but where such a suit was instituted by a party asking for maintenance out of the *corpus* of the estate, the Court, as a check upon such suits, refused to make any direction as to maintenance.

Statement.

The bill in this cause was filed by the administrator of the estate of one *Rannie*, against the widow and children of the intestate, alleging, amongst other things, that he had expended large sums in payment of debts, and in the maintenance of the intestate's family, beyond what he had received out of the estate, or was chargeable with in respect of the real estate of which he had been in the occupation, and he claimed to be repaid out of the *corpus* of the estate the amount he had so advanced, and also to have the estate administered.

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The case was heard before the Chancellor at Barrie, at the Spring examination and hearing term, 1873.

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

Mr. *Bain*, for the infant defendants.

Mr. *Scanlon*, for other defendants.

SPRAGGE, C.—The plaintiff refers me, in addition to other cases to which I have already been referred, to the late case of *In re Howarth*, before the Lords Justices (*a*). It is an authority for this, that the Court will permit the use of the *corpus* of an infant's estate, or so much of it as may be necessary, where the doing so is for the benefit of the infant; and will do so where it is proper for past as well as for future maintenance.

Judgment.

This is not a new doctrine. The practice of the Court in this respect, is laid down by the late Vice-Chancellor in the late case of *Edwards* v. *Durgen* (*b*), as follows: "There is no doubt that the Court has power to employ the *corpus* of an infant's estate for his maintenance; and that the Court exercises this power wherever that course is shewn, to the satisfaction of the Court, to be more for the infant's benefit, than to preserve the property intact until the infant comes of age; and it is the modern doctrine, that payments made by trustees or executors out of the *corpus* without the previous sanction of the Court are to be allowed where the Court considers the payments reasonable and proper; and such allowance may be made whether the payments were for advancement or maintenance, though payments by way of advancement, are more readily allowed than payments by way of maintenace. In all cases, payments made without previous authority are made at the risk of

(*a*) L. R. 8 Ch. App. 418. (*b*) 19 Gr. 101.

the parties; and the allowance afterwards is for the discretion of the Court in view of all the circumstances."

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This is, in my opinion, a sound exposition of the law. In that case and in the case before the Lords Justices, the suit was not by the party who was before the Court asking to be allowed for maintenance. Where the suit is by the party so claiming, as it is in this case, it behoves the Court to be especially vigilant that an administration suit is not made the vehicle for obtaining a sale of the *corpus* of the estate of infants, without the safeguards for the protection of infants which are provided by our Statute 12 Victoria and the orders of this Court made to carry it out. I had occasion to comment upon this in a case of *Fenwick* v. *Fenwick* (*a*), which was lately before me; and I have reason to believe that that case is by no means a singular one. I may observe also that in England there is not, I believe, the like machinery provided for informing the Court of the several particulars with which it is desirable that it should be made acquainted, before directing a sale of infants' estates.

Judgment.

Where the Court is satisfied that the question of maintenance arises in the suit incidentally, and that the suit has really and properly been instituted in order to the administration of an estate, and not by way of a short cut to avoid the Statute 12 Victoria, the question of maintenance past and future may, I apprehend, be properly dealt with in the suit, because a great deal of the information required by the Statute and the general orders may properly be evolved in taking the account.

I would not, however, myself make any direction as to maintenance in an administration suit, instituted by a party asking for maintenance out of the *corpus* of the estate. I do this by way of a check upon suits, institu-

(*a*) Ante page 381.

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ted for the purpose to which I have referred. Without expressing any opinion, whether this suit was instituted for that purpose, I decline to give any special direction as to maintenance. Any proper application of rents and profits will be covered by the usual administration order. I will not at present say that the filing of this bill was improper, but unless in the course of taking the accounts, something should be made to appear to shew its necessity, I should, on further directions, hold the usual rule to apply where a party files a bill, in a case where the ordinary administration order would answer all the proper purposes of the suit. For the present, further directions and costs are reserved.

RODMAN v. RODMAN.

Alimony—Amendment—Pleading—Practice.

The Ecclesiastical Courts in England will not for an isolated act of personal violence declare the wife entitled to a separation *a mensâ*; and this Court, following the same principle, will not, as a rule, for only one act of violence make a decree for alimony. But where a husband had for several years indulged in the use of intoxicating liquors to such an extent as to have produced repeated attacks of *delirium tremens*, during which he became very violent; and his wife had, on one occasion when he became intoxicated, been compelled by reason of his violence to leave home and go to a neighbour's house, where she remained all night, and on the following day, in company with two of her neighbours, had returned to her husband with a view of inducing him to abstain from drinking, when he assaulted her with a stick, inflicting several blows on her head; whereupon she ran away and he followed her, kicked at her, and told her to be gone, and otherwise conducted himself in a very violent manner, although this was the only instance in which he had, during eighteen years they had been married, ever struck her, the Court made a decree for alimony, the wife swearing, that she was apprehensive of further ill treatment if she were to return to live with her husband; which decree on rehearing was affirmed by the full Court.

The particular act of violence charged was stated in the bill to have occurred on the 30th of August, and the evidence shewed that it had been committed on the 31st of that month:

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Held, that this was not such a variance as would disentitle the plaintiff to prove the act alleged; and if necessary an amendment would be allowed so as to state the date correctly, as it could not be considered that the defendant had been misled by the mistake in the date.

Where with a view of obtaining a decree for alimony it is desired to give evidence of various acts of violence by the husband, it is necessary to set forth such acts specifically in the bill, in order that the husband may have notice of the acts charged against him, and so that he may, if he can, adduce evidence in rebuttal or explanation thereof;—and this rule cannot be said to operate oppressively upon the wife, as the facts and circumstances charged, if true, must be all within her knowledge.

In this case a decree had been made by Vice Chancellor *Strong*, at the sittings of the Court at Lindsay, declaring the plaintiff entitled to alimony. The defendant thereupon reheard the cause. The circumstances giving rise to the suit are very clearly stated in the judgment.

Mr. *Attorney General Mowat*, and Mr. *Maclennan*, for the plaintiff.

Mr. *Boyd*, for the defendant.

In addition to the cases mentioned in the judgment *Holden* v. *Holden* (*a*), *Otway* v, *Otway* (*b*), *Hulme* v. *Hulme* (*c*), and *Bishop* on Marriage and Divorce, section 722, were referred to.

Judgment.

SPRAGGE, C.—The plaintiff's case rests, principally at least, upon what took place in the end of August, 1872.

Upon this a question of pleading is raised, that the allegation in the bill is, that the wife left, and that she was justified in leaving, in consequence of what took place on the 30th of that month, and it is contended that

(*a*) 1 Hag. Con. 453.
(*b*) 2 Phillim. 95.
(*c*) 2 Ad. 277.

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what took place on that day was not sufficient to justify her in leaving; and that having rested her case in her bill upon what took place on that day, she cannot rest it upon what took place on the next day, and this is clearly and forcibly put by Mr. *Boyd;* but the bill should not, in my opinion, be dismissed upon that ground. The defendant is not taken by surprise. The plaintiff alleges that he beat her with a stick. He admits that a blow with a stick was inflicted on the 31st. He knew therefore that he was called upon to answer for that act, whether committed on the 30th or 31st. It would at any rate be a case for amendment, and it would be proper to allow an amendment now if it were necessary, which I think it is not. The whole of what took place on those two days is, I think, properly open. It is another thing whether the violence alleged to have been committed on the several previous occasions narrated in the evidence of the wife, is admissible upon the pleadings. I will refer to that point presently. It is a case of great practical importance upon which, I apprehend, some misapprehension exists. I will address myself first to what took place on the 30th and 31st of August.

Judgment.

It may be conceded that what took place on the 30th would not have been sufficient to justify her withdrawal from her husband's roof, and it may be conceded also, that she had no right to require—abstractedly considered—that her husband should give up drinking; for a husband having the bad habit of drinking to excess, is not of itself sufficient to justify the withdrawal of the wife; still excessive drinking may, and often does, brutalize a man, and engenders a ferocity of temper which becomes an element of danger to a man's household.

The law as laid down in the more modern cases, as well as in the older ones, lays upon the wife the necessity of bearing some indignities, and even some personal

violence, before it will sanction her leaving her husband's roof. Thus in the late case of *Milford* v. *Milford* (*a*), it is said by Lord *Penzance*, "There must be actual violence of such a character as to endanger personal health or safety; or there must be the reasonable apprehension of it. The Court, as Lord *Stowell* once said, has never been driven off this ground, nor do the cases cited in the argument, whatever general expressions may have fallen from the Court, affect to decide that anything short of this will be sufficient to found a decree upon cruelty. The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread." The learned Judge in that case held that the case of cruelty was not made out, as there was "nothing in the evidence in the case to induce the conclusion that the petitioner's safety was compromised, or any fears for it entertained even by herself." I take the learned Judge to mean in the use of the word "impossibility," that the law does not put it upon the wife to continue to fulfil the duties of matrimony when her personal safety is compromised.

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Judgment.

The case of *Smallwood* v. *Smallwood* (*b*), is referred to for the defendant. The act of vi[illegible]ce committed in that case was certainly a very gross one. The husband it appeared was jealous, causelessly so, so far as appeared, and after accusing his wife of improper intimacy with a third person, which she denied, he took her by the throat, and after shaking her violently threw her on the floor against the drawing room door. Sir *Cresswell Cresswell* refused the petition—which was for a judicial separation—with these observations: "The violence consisted of one act only. No blow was given. An altercation arose out of the husband's suspicions, and then he took her by the throat, shook her, and threw her down. It does not appear that any marks

(*a*) L. R. 1 P. & D. 295. (*b*) 2 S. & T. 397.

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were left on the throat, or that she was rendered ill by the transaction. She told Mr. *Tatham* that she was afraid, and should go to her brother-in-law's house, but did not do so; nor does it appear that any complaint was made to that gentleman; and from his evidence and that of Mr. *Tatham*, I infer that she refused further cohabitation with her husband, not on account of his cruelty, but on account of the unfounded accusation. The ultimate departure of the respondent from the house did not take place until he again complained of undue familiarity on the part of Mr. *Williams* in writing to the petitioner.

That the conduct of the respondent was unwarrantable is true, but I have examined the cases referred to, and find in each of them not merely one violent act committed under excitement, and not producing any considerable injury to the person, but repeated acts, furnishing such evidence of *sævitia* as warranted the Court in concluding that the wife could not cohabit in safety with such a husband, and was therefore entitled to the protection of the Court."

Judgment.

Another case referred to is *Plowden* v. *Plowden* (*a*), in which Lord *Penzance* held the case not proved by the unsupported testimony of the wife, met by a denial on the part of the husband. The law of the case is well put in the head note. "As the future safety of the injured party is the ground of the Court's interposition, cruelty which extends over only a short space of time, should be shewn to be so far referable to permanent causes as to be likely to recur." The learned Judge in giving judgment made these observations, which are apposite to the case before us: "The Court in most cases looks for sustained harsh conduct, evidencing continued want of self-control and a tendency to resort to violence on

(*a*) 18 W. R. 902.

the part of the husband, and the failure on the part of the wife after renewed effort by all reasonable and prudent means to subdue and pacify those dispositions. It is obvious that there may be occasions of short duration when special circumstances of excitement may lead to language and acts foreign to the natural character, and therefore not likely to be repeated. And as the future safety of the wife from injury to person or health is the ground of the Court's interposition, it becomes necessary in cases like the present, where the alleged cruelty is to be found only in the events of two or three successive days, to be the better satisfied that the conduct complained of is well proved; is so far referable to permanent causes as to be likely to recur, and is of the dangerous character imputed.

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Now, what is the evidence in this case? To begin with, it is clear, on the evidence of both, that Mrs. *Plowden* has never received a wound, or bruise, or personal injury of any kind from her husband. But it is sworn by the petitioner that on the two nights before she left him his conduct and language were most violent; that on one night he held a drawn sword over her; and on the next he drew from its sheath an Indian knife which he had in his room and laid it by his side "to be in readiness," as he said, and that though he did not make any attempt to injure her with either of these weapons he did very much frighten her. I am far from saying that such conduct as this, though confined to two occasions, might not be sufficient to establish cruelty, if this account were entirely true, and the respondent's demeanor such as to show he was in earnest. On the other hand, though he were not in earnest, if he really tried to frighten his wife and had constant recourse to such a show of violence, his conduct would be intolerable, and the wife entitled to relief. But what is true? The respondent entirely denies it. (The learned Judge here referred to some

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facts touching the credibility of the petitioner's evidence.) On the whole then (his Lordship continued), I find myself unable on the unsupported testimony of the petitioner, in the face of the respondent's denial, to give that credence to her account which would alone support the charge of cruelty, and I hold the proof of it to have failed."

The case having gone off upon the absence of credible proof of the petitioner's case, it is chiefly valuable for the observations of the learned Judge upon the law.

Upon the facts of this case, I will take first the evidence of the two neighbours, *Dix* and *Whiteside*, as to what took place on the last day of August. The plaintiff had left her husband's house on the previous day, with or without sufficient cause. Be that as it may, I think it appears from the evidence that she left from an apprehension of personal violence which she sincerely entertained. She got the two neighbors whom I have named at the suggestion, as it appears, of the defendant's brother, to see the defendant himself and try to persuade him to leave off drinking.

Judgment.

Mr. *Dix* swears, that "At the end of August or beginning of September last, I was asked by Mrs. *Ann Rodman* to go and see her husband, and tell him that if he would quit drinking and throw away what he had in the house, she would go and live with him, otherwise she would not; that day Mr. *Whiteside* and I went down; as we went along, we saw *Rodman* in the field, and I went to him, and *Whiteside* and the plaintiff went to the house. I told defendant what plaintiff wished me to say to him. He said: 'Oh! she has come back, has she? I've got a rod laid up, and I'll give her a good thrashing.' I said, 'No, you won't give her a good thrashing while we are here; besides that's not the way; it will only make matters worse. * * *

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We went up towards the house, and as we went he repeated that he would give his wife a thrashing, and when he came up to her and *Whiteside* he repeated it; *Whiteside* said he should not while we were present, as we would be witnesses against him. He then ordered us off the premises: he went into the gate and shut it after him, forbidding us to enter. We opened the gate and followed him pretty speedily. Plaintiff was standing near the well. Defendant went towards her, picked up a rod from the grass, found fault with her, and went at her and struck her a few times. She screamed and ran behind us, and then down into the field, and he told her to begone. * * * He began to swear fearfully, and said he would like to see her in hell. After a little he made at her as if he were going to strike. She got up and ran, and I saw him kick at her. He caught her by one arm, apparently very firmly, * * as he held her he stretched his fist several times towards her face and said, 'See how near I can come to your face without hitting you;' after a while he let her go, and told her to be gone."

Judgment.

The witness *Whiteside* said: "Defendant said he had a rod prepared for *Ann* and the children, they had not been at home the night before; he seemed in a great rage. I have known him for thirty years, and I never saw him in such a rage."

I come now to the evidence of the plaintiff herself, evidence which, as I understand from my brother *Strong*, before whom the cause was heard, was given in no spirit of exaggeration. Her statement under oath is:—"I left the last day of August last. I have not lived with him since. I left on account of his ill-treatment, and I was afraid of my life stopping with him. I left on a Saturday. On the Thursday previous he had been at Little Britain. He brought some beer home,

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and before night was the worse of liquor. He went down into the cellar where the beer was kept. I was sick and did not wish him to make so much noise. I was afraid of him when he was in liquor." She further stated that next morning she was standing on the stoop, and asked her husband why he had frightened her the previous night, and if he wanted a funeral; to which he replied, "Yes, two." She then went to the house of the defendant's brother, but returned home the same day, and saw her husband. She again left that day (30th August), and went to a neighbour's where she remained that night.

She then gives a narrative of what took place on the last of August. "I next saw my husband on the last day of August. I drove down with Mr. *Whiteside;* and Mr. *Dix* also went then, they went there to see if my husband would give up drink. *George Rodman* had suggested that I should get two sensible men to go and talk to his brother. I met my husband near the well. *Whiteside* and *Dix* were a little way behind me, coming up. Defendant struck me twice with what looked to me to be a stick, in their presence. I don't remember what he said. He struck me on my head; it was sore afterwards. I ran away into the field: this was in the forenoon. *Dix* beckoned me to come back to the house. I went back to the stoop; defendant was swearing. He took hold of me by the arm, and wouldn't let me go. I don't know what he said. Some one told me to go to *Sellar's* for *Isaiah,* and I went there. I didn't go back to my husband's, and have never been in the house since. I have been afraid of him this long time whenever he got too much liquor. He drank pretty freely before he was sick. He had 'spells.' I won't say they resulted from sickness. * * * He never struck me except in August last. I had taken off my bonnet, and left it in the stoop. It wasn't a walking stick he struck me with.

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Dix went down to the field to defendant, and they came back together. I remained with *Whiteside*. I brought *Whiteside* and *Dix* with me to see if he would promise to give up drinking altogether, and throw away what he had, and then I would continue to live with him. If he had promised I would have gone back. I don't believe now he will keep from drinking. I want to see that he does reform. After I left I didn't wish to see my husband, although I believe he wished to see me. I was afraid of him. I am living at my mother's house. * * When I went away I didn't intend to return to my husband. I didn't sleep at home on the 30th August, nor did I intend ever to sleep there again. I have never lived, or slept, or taken a meal in defendant's house since. When I went to *George Rodman* on the 30th I told him 'I was frightened again last night, and I won't go back, I am afraid he will kill me,' or words to that effect. When defendant struck me he had a threatening look. He looked angry. Defendant has been drinking hard for seven years, and I have been told by the Doctor he had the 'horrors.' * * I am afraid to go back to defendant. I am afraid he will take my life, owing to the way he treated me before. I never saw defendant in any of his wild spells, unless he had been drinking. I have seen him have 'weak spells,' but I was not afraid of them."

Judgment.

It appears to me to be clear from the evidence of all the witnesses, from the evidence of *Dix* and *Whiteside*, as well as of the plaintiff, that there was no wish on the part of the plaintiff to leave her husband; that she was anxious indeed to stay with him; that her apprehensions of personal violence and for her personal safety were genuine, and were unhappily too well founded, whenever an access of passion, which she attributed to drink, made his anger ungovernable. Her request that he would abstain from drink was perfectly reasonable. If a stimulant upon the recurrence of any of the "spells"

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spoken of in evidence was really necessary, he should have confined himself to the necessity, which I conclude from the evidence he did not do.

There is other evidence besides that of the defendant, which is not very material. I may except that of *Ellen Sellars*, a witness called for the defendant, and as I judge from her evidence in chief, not indisposed to be favorable to him. Her evidence was as follows:—"I have stayed at the house several times. I went to sew, but it was only last summer that I went there, because plaintiff was afraid. At one time defendant was the worse of liquor at the stoop, and plaintiff and I went to the cherry tree to get out of his way. This was the week she left. * * * We stayed at the cherry tree about an hour and a half. Plaintiff was afraid of him, and that was why we stayed there. * * * Others, besides my brother, came to the house accidentally, and remained to render assistance if necessary. I was a little afraid because I did not know what he would do, and owing, I suppose, to hearing plaintiff say she was afraid."

Judgment.

Taking the whole of her evidence together, it confirms the evidence of the plaintiff as to the genuineness of her apprehensions from the violence of her husband, and that her apprehensions were by no means without reason. The defendant was himself examined on his own behalf, but his own denials and explanations cannot outweigh the evidence against him. His own appearance in Court, as described by my learned brother, was itself strong evidence against him, and of the untruthfulness of his statement as to his habits in the matter of drink.

Taking the account of what took place on the last of August given by *Dix* and *Whiteside*, and by the plaintiff, to be true, as it was taken to be by the learned Judge

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who heard the evidence given, it presents a case widely different from the English cases to which we have been referred. This case contains all the material elements wanting in those cases, a tendency to resort to violence on the part of her husband whenever strong drink should inflame him and a failure on the part of the wife, after efforts with that view, "to subdue and pacify those evil dispositions." The plaintiff's own brother, whose evidence leads to the belief that he desired to palliate his brother's conduct, was yet unable to say that he had not used the expression that he was killing his wife by inches. Danger to life, limb, or health, is necessary according to the old cases as well as the new, to entitle the wife to relief. It cannot be said that the danger, to the latter at least, was in this case merely fanciful. I think it in the highest degree material to our consideration of this case now, that the Judge who decreed relief in this case saw both the parties, and heard the evidence given by each, as well as by the other witnesses. Unless we think that what is deposed to by the plaintiff and her two neighbours, taking it to be strictly true, is yet an insufficient ground for relief, we ought not to disturb the present decree.

Judgment.

It is well to consider what we must hold if we refuse relief in such a case as this. We must hold a wife bound to submit to blows, to be kicked at, to be held by the arm with her husband's fist threatening her face; to be told to begone, and such other like violence and indignities as a husband brutalized by drink may inflict; and still be bound to live with him and endure it all, and live in short a life that is simply intolerable. The law of England, in its care that husband and wife should not be separated upon slight grounds, has gone far enough in exacting endurance from the wife. It has not gone so far as we should go, if we refuse relief in this case.

I have considered the case only upon what took place on the 30th and 31st of August. The plaintiff, in her

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evidence, gives an account of four previous occasions of intemperate and violent conduct, and what may be called domestic tyranny on the part of her husband: on none of which, however, was any blow inflicted by him. None of these acts are charged in the bill, and the plaintiff having continued to live with the defendant had condoned them. Some gentlemen of the profession, I have reason to know, have an idea that upon proof of some act not condoned, it is open to them to give evidence of previous acts which have been condoned; and so far they are right, but they go further, and hold that they may give evidence of such previous acts without their being charged in the bill. I confess I see no sound reason for this. Condonation is defined to be "forgiveness with an implied condition that the injury shall not be repeated, and that the other party shall be treated with conjugal kindness. On breach of the condition the right to a remedy for the former injuries revives:" *Pritchard* on Marriage and Divorce (*a*), *Durant* v. *Durant* (*b*), and other cases cited. Take it that the forgiveness is wiped out; and that it is as if it had never been, so that the injured party may proceed in respect of "the former injuries," is there any reason why the rule as to setting out these former injuries should not prevail? It seems to me to apply with at least the same force where there has been condonation as where there has not, perhaps with more, for after a renewal of conjugal relations past injuries may be looked upon as not forgiven only but obliterated, and parties may all strive to forget as well as to forgive. There is therefore every reason why, when old grievances, spread perhaps over several years, are renewed, they should be specified with the same particularity as is required where they are more recent. I have seen no authority against this, and reason certainly is in favor of the application of the general rule. It certainly imposes no difficulty on the wife, as all these matters are necessarily within her

Judgment.

(*a*) Page 61. (*b*) 1 Hag. 528.

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own personal knowledge. In the case before us evidence was admitted of acts previous to those on the two last days of August, and which previous acts are not specified in the bill. I understand that this evidence was taken subject to objection, and I think the objection should prevail; but I am of opinion, nevertheless, that if that evidence be put out of the case, there is still sufficient to entitle the plaintiff to a decree.

STRONG, V.C., retained the opinion expressed on the original hearing.

BLAKE, V. C.—In order to consider the sufficiency of the evidence to support the plaintiff's case, it is necessary to decide the point first raised by the defendant, which is, that on the bill as it stands only one act of cruelty can be proved; that the general statements of ill-treatment made are not sufficient to warrant the Court in allowing evidence to be given in respect of them; and therefore that the case must stand or fall on this one charge, coupled with that of habitual drunkenness.

Judgment.

There is no doubt that under the practice of the Ecclesiastical Court in England, as it existed in 1837 and 1858, the charges made, with the one exception mentioned, are not here pleaded so specifically as is there required. The rule there laid down is, that a petition for judicial separation on the ground of cruelty should specify all the acts intended to be relied on as constituting cruelty: *Goldney* v. *Goldney* (*a*), *Windham* v. *Windham and Cleugham* (*b*), *Suggate* v. *Suggate* (*c*).

In the United States Courts where they are not trammelled by the English system of pleading, the practice is thus stated by Mr. *Bishop* (*d*), "The pleader should

(*a*) 32 L. J. Mat. Cas. 13. (*b*) 9 Jur. N. S. 82.
(*c*) 1 S. & T. 489. (*d*) Bishop on Divorce, secs. 654, 655

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be as accurate as possible in these cases, in stating the times and places in which the cruelty was inflicted. * * It is not easy to lay down such general rules as will guide the practitioner in all cases wherein he may desire to allege cruelty concerning what the allegation shall contain; and the Courts seem not, in this country, to be quite harmonious in their decisions on the subject. Yet it is probably true everywhere with us, that to allege cruelty in general terms and in the mere words of the statute is not sufficient; the facts must, with greater or less minuteness, be set out, and the Court, where there is a trial by jury, is to decide on the sufficiency of the facts alleged, and the jury is to find whether or not the facts transpired (*e*),—plainly, both on the authorities cited to the last section, and on general principles of pleading, there may or should be in these cases, besides the particular allegations of specific facts, a general allegation concerning the habit and demeanour of the party complained against, in his matrimonial relations with the complainant."

Judgment.

Our general orders require that the bill should contain a statement of the plaintiff's case in clear and concise language. Here the case depends on certain acts of cruelty; the marriage has lasted for over eighteen years—one act of cruelty has been particularized as having taken place on the last day that plaintiff and defendant lived together as husband and wife; and, on the record thus framed, the wife alleges she can go into evidence of any act of cruelty of which the husband has been guilty, throughout the whole course of the marriage. If, under this one specific act, the complainant is to be allowed to go over the whole of their past life, it would necessitate a defendant in every case on a single allegation of cruelty to protect himself by bringing before the Court, no matter at what expense, the

(*a*) Sec. 652.

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friends, relatives and domestics, that may from time to time, through a course of years, have had knowledge of his conduct as a husband, in order to answer any charge which the evidence of the plaintiff may make against him. In some cases, where a bill is filed for discovery as well as for relief generally, it is necessary to relax somewhat the rules of pleading. But in suits such as the present, where all the circumstances are within the knowledge of the party complaining, no reason exists for not distinctly stating the particulars on which reliance is placed for the relief sought. It is for the Court to say, whether or not the allegations sufficiently notify the defendant of the matter complained of. Under the present liberal system of pleading, if it appear that the defendant has been misled because the statements in the bill have not been pleaded with sufficient minuteness, any omission of the kind can, in most cases, without much difficulty, be remedied. I am of opinion that the rule must be laid down, that where there is a general allegation of cruelty, and one specific act is pleaded, and the defendant objects to evidence being given as to any but this one act, and the plaintiff does not ask to amend, but proceeds on the record as it stands, there the case must depend on the sufficiency of the specific allegation. That is the case here, and I think the general habits of intoxication and the ill-treatment of the 31st of August, having been alone pleaded with the particularity which is required, the case of the plaintiff must stand or fall thereon.

Judgment.

In England it has been broadly laid down that a habit of intoxication on the part of the husband, is not sufficient to warrant the interference of the Divorce Court in favor of the wife. It is, I think, to be regretted that the giving way to this, which is the fruitful parent of so many vices, and which so completely unfits the husband for the duties which he has, as such, undertaken—which turns him, who is bound to be the protector and guardian

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of his family, into a being incapable of holding this position, whose conduct leads them into that which he should teach them to shun, and opens the door in others to a freedom and laxity, the effects of which may be seen in the ruin of his children, should not have been considered as a sufficient cause for grounding a temporary separation. If it were simply the claim of the husband as against the wife, the hope of a reformation to be effected by the hearty co-operation of the latter, might lead the Court a considerable length in asking the wife to continue the duties which she has undertaken; but the matter assumes a very different aspect when the children are to be eye witnesses of the daily disgrace of their parent. In several of the States of the Union habitual drunkenness will justify a divorce. There, "if there be a fixed habit of drinking to excess to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance, although the person may at intervals be in a condition to attend to his business affairs, and a divorce will be granted" (*a*).

Judgment.

But, although habits of intoxication do not form a sufficient ground for relieving the plaintiff, they are material to be considered in connection with other objectionable acts of the defendant, as they may shew that from his state, the plaintiff will be more liable to a recurrence of the ill-treatment than if the husband were sober.

The bill alleges that at the time of the cruelty complained of, the plaintiff was living with the defendant as his lawful wife, and that he then struck her on the head with a stick and otherwise ill-treated her, whereupon she was obliged to leave; and has since remained away.

If this statement in the bill were correct, there would not have been much difficulty in coming to a conclusion

(*a*) Bishop, secs. 313, 314.

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as to the proper decree to be made; but the evidence shews, that at the time referred to, which was the 31st of August, the plaintiff was not living with the defendant as his lawful wife, but that she had left him on the 29th of the same month. The plaintiff thus speaks of her departure in her examination before the Court: "He never struck me, except in August last; when I went away I did not intend to return to my husband; I did not sleep at home on the 30th of August, nor did I intend ever to sleep there again." So that we find that the wife left the husband on the 29th of August, intending never to return; that she came back in a couple of days; that then the husband, being annoyed, struck her and turned her away, and she has not returned since. I do not think the wife was justified in going away on the 29th; and I think the husband was warranted in shewing his annoyance at this act of the wife, and in reproving her for this dereliction of duty. It is necessary, however, to consider whether the punishment was greater than the fault called for; and further, whether the offence was forgiven, or the wife had reasonable apprehension of a renewal of the same treatment at the hands of her husband. When the wife left the husband on the 29th of August, she may have thought she had reason for so doing. Thereafter she wanted a settlement or reconciliation with her husband, and her neighbours, *Dix* and *Whiteside*, called with her on her husband and explained her wishes. The following is the account given by these gentlemen of the reception the wife then met with. The husband said: "I've got a rod lying up and I'll give her a good thrashing. Defendant went towards her, picked up a rod from the grass, found fault with her, and went at her and struck her a few times; she screamed and ran behind us, and then down into the field, and he told her to begone * * after a little he made at her as if he was going to strike; she got up and ran, and I saw him kick at her. He caught her by one arm, apparently very firmly, she said, 'don't break

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my arm; as he held her, he stretched his fist several times towards her face, and said, 'see how near I can come to your face without hitting you;' after awhile he let her go, and told her to begone; she ran down into the field."

In *Plowden* v. *Plowden* (*a*), the Court held that "As the future safety of the wife from injury to person or health is the ground of the Court's interposition, it becomes necessary, in cases like the present, where the alleged cruelty is to be found only in the events of two or three successive days, to be the better satisfied that the conduct complained of is well proved, is so far referable to permanent causes as to be likely to recur, and is of the dangerous character imputed."

Judgment.

Sir *Cresswell Cresswell*, in the first case under the Act to amend the law relating to Divorce and Matrimonial causes (*b*), tried before him with a jury, in his charge quoted the decision of Lord *Stowell* in the leading case of *Evans* v. *Evans* (*c*), as laying down the law on the subject as it stands at the present day. The following passages are taken from that judgment.: "When people understand that they must live together, except for a very few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off: they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching what it imposes." The causes which warrant separation "must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged, for the duties of self preservation must take place before the duties of marriage. * * What merely wounds the

(*a*) 18 W. R. 902. (*b*) Tomkins v. Tomkins, 1 Sw. & Tr. 168.
(*c*) 1 Consist. 35.

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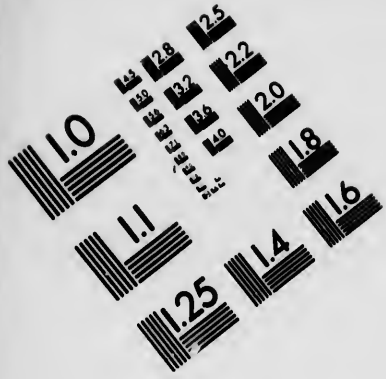
mental feelings is in few cases to be admitted, where it is not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection, must subdue by decent resistance or by prudent conciliation: and if this cannot be done, both must suffer in silence. In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health, is usually inserted as the ground upon which the Court has proceeded to a separation. The Court has never been driven off this ground; it has always been jealous of the inconvenience of departing from it, and I have heard no case cited, in which the Court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be reasonable, it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind."

Judgment.

In the case before us the difficulty as to the proof of the facts which so often appears is not found. Here what is complained of took place in public. The wife, accompanied with two of her neighbours, approached her husband, and sought a reconciliation or settlement with him. In their presence she was struck with a rod "and told to begone," whereupon she ran away; a second time "he made at her, * * and kicked at her, * * caught her by the arm, * * shook his fist in her face, * *



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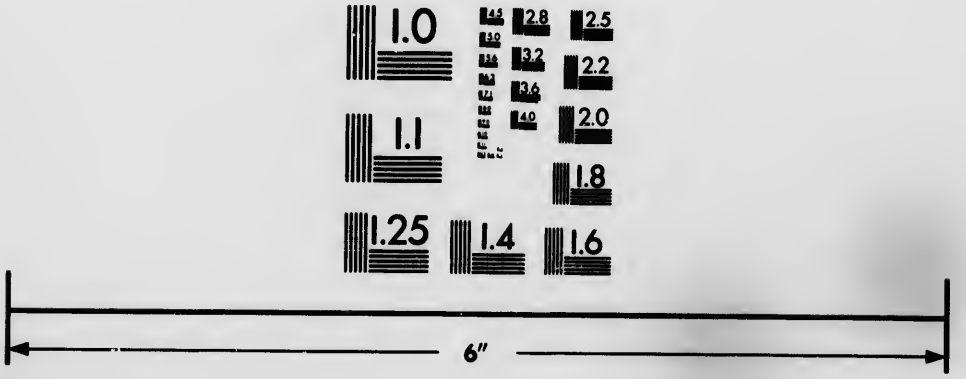

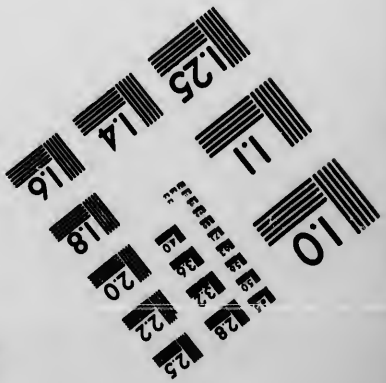

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1873. Rodman v. Rodman. and told her to be gone." Here we have the manner in which the wife was treated when she comes to ask to be reconciled; we have her beaten, refused admittance to the house, and driven from her home; we have cause for concluding that this ill-treatment would be continued should opportunity be furnished therefor. It is not unreasonable to say, if a sense of shame and decency would not in public prevent a man from being guilty of so gross an outrage to one he is bound by the most solemn vows to treat far otherwise, what would he not be guilty of when placed beyond the view and control of others? Is it reasonable for this Court to say, we will compel the wife to return? or, is the correct conclusion that she has good reason for fear, and is therefore justified in living apart. Has the Court such evidence as binds it to yield to the consideration of her future safety?

Judgment. It is but charitable to conclude that the acts of the defendant, in which it seems he has but recently indulged, arise from a diseased state of mind and body. The Vice Chancellor considered that the spells or spasms spoken of by the witnesses were the effect of the excessive use of liquor; that they were or arose from what is ordinarily termed, *delirium tremens*. The brother, *George Rodman*, called as a witness for the defendant, says, "I have been often sent for, to go to defendant's house to assist him when in his spells. He was helpless; not wild when in these spells." *George Broad* says, "When I have seen him in his spells, his head seemed distracted, and he was restless. He could not lie down or sit still."

It was said that Dr. *Andrews*, his medical attendant, now dead, stated he had *delirium tremens*. I think it was for the defendant to explain if he could, that these attacks arose from a cause other than that to which they generally are under such circumstances as the

present, and have been here attributed, and he has not done so. The Vice Chancellor states that the appearance of the defendant shewed that he suffered from the excessive use of intoxicating liquor. 1873. Rodman v. Rodman.

The plaintiff and defendant were both examined at the hearing of the cause. Much would depend upon the manner and spirit in which their evidence was given. The Court always is most desirous that these suits shall end in reconciliation rather than separation, and accepts gladly any symptom from which it may conclude that it will tend to the happiness of husband, wife and children, if the parents were again to live together. But where the Judge in the Court below, having all this in his mind, concludes that such an attempt will fail in procuring the results so much wished for, the Court on rehearing cannot, standing in a position so much more disadvantageous for the dealing with the case, come to the conclusion he erred in his judgment. It is true tho defendant now offers to take his wife back, but I think the Court should be very slow to accept these repentances made at the eleventh hour, and under the provocation of a decree for alimony hanging over the head of the supposed penitent. I cannot say that the wife has been free from blame in the matter. She left her husband without just cause. She returned with two of the neighbours, which, in itself, may have been a means of aggravating her husband, as he may not unreasonably have desired that their difficulties might be kept private; then the only blow ever struck in eighteen years, was given to the wife by the husband. It was done under circumstances of provocation. The husband would have been, on the facts as proved, more justified in approaching his wife with her neighbours to demand a settlement than was the wife. Up to this point, it was the wife that had done wrong and not the husband. If the matter had not gone further than the blow, I do not think the authorities would have warranted the decree made; Judgment.

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but, followed as it was, by the demand that the wife should begone, which was again repeated shortly after, I think the decree can be upheld, although I would have been equally well pleased had this single act of cruelty during a married life of eighteen years, under the circumstances of provocation that it took place, been overlooked. I cannot form as correct an opinion upon the propriety of so dealing with the case, as could the Judge before whom passed the parties to the record, the witnesses and all the many little circumstances attendant upon an examination and hearing, which, although trivial in themselves, assist much in the conclusion to be formed. I think, under the allegations on which the plaintiff was entitled to give evidence, the decree can be sustained, and, as the Vice-Chancellor still adheres to his finding on the facts, that it should be affirmed with costs.

McGregor v. McGregor.

Will, construction of— ...er—Election.

A testator directed first that all his ...s, funeral and testamentary expenses should be paid, and then that all his real and personal estate of every nature and description should be equally divided between his wife and mother, share and share alike:

Held, that the widow was not entitled to dower and to the provision made for her by the will; but that she was put to her election.

Hearing at Sarnia.

Mr. *Pardee*, for the plaintiff.

Mr. *J. A. McKenzie*, for the defendant.

Judgment.

Spragge, C.—The question made in this case is, whether the widow of the testator is entitled to dower in the real property of her husband, in addition to the provision made for her by his will, or is put to her election.

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The will is a short one. After directing payment of his debts, and funeral and testamentary expenses, it proceeds thus: "And secondly, I will and devise that after payment as aforesaid, all my real and personal estate of every nature and description whatsoever and wheresoever, shall be equally divided between my beloved wife *Rosetta McGregor*, and my mother *Agnes McGregor*, share and share alike." Then follows the appointment of executors, and we have the whole of the will.

For the wife's contention, the rule is invoked that where a testator says he gives all his estate, he does not mean to give his wife's estate, *i. e.*, her right to dower; but it must always be a question in what sense the word "estate" is used by the testator, whether the property itself which is the subject of devise, or that which in the contemplation of law is the testator's interest in that property. It is entirely a question of intention, and it is quite clear that if the Court can see, from the frame and the provisions of the will, that what the testator means to dispose of is the land itself, and not his own interest in it, the widow is put to her election; or, as it is generally put, if the claim of dower is inconsistent with the disposition of the land made by the will, the widow is put to her election.

Judgment.

The provisions of the will in *Chalmers* v. *Storil* (*a*) resemble very closely the provisions of the will in this case. The testator gave to his wife and his two children a daughter and a son, "all my estates whatsoever, to be equally divided amongst them, whether real or personal, making no distinction in favor of the male, as it is my intent that my daughter shall have an equal share with my son of all my property after paying the following legacies," which were specified. The testator then,

(*a*) 2 V. & B. 222.

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as the report says, specified the property bequeathed by him; and this, it is true, was considered by the learned Judge as tending to shew that it was the property itself there described, and not his interest in it that was the subject of devise. Besides that reason, however, he gave this, which is applicable to the case before me. "The testator directing all his real and personal property to be divided, &c., the same equality is intended to take place in the division of the real as of the personal estate; which cannot be, if the widow first takes out of it her dower, and then a third of the remaining two thirds," and he held the claim of dower to be directly inconsistent with the disposition of the will.

Sir *Thomas Plumer* proceeded upon the same principle in *Dickson* v. *Robinson*, (*a*) where there was a devise of all the real and personal estate of the testator in trust for the equal benefit of his wife and two daughters, and of any, of which his wife was then *enceinte*. Mr. *Jarman* says (*b*) that this case was decided on the authority of *Chalmers* v. *Storil*. The Master of the Rolls said indeed, that he could not distinguish the two cases, but he added his own assent to the earlier case, observing, "The substance of the will is, that there should be an equal division of the property, which cannot take place if the widow is to have a third. The real and personal estate are united together; the personal estate is not subject to any antecedent claim; and, is not the real estate intended to be given in the same manner? The principle certainly is, that the Court will go as far as it can, not to exclude the claim to dower, but here it would be inconsistent with the will." There was in that case no designation of the property bequeathed and devised; and no such words as share and share alike, and no equivalent words appear to have been in the will.

Judgment.

Roberts v. *Smith*, before Sir *John Leach* (*c*), was a

(*a*) Jac. 503. (*b*) 3rd Ed. p. 436. (*c*) 1 S. & S. 513.

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decision upon the same principle. The Master of the Rolls said, "The principle referred to in *Chalmers* v. *Storil* decides this case. The plain intention of the testator was that the wife should have half the income of his property for the maintenance of herself and her children by a former husband; and that the other half of the income should be applied to the maintenance and education of the testator's own children. That intended equality would be disappointed if the wife were in the first place to take her dower."

Mr. *Jarman*, in his valuable book on the Law of Wills, takes exception to all these decisions. If I agreed with him, which I do not, I should still feel bound to follow the decided cases. He seems to me to push to an extreme length the doctrine that when a testator devises all his estate, he is to be taken to mean all his interest in the estate devised, leaving the right of dower in the wife intact; and he reasons from this, that where a testator directs all his estate real and personal to be equally divided, he is to be taken to mean his estate after satisfying his wife's dower; although the wife be one of those between whom this equal distribution is to take place. Such a construction appears to me a forced and unnatural one, and one that would almost certainly disappoint the intention of the testator.

Judgment.

My conclusion is, that the widow is put to her election.

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FALLS v. POWELL.

Account—Demurrer—Proceeding in Master's office de die &c.

The bill in this case alleged that under a yearly engagement the plaintiff agreed to discharge the duties of Deputy Sheriff for the defendant, for which he was to be compensated by a proportion of the fees payable on certain services performed by the Sheriff; that shortly before the expiration of the second year the defendant discharged the plaintiff, and, as alleged, refused to account to the plaintiff for his portion of the fees, whereupon the plaintiff filed his bill, claiming that he was entitled to share in the fees for three years, that the items upon which he was entitled to a share of the fees numbered over one thousand, and that he had no means of shewing the amount due him except by a discovery from the defendant, and praying an account and relief consequent thereon. A demurrer thereto for want of equity was overruled; although had the plaintiff seen fit to institute proceedings at law to enforce payment of his demand, this Court would not have withdrawn it from that jurisdiction by granting an injunction to stay proceedings.

It is the bounden duty of the Masters of this Court to observe, to the letter, the General Orders of the Court requiring references to be proceeded with in their offices *de die in diem*.

The Administration of Justice Act (36 Vic. ch. 8, Ont.) may be considered as a Legislative recognition of the principle which has always prevailed in this Court, that the fitness of forum is the test upon the question whether a suit brought in this Court should be retained and adjudicated upon here or transferred to a Court of Law.

Statement. This was a bill by *William Hugh Falls* against *William Frederick Powell*, setting forth that defendant being sheriff of the county of Carleton, on or about the first of January, 1870, applied to the plaintiff to accept employment as his deputy, to assist in the discharge of the defendant's duties as such sheriff, whereupon plaintiff accepted the appointment, and for his services as such deputy sheriff, and as a remuneration therefor, the defendant agreed to pay for a yearly hiring of the plaintiff to commence on said 1st of January, a moiety of the following emoluments of the office from day to day, and so soon as the same had been collected and paid to the defendant, that is to say, one half the fees, of travelling on and service of all writs that should

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pass through the sheriff's office; one half of the fees and poundage on writs of execution; one half of the fees on the sales of lands for taxes; one half the fees per day on conveying prisoners to the penitentiary, or out of the county, when such services were performed by plaintiff as such deputy; one half of the allowances for summoning grand, petit, or special jurors, and one half the travel thereon; also, one half of the sums charged for filing papers in the office; one half of the fees for attendance at all Courts, and one half of all fees paid for searches in the office. That notwithstanding the mode of remuneration of the plaintiff it was expressly agreed that plaintiff's employment should be a yearly hiring, and out of plaintiff's moiety of fees he was bound to pay for all services of bailiffs and one half the printing required in the office. That plaintiff entered upon the duties of the said office of deputy sheriff on the said 1st of January, and faithfully performed such duties, and made the payments agreed to be made by him up to 15th November, 1871, when the defendant, without any previous notice, broke the agreement, and discharged the plaintiff from his employment, and that in consequence the plaintiff was entitled to the same fees and remuneration until 1st January, 1873. That defendant had not paid plaintiff the moiety of such emoluments for and during that period, but only a small portion thereof, and not more than the plaintiff would have been entitled to receive for three months, and defendant denied the plaintiff's right to any further sum for his said services.

Statement.

The bill further alleged that the number of items plaintiff was entitled to a share of was very great, and they in fact comprised upwards of a thousand items and "that owing to the immense number of items upon which individually the remuneration of your orator's services as aforesaid requires to be estimated, your orator hath no adequate remedy in a Court of Law and the said account could not be taken in a Court of Law."

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That the defendant had possession of all books, accounts, vouchers, papers, and documents, and a full discovery thereof was required to enable the plaintiff to determine the amount due to him—plaintiff averring that a large sum, not less than $3,000, was due him—for services to the defendant from the 1st January, 1870, to the 1st January, 1873, which the defendant, though frequently applied to for the purpose, had refused to settle with or pay to the plaintiff. That the account between the parties could not be properly taken except in a Court of Equity, and all the knowledge of the accounts was in the keeping of the defendant, and plaintiff could not make up the account or ascertain the same except from the defendant; and he claimed that defendant was a trustee for plaintiff of his share of such fees, and that defendant should account for and pay over the same; and prayed relief in accordance with these allegations.

To this bill the defendant demurred generally for want of Equity.

Mr. *Moss*, Q. C., for the demurrer.

Argument.

What is really sought here is, to make this Court try the question whether plaintiff had been improperly discharged by the defendant from his employment. The bill alleges that plaintiff was wrongfully discharged, but this the Court will not inquire into. Neither will the Court entertain a bill for an account even between a principal and his agent, unless the accounts between them are complicated, and here there is no allegation that there is any complication in them.

In this case nothing is shewn to warrant the plaintiff taking proceedings in this Court, instead of bringing an action at law, where the question of damage, as well as the amount of fees, could be inquired into and adjudicated upon. He referred to and commented on *Phillips*

v. *Phillips* (*a*), *O'Connor* v. *Spaight* (*b*), *Fleuker* v. *Taylor* (*c*), *Smith* v. *Leveaux* (*d*), *The Southampton Dock Company* v. *The Southampton Harbour and Pier Board* (*e*), *The Taff Vale Railway Company* v. *Nixon* (*f*), *Padwick* v. *Hurst* (*g*).

Mr. *Fitzgerald*, Q. C., contra, contended that the case was clearly one entitling the plaintiff to equitable relief: that although the cases reported are generally cases by the principal against the agent, still there is nothing in principle, and no case can be found establishing that relief cannot be obtained in the same manner by an agent against his principal. He also pointed out that even if an objection would hold that a bill would only lie by a principal against his agent, that principle applies here, for the agent is ordinarily the accounting party; and here the defendant is really the party to account.

Argument.

The demurrer admits the statements of the bill for all purposes of this argument to be true, and it is distinctly alleged in the bill that the items of account are very numerous; that defendant alone has the papers and documents evidencing those items; that the defendant alone can give the information necessary for making up a proper statement of account, and that for the purpose of ascertaining what the plaintiff has really a right to, a discovery is required from the defendant.

He referred to *Shepard* v. *Brown* (*h*), *Harrington* v. *Churchward* (*i*), *Barry* v. *Stevens* (*j*), *Hill* v. *The South Staffordshire Railway Co.* (*k*).

(*a*) 9 Hare, 471.
(*b*) 1 S. & L. 305.
(*c*) 3 Drew, 188.
(*d*) 2 D. J. & S. 1.
(*e*) L. R. 11 Eq. 254.
(*f*) 1 H. L. C. 111.
(*g*) 9 Hare 575.
(*h*) 9 Jur. N. S. 195, S. C. 4 Giff. 208.
(*i*) 6 Jur. N. S. 576.
(*j*) 9 Jur. N. S.
(*k*) 11 Jur. N. S. 192.

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SPRAGGE, C.—The bill alleges that the defendant being sheriff of the county of Carleton, engaged the plaintiff as his deputy, his services to commence on the 1st of January, 1870, the hiring to be by the year, and the plaintiff to be remunerated by the payment to him from time to time as received of one half the fees on a large number of official duties enumerated in the bill. The plaintiff alleges that he entered upon and performed his duties until the 15th of November, 1871, when the defendant broke his agreement with the plaintiff, and discharged him from his employment: that the defendant has not paid the plaintiff the moiety of fees come to his hands according to agreement, but a small portion only, and not more than he would be entitled to for three months, and now denies the plaintiff's right to any further sum.

Judgment.

The plaintiff so far states a mere legal right for which he could have his remedy at law. His grounds for coming into this Court are stated in paragraphs 7, 8, 9, 10, and 11, of the bill.

It is not a case of *mutual* accounts, and the bill does not state that they are complicated, nor would they appear to be so from the plaintiff's description of them. I mean complicated in the ordinary sense of the term, *i.e.*, complex and intricate.

In *Padwick* v. *Hurst* (*a*), before Lord *Romilly*, and in *Phillips* v. *Phillips* (*b*), and *Padwick* v. *Stanley* (*c*), before Sir *George Turner*, it was held as a general rule that it was only where there are mutual accounts that the Court would take cognizance of matters of account.

In *Smith* v. *Leveaux* (*d*), the Lords Justices *Knight Bruce* and *Turner* reversed a decision of Vice Chan-

(*a*) 18 Bea. 575.
(*b*) 9 Hare, 471.
(*c*) 9 H. 627.
(*d*) 2 A. D. J. & S. 1.

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cellor *Page Wood*, who held a plaintiff entitled to come to this Court for an account who had acted as agent in soliciting orders for wine merchants, and who was to be paid by commission. Lord Justice *Turner* said that the only ground upon which he could come into equity would be that it was the duty of the defendant to keep accounts in respect of the orders obtained from the plaintiff's friends and connections, and that there was no contract on the part of the defendant to keep such account, and that he would give no opinion whether if there were such a contract it would entitle a Court of Equity to interfere. The learned Lord Justice in that case and in the other cases decided by him to which I have referred, appears to have been apprehensive of the consequences of opening the door too readily to entertaining matters of account in the Court of Chancery. We find him, however, in a subsequent case, *Hill* v. *South Staffordshire Railway Company* (*a*), using this language: "This Court has a concurrent jurisdiction with a Court of Law in matters of account, but it does not hold itself bound to exercise its jurisdiction. It exercises, or refuses to exercise it, according to the nature and character of the account to be taken. If, on the one hand, the account be simple and the remedy at law free from embarrassment, it will not interfere, but if, on the other hand, the account be so complicated as that a Court of Law, from the imperfection of its powers, or otherwise, has no adequate means of dealing with the case, it entertains a suit for the account." And quoting Lord *Cottenham* he adds: "Every case of this nature must * * depend upon its circumstances."

Judgment.

Every case depending upon its own circumstances, and the Court using its discretion in the exercise of the jurisdiction, it is not surprising if we find among the large number of cases upon the subject some apparent

(*a*) 11 Jur. N. S. 192.

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conflict in the decisions. This may, indeed, have arisen partly from this, that the plaintiff in equity is sometimes a defendant at law and comes into equity for a injunction. Lord *Truro*, in *The South Eastern Railway Co.* v. *Brogden* (*a*), alludes to this. He says, "I think sufficient distinction has not been made between cases where this Court will entertain jurisdiction over a matter of account; and where this Court will withdraw a matter of account from a Court of Law. There are many cases in which it seems to me, looking through the whole of the decisions, that this Court would properly entertain jurisdiction in the matter where, if the parties making the claim proceeded at law, the Court would not as a consequence, because it would itself exercise jurisdiction if appealed to, withdraw it from the jurisdiction of a Court of Law"; and again, referring to *The Taff Vale Railway Co.* v. *Nixon* (*b*), he says, "That was a case where the contractor filed his bill praying an account to be taken of his demand against the company, in equity. The company contended that the demand was purely legal, and therefore that equity ought not to interfere. The House of Lords, however, considered that it was an account which could not be taken with justice to the parties, at law. In that case no action had been brought; on the contrary, it was the party claiming the demand who sought the interference of a Court of Equity. The case came on upon demurrer, that is to say, the defendant denied that the Court had any jurisdiction to take such an account as the plaintiff claimed in his bill, and the House of Lords overruled the demurrer. It must not, however, be concluded that in every case of concurrent jurisdiction in which this Court would overrule a demurrer on the ground that the bill disclosed sufficient equity, it would, therefore, withdraw the matter from a Court of Law. That will depend upon the circumstances of each particular case."

Judgment.

(*a*) 3 McN. & G. at 23.

(*b*) 1 H. L. C. 111.

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And I take it, from the language of Lord *Cottenham*, in *The North Eastern Railway Company* v. *Martin* (*a*), that he was largely influenced by such considerations in refusing to interfere by injunction. Some observations of Lord *Cottenham* in that case upon the exercise of the jurisdiction, I cannot do better than quote: "The jurisdiction in matters of account is not exercised, as it is in many other cases, to prevent injustice which would arise from the exercise of a purely legal right, or to enforce justice in cases in which Courts of Law cannot afford it, but the jurisdiction is concurrent with that of the Courts of Law, and is adopted because in certain cases it has better means of ascertaining the rights of parties. It is therefore impossible with precision to lay down rules or establish definitions as to the cases in which it may be proper for this Court to exercise this jurisdiction. The infinitely varied transactions of mankind would be found continually to baffle such rules, and to escape from such definitions. It is, therefore, necessary for this Court to reserve to itself a large discretion, in the exercise of which due regard must be had not only to the nature of the case, but to the conduct of the parties." Judgment.

In *The Taff Vale Railway Company* v. *Nixon*, a graphic description was given by Lords *Campbell* and *Brougham*, of what usually took place at *Nisi Prius* upon long questions of account being brought before a jury. The facts of that case were different, but the observations are apposite. Lord *Campbell* said: "What would be done if such an action were brought at *Nisi Prius?* I know that within five minutes from the opening of the case by the leading counsel for the plaintiffs, the Judge would say, 'If we sit here for a fortnight we cannot try this sort of case, and therefore it is indispensably necessary for the sake of justice—not to save us

(*a*) 2 Ph. 758.

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from the trouble of trying the case, which we are perfectly willing to take—but for the sake of justice, that there should be a reference to an arbitrator who will take accounts between the parties.' My Lords, in ninety-nine cases out of a hundred, that recommendation would at once be acceded to. Sometimes there is a wrong headed client, who is fool enough to resist such a recommendation, and to whom, according to a well known saying that we have in Westminster Hall, it is necessary to use "strong language" to induce him to listen to the recommendation of my Lord the Judge. But, my Lords, it is quite clear that trial by jury never was meant for such a case, and it is wholly incapable of doing justice in such a case. Although a demand may resolve itself into a legal demand, still if there is such a complication of accounts that it is not a fit case for a trial at law, then according to the rule laid down by that most eminent Judge, Lord *Redesdale*, a bill in equity is the remedy. That if properly pursued will be effectual, because that is followed by a reference to the Master, and the Master takes the account, and he does justice between the parties; he at once doing properly what, after great expense incurred by an action at law in bringing the case before a jury, would at last have to be attempted by arbitration. My Lords, I may be allowed at this point to say that I think some important improvement might be made even with reference to this remedy of a bill in equity in a case of this sort; because I think it is an enormous hardship upon parties coming into the Master's office, taking out warrant after warrant for months and years, and sitting an hour a day in a very complicated account. But if there were to be means taken, which I hope we may see taken in cases of this sort, first of accelerating the proceedings for bringing it into the Master's office, and then when in the Master's office going on continuously until the account is taken, speedy and ample justice would be done."

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Lord *Brougham* followed in much the same strain, observing: "My Lords, I rise only to mention a circumstance which my noble and learned friend reminds me of, that it was formerly so much a matter of course, where cases of this sort came before us at *Nisi Prius* upon the Northern circuit, to refer them to arbitration, that we invented a phrase for it at consultation, the meaning of which was, that it could not be tried, and that the leading counsel for the plaintiff would, what is commonly called, 'open a reference.' Now, the course ought to be a bill in equity; that is clearly the best remedy; and with my noble and learned friend I entirely concur, in the hope that we may live to see such an improvement in the practice as would eradicate all the abuse, and stop all complaints against the Master's office, and almost against the Court of Chancery—that of parties being obliged to go on, not *de die in diem* merely, but *de hora in horam*, as they do at *Nisi Prius* after due notice."

Judgment.

Both these learned Lords took occasion to allude to the mode of proceeding in the Master's office, and to suggest what it ought to be. They suggest that it should be, what by our General Orders it is directed to be.

With the imperfect mode of taking accounts in the Master's office in England, it was held that it was the proper tribunal rather than a jury. *A fortiori* would this be the case where accounts are taken as they are directed to be taken in this Court.

Lord *Cottenham* took occasion in *The North Eastern Railway Company* v. *Martin*, to combat the notion that he thought had arisen from the remarks of Lords *Campbell* and *Brougham*, in the case that I have last referred to, that accounts ought to be decreed in this Court in all cases in which references would be pressed

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at *Nisi Prius*, observing that he could not accept any such ground or measure for exercising the equitable jurisdiction of the Court in matters of account; adding, "It has rules and principles of its own, although the practical difficulty experienced in proceeding at law does form an important consideration in the exercise of the *discretion* of this Court."

I think it cannot be now contended that in order to a party being entitled to have an account taken in this Court, it is necessary to shew either that there are mutual accounts, or that the accounts are complicated, complicated, that is, in the sense of being complex, mixed up or intricate. They were not so, nor were there mutual accounts, in *Shepard* v. *Brown* (*a*). The plaintiff was entitled to a commission on sales of railway iron effected through him for the defendant in France, and filed his bill for an account or rather for discovery and account. There was a demurrer, and the usual contention that a Court of Law was the proper forum, but the bill was sustained, partly, certainly, on the ground that the plaintiff was entitled to discovery, but not wholly on that ground, the Vice Chancellor citing Lord *Cottenham* (*b*), that "the question whether the remedy for an account should be at law or in equity should be decided with a view to the most convenient mode of having the question decided."

Judgment.

The case nearest, perhaps, in its circumstances to the one before me, is that of *Harrington* v. *Churchward* (*c*), It was a case of hiring and service, the party hired to be compensated in part by salary, and in part by a per centage upon net profits and earnings; as to which annual accounts were to be made out and declared by the employer. Lord *Hatherley*, then Vice Chancellor, after

(*a*) 4 Giff. 208

(*b*) p. 218.

(*c*) Jur. 6 N. S. 576.

holding the plaintiff entitled to come into Court upon the agreement not performed for making out and declaring the accounts, added, "But if it depended on the more narrow point on his wages depending upon the profits and his wanting the discovery in respect of it, and there being no specified agreement as they contend, the case would fall distinctly within the authority of *The Taff Vale Railway Company* v. *Nixon*," from which he quotes passages of Lord *Cottenham's* judgment, to which I have already referred. 1873. Falls v. Powell.

Many of the cases to which I have referred differ in several particulars from the one before me. I have referred to most of them for the enunciation of the principles upon which the learned Judge who decided them professed to act. I refer particularly to what was said by Lord *Cottenham* in *The North Eastern Railway Company* v. *Martin*, that it is impossible, with precision, to lay down rules or establish definitions as to the cases in which it may be proper for the Court to exercise the jurisdiction; and that it is necessary for the Court to exercise a large discretion. It is, therefore, to the principles enunciated, rather than to the facts of any particular case, that we must look for guidance. I think it is a fallacy to start with the idea, that because this is a money demand the presumption is that the disposition of it belongs to a Court of Law: that fiduciary relation, or mutual accounts or complication of accounts, is necessary in order to a Court of Equity having jurisdiction. It is matter of account; and being so, the jurisdiction of a Court of Equity is concurrent with that of a Court of Law, and the question in each case is, which Court is best fitted by its constitution and machinery to deal with it. It is not a question *between* Courts of Law and Courts of Equity, but simply a case of the administration of justice. It is true that Courts of Equity themselves deal with it; but suppose there were a third tribunal, whose duty it Judgment.

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were in matters of account to assign to each, common law or equity, the disposition of such matters according to whether they were simple or otherwise, such tribunal would assign to each, according to its fitness by constitution and machinery, different cases as they arose. And a Court of Equity, in taking cognizance of cases, or refusing cognizance of them, ought to act, and does act, in the same spirit. Each of the Courts is diverse, each has its own advantages, each its own fitness and aptitude for dealing with particular cases.

In reason there can be no other ground for one Court rather than another, having cognizance of a case, where the jurisdiction is concurrent, than the fitness of one rather than another by constitution and machinery to deal with it; and I think the spirit of the decisions has come to this, as the principle upon which they are avowedly decided certainly has; with this qualification, however, that if a Court of Law has already cognizance of a case, a Court of Equity will not withdraw it from its cognizance merely because a demurrer would not lie if it were brought originally in a Court of Equity.

Judgment.

In the case before me, the plaintiff's case might, perhaps, be rested upon the ground that the defendant has not paid over, from time to time, to the plaintiff the moiety of fees as received by him, as, according to the agreement, he was bound to do; and that the same having run on for nearly two years, he needs a discovery in respect of the sums received. I prefer, however, to place my judgment upon the broader ground that I have indicated.

An enumeration of the items upon which the plaintiff was to have half the fees shews manifestly that the case could not be dealt with satisfactorily by a jury. (His Lordship here read that portion of the bill enumerating the items as above set forth.) It is plainly a case in which

there would at law be either a voluntary or a compulsory arbitration, which is itself any thing but satisfactory. The question, however, is not between arbitration and the Master's office, but between a jury trial and the Master's office, and it is obviously not a fit case for a jury. It is a case in which it would be impossible for a jury to do justice between the parties, if the defendant were to insist, as he would have a right to do, upon strict legal proof of the plaintiff's claim.

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On the other hand, it is a matter of account peculiarly fit for the office of the Master at Ottawa, where the venue is laid. I may take judicial notice that the Master's office and the Sheriff's office are in the same building, the Court House at Ottawa. Discovery from the Sheriff, his officers, and his books, would plainly be necessary to the plaintiff in making out his case; and all this could be had without detriment or inconvenience, public or private; the taking of the account going on continuously as provided by the orders. All this would be in striking contrast to the necessarily cumbrous and unsatisfactory investigation of the same matter that would be had before a jury. It would be difficult to conceive a case with less reason than there is in this, for withdrawing a case from this Court and sending it to a jury. The reasons, indeed, from fitness of forum and convenience of litigants are all the other way.

Judgment.

Nothing was said in argument of the Administration of Justice Act of last session. It had, indeed, not come into force when the demurrer in this case was filed and argued. If it had, the demurrer must have been at once overruled, for the 32nd section provides that "No objection shall be allowed on demurrer, or upon the hearing of any cause in the Court of Chancery, upon the ground that the subject matter of the suit or other proceeding is exclusively or properly cognizable in a Court of Law." And it then goes on to provide for the

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transference, by the order of the Court or a Judge, to a Court of Law, of cases more fit to be dealt with in a Court of Law than in this Court.

I have referred to the General Orders of this Court enabling parties to proceed continuously in the Master's office, and making it the duty of the Masters of this Court so to proceed. The observations that I have made as to the fitness of this Court to take accounts between parties, and of its superior fitness in cases of a like nature to this, as compared with a Court of Law, lose much of their force if the General Orders in relation to the Master's office are not observed. I apprehend that the rules laid down are too often deviated from, upon insufficient grounds, to the great delay of the business of the Court; and I speak the sentiments of my learned brothers, as well as my own, when I say that it is the bounden duty of the Masters to observe these orders to the letter, wherever it is not absolutely impracticable to follow them literally. In this case I do not at present see any reason why the taking of these accounts should not be proceeded with *de die in diem* and *de horæ in horam;* and if this be done, it will afford a good illustration of the superior fitness of this Court over a jury trial or even an arbitration for the taking of such accounts.

Judgment.

The only use that I make of this enactment is, that it is now settled by Legislative authority, and was in fact so settled before this demurrer was filed, that fitness of forum is to be the only test upon the question whether a suit brought in this Court should be retained and adjudicated upon in this Court, or transferred to a Court of Law. I am not sure, however, that the establishment of this principle by the Legislature is not itself an answer to this demurrer; for the principle was established as soon as the Act was passed. It became at once an expression of the mind of the Legislature as to what

was fit and proper under certain circumstances, which circumstances exist in this case. The Act, as an enactment, having a future operation, does not weaken the force of the expression of the mind of the Legislature at the time the Act was passed. 1873. Falls v. Powell.

I do not think, however, that this is necessary for the decision of the question before me. I have considered it and come to a conclusion upon it, independently of the Administration of Justice Act.

The demurrer is overruled with costs.

National Life Assurance Company v. Egan.

Life policy—Fraudulent misrepresentations—Jurisdiction.

An Insurance Company filed a bill seeking to have a policy declared void, and delivered up to be cancelled, on the ground of fraudulent misrepresentations when the same was being effected. The facts set forth would, if true, have been a good defence to the action; but in the view that there should be but one trial of the questions of fact, and that in this Court alone could full relief be given in the event of the fraud being established, an injunction was granted to the hearing restraining proceedings at law to compel payment of the amount covered by the policy.

Motion for injunction to restrain proceedings at law to recover money secured by a life assurance.

Mr. *Cattanach*, for the motion.

Argument.

Mr. *Boyd*, contra, contended the plaintiffs were not entitled to succeed, as the Court of Law has a concurrent jurisdiction with this Court, and proceedings had been instituted there before the bill was filed. If the ruling on this objection should be against him, in that case he desired to have the opportunity of answering the motion on the me-

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SPRAGGE, C.—This is an application for an injunction to restrain proceedings at law. The bill is by the insurers upon a life policy, to declare the policy void by reason of fraudulent misrepresentations; and that it should be delivered up to be cancelled. If the policy be void upon this ground it is not denied that in this Court the insurers are entitled to the whole of the relief prayed for, including the delivery up and cancellation of the policy.

The insurers upon the same ground have a good defence at law to the action upon the policy. If, therefore, they are right in their facts, they can defeat the action at law, but the policy would still remain in the hands of the plaintiff at law; and it might be in his power to harass the insurers with other actions upon the same policy; or he might protract litigation at law in the one action. The inability of a Court of Law to order the cancellation of an instrument has been held sufficient to give this Court jurisdiction; and the Court has in some cases enjoined the plaintiff at law from proceeding. This was done by Lord *Loughborough* in *Newman* v. *Milner* (*a*), although it was objected that the Court could not prevent the defendant from trying the question at law. Lord *Loughborough* seems to have adopted the position taken by the Attorney General (afterwards Lord *Eldon*) that "if the conscience of the Court is satisfied that a jury ought to be directed to find for the plaintiff, he is not to be sent to a Court of Law, that another Judge may tell the jury what is the clear conclusion of law upon the facts." Lord *Loughborough* exercised his discretion. He said "If anything could arise upon evidence, the credit to be given to a witness, or the advantage of a *vivâ voce* examination, I should be loth to determine it. * * The only chance I could give them would be, of a jury making a mistake and

Judgment.

(*a*) 2 Ves. Jr. 483.

giving a verdict contrary to the direction of the Judge." The instrument impeached in that case, a bill of exchange, was ordered to be delivered up. 1873. National Life Ass. Co. v. Egan.

I do not go into the question of the jurisdiction of this Court to order instruments to be delivered up to be cancelled, in cases where their invalidity does not appear upon their face; as it is conceded. It is a substantial part of the relief given by this Court, and is so treated by Lord *Eldon*, who was referring to cases of promissory notes and policies of insurance, in *Bromley* v. *Holland* (*a*). In *Jervis* v. *White* (*b*) the same learned Judge treated it, as it was treated in *Newman* v. *Milner*, as a matter of discretion whether or not proceedings at law should be enjoined.

In opposing the injunction in this case, the learned counsel for the defendant relies upon the late case of *Hoare* v. *Bremridge* (*c*) before the present Lord Chancellor. I do not think that that case overrules any previous decisions. He held certainly that where questions of fact were in dispute, a Court of Law with a jury is the proper forum for the trial of such questions. His language is, "No authorities have been cited to shew that this Court has ever, in contested questions, determined that in such a case as this it would, on an interlocutory application, grant an injunction where the other party desired to try the question at law." In another passage he says, "I think we are bound to take notice that a jury is not only the usual, but most suitable and proper tribunal to try questions of this nature," and he gives his reason for so thinking. "In this case the balance of convenience is clearly in favor of a trial at law. It is more speedy, less costly, and gives the advantage of having all the evidence subjected to cross-examination without previous rehearsal." Judgment.

(*a*) 7 Ves. at 20. (*b*) 7 Ves. 413.
(*c*) 21 W. Rep. 43.

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The advantages enumerated by Lord *Selborne* of a trial of questions of disputed fact before a jury, as compared with a trial of the same question in this Court, do not exist in this country; and so free are we felt to be, in this Province, from the imperfections attending the trial of disputed questions of fact in the Court of Chancery in England, that although it is in the power of this Court, upon the application of a party, to try questions of fact by a jury, no application for that purpose has, within my knowledge, ever been made. I may also notice the fact that the tendency of legislation and of practice in this Province is to try issues of fact at common law without the intervention of a jury; and it will hardly be contended, I apprehend, that a jury would be a more competent, or in any respect a more fit tribunal, than a Judge, for the trial of such questions as are in issue between the parties to this suit.

Judgment.

I must notice one other observation in the judgment of Lord *Selborne*; he says, "It was said that the case would still go on in equity. I can divine what the effect would be of a motion to dismiss for want of prosecution by the defendant if the only default of the plaintiff was, that proceedings were being taken at law. I am satisfied that if the case were tried at law this Court would act on the verdict, and would not disturb it." His Lordship here assumes that the plaintiff in equity would not proceed in that Court to try the issues of fact between the parties: and, with the intimation given by the Court that a jury is the proper forum, this would probably be the case; but what if the plaintiff in equity were to proceed to try those questions of fact in this Court. I see nothing to prevent him, and I see no reason why he should not. I cannot intimate to him—our course of procedure being what it is,—that a jury would be more likely than a judge of this Court to arrive at a sound conclusion upon these questions, because I believe that a Judge would be much more likely to be right.

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It would be mere affectation to express a contrary opinion. This difficulty then might arise: the plaintiff at law, not enjoined from proceeding at law, might proceed and obtain a verdict, the plaintiff in this Court proceeding and obtaining a decree; or suppose the evidence taken and the cause heard before a Judge of this Court, would he be bound or even at liberty to act upon the verdict if in his judgment the proper conclusion from the evidence before him was the other way? I think certainly not. It seems to me to be clear that there can properly be only one trial of the issues of fact. If the course of procedure to try questions of fact were the same in this Court as in the Court of Chancery in England, or if in my judgment the issues of fact would be better tried before a jury than by a Judge of this Court, I should follow *Hoare* v. *Bremridge;* but the reasons given for that decision are so entirely inapplicable to our course of procedure, that the decision itself does not apply.

Judgment.

If, as I think, there should be but one trial of the questions of fact, should it be by this Court or at law? The action at law was first commenced; but this Court is the more proper forum for dealing with the question between the parties, not only because it is a question of fraud, which *per se* would not be sufficient, but because in this Court only can full relief be given in the event of the fraud being established.

The conclusion is, that the action at law should be enjoined.

The plaintiffs in this Court offer to give judgment at law, to be dealt with by this Court; the injunction will issue upon the terms of such judgment being given; and as there is a legal right which is stayed by injunction, I put the plaintiffs upon terms of going to a hearing at the next sittings, the defendant interposing no obstacle, and facilitating as far as is reasonable a hearing at the next sittings.

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The defendant's counsel in raising the point, of what he conceived to be the altered practice of the Court, under the authority of *Hoare* v. *Bremridge*, stated that he desired to raise that point first, and in case I should be against him, he wished to shew cause upon the merits. I did not object to that course; but I think it would be unprofitable to discuss the merits upon affidavit evidence. It is probable that nothing would be gained by it, inasmuch as if the merits were left doubtful, the injunction would probably, according to the usual practice, be continued to the hearing; and the plaintiff's evidence and the discussion upon it would, to use Lord *Selborne's* language, be only "a previous rehearsal."

Judgment.

FEATHERSTONE v. SMITH.

Injunction—Undertaking and reference as to damages—Practice.

On obtaining an *ex parte* injunction restraining the sale of property, the plaintiff entered into the usual undertaking as to damages, and subsequently dismissed his bill; whereupon the defendant moved for a reference to the Master to inquire as to damages sustained by him, when in answer to the application, it was shewn that, since the dismissal of the bill, an increased price had already been offered, and that it was probable a still greater advance in price would be obtained on a sale. The Court, under the circumstances, refused the application, but without costs, and reserved to the defendant liberty to renew his application, on which he should be at liberty to use the depositions and affidavits read on the present motion.

In this case an *interim* injunction had been obtained *ex parte* by the plaintiff, restraining the defendant from selling certain timber limits held by the defendant, and which the plaintiff alleged the defendant had contracted to sell to him. On the injunction being obtained, the plaintiff had entered into the usual undertaking as to damages. On a motion being subsequently made to continue that injunction, the Court refused the motion; and the plaintiff having dismissed his bill, the defendant

thereupon moved upon notice for a reference to the Master to inquire as to the damages sustained by the defendant in consequence of his having been prevented from selling the property in question, and which he alleged he had had several opportunities meanwhile of selling. 1873. Featherstone v. Smith.

In answer to the motion, affidavits were filed by the plaintiff, shewing that recently the defendant had been offered a greater price than that agreed to be given for the property by the plaintiff; and that at a later period he would probably be able to obtain a still greater advance, as timber limits were continually increasing in value. Under these circumstances, it was contended that no reference should be directed until after a sale should have been effected, as it might turn out that, instead of sustaining a loss, the defendant had actually derived a benefit from the delay which had taken place.

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

Mr. *Boyd*, contra.

SPRAGGE, C.—The undertaking entered into by the plaintiff upon obtaining his interim injunction in this cause was "to abide by any order this Court may make as to damages, in case this Court shall hereafter be of opinion that the defendant shall have sustained any, by reason of this order, which the plaintiff ought to pay." Upon the plaintiff's application to continue his injunction it was refused; and thereupon the plaintiff dismissed his bill; and this application is for a reference to the Master to ascertain the amount of damages sustained. Judgment.

There appears to be no settled practice upon applications of this nature. *Mold* v. *Wheatcroft* (*a*) was quite

(*a*) 30 L. J. Chy. 598.

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a different case. There was there a decree for an injunction, and which directed inquiries as to what would be proper to be allowed for compensation to the respective parties for acts done by the others. It was before the Master of the Rolls, upon applications by each party to vary the Chief Clerk's certificate, and it was only in that way that the question of damages came before the Court.

Newby v. *Harrison* (*a*), only decides that the dismissal by the plaintiff of his bill does not oust the jurisdiction of the Court to enforce such an undertaking. Lord Justice *Turner* did, indeed, add this observation to his judgment, "and we must hear the whole case upon the merits, in order to ascertain whether there is really ground for the exercise of the jurisdiction of the Court. There may, of course, be many cases in which the Court will not enforce an undertaking of this kind." It is probably this observation of the Lord Justice that has induced the parties to go as fully as they have done into the merits of this case, so far as it relates to the question of compensation.

Judgment.

The Court must come to the conclusion that the defendant has sustained damage by reason of the order; and, that it is a damage which the plaintiff ought to make good. The affidavits and depositions are directed to both these points. In *Bingley* v. *Marshall* (*b*), the Court was willing to grant relief to the plaintiff; but only upon terms which the plaintiff was unwilling to accept. The bill was dismissed with costs, but the Court holding that he was not wrong in coming to the Court, refused a reference to ascertain the damages sustained by the defendant by the granting of the injunction. In this case my brother *Strong* held the plaintiff not right in coming to the Court at all;

(*a*) 7 Jur. N. S. 981.

(*b*) 11 W. R. 1018.

and it seems to me a proper case for damages, if damages have been sustained, and not sustained through the fault of the defendant. 1873. Featherstone v. Smith.

But it appears to me that the defendant is premature in making his application, inasmuch as it is yet uncertain whether he will eventually sustain any damage. The defendant's case is that by reason of the injunction he lost the sale of the timber limits in question to certain persons, (*Blackburn & Co.*,) who had contracted to purchase them; and that they are not saleable for the current year's operations after a certain period which had elapsed before the judgment of my brother *Strong* (which was promptly given) left him free to dispose of them. There is some conflict of evidence as to this time having elapsed, but I incline to agree that the best time for effecting sales had elapsed, and I agree that the defendant was not bound to work them himself. There were, however, negotiations between the defendant and other persons for the sale to them of the limits; and there is evidence of his asking a price which, if he had obtained, would have left him a gainer by the falling through of his contract with *Blackburn & Co.* The plaintiff attempts to shew that the defendant could have obtained from others as good a price as his contract price with *Blackburn & Co.* If he had effected a sale for the best price that could be obtained, and that price was less than the price that he could have obtained from *Blackburn & Co.*, there would be something definite by which to measure his damage; but he still holds the limits, and it is in evidence that they are a commodity the value of which is rising in the market; and he may yet sell them at a price which would save him from loss. If he were to do this after an award of damage for loss it would shew such an award of damage to be premature. If the subject of contract had been stocks of defined market value it would be different; but each timber limit must, I apprehend, have its own value. Judgment.

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I do not mean to lay it down as a rule that the defendant must sell these limits before coming to this Court for damages; but it is clear from the English cases, and from the nature and terms of the undertaking, that it is in the discretion of the Court to deal with it as may appear to be just. I think that it would not be just, and that it might place the parties, and possibly the Court also, in a false position, to direct an inquiry as to damages at the present time and under present circumstances. This application is, therefore, refused, but without costs, and with liberty to the defendant to renew it as he may be advised, and the present affidavits and depositions may, of course, be used upon any future application.

GILBERT v. JARVIS.

Practice—Varying decree on appeal.

Where a decree directing accounts to be taken in the Master's office, is afterwards varied on Appeal, the Master in his subsequent proceedings under such decree is bound to observe the principles enunciated by the order in Appeal, although such order does not in terms refer to the party against whom the decree had directed such accounts to be taken.

Statement.

The decree made in this cause declared that the annuity to which the defendant *Mary Boyles Jarvis* was entitled under the will of her late husband, was applicable to the payment of the debts due to the plaintiffs and other creditors of the defendant *Mary Boyles Jarvis*; and, also, that the amount due to her from her husband's estate on any account whatever was applicable to the payment of the same. The decree contained, along with the usual directions for the administration of the estate, some special directions as to the annuity. The defendants *Mary Boyles Jarvis* and her son *Samuel Peters Jarvis*, applied for leave to appeal from the decree after

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proceedings had been taken thereunder in the Master's office, and leave was granted to the defendant *Samuel Peters Jarvis* alone; it being made a condition of allowing him to appeal, that notwithstanding any order that that might be made in Appeal, the proceedings in the Master's office should stand as if an administration of the said estate had been had in an ordinary administration suit. The order made in Appeal declared that the plaintiffs, by reason of such condition, were not entitled to any relief against the defendant *Samuel Peters Jarvis*, but did not dismiss the bill; and that order was made an order of this Court. A report had been made under the decree which stood confirmed, and the cause had been heard on further directions, and a decree made under which the Master had made his separate report before the judgment in Appeal was pronounced. In the subsequent prosecution of the reference by a creditor of the estate to whom the conduct of such reference had been transferred, the Master determined that he must, under the order of reference, notwithstanding the order made in Appeal, take an account of the debt and arrears of annuity found due to the defendant *Mary Boyles Jarvis*, under the first mentioned report.

Statement.

The creditor who had so obtained the conduct of the reference, thereupon moved upon petition for an order declaring, amongst other things, that the suit was one solely for the administration of the estate of the late *Samuel Peters Jarvis*; and that such portions of the original decree, and the decree on further directions and the proceedings had thereon, other than such administration, had been varied by the order of the Court of Appeal; and that the plaintiffs might be declared entitled only to such costs as would be properly incurred in the prosecution of an administration of said estate.

The other facts are stated sufficiently in the report of the case in Appeal, *ante* volume xvi., page 265.

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Mr. *Bethune*, for the petitioning creditor.

Mr. *Moss*, Q. C., for other creditors.

Mr. *Boyd*, for the plaintiffs.

SPRAGGE, C.—The questions between the parties seem to lie in a very small compass. The plaintiffs in *Gilbert* v. *Jarvis* conceived that as creditors of *Mary Boyles Jarvis*, who was as they alleged a creditor upon the estate of *Samuel P. Jarvis*, they were entitled in equity, by analogy to the rights of garnishment under the Common Law Procedure Act, to stand in her place *pro tanto*, against the estate of *Samuel P. Jarvis*, and this Court by its decree gave effect to this alleged equity. The bill on which this decree was made was filed against *Mary Boyles Jarvis* and Col. *Samuel P. Jarvis*, and upon application for leave to appeal by the defendants, leave was refused to *Mary Boyles Jarvis* and was granted only to Col. *Samuel P. Jarvis*.

Judgment.

Proceedings had at that time been taken in the Master's Office under the decree, with which decree an administration order obtained by a creditor of *Samuel P. Jarvis* had been consolidated.

The Court of Appeal differed in opinion from this Court as to the equity upon which the plaintiffs' bill was filed, and held that there was no such equity; and from the judgments pronounced in Appeal, and from the terms of the order made in Appeal, it is evident that the order of that Court would have been to dismiss the plaintiffs' bill out of Court, if both defendants had been appellants and if it had not been thought right to preserve to creditors who had proved claims in the Master's Office the benefit of proceedings therein taken. It had, indeed, been a condition of allowing Col. *Jarvis* to appeal, that notwithstanding any order that might be made in Appeal the

proceedings in the Master's Office should stand as if an administration of the estate of *Samuel P. Jarvis* had been had in an ordinary administration suit. The order in Appeal, after reciting this, proceeds thus "This Court doth not dismiss the plaintiffs' bill, but doth order and declare that the said respondents (the plaintiffs) are not entitled to any relief against the said appellant in this suit." It then directs that no costs be given to either party.

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The language of the ordering part is somewhat ambiguous, "This Court doth not dismiss the plaintiffs' bill." Does that mean, does not dismiss it absolutely or only does not dismiss it as against the appellant? The *ratio decidendi* would apply to both; and there was no object in preserving the bill for the sake of creditors as against Col. *Jarvis*; *Mary Boyles Jarvis* being sole personal representative of the estate which was in the course of administration. If so the interpretation of the order of the Court of Appeal is that it abstained from dismissing the bill out of Court absolutely, because the effect of doing so would be to prejudice creditors who had proved under it. It goes on, indeed, to declare that the plaintiffs are not entitled to any relief against the appellant, leaving undeclared whether entitled to any relief against the other defendant.

Judgment.

I have again examined the judgment of the Court of Appeal, and the judgments in this Court in *Blake* v. *Jarvis*, and I can see no escape from the conclusion, that they decide as a matter of law that the plaintiffs in *Gilbert* v. *Jarvis* have no *locus standi* in this Court, as against the estate of *Samuel Peters Jarvis*. It is urged now that it was established in *Gilbert* v. *Jarvis* upon the appeal, that the estate was indebted to *Mary Boyles Jarvis* in a certain sum of money, that the Master so found, and that his Report stands confirmed, and not disturbed by the judgment in the Court of Appeal. This is true in

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its literal terms but not in spirit. The debt was established, not by the creditor, or at her instance, but at the instance of her creditors in the exercise of a supposed right to establish it *for their benefit against her will.* This supposed right has been negatived by the judgments I have referred to, and only the bare fact remains that the debt was established. Consistently with the judgments given, the plaintiffs in this suit can have nothing to say in respect to that debt, they have no rights in regard to it; they are what the law calls strangers to it. Suppose, instead of resisting the petition of a creditor, they were themselves petitioners in respect of this debt, the answer would be obvious. They have no rights in respect of it, and the answer *must* be the same in whatever shape they attempt to intervene; or, to test it in another way, the plaintiffs object to what the creditor asks by his petition. The creditor may well ask the plaintiffs to point out in what respect that which is asked will affect them, and may well add that what "is asked cannot affect them, for they have no rights in the subject matter."

Judgment.

If I am right in this the plaintiffs are really out of the case, except upon the question of costs, and the only consideration for the Court is, in what mode it is proper to give effect to the order of the Court of Appeal.

That order has already been made an order of this Court, and the position of the plaintiffs must be the same as if this Court had on rehearing reversed its decree; the rehearing being at the instance of one defendant only, but the grounds of reversal applying to the plaintiffs' entire case. I think the plain course of the Master in such a case would be to disallow any claim which was necessarily founded on the reversed decree. To hold the plaintiffs entitled to be paid their claim when the very foundation upon which it rested was removed, would be too palpable an anomaly to be allowed.

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In *Denison* v. *Denison* (*a*), which was an appeal from the Accountant, I expressed the opinion that if a judgment on an appeal enunciated a principle which was applicable to other points, or other parties, besides those to which it was in terms applied by the order made on appeal, the Master ought to apply it; and I think that principle is strictly applicable to this case. The Master had before him the order in Appeal and the order made thereupon by this Court, and it was certainly competent to him, and proper for him, to look at the judgments in Appeal and in this Court. It was proper, and indeed necessary that he should do this, in order to his forming an intelligent judgment upon the matters before him. I have no reason to doubt that he did this, but I think that he attached undue weight to the circumstance of the debt of *Mary Boyles Jarvis* against the estate having been allowed by a report, which report had been confirmed. I think he should have reported that he had taken the accounts of the creditors of the estate of *Samuel P. Jarvis* other than the debt and arrears of annuity found due by the report of the accountant to *Mary Boyles Jarvis*, and that he had excluded that debt and those arrears, by reason of the order in Appeal and in this Court. I think in doing this he would not be overstepping his duty, but that he would be only interpreting the necessary effect of those orders, and that if any doubt could remain as to their effect they would be removed by a perusal of the judgment.

Judgment.

If, however, the Master apprehended that it might be beyond his province so to report, he might have reported specially, finding how the account stood excluding, and how it stood including these claims. I think, however, that this would have been a piece of overcaution.

I grant that if the point decided in Appeal had been decided in another case the Master must necessarily

(*a*) 17 Gr. 307.

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have left the report standing; but it having been decided in this case that decision was a direction to him in this case; and if he had reported upon the accounts of the estate, taking into account the plaintiffs' claim or the claim of *Mary Boyles Jarvis*, unless by way of special report, it would have been erroneous. It appears to me that in whatever way the question is viewed it can be only a question of procedure. If the defendants and the creditors had set down the cause to be reheard, adopting the view of the plaintiffs that the decree stands as against *Mary Boyles Jarvis*, that part of the decree which directs an account at the instance of and for the benefit of the plaintiffs must have been reversed. There would be an apparent technical anomaly in setting a cause down for rehearing after it had been dealt with on appeal; but it would be only a mode of carrying out the order of the Court of Appeal.

Judgment.

In my opinion it was not necessary to rehear the cause, and I see no impropriety in making the declaration that is asked by the petition, basing the declaration upon the Master's certificate and the petition. These, however, need not be set out *in extenso*.

I find that the executrix *Mary Boyles Jarvis* has released her claims, if any, upon the estate. She has a right to do this if it is not to the prejudice of any other person. I do not know that anything turns upon it, but the Master may, if desired by any party, report the fact specially.

I regret to be obliged to come to the conclusion that I do in this case, for as I took occasion to observe when the question was before me on demurrer in *Blake* v. *Jarvis* (*a*), it is unfortunate in the interest of justice that the remedy given by the Common Law Procedure Act

(*a*) 17 Gr. 204.

in the case of garnishee proceedings should not in terms apply to an equitable debt. The principle upon which the Act proceeds applies to an equitable debt as much as to a legal debt, and I can see no reason why the creditors should not have a remedy in the one case as well as in the other. As the law stands it is an anomaly, but the remedy, the Act being interpreted as it is, is with the Legislature not with the Court. 1873. Gilbert v. Jarvis.

There has also, as appears by the Master's certificate, been a contention before him in relation to the costs to which the plaintiffs are entitled. I think the petition places it upon the correct footing, and that the plaintiffs are entitled only to costs properly incurred in an administration suit having regard to the administration order obtained before the filing of the plaintiffs' bill.

I do not think that it is an objection to this application that it is by petition. In *Maddock's* Practice (*a*), it is said, "The office of a cause petition is to carry a decree into execution;" and that is really the object of this petition. It is not necessary to say that the Court would not have heard this application upon motion, but I think a petition not improper. There have been a number of proceedings, which it was convenient to present to the Court in a narrative form; and I have known petitions held proper simply upon that ground. It is not suggested that this petition is of unnecessary length. Judgment.

I do not think that this application is open to the objection that the petition approbates and reprobates at the same time. It submits that the orders made are sufficient for the Master to proceed to dispose of the rights of the parties as settled in Appeal, but asks that if the Court think them not sufficient, an order should be now made to carry out the order of the Court of Appeal.

(*a*) Vol. II., page 766.

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This is analogous to an alternative prayer in a bill, and seems to me to be right.

I think I cannot do otherwise than give the costs of this application against the plaintiffs. Their contention before the Master was, that their right to the moneys in question had become absolute by the confirmation of the Accountant's reports, and was not affected by the order of the Court of Appeal. In my judgment their contention was wrong; and as it has been the occasion of the costs that have been incurred I must adjudge those costs against them.

McFarlane v. The Andes Insurance Company.

Insurance policy—Demurrer for want of equity.

In a suit in this Court brought against an Insurance Company to recover for loss sustained, on the ground that the policy was not a perfected one, and therefore that the plaintiff had no remedy at law; but the allegations in the bill were, that the policy had been duly signed by the President and Secretary, and countersigned by the Agent at I, (the place where the insurance was effected), and was ready to be delivered to the plaintiff.

Held, that these allegations must be taken in law to include a delivery of the policy, although it had not actually reached the plaintiff's hands; and on this ground a demurrer for want of equity was allowed.

Demurrer for want of equity.

Mr. *Moss*, Q. C., for the demurrer.

Mr. *Blake*, Q. C., contra.

Judgment.

Spragge, C.—The defendants are, as the bill alleges, a Fire Insurance Company transacting business in the Province of Ontario. The plaintiff effected an interim assurance with a local agent of the Company, when a receipt was given to the plaintiff in the following form:

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"No. 2251—Andes Company of Cincinnati, Ohio, $5,000—Received of *Samuel W. McFarlane*, of Ingersoll, the sum of thirty-five dollars, being premium for insurance to the amount of $5,000, upon property described in application of even date herewith, which risk is hereby accepted for a period not exceeding fifteen days, subject to all the terms and conditions of the Company's Fire Policy. It being understood and agreed that, if the same application is approved at the Cincinnati office of the Company, a regular policy shall be issued in conformity therewith; but if for any cause whatever, a policy be not delivered within fifteen days after date hereof, all liability on the part of the Company shall cease and be at an end, and the unearned premium herein shall, on demand, be returned to the applicants. No risk shall be considered binding until actual payment of the premium has been made, and this receipt shall not be valid unless countersigned by a duly authorized agent of the Andes Insurance Company.

"(Signed) J. B. BENNETT, *President.*

"(Signed) J. H. BEATTIE, *Secretary.*

"Countersigned by N. HAYES, Agent."

Judgment.

The bill, after setting out the interim receipt, contains these allegations:—

(4). "The said Insurance was accepted by the said Company, and while the same was pending a fire occurred at the store and premises of the plaintiff at the said town of Ingersoll, in which the said goods were, and the same goods were nearly all destroyed by said fire; the amount of loss to said goods occasioned by said fire, and covered by said insurance, was and is about the sum of $5,000.

(5). "That a Policy of Insurance on the said goods for the said amount in pursuance of the said interim

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receipt, was drawn up by said defendants and duly signed by their said President and Secretary, and countersigned by the said agent at Ingersoll, and ready to be delivered to the plaintiff, which said policy is now in the hands of the said agent at Ingersoll, but has never been delivered to the plaintiff."

The defendants demur generally for want of equity The equity upon which the plaintiff comes into this Court, is thus stated in the bill:—

"By reason of a policy not having issued from the defendants to the plaintiff, the plaintiff has no remedy in a Court of Law against the defendants for the amount of such insurance; but the plaintiff submits that in this Honourable Court the defendants are liable to pay the said sum."

Judgment.

If a Policy of assurance had been issued by the defendants, the plaintiff's remedy would of course have been at law; and the defendants' contention is, that it appears upon the face of the bill that a Policy has been issued.

In the case of *Xenos* v. *Wickham* (*a*), the question was, whether there had been a delivery of the Policy of assurance. The instrument purported to be signed, sealed and delivered, and was in fact signed by the proper officers of the Company, and had, as I understand from the report of the case, a seal affixed, but it never left the office of the Company. It was held in the Lords that there was a delivery. Three of the five Judges who were called in were of that opinion, and two dissented.

I think this case is much stronger for an actual delivery, than the case of *Xenos* v. *Wickham*. The bill

(*a*) L. R. 2 E. & I. App. 296.

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alleges that a Policy in pursuance of the interim receipt was drawn up by the Company; that it was duly signed by their President and Secretary, and countersigned by their agent at Ingersoll, and ready to be delivered to the plaintiff. So far the allegations, as I read them, state a perfect execution of the Policy. They do not, indeed, say that the Policy was sealed with the seal of the Company; but if a seal was necessary, the presence of a seal is implied, because it is alleged that it was a Policy of assurance ready to be delivered to the plaintiff; and it would not be ready to be so delivered, if any essential, besides delivery, was wanting.

But further, there is nothing to shew that a seal was an essential to the perfect execution of a Policy by this Company. The Company is not shewn to be a corporate body, and it may be that such a signing and countersigning as is alleged in the bill, was an execution in the mode prescribed by the Company's articles of association. I do not find any allegation in the bill negativing as a fact the perfect execution of the policy. It is true that after stating the signing and countersigning and readiness for delivery, the bill goes on to say that the Policy is in the hands of the agent at Ingersoll, but has never been delivered to the plaintiff; but that is only a statement of the locality and custody of the instrument, and not a qualification of the previous allegation.

Judgment.

Nor do I read the 8th paragraph as any qualification of the previous allegation. It says, "By reason of a policy not having issued from the defendants to the plaintiff, the plaintiff has no remedy in a Court of Law;" but that his remedy is in this Court. This is only, as I read it, an erroneous conclusion from the premises, that because the Policy, though perfectly executed, including what is in law a delivery of the Policy, had not actually reached the plaintiff's hands, he had no remedy upon it

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at law. It did not need the case of *Xenos* v. *Wickham* to negative such a proposition. That case is, however, a very clear authority against it; and judging from the language of all the Judges, I do not think that any one of them would have assented to the proposition that is in effect propounded by the plaintiff's bill.

This is in a sense a demmurer to the jurisdiction, but not in the sense in which the term is used in *Barber* v. *Barber* (*a*). It is properly a demurrer for want of equity; the equity alleged being that by reason of there being no perfected Policy, the plaintiff has no remedy at law, but is obliged to come into this Court upon the contract of the defendants to make a policy. The equity is displaced if there is a perfected policy.

Judgment.

The defendants' position is, that the bill shews a pefected policy, and that the plaintiff has therefore, no equity to come into this Court. The demurrer is allowed with costs. Plaintiff to have leave to amend.

The Attorney General v. The Niagara Falls International Bridge Company.

Foreign Corporation—Nuisance—Railway—Suspension Bridge—Ultra Vires—Illegal instrument.

By Acts of the Legislature of Canada and the State of New York respectively, a company was incorporated in either country for the purpose of constructing a Suspension Bridge across the River Niagara, with compulsory powers as to the taking of lands, &c., and having the right to impose tolls for the user of the bridge. The two companies so incorporated joined in a lease of the upper or railway floor of the bridge for the term of their charters, to a railway company, to be for their exclusive use, and the use of such other railway companies as the lessees might arrange with. *The Erie and Niagara Railway Company* had, by Statute, authority to arrange for the passage over such bridge from Canada into the

(*a*) 4 Dy. 670.

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United States; but it was alleged, that the lessees refused them permission to cross the bridge. Thereupon an information by *The Attorney General* of Ontario, at the relation of *The Erie and Niagara Company*, and a bill by that Company, was filed against the two *Bridge Companies* and their lessees, complaining of such refusal; and praying a declaration, (1) That the lease of the bridge was *ultra vires*. (2). That *The Erie and Niagara Company* were entitled to the use of the bridge on paying reasonable tolls; and for an injunction restraining the defendants from preventing *The Erie and Niagara Company* using the bridge. The evidence shewed that *The Erie and Niagara Company* had not effected any actual connection with the bridge, and that it was not clear they could do so without passing over lands of the lessees; and that by their charter the American Bridge Company had the power of making a lease to one railway company exclusively. Under these circumstances, as the damage, if any, to *The Erie and Niagara Company* was only prospective, and they could not be said to have sustained any actual damage by the refusal of the defendants to recognize their right to use the bridge, the Court, at the hearing, dismissed their bill as against all the defendants; and also dismissed the information as against the American Bridge Company with costs; declared the lease of the bridge, as regarded the Canadian Bridge Company void, and restrained them from further acting thereunder: and,

Semble, that even if *The Erie and Niagara Company* had established a complete title to relief as against the Canadian Bridge Company, still, as this Court had no authority to interfere with the American Bridge Company, and could only have compelled the other defendants to permit the cars of *The Erie and Niagara Company* to cross as far as the Canadian Bridge Company's charter extended, *i.e.*, to the centre of the bridge, and was thus unable to afford any effectual assistance, the Court on this ground also would have refused to interfere.

Where a party succeeds in establishing the illegality of an instrument he will not be allowed to enforce any stipulation that may be contained therein for his benefit.

Statement.

After the decision of the demurrer, which is reported ante page 34, the defendants severally answered, setting up the several defences stated in the judgment; and the cause having been put at issue, evidence was taken therein before the Court, the effect of which also appears sufficiently in the judgment.

Mr. *Crooks*, Q. C., Mr. *Moss*, Q. C., and Mr. *Cattanach*, for the relators.

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Mr. *Blake*, Q. C., and Mr. *S. Barker*, for the defendants *The Great Western Railway Company*.

Mr. *Hillyard Cameron*, Q. C., for *The Bridge Companies*.

The authorities cited are mentioned in the judgment.

Judgment.

STRONG, V. C.—This is an information filed by *The Attorney General of Ontario*, at the relation of *The Erie and Niagara Railway Company*, and a bill by *The Erie and Niagara Railway Company* against *The Niagara Falls International Bridge Company*, *The Niagara Falls Suspension Bridge Company* and *The Great Western Railway Company*; the first named Bridge Company being a foreign corporation incorporated under an Act of the Legislature of the State of New York, and the other defendants being corporations created by the Legislature of the late Province of Canada.

The complaint is, that the defendants *The Canadian Bridge Company*, being a corporation having authority to erect a public bridge for railway and general traffic across the Niagara River, and to levy tolls in respect of it, did construct or take part in the construction of a bridge under their Act of Incorporation, the upper floor of which bridge, by an indenture dated the 1st of October, 1853, made between the two Bridge Companies and the Railway Company, the Bridge Companies assumed to lease to *The Great Western Railway Company* to be for their exclusive use and under their entire control: that this agreement was in excess of the corporate powers of *The Canadian Bridge Company*, and constituted a public injury occasioning particular damage to *The Erie and Niagara Railway Company*, a corporation having a statutory right to connect its line of railway with the bridge.

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The informant and the plaintiffs in substance pray that the agreement of the 1st of October, 1853, may be declared void, and that it may also be declared that *The Erie and Niagara Railway Company* have a right to the use of the bridge on payment of tolls, and for an injunction restraining the defendants from interfering with the free use of the bridge by the plaintiffs on payment of reasonable tolls.

The Great Western Railway Company demurred to this information and bill for want of equity; and on the demurrer being argued before me, I overruled it.

I then determined that the bridge was a public structure so far as it was constructed by and belonged to *The Canadian Bridge Company:* that *primâ facie* all railway companies were therefore entitled to its use on equal terms: that the allegations of the information shewed that in this respect the rights of the public, and especially those of *The Erie and Niagara Railway Company*, had been infringed: that the agreement of the 1st of October, 1853, was in excess of the corporate powers of *The Canadian Bridge Company:* that the demurring defendants, *The Great Western Railway Company*, could therefore derive no rights under it, and were necessary parties to a proceeding in this Court to have it declared void; and that *The Attorney General* for Ontario was the proper officer to sue on behalf of the public.

Judgment.

Subsequently, the order overruling the demurrer was reheard before the Chancellor and myself.

The Chancellor was of opinion that the user of the bridge might, in the absence of evidence, be assumed to be of necessity confined to a single railway company; and therefore that until it was shewn that the bridge was of sufficient capacity to carry the traffic of other rail-

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ways besides *The Great Western*, it could not be said that either the public or the plaintiffs, *The Erie and Niagara Railway Company*, were prejudiced by the enjoyment being confined to *The Great Western Railway Company*.

But assuming this, his Lordship thought the agreement of the 1st of October, 1853, was clearly *ultra vires* as an abandonment by the bridge company of their corporate powers and functions to *The Great Western Railway Company;* and that on that ground the demurrer had been properly overruled.

I adhered to my original opinion, and the order on demurrer was therefore affirmed.

The case on the argument of the demurrer and on the rehearing, is reported in the 20th volume of Mr. *Grant's* Reports, page 34, where a full statement of the case as it appeared on the information, and of the grounds on which the conclusions just stated were arrived at, will be found.

Judgment.

The defendants separately answered the information and bill.

The Bridge Companies, in substance, after referring to their Acts of Incorporation, set up that as regards the American company there is no jurisdiction, as it is a foreign corporation, and that as to so much of the railway floor of the bridge as is within the United States boundary line, there is likewise no jurisdiction.

They admit the agreement of the 1st of October, 1853, referred to in the bill, and that clause nine of that agreement, which required *The Great Western Company* to permit the transit of *The Erie and Ontario Company's* traffic at a certain fixed rate was abrogated on 18th

January, 1872, and they insist that *The Erie and Niagara Company* cannot get access to the bridge without passing over *The Great Western Railway Company's* lands, to which passage they have acquired no right, and that the agreement was not *ultra vires* of any of the companies who were parties to it. 1873. Attorney General v. The Niagara Falls &c. Bridge Co.

The Great Western Railway Company by their answer, state :—

That the agreement of the 1st of October, 1853, was entered into whilst the bridge was in course of construction; that by the New York Acts incorporating *The Niagara Falls International Bridge Company*, express power to make an exclusive agreement was conferred; that at the date of the agreement no other railway was in existence which could have taken advantage of the bridge; that *The Erie and Niagara Railway Company* have never completed their line; have never equipped it; and have not and never have had any rolling stock; that under a Statutory power enabling them so to do, they have leased their line to *The Canada Southern Railway Company*, who are incorporated under a Provincial Act, and are not entitled to cross the Suspension Bridge; that the long exclusive use of the bridge by *The Great Western Railway Company* under the agreement makes it inequitable now to disturb them; that it is absolutely necessary for the convenient and safe working of the bridge that it should be under the control of one company; that the agreement does not derogate from the obligations of the Bridge Company to the public; that the information is only sustainable by *The Attorney General* of the Dominion; that the agreement was a beneficial and reasonable one having regard to the nature and capacity of the bridge; that under their Acts of Incorporation, *The Erie and Niagara Company* have no right to cross the Niagara river at the Falls, their proper point of crossing being at Buf- Judgment.

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falo; that *The Erie and Niagara Company* have no right to approach to or connect with the railway floor, as they cannot do so without passing over the lands of *The Great Western Railway Company*, to which right of passage they have as yet acquired no right; that on the 22nd April, 1872, *The Erie and Niagara Company* leased their line to *The Canada Southern Railway Company* for a term of five years; and that the latter company have equipped and are using the line; that *The Great Western* have always been ready to carry goods and passengers over their own line from station to station, including the transit of the bridge. And they submit that this Court has no jurisdiction as regards the American Bridge Company, or as to that portion of the bridge which is within the United States boundary.

The cause was subsequently heard before me, when several witnesses were examined, their evidence being principally directed to two points: the capacity of the bridge to accommodate more than the traffic of one railway; and the possibility of *The Erie and Niagara Railway Company* connecting their line with the bridge, which connection it was conceded they had not yet accomplished.

Judgment.

The result of this testimony was to establish satisfactorily to my mind that, with proper arrangements, no difficulty would be experienced in affording the use of the bridge to other railways than the Great Western.

The evidence of General *Serrell* and Mr. *Samuel Keefer*, both civil engineers of great experience in the construction of suspension bridges, is conclusive on this point, and it is not opposed by any contradictory proof on the part of the defendants.

On the other question of fact, I am of opinion that *The Erie and Niagara Railway Company* have failed to

establish that they have the right of passage over the lands of *The Great Western Railway Company*, and through and across the streets of Clifton, which the evidence and the plan made for and produced by *The Erie and Niagara Company* (Exhibit A) shew to be indispensable to enable them legally to lay down a line of rails from their station at Clifton, the starting point proposed by them, to the bridge. With reference to the streets this is indisputable; as regards the possibility of making the connection without entering upon the lands of *The Great Western Company*, there is some testimony to shew that to be possible, but not satisfactory evidence, supported as such proof ought to be by surveys and plans, leaving a point so easily capable of demonstration in no doubt, for it is inconsistent with the plan produced by the plaintiffs and prepared by their own draftsman, which shews the line of connection passing through the lands of *The Great Western Company*. I think, therefore, I must assume that the plaintiffs, upon whom it rested to prove the possibility of a connection not touching *The Great Western* lands, have so far failed in their proof; but if the case turned on this point alone, I should direct further inquiry by competent engineers.

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Judgment.

Then to apply the law to the facts so stated and proved: In the first place, I am of opinion that both the information and bill must be dismissed as against *The Niagara Falls International Bridge Company*, the New York corporation, upon the ground that this Court has no jurisdiction as regards that defendant.

The facts in proof that this corporation is the creatnre of a foreign legislature, having an exclusively foreign domicile, and exercising all its corporate franchises and having all its corporate property situated within the boundaries of a foreign state, are sufficient without calling for any demonstration by argument, to warrant the conclusion that this Court has before it as

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regards this defendant, neither person nor property upon which its decree can operate.

Moreover it has been contended that by the 2nd section of the New York Amending Act of 1853, *The Niagara Falls International Bridge Company* had power conferred upon them to enter into an agreement conferring exclusive rights upon a particular railway company.

The clause in question is in the following words: "The said *Niagara Falls International Bridge Company* shall have full power and authority by themselves or in union with *The Niagara Falls Suspension Bridge Company*, to enter into any contract or agreement with any individual railroad company or railroad companies with reference to the terms of crossing locomotives and cars, passengers and freight over said railroad bridge, and the construction, repairs, insurance, and maintenance of the same, upon such terms and conditions, and for such time or times as may be agreed upon by and between the parties."

Judgment.

This, I incline to think, upon ordinary principles of construction was sufficient to authorize the agreement of 1st of October, 1853, as regards the New York Company. These defendants must, therefore, be dismissed with costs.

The case against the remaining defendants may be conveniently divided and separately considered in two heads: *Firstly*, as regards the grounds for relief on the information at the suit of *The Attorney General*. *Secondly*, as to the right of *The Erie and Niagara Railway Company* to a decree founded upon the complaint of injury to their private interests advanced by the bill.

I may remark, that it has been already determined by the judgment on the demurrer, that the bridge so far as

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it is within Canadian territory is to be considered as a public work—the corporate property of the Canadian company, brought into existence and held by that company upon the trusts expressed and implied impressed upon it in favor of the public by the Act of Incorporation; and that consequently the public, as well railway companies as individuals, have an equal right to its use upon payment of tolls.

The Chancellor was of opinion that this general right of the public to the use of the railway bridge, depended upon its capacity to carry the traffic of more than one railway company; that *primâ facie* this was not to be assumed, and that the onus of proving it rested upon *The Attorney General* and the plaintiffs.

I was myself of a different opinion, the grounds for which are stated in the reported judgment.

Judgment

All ground for any difference of opinion on this score is now, however, removed by the evidence which, especially that of the distinguished engineers already named, must convince any one who reads it, that there is no foundation for the suggestion of the defendants, that the user of the bridge as regards the railway floor was necessarily restricted to a single company.

The Act of Incorporation must, therefore, be construed as recognizing the general public right of user by all railway corporations or proprietors who are able to bring their lines into actual contact with the bridge, upon the payment of tolls lawfully imposed.

Indeed the defendants themselves explicitly shew in the agreement of the 1st of October, 1853, that in their own view there was nothing objectionable in the use of the bridge by several companies, for by article 3 of that instrument the power of conferring the right of

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passage upon other railway proprietors, without limit as to number, is expressly delegated to *The Great Western Railway Company*.

The legal arguments for holding the bridge to be a public work, are stated in my former judgment upon the demurrer. In considering the case since I have met with some additional authorities.

In *Bloodgood* v. *The Mohawk and Hudson River Railroad* (*a*), it is said that bridges like turnpike roads where tolls are authorized to be levied and lands to be appropriated are *publici juris*. In *The Charles River Bridge Company* v. *The Warren Bridge Company* (*b*), *Putnam* J., says, "It has been suggested, but not much pressed, that the legislature has as much right to grant rival bridges as they have to grant rival banks and insurance companies. But there is an obvious difference between these cases. Grants of banking and insurance corporations merely give an authority to manage their private concerns. A mere faculty or power of doing in a corporate name what they might at common law have lawfully done as individuals. But bridges and ferries are '*publici juris*.' A toll is granted for a service rendered to the public The bonus which banks or insurance companies pay for their charters does not make them matters in which the public have an interest. They may discontinue them and divide the stocks just when they please, paying their debts. No individual can compel a bank to lend him money or an insurance company to write upon his ship unless they please. But the proprietors of the bridge or ferry are under great liabilities to the public, are compellable to permit the public to use them paying toll. To use the words of the old law as to ferries, "they are liable to grievous amercements for non-performance of their duty."

Judgment.

(*a*) 18 Wend. 22, 23.

(*b*) 7 Pick. 495, 496.

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In addition, however, to shewing the bridge to be "*publici juris*," *The Attorney General*, in order to entitle himself to relief on the ground of nuisance, or on one analogous to it, disturbance of the enjoyment of a public right of passage, must make out that there has been some actual damage to the public, or some part of it, occasioned by the refusal of the defendants to concede the user.

On this part of the case I think the information fails on the evidence and admitted facts.

No railway proprietors have ever yet been hindered in the use of this bridge, for the simple reason that no such persons have ever yet been in a position to use it.

The Erie and Niagara Railway Company, as I have already said, and as I shall point out more specifically when I come to consider their title to relief on the ground of injury to their private rights, have not been subjected to any obstruction on the part of the Bridge Company causing prejudice or damage which can amount to a public wrong, as its railway has not yet been united and cannot, as it appears, be at present united with the line of the bridge. *The Canada Southern Railway Company* cannot so complain, for the same good reason, and for the additional reason that a connection with the United States by means of the bridge would be an act in excess of its corporate powers, and there are no other lines of railway within many miles of the bridge.

Judgment.

No public wrong for which an indictment would lie has therefore been committed, and *The Attorney-General* is not in a position to complain of an undue interference with public rights on the part of *The Suspension Bridge Company* in withholding the use of the bridge. The authorities in support of this view of the law are numer-

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ous: I will refer to one decided case, *The Attorney General* v. *The Mayor of Kingston on Thames* (a).

What appears to be a correct deduction from the authorities is also stated in *Joyce* on Injunctions, p. 100, where all the cases are collected.

The same principle applies, as I shall shew, in a still stronger degree, to the case brought forward by the bill of *The Erie and Niagara Railway Company* of complaint on the score of private injury.

But there is in this connection another argument to be noticed against any relief being accorded on the ground of a public tort, one which was powerfully urged at the bar.

Judgment.

The Court, it is well established, will not act on the ground of public nuisance and in cognate cases unless there is actual injury and damage caused to the public by the act sought to be restrained, and it is in the power of the Court by its injunction effectually to repress the mischief.

Could it be said, even if *The Erie and Niagara Railway Company* and several other railway companies had actually established a physical connection with the bridge which they were legally entitled to maintain, and had the right, so far that nothing in their own corporate constitutions prevented it, to carry their traffic to the American bank of the Niagara, that having regard to the rights *de facto* if not *de jure* of the New York Bridge Company, this Court could even then, consistently with the principles by which it is governed in granting injunctions, properly exercise its jurisdiction? The Court as I understand its rules never acts in this class of cases unless it can do so effectively and usefully. Now

(a) 11 Jur. N. S. 596.

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of what use would it be to enable a railway company by means of an injunction to pass its trains half way across this Bridge to find its complete passage barred by the New York Bridge Company?

The public uses which the Court could, in the particular circumstances here presented, in any case enforce, would be unprofitable and idle, and therefore the case is one in which this Court declines jurisdiction either at the instance of *The Attorney-General*, suing in the public interest, or on the complaint of private parties alleging particular damage.

There might, if the supposed case of an actual junction had occured, which however it has not, have been an undue interference with a dry legal right; but there could not have been either to the public or to private persons such a real substantial injury as in cases of tort is always necessary (save in some peculiar and exceptional cases), to warrant the exercise of the extraordinary powers of this Court by means of the writ of injunction.

Judgment.

There is, however, a distinct ground for equitable relief made by the information, namely, that the agreement of the 1st of October, 1853, was in excess of the corporate powers of *The Canadian Bridge Company*, and therefore void.

Of this opinion was the Chancellor on the re-hearing, his Lordship in that respect agreeing with the judgment on the original argument of the demurrer.

By the indenture of the 1st of October, 1853, *The Bridge Companies*, as parties of the first part, agreed to lease and let, and did thereby "lease and let to *The Great Western Railway Company*, the party of the second part, the railroad floor and structure, including all its supports, fixtures, and gates, excepting the side-

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walks and their gates, to be for their entire use, and under their controul, for and during the continuance of their charter, yielding and paying therefor" $45,000 for each year. This instrument also contained the following provisions.

Article 2nd.—"The upper railroad floor of the bridge and structure, including all support, fixtures and gates, excepting the side-walks and their gates and approaches, are to be under the controul and for the use of the parties of the second part for railroad purposes, said support and fixtures properly belonging to and sustaining the upper structure thereof."

3rd.—"The possession and use of said railroad structure by the parties of the second part is to carry with it the exclusive right to extend to other companies and persons the privilege of crossing said railroad bridge with locomotives trains and cars carrying passengers and freight, on such terms as they may agree to; subject, however, to the conditions and restrictions prescribed in this indenture, to the parties of the second part."

Judgment.

4th. "It is understood that the privilege hereby conveyed to the parties of the second part, is for the purpose of passing locomotives and cars with freight and passengers in the prosecution of legitimate railroad business, and that they are not to afford the means to any other person or persons except railroad passengers, of crossing or evading the payment of toll to the parties of the first part."

5th. "The parties of the second part to be responsible to the parties of the first part, that the companies or individuals to whom they shall underlet, shall keep within the restrictions and conditions contained in this indenture, and the parties of the second part shall have all the profits accruing therefrom."

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9th. "The short railroad from Niagara, Canada West, to the Falls, and from Port Dalhousie to St. Catherines, which could not be expected to arrange with the parties of the second part for transit across the Bridge, to have it in their power to arrange with the parties of the second part at five cents per head for their railroad passengers, and a proportionately moderate fare for freight."

It has, as I have said already, been determined that the provisions contained in the second, third, and fifth of these articles are *ultra vires* of *The Suspension Bridge Company*, so that even if the argument at the hearing had led me to form a different opinion from that which I at first formed (which it has not), I should still consider myself bound by the judgment of the Court on the rehearing of the order on demurrer.

There is, however now, ground for even stronger arguments in support of the information, in this respect, than when the cause was before the Court on the demurrer; for the evidence makes it now impossible to say that such an agreement as that of the 1st October, 1853, was rendered necessary by the structure and capacity of the bridge, and was therefore to be considered as impliedly authorized by the Act of Incorporation.

Judgment.

Moreover, the Chancellor, whilst holding the opinion that the sufficiency of the bridge for general railway traffic was a proposition to be established by proof on the part of *The Attorney General* and the plaintiffs, before it could be said that any public right had been violated, at the same time considered it clear that the indenture of the 1st of October, 1853, was in excess of the corporate powers of *The Suspension Bridge Company* and illegal.

By the introductory clause of the instrument, the

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Bridge Companies grant to *The Great Western Railway Company* the perpetual and exclusive enjoyment of the bridge, but by the subsequent clauses, Articles 2 and 4, they do more; for by these provisions they assume to divest themselves of all control, and to delegate to *The Great Western Railway Company* the performance of those duties which the Act of Incorporation made obligatory upon themselves.

If the bridge is *publici juris* there cannot be a doubt but that such an attempt to devolve its corporate functions upon *The Great Western Railway Company*, without legislative authority for so doing, was an illegal act on the part of *The Suspension Bridge Company*. That I must hold the structure to be a public bridge, I have already decided.

The case of *Hinckley* v. *Gildersleeve* (*a*), cited in the former judgment, is sufficient in point of authority to establish the illegality of the (so-called) lease.

Judgment.

The agreement being illegal, the jurisdiction of the Court to interfere by injunction, at the instance of *The Attorney General*, is equally established by the former decision in this cause.

I will, however, adduce some additional authorities on these points, as they tend to bring out very clearly the distinction between the jurisdiction exercised to repress public wrongs by enjoining the continuance of nuisances or obstructions to the public enjoyment of roads, bridges, ferries, and other modes of communication, in which cases some substantial damage must be shewn, and the totally different head of jurisdiction under which the Court, being put in motion by *The Attorney General*, acts in confining corporate bodies having public obliga-

(*a*) 19 Grant, 212.

tions to perform and public trusts to execute, within legal limits. 1873.

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In the latter class of cases the ground of jurisdiction is not tort, but the Court acts to compel the execution of trusts and the fulfilment of contracts, for it has been frequently laid down and it is, according to late authorities, the law, that corporations, such as railway, canal, road, and bridge companies, created by Act of the Legislature, and having extraordinary powers of interference with private property conferred upon them, are to be considered as contracting with the public to keep within the limits prescribed to them by the Legislature.

To entitle *The Attorney General* to relief under this last head of equity, no actual damage either to the public or to an individual is required to be shewn.

In *The Stockport District Waterworks Company* v. *The Mayor of Manchester* (a), Lord *Westbury* thus states the law: "There is a very great distinction between powers given to an individual and powers given to an incorporated company. Where an incorporated company is created for certain purposes undoubtedly the agency of the company, the course of action and the sphere of action of the company are limited entirely to that which is defined by the Legislature. What it is empowered to do it has a right to do, and what it is not empowered to do it must be considered as having no right to do. I concur, therefore, in the proposition that an incorporated company is to be confined within the sphere of the agency which has been defined by the Legislature." Again, in another part of the same judgment, Lord *Westbury* says: "If I had here a party who had a right to restrain the Manchester Corporation within its proper limits, as, for example, the ratepayers

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(a) 9 Jur. N. S. 266.

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who were interested in having the water at the lowest amount and in having the certainty of an abundant supply, or if I had *The Attorney General* who would be able to represent that larger view of the question, namely, that if you extend the purposes of the legislative grant to Manchester you may be overstepping the bounds within which the Legislature confined its views when it granted these powers to the corporation of Manchester. If I say I had the *Attorney General* here as an informant, representing that general view of the subject, the *bonum publicum*, which is contained in that view of the subject, I should probably not hesitate to restrain the Corporation of Manchester from carrying into effect the agreement which they have entered into with the registered company. The only arguments which I am disposed to accept from those which I have heard to-day are arguments founded upon the public interest and the general advantage of restraining an incorporated company within its proper sphere of action. But in the present case the transgression of these limits inflicts no private wrong upon these plaintiffs, and although the plaintiffs, in common with the rest of the public, might be interested in the larger view of the question, yet the constitution of the country has wisely intrusted the privilege with a public officer, and has not allowed it to be usurped by a private individual."

Judgment.

The case of *The Attorney General* v. *The Great Northern Railway Company* (*a*), is also an instance of the exercise of the same jurisdiction, as that which *The Attorney General* invokes in the present case, and it is there put upon the ground that there is in every Act of Incorporation of a company, with powers such as this Bridge Company has, a contract with the public to keep within the limits of their powers, whether expressed or to be implied The same doctrine is laid down by Lord *Cottenham* in *Frewen* v. *Lewis* (*b*).

(*a*) 1 Drew. & Smale 154.

(*b*) 4 M. & C. 445.

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As shewing strongly that where *The Attorney General* comes to the Court asking that a corporation may be kept within due limits, actual damage to the public is not a necessary ingredient in his case, I quote from Lord *Chelmsford's* judgment in *Ware* v. *Regent's Canal Company* (*a*) the following passage: "But the plaintiff insists upon his right to an injunction, on the ground that the defendants have violated the Act of Parliament by raising their embankment higher than the maximum heighth. And he contends that this in itself gives him a right to an injunction, even if he should be unable to show that he has sustained any injury from this transgression of the prescribed limits. But I cannot think that such an abstract right can belong to that particular portion of the public which happens to be within the range of possibility of injury, which must always be a very indefinite and uncertain criterion of the class to which the right extends. Where there has been an excess of the powers given by an Act of Parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no one but *The Attorney General* on behalf of the public has a right to apply to this Court to check the exorbitance of the party in the exercise of the powers confided to him by the Legislature. If an individual has sustained no damage, and there is no reason to apprehend that he will sustain damage notwithstanding his being nearer to the possible cause of injury than the rest of the public, he has no peculiar position or claim to entitle him to become the redressor of a public grievance, or to complain of the disregard of the provisions of an Act of Parliament."

Judgment.

I may also refer on this point to *Kerr* on Injunctions, page 542, where many other authorities are collected.

Therefore while the Court may well say that there

(*a*) 3 DeG. and Jones 227.

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has been here no interruption, actual or threatened, of any useful right of passage of this bridge, amounting to a public injury remediable in this Court, it must, and can consistently, determine that there has been such an excess of authority on the part of a corporation with limited powers, created by statute as entitles *The Attorney General* suing in the public interest to the aid of this Court, interposed both on the ground of public policy and public contract, to annul the Act by which the corporation has so transcended its powers.

I cannot see that there is any defence to this branch of the case afforded by the 13th article of the indenture of the 1st of October, 1853. The parties did not, I am of opinion, intend by that to nullify the whole instrument in which it was contained as a subsidiary clause, and I read it as the common rules of construction require that I should, as intended to impose upon the railway company the duty of being guided in their conduct under the agreement by the Acts or Charters of Incorporation, and not as a proviso that the whole instrument shall be void if it contains anything exceeding the powers of the granting parties. I am therefore unable to follow the argument by which it is sought to shew that this 13th clause renders the whole agreement innocuous through a proceeding *ultra vires*.

Judgment.

That *The Attorney General* of Ontario is entitled to maintain the information for relief on the ground I have just stated is, I must hold, concluded by my former judgment on that point, on the demurrer, in which I understood his Lordship the Chancellor to agree.

An information to keep within due bounds a corporation, which could now only be created by the legislative action of the Parliament of the Dominion, may in my view be as well maintained in the interest of the public

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of this Province by the Provincial *Attorney General* as an *ex officio* criminal information in a Court of Law, or an information in this Court to restrain a public nuisance, may be maintained by the same officer.

The general public of the Province are interested in keeping this corporation within the line marked out for it by the Act of Incorporation, and they are entitled to the assistance of the Court for that purpose; then *The Attorney General* of the Province is the proper officer to represent that portion of the public. Whilst I thus determine I am far from saying, however, that *The Attorney General* of the Dominion may not have a concurrent right to sue; upon that point I express no opinion.

There must therefore be a decree on the information declaring the Indenture of the 1st October, 1853, void as regards *The Niagara Falls Suspension Bridge Company* and *The Great Western Railway Company*, and restraining those companies from further acting under it.

Judgment.

I have next to consider the case of *The Erie and Niagara Railway Company*, as plaintiffs on this record, on which they are suing by bill in respect of their private rights.

It is not necessary in the view which I take of this part of the case that I should decide several points raised and argued at much length arising on the Statutes incorporating *The Erie and Niagara Railway Company* and *The Erie and Ontario Railway Company*.

I assume that *The Erie and Niagara Railway Company* have it within their corporate powers to make a connection with the Suspension Bridge, and that they have, under the 21st section of the Act 27 Victoria, chapter 59, perfected their title to the line, branches,

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property, and franchises of *The Erie and Ontario Railway Company*, and further, that there is nothing in any special legislation which has taken place exempting *The Great Western Railway Company* from the obligation to permit other railways to cross, intersect, and unite with their line, imposed by section 9, sub-section 15, of the Consolidated Statutes of Canada, chapter 66, upon the conditions there required. This being so, what are the rights of *The Erie and Niagara Railway Company*?

It is very clear that private individuals or corporations cannot be heard to complain of any exorbitant exercise of powers on the part of a statutory corporation or on the ground of public nuisance, or obstruction to the enjoyment of public rights, without shewing special damage to themselves.

Judgment

Lord *Westbury's* judgment in the case of *The Stockport District Water Works Company* v. *The Mayor of Manchester*, and *Ware* v. *The Regent's Canal Company*, already cited, are plain and direct authorities for this; to the same effect is *Brown* v. *Gugy* (*a*).

In *Hinckley* v. *Gildersleeve*, before referred to, this principle was acted upon, for the learned Vice-Chancellor who decided that case proceeded expressly upon the ground that the plaintiff was prejudiced and damaged by the lease which the Canal Company had made.

In the present case it appears to me to be impossible that *The Erie and Niagara Railway Company* can say that they have been specially damnified by the conduct of *The Suspension Bridge Company*; that they are in a position to recover damages at law, or that they have received any pecuniary damage not too remote for legal cognizance from the act complained of.

(*a*) 2 Moore, P. C. Cases (N. S.) 341. Joyce on Injunctions, p. 950.

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The Erie and Niagara Railway Company are a corporation which has not yet equipped its railway with rolling stock.

It is, moreover, not in the actual possession of its own line, having conceded a lease of it under legislative authority to *The Canada Southern Railway Company*, a corporation created by a Statute of this Province, and which has, consequently, no power to extend its traffic across the Suspension Bridge, this lease being for a term of which upwards of three years are still unexpired. These are all matters which would have an important bearing on the question of damage if there were not others which supersede the necessity of considering them.

The Erie and Niagara Railway Company has, as already stated, no actual or, as it has been termed in argument, physical connection wit. the bridge. Between its station at Clifton, the point which has been designated by its officers as the proposed starting point from the main line, and the bridge, there lie intervening the streets of Clifton and a large piece of land the property of *The Great Western Railway Company*. The streets must be crossed, and the line must be carried for some distance along one of them, Bridge Street, as shewn by the plan produced in evidence by the plaintiffs.

Judgment.

Then it is urged by the defendants that no connection could be effected without crossing the land on which numerous switches and sidings of *The Great Western Railway Company*, are laid down, and which land is their property.

Some of the plaintiffs' witnesses, it is true, say that this could be avoided, and that, subject to some inconvenience, *The Erie and Niagara* could be connected with the bridge without crossing *The Great Western* land.

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It lay upon the plaintiffs to prove this, and they have not, in my judgment, given that clear proof of it which they might have given if the facts were as they allege. On the contrary, they produce a plan shewing the proposed junction line crossing *The Great Western* land.

Then the plaintiffs have neither obtained authority from the corporation of Clifton to pass across and along the streets, nor have they obtained, under the Railway Clauses Act, the right to cross the land of *The Great Western Company*. Consequently they were unable at the time their bill was filed, and also at the time of the hearing, to make any actual use of the bridge, even if the Bridge Companies had tendered to them that use in the most ample manner.

The resolution passed since the filing of the bill by the town council of Clifton, giving a modified assent to the use of the streets by *The Canada Southern Railway Company*, can make no difference. It cannot in any way enure to the benefit of *The Erie and Niagara Railway Company*, since the permission is exclusively given to *The Canada Southern Railway Company*, which for the reason before given cannot lawfully make use of the Suspension Bridge.

Judgment.

These reasons would be quite sufficient to warrant the decision that the bill cannot be maintained. But granting that all the difficulties I have just mentioned were overcome, ought the Court to grant an injunction in a case where it could serve no useful purpose?

Had the junction of the plaintiffs' line with the Bridge been accomplished, and had there been an agreement with the American Bridge Company to permit the transit of *The Erie and Niagara Company's* trains and traffic, I can understand that the plaintiffs would be in a position to complain; but at present, the utmost the injunction

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of this Court could enforce, would be the right to cross the Bridge to the distance of a line drawn through its centre, forming the boundary line between Canada and the United States, the American Bridge Company having it in their power to repel the plaintiffs when they reached that point, and probably being able to support that right by an appeal to the Courts of the United States or of the State of New York.

What damage can *The Erie and Niagara Railway Company* suffer from being precluded from such a user?

The idea of actual legal damage is therefore entirely illusory, and so it must continue if the American Bridge Company have, as they claim to have, the legal right to confer exclusive enjoyment on one railway company; at least so long as they choose to exercise that right.

A great difficulty in the plaintiffs' way would, perhaps, have been removed if the Bridge Companies had been regulated by uniform legislation on both sides of the Niagara river; for had the American Company been subjected to the same obligations as regards the public as this Court holds the Canadian Company to have been, and had judicial proceedings to enforce these obligations been carried on simultaneously in the United States and in this Province, arguments deduced from the principles of international comity might possibly have been brought forward on behalf of the plaintiffs, which would, if they were otherwise in a position to complain, have entitled them to relief. I do not mean to express any legal opinion as to the New York law. I understand the rule to be that where the written law of a foreign state is put in evidence, the Court, as a presumption of fact, assumes in the absence of proof to the contrary, that the foreign Statute is to be construed upon the same principles as they apply to their own domestic legislation; (*Wharton's* Conflict of Laws, page 514,)

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and dealing with the New York Act of 1853 in this way, it seems to me that there is ground for saying that the Indenture of the 1st of October, 1853, may not have been *ultrà vires* of the American Bridge Company.

I am aware, however, that it is not very safe to apply an ordinary rule of construction to an Act of the Legislature of one of the United States, since something more than interpretation is required in applying such legislation, it being essential to the validity of the enactment that the construction should harmonise with the fundamental law, the constitution, and with such questions our Courts can only deal as pure matters of fact, to be established by the evidence of skilled witnesses. No evidence to shew the 2nd section of the New York Act in question to be unconstitutional has been given, and I must, in the absence of such testimony, presume it to be valid.

Judgment.

But it would make little difference in the reasoning if the New York Statute had not been put in evidence here, for the American Company, and their lessees *The Great Western*, are beyond question *de facto* in possession of the American portion of the bridge, and it has not been shewn that their power to refuse the right of passage to the plaintiffs could be controlled in the United States or New York Courts. It lay upon the plaintiffs to prove that as a fact if the law in New York is otherwise than I suppose it to be.

It is sufficient to say then that, at present, even if the plaintiffs shewed a complete title to relief, the Court would be impotent to give them any effectual assistance, and where this is the case the Court never acts.

I do not understand that the bill seeks any relief founded on the 9th article of the deed of October 1st, 1853, providing that *The Great Western* may agree with

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The Erie and Ontario for the passage of their passengers and goods at certain specified rates. If such relief is claimed there are many objections to it. The agreement in question is one to which *The Erie and Ontario Company* were not orginally either directly or indirectly parties, and they have not acted on it since in such a manner as to entitle themselves to the benefit of it, and therefore they can claim no rights under it; the parties who made it were, therefore, free to abrogate it (*a*).

But a further answer to any case founded on the provision mentioned is, that it would be impossible for the plaintiffs who, by their bill, insist upon and have succeeded in establishing the illegality of the indenture of the 1st of October, 1853, to enforce any stipulation contained in the agreement which they have so successfully attacked.

Other objections occur to me, which I need not however refer to, as the answers already given seem to be sufficient, and indeed no point was made of this stipulation in the argument. Judgment.

The bill must be dismissed as to all the defendants.

Upon the information I make the decree which I have already indicated.

The American Bridge Company are dismissed generally with costs. As the *Erie and Niagara Railway Company* are the relators in the information, I give no other costs.

The following are the minutes of the decree:

Declare the indenture of the 1st day of October, 1853, void as regards *The Niagara Falls Suspension Bridge Company*.

(*a*) Colyear v. Lady Mulgrave, 2 Keen at 98; Tweddle v. Atkinson, 1 B. & S. 393.

1873.

Attorney General v. The Niagara Falls &c. Bridge Co.

Order and Decree that the information and bill do stand dismissed with costs as against *The Niagara Falls International Bridge Company.*

Order and Decree that the defendants *The Niagara Falls Suspension Bridge Company* be restrained by the order and injunction of this Court from further acting under the said agreement.

No order as to costs except as aforesaid.

HAWN v. CASHION.

Vendor and Purchaser—Repairs and improvements after suit—Costs.

Where a vendor brought ejectment, and turned the heirs of the purchaser out of possession, he was held to have disabled himself from coming to the Court for specific performance, and could only do so in order to bind their interest in such a manner as to render the property saleable. Under such circumstances, the plaintiff having placed himself in a false position by reason of the proceedings at law, the Court deprived him of his costs up to decree, but gave him his costs subsequent thereto.

On taking an account of what was due to a plaintiff in possession who claimed under a vendor of real estate in a specific performance suit, the Master allowed certain repairs and improvements, some of which were made after the commencement of the suit. On further directions, the Court expressed the opinion that the only repairs made after suit commenced, that could be allowed, were such as it was the plaintiff's duty to make in order to save the premises from deterioration.

Hearing on further directions.

Mr. *Bethune*, for the plaintiff.

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

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Hawn v. Cashion.

SPRAGGE, C.—From the terms of the decree I assume that the contract of sale alleged in the plaintiff's bill was proved at the hearing; and that the conveyance alleged in the defendant's answer was not proved; and from the report I infer that the alleged payment by the purchaser to Mr. *Mason* was not established in evidence.

So far the vendor appears to have been in the right: but, on the other hand, by bringing ejectment and turning the heirs of the purchaser out of possession, he disabled himself from coming to this Court for specific performance; and he could only come, as put in *O'Neal* v. *McMahon* (*a*), in order to call upon the defendants specifically to perform the contract, or to have their right to a specific performance bound in such a manner as to render the property disposable.

Judgment.

With regard to the allowance for repairs and improvements made on the premises by the vendor or those claiming under him, the Master reports that "all the repairs done to the buildings upon the land in question and the said improvements were done after the commencement of this suit, except the repairs done to the said house, which I allowed at $43."

I do not see how I can allow to the plaintiff for repairs and improvements made after suit commenced. The utmost that could be allowed to the plaintiff would be such expenditure as would be excused by necessity, in order to prevent the premises getting into such a state of disrepair, as would be injurious to them; such repairs, in short, as it would be the duty of the party in possession to make in order to save them from deterioration. The report does not give me such information as to enable me to say what, if any, of these repairs and improvements would fall within the category

(*a*) 2 Gr. 148.

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that I have designated. It is clear that all would not, for they are not all repairs, but some are improvements, as distinguished, as I understand it, from repairs. Upon this question of allowance for repairs after suit I refer to *The Master of Clare Hall* v. *Harding* (*a*).

As to costs—looking at the plaintiff's position and the ground upon which he comes into Court, I think he should have no costs up to decree. He comes to set himself right in regard to a false position in which he had placed himself by his proceedings at law. The costs subsequent to the decree I think he is entitled to, and those costs should be added to the amount to be allowed to him for purchase money, interest, and repairs. There will be the usual decree for payment or rescission.

Judgment.

(*a*) 6 Hare, 296.

1873.

WILDE v. WILDE.

Parol trust—Statute of Frauds—Pleading—Resulting trust.

A party is entitled to set up the Statute of Frauds as a defence to a suit to enforce a parol agreement respecting an interest in land, although the Statute has not been specially pleaded.

Where a party fails to establish a parol trust in favor of himself and another, which his own evidence supports, he cannot afterwards insist upon a resulting trust or trust by operation of law.

A party claiming a resulting trust in his favour, arising out of a purchase of land must shew that such purchase was made on his behalf, and that the money paid on account of it was his money.

A father and son lived together on the same farm, of which they obtained a lease in their joint names, the son having for several years, owing to the infirm state of his father's health, the entire management of the farm; and any moneys he received from the sale of the produce thereof, he was in the habit of handing over to his mother for safe keeping, thus forming, as it were, a common fund. Subsequently he effected a purchase of the farm in his own name, when he paid $1,000 on account of the purchase money, derived partly from private funds, and partly from the fund held by the mother, and gave a mortgage with the usual covenants for the residue of purchase money, on which he subsequently made a payment of $1,520; $1,000 of which he borrowed from his wife, the balance being made up partly of funds of his own, partly of funds obtained from the common purse. The father claimed that the purchase had been made for his benefit and the benefit of the son and his brother, and filed a bill to enforce such claim: the son answered denying having made the purchase in the manner alleged, and claiming to be the sole owner of the property, subject to the support of his father and mother out of the same.

Held, per Curiam, that, in the absence of any writing signed by the son, nothing was shewn to take the case out of the Statute of Frauds; and even if the defence of the Statute were not set up, sufficient was not shewn to entitle the father to a decree on the ground of contract: [SPRAGGE, C., *dissentiente*,] or on the ground of a resulting trust in his favor, by reason of his having paid a portion of the purchase money. [SPRAGGE, C., *dubitante*.]

Statement.

The bill in this cause was filed by *John Wilde* against his two sons, *John Edward Wilde* and *William Wilde*, stating to the effect (1) that plaintiff was lessee from one *Jacob T. Nottle*, of one hundred acres of land in

1873. Wilde v. Wilde.

Statement.

Caistor, (2) and during the currency of his lease both the defendants resided with him, and assisted in working the land; (3) that in 1870 plaintiff decided to purchase the land in order to provide homesteads for the defendants, which decision he communicated to the defendants, and thereupon entered into negociations with *Nottle* for such purchase, which negociations were carried on partly by the plaintiff and partly by the defendant *John Edward Wilde;* (4) that it was understood between plaintiff and the defendants, that he should become the purchaser, and when fully paid for, the property should belong to the two defendants in equal shares, but that during the lifetime of the plaintiff he should have the control and management of the farm, and the support of himself, wife, and family during his or her life; (5) that a short time prior to the 19th of November, 1870, plaintiff and *Nottle* verbally agreed for the purchase and sale of the premises for $3,000; $1,000 of which sum was to be paid down in cash; (6) and for the purpose of carrying out such verbal agreement plaintiff handed to defendant *John Edward* $1,000, with instructions to pay the same to *Nottle*; (7) and he accordingly paid that sum to *Nottle*, but entered into a written agreement for the purchase in his own name, which agreement was handed to the plaintiff, by *John Edward*, and had ever since remained in his possession, and *John Edward* had always until recently admitted that the purchase was made in the manner and upon the understanding mentioned; (8) that in June, 1871, *Nottle* conveyed the land to *John Edward Wilde;* taking back from him a mortgage for $2,000; (9) that after this time plaintiff continued still to manage the farm, assisted by the defendants; (10) that in November, 1871, plaintiff handed the defendant *John Edward* $120 to pay the interest then due on the mortgage, and he paid the same and took a receipt in his own name, which on his return home he handed to the plaintiff; (11) that in November, 1872, plaintiff paid *Nottle* $400 on account of said mortgagee

and took a receipt in his own name. (12) In the same year *John Edward* married and brought his wife to live with the plaintiff and his family on the farm, and in the month of November of that year paid to *Nottle* $1,000 on account of the mortgage, and took a receipt therefor in his own name, but which, as before, was handed to the plaintiff: the money so paid being, as plaintiff believed, borrowed by the defendant from his wife; (14) that in January, 1873, the defendant *John Edward* informed the plaintiff and the defendant *William Wilde* that he claimed to be sole owner of the farm, and repudiated any understanding as to having purchased for the plaintiff, and threatened and intended to sell the same. 1873. Wilde v. Wilde.

The prayer of the bill was that it might be declared that the defendant *John Edward Wilde* held the land in trust for the plaintiff and the defendant, during the life of the plaintiff; and after the death of the plaintiff, in trust for himself and his co-defendant, as mentioned in the fourth paragraph of the bill, and for an injunction to restrain *John Edward* from selling or incumbering the property. Statement.

The defendants severally answered the bill. *John Edward Wilde* denied that the purchase had been made as stated in the bill.

The cause having been put at issue came on to be heard before The Chancellor, at Hamilton, when evidence was taken, the effect of which is clearly stated in the judgment, and His Lordship pronounced a decree in favor of the plaintiff.

The defendant *John Edward Wilde*, thereupon reheard the cause before the full Court.

Mr. *Proudfoot*, Q. C., and Mr. *Duff*, for the defendant *John Edward Wilde*.

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Wilde v. Wilde.

Mr. *Moss*, Q. C., and Mr. *C. Moss*, contra.

In addition to the cases mentioned in the judgment, *Wood* v. *Midgley* (*a*), *Prankerd* v. *Prankerd* (*b*). *Williams* v. *Jenkins* (*c*), *Williams* v. *Williams* (*d*), *Devoy* v. *Devoy* (*e*), *Bone* v. *Pollard* (*f*), *Rider* v. *Kidder* (*g*), and *Fry* on Specific Performance, page 156, were referred to by counsel.

STRONG, V. C.—The bill in this cause is filed by *John Wilde* against his sons *John Edward Wilde* and *William Wilde*, and it seeks to establish against the defendant *John Edward Wilde* a trust in respect of 100 acres of land in the Township of Caistor.

The land in question was purchased in November, 1870, from *Jacob T. Nottle*, and was on the 19th of November, in that year, conveyed by the vendor to *John Edward Wilde*, the price being $3,000, of which $1,000 was paid in cash at the time of the execution of the conveyance, and the residue of $2,000 was secured by the mortgage of *John Edward Wilde*, which contained the usual mortgagor's covenant for payment, and was the only security given for the unpaid purchase money.

Judgment.

It is alleged by the plaintiff that this conveyance to the defendant *John Edward Wilde*, was upon an express trust, the terms of which are thus stated in the fourth paragraph of the bill: "An understanding was come to between the plaintiff and defendants that he, the plaintiff, should become the purchaser of the said premises, and that such premises should, when fully paid for, become the property of the two defendants in equal

(*a*) 5 D. M. & G. 41.
(*b*) 1 S. & S. 1.
(*c*) 18 Gr. 536.
(*d*) 32 Beav. 370.
(*e*) 3 S. & G. 403.
(*f*) 24 Beav. 283.
(*g*) 10 Ves. 360.

shares; but that during the lifetime of the plaintiff he should have the control and management of the said farm, and he and his wife and family should, so long as the plaintiff and his wife should live, reside upon and be maintained out of it; and for the purpose of paying so much of the purchase money as was not required for the down payment, it was agreed that the defendants should continue to reside with the plaintiff and assist him with their labour in accumulating means to complete the payment of the purchase money."

The bill prays that the trust so alleged may be declared and carried into execution.

The defendant *John Edward Wilde* in the third and fifth paragraphs of his answer explicitly denies the trust alleged by the plaintiff, but he admits and has always, so far as I can discover, admitted that his father and mother were to have a home with him on the farm during their lives. In other respects the defendant insists that the purchase of the land in question was made for his absolute use.

Judgment.

The defendant *John Edward* does not plead the Statute of Frauds.

The defendant *William Wilde* answers, admitting the trust set forth by the bill, and his answer and his evidence shew that his interests are in all respects identical with his father's.

The plaintiff in his evidence swore that the land was purchased on the trust stated in his bill. His statement is in these words: "The understanding between my two sons and myself was, that we should all work together until the place was paid for. It was to be divided as soon as paid for. I was to continue to live on the place and my wife and unmarried children."

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The plaintiff's wife, who was examined as a witness for him, states the trust or understanding differently. She says: "We were to keep the land as long as we lived; then they talked of it being divided between *John* and *William*. *John* frequently made that offer —viz., that they should all work on together and then divide it beween them, so that each should have half."

The plaintiff's married daughters and his son *William* say, that the arrangement was, that which the plaintiff himself describes it to have been, namely, that the land was to be divided between the two sons as soon as it was paid for; whilst *Sarah Wilde*, another daughter, gives evidence inconsistent with this, and proves the agreement to have been, that the plaintiff was to keep the property during his life, and that a division between the two sons, the defendants, was to be made at the plaintiff's death.

Judgment.

This was substantially the proof given in support of the plaintiff's case, so far as it was one of express trust.

Failing the actual trust, stated in this evidence, the plaintiff sought to establish a resulting trust, or trust by operation of law, and he relied for that purpose on a case which he insists appears from the evidence, that the purchase, though in his son's name, was made for his benefit, and, so far as the purchase money has been paid, with his money.

Assuming, therefore, that this case of resulting trust is open to the plaintiff, it becomes important to inquire into the circumstances attending the purchase and the ownership of the money which has been paid to the vendor.

The land in question had been in the first place occupied by the plaintiff in 1860, under an agreement with

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Mr. *Nottle*, the owner and the vendor from whom it was afterwards purchased, to work it on shares; and it was accordingly worked on shares during the years 1860 and 1861. In 1862, the plaintiff took a lease from *Nottle*. About this time the defendant *John Edward Wilde*, who was then twenty-three years of age, proposed to leave home, but was induced by his father's persuasions, as he says, to remain on the farm. The plaintiff, I gather from the evidence, was not even then a very robust man, and owing to his health, was not capable of hard labor. On the other hand, the defendant *John Edward Wilde*, was active, vigorous, and intelligent; indeed, Mr. *Nottle*, who I should suppose a competent judge, says, "he was the very best man he ever saw on a farm." He says that he was a butcher and a carpenter and very industrious. The father seems to have retained the management of the property while under lease, until 1866, when *John Edward* took the charge, and thenceforward until the date of the purchase in November, 1870, superintended the farm, and with much success, for whilst in the father's hands the rent fell in arrear, and the landlord had to distrain; under the son's management it seems to have been worked at a considerable profit. In March, 1870, a new lease was taken in the joint names of the father and his son *John Edward*.

Judgment.

The purchase was made in the month of November, 1870; and I think the evidence shews, notwithstanding what is said by the plaintiff and his wife, that the bargain was between the defendant *John Edward* and the vendor Mr. *Nottle*.

The preliminary contract was certainly in the name of the defendant *John Edward*, for although the name originally mentioned as that of the purchaser, was *John Wilde*, yet Mr. *Nottle*, who I take to be a credible witness, explains that the word "*Edward*," was interlined

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before execution; and that the person he sold to, and the only person he would have sold to, was *John Edward Wilde.*

The money which was paid at the date of the purchase in November, 1870, amounting to $1,000, appears to have been made up as follows: $400 of this amount was a sum of money which the defendant says he had had for some time previously in the Post Office Savings Bank, at Hamilton; and which consisted of the proceeds of sales of stock on the farm, which had been his own exclusive property; that *John Edward Wilde* had owned stock which he had sold, is proved by Mr. *Nottle*, and I cannot help thinking that all the circumstances go far to confirm his contention, that this sum of $400 was his own money.

Judgment.

This, however, is denied by both his mother and his father, who assert the money to have been cash in the hands of the mother, derived from the produce of the farm, which, as she and the plaintiff allege, was sold by *John Edward*, and the proceeds deposited with his mother for safe keeping.

I should, if I am to form a judgment upon the written evidence before me, much prefer the plaintiff's statement as to this, as I think it is more in keeping with the circumstantial evidence which cannot be questioned.

A further contribution to this first payment of $1,000, was a sum of $300, which was borrowed from *Edwin Wilde*, a son of the plaintiff living in Hamilton, on the joint promissory note of the plaintiff and *John Edward Wilde*. There is also a dispute as to this loan, the plaintiff insisting that it was made on his credit, in which he is rather confirmed by *Edwin* the lender, whilst the defendant insists that he was the borrower and his father joined in the note as a surety for him. An additional

sum of $164 was borrowed from some School Trustees living in the neighbourhood; and this, beyond all question, was loaned on the defendant's credit, and he procured a friend to become a surety for him. The residue of the $1,000, amounting to $136, was made up from the purse which, as before mentioned, was kept by the mother, and which consisted of the proceeds of produce sold.

Upon this $1,000 being paid over to the vendor *Nottle*, he executed a conveyance, in the usual form of purchase deeds, to *John Edward*, and took from him a mortgage to secure the residue of the purchase money, $2,000.

No declaration of trust was ever executed by *John Edward Wilde*, and not a written word signed by him exists to shew that he was ever such a trustee as his father alleges him to have been.

Judgment.

The farm, after the purchase, was carried on as it had been before by *John Edward*, who in conjunction with it worked fifty acres of land adjoining, of which he had in his own name a lease also from *Nottle*.

In November, 1871, a gale of interest amounting to $120 was paid on the mortgage by *John Edward*; this money he obtained from his mother, and it was derived from the sale of produce.

Sometime in 1872, *John Edward* married. In November, 1872, $1,520 was in all paid to Mr. *Nottle*. First, there was paid him for interest $120; $100 of this was derived from the fund kept in Mrs. *Wilde's* hands, already mentioned; and $20 was borrowed by *John Edward* from his brother *Edwin*. A few days afterwards, $400 on account of the purchase was paid to Mr. *Nottle*; this money, it is said by the plaintiff, was

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paid by him, but Mr. *Nottle* swears he received it from the defendant *John Edward*, and intended to have given the receipt in his name, though it was by accident given in plaintiff's name. This sum of $400 was, as the defendant says, made up of $300, the price of grain sold from the fifty acres which he held under the lease from *Nottle* to himself; $30 in money borrowed from his wife, and $70 which he got from his mother out of the often-mentioned fund. A few days afterwards the defendant *John Edward Wilde* paid $1,000, a sum which was then overdue for purchase money under the mortgage which he had given. This was borrowed from the defendant's wife, and it does not appear that there was any other source available to the defendant or the plaintiffs, from which such a sum could have been raised

Soon after these payments were made in November, 1872, disputes arose amongst the members of the family as to the land in question, the result of which was, that the bill in this cause was filed.

Judgment.

The cause was heard at the last Spring Sittings at Hamilton, before his Lordship the Chancellor, when a decree was pronounced for the plaintiff with costs, establishing a trust in favor of the plaintiff and his wife during their joint lives, and for the life of the survivor, and after the death of the survivor of the plaintiff and his wife, for the defendants in equal shares, with a provision for a lien in respect of moneys advanced; which lien, however, was not to be enforced until the whole of the purchase money should become due.

The cause has been reheard by the defendant *John Edward Wilde*, and was most ably argued at this bar by the learned counsel, who appeared for the respective parties.

The counsel for the defendant raised at the beginning of his argument a point which seems to me to be

one which must prevail, namely, that the case made by the plaintiff and denied by the defendant, as well in pleading as in evidence, is, that the land in question was purchased and conveyed to the defendant *John Edward Wilde*, upon a certain special trust, the particulars of which are set forth in the fourth paragraph of the bill and in the plaintiff's evidence; and it is argued, there being of this trust no written evidence signed by the defendant, the Statute of Frauds is an insurmountable difficulty in the plaintiff's way. 1873. Wilde v Wilde

It is said on behalf of the plaintiff that the Statute of Frauds, not having been pleaded by the answer, is a defence of which the defendant cannot avail himself.

I do not agree in this contention. The seventh section of the Statute of Frauds, which requires special trusts relating to lands to be evidenced in writing, signed by the alleged trustee, forms a rule of evidence and nothing more; and if between the time at which a plaintiff alleges a trust in pleading, and that at which he is called on to prove it, he can procure a writing to be signed by the defendant, he is entitled to succeed. In *Ridgway* v. *Wharton* (*a*), Lord *Cranworth* lays down the rule that if a party in a suit in equity is put to proof of an agreement to which the Statute of Frauds applies, he must establish his case by evidence sufficient within the Statute. This case of *Ridgway* v. *Wharton* went to the House of Lords, and was there the subject of much discussion, but the rule of pleading it laid down seems to have received the silent acquiescence of the Lords who heard it, for no objection is raised to that part of Lord *Cranworth's* decision in the Court of Chancery. In *Heys* v. *Astley* (*b*), Sir *George Turner*, L. J., approves of what Lord *Cranworth* decided in *Ridgway* v. *Wharton* on the point of pleading, and in *Butler* v. Judgment.

(*a*) 3 DeG. McN. & G. at. 689. (*b*) 12 W. R. 64.

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Church (*a*), in our Court of Appeals the Chief Justice and the learned Judges who concurred with him were of the same opinion. The analogy of pleading at law is also in favor of the defendant, since it was there determined, soon after the Pleading Rules of 1834 were established, that a party who put his adversary to proof of a contract which happened to be within the Statute of Frauds, did not forego the right to insist on the Statute, because he did not plead it specially: *Butterwere* v. *Hayes* (*b*), *Leaf* v. *Tuton* (*c*).

The case of *Davies* v. *Otty* (*d*) is also, I conceive, a strong authority for the defendant.

As the result of these authorities I am therefore prepared to decide that the Statute of Frauds is open to the defendant as a defence in the present case, though he has not pleaded it; upon the principle that the plaintiff being put to prove the special trust which he alleges, is bound to prove it by evidence sufficient according to the requirements of the Statute.

Judgment.

Then, as I have already said, there is no written evidence signed by the defendant implying the slightest recognition of a trust of this land.

The conclusion is, that the plaintiff ought to fail upon this ground alone.

It has, however, been argued, and I understand that the judgment of his Lordship the Chancellor proceeded upon that principle, that the evidence here shews, independently altogether of the case of express trust made by the bill, that a trust resulted by operation of law in favor of the plaintiff which he is entitled to enforce. I must, however, observe that the decree certainly does

(*a*) 18 Gr. 190.
(*b*) 10 M. & W. 397.
(*c*) 5 M. & W. 460.
(*d*) 33 Beav. 540.

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not proceed on any resulting trust, since it establishes the trust which is sworn to, not exactly by the plaintiff himself, but by his wife; that is to say, a trust for the plaintiff and his wife for life, and for the life of the survivor, and an ultimate trust for the two defendants equally. I am entirely adverse to such a decree. I conceive it directly establishes a conventional trust by parol proof. The decree, however, contains in other respects internal evidence that it has been inaccurately drawn up, and I understand from observations made during the argument that it does not correctly embody the Chancellor's decision.

Had, however, the plaintiff shewn himself upon the evidence to be entitled to insist upon a resulting trust, I would not for a moment hold him to be concluded by the form of his pleading. The evidence, however, does not I conceive entitle the plaintiff to insist upon the enforcement of a trust by operation of law, and that for more than one reason.

Judgment.

In the first place the eighth section of the Statute of Frauds exempts this class of trusts from the operation of the Statute altogether, and leaves them as they stood before its enactment.

Then it is not only law upon authority, but law founded upon reasoning which commends itself to the understanding of every one, that a man who asserts upon his oath that land which was conveyed to *A* in trust for him for life, remainder to his son, shall not be permitted in the face of his own evidence of such an actual trust to fall back upon a legal implication of a trust of a totally different nature, one for himself absolutely,—arising from the fact of his having paid all the purchase money. Resulting trusts owe their origin to feoffments without consideration expressed, and without limitation of use to the feoffee, in which case a use which before

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the Statute of 27 Henry VIII., was nothing more nor less than a trust, resulted to the feoffor. It was held that the express limitation of a use to the feoffee prevented any such resulting use from arising. From analogy to that rule it was the law before the Statute of Frauds that if a special trust was intended and agreed there could be no resulting trust, and by the express saving of the eighth section the Statute has not made any difference in law in this respect. Therefore I consider the law to be, that a man who seeks to enforce an express parol trust which out of his own mouth and by his own oath he proves to have been the declared intention of the parties, can never insist upon enforcing a trust by operation of law.

The case of *Bellasis* v. *Compton* (*a*), is an authority to this effect entirely satisfactory to my mind, although upon the collateral point that a trust of a mortgage of lands is not within the Statute of Frauds, it may be considered to have been displaced by Sir *John Leach's* decision in *Benbow* v. *Townsend* (*b*). These considerations form, therefore, a distinct ground for refusing relief to the plaintiff.

Judgment.

I think, however, if the defendant were driven to it, he would be able to take refuge in the merits of the case as disclosed in evidence.

If the plaintiff is entitled to say that there was a resulting trust, it lies upon him to shew that the purchase was made on his behalf, or that the money paid on account of it was his money.

I think in both of these respects the plaintiff fails. Granting that every cent of the $2,640 which has been paid to the vendor, was *originally* the money of the

(*a*) 2 Vern. 294. (*b*) 1 M. & K. 506.

plaintiff himself, his case, would not, in my opinion, come up to that which would be requisite in order to establish a resulting trust. 1873. Wilde v. Wilde.

All this money passed through the hands of the defendant *John Edward*, and under all the circumstances of the case, I should come to the conclusion, as an inference of fact, that putting the relationship of the parties and all presumption of advancement out of the question altogether, there was here sufficient proof that the son and not the father was the real purchaser of this land; that in consideration of the very valuable services of the defendant to his father and his father's family, this money, supposing it to have been all the father's, acquired from some other source than the farm, had been put into his hands to enable him to make this purchase as absolutely for himself, and as free from any trust as any purchaser who borrows money to pay to his vendor would purchase. Judgment.

The vendor understood he was selling to the defendant. He says he would not have sold to any other member of the family; the bargain was made with the defendant—the original contract was with him; and the security for the purchase money unpaid, amounting to $2,000, was given by him and involved his personal covenant—all this being done with the consent of the plaintiff. Supposing this purchase had turned out to be a bad one; and the vendor had resorted to the personal covenant of the defendant for the unpaid two-thirds of the price and had compelled payment, where would have been found the defendant's right to an indemnity from the plaintiff? I apprehend it would have been impossible for the defendant, upon the evidence now before the Court, to have enforced any such indemnity from the plaintiff.

Independently, however, of this view, I should be

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against the plaintiff's case of a resulting trust, if I even thought such a case open to him, upon the ground that he does not shew that the money paid was his money.

As I have made the calculation, two-thirds or nearly so of the $2,640, which in all for principal and interest has been paid to Mr. *Nottle*, was either the defendant's money or raised upon his credit. The residue came out of the purse carried by the defendant's mother, the contents of which consisted entirely of the proceeds of the farm produce. It is out of the question to say, that the defendant *John Edward Wilde*, a man of mature years, who from the age of twenty-three had devoted himself to the work of this farm, who is shewn, I think, to have been economical and careful in his expenditure, and whose labours must have been the principal origin of the money in his mother's hands, was entitled to no beneficial interest in that money. Such a position would be most unfair and unreasonable. I consider, therefore, putting it as high as it could possibly be placed for the plaintiff, that the money produced by the sale of crops and stock formed a common fund which father and son were both interested in, though in undetermined proportions, and I therefore concede that they were in this way interested in so much of the purchase money, less than one-third of all which was paid, as went through Mrs. *Wilde's* hands, though I think this is a concession in favor of the plaintiff.

Judgment.

Taking this, however, to be the proper view of the evidence, it does not establish any right by way of resulting trust in the plaintiff.

There can of course be no doubt but that a trust results where two or more persons, in determined proportions, advance the purchase money of land which is conveyed to one, as was decided in *Wray* v. *Steele* (*a*).

(*a*) 2 V. & B. 388.

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Where, however, it is impossible to determine the proportions in which there has been contribution to price, as here, it is impossible that there can be any trust by operation of law, for the Court cannot determine the interest. Upon this, authority, if any is needed, is clear. I refer to *Crop* v. *Norton* (*a*), decided by Lord *Hardwicke*, a case which seems to be exactly in point, and has never been overruled, and to *Re Ryan* (*b*), in which *Crop* v. *Norton* was expressly followed. At all events the inevitable inference that the defendant *John Edward Wilde* was beneficially interested in the money in his mother's hands, coupled with the other circumstances of his own large advance, independently of his father and the family altogether, and his coming under the liability of the mortgage covenants, would, to revert to the first point I observed upon as arising on the evidence, be conclusive to my mind as shewing that he was a beneficial purchaser, and not a trustee either actually or by legal implication.

Judgment.

I think the plaintiff should pay the costs, and also the costs of the re-hearing. The decree should declare the plaintiff's right to a charge for maintenance of himself and his wife, which the defendant concedes.

BLAKE, V. C.—The case made by the bill is, that the plaintiff was to be purchaser of the premises, that when paid for they were to become the property of the defendants, but that the plaintiff was to have the control of them for his life, and he, his wife and family, were to live and be maintained on them. In his examination the father says: "The arrangement was, that the deed was to be made to my son *John*." The mother says: "When paid for, if *William* worked on, he was to have half." *William* the son says: "I remember the time the purchase was made; it was talked over in the house. I

(*a*) 2 Atk. 74. (*b*) 3 Ir. Rep. (Eq.) 222.

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was not consulted. I did not know that *John* had any interest in the lease." At the age of twenty-three the defendant *John* became the active manager, and the mainstay of the family. In the year 1866 there had been so much difficulty that it was suggested that the farm should be abandoned. *John*, however, determined to struggle through the difficulties, and by his ability and hard work he was enabled to arrange with *Nottle*, the owner of the land, for its purchase. The $1000 to be paid in cash, most of which had been put together by the exertions of *John*, who had acquired an interest in the adjoining fifty acres, were deposited to his credit in the Bank of Commerce on the 15th of November, 1870, and were checked out on the 19th day of the same month to the vendor, by *John*. *William* did not continue to work on the premises, and everything, with this exception, seems to have gone on smoothly until the defendant *John* married, when difficulties in the family immediately arose. *John* does not deny that the father and mother are to have a home on the place, and their maintenance during their lives; but he denies any right in his brother *William* (who, even according to the statement of the mother, seems to have forfeited, by his leaving the premises, any right he might otherwise have claimed), or the other members of the family, as to the premises. The bill alleges that the defendant *John* took the premises for the father and mother for life, to be divided between himself and his brother *William* upon the death of the parents. The defendant *John* denies any such agreement. I think, on the authority of *Butler* v. *Church*, reported in 18 Grant, citing *Ridgway* v. *Wharton* (*a*), that where a plaintiff alleges an agreement, and the defendant denies its existence, or does not admit it, the burden of proof is on the plaintiff, who must establish a valid agreement capable of being enforced. I therefore think that here the defendant is

Judgment.

(*a*) 3 DeG. McN. & G. 689.

entitled to put the plaintiff to the proof of such an agreement as would be binding within the Statute of Frauds. 1873. Wilde v. Wilde.

At the conclusion of the argument of the case, I was of opinion, independently of the Statute of Frauds, that the plaintiff had not made out that clear and distinct case which is necessary before the Court would interfere, to declare the trust alleged in favor of the plaintiff and *William*. I have since read over several times the evidence in the case, and I have done so with the feeling that *primâ facie* I must be wrong in my conclusion, as I differ from the Chancellor who took the evidence in the case; but, notwithstanding this I have been unable to satisfy my mind that the finding on the facts is the one which should have been arrived at. When *John* came to the assistance of the family, he was twenty-three years of age, and *William* but twelve. The burden of the work and responsibility fell upon *John*, the father not being able to render much assistance. In the March before the agreement for purchase was made, a lease had been given of these premises to the father and *John*. *Nottle*, the owner, with the knowledge of the family, refused to negotiate with any of them but *John* for the sale. A large portion, if not the bulk, of the purchase money was found by *John* himself. He alone gave back a mortgage to secure the balance of such purchase money. The agreement was made with him, and the conveyance was made to him, and that also with the knowledge of the family. No objection was taken to the position assumed by *John* under these instruments until the difficulties arose about two years after the purchase, owing to the marriage of *John*. Judgment.

Even if the evidence were admissible, I am unable to agree in the proposition that it supports the case of the plaintiff so as to prove the agreement he states. The bill alleges a trust in favor of the plaintiff and *William*, and it is said, because a portion of the purchase money which

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is traced into these lands was that of the plaintiff, therefore such evidence is admissible. The bill does not make the case of a resulting trust in favor of the plaintiff owing to the payment of part of the purchase money by him; but even if this case were open to him on the pleadings, I do not think that the facts sustain it. No money of the plaintiff, as purchase money of his, went into these lands. That part of the $1000 which was not either borrowed by, or otherwise the money of, the defendant *John*, was handed over to him by the mother and father, not in order that they or either of them should be the purchaser of the premises, either jointly with *John* or otherwise, but that *John*, and he alone, should become the purchaser. There may have been money advanced by the father and mother to *John*, but if so, it was an advance to him by them, in respect of which *John* may be their debtor, but this money, when it went into the hands of the vendor, was received as the purchase money of him, whose it then was, and who was to and did become, according to the statement and agreement of all parties, the purchaser of the premises.

Judgment.

I do not think, therefore, that there was any resulting trust in favor of the plaintiff. There certainly was none in favor of *William*. I do not think the trust pleaded can be enforced, owing to the Statute of Frauds. I am further of opinion that if the difficulty of the Statute were removed, the evidence would not warrant the Court in granting the plaintiff the relief he asks. The defendant does not deny that the plaintiff and mother are entitled to a home on, and their maintenance from, the premises so long as they live. That being so, I think the bill should be dismissed with costs, and that the plaintiff should pay the costs of this re-hearing.

SPRAGGE, C.—When this case was before me at Hamilton, I disposed of it at the conclusion of the argument. Mr. *Proudfoot* on that occasion took the position

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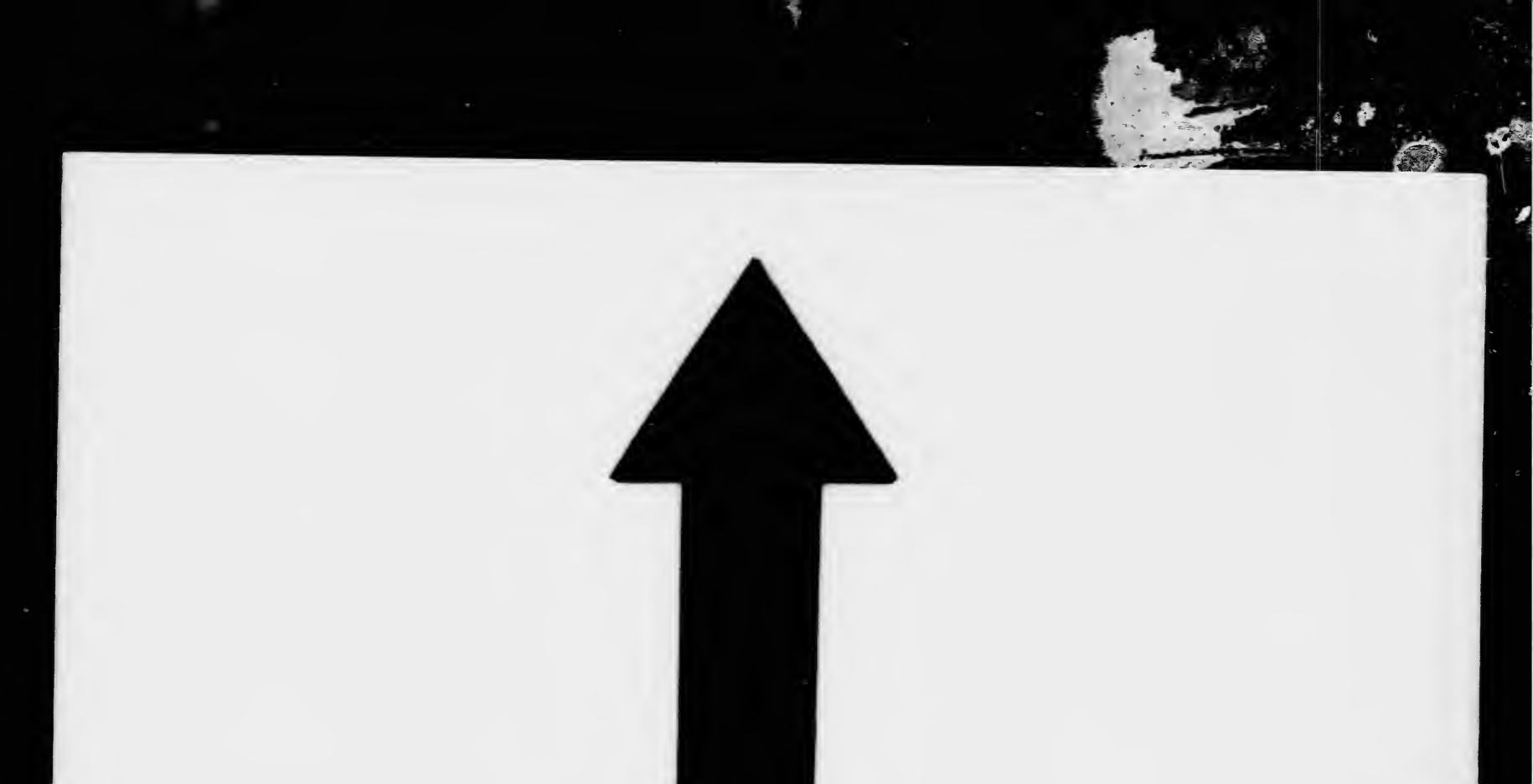
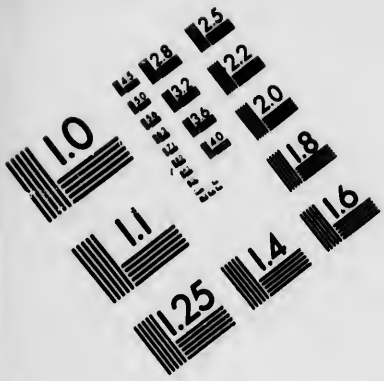
which he has taken at the re-hearing, that even assuming that the plaintiff's case was proved so as to rebut the presumption of advancement, he could not by parol establish a trust in favor of *William* his son. What I said upon that was, that I did not look upon it as a case of establishing a trust; but, the presumption of advancement being rebut[illegible] there was a resulting trust in favor of the father; t[illegible] in shewing the facts in rebuttal of the presumption of advancement, he shewed an agreement with *John* which prevented an unqualified vesting of the estate in the father; that if qualified it was by agreement in favor of *John*, of which *John* might avail himself; but this agreement was not in favor of *John* only, but of *John* and *William* also. If any agreement shewn, we must take the whole of it; and if *John* availed himself of it, it must be with all the stipulations to which it was subject; he cannot reject any portion of it if he makes any claim under it; that if he takes it, he takes it *cum onere*.

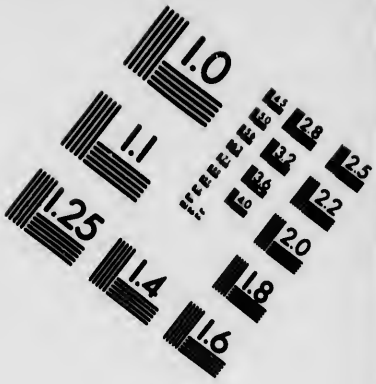
Judgment.

My learned brothers are of opinion that this is only a mode of shewing a trust in favor of a third person by parol, and I must confess that conference with my learned brothers, and an examination of the authorities, have a good deal shaken the opinion that I formed of the case at the hearing.

With regard to a resulting trust in favor of the father as well as the son, the father in my opinion furnishing a large portion of the money wherewith the land was purchased, there are certainly authorities—*Crop* v. *Norton*, and in *Re Ryan* referred to in the judgment of my brother *Strong*—which tend to shew that in such a case there would be no resulting trust in favor of the father. It may not be shewn in this case what moneys of the father went into the purchase of this land, but I think it might be ascertained by inquiry in the Master's office. If it is intended to carry the doctrine to this extent, that







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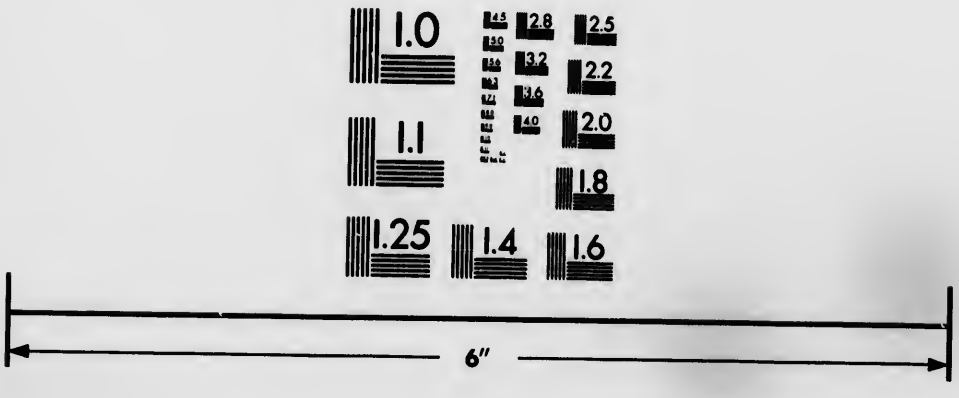

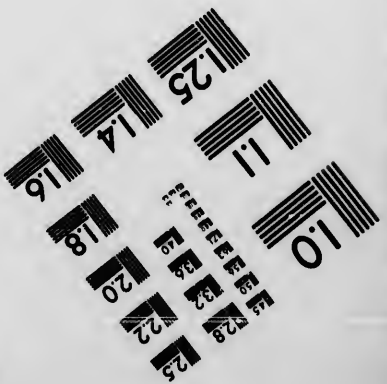

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where land is purchased with moneys, a portion of which only, belongs to the party who takes a conveyance to himself, and the residue to another person, there is no resulting trust in favor of that other person, I am not prepared to assent to it.

Nor am I prepared to take as settled law, that where a father furnishes a son with money to make a purchase of land, and is able to rebut the presumption of its being intended by way of advancement, by shewing an agreement or a declared intention that the land purchased was to be in whole or in part for another, that the son who makes the purchase cr· .hold it for himself, on the ground that what is shewn .n rebuttal of the presumption of advancement is shewing a trust by parol. The third person would in such a case be the appointee of the father. If the father made no appointment, the conveyance from the son would be to himself, and I do not see that he could not appoint it to be made to another. And the only question would be whether the appointment was in such a shape as to be effectual. It would be establishing no trust by parol against the son; it would be a resulting trust in favor of the father, and the person to whom he directed that his son should convey, would be merely the father's appointee.

Judgment.

So if the father shewed an agreement with the son that the son should purchase and hold the land as tenant in common with another son, I apprehend that the same principle would apply; the agreement proved would be the establishing of a fact negativing the presumption of advancement, as to an undivided moiety of the land, and the resulting trust as to that moiety would enure to the benefit of the other son as appointee of the father. A regular effectual appointment would have to be made if required by the son; but he could not, I apprehend, keep the whole land himself; the existence of the resulting trust would, it seems to me, make that impossible.

If part of the purchase money is furnished by the father and part by the son, the matter becomes more complicated, and where the proportion furnished by the father is not of such an amount as to exceed the proportion that would result to the father by way of resulting trust in virtue of the purchase money furnished by him, it would then become a parol declaration of trust, at least as to the excess, and open to the objection that it is within the Statute of Frauds; and I understand it to be the opinion of my learned brothers that such is the case in the suit before us. 1873. Wilde v. Wilde.

I have not come to the same conclusion as to the facts in this case. My conclusion has been, that what has been advanced by the father, and what has been furnished from the profits of the farm, were in no sense advances to *John*, to enable him to buy the farm, but were moneys of the father furnished by him as part of the purchase money on his own behalf, as purchaser on his own behalf or at least joint purchaser with *John* of the farm. It would be unprofitable now to enter into an examination of the many facts which led me to that conclusion, and which I explained at considerable length at the hearing. My purpose now is rather to define the view which I now take of the law of the case. Judgment.

I must dissent from the view expressed by my brother *Blake*, that independently of the objection of the Statute of Frauds, the case of the plaintiff is not made out in evidence. I heard the evidence given by the witnesses, and giving such weight to it as in my judgment it was justly entitled to, my conclusion was, and I still adhere to it, that *John* did agree substantially to the terms stated by the bill.

In regard to the way in which the case is stated by the bill, it is, as I observed at the hearing, rather a narrative of the facts of the case than a statement of

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the law of the case, or of the equity upon which the plaintiff founds his claim for relief.

I must observe too with respect to what may be considered as the meritorious position of *John* in this matter that he exaggerated his own case quite as much as the case of the plaintiff was exaggerated by himself and his wife; and in regard to the proposed abandonment of the place in 1866, it was *John* himself that proposed it, and it was the father that induced him to forego his intention.

It is said that *William* was to have a share only upon his continuing to work on the place, and that he did not continue to work. I do not agree that he forfeited his right if he had any. *John* complained certainly, but the substance of it was, that *William* was extravagant, and did less work than he was bound to do.

Judgment.

A letter from *William* to his father was among the papers that were before me. I thought it material in my view of the case as containing an admi[illegible] that the father had rights beyond what are now a[illegible]ed, and that *William* also was entitled to something, without explaining what.

As I have said, an examination of the cases and conference with my learned brothers has shaken the confidence that I felt at the hearing in the plaintiff's case. I have made the observations that I have made, to guard myself from too general an assent to the propositions that might be deduced from some of the cases.

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CASSIE v. COCHRANE.

Compromise—Surprise—Undue influence.

A farmer died intestate, leaving two sons and two daughters, and considerable property, most of which was in the possession of one of the sons. Two days after the funeral, at the suggestion of the sons, all went into town, the sisters being under the idea they were going to the Registry Office to make inquiries about the property, instead of which they were taken to see a lawyer about the estate; and while there, through the influence and importunity of the sons, and on the faith of their representations, some of which were not correct, and without full or correct information of the value of the estate, one of the daughters, in her husband's absence, and without any independent advice, executed a transfer of her interest in the estate to the son who was in possession, in consideration of his note for about one-fifth of the value of her share payable in six years without interest. There were moral reasons why she should have made a generous settlement with this son; but the settlement having been obtained as stated, was held by Vice Chancellor *Mowat* not to be binding, and on rehearing the full Court, considering the issue between the parties to be one of fact, refused to alter the decree.

The facts of the case appear sufficiently in the notes of the judgment of the late Vice Chancellor *Mowat* who pronounced the original decree. On referring to his note book it appears that the view which he took of the case was as follows:—

The plaintiff was entitled to one-fourth of her father's estate. She was induced by her brothers to give up this share, worth about $2000, for $400 payable in six years without interest, and secured by the promissory note of her brother *John*, to whom the surrender was made; and the question considered was whether such a transaction was sustainable as a family arrangement or compromise.

The Vice Chancellor observed that the agreement took place at Brantford two days after the funeral; that the plaintiff lived in a distant part of the country, but had gone to her father's place, near Brantford, to see her

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father during his last illness; that she was asked to accompany the family to Brantford to see about the estate; that she was not informed before hand that one purpose of their going was to accomplish an immediate settlement amongst the heirs and next of kin; that she was induced however, after they had gone to *Mr. Brooke's* office in Brantford, to consent to the settlement in question, by means of strong pressure on the part of her two brothers, one of whom, *John*, was in possession of the property or the principal part of it.

Her husband was not present, and she had no attorney to assist her in the settlement by his independent advice. She was told by her brothers on the occasion, that, among other things, *William* had a claim on the estate for $700 and compound interest for 24 years; that *John* was entitled to £7 10*s.* a month for the time he had lived with his father, and compound interest for 23 years; that her sister-in-law was entitled to $5 a month from the time she came there, and that a lawyer had told them that the brothers and sister-in-law could recover these sums from the estate. The plaintiff was told also that her share could not exceed $600. On the other hand, no statement of the affairs of the estate was exhibited to her. Having at length prevailed on her to say that she would accept the note in full satisfaction of her share, her signature was on the same day, 26th September, 1871, taken to the deed prepared to carry out the agreement. On the 22nd August, 1872, the present bill was filed.

Statement.

The Vice Chancellor thought that the haste with which the settlement was insisted upon and carried out was remarkable, and that the transaction was a "surprise" in the technical sense of the term. A settlement of this kind, to be effectual, must take place deliberately, after full and truthful information, and due advice. The brothers, however, insisted upon the settlement taking place that very night. It is evident, the Vice-Chancellor

remarked, that having no other counsel, she was trusting to her brothers' statements, and was made willing, in consequence of their misrepresentations and importunity, to take whatever they chose to say that they thought right. The plaintiff might legally be generous, but her generosity must be voluntary and deliberate, and not trapped from her when she had not the means of protecting herself. Important statements which were made to her, the defendants had failed to prove true or well founded.

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Upon this view of the facts, the Vice Chancellor considered that the plaintiff was not bound by the settlement at the time, and that nothing occurred afterwards which was sufficient to render it binding on her, a married woman.

The defendant *John Cochrane*, being dissatisfied with the decree so pronounced, reheard the cause before the full court.

Mr. *Fitzgerald* and Mr. *Morgan*, for the defendant.

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

SPRAGGE, C.—This is a case to set aside a perfected agreement for a compromise of claims. In many cases specific performance has been decreed of agreements for compromise in the nature of family arrangements. In the present case it was not a question of doubtful title, as in most of the cases; but the being known a settlement of claims and alleged rights has arrived at, and in that respect the case resembles *Williams* v. *Williams* (*a*) more than any of the other cases. Judgment.

It was known to all the parties that *John Cochrane* had no legal or equitable title. The land was the

(*a*) L. R. 2 Ch. App. 294.

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father's. No question was made that it was so, but it was put to the sisters that *John* having worked upon it for many years, having cleared it, and supported their father and mother out of it, he ought to be allowed to keep it; and the question discussed between them was, upon what terms, as between them and him, it was reasonable that he should be allowed to keep the land.

The strict legal right of the plaintiff, as of her brothers and sister, was to one-fourth each of the land and personalty. The value of the land was an element of consideration in settling what would be reasonable, and any charges against it, or claims to which the estate was subject, were also elements of consideration; but the agreement entered into was not based upon deducting these charges and claims from the value, and then dividing the reduced value into four parts, but all the circumstances were taken into consideration, and the conscience of each and good feeling of each were appealed to. If the settlement were upon any other basis, the two sisters would naturally expect to receive the same amount, which they did not.

Judgment.

Still to support such a settlement there must have been no misstatement, and no withholding of any fact material to a full and intelligent consideration of the circumstances.

There was some haste and pressure in the matter. The two sisters were taken to Brantford under the idea that they were going to the Registry Office in order to inquiries being made as to the affairs of the estate. They were, to their surprise, taken to a lawyer's office, and it was pressed upon them that there should be a settlement there and then; *William* saying he had to leave by the train.

The brothers seem from the first to have proceeded upon this, that *John* was to keep the land, and that the only

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question was, how much he was to pay his sisters for the relinquishment of their rights; and the sisters appear to have acquiesced in this. The question of amount seems to have been the only question really discussed between them. *Mrs. Parkhill* was first approached upon this; she named $1000, which *John* strongly objected to; and in order to cut down her claim *William* made a statement of the claims against the estate, his own claim for $700 with interest and compound interest for upwards of twenty years. He stated *John's* claim as $30 a month for the period he had worked for the father, which was some twenty-three years, with interest and compound interest, and that a sister-in-law, probably *John's* wife, was entitled to $5 a month; and he added that *Mrs. Parkhill* had better take a less sum than she had named, for the lawyer had told them (the brothers) that they could get it, *i. e.*, what he stated as their right. *Mrs. Parkhill* says that in the face of this claim stated to her, she could not get so much, and she agreed to take $800 in four equal yearly instalments.

Judgment.

The plaintiff, who was present at all this, was then approached. She named no sum but eventually agreed to take $400; and a note for that amount payable in six years without interest, was given to her; and this was the money consideration for her relinquishing her share in her father's estate, and she accepted this in the belief, as she swears, that her brothers could have enforced their claims; and she depended upon their doing what was right. She adds that her nephew told her, in the spring of 1872, that he thought her brothers could not have recovered their claims; but that, up to that time, she believed they could.

The discussion referred to took place not in the presence of Mr. *Brooke* the lawyer, in whose office they were, but in an adjoining room. The plaintiff says some conversation took place between her brothers and

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Mr. *Brooke*, but that she does not remember what it was; the result of the conference was communicated to Mr. *Brooke*, when the parties had decided. He looked upon the matter, he said, as a family arrangement, and thought that the plaintiff had acted very liberally. He was asked by Mr. *Parkhill* if *John Cochrane* was entitled to wages, and he told him that if the father had agreed to pay him wages, he could recover them for six years back. This seems to have been the only legal opinion given by Mr. *Brooke*, except that he told the parties that the property, after paying debts and liabilities would be equally divided between them; and this, as I read his evidence, was before the discussion between the parties in another room. The opinion given to *Parkhill* does not appear to have been communicated to the plaintiff: it is not said to have been communicated; and I assume that the learned Judge, who heard the evidence, believed her statement, that her belief at the time of this settlement and long after was, that the brothers' rights were what they were stated to be. I infer also, that these statements as to the rights of the brothers, were not made in the presence of Mr. *Brooke*. I understand so from the evidence, and I assume that if they were Mr. *Brooke* would have felt it his duty to have set the parties right upon the point.

Judgment.

The evidence of the brothers does not agree altogether with that of the sisters. It was for the learned Judge before whom it was given to attach such weight to the evidence of the different witnesses as it was in his judgment entitled to. I may, I think, properly assume that he believed the evidence of the sisters; and indeed the brothers themselves say that they could not contradict them upon oath.

The evidence then proves, that both the sisters were induced to make the settlement, that they did, in the

belief that claims existed against the estate of several times the amount that in truth did exist. This belief was brought about by statements made by *William*, in the presence of *John*. I do not think it makes any difference that they were not made by *John* himself. He stood by, and acquiesced, and took the benefit of them. I think he is in the same position as if he had made these statements himself. It is true, that they were in part statements of facts, or were not untrue, *e. g.*, the length of time that he (*John*) had been working on the farm; but, if beyond stating the facts, he took upon himself to state the legal rights of the brothers and sisters, upon the estate, resulting from those facts, with the addition not proved, that he had been so advised by a lawyer; and if these statements are acted upon, the case is brought within the rule that a settlement brought about by misstatement cannot be allowed to stand.

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Judgment.

The case of *Pusey* v. *Desbouvrie* (*a*), was not nearly so strong a case as this for setting aside a release of a right. A woman had certain rights as the daughter of a freeman of London. She had a right to elect between a legacy and her "orphanage;" and she did release the latter to her brother, being informed at the time of her right to elect; but she was not informed of her right to inquire into the value of her estate and the quantum of her orphanage part, before making her election; and upon this Lord *Talbot* observed; "I do not see that any manner of fraud has been made use of in this case; but still it seems hard that a young woman should suffer for her ignorance of the law, or of the custom of London; or that the other side should take advantage of such ignorance." The release was pleaded by the brother, and the Lord Chancellor directed the plea to stand for an answer: the brother to answer upon certain points indicated in the judgment. I refer also to the case of

(*a*) 3 P. Wms. 315.

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McCarthy v. *Decaix* (*a*), *Pickering* v. *Pickering* (*b*) *Groves* v. *Perkins* (*c*), and *Harvey* v. *Cooke* (*d*).

It may be added, that the position of the parties was unequal. The defendant *John* was in possession; the plaintiff had no independent professional advice, she was away from her husband, and she was pressed for an immediate settlement.

It is contended that the deed of release having been executed by the plaintiff's husband, some two weeks after its execution by the wife, she had *locus pœnitentiæ*, and should be held bound. In *Harvey* v. *Cooke* there had been receipts of interest under a deed which was sought to be set aside, and these were insisted upon as acts of confirmation; but Sir *John Leach* (*e*) held them to be "of no weight, it not being suggested that she or her husband were then better informed of the facts, than she had been when she executed the deed." And so, in this case, the plaintiff remained under the same misapprehension as to her rights, when and after the deed was executed by her husband, as she was when it was executed by herself in the office of Mr. *Brooke*.

Judgment.

In my opinion the judgment of the late Vice Chancellor is right.

STRONG, V.C.—If I had to determine this case on written evidence, I should probably not come to the same conclusion as the Vice Chancellor who heard the cause. I am not however so deciding it, but upon evidence taken *viva voce* in open court before the Judge whose decree is appealed from. Then I find the testimony conflicting. The plaintiff's evidence beyond all doubt is sufficient to establish her case. It is, however, contradicted by the

(*a*) 2 R. & M. 614.
(*b*) 2 Bea. 31.
(*c*) 6 Sim. 576.
(*d*) 4 Russ. 34.
(*e*) At page 58.

defendants, especially by *William Cochrane*, but I must assume that the Vice Chancellor believed the plaintiff's witnesses in preference to the defendant's. 1873. Cassie v. Cochrane.

The evidence of *Mr. Brooke*, which was not taken on oath, but for which a written statement was substituted, might have been more full if he had been examined in Court; as it stands, it is insufficient to counteract the evidence of the plaintiff's witnesses, which must be deemed conclusive. I entirely agree with the observations of his Lordship the Chancellor as to the law applicable to the facts established by the plaintiff and her sister Mrs. *Parkhill*.

Acting upon the principle, that in a conflict of testimony the finding of the Judge, in whose presence witnessess are examined, must be considered final, a principle recognized in the case of *Sanderson* v. *Burdett* (*a*), and the authorities there referred to; and also in *Penn* v. *Bibby* (*b*), and *Ball* v. *Ray* (*c*), I am of opinion that this decree must be affirmed with costs.

Judgment.

BLAKE, V. C.—One *John Cochrane* died intestate about the 26th of September, 1871, leaving four children; the plaintiff, the two defendants *William* and *John Cochrane*, and another daughter, Mrs. *Parkhill*. He was possessed of property to the value of from $6,000 to $8,000. The defendant *John Cochrane* had lived with his father and his mother up to the time of and for twenty years previous to the death of the father. The plaintiff and the other children had resided at a distance from their father for a number of years, and had not contributed to his support. The day after the father's funeral the children all met and resolved to investigate his affairs. The day following they went to a solicitor in Brantford, the town nearest the residence

(*a*) 18 G. 417. (*b*) L. R. 2 Ch. App. 127.
(*c*) 28 L. T Rep. p. 346; S. C. L. R. 8 Ch. App. 467.

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of the father, and the place where he died, and there and then a settlement was arrived at, whereby each of them, the plaintiff, Mrs. *Parkhill*, and the defendant *William Cochrane*, for the respective sums of $400, $800, and $700, released their claims upon the estate, and assigned the same to their brother *John Cochrane*. When the parties met they discussed their various rights or supposed rights to share in the estate of their father, *John* urged that while the rest of the family had left their father he had continued to reside with him; that he was entitled to the real estate, as on the understanding that he was to receive it he had lived on the land and improved it, and supported his parents for over twenty years; and that even if he were not entitled to the land he had a claim for wages spread over a number of years, and this claim, with interest, amounted to a large sum. *William* claimed that he had advanced $700 to his father twenty-four years before, to make the payments on the land, and that he should receive that sum with interest. It was also stated that there were liabilities to be met out of the property, and thus the one-fourth of the estate, or from $1,500 to $2,000 coming to each of the children would be much reduced.

Judgment.

It was also stated that the father had made a will, which, however, Mr. *Brooke*, the family solicitor, could not find. Under all these circumstances Mr. *Brooke* recommended a settlement, and it was made. I made the following note during the argument of the case as to the impression made upon my mind at the close of the reading of the evidence: "There might have been a will, and this would perhaps have defeated the claim of the plaintiff *in toto*. Mr. *Brooke* said, he thought there had been one; Mrs. *Cassie* had persons present in the office of the Solicitor in the same interest. It is evident she knew she could make more out of the settlement, as did her sister Mrs. *Parkhill*, but she preferred to make the arrangement she did. *William* accepted his $700,

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and, I think, all the family considered there was some indulgence to be shewn to *John*, who had lived with his father for years, and therefore they took the sums of money they did, and allowed *John* to retain the estate. It is impossible to say to what extent this and the chance of a will turning up may have influenced the plaintiff in coming to the arrangement she now impeaches. Each urged his or her claim, and they made the best settlement they could." I have perused the evidence several times since, and I cannot, from this alone, come to any conclusion other than the one that the considerations which I have mentioned operated upon the minds of the parties to the settlement; that they looked upon *John* as the child who had supported his parents, and was therefore entitled to that which otherwise might reasonably have been divided amongst them; they remembered they had left their parents to the protection of *John*, and without any strict examination of their legal rights, they dealt with *John*, considering only what, outside of a Court, would be due from a sister to a brother. The chief value of the estate consisted in the real property, and it was not a very great stretch of sisterly feeling to say, "to the brother who has made this land what it is, and who has maintained our parents for nigh twenty-five years, it shall belong." From the time of *Stapilton* v. *Stapilton* (*a*) downwards, whenever disputes have arisen with regard to the rights of different members of the same family, and fair compromises have been entered into, although perhaps not resting upon grounds which would have been considered satisfactory if the transactions were between strangers, they are sustained. The Court will not inquire into the supposed adequacy or inadequacy of the consideration. "Where," asks *Sir John Leach* (*b*), "is it to find a scale for determining the true measure of adequacy? If a Court is in such a case to be governed by its judicial opinion

Judgment.

(*a*) 1 Atk. 2. (*b*) Naylor v. Winch, 1 S. & S. 565.

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upon the rights of the parties, then, to him who by that opinion is held to be entitled to the whole property, no consideration can be really adequate which is less than the whole, and no compromise can ever bind the successful claimant. It is for this reason, and because I consider it to be wholly immaterial for the purpose of deciding upon the validity of the deed of compromise, that I do not give any opinion upon the arguments by which the counsel for the plaintiff assert her claim to the perpetual annuity. It is enough to support this deed, that there was a doubtful question and a compromise fairly and deliberately made upon consideration, and the actual rights of the parties, whatever they might be, cannot affect the question." I entirely concur in this statement of the law, and desire it to be distinctly understood, while affirming the decree in the present case, that it is not upon the ground that the Court is not bound to sustain a compromise, or that it readily interferes with a settlement that may be made where there are doubts as to the rights of the parties to it, that I do so.

Judgment.

But in order that the Court support such transactions, there must be "a full and free disclosure;" (*a*) there must be "good faith and honest intention," and if one of the parties stands in such relation to the other as renders it incumbent on him to give a fuller account of the matter in question in dispute than he has done, the Court, although no intentional fraud may be imputable to such person, will not support a compromise entered into between the parties (*b*).

Unfortunately no trace is found in the books of the Registrar of the Court of the points raised by Counsel, nor of the finding of the Court thereon; nor has any

(*a*) Gordon v. Gordon, 3 Swa. 400.

(*b*) Pickering v. Pickering, 2 Beav. 31–56; Groves v. Perkins, 6 Sim. 576.

note been made by the reporter of the Court of the argument of counsel, nor of the judgment of Mr. *Mowat*; and so we are left without any guide to come to the best conclusion we can upon a case thus unsatisfactorily presented to us. 1873. Cassie v. Cochrane.

The question in issue was one of fact for the Judge who tried the cause to determine. He had to say whether or not the defendant *John Cochrane* had so acted as that he can insist upon the parties to the compromise being bound thereby. He has come to the conclusion that this is not so, and although I do not arrive at the same conclusion from a perusal of the evidence, I am bound by his finding, as I would be by that of a jury, and am obliged to conclude that the circumstances do not warrant the view that *John Cochrane* so acted as that he can insist upon the instrument of September, 1871, defining the interests of the parties to it in the estate of the father. The decree must, therefore, be affirmed with costs. Judgment.

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BELL v. WALKER.

Acquiescence—Equitable interest—Notice—Registered title.

By a deed duly executed and registered, lands with a water frontage were vested in a man for life remainder to his son in fee. The deed contained an agreement or stipulation that neither party should be at liberty to dispose of or encumber the property in any way without the consent of the other. The father, with the knowledge, but without the consent of his son, sold portions of the water frontage, and the purchaser, with the knowledge of the son, improved thereon. After the death of the father the son sold and conveyed the lands, including the whole water frontage, to *W.*, whereupon a bill was filed by the vendee under the father against the son and *W.*, claiming absolutely the part of the water frontage which had been conveyed by the father, on the ground of acquiescence by the son, and that *W.* had notice of the plaintiff's interest:

Held, that the registration of the deed under which the father and son claimed, was actual notice of the son's title, and that his acquiescence or lying by could not affect his interest, but at most could only be construed into a consent by him to the sale by the father of his own interest, and

Semble, that under the circumstances, if even registration were not actual notice, the acquiescence would not bind his reversionary interest; and that even if the plaintiff had acquired any equitable interest arising out of such acquiescence, he could not enforce it against *W.*, without proving actual notice to him of such equitable interest.

Statement. This was a bill by *George Bell* against *Hiram Walker* and *Stanislaus Labadie*, seeking, under the circumstances stated in the headnote and judgment, to compel a conveyance of the property in question from *Walker* to himself; and failing that, that *Labadie* might be ordered to make good to plaintiff the amount expended in purchasing and improving on the property.

The case was originally heard before Vice-Chancellor *Blake* at the sittings at Sandwich, when he dismissed the bill; and the plaintiff thereupon reheard the cause before the full Court.

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

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It will be convenient, in discussing this case, to consider the position of *Walker* first, he having a registered title; and the defence raised by him of purchasing without notice is not available to *Labadie*. The Registry Act of 1868 does not apply here. The words of the Act (Sec. 68) are, that "no equitable lien, charge, or interest," shall be enforced against a registered title; but the Act affords *Walker* no protection. The interest spoken of in the Act is not such an estate as is claimed here, which is an equitable fee simple. *Walker* knew the *Bells* were in possession claiming some title; and he, by the advice of counsel, took the risk of their being able to substantiate their claim; and although there was a substantial consideration given, still the deed shews that defendant *Labadie*, sold and meant to sell only what estate he had. *Walker* cannot be heard therefore to assert that he is a purchaser for value without notice: *Wigle* v. *Settrington* (*a*), *Goff* v. *Lyster* (*b*). On the contrary, if the statute, under other circumstances, would be a defence, it cannot be so to *Walker*, on the ground of wilful blindness on his part; he should have inquired of the *Bells* what interest they held or claimed; and he would then have found out their title exactly: *Owen* v. *Harrison* (*c*), *Thomson* v. *Simpson* (*d*), *Leary* v. *Rose* (*e*), *Moore* v. *The Bank of British North America* (*f*).

Argument.

The fact that *Labadie* consented to the sale by his father, and afterwards sold to *Walker*, is such a fraud on his part as entitles plaintiff, in the event of failing against *Walker*, to ask relief against him, by compelling him to re-imburse plaintiff the amount expended in payment of purchase money and for improvements.

Mr. *Boyd*, for the defendants.

(*a*) 19 Gr. 512.
(*b*) 14 Gr. 451.
(*c*) 17 Jur. 861.
(*d*) 2 J. & La. 110.
(*e*) 10 Gr. 346.
(*f*) 15 Gr. at 319.

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Walker's position is clearly not assailable. The object of the statute (*a*), was to make the books in the Registry Office the final muniments of title. The word "interest" covers all kinds of interest, legal or equitable: *Copeland* v. *Davis* (*b*). In *Forrester* v. *Campbell* (*c*), Vice Chancellor *Mowat* seemed to give the most unlimited construction to the Registry Act, in protecting a *bona fide* purchaser, and *Walker's* evidence shews that he took the precaution of searching into the title, and he employed a solicitor to do so for him; and by him he was advised the title was good, and counsel certified it to be so: *Sherbonneau* v. *Jeffs* (*d*). *Chadwick* v. *Turner* (*e*), shews that there must be clear and express notice to avoid *Walker's* title. It is true one of the witnesses, *Henry Bell*, states that *Walker* had said, "he supposed the *Bells* had some title," and he was right in saying so; but his solicitor advised him that the title, whatever it was, had ceased on the death of the elder *Labadie:* besides it is shewn that the *Bells* went to a solicitor after *Labadie's* death, and asked if the patent for the land could be obtained in the name of the son, clearly evidencing that they were aware that they had not a perfect title. Besides the consideration paid by the *Bells* was not such as would justify them in expecting to receive an absolute title. The amount paid was $300, and the property rented for $150 a year.

Argument.

There is no ground for charging *Labadie* with having encouraged *Bell* in expending money on the property. He referred to *O'Fay* v. *Burke* (*f*), *Dann* v. *Spurrier* (*g*), *Pilling* v. *Armitage* (*h*), *Ramsden* v. *Dyson* (*i*), *Crofts* v. *Middleton* (*j*), *Cockerell* v. *Cholmeley* (*k*).

(*a*) 31 Vic. Ch. 20 Ss. 66 & 67.
(*b*) 21 W. R. 1.
(*c*) 17 Gr. 379.
(*d*) 15 Gr. 574.
(*e*) L. R. 1 Ch. App. 310.
(*f*) 8 Ir. Ch. at 248.
(*g*) 7 Ves. 231.
(*h*) 12 Ves. at 85.
(*i*) L. R. 1 H. L. 129
(*j*) 2 K. & J. at 209.
(*k*) 1 R. & M. at 425

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STRONG, V. C.—I am of opinion that this decree should be affirmed. I have come to the conclusion that the plaintiff and his brother never had an equity against *Stanislaus Labadie*. The conveyance to *Stanislaus* by his father, of the 22nd January, 1857, was registered on the 5th of February following. This registration, by force of the Statute 13 & 14 Victoria, chapter 63, section eight, constituted notice of the deed to all persons claiming any interest in the lands subsequent to the registry.

I consider therefore that the rights of the *Bells* must be regarded as though they had made their improvements after having had from *Stanislaus* express notice of his title. Then what is charged against *Stanislaus* is not any act or representation calculated to mislead the *Bells*, but merely acquiescence or lying by whilst they expended their money upon the land. It is true that it is said that *Stanislaus* assisted in building the break-water, but this he is said to have done under some agreement with his brother. Now, it is quite clear that the owner of land cannot be bound in equity by acquiescence in the expenditure of another upon the land, when the person making the expenditure does so with notice of the true state of the title.

Judgment.

In *Rennie* v. *Young* (*a*), Lord Justice *Knight Bruce*, says, "Can the authorities as to lying by have any application, except where the person expending his money is ignorant of the title afterwards set up." And in the same case, Lord Justice *Turner*, says, "If a man places his property on the land of another with full knowledge of that person's title, how can the fact that the land owner assented to its being placed there give an equity to have it restored. If it did, the doctrine would come to this, that whenever a man lays out money

(*a*) 2 DeG. & J. 138.

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on another person's land with the consent of the owner, he has an equity to have it repaid."

In *Kenney* v. *Browne* (*a*), it is said by Lord Chancellor *Clare*, "I do not consider a man who is conscious of a defect in his title, and with that conviction in his mind expended a sum of money in improvements, is entitled to avail himself of it."

In *Clare Hall* v. *Harding* (*b*), Sir *J. Wigram*, V. C., says, "If a party in possession of an estate, knowing that another claims the property, will, with his eyes open, spend money upon it, I know of no case in which it has been held that he can, in the absence of special circumstances, keep the lawful owner out of possession unless he will reimburse the party in possession for the expenditure he has made."

Judgment.

I also refer to the observations of Lord *Cranworth* in *Crosse* v. *The General Reversionary and Investment Company* (*c*), strongly disapproving of any amplification of this doctrine of equitable estoppel; also, to Duke of *Beaufort* v. *Patrick* (*d*), and *Ramsden* v. *Dyson* (*e*), and to *Dart's* Vendors and Purchasers, 4th Ed. page 770.

In addition to the reasons I have just stated for rejecting the plaintiff's claim, to have the interest of *Stanislaus Labadie* bound in equity, there exists another. The *Bells* by the conveyance from *Charles Labadie* acquired a legal title to his life estate. The agreement contained in the deed not to alien without consent, not being expressed as a condition, and there being no clause of forfeiture, did not, I conceive, prevent the pass-

(*a*) 3 Ridg. P.C., at page 518. (*b*) 6 Hare 297.
(*c*) 3 D. M. & G. 712. (*d*) 17 Bea. 75.
(*e*) L. R. 1 E. & I. App. p. 129.

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ing of the estate, and amounted to no more than a personal covenant; and even if there had been a proviso properly expressed, so as to avoid any conveyance made by *Charles Labadie* without his son's consent, it may well have been assumed that *Stanislaus* had waived objections to the sale by the father of his interest to the plaintiff and his brother.

Having the life estate therefore, the *Bells* were in the position of persons having a limited interest, expending money in improvements. In such a case abundant authority shews that the reversioner is not bound by standing by, even where the money laid out, instead of being of no considerable amount, as in the present case, was so large as only in point of fact to be referrible to the supposition of the party making it that he had an absolute title: *Pilling* v. *Armitage* (*a*), and the cases cited above of *Ramsden* v. *Dyson*, *Kenney* v. *Browne* and *Clare Hall* v. *Harding*, are strong instances of this principle being applied. Judgment.

I think, therefore, that upon this ground alone *Stanislaus* would not have been bound even if the *Bells* had not had the notice which they must be deemed to have had by the registration of the deed of 22nd January, 1857.

This is sufficient to shew that the plaintiff's case entirely fails. But even if an equity as against *Stanislaus* had been established, I am of opinion that the defendant *Walker* would have been entitled to the protection of the Registry law.

The equity asserted by the plaintiff is one against which registration is now, by the express words of the Statute 31 Victoria, chapter 20, section 68, a protection. It cannot be said that *Walker's* purchase was a speculative purchase, or a purchase merely of the in-

(a) 2 Ves. 85.

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terest whatever it might be of *Stanislaus Labadie*, and therefore the doctrine which I ventured to enunciate in *Wigle* v. *Setterington*, could not apply. Then the attempt to prove notice failed, as the learned Vice Chancellor did not give credit to the witnesses who were called to establish it. Mr. *Walker* would, therefore, have had a complete defence even if the case had been established against *Stanislaus Labadie*.

The decree should be affirmed with costs.

BLAKE, V. C.—On and prior to the 22nd day of January, 1857, one *Charles Labadie*, the father of the defendant *Stanislaus Labadie*, was the owner in fee simple in possession of lot 100, in the 1st Concession of the Township of Sandwich, East. This lot fronted on the Detroit River, and the owner had certain rights to the water opposite the land in question, under which the Crown was prepared to issue a patent of the water lot to him as the person entitled to the land adjacent thereto. On the last mentioned day, by an instrument of that date, which appears not uncommon amongst the French settlers in that part of the country, the father, *Charles*, did grant to the said *Stanislaus*, his heirs and assigns, for ever, the aforementioned lot, with all the water privileges and the land covered with water, then belonging to him, for certain good and valuable considerations in this instrument set forth, "To have and to hold the said lands in the way and manner following, that is to say, firstly: to have and to hold the said lands unto the said *Charles Stanislaus Labadie* and the said *Stanislaus Labadie*, his son, for and during the natural life of him the said *Charles Stanislaus Labadie;* and from and after the demise of the said *Charles Stanislaus Labadie*, to have and to hold said lands above described unto the said *Stanislaus Labadie*, his heirs and assigns, to and for his and their sole and only use forever," subject to the following reservation, however, "that neither the said *Charles Stanislaus*

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Labadie nor the said *Stanislaus Labadie*, their heirs or assigns, shall have any right whatsoever to sell, alien, mortgage, lease, engage, or encumber the said lands above described, or any part thereof, during the natural life of the said *Charles Stanislaus Labadie*, without the mutual consent of the said parties of the first and second part first given under their hands and seals respectively." This instrument was duly registered on the 5th day of the month of February following.

By an indenture of bargain and sale, dated the 11th of February, 1858, and duly registered on the 5th of February, 1859, *Charles Labadie* purported to grant to the plaintiff and his brother, *Henry Charles Bell*, a portion of the water frontage in question; and by another instrument dated the 18th of May, 1860, and registered the 30th of July, of the same year, *Charles Labadie* purported to grant to the same persons another portion of the water frontage in question. By an instrument dated the 19th of February, 1872, *Henry Charles Bell* conveyed all his interest in the premises set forth in the last mentioned two deeds to the plaintiff.

Judgment

By an indenture of bargain and sale, dated the 11th and registered the 15th of March, 1872, the defendant *Stanislaus Labadie* conveyed to his co-defendant the whole of the lot, including the water frontage. *Charles Labadie* died on the 20th of July, 1867. The defendant *Walker* now claims to be the owner of lot 100, and entitled to the water frontage in question; whereas the plaintiff claims that under the conveyances above referred to, and by the acts of the defendant *Labadie*, the water frontage belongs to him. The plaintiff alleges that the sales to the *Bells* were made with the full knowledge, concurrence and acquiescence of the defendant *Labadie*, and that he received part of the purchase money thereof, and fraudulently concealed from the purchasers the conveyance made to him by his father—

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that *Walker* knew the *Bells* had purchased the water frontage, and that he paid less for the premises because this water privilege was wanting, and that he colluded with his co-defendant to defraud the plaintiff of the premises in question by accepting from him a conveyance thereof, and making a claim thereunder with a knowledge of all the facts connected with the sales to the *Bells*.

The defendants deny the acts relied on as binding the defendant *Labadie*. They state that *Charles*, the father, and he alone, sold to the *Bells*, and that in such sales he only parted with his own interest in the premises, the subject of the contract;—that *Walker* had no notice of the matters in respect of which notice is imputed by the plaintiff, and that the registry laws form a complete defence against the attack now made upon the position of *Walker*. At the hearing of the cause, I went over the evidence in detail, commenting upon it at length, and giving my reasons for the view I formed of it. The conclusions then arrived at may be shortly stated as follows:—

Judgment

The *Bells* had notice under the registry laws, and through *Fluett*, of the existence of the conveyance from the father to the son. Under this instrument the father could not part with any interest in the premises without the consent of the son. The acts relied on by the plaintiff to shew a consent on the part of *Stanislaus* to a parting with his interests in the premises may be explained as an assent simply to *Charles Labadie's* disposing of the estate he took under the deed, the assent of *Stanislaus* being necessary to such a disposition.

The expressions of most of the witnesses may apply as well to an arrangement in respect of the father's interest as in respect of that of the son. The statements deposed to are, at best, vague. The improve-

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ments do not assist much, nor does the price. Persons situated as were the *Bells*, owning the next lot and wanting to extend their premises, as dealers in ice, might well pay what they did as purchase money, and for buildings, on the chance of the life of *Charles Labadie*. As a matter of fact they did obtain a ten years' benefit from the property. The defendant *Labadie's* dulness of comprehension, his ignorance of English, the peculiarities of the expressions used in English as compared with those in French, and the difficulty he would have in understanding the exact nature of a bargain of the kind, must not be lost sight of. It is true *Walker* saw some buildings said to have been erected by the *Bells*, but then they owned the next lot. It was not very easy to say where that ended, and the lot in question began. *Walker* says he had an impression the *Bells* owned this lot, but then he went to his solicitor, who searched the title; upon doing so it appeared that the *Bells* had, at one time, some right to the lot, but that ceased when *Charles* died, and therefore *Walker* and his solicitor may well have concluded that whatever right the *Bells* once had it was then at an end. On inquiry of *Stanislaus* and his agent, *Jules Janisse*, they both stoutly affirmed the *Bells* had no right.

Judgment.

I have again perused the evidence, and considered it, but do not find reason to alter the view I arrived at upon it in the Court below. It may be that there are circumstances of suspicion attending the transaction, but to be simply suspicious of *Labadie's* actions and dealings in the matter is one thing, to be satisfied of his knowledge and acquiescence is quite another; and I take it to be clear that the mind must be thoroughly convinced before we are justified in acting so as to bind the defendant and compel him to convey to the plaintiff the premises in question.

It must not be forgotten that at the time of the two

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conveyances from *Charles Labadie* to the *Bells*, the conveyance from *Charles* to *Stanislaus* was registered. The effect of such registration is to be found in section 47 of chapter 89 of the Consolidated Statutes of Upper Canada: "The registry of any instrument, will, judgment, decree, rule, or order affecting any lands or tenements registered under this or any former Act shall in equity constitute notice of such deed, conveyance, will, or judgment, decree, rule or order, to all persons claiming any interest in such lands or tenements subsequent to such registry." The law, therefore, imputed to the *Bells* notice of that conveyance which shewed in the father a limited interest that ceased on his death, at which time the son became absolutely entitled to the property. *Stanislaus* was justified in taking for granted that the *Bells* had this knowledge which the law supposes, and it did not become necessary that he should bring before them such a fact, nor can he be accused of fraud or concealment in the matter, when he simply relied on the position in which the *Bells* were placed by the Registry Act. Under these circumstances, when *Stanislaus Labadie* acquiesced in the *Bells* obtaining an interest in the premises, he might well think, "They know how my father claims the property in which they desire to obtain an interest; they also know my rights; they prepare an instrument in which he alone is to join; to that I assent; they do not ask me to be a party to the conveyance; I cannot, therefore, suppose they intend to bargain for my interest. The same formality requisite to obtain the estate of my father should surely be needed to obtain mine; but, as they do not seek the latter, I am not asked to execute any deed." Adopting this view of the rights and liabilities of *Labadie*, I think the case fails against him.

Judgment.

But if I am wrong in this conclusion, and as a matter of fact the acts of *Labadie* did so bind him as that he cannot lay claim to the property in dispute, I am of

opinion that in the hands of the defendant *Walker* it cannot be reached by the plaintiff. It is true *Walker* in his evidence says "he thought the *Bells* owned the pieces, * * * . He always supposed the *Bells* owned until his lawyer told him not." But then he says he thought so because he considered their buildings were partly on this lot. He went to his lawyer, was told the *Bells* only claimed under a deed from the father and that their right was at an end, and therefore he purchased. That which is relied on in this case does not, I think amount to the "actual notice" which must be given in order to defeat the Registry Act. The equity relied on to do away with the effect of a registered conveyance must be distinctly and plainly brought to the notice of the intending purchaser, or else the Act protects him. 1873. Bell v. Walker. Judgment.

It is clear *Walker* was giving the value of the lot, and he wanted the water frontage and intended to purchase it. The probabilities are he would not have bought if the title to any portion of the premises was defective.

But it is said the Registry Laws do not apply in this case. First, because the equity of the plaintiff had arisen before the passing of the Act under which the defendant seeks protection; and second, because the equity of the plaintiff is not touched by the Act.

The section in question, which is section 66 of 29 Victoria, chapter 24, and 68 of 31 Victoria, chapter 20, reads as follows: "No equitable lien, charge or interest affecting land shall be deemed valid in any Court in this Province, after this Act shall come into operation as against a registered instrument executed by the same party, his heirs or assigns."

The first of these Acts, which was passed on the 18th of September, 1865, did not come into force until the

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1st of January, 1866. Over two months were thus given in which to assert these rights, and after that period they were not to "be deemed valid in any Court in this Province." It is clear this clause strikes at all such claims, no matter when they may have arisen. To hold otherwise would be to postpone for many years the full effect of this salutary enactment, without anything in the Act itself to warrant such a construction.

It is argued, secondly, that the "interest" referred to in the Act must be in the nature of an equitable lien or "charge." I do not think there is any ground for this contention. From year to year the object of the Legislature has been to make the Registry office the test of title. All those claims which made it dangerous to deal with land notwithstanding that the record in the office failed to disclose them are being swept away. It will not be a carrying out of the intention of the Act, if, in place of giving it the liberal construction which is the result of the natural meaning of the words used, we seek to limit their signification and narrow their meaning. The plaintiff claims that the defendant, *Labadie*, had an "interest" in the premises in question; that by his acts this "interest" was bound; that *Walker* takes subject to this "interest." *Walker* answers that as the "interest" is an equitable one under section 68 of the Act in question, it is cut out. I think the Legislature must have been taken to intend by the use of this general expression "interest" after the words "lien" or "charge," to cover as much ground as possible, and that the present claim comes within the term employed for this purpose.

Judgment.

I am of opinion the decree should be affirmed with costs.

SPRAGGE, C.—There was no contract between *Stanislaus Labadie* and the *Bells*. The plaintiff's equity

must rest upon the fact of *Stanislaus* standing by while his father was assuming to dispose of the water lot frontage. 1873. Bell v. Walker.

It is not the ordinary case of the owner of land standing by while another is dealing with his property; because the father who did assume to deal with it had himself an interest in it, and that interest might have been the subject of contract between himself and the *Bells*, though even for that purpose the assent of *Stanislaus* was necessary.

Under the Act registration constitutes notice—and so it is not necessary to prove notice to be given. Does it go further? Does it prevent a purchaser from alleging and proving that he had not notice? Is he affected with all the consequences of actual notice, *e. g.*, affecting his conscience, or may he prove, and the Court find that he had not actual notice? The consequences may be widely different. If affected as with actual notice, not to be controverted, the Court must find in this case that he actually knew of the conveyance from *Labadie* the father to *Stanislaus*, and so must have understood that the father was conveying only his own life interest and that *Stanislaus* was only acquiescing in the conveyance of that interest. Judgment.

From the evidence (*i. e.* from merely reading it without having had the opportunity of judging of its value and trustworthiness, as the Judge who heard the evidence given had) I should say that the father assumed to sell an absolute interest in this land: that *Stanislaus* knew this—and that the *Bells* assumed that they were purchasing the whole interest; and further, that *Stanislaus* himself understood that such was the assumption upon which the *Bells* purchased. It would in that case be the case of a remainder man standing by while a tenant for life assumed to sell the fee. If regis-

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tration is equivalent to actual notice it would be different, inasmuch as in such case all the parties must be taken to have had actual notice, and so all would be upon an equal footing as to knowledge of facts.

What passed in the family, not communicated to the *Bells*, can give them no equity. Its only value is to shew knowledge in *Stanislaus* of what his father proposed and professed to sell to the *Bells*, and to assist in giving a character to the acts and conduct of *Stanislaus* relied upon by the plaintiff as a lying by, and an acquiescence in the sale made by the father to the *Bells;* and in that way it has its value.

I incline to agree that the Act of 1868 applies to this case, and that such notice as is required against a registered title is not made out against *Walker*.

Judgment.

If not, so that *Walker* is protected, the question might arise, whether the plaintiff can have any relief against *Stanislaus*.

I incline to think there was no fraudulent lying by in the sale to the *Bells*, but that *Stanislaus* acquiesced in what might be then considered the parting with a small part of that which he was to receive.

The wrong, if any, was in including the part sold to the *Bells* in his own sale to *Walker*, but it would be unprofitable to discuss that point, as my learned brothers both think that the *Bells* are, under the Statute, affected as with actual notice of the conveyance to *Stanislaus* from his father. I have not myself any decided opinion to the contrary, and only throw out the doubt sthat have occurred to my own mind upon the point.

ROCHE v. JORDAN. 1873.

Costs—Demurrer—Practice.

Where a demurrer on record is over-ruled, and a demurrer *ore tenus* is allowed, the Court may in its discretion allow the plaintiff the costs.

Wylie v. *McKay*, *ante*, page 421, not followed.

In this case a demurrer for want of equity had been filed, which on argument was over-ruled, and the defendant then demurred *ore tenus* for want of parties which was allowed.

Mr. *Cassels*, for the plaintiff, thereupon asked for the costs of the demurrer.

Mr. *Grahame*, contra, objected to the plaintiff receiving costs, the rule being that where one demurrer was over-ruled and another allowed, neither party received costs.

Wylie v. *McKay* (*a*) was referred to.

After looking into the authorities,

Judgment.

BLAKE, V. C., said that until his attention had been drawn to *Wylie* v. *McKay* he had been under the impression that in such a case the plaintiff was entitled to be paid his costs. That case, however, proceeded upon the ground that the practice was governed by the 14th of the English General Orders of 1861, which had not been adopted by this Court. That was an error, however, as the case was regulated by an order made as far back as Lord *Clarendon's* time, in 1661, and under which the plaintiff was entitled to be paid his costs. This order was acted on in *McIntyre* v. *Connell* (*b*), decided in 1851, and was followed in this Court in *Kelly* v. *Ardell* (*c*), and the Vice Chancellor thought the practice

(*a*) Ante, page 421. (*b*) 1 Sim. N. S. 252. (*c*) 11 Gr. 579.

1873. Roche v. Jordan. of our Court was there correctly laid down, and he therefore followed that decision. The order he would now make would therefore direct the demurrer for want of equity to be over-ruled with costs; the demurrer *ore tenus* to be allowed without costs.

NOTE.—Lord *Clarendon's* order referred to in the judgment, was, "If any case of demurrer shall arise and be insisted upon at the debate of the demurrer more than is particularly alleged, yet the defendant shall pay the ordinary costs of over-ruling a demurrer, which is hereby ordered at five marks, if those causes which are particularly alleged be disallowed; though the bill, in respect of the particulars so newly alleged, shall be dismissed by the Court."

In *Brown* v. *Capron*, subsequently brought before the Court on demurrer, on the ground that the bill was multifarious, *Strong*, V. C., on over ruling the demurrer, intimated a doubt, whether under the administration of Justice Act of 1874, a demurrer for multifariousness, would now lie, in any case, where all the parties to the record are interested in each of the several causes of action, though distinct; this it will be understood, is different from the case of several parties being interested in several and distinct causes of action, and all made parties to one suit, that being a case of misjoinder. The defendant also demurred *ore tenus* for want of equity, which was allowed; and, the Vice Chancellor gave no costs to either party, considering that the giving or refusing of costs in such cases, was a matter of discretion.

In *MacIntyre* v. *Connell*, as stated, where a demurrer assigned was over-ruled, and a demurrer *ore tenus* was allowed, the Court ordered the defendant to pay the costs of the demurrer on record, and made no order as to the other; and Lord *Eldon* in *The Attorney General* v. *Brown*, (1 Swan. 288,) said that a defendant who avails himself of the right to demur *ore tenus*, must pay the costs of the demurrer on record. In *Rump* v. *Greenhill*, (20 Beav. 512), a demurrer on record for multifariousness was over-ruled, and the defendant was then allowed to demur *ore tenus* for want of equity, as in *Brown* v. *Capron*, the Master of the Rolls, (Sir J. Romilly), at first doubting, however, whether that could be done: there, however, both demurrers were over-ruled, so that the costs followed as of course.

MURPHY v. MURPHY. 1873.

Will, construction of—Vested interests—Declaratory Decree—Practice.

A testator devised his estate to trustees to invest for the benefit of his wife and children, and to give to each child on attaining 21 a sum of $1,000; and further directed that when his youngest child should attain the age of 21 years the trustees were to invest a sufficient sum to yield to his widow $400 a year; and all the rest and residue of his real and personal estate remaining after investing such sum to be equally divided among his children share and share alike.

Held, that each child on attaining 21 took a vested interest in the residue of the estate.

Where a party in addition to a declaration of the true construction of a will is entitled to ask, as consequential relief, the administration of the estate, the case is within General Order 538; and the Court will make a decree declaring the proper construction of the will without directing the administration of the estate.

The late *Daniel Murphy*, by his will, dated 1st December, 1860, gave all his plate, pictures, linen, and other household furniture and effects, to his wife; and, after giving certain legacies, devised all his real estate and residue of personalty, to trustees upon trust to sell the real estate and leaseholds (at their discretion), and to collect and get in the personalty, and out of the proceeds of sales and collections the trustees were to pay debts, funeral expenses and legacies; and after payment thereof invest the residue, with power to vary and change the investments; and that the annual income of investments and rents of realty (which the trustees were empowered to lease until sold) should go and be in trust (after payment of legacies): (1st.) to pay his wife $150 a year for the maintenance of each child until each should attain 15 years, and after that, if a son, and sent from home to school, &c., to be increased to $250; and from 5 years after the death of the testator till the youngest child attained 21 his wife to receive $400 additional for maintenance, &c., of children. The trustees were to invest any residue of annual income and accumulate it at compound interest, and should stand possessed of the accu- Statement.

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mulations, funds and securities upon the same trusts as they held the funds producing such income, with power to the trustees to give to each child, on attaining 21, a sum of $1,000. The testator further directed "that when my youngest child shall attain the age of twenty-one years my said trustees or trustee, for the time being, shall first retain out of the said trust estates, and invest as aforesaid, a sufficient sum of money to yield at least the sum of $400 a year, which said sum of $400 a year shall be paid to my said wife for her separate use during the term of her natural life; and all the rest and residue of my real and personal estate which shall remain after retaining the last-mentioned sum shall be divided equally among all my children, share and share alike; and also that the said sum above directed to be invested for the benefit of my wife shall, after her death, be likewise equally divided among my children. And lastly, I direct that should it so happen that any of my children shall die before the said distribution, and leaving a family, him or her surviving, in that event his or her children so surviving shall receive equally among them the share which my said son or daughter would have been entitled to receive if living at the time of such distribution;" and the present amicable suit was brought by two of the adult children of the testator against the widow and the other sons and danghters, to obtain a declaration as to the proper construction of the will.

Statement.

Mr. *McKelcan*, for the plaintiffs.

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

Mr. *Gibson*, for the trustees and the widow.

The question discussed was whether the children, as they attained 21 respectively, took vested interests in the residue; or whether the vesting of their interests was postponed until the period of distribution—the youngest child attaining 21.

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In addition to the cases mentioned in the judgment, *Bigelow* v. *Bigelow* (*a*), *Martin* v. *Jeys* (*b*), *Kerr* v. *Leishman* (*c*), *Hanson* v. *Graham* (*d*), and *Williams* on Executors (7th Ed.), pp. 1224, 1248, were referred to by counsel.

STRONG, V. C.—I am of opinion that the children of the testator take vested interests in the residue on their attaining the age of 21 years. The case seems to me identical with that of *Leeming* v. *Sherratt* (*e*), and but for the clause of survivorship contained in the will, which was the subject of decision in *Vorley* v. *Richardson* (*f*), it would have resembled that case also. Lord Justice *Turner*, in the latter case, says that the interests would have been vested had there not been the gift to survivors. In consequence of the language of Lord Justice *Turner* in *Vorley* v. *Richardson*, I had some doubt whether the children did not take vested interests immediately on the testator's death, but upon this I think I ought to be governed by the decision in *Leeming* v. *Sherratt*, which treats the attainment of 21 as a condition precedent to the vesting, and I therefore so determine.

Judgment.

The case of *Re Hunter's* Trusts (*g*), is distinguishable from *Leeming* v. *Sherratt* upon the same ground as *Vorley* v. *Richardson*—namely, that there was a gift to survivors which, on the principle of *Cripps* v. *Wolcott* (*h*), by late cases applied to realty (*i*), is always to be understood as meaning survivorship at the period of distribution, unless a contrary intention is expressed.

Here there is no benefit of survivorship, and the cases last mentioned do not therefore apply. *Leeming* v.

(*a*) 19 Gr. 549.
(*b*) 15 Gr. 114.
(*c*) 8 Gr. 435.
(*d*) 6 Ves. 238.
(*e*) 2 Hare 14.
(*f*) 8 DeG. McN & G. 126.
(*g*) L. R. 1 Eq. 295.
(*h*) 4 Madd. 11.
(*i*) See Gregson's Trusts, 2 D. J. & S. 428; Taaffe v. Conmee, 10 H. & C. 64; Peebles v. Kyle, 4 Gr. 334.

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Sherratt was followed by Vice-Chancellor *Kindersley* in *Parker* v. *Sowerby* (*a*), and has never been questioned. Any argument against vesting founded on the substitutionary clause is also covered by the reasoning of Vice-Chancellor *Wigram* in *Leeming* v. *Sherratt*, where there was a similar provision.

The case on the question of construction seems to me a very clear one, and I should have given judgment at the conclusion of the argument had I not had some doubt as to whether there was jurisdiction to make a merely declaratory decree in such a case. I think, however, the case is within General Order 538, since the plaintiffs could have asked, by way of relief consequential on the declaration of construction, the administration of the estate, and in such a case the general order referred to applies. *Rooke* v. Lord *Kensington* (*b*).

Judgment.

Decree accordingly; costs out of estate.

(*a*) 1 Drew. 488.

(*b*) 2 K. & John. 753.

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CARRUTHERS v. ARDAGH.

Partnership note.

In the absence of express agreement to that effect a creditor taking the note of one partner for a debt of the partnership, and suing thereon, but failing to recover the amount of the note, is not precluded from afterwards claiming the amount of the note against the partnership.

J C and *T A* formed a partnership under the style or firm of "*C & A*". Both parties were illiterate and unused to business, and in giving notes for debts of the partnership were in the habit of each signing his own surname, thus forming the partnership name. One of such notes being about to fall due and the partnership being unable to retire it, the holder agreed to renew it; and he, together with *C*, endeavoured to find *A* to procure his signature in the usual way to the new note, but being unable to find him, *C* gave his own note for an amount sufficient to cover the old note and an account for goods furnished the partnership by the holder. This note being unpaid an action was brought by the holder against *C* and a small portion of the amount realized by sale of his goods under execution. Subsequently a suit was brought by *C* against *A* to wind up the partnership, and the holder of the note sought to prove for the amount of the note against the partnership estate, which the Master refused to allow, and on appeal his order was affirmed. The holder thereupon re-heard the appeal motion:

Held, that the holder, by the proceedings he had taken, was not precluded from claiming the amount against the partnership assets [BLAKE, V.C., dissenting.]

Re-hearing of an order of Vice Chancellor *Blake* dismissing an appeal from the finding of the Master, under the circumstances appearing in the head-note and judgment.

Mr. *Attorney General Mowat*, for *Peckham & Hoag*, who re-heard.

Mr. *Cattanach* and Mr. *Francis*, contra.

SPRAGGE, V. C.—The parties to this suit were contractors in partnership for certain works, for the construction of which lumber was required. The Master in his report, states that *Carruthers* had the manage- Judgment.

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ment of the money matters of the partnership; and that the business of the partnership in connection with the lumber contracts was managed by him or by an agent of the firm under his instructions. He states also that both parties are illiterate men unacquainted with the keeping of accounts. Messrs. *Peckham & Hoag* were dealers in lumber, and in the course of their business supplied lumber to *Carruthers & Ardagh*. Notes were given for lumber supplied, sometimes in the name of the firm, at other times in the name of *Carruthers* alone. On the 25th of July, 1871, a note made by the firm was given to the creditors, which was renewed by a note in the same form, given on the 26th of September. The name of the firm appears to have been signed in a peculiar way: the word *Carruthers* by *Carruthers*, and that of *Ardagh* by *Ardagh*. In the month of December, the creditors held the note of the firm for $800; and they had also an open account against the firm for something over $400. The note given in September was about maturing, and the creditors were desirous of getting from the firm a note for the whole amount of their claim. Their intention was to get a note signed by the members of the firm, and with that purpose *Carruthers* and one of the creditors, endeavoured to find *Ardagh*. It is in evidence that they searched for him for two days in order to obtain his signature, but failed to find him; and then, as the note held by the creditors was about maturing, the note of *Carruthers* alone for the amount of the whole claim was given, and the note of the firm for $800 was delivered to *Carruthers*.

Judgment.

I think the law is stated too broadly in *Byles* on Bills (*a*), when it is said that, "in general, the taking a separate bill of one of two joint acceptors of a former bill, is a relinquishment of all claim on the former security."

The cases cited for this, are *Evans* v. *Drummond* (*b*),

(*a*) p. 199.

(*b*) 4 Esp. 89.

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Reed v. *White* (*a*), and *Thompson* v. *Percival* (*b*). In another passage, the learned author's language is, "the taking of his separate bill from one of several partners, will, as we have seen, discharge the others" (*c*). Such a transaction "imports an agreement between the creditor and the firm, that the creditor shall rest on the liability of the one partner alone, and shall discharge the others; that is an accord—and the separate bill is a satisfaction."

In *Evans* v. *Drummond*, there had been a partnership between the defendant and one *Combrune*, which had ceased in March, 1796, the defendant at that date going out of the concern, and this became known to the plaintiff on the 18th of April, 1800. A bill of exchange for certain goods furnished by the plaintiff was given in March, 1800, at two months, in the name, as I gather from the case, of *Combrune & Co.*, the style of the firm. The plaintiff's case was, that this bill was not paid, as contended for by the defendant, but was renewed when it became due by another bill for the same amount given by *Combrune*. It was upon this state of circumstances that Lord *Kenyon* said, "Is it to be endured that when partners have given their acceptance, and where perhaps one of two partners has made provision for the bill, that the holder shall take the sole bill of the other partner, and yet hold both liable? I am of opinion that when the holder chooses to do so, he discharges the other partner. Here the plaintiff has taken the bill of *Combrune* after he admits that he was informed that *Drummond* had nothing to do with the concern. It is a reliance on the sole security of *Combrune* and discharges the defendant." The verdict was for the defendant. The case was the not unfrequent one of a debt being due by a firm, and a partner retiring, and the creditor giving credit to the continuing partner,

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(*a*) 5 Esp. 122. (*b*) 5 B. & Ad. 925. (*c*) p. 381.

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a state of circumstances admitting of different considerations from the case of a bill or note being taken from a member of a firm in the *personnel* of which there has been no change.

Reed v. *White* was an action for cordage sold, against the owners of a ship. One of the defendants, *White*, was the managing owner or ship's husband. The plaintiff took *White's* bill for the amount, which was dishonored, was renewed, and again dishonored. For the defendants, other than *White*, it was insisted that the plaintiff had discharged the other owners, who in ignorance of this mode of dealing between him and *White*, had suffered him to receive large sums from the *East India Company* for freight which they would otherwise have detained. Lord *Ellenborough* said, "If the plaintiff dealing with *White* separately, has adopted him, he has discharged the others and must have a verdict against him. * * * The question is, whether it (the first renewal bill), was intended as a settlement with him alone, and adopting him as the single debtor?" The report adds, "a very respectable full special jury of merchants found for the defendant." It was thus made a question for the jury, whether the dealing of the plaintiff with *White* did not indicate an intention on the part of the plaintiff to adopt *White* as the single debtor, a dealing in ignorance of which the other part owners of the ship had changed their position, forbearing to protect themselves, which it was to be presumed they otherwise would have done, and so suffering prejudice, and, perhaps, loss, a circumstance extremely likely to weigh with the jury to whom the question was left.

Judgment.

Thompson v. *Percival* is an important and instructive case. *James* and *Charles Percival* were in partnership when a portion of the goods for which the action was brought were sold, and their dissolution of partnership

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was unknown to the plaintiff when the residue of the goods were sold, although the dissolution had been published in the *Gazette;* and it was announced at the same time that the business would be continued by *James*, who would receive and pay all debts. Upon the dissolution sufficient effects were left in the hands of *James* to pay all the debts due by the partnership. The plaintiffs applied to *James* for payment, and were told by him that *Charles* knew nothing of the transactions, and that they must look to him, *James*, alone for payment. The plaintiff afterwards drew a bill on *James* for the "mixed amount," as it is called in the report, which bill was dishonored, and they then brought their action against *James* and *Charles*. A verdict was taken with leave to move for a nonsuit if the Court should be of opinion that the plaintiffs had discharged *Charles* from the debt. The judgment was delivered by Lord *Denman*, who said, "It appears to us that the facts proved raised a question for the jury whether it was agreed between the plaintiffs and *James* that the former should accept the latter as their sole debtor, and should take the bill of exchange accepted by him alone by way of satisfaction for the debt due from both." And after commenting upon the cases referred to in argument he concludes thus: "If, therefore, the plaintiffs in this case did expressly agree to take, and did take the separate bill of exchange of *James* in satisfaction of the joint debt, we are of opinion that his so doing amounted to a discharge of *Charles*. No point was expressly made at the trial as to the proof of such agreement, nor was it required that the question should be put specifically to the jury. We think that this ought to be done, and consequently, the rule must be made absolute for a new trial."

Judgment.

This is essentially different from the proposition for which it, with the two cases in *Espinasse*, is cited in Sir *John Byles's* book. If that were accurate, the taking of the separate bill by *James* would have been held to

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operate as a discharge, and the verdict would not have been disturbed; but so far from this, the language of the judgment imports that it must be shewn that the creditors expressly agreed to take the separate bill of one partner in satisfaction of the joint debt, otherwise the joint liability remains; and this opinion could not be expressed more emphatically than it was expressed in this case by sending back to the jury the question whether the creditors did so expressly agree. It is to be observed, too, that this was in a case where the bill was taken from a partner who was continuing the business, the other partner having retired from it.

Mr. *Lindley*, in his book on partnership, states his proposition as to the effect of a bill or note being given for a partnership debt by one of several partners less generally than it is stated in *Byles*, and applies it only to the case of a *continuing* partner. His language is (*a*),

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"The fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired partner jointly, is strong evidence of an intention to look only to the continuing partner for payment." In a previous passage he refers to the three cases referred to in *Byles* for this (*b*), "that a retired partner *may* be discharged by the creditor's adoption of the other partners as his sole debtors, although no new partner has been introduced into the firm."

Mr. *Parsons's* (*c*) proposition that "if after a dissolution the payee of the note of a firm gives it up, and takes the several notes of the partners for their several shares, he has no rights as a partnership creditor," rests only on the authority of a decision of the Supreme Judicial Court of the State of Maine, *Crooker* v. *Crooker* (*d*). In giving judgment the learned Chief Justice of that

(*a*) P. 464.
(*b*) P. 459.
(*c*) p. 503.
(*d*) 52 Maine, 267.

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Court put as one of his propositions that "a negotiable note, given for an account, or a renewal of a preceding note, is presumed to be in payment of the original demand." This, I take it, is not according to our law, and is, as stated by Mr. *Parsons*, peculiar to the States of Maine and Massachusetts. "In other States (he says) and in the federal Courts the general presumption that a negotiable note is not payment, would apply, and could be rebutted only by proof that it was otherwise intended." It is sufficient to observe, however, that this is not the case of a note taken after dissolution of partnership; nor of the taking of the several notes of those who had been partners.

Mr. *Chitty*, in his work on Bills (*a*), published in 1859, states the law as broadly as it is stated in *Byles*, "If there be two or more joint acceptors of a bill, and the holder thereof subsequently take the separate acceptance of one of them for the debt, such a substitution of the second bill amounts to an accord and satisfaction with regard to the first, and extinguishes the liability of the joint acceptors"; and for this the same three cases are cited as are cited in *Byles*. So if text-writers were always authority, Mr *Ardagh* would have more in favor of his contention than at present I think he has. In *Chitty* on Contracts, however, published in 1868, the rule appears to be stated more in accordance with the cases. It is that, although mere knowledge by the creditor of the existence of an arrangement among members of a firm about to be dissolved, in relation to the assets, the payment of the debts, and continuing the business, will not bind the creditor, "yet his own agreement to accept the transfer of liability will; and that it is for the jury to say whether or not he has entered into such an agreement." For this, *Thompson* v. *Percival*, with other cases, is cited: among them, *Lyth* v. *Ault* (*b*)

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(*a*) p. 208.

(*b*) 7 Ex. 669.

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The defendants *Ault & Wood* had been partners, and the action was brought for a partnership debt. The question arose upon the second plea, which was to the effect that *Ault* was about to retire from the partnership, the business to be continued by *Wood*, of which the plaintiff had notice, and that it was thereupon agreed by the plaintiff that she would accept payment of a certain sum on account of her debt, abandon her claim against *Ault* for the residue, that *Wood* should become solely liable, and that the plaintiff would accept him alone as her debtor for the residue, and have no further claim against *Ault*. The contention was, that this was *nudum pactum;* but the Court held that what was agreed to be done, and what was done, was a good consideration for the promise.

Judgment.

In giving judgment, Lord *Wensleydale*, then Baron *Parke*, referred to *Thompson* v. *Percival* as expounding the principle which governed the case in judgment, adding "It is clear that where there is an accord and satisfaction by the debtor agreeing to give something totally different in its nature from the debt, *and which the creditor agrees to accept in satisfaction of the debt*, the Court cannot inquire into the value of that which is the subject matter of the new agreement, and therefore *there is nothing to prevent the parties from agreeing* that a horse or bill of exchange, or any other commodity shall be given in satisfaction of a larger demand." The words that I have italicised shew that Lord *Wensleydale* considered, as was held by the Court in *Thompson* v. *Percival*, that it was necessary to prove *an agreement* by the creditor to accept the substituted commodity or security in lieu of the original debt.

Before noticing the more modern cases I will refer to the old case of *Bedford* v. *Deakin*, reported upon the trial at *nisi prius* in 2 *Starkie*, p. 178, and in *Banc* in 2 *Barnwell* and *Alderson*, p. 210. The three

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defendants *Deakin*, *Bickly* and *Hickman* were partners. They were the drawers of two bills of exchange of which the plaintiff *Bedford* was indorsee. They dissolved partnership—*Bickley* continued the business—and it was agreed between them that he should pay the two bills of exchange; and the plaintiff after some hesitation agreed to accept promissory notes for the amount with interest, signed by *Bickley* and indorsed by a third person but "reserving strictly the security of the three partners," and he retained the original bills of exchange in his hands. It is chiefly for this latter circumstance that I refer to this case. Two of the notes given by *Bickley* were renewed by the plaintiff, and this it was contended operated to discharge the other partners; and it is only in reference to this that the retention of the original bills is alluded to in the judgment in *Banc*, Lord *Tenterden* observing that whether *Deakin* had or had not actual knowledge of time being thus given to *Bickley* he undoubtedly had legal knowledge of it; "for he knew that the original bills had not been delivered up by the plaintiff, and that till that happened he remained liable upon them." Mr. Justice *Bayley*, after alluding to the plaintiff's express reservation of his claim against the three partners, thus refers to the retention of the bills. "If *Deakin* was by the successive renewals of the bills (the *notes*, it is plain from the context, are here meant) lulled into security it was his own fault; for being a joint debtor with *Bickley*, it was his duty for his own security to see that the debt was paid, and the test of that was easy; for if *Bickley* had paid the debt he must have had the original bills to produce; and *Deakin*, therefore, if *Bickley* did not produce them, ought to have concluded that the debt had not been paid." At *nisi prius* indeed Lord *Ellenborough* alluded to the retention of the bills more pointedly, and after observing that the notes were taken on the express condition that they should not affect the security already held by the plain-

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tiff, added that he acceded to the cases reported in *Espinasse*, but that "the case before him differed from them, in this material circumstance, that the original security was never delivered up."

Bedford v. *Deakin* differs from the case before us in some essential particulars. *Bedford* was indorsee only of the bills of exchange. There appears to have been no debt due from the partnership other than that created by the bills. He expressly reserved his security against the partners and so as a matter of course retained the bills. If he had given them up he would have done an act inexplicable in itself, and entirely inconsistent with his position. In the case before us *Carruthers & Ardagh* were the debtors of *Peckham & Hoag* for lumber sold and delivered—the notes taken from time to time were in lieu of money payments, in fact modes of raising money—at most conditional payments; the original debt reviving upon non-payment. Conceding that the delivery of the $800 note to *Carruthers* is a circumstance in favor of *Ardagh* it is an act of a very different character than the giving up the bills of exchange would have been in *Bedford* v. *Deakin*.

Judgment.

The more modern cases are strongly in favor of the contention of *Peckham & Hoag*. In *Ansell* v. *Baker* (*a*) a note had been given by two: after it became due a mortgage to secure payment was given by one, the mortgagor covenanting for payment, the liability of the other maker of the note was recited in the mortgage, and the question was, whether the remedy on the note was lost by the taking of a higher security for the same debt. "This," Lord *Campbell* said, in delivering judgment, "we answer in the negative, as the remedy given by the specialty security, being confined to one of the debtors only, is not co-extensive with that which the creditor had upon the

(*a*) 15 Q. B. 20.

note (*a*). The contents of this indenture therefore do not prove that it was accepted in the place and stead of the promissory note, which is the issue on the fourth plea." 1873. Carruthers v. Ardagh.

Whitwell v. *Perrin* (*b*) was an action for goods supplied to a vessel at Bristol of which the defendant was part owner; and bills had been drawn by the ship's husband upon the ship's brokers for a portion of the goods supplied, which bills were paid. The brokers failed, and the plaintiff proved against their estate for the balance. It was contended that the plaintiff having received bills from the brokers was an election to treat them as his debtors, and *Reed* v. *White*, in *Espinasse*, was referred to. The Court held the plaintiff entitled still to recover for the goods supplied; *Willes*, J., observing that the bills were taken merely for the plaintiff's convenience to put him in funds; and *Crowder*, J., referring to the argument that the taking of the bills was an election by the plaintiff to take the brokers as his debtors, said "there is no foundation for that argument. The bills were taken for the plaintiff's convenience." This case would be a virtual overruling of *Reed* v. *White*, unless that case be rested, as I think it properly may, upon the point that the ship owners had changed their position to their prejudice by allowing freight to be received by the ship's husband in ignorance of the dealing between him and the plaintiff. Judgment.

Bottomley v. *Nuttall* (*c*) is also an important case. Goods were supplied to a firm, one member of which resided in England, the rest abroad. The dealing of the plaintiff was with the one resident in England, the invoices were made out in his name; bills for the price of the goods were drawn upon him individually, the plaintiff being aware that he was a member of the firm,

(*a*) Solly v. Forbes, 2 B & B. 38. See Twopenny v. Young, 3 B. & C. 208.

(*b*) 4 C. B. N. S. 412.

(*c*) 5 C. B. N. S. 122.

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and the goods being shipped for the firm. The member of the firm so dealt with became bankrupt and the holders of the bills proved against his estate, and the Court held that the right of the vendor of the goods to have recourse against the firm was not thereby prejudiced. It was contended that the dealing with the English resident partner was evidence of the credit being given to him alone, and that the plaintiff could not prove for the bills in bankruptcy and then sue the firm. The Chief Justice in the course of the argument observed, "Assume that there was not bankruptcy but that the bills turned out to be valueless, could not the plaintiff have sued the firm." The answer was, "No doubt, but he could not take the double remedy, treating the debt as a joint debt for one purpose, and as a separate debt for another purpose. It was competent to the plaintiff to resort to the original consideration upon the dishonour of the bills; but he could not do that, and sue upon the bills also." Upon this Mr. Justice *Williams* observed, "It is impossible that there can be any rule of law that should so completely shut out common sense and justice." It is to be observed that it was conceded by counsel for the defendants that upon dishonor of the bills given by the one partner it was competent to the creditor to resort to the original consideration. In giving judgment Sir *Alexander Cockburn*, after adverting to the several circumstances relied upon by the defendants, says, "I do not think we are justified in holding that these circumstances neutralize and overpower the strong probabilities of the case. One who sells goods to a firm has in the first instance the security of the firm for payment; and, failing that, he has also the security of the separate estates of the individual members of the firm, their separate liabilities having first been discharged. It is not to be assumed without some cogent evidence that a man to whom the law has given this double advantage should relinquish a part of it. The fact of the bills for the price of the goods having been drawn upon *James Hargraves Nuttall*, (the

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partner resident in England) alone is not inconsistent with any other view than that of his being solely and exclusively liable," and he suggests as a reason that they might be more readily negotiable than if drawn upon the firm abroad. He then discusses the effect of the invoices being made out in the name of the one partner, and then proceeds to the question of the effect of proving in bankruptcy against the estate of the one partner, and treats as contrary to common sense and justice, "the proposition that where an acceptance is given by an individual member of a firm for goods supplied to the firm, and the party giving the acceptance becomes bankrupt, and a portion of the amount is realized from his estate, the drawer is estopped from proceeding against the other members of the firm, or against the partnership estate for the residue." In another passage he says, "It is true the acceptance operates a suspension of the drawer's remedy until the maturity of the bill; but the bill being unpaid when it becomes due, the drawer may treat it as waste paper, and proceed for the original consideration." The judgment of Mr. Justice *Williams* was to much the same effect; he held that to take the case out of the ordinary rule of the law of partnership it "must be shewn most clearly that the seller of the goods did intend to rely solely upon the one partner to the exclusion of the liability of the rest of the firm," and he then treats of what he calls "the ordinary case of a sale of goods to a firm consisting of three members, and a bill taken from one for the price;" he then states the effect of a bill being given for a debt; that it is to be taken as a conditional payment; and he adds, "the question here is whether the condition to defeat the payment has or has not happened. If the bill has been returned to the creditor unpaid without any laches on his part, the condition which was to defeat the payment has happened and consequently it is no payment." Judges *Crowder* and *Byles* agreed, and Mr. Justice *Byles*, in relation to the taking the separate bill of the partner in England, observed "It is urged that

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the taking the separate acceptance of the one partner was inconsistent with the joint liability of the three. I do not, however, see any inconsistency in that," and he suggests that it might have been taken as a matter of convenience. In regard to the bills accepted by the partner resident in England he observed that it was only a conditional payment which was defeated by the subsequent dishonour of the bills, and adds "The debt not having been paid in this collateral way, the plaintiff was remitted to the joint liability of the firm."

The case of *Ansell* v. *Baker* was followed in *Sharpe* v. *Gibbs* (*a*). There was a simple contract debt by three, and a mortgage given by two only of the three, though drawn out in the name of the three. The question was, whether the liability of the three for their debt was merged in the specialty given by the two, and the Court, composed of *Erle*, C. J., and *Willes* and *Byles*, JJ., was unanimous that it was not, on the ground that the remedy by the specialty was not co-extensive with that on the simple contract debt.

Judgment.

The case of *Ex parte Seddon* (*b*) was the converse of this. It arose upon a petition by creditors to prove against a bankrupt, and the question was, whether the debt was a separate debt. Goods had been sold to one of the bankrupts which were paid for by a joint note, and a receipt was given as for money paid, not expressing how the payment was made; and the question was, whether the sellers of the goods had not accepted the joint note in full satisfaction of the debt so as to preclude them from coming on the separate estate. Lord *Thurlow* said that, though on the face of the note it was a joint debt, it was still a question whether the creditor could not maintain his action for goods sold, and he held that the note was no payment; and as to the receipt he observed,

(*a*) 16 C. B. N. S. 527. (*b*) 2 Cox 49.

if it had remained unexplained it would have been evidence of the debt being paid, but it appearing as it did how the receipt happened to be given, it was not conclusive; and the creditor was allowed to prove as for a separate debt.

This is in affirmance of the same principle as is involved in the other cases to which I have referred, that upon the dishonor of a bill or note given as collateral security the original cause of action revives, and it resembles the case before us also in this, that there was something besides the taking the collateral security, in that case the giving a receipt for payment of the goods sold, but it was held to be open to explanation, and no bar to a recovery upon the original cause of action.

Judgment.

It seems to me quite immaterial whether the giving of a note or bill for the amount of a debt is to be considered as operating as a suspension of payment, or as a conditional payment; whichever it be, the original cause of action revives upon default in payment of the note or bill, and the cases to which I have referred prove incontestably that this is the effect of such default, as well where the note or bill is given by one member of a firm for a debt of the firm, as where it is given by a firm or by all the members of a firm, for a debt of the firm, or by a sole debtor for his debt. It is in short, as a general rule, merely collateral security. It is of course competent to a creditor to agree to accept the note or bill of one partner as payment of a partnership debt, and *Lyth* v. *Ault* settles, that the giving of such note or bill may be a good consideration for an agreement to release the other members of a partnership; but this itself implies that there must be an agreement to release them, and, as is expressed in *Thompson* v. *Percival*, in *Lyth* v. *Ault* and in other cases, to accept the note or bill of one partner in accord and satisfaction of the partnership debt. The cases entirely negative the proposition that

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the mere taking of such note or bill does itself import that it is taken in accord and satisfaction.

In the two cases that I have last referred to, it is put strongly that an express agreement to accept the bill of the one partner in accord and satisfaction must be proved, and I do not find that this is denied in any of the cases, though the language of learned Judges in some of the cases rather imports that such agreement may be implied from circumstances, *e. g.*, Sir *Alexander Cockburn* in *Bottomley* v. *Nuttall* says, "It is not to be assumed without some cogent evidence that a man to whom the law has given this double advantage should relinquish a part of it."

Whether an express agreement must be shewn or whether an agreement may be implied, is not very material in this case. There must at least be cogent evi-

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dence, and it must be evidence of an agreement to accept the note of the one partner in accord and satisfaction of the partnership debt. Apart from the delivery to *Carruthers* of the note of the firm for $800 there is in this case no evidence whatever of agreement or even of intention on the part of *Peckham & Hoag* to accept the note of *Carruthers* in satisfaction. What evidence there is is the other way; for *Ardagh* was sought for, and it was only upon failure to find him that the note of *Carruthers* was taken; then again it was taken for the open account as well as for the amount of the note of the firm. The almost necessary inference is, that it was taken as a matter of convenience in order to raise funds, as in *Bottomley* v. *Nuttall;* as a collateral security for the partnership debt, not certainly in accord and satisfaction of it.

The delivery of the partnership note for $800 to *Carruthers* upon the giving of his note for $1200 and old, is the only circumstance that is in my judgment entitled to any weight in support of *Ardagh's* position;

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but that circumstance is not, to quote the language of Sir *Alexander Cockburn* in a passage that I have cited, "inconsistent with any other view than that of his being solely and exclusively liable." If any reason can be suggested for it (not an absurd one) it is sufficient. In *Bottomley* v. *Nuttall* and in other cases reasons were suggested without any evidence that they were the reasons that induced the parties to act as they did; and this is obviously right, for all that it is necessary to shew is, the absence of inconsistency between what was done and the position now assumed by a party in relation to it, he says in short it admits of an explanation that is not inconsistent with the creditors not foregoing their rights against the partnership.

Judgment.

It may have been then—to use the language used in some of the cases,—that *Carruthers* or that *Peckham & Hoag* considered that it was proper that the two evidences of debt, the note for $800 and the note for $1,200 should not be held by the creditors at the same time, inasmuch as they together constituted evidence of a debt $800 more than was really due. It is impossible to say, as was said in *Crooker* v. *Crooker*, "they preferred the separate notes of the members for their share, to the note of the firm for the amount due," and it is pointed out in that case how they might be preferable—but in this case no reason is suggested even, for preferring the separate liability of *Carruthers* to that of his firm. Again, the note was simply delivered to *Carruthers*, he being at the time a member of the firm; the inference I take to be that it was given to him in that character, and so given to the firm. *Peckham & Hoag* were holders of a collateral security for a part of the debt of the firm. They received in lieu of it that which was undoubtedly *per se* a collateral security for the whole debt. It appears to me not inconsistent with their retention of their right against the firm that they should deliver to a member of the firm the collateral

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security for a portion of the debt. It certainly does not *necessarily import an agreement* to forego any of their rights, and it is necessary to go to that length under the cases. It is to my mind much less cogent evidence of an agreement to forego the liability of the firm, than is the searching for *Ardagh* with a view to obtaining his signature to the $1,200 note, of an intention to retain it.

I desire to add that the justice of the case appears to me to be entirely with the creditors. There seems to be no reason why they should lose the liability of the firm. It is said that *Carruthers* has charged *Ardagh*, or charged the firm, with the $800 note. There is no sense in such a charge, if he has made it. As well might he charge him or the partnership with the $1,200 note. He has paid one, no more than the other, and cannot sustain any charge in respect of either, against his partner or the partnership. In justice and common sense, therefore, as well as in law, I think the creditors entitled to their debt against the partnership.

Judgment.

I do not think that the fact of judgment having been recovered against *Carruthers* alone, upon the $1,200 note, presents any real difficulty in the case. Of the cases cited, *Drake* v. *Mitchell* (*a*), is the only one that applies. In that case there were three joint covenantors for the payment of certain moneys by instalments. For the amount of one of these instalments a promissory note or bill of exchange was given by one of the covenantors, which was dishonored. Suit was brought upon it and judgment recovered, but nothing was realized therefrom. The plaintiff then sued the three upon their covenant, when the above facts were pleaded, and it was averred that the note, or the bill, was given for the payment and satisfaction of

(*a*) 3 East 251.

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the debt, (the instalment then due as I understand), but it was not averred that it was accepted as satisfaction, or that it produced it in fact. The question then was, whether the taking the security of the one and recovering judgment upon it, was a bar to a recovery upon the covenant of the three; and the Court, composed of *Lord Ellenborough*, C.J., and *Grose*, *Lawrence*, and *Le Blanc*, JJ., was unanimous that it was not; *Lord Ellenborough* saying, "I have always understood the principle of *transit in rem judicatam* to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party; and therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have." Each of the learned Judges gave his opinion in the case. I will refer only to that of Mr. Justice *Grose*, which is peculiarly apposite to this case. "The note or bill not having been accepted as satisfaction for the debt, could only operate as a collateral security, and though judgment has been recovered on the bill, yet not having produced satisfaction in fact, the plaintiff may still resort to his original remedy on the covenant."

Judgment.

Drake v. *Mitchell* has not, nor has the reasoning upon which it proceeds, been impugned in any subsequent case. It was cited as authority by Chief Justice *Tindal* in *Bell* v. *Banks* (*a*). The principle that there is no merger in a higher security where the remedy given by the higher security is not co-extensive with the original cause of action, is in affirmance of it. The cases of *King* v. *Hoare* (*b*), and *In re Higgins* (*c*), are plainly dis-

(*a*) 3 M. & G. 267.

(*b*) 13 M. & W. 494.

(*c*) 3 DeG. & J. 33.

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tinguishable. In neither of them was there a collateral security given by one of several who were jointly liable. They were both of them cases of a naked joint liability by two, and suit brought by the creditor and judgment recovered in it against one. In *King* v. *Hoare*, *Drake* v *Mitchell* was not even referred to by counsel for the plaintiff, only referred to in order to distinguish it by counsel for the defendant, and not at all referred to in the judgment. In giving judgment *Lord Wensleydale* observed that the point in question in that case had never been actually decided in the Courts. He therefore plainly regarded it as a different point from that decided in *Drake* v. *Mitchell*. He distinguished between the case of a joint, and a joint and several liability, holding a joint contract to be like a joint tort, and that whether the action be brought against one or two it is *for the same cause of action*. A joint contractor, he says, is not severally liable in the same sense as he is on a joint and several bond, "which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all, and the several bonds of each of the obligors, and gives different remedies to the obligee." He refers to the general rule that an action on a joint debt barred against one is barred altogether. The conclusion is thus summed up: "that where judgment has been obtained for a debt as well as a tort the right given by the record merges the inferior remedy by action for the *same debt or tort* against another party," this not applying, as is pointed out by the judgment, to a case of joint and several liability, and clearly not applying to a judgment upon a collateral security. Some anomalies are pointed out that would result from a contrary decision, but the reasoning upon which the decision proceeded was chiefly technical; and in the case of *In re Higgins*, Lord Justice *Knight Bruce* expressed his regret that the law compelled him to decide that the joint debt was extinguished by the judgment recovered against one of the joint debtors. Lord Justice *Turner*, after agreeing

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with Lord Justice *Knight Bruce*, added that the creditor had made his deliberate election to pursue his remedy against one debtor. He certainly had done so, for after knowledge of the partnership of the two he chose to proceed against one of the two for no reason that appears, except that he chose to do so. The case before us is more like that of *Bottomley* v. *Nuttall*, the creditors having in that case as in this the separate security of one partner, upon which they proceeded. 1873. Carruthers v. Ardagh.

In my opinion, the creditors, *Peckham & Hoag*, have not by anything that has occurred lost their remedy against *Carruthers & Ardagh* upon their original cause of action.

STRONG, V. C.—This was a suit instituted by *John Carruthers* against *Richard Ardagh* for the purpose of having the accounts of a partnership, which had existed between them, taken in this Court, and the partnership wound up. The decree directed, amongst other inquiries, an account to be taken of the outstanding liabilities of the firm. The partnership subsisted during the year 1871—and the partnership business consisted in the performance of certain contracts with the Corporation of the City of Toronto, for the performance of public works, and for the supply of lumber to the City. In the course of this business, and at various times during the year 1871, the firm purchased lumber from Messrs. *Peckham & Hoag*, lumber merchants in Toronto, who carried into the Master's office, under the decree mentioned, a charge claiming to be creditors to the amount of $1,200 and upwards, in respect of the lumber supplied to the firm. The defendant *Ardagh* disputes this liability, and insists that the joint or partnership liability was satisfied by the plaintiff *Carruthers* giving to the claimants in December, 1871, his separate promissory note for $1,200, upon which the payees, Messrs. *Peckham & Hoag*, subsequently brought an Judgment.

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action and recovered a judgment against *Carruthers*. The purchases of the lumber are stated to have been all effected by *Carruthers* personally, or by some person in the employment of the firm under the express direction of *Carruthers*—and *Ardagh* says that he had but one interview with Messrs. *Peckham & Hoag*, which I gather was in July, 1871, when a promissory note signed by the firm for $1,000 was given, and it does not appear that on this occasion anything material to the question now in dispute passed between the parties. At different dates during the year of the partnership business notes were given to Messrs. *Peckham & Hoag* on account of the lumber supplied by them. These notes were in some instances signed by *Carruthers* alone, and in some by the firm; the notes in the latter case being made by each partner signing his own name. There seems to have been in all four of these notes—viz.: Notes on 6th April and 8th May, signed by *Carruthers* alone; and on 25th July and 26th September, by *Carruthers* and *Ardagh*. It does not appear whether or not each of the notes covered the whole debt due at the time it was given. In the latter part of December, 1871, the note given in September, which had been signed by both partners in the way I have mentioned and which was for the amount of $800, was about maturing and the creditors had called the attention of *Carruthers* to it. *Carruthers* not having funds to pay the note, and *Ardagh* having obtained possession a short time before of the only available funds of the partnership—a cheque of the Corporation of Toronto, which *Carruthers* had stopped the payment of—there was no alternative to save the note from being protested but to renew it, which the creditors appear to have agreed to do. *Carruthers* and one of the creditors, Mr. *Peckham*, endeavoured to find *Ardagh* to procure his signature to the new note, but sought him unsuccessfully for two days, when *Carruthers* gave his separate note for $1,200, that sum being made up of the amount of the note about maturing for $800 and an account for lumber

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amounting to $400, due to the creditors. Upon this note being given, Messrs. *Peckham & Hoag* retired the note for $800 and delivered it up to *Carruthers*. 1873. Carruthers v. Ardagh.

Upon this note for $1,200 becoming due it was not paid, and Messrs. *Peckham & Hoag* thereupon brought an action and recovered a judgment upon it, which judgment, with the exception of a small amount levied upon the goods of *Carruthers*, still remains unsatisfied. *Carruthers* has since become insolvent.

Upon this state of facts two questions are raised:—

1st. It is said that although *Ardagh* was liable for the whole $1,200 at the time the note for that amount was given by *Carruthers*, yet the acceptance of that note by the creditors under the circumstances stated discharged *Ardagh* from all liability.

2nd. That at all events the recovery of the judgment on the note given by *Carruthers* has had that effect. Judgment.

These are both legal questions, free from any complication on equitable grounds, and are to be decided on the same principles as would have been applied to them by a Court of Law if an action had been brought against *Ardagh*

The rules of law as to the effect upon the original liability of a debtor by simple contract of the giving of the bill or note, either of a sole debtor or of one of two or more joint debtors, or of a stranger, for the antecedent debt, appear to be well settled.

If so agreed the bill or note may be an absolute satisfaction: that is to say, if there is an accord the giving of the bill or note is a good satisfaction, just as under the like circumstances the giving of a chattel may constitute satisfaction.

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In order to constitute satisfaction the agreement, or in the language of pleading the accord, must be proved and is not to be inferred from the bare acceptance of the security.

This may be established either by an express contract, or it may be implied from the conduct of the parties and the circumstances surrounding the transaction.

The question is therefore purely one of fact, as is well illustrated by the case of *Thompson* v. *Percival* (*a*).

There was at one time some doubt as to whether the separate liability of one of two or more joint contractors could be a satisfaction of the joint liability, and the cases of *Lodge* v. *Dicas* (*b*), and *David* v. *Ellice* (*c*), gave much colour to the opinion that for want of consideration, on the same principle that the acceptance of a lesser sum cannot be pleaded as a satisfaction of a larger, the separate contract of one of the joint debtors could not be a discharge of the joint obligation of all, even if so agreed by the creditor.

Judgment.

This fallacy has however been entirely dissipated by later cases, particularly by *Thompson* v. *Percival* and *Lyth* v. *Ault* (*d*).

The doctrine of the later cases is stated by Lord *Cottenham* in *Winter* v. *Innes* (*e*), as follows. He says: "The cases at law have necessarily arisen where the dissolution of a partnership has taken place by arrangement between the partners and not by death. It will be found in some, even where it was clear that the creditor intended to take the separate security of the continuing partner in lieu of the joint liability of the

(*a*) 5 B. & Ad. 925.
(*b*) 3 B. & Ald. 611.
(*c*) 5 B. & C. 196.
(*d*) 7 Exch. 669.
(*e*) 4 M. & Cr. at 108.

dissolved firm, the retired partner was held not to be discharged, as in *David* v. *Ellice* and *Lodge* v. *Dicas*, in which the creditor with a knowledge that the continuing partner had agreed to pay all the debts, took his personal security for the debt, but it was held that he had not thereby released the retiring partner upon the ground of want of consideration for his so doing. These decisions have been considered as carrying the doctrine very far, and undoubtedly they do, and the true ground appears to me to have been acted upon in *Bedford* v. *Deakin*, and *Thompson* v. *Percival*. In the former it is laid down that to discharge the retiring partner it must appear that the creditor accepted the separate security of the continuing partner in discharge of the joint debt; and in the latter case, although the creditor knew that the continuing partner had agreed to pay all debts, and with that knowledge had taken a bill from him for the payment of which, when due, he afterwards allowed two months; yet the Court, upon a motion for a new trial, ordered it that it might be put to the jury whether the plaintiff had agreed to take, and did take, the bill in satisfaction of the joint debt."

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In *Lindley's* Treatise on Partnership (Ed. 3, p. 454), the result of the modern cases is, I think, correctly summarised.

It cannot, I think, be said that the mere taking of the security of one joint contractor or partner for the joint or partnership debt is to be taken by itself as conclusively showing an agreement that it should be accepted by the creditor as satisfaction, any more than such a consequence would follow a similar act on the part of the creditor of a single debtor.

The question is always to be dealt with as one of fact, and under circumstances like those which were proved

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in *Thompson* v. *Percival,* the dissolution of a partnership, an agreement between the partners that the partnership debts should be paid by one partner, the communication of that agreement to the creditor, and the subsequent acceptance by the creditor of the bill or note of the partner who has assumed the liability, coupled with the relinquishment by the creditor of any partnership security held by him—there would, without any proof of express agreement, be strong, almost irresistible evidence in the conduct of the creditor to shew that he accepted the separate liability in satisfaction and discharge of the original partnership debt. If a creditor, however, accepts the negotiable bill or note of his debtor payable at a future day, and the debtor is unable to prove either an express or implied agreement to take the security in satisfaction and discharge, the consequence is that the original obligation continues to exist unimpaired, the remedy on it, however, being suspended until the maturity of the bill, when in the event of non-payment the creditor can at his election sue either on the original cause of action or on the substituted security. This suspension of remedy is, it would seem, an innovation upon the ancient principles of the common law, introduced for commercial convenience subsequently to the introduction of the use of negotiable instruments.

Judgment.

In 2 *Williams's* Notes to *Saunder's* Reports, p. 351, it is said with reference to this principle: "In truth then this abeyance of the creditor's right to sue seems an anomaly which the law has admitted, as in other instances, as part of the law merchant in respect of mercantile securities."

And the necessity of such a rule is apparent from the consideration that if the remedy on the first cause of action were not suspended the effect would be to subject the debtor to great risks, since the creditor might in-

dorse the bill over during its currency to a *bonâ fide* holder for value, and in that way the debtor might have imposed upon him a double liability for the same debt. In order to entitle the creditor to sue on the original liability he must shew that the substituted bill is in his hands unsatisfied. In *Kendrick* v. *Lomax* (*a*), *Bayley J.* says: "The second bill being a negotiable instrument the plaintiff would be precluded from recovering ont he first bill until he makes out satisfactorily that the defendant cannot be liable on the second, and he virtually undertakes not to sue on the first until he has delivered up the second."

In *Belshaw* v. *Bush* (*b*), this subject is learnedly expounded by *Maule*, J., who describes the effect of the transaction as a conditional payment.

The same effect is to be attributed to a bill or note given on account of a partnership or joint debt by one partner or joint contractor as in the case of a single debtor giving his own security. Judgment.

If any authority is needed for this proposition it will be found in the case of *Bottomley* v. *Nuttal* (*c*); and indeed in the case of *Belshaw* v. *Bush* it had been held that the acceptance of the bill of a stranger had the same effect as that of the original debtor himself.

In the case of *Sayer* v. *Wagstaff* (*d*), Lord *Langdale* has given an exhaustive statement of the law on this point of conditional payment, or suspension of remedy by taking a negotiable security.

It therefore follows that if in the present case the note for $1,200 was not in fact accepted in absolute satisfac-

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(*a*) 2 C. & J. 405.
(*b*) 11 C. B. 191.
(*c*) 5 C. B. N. S. 122.
(*d*) 5 Beavan 415.

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tion of the original debt, Messrs. *Peckham & Hoag*, upon its dishonour, became entitled to sue upon the original contract—that is to say, for the price of the goods sold and delivered to the partnership firm.

This reduces the inquiry on the first head to the question whether the note for $1,200 was accepted in discharge, and this is purely a matter of evidence.

It is to be remarked that all the four notes which were from time to time given were accepted like the last, without any expressed understanding or agreement, either by the debtors or the creditors, as to the effect which they were to have on the account.

If, therefore, there was any such agreement by the creditors as to this note, it is to be implied from the circumstances attending its receipt by them.

Judgment.

Ardagh says in his evidence that he had no communication with Messrs. *Peckham & Hoag*, or either of them, except upon one occasion, that on which the note for $1,000 was given in July, and nothing which then occurred affects this question. It follows that nothing which *Ardagh* said or did can have had any effect in bringing about his discharge.

Then who stipulated on *Ardagh's* behalf and in his interest that the creditors should forego his liability and look alone to that of *Carruthers?* There is no evidence that *Carruthers* did so, and all the strong probabilities of the case are against his having done so, as he would have been taking gratuitously a greater burthen upon himself without, as it appears, having even been solicited by *Ardagh* to do so. From the feeling which existed between *Carruthers* and *Ardagh* at the time, it is not probable that *Carruthers* would have felt himself called upon to exert himself to protect *Ardagh* at his own ex-

pense. Then if *Carruthers* did not stipulate for *Ardagh's* discharge, and did not even intend it, it is out of the question to suppose that the creditors intended, of their own free will, to release *Ardagh*. The evidence, however, gives a satisfactory explanation of the real reason for taking *Carruthers's* note. The partners, *Carruthers & Ardagh*, were illiterate men, not men of business; neither of them had been in the habit of signing the partnership name, but when a note signed by the partnership was given each wrote his own name in the partnership style. As this course had been adopted on previous occasions it is not unreasonable to suppose that *Carruthers* should have thought it necessary in this instance, and should have considered that he had no power to sign the partnership name; and especially such a peculiar mode of signature would have suggested to Mr. *Peckham*, as a man of business, at least the suspicion that *Carruthers* had not the power to sign the partnership name, and that a note so signed by him might be of doubtful validity.

Judgment.

So far, therefore, there does not appear to be a single circumstance in evidence which points to an agreement to accept *Carruthers's* note as absolute satisfaction. It is, however, said that the delivery up of the note for $800, made by both partners, is a material fact as indicating an intention to relinquish the joint liability of *Ardagh*.

I think this is sufficiently explained. It was surely reasonable that *Carruthers* should insist on the delivery up of this $800 note in the ordinary course of business, as otherwise the creditors would have held to the extent of $800 double securities, which might in the case of the loss of evidence have led to a double liability.

If the note for $800 had been the sole cause of action, if, for instance, the partners had only been liable to the

1873. holders as indorsers upon it for the accommodation of the maker, it might have been different; but as it was, on the dishonour of that note *Peckham & Hoag* could have fallen back on the original cause of action and sued for the price of the goods sold and delivered, for which that note was given,—for I understand that the $800 note had also been given for a pre-existing debt,—the price of the lumber sold, and, although the note of the partnership, it also had been accepted, not in satisfaction, but on account of the debt represented by the amount for which it was made payable.

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I must therefore say on the evidence, giving implicit credit to *Ardagh* in preference to *Carruthers* whenever they come in conflict, that the defendant has failed to prove that which it lay upon him to establish in order that the Master's finding can be supported.

Judgment. The recovery of the judgment by Messrs. *Peckham & Hoag* on the note cannot in my present view of the case make any difference, except, of course, to the extent to which it may have been satisfied.

At the time this judgment was recovered the creditors were entitled to the benefit of two obligations collateral to each other—the original liability of both partners for goods sold, and the liability of *Carruthers* on his promissory note.

The recovery on the note could only have the effect of passing into judgment the latter of these two causes of action, leaving the former subsisting and entirely unaffected by the judgment; and it is this original debt which the creditors now seek to enforce the payment of.

That they can do so is, I think, very clear on principle, though I confess I thought upon the argument that the judgment stood in the way of the creditors. Subsequent

consideration has, however, shewn me that this cannot be so, and indeed the case of *Tarleton* v. *Ollhusen* (*a*), is express to the point. 1873. Carruthers v. Ardagh.

I think the present case entirely different from that of *Re Higgins* (*b*) in this, that the action was brought and the judgment recovered by the creditors here, not on the joint contract as in that case, but on the collateral several liability of one of the joint contractors.

I repeat that I have regarded the principal question here, that as to the effect of taking *Carruthers's* note, as entirely one of fact; and I dissent from the learned Vice-Chancellor, whose order is under review, upon the proper conclusion to be drawn from the evidence.

I think the appeal should be allowed.

Judgment

BLAKE, V.C.—The plaintiff and the defendant *Ardagh* entered into a partnership as contractors, some time in the beginning of 1871, for the doing of certain work in which lumber was required, and they continued such partnership until the month of November of the same year. Messrs. *Peckham & Hoag*, the claimants in this matter, were lumber merchants, who supplied some material to these partners. They first dealt with *Carruthers* alone, not being aware of the partnership with *Ardagh*. On the 6th of April the first note was given on account of lumber supplied, and this was given by *Carruthers*, and in his name alone. The next note was dated the 8th of May—that note was also given by *Carruthers* alone, although at this time the claimants knew that *Carruthers* and *Ardagh* were in partnership in respect of the matters for which the lumber supplied by them was needed. On the 25th of July a note made by both *Carruthers & Ardagh* was given to Messrs. *Peckham*

(*a*) 2 A. & E. 32.

(*b*) 3 De. Gr. 33 De G. & J.

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& Hoag, and this was taken up on the 26th of September by a note made by the same parties. In the month of December the claimants held the note of the firm of *Carruthers & Ardagh* for $800, and they had likewise a claim for an open account, to the amount of about $400. Before this partnership note fell due Messrs. *Peckham & Hoag* accepted a note from *Carruthers* alone for about $1,200, which covered the amount of the partnership note then current and not yet due and the open account, and they delivered up the firm note for $800. In May, 1872, *Carruthers* was sued on the $1,200 note; judgment was recovered against him, and a portion of the amount due was collected by sale of his goods. *Carruthers* has gone into insolvency, and *Peckham & Hoag*, although they have not proved in the Insolvent Court, have interested themselves in respect of this claim, which has been entered in the schedule of liabilities of the insolvent. The claimants now seek to prove in this suit against the partnership of *Carruthers & Ardagh*, in order to reach the assets of the firm, while the defendant *Ardagh* alleges that he is no longer liable for this debt; that *Carruthers* was accepted as the debtor; that he alone must be looked to for its payment, and that so far as he or the firm is concerned, it must be considered as a debt which has been discharged. *Ardagh* says he knew nothing of the giving of the $1,200 note until after it fell due. *Carruthers's* view of the transaction is plain, as, in the account brought into the office of the Master by him, he charged the partnership with a payment by him of $800, treating the giving of the note for $1,200 as a taking up of that for $800.

Judgment.

The debt of the firm, in the month of December, was represented by the firm note—so long as that ran the debt was in abeyance, but if it were satisfied the debt was discharged; under these circumstances the creditors knowing of the partnership—knowing that it had come

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to an end—knowing that *Ardagh*, one of the partners, disputed the amount of the account, procure a settlement with the other partner, accept his note for the full claim, and deliver up that which then represented the partnership debt. Five months afterwards this note is put in suit, judgment is recovered on it, the goods of the defendant are sold by the sheriff, and thereafter the plaintiffs turn round and claim that the note given by *Carruthers* was merely collateral to the partnership debt, and they ask to be allowed to prove against the firm. But it seems evident that this could not have been intended by the parties at the time. If the note of *Carruthers* were to be simply collateral to the partnership debt, that which represented this partnership debt, namely, the joint note of the partners, should have been retained. At page 199, of *Byles* on Bills, the law is laid down as follows: "But in general the taking a separate bill of one of two joint acceptors of a former bill is a relinquishment of all claim on the former security." And at page 381: "The taking of his separate bill from one of the several partners for a joint debt will, as we have seen, discharge the others—such a transaction imports an agreement between the creditors and the firm that the creditors of the firm shall rest on the liability of the one partner alone, and shall discharge the others; that is an accord—and the separate bill is a satisfaction." Mr. *Lindley*, in his work on Partnership (*a*), says: "The fact that a creditor has taken from a continuing partner a new security for a debt due from him, and a retired partner jointly, is strong evidence of an intention to look only to the continuing partner for payment." The language of Mr. *Parsons* is: "If after a dissolution the payee of a note of a firm gives it up and takes the several notes of the partners for their several shares, he has no right as a partnership creditor" (*b*). "Is it to be endured," says *Lord Kenyon* in *Evans* v. *Drummond*,

Judgment.

(*a*) Vol. I, p. 465. (*b*) Parsons on Partnership, Sec. 485.

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"that when partners have given their acceptance, and where perhaps one of two partners has made provision for the bill, that the holder shall take the sole bill of the other partner, and yet hold both liable. I am of opinion that when the holder chooses to do so, he discharges the other partner" (*a*).

The view of *Lord Ellenborough*, in *Reed* v. *White* (*b*), is to the same effect.—See also *Lyth* v. *Ault*, 7 Ex. 669; and *Thompson* v. *Percival*, 5 B. & Ad. 925. The creditors may have thought *Carruthers* good for the debt, and have considered it better to take him and have the account settled rather than keep the matter open and run their risk of establishing their full claim against both: *Bottomley* v. *Nuttall* (*c*). Here one of the creditors was examined before the Master, on his claim, and assigned reasons for the course he pursued. I have read this evidence, and that of *Carruthers & Ardagh*, given at the same time, and from this testimony I must say I am by no means satisfied that the intention in 1871 was not to accept the note of *Carruthers* for the partnership debt. The officer of the Court who examined these parties and weighed their evidence finds in his judgment that "the reasons assigned for taking the separate note here, are not at all satisfactory." The undisputed facts of the case shew a discharge of the partnership debt by the acceptance of the note for $1,200. The oral testimony does not satisfactorily displace this case, and I, therefore, am of opinion that the claim of the creditors should be rejected and the order made on the appeal from the Master be affirmed with costs.

Judgment.

(*a*) 4 Esp. p. 92. (*b*) 5 Esp. 122.
(*c*) 5 C. B. N. S. 122.

1873.

JENKINS v. MARTIN.

Partition—Squatter's right.

The right which a squatter acquires, by being in possession of lands of the Crown, is not such an interest therein as this Court will order a partition of amongst his heirs: in such a case the only remedy is by application to the Executive Government of the Province.

The bill in this cause was filed by *Elizabeth Jenkins*, as one of the heiresses of the late *John B. Martin*, who died intestate on the 29th March, 1864, against the other children of *Martin*, setting forth that the deceased was at the time of his death entitled to the use and occupation, by sufferance of the Government of Canada, of certain lands known as the Burlington Beach Gardens, on which he had built and made other improvements to the extent of $2000; that the plaintiff and her brothers and sisters were entitled as co-heirs and heiresses of the deceased, and praying a partition of the said lands or a sale thereof, and a division of the proceeds amongst the parties so entitled. Statement.

An answer was filed denying the right of the plaintiff to the relief prayed, on the ground that the intestate was not shewn to have had, at the time of his death, any estate or interest in the premises which had devolved upon his heirs-at-law, and that therefore the plaintiff was not entitled to the relief asked.

The cause came on to be heard by way of motion for decree.

Mr. *Leggo*, for the plaintiff.

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

Mr. *C. Moss*, for the infant defendants.

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Jenkins v. Martin.

BLAKE, V. C.—The bill alleges that *John B. Martin* was entitled "to the use and occupation, by sufferance of the Government of the Province of Canada," of certain premises; that he died intestate, leaving the plaintiff and four other children his co-heirs. The deceased was simply allowed to live on the premises in question; he had no pre-emptive right, nor has the Crown recognized in any way his claim. If partition be granted here any squatter's heirs may come to the Court and ask for partition. There must be some estate or interest to warrant the interference of the Court; and that not being shown here, the bill must be dismissed with costs. The Crown can, without the assistance of this Court, determine what is right to be done between, not only the Crown and the parties, but between the parties respectively. The dismissal of the bill will not prejudice the position of the infant defendants, as was suggested by their guardian. On this point alone I reserved judgment, and after consideration I cannot see that this decree can affect the infant defendants injuriously.

Judgment.

1873.

GRIFFITH V. PATERSON.

Husband and wife—Maintenance—Executor—Costs.

Where a husband's conduct towards his wife is such that she is unable safely or comfortably to remain in his house, she has a right to pledge his credit for the suitable support and maintenance of herself and children; and it will make no difference in the right of the party furnishing such support to recover therefor, that he is the father of the wife, and did so provide such maintenance without any immediate intention of making a claim for his outlay in their behalf.

Where in such a case a father had for several years supported his daughter and grandchildren, but made no claim against the husband during his lifetime, and after his death made a claim against his estate: the Court, although it considered him entitled to be paid his demand, thought the executor, under the peculiar circumstances, was justified in having resisted payment of the demand without the sanction of the Court; and that in the administration of the estate the executor would be entitled to be paid his costs of the litigation.

Statement.

This was a bill by *Thomas Griffith* against *Robert Paterson*, executor of the late *William Foster*, the younger, who died in March, 1871, claiming to be a creditor of the deceased to a large amount for the support and maintenance of his wife and two children, for whom he had neglected to provide a suitable maintenance, and who by his cruelty and ill-treatment, he had compelled to leave his house and seek shelter in the house of her father the plaintiff; that the plaintiff had continued to support and maintain them since 1866; that the defendant refused to pay plaintiff his demand out of the estate of the deceased, come to his hands as such executors; and prayed that the estate might be administered, and plaintiff's claim paid.

The defendant answered, stating that he had been informed and believed that the wife of *Foster* had abandoned her husband and his home without sufficient reason therefor; that he was not aware of the claim of the

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plaintiff, and had no personal knowledge of its correctness, and asked the direction of the Court in the matter. Evidence was taken before the Court, which fully established the alleged cruelty, and the question discussed was, whether the plaintiff, who was the father of the wife, had a right to claim for their support in the same manner, and to the same extent as a stranger would have been entitled.

Mr. *Boyd*, for the plaintiff.

Mr. Moss, Q. C., and Mr. *George Murray*, for the defendant.

The cases cited are mentioned in the judgment.

Judgment.

BLAKE, V. C.—The bill alleges that one *William Foster* so treated his wife, that in July, 1866, she, with her two children, was obliged to leave him and remain away until his death, which took place in March, 1871. He made no provision for his wife, and the plaintiff, her father, took her and the children to his home and provided for them. The husband, by his will, appointed the defendant his executor, but made no allowance to the wife or for her support. The plaintiff claims out of the estate payment of what he has expended for the support of the wife and children. The defendant alleges the wife left the husband without just cause; that there was no liability on the part of the husband for the support of the wife, and none could be made against the estate; that the plaintiff did not maintain and support the wife and children on the credit of *William Foster*, or on that of his estate, but that the demand now made is an after-thought, and for this reason cannot be sustained.

There is no doubt on the evidence that *William Foster* abused his wife and compelled her to leave him; and

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that a case was made before me sufficient to have warranted the Court in decreeing alimony in favor of the wife, if a bill for that purpose had been at the proper time filed. It is equally clear that the plaintiff maintained his daughter and grandchildren until the death of the husband. But the question is raised, whether where a husband turns a wife out of doors, and she takes refuge with her father, who supports her, any liability in favor of the father against the husband can be inferred, or whether the proper implication is not that the necessaries were supplied without any regard to the husband; and that the father took back his child prepared to do for her as he had before she left his roof to commence her married life.

Judgment.

In *Rawlins* v. *Vandyke* (*a*), Lord *Eldon* ruled, "that if a man will not receive his wife into his house, he turns her out of doors; and if he does so, he sends with her credit for her reasonable expenses."

In *Hodges* v. *Hodges* (*b*) Lord *Kenyon* says, "Where a wife's situation in her husband's house is rendered unsafe from his cruelty or ill-treatment, I shall rule it to be equivalent to his turning her out of the house; and that the husband shall be liable for necessaries furnished to her under these circumstances."

In *Jenkins* v. *Tucker*, (*c*) the defendant had married the plaintiff's daughter and left her; upon her death, her father paid her funeral expenses, and it was held he was entitled to recover them against the husband.

In the notes to *Manly* v. *Scott* (*d*), the result of the cases is given as follows: "From the above, it will appear that, if the husband and wife separate by mutual

(*a*) 3 Esp. 250.
(*b*) 1 Exp. 441.
(*c*) 1 H. Bl. 90.
(*d*) 2 Sm. L. Ca. 389.

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consent, the wife has an implied authority to bind the husband for articles suitable to her degree, unless she have an adequate allowance—and unless that allowance be duly paid to her." That the father also is liable for the maintenance of his children, seems plain. Mr. *Parsons* (*a*) says, "So far as the duty of support certainly belongs to the parent as a legal obligation, and is neglected, any other person may perform it, and will be regarded as performing it for him; and on general principles the law will raise a promise on the part of the parent, to compensate the party who thus did for him what he was bound by law to do." On this point, Lord *Eldon's* language is, "With respect to the things furnished to the children, I do not lay it down as the law, that where the children live away from the father, that he is liable because the things furnished are necessaries. As a father, he has a right to the custody of his children; and may obtain possession of their persons by *habeas corpus;* but where he does not assert that right, and suffers them to remain with their mother, I think he, thereby, constitutes her as his agent, and authorizes her to contract those debts for clothing and other necessaries." So that it would seem clear from the authorities, that where a husband so treats his wife that she is justified in leaving him, and she with the children whom he is bound to support leaves his house, he is responsible for the necessaries supplied to the wife for herself and their children, so long as the separation continues, without default on the part of the wife.

Judgment.

But it is said here, because the father of the wife is the person who maintained the family, no demand can be made: that taking for granted a stranger could support the present claim, there can be no implied contract here, as it is obvious the father acted as he did solely out of regard for his child, and without any in-

(*a*) Parsons on Contracts, I, p. 30.

tention of making any charge against the husband, or of looking to him for repayment, and therefore the present case must fail. 1873. Griffith v. Paterson.

The case of *Emery* v. *Emery* (*a*), seems, however, conclusive on this point, if authority for it were necessary. There the wife being abused by the husband, left his house. She lived at the house of her father for over a year, and he brought an action to recover compensation for her board and lodging during that time. The Court held the plaintiff could recover. Sir *William Garrow* in his judgment, says, "I take it to be a clear principle of law, that if a husband conducts himself towards his wife with such a degree of misconduct and cruelty as to render it no longer safe for her to remain in his house, she is not to be turned out into the street to starve, and to seek relief in the parish workhouse, but is justified in leaving her home, and goes forth into the world with a credit for the necessaries of life suitable to her condition. Such is the effect of the marriage contract; and if the husband by his misconduct forces her to leave his protection, she may seek the means of subsistence elsewhere; and those who from charity or other motives are willing to provide them, are entitled to recover a compensation from the husband." Judgment.

It seems, therefore, immaterial whether the act of the father in taking in his child and his grand children when turned adrift by the husband and father, arose from feelings of charity or not, so long as he maintained them; this case lays it down that he is entitled to recover. I think there should be a reference to the Master to ascertain what sum should be allowed the plaintiff as compensation for his expenditure on behalf of the wife and children of *William Foster*, deceased; and that the plaintiff should be paid his costs of suit. If

(*a*) 1 Y. & J. 501.

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the defendant does not admit assets, let the estate of *William Foster* be administered.

I do not think it unreasonable under the peculiar circumstances of the case, that the executor should have put the plaintiff to the proof of his claim; and I consider he should be allowed his costs of the suit, in passing his claim, although I cannot make any order to that effect in this suit, as the persons interested in contesting therein, are not before the Court. I merely give it as my present view for what it may be worth, should the conduct of the executor in defending this suit, be, years afterwards, brought in question.

Judgment.

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POWELL v. LEA.

Practice—Evidence.

Where a defendant has been cross-examined on his answer, he has a right in all future proceedings in the case to make the same use thereof as, under the former practice, could be made of the answer to the interrogatories in a bill: and

Where a defendant after having been so cross-examined died, and the cause was revived against his real representatives, the defendants were allowed at the hearing to read such cross-examination in answer to the statements of the bill; thus rendering it necessary that such statements should be proved by two witnesses, or, if by one witness only, corroborated by attendant circumstances.

This was a suit for the specific performance of an agreement for the sale of lands, alleged to have been entered into by the late *Richard Lea* with the plaintiff. The original bill was filed against *Richard Lea*, who having put in his answer, was examined thereon by the plaintiff, and *Lea* having died the suit was revived against his real representatives, and the cause having been put at issue was set down for the examination of witnesses and hearing, when the defendants tendered the examination of *Richard Lea* as evidence in their behalf, which was objected to on the part of the plaintiff.

Mr. *Attorney General Mowat* and Mr. *S. G. Wood*, for the defendants, referred to *Taylor* on Evidence, section 434, to shew that this was, under the circumstances, receivable.

Mr. *Hoskin*, Q. C., contra.

BLAKE, V. C.—It was urged that the depositions of the original defendant were taken simply for the purposes of discovery, that he was examined as a party and Judgment.

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not as a witness, and therefore that they could not now be received or read. *Taylor* on Evidence (*a*) lays it down that "If the point in issue, though very similar, was so far different in the two proceedings that the witness, who was called to prove or disprove the issue in the former, need not have been *fully* cross-examined in regard to the matters in controversy in the latter his deposition, if tendered on the second trial, will be excluded." The necessity for the full examination of the witness seems therefore an element for consideration in deciding whether or not the evidence tendered is to be received. I cannot say that upon an examination for the purpose of discovery merely, the necessity for this full examination arises. The plaintiff may desire to ascertain how far the defendant is prepared to go in making a particular statement, in order simply to learn whether it will be necessary at the hearing to produce certain evidence to negative these allegations of his opponent. The necessity for sifting such evidence does not exist. In place of calling the attention of the party to discrepancies in his testimony, and attempting thereby to draw from him the whole truth in the matter, you may pass lightly over them in many cases, hoping from these discrepancies left unexplained to effect more at the examination before the Court when they are exhibited to the defendant. Their comparison may wring from the defendant admissions fatal to his case. I am unable to come to the conclusion, looking at the section from which I have quoted and that which *The Attorney General* has cited, that the cross-examination tendered can be received as secondary evidence; or, in other words, that it can be allowed to take the place of the evidence of the defendant which if he were alive could be given here by him to-day.

Judgment.

But I am of opinion that on another principle I am bound to look at these depositions. The examina-

(*a*) Sec. 437.

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tion of a defendant, under our present practice, takes the place of the old interrogatories, which formed a part of the bill, and of the answers thereto made by the defendant (*a*). The discovery obtained under this new system takes the place of that formerly had under the old; and to whatever use the bill with its interrogatories and the answers thereto could be put, can now be put the answer with the examination thereon. It is stated in section 882 of the same work on evidence, that "the right to equal credit with any other witness which the defendant may claim in all cases, where his answer is positively, clearly, and precisely responsive to any matter recited in the bill" is a rule upon which Courts of Equity act. Mr. *Gresley*, in his work on Evidence (*b*), says, "In cases where a material fact was directly put in issue by the answer, the Courts of Equity followed the maxim of the civil law, *Responsio unius non omnino audiàtur*, and required the evidence of two witnesses as the foundation for a decree." He then lays down the rule as in the passage cited from *Taylor*, and, at page 227, proceeds, "It has been already mentioned, as a rule of equity, that the oath of a single witness shall not prevail against a distinct and positive assertion in the answer. When therefore such an assertion is pointed out by the defendant's counsel the testimony is simply treated as insufficient. It is not however suppressed, for 'though the rule of the Court is, where there is oath against oath, that the plaintiff shall not have a decree for relief upon this fact, yet this Court, as well as Courts of Law, will so far lay stress upon the evidence as it serves to explain any collateral circumstance.' And the circumstances thus explained may react so as to give efficacy to the evidence, by reason of the further rule, that single testimony will prevail if corroborated by circumstances."

Judgment.

(*a*) Proctor v. Grant, 9 Grant 26.
(*b*) Page 4.

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This rule, that a strict denial in an answer of statements made in the bill must be contradicted by two witnesses, or by one witness corroborated by attendant circumstances, was considered and acted upon in this Court in *Boulton* v. *Robinson* (*a*).

If such weight were given under the old practice to answers to interrogatories, which are described by Lord *Erskine* as "a frail and imperfect mode of examining into facts," there can no satisfactory reason be given why the much more effective proceeding of an examination before the examiner should be of less avail. I find, therefore, that as under the old practice, the defendant would be at liberty to present his answer, with its reply to the interrogatories, to the Court, so here he can read that which takes its place, the answer, and the examination had thereon for the purpose of discovery. The use to be made thereof will be such as the defendant could have made of the answer under the former practice.

Judgment.

(*a*) 4 Grant 109.

1873.

THE FIRE EXTINGUISHER CO. v. THE NORTH WESTERN (BABCOCK) FIRE EXTINGUISHER CO.

Patent, Assignment of—Exclusive use—Right to manufacture, Assignment of.

The patentee for the manufacture of certain machines for the extinguishing of fires, assigned to another the right to manufacture such machines, reserving a certain royalty, with the right at any time within one year on the part of the assignee to absolutely purchase all the rights of the patentee under the patent for a sum named:

Held, notwithstanding such right of purchase, that the assignee was not entitled to the exclusive right of manufacturing, and that the patentee could, notwithstanding such assignment, confer on other parties the right of manufacturing.

Where the result of a motion for an interlocutory injunction depended upon a question of law and not of fact, and the motion was reheard at the instance of the defendant, against whom an injunction had been ordered, the Court, on reversing such order, gave the defendant the costs of the motion as well as of the rehearing.

Statement.

This was a rehearing of an order pronounced by his Lordship The Chancellor granting an injunction restraining the defendants *The North Western (Babcock) Fire Extinguisher Company* from manufacturing certain machines for subduing fires, the right to the exclusive manufacture of which the plaintiffs *The Fire Extinguisher Company* claimed, under an alleged assignment of a patent for the construction of the machines by the patentee to themselves. The instrument conveying the right to the plaintiffs was in these words:—

"Agreement made and entered into the eighteenth day of January, one thousand eight hundred and seventy two, between *Thomas Henry Ince*, of the City of Toronto, in the Province of Ontario, in the Dominion of Canada, barrister, of the one part, and *William Morrison*, of the town of Napanee, in the said Province, manufacturer, of the other part.

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"Whereas, by letters patent bearing date the eighteenth day of January, in the year of our Lord one thousand eight hundred and sixty eight, certain exclusive rights and privileges are granted for the term therein specified to the said *Thomas Henry Ince*, his heirs, lawful representatives, and assigns, in respect to a certain portable machine for extinguishing fires, called L'Extincteur, in the said Province of Ontario; and whereas the said *Thomas Henry Ince* has in his possession or control about fifty of the portable extinguishers known as L'Extincteur, and also a large quantity of the chemicals for charging the said machines; and whereas the said *William Morrison* has proposed to purchase the said machines and charges, and the right to manufacture machines of a similar description for extinguishing fires.

"Now it is hereby agreed between the parties hereto, that the said *Thomas Henry Ince* sells to the said *William Morrison* the said fifty portable fire extinguishers and the charges therefor, and hereby agrees to grant to the said *William Morrison*, his executors, administrators, and assigns, license and liberty to manufacture, use, and sell such portable fire extinguishers as the said *Morrison*, his executors, administrators and assigns shall see fit, so long as the said *Morrison*, his executors, administrators, and assigns shall continue to observe and keep all the terms and conditions of this agreement, and make all and every the payments hereunder, on the days and times hereby required. It is hereby further agreed between the parties hereto that the said *William Morrison* shall pay down in cash to the said *Thomas Henry Ince* on executing these presents the sum of fifty dollars, and a further sum of fifty dollars on the eighteenth day of March next, and a further sum of nine hundred dollars on the eighteenth day of October next, and also a further sum of two dollars for every machine or fire extinguisher (other than the said fifty machines) hereafter to be sold by the said *William Morrison*, his

Statement.

executors, administrators, or assigns, by way of royalty to the said *Thomas Henry Ince*, his heirs or assigns. And it is further hereby agreed that the said *William Morrison*, his executors, administrators, or assigns shall on the first days of January, April, July, and October, in each and every year during the continuance of the said patent, make a correct return in writing of all machines theretofore sold or used in the Province of Ontario, and shall immediately pay to the said *Thomas Henry Ince*, his heirs or assigns, two dollars for each fire extinguisher sold or used in the said Province up to the then return or quarter day.

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"And it is also agreed that the said *William Morrison*, his executors, administrators, and assigns will afford all the information in their power to enable the said *Thomas Henry Ince*, his heirs and assigns, to ascertain correctly the number of machines manufactured, sold, or used. And it is expressly agreed between the parties hereto, that if any of the payments hereby reserved shall be unpaid for a space of thirty days this agreement shall cease and be utterly at an end, and that any concealment or false return as to the number of machines manufactured, sold, or used by the said *William Morrison*, his executors, administrators, or assigns will put an end to this agreement, and thereafter neither the said *William Morrison*, his executors, administrators, nor assigns, will have any right whatever to manufacture, use, or sell the said portable fire extinguishers or any of them, and all the rights of the said *William Morrison* and his legal representatives under this agreement will thereupon cease and determine forever.

Statement.

"And it is hereby further agreed, that so long as all the payment thereby reserved are punctually made, and not in any way in default, the said *William Morrison*, his executors, administrators, and assigns shall have all

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the rights and privileges under the said patent, paying therefor the said royalty or sum of two dollars for the liberty to make, sell, or use each fire extinguisher. And further it is agreed that the said *William Morrison* his executors, administrators, or assigns shall have the privilege for the space of one year from the date of these presents of absolutely purchasing all the rights of the said *Thomas Henry Ince* under the said patent for the price or sum of four thousand dollars cash.

"And the said *Thomas Henry Ince* hereby covenants with the said *William Morrison* that he has not in any way assigned his said patent or any of the rights or privileges thereunder, but is now as fully entitled thereto as when the said patent was granted him.

"As witness our hands and seals the day and year above written."

"Witness (Sgd) T. H. INCE.
(Sgd) GEO. KERR, Jr. (Sgd) WM. MORRISON."

Subsequently to the execution of this instrument *Ince* the patentee, assigned to the defendants also a right to manufacture; and thereupon the bill was filed, seeking to restrain such manufacture by the defendants.

Mr. *Bethune* and Mr. *Delamere* for the defendants.

Mr. *C. S. Patterson*, Q. C., and Mr. *J. C. Hamilton* for the plaintiffs.

Judgment.

SPRAGGE, C.—I am inclined to agree in the judgment of my learned brothers.

But for the recitals to the document entered into between *Ince* and *Morrison*, I should, I think, adhere to the construction that I placed upon the instrument on

the application for the injunction. The instrument is ill drawn and ambiguous. A recital has been termed the key to the ambiguity of an instrument; and if my attention had been drawn to it I should, as it seems to me now, have arrived at the same conclusion as my learned brothers. I ought, I suppose, to have noticed it, but I assumed that all the material parts of the instrument were brought under my notice.

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With the aid afforded by the recitals as to what was the intention of the parties, I do not dissent from the construction put upon the instrument by my learned brothers.

STRONG, V.C.—The operative part of the instrument which the Court is called upon to construe is expressed in these words: "The said *Thomas Henry Ince* agrees to grant to the said *William Morrison*, his executors, administrators, and assigns, *license* and *liberty* to manufacture, use, and sell, such portable fire extinguishers, as the said *Morrison*, his executors, administrators, and assigns shall see fit, so long as the said *Morrison*, his executors, administrators, and assigns shall continue to observe and keep all the terms and conditions of this agreement, and make all and every the payments hereunder on the days and times hereby required."

Judgment.

These words granting, "liberty and license," by themselves could, beyond all question, only have empowered *Morrison*, the licensee, to manufacture, and would not have amounted to a grant or divested the patentee *Ince* of his rights under the patent. If therefore these words are to receive a more extended meaning in favor of the licensee than they *primâ facie* import, the reason must be found in some other part of the instrument. In inquiring whether any such amplification is contained in the agreement we naturally turn in the first place to the recital, but so far from finding there anything inconsistent with the *primâ*

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facie import of the operative words, we have a confirmation of that meaning in the recital that *Morrison* had proposed to purchase "the right to manufacture machines." Then pursuing the inquiry after words calculated to enlarge the license to a grant into the covenants and stipulations coming after the operative or granting part of the instrument, we find nothing there, as far as I can see, sufficient to warrant us in introducing the word "exclusive" before the words "license and liberty." The covenant that so long as the payments are made *Morrison* shall have "all the rights and privileges under the patent," paying therefor the royalty, may without doing any violence to their meaning, and in conformity with the obvious meaning of the operative words, be taken to signify that the licensee should, in exercising his license, have co-ordinate powers with the patentee himself—not merely subordinate powers—that paying the royalty he should be able to do anything the patentee could himself do. It is the duty of the Court to construe these words in such a way as to make them consistent with what may be called the granting part of the instrument, and I see no difficulty in doing it in this way.

Judgment.

The right of pre-emption, however, accorded to *Morrison* would in my opinion be conclusive to shew that *Ince* did not intend to divest himself, as the plaintiffs contend, of all interest under the patent. According to the argument of the plaintiffs' counsel this covenant contemplates a redemption of the royalty. I cannot so read it; the words are, "shall have the privilege for the space of one year from the date of these presents of absolutely purchasing all the rights of the said *Thomas Henry Ince* under the said patent for the price or sum of $4,000 cash." To construe the words "rights under the said patent" as referring to the royalty reserved, would be, it seems to me, to go out of the way to seek for a construction inconsistent with the rest of the deed, as the royalty is not a right under the patent. The right

under the patent, I am of opinion, clearly means the original rights granted by the patent to Mr. *Ince*, and reserved by him untouched by the agreement. 1873. The Fire Extinguisher Company v. The North Western Fire Extinguisher Company.

By the advised use of the word "assigns," the patentee seems to have placed the licensee in the position of a grantee of a moiety of his rights under the patent; but this is immaterial as far as regards the present decision.

The order appealed from should, I agree, be discharged, and the motion for an injunction should be refused.

BLAKE, V. C.—In endeavouring to ascertain what was intended to be given by this agreement we should look first at that part of it which transfers the subject of the contract. If in any part of the document there is a description of the interest assigned, it is there we should expect to find it; and if this be full and free from ambiguity it is very seldom that it can be controlled by other passages in the same instrument dealing in more general terms with that which is the subject matter of the agreement between the parties. The words here used are, "agrees to grant to the said *William Morrison*, his executors, administrators, and assigns, license and liberty to manufacture, use, and sell such portable fire extinguishers as the said *Morrison*, his executors, administrators, or assigns shall see fit, so long as the said *Morrison*, his executors, administrators, or assigns shall continue to observe and keep all the terms and conditions of this agreement." There can be no doubt that this language does not give *Morrison* any exclusive rights in respect of the subject of the patent. It gives him a large interest, for it is to be observed that this is not merely a personal right granted to *Morrison*, but the right is given to *Morrison* and also to those to whom he may please to assign, so that a very large and general power is thus bestowed; but even so, all that he could claim Judgment.

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thereunder would be what the language used seems so plainly to give him—a license and liberty to him and *his assigns* to manufacture. It gives that right which patentees often part with, but which does not prevent them from using themselves or selling to others a like liberty in respect of the article patented.

But it is said that the light thrown on the matter by the other portions of the agreement leads to the conclusion that a more extended privilege was being granted, and that *Morrison* and his assigns can claim the right of manufacture to the exclusion of all others—that, in effect, by the instrument in question, he became the assignee of the patent.

It commences with the recital, that "Whereas, by letters patent * * * certain *exclusive* rights and privileges are granted * * * to the said *Thomas Henry Ince*"; and the recital closes with "whereas, the said *William Morrison* has proposed to purchase the said machines and charges, and the right to manufacture machines of a similar description for extinguishing fire." Here we have the statement that *Ince*, under letters patent, possessed "certain exclusive rights and privileges"—and we have also the statement that what *Morrison* proposes to purchase is not these "exclusive rights and privileges," but merely "the right to manufacture." The recitals, therefore, militate against the position of the plaintiffs. They shew that, with a knowledge of what he possessed, *Ince* agrees to give and *Morrison* to accept something less; and in place of arranging for exclusive privileges an agreement is arrived at merely for a right in respect thereof. It has been urged that this agreement has been inartificially drawn and that the strict rules of construction cannot be thereto correctly applied. I think this is so, but at the same time it is impossible to lose sight of the fact that such a thing as an *exclusive* right was in the mind of *Ince* when he states this as the

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interest he possessed, and that in the next breath when he speaks of parting with an interest in the patent he omits this word, and uses that language which limits the interest of *Morrison* in the manner contended for by the defendants. It is said, however, that the following words, notwithstanding the recitals and the language used in transferring the interest given by the agreement, are sufficient to show that all the rights of the patentee under the patent passed: "It is hereby further agreed, that so long as all the payments hereby reserved are punctually made, and not in any way in default, the said *William Morrison* * * * *shall have all the rights and privileges under the said patent, paying therefor* the said royalty or sum of two dollars for the liberty to make, sell, or use each fire extinguisher." It is argued that the expression, "shall have all the rights and privileges under the said patent," enlarges what was intended to pass by the prior clauses in the assignment. I cannot accede to this argument. I am of opinion that these words were intended to give *Morrison* and his assigns such rights and privileges in respect of the license to manufacture as *Ince* possessed under his patent, and which he retains in respect of the interest which I think he has still reserved in himself. It gave *Morrison* and his assigns in respect of their interest the same rights and privileges as the patentee possessed under the patent, but it did not enlarge their interest from that of mere licensees to that of the exclusive assignees of the patent. As a mere licensee cannot, it appears, in any case maintain an action for the infringement of the patent, it may have been considered material to clothe *Morrison* in respect of his license with those larger rights which are given him by the subsequent part of the agreement, in order thereby to endeavour to enable him to protect himself by legal proceedings when his position is injuriously affected by any interference with his rights under the patent; whether this has been effectually carried out is, of course, another question. That this is the

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true construction appears evident from the next following part of the agreement, which goes on to arrange for the terms on which the whole of the interest "under the patent" is to be assigned. *Morrison* is for one year to have the privilege "of absolutely purchasing all the rights of the said *Thomas Henry Ince* under the said patent." If the construction of the plaintiffs be the true one, then *Ince* had no further privilege under the patent; it had passed to *Morrison*, and therefore it was meaningless to insert this provision. According to the construction put on the agreement by the defendants, this was a condition that might well have been inserted.

Judgment.

It cannot be denied but that the plaintiffs have, as they contended, the right, in seeking to ascertain its true meaning, to look at the whole of the agreement. In *Childers v. Eardley* (*a*), it was held that the general words in the operative part of the deed must be modified in their operation by the recitals shewing the intention of the parties. There the Master of the Rolls says: "I do not think that the additional words, 'all other, his part, share and interest whatever, as well vested as contingent,' though, in one sense, they would include everything, do, in the fair construction of the settlement, and taking the recitals and operative part together, mean more than the £10,000, and that which he might obtain contingently by the death of his sister, under 21, unmarried." In the cases of *Barratt* v. *Wyatt* (*b*), and *Selby* v. *The Crystal Palace Gas Co'y* (*c*), the same learned Judge, citing *Moore* v. *Magrath* (*d*) before Lord *Mansfield*, lays it down as a well settled principle that a covenant, if there be any ambiguity about it, should be limited by the recital. In *Jenner* v. *Jenner* (*e*), the present Lord *Hatherley* reviews the authorities, and finds upon them that "where there is a manifest discrepancy between the

(*a*) 28 Bea. 648.
(*b*) 30 Bea. 442.
(*c*) 30 Bea. 606.
(*d*) 1 Cowp. 9.
(*e*) L. R. 1 Eq. 361.

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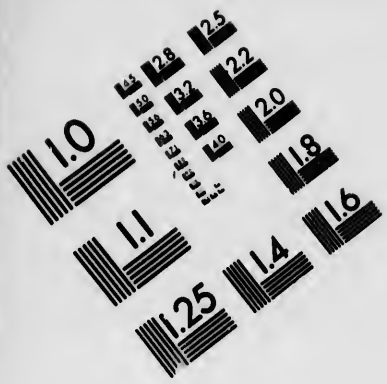
recital and the conveyance, the recital being clear as to what was intended to be conveyed, and the conveyance going beyond the recital, the conveyance will have to be restricted." He approves of the language of Lord *Ellenborough*, in *Payler* v. *Homersham* (*a*), where he says: "Common sense requires that * in order to construe any instrument truly you have regard to all its parts, and more especially to the particular words of it." He also adopts the view of Lord *St. Leonards* in *Alexander* v. *Crosbie* (*b*), that "where there are two parts of a deed inconsistent with each other, he must take the part where the property is specifically described, in preference to that where it is generally described." The then Vice-Chancellor concludes with the observation, "The general principle, therefore, is, that you must look at the object and intention of the parties." Here, if we take the words used in describing what the patentee grants, we find he only parts with a license and liberty to manufacture. If we look at the previous portion of the instrument we do not find this enlarged; but, on the contrary, while stating the exclusive rights and privileges appertaining to the patentee, a simple liberty to manufacture, and right to grant this to others, is alleged as that which *Morrison* agreed to purchase. These two portions of the instrument agreeing in this respect, are they to be taken as annulled by the subsequent part, which is not dealing so much with the matter assigned as with the terms on which it is to be held? I think not, and the more particularly so, when it does not follow that these words should, therefore, be rejected or treated as contradicting other parts of the instrument, but they may be taken in their ordinary meaning as expressing the full rights and powers to be enjoyed in respect of the license and liberty given.

Judgment.

I gather from the whole of the instrument that *Ince*

(*a*) 4 M. & S. 423. (*b*) Ll. & Goo. 145.



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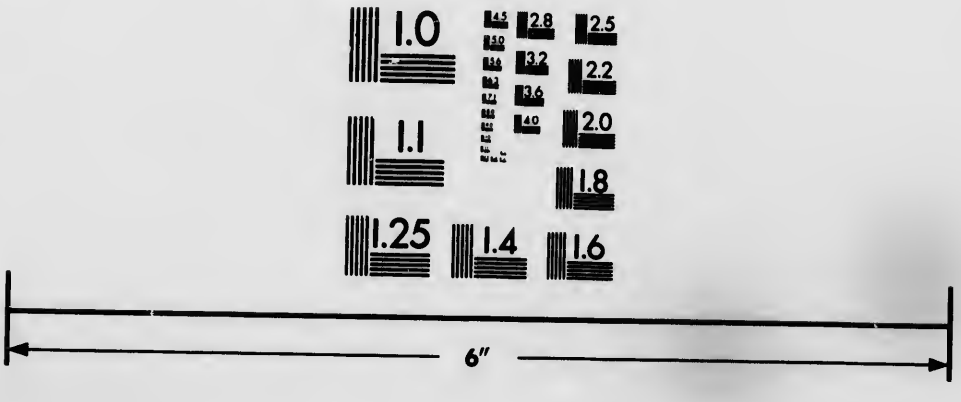

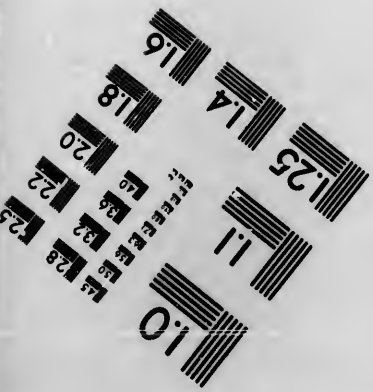

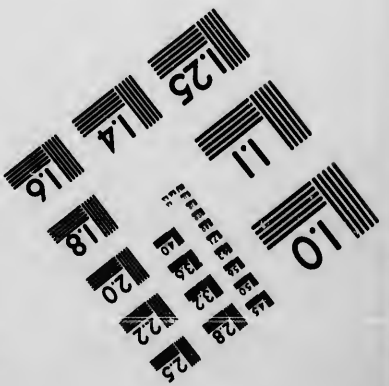

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intended thereby to grant a license in respect of the subject matter of the patent to *Morrison* and his assigns, and nothing more. I therefore think the plaintiffs, although they have large powers, have not the exclusive rights for which they contend, and that the motion for injunction should have been refused.

I think the defendants should have the costs of the rehearing.

It was then suggested that this was an injunction motion, and that the rule as laid down in *Carruthers* v. *Armour* (*a*) is, that the question of costs should be reserved to the hearing. The other members of the Court not being prepared to adopt a different practice from that laid down in the case cited, directed the matter to stand over as to the disposition of the costs, and on a subsequent day (May 9th, 1874).

Judgment.

SPRAGGE, C.—My opinion is, that the defendant succeeding upon the question of the construction of the agreement upon which the plaintiffs found their claim, the defendants should have their costs.

I had some doubt whether this rehearing arising out of an application for an interlocutory injunction, the costs of such application being as a rule reserved to the hearing of the cause, the costs of the application as well as of this rehearing should not be reserved. If it were a question depending upon facts which might be shewn at the hearing to be different from what they appeared to be upon the interlocutory application, I should think it would be proper to reserve the costs; but the question presented to us upon the rehearing was a dry question of law, and that question must be the same at the hearing of the cause, and therefore I

(*a*) 7 Gr. 34.

think the order now drawn up should give the defendants their costs both of the original motion and of this re-hearing. 1874.

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STRONG, V. C., concurred in giving the defendants the costs, remarking that the decision in *Carruthers* v. *Armour*, which turned upon a question of fact, did not govern here, where the question was one exclusively of law.

BLAKE, V. C.—Thought that under the circumstances it would be unreasonable to reserve the question of costs to the hearing of the cause.

Per Curiam.—Order granting injunction reversed with costs, including the costs of the original motion.

MCLAREN V. MILLER.

Mortgage payable by instalments—Interest.

A mortgage made payable by instalments, with interest on each as it became due, contained a stipulation that if any of the instalments should remain unpaid for the space of thirty days after the same became payable, that the whole principal sum, with interest remaining unpaid, should forthwith become due and payable. Default was made in payment of some of the instalments; the mortgagee, however, did not call in or insist upon payment of the whole sum remaining unpaid, but continued to receive payments from the mortgagor on account. On a bill to redeem the mortgagee claimed to be entitled to charge interest on the whole sum due at the time of each payment, in consequence of the default which had occurred:

Held, affirming the finding of the Master, that he could claim interest only on each of the instalments as it became due, according to the terms of the proviso for redemption.

This was an appeal by the defendant from the report of the Master at Stratford, under the circumstances stated in the head note and judgment. Statement.

1874.

McLaren v. Miller.

Mr. *Stephens*, for the appellant.

Mr. *Boyd*, contra.

The cases cited are referred to in the judgment.

BLAKE, V. C.—This is an ordinary redemption suit. The mortgage, dated the 14th of November, 1862, contains the following proviso: "Provided always, that if the said party of the first part, his heirs, executors, or administrators, or any of them, do and shall well and truly pay or cause to be paid unto the said party of the third part, his executors, administrators, or assigns, the just and full sum of $1,550 of lawful money of Canada, with interest thereon, at the rate of six per cent. per annum, on the days and times and in manner following, that is to say—the sum of $300 to be paid on the 2nd day of February next with interest, and the remainder in ten
Judgment. equal annual instalments of $125 each, with interest on each instalment as it becomes due; the first instalment to become due and payable on the 14th day of November, 1863: Provided always, that if the said instalments, or any one of them, shall remain unpaid for the space of thirty days after the same shall become due and payable by the terms hereof, then that the whole principal sum, with interest then remaining unpaid, shall become due and payable forthwith, notwithstanding anything contained in this proviso to the contrary." Default took place in payment of some of the instalments falling due under this proviso; and the defendant contends that thereupon the whole principal became payable, and he was entitled to charge interest thereon until the whole sum was paid, in place of charging interest merely on the instalments as they fell due. The defendant never insisted upon the plaintiff's paying the whole amount secured by the mortgage upon default being made; and in 1868, for the first time, he claimed the right to make a charge for interest, not on the instalments of $125

each as they became due, but on the balance of unpaid principal money secured by the mortgage. 1874.

McLaren v. Miller.

Quite apart from any such peculiar proviso as we find here, prior to the passing of the general orders of 1853, upon breach of the condition, the law enabled a mortgagee to foreclose. If an instalment of principal or interest fell due, the estate became absolute at law, and the mortgagee had a right to foreclose at once, which right could only be met by payment in full of the whole debt secured by the mortgage and remaining unpaid. See *Cameron* v. *McRae* (*a*). This was the penalty which a mortgagor paid for not meeting the instalments on his mortgage as they became due; and he paid this penalty equally, whether a special provision were inserted in the instrument whereby it was agreed that this should be the result of default, or whether such a clause were omitted. I do not see that the mortgagee stands in any better position because the instrument under which he claims contains, in so many words, a condition which the Court annexed, independently of agreement, to every mortgage. If this view be correct, it follows therefrom that the general order of the Court which relieves against forfeiture in the one case, will relieve also in the other; and that in neither case can the mortgagee insist, although there be default, on calling in the whole amount secured by the mortgage. The order in its spirit, if it does not in the letter, strikes at the right of a mortgagee to collect his instalments, except as defined in his deed apart from any penal clause added to the document, or by the former practice or rule in force in such cases. But it is here said, if all this be admitted, yet the defendant can succeed, for he insists on no forfeiture, but simply asks in taking the account that regard shall be had to the agreement of the parties. Is not this, however, based on that right which I do not find here exists? The de-

Judgment.

(*a*) 3 Gr. 311.

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fendant cannot charge interest in the manner in which he has brought in his account, except it be that he can take advantage of the default in meeting the instalments as they became due. He does not choose to attempt to take advantage of this default to its full extent, as he will not call in the whole of the money secured; but to the extent that he pleases, that is to the receipt yearly of interest on the full amount outstanding, he is willing to benefit by the default.

In *Knapp* v. *Cameron* (*a*), the full Court restrained an action at law on a covenant in a mortgage to the same effect as the one in the present case. The Court considered there were two grounds which entitled the plaintiff to his injunction: First, the one to which I have above referred; and second, that as the covenant was in the nature of a penalty, the plaintiff would, on that ground, be entitled to relief in equity. On both points that case is an authority for the position here taken by the plaintiff.

Judgment.

In *Stimson* v. *Kerby* (*b*), for some years the mortgagor had paid interest above the rate allowed by law; and in taking the account, the Court directed that these payments should be applied in reduction of the principal money. Although this case was overruled by the Court of Error and Appeal, in *Quinlan* v. *Gordon* (*c*), (which latter case has in its turn been shaken by *Kieszkowski* v. *Dorion* in the Privy Council) (*d*), on the question of the construction of the usury laws then in force; yet it shews the length the Court will go in endeavouring to have the account between the parties taken as it should rightly be, even where, for years, payments have been made which will thereby be disturbed.

(*a*) 6 Gr. 559.
(*b*) 7 Gr.
(*c*) See *post* Appendix i.
(*d*) L. R. 2 P. C. 291.

1874.

McLaren v. Miller.

It is, however, argued on behalf of the defendant that, whatever may be the effect of the mortgage, the dealings between the parties, shew the defendant entitled to what he now claims. I think the reverse is thereby shewn. On the 28th of January, 1864, the defendant by letter calls the attention of the plaintiff to the fact that he has overpaid him, as the interest is not due on the whole of the unpaid principal money, but only on the instalments as they become due; and he then proceeds to inform the plaintiff that he has placed $205, which included the overpayment of £16 11s. 0d., to his credit on the mortgage. On the 6th December, 1865, the defendant in another letter sends the plaintiff a calculation in which he only claims payment in the manner now contended for by the plaintiff. In this same calculation the defendant does not claim that credit should not be given until the period at which this instalment actually fell due, but he gives credit for the payment, on the day when it was made, not when the instalment matured. On the 14th of November, 1866, the receipt of $155 is acknowledged, and as to that the defendant says, "I have placed that sum to your credit." On the 25th of October, 1867, another receipt is given for $162.50, "to apply on his mortgage to me." In a letter of the 11th of February, 1868, the defendant sends a statement of account shewing £213 13s. 3d. due, and he adds, "I shall be happy to accept any sum you can afford to send me." It is not until the 18th of February, 1868, and after a demand made by the plaintiff for an explanation of the manner in which the amount stated to be due has run up to so large a sum, that the defendant claims to be entitled to charge the plaintiff with interest on the whole principal money. In this letter he adds, "I will credit you with whatever sum you may pay." On the 4th of November, 1868, the defendant acknowledges the receipt of $170 and says, "I have placed this sum to your credit to-day." Again, on the 8th of December, 1869, a sum of $177.50, and on the 22nd Novem-

Judgment.

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ber a sum of $185.20 was sent, and the receipt acknowledged "to apply on your mortgage." On the 18th of October, 1872, the defendant wrote to the plaintiff referring to the statement of February, 1868, claiming that it was correct, but so far from insisting that credit should not be given when sums were actually paid, he refers to the fact that credit is given for all moneys paid at the time when received. The plaintiff never assented to the claim of the defendant. In answer to the demand first made in February, 1868, in place of remitting the large amount asked for, he sends on the 4th of November the exact amount of instalment that day due.

The November instalment of	1869	was	$177	58	he sent	$177	50
"	"		1870	"	185	16	"	185	20
"	"		1871	"	192	50	"	191	50
"	"		1872	"	199	05	"	198	00

Judgment.

From 1865 down, the instalments were paid about the time when they were payable in November under the mortgage; but when paid, as they were sometimes, in advance, the mortgagor was not allowed interest on these advance payments.

Even supposing that the defendant had the right to insist upon calling in the whole amount, he did not avail himself of this liberty. Up to 1868 it is clear, so far from doing so, he corrected the plaintiff and shewed him the account should not so be made out. After that time he still did not call the money in, but sought to make a fresh arrangement with the plaintiff, to which, so far from acceding, he refused to agree. No doubt *McGregor* v. *Gaulin* (*a*), is an authority as to the proper method of taking accounts in a mortgage suit, but it does not assist on the question as to the effect of accounts rendered between the parties, for there the plaintiff resided out of the jurisdiction, and this was thought a

(*a*) 4 U. C. R. 378.

reason for not considering the accounts, furnished by his solicitor living in Canada, as binding on him. Here the defendant is himself a practising solicitor and attorney, and he does not pretend but that from the first he well knew all his rights in the premises, whereas the plaintiff is a farmer unable, as it seems from the correspondence, to understand aught else, but that as he agreed to pay his mortgage by certain instalments the mortgagee should be bound, without troubling him, to take the payments accordingly. I am of opinion that the Master has correctly taken the accounts in the case, and that the appeal should be dismissed with costs.

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Judgment.

APPENDIX.

QUINLAN v. GORDON.

Usury—Illegal contract.

A mortgage was created on real estate to secure £375 with interest, which, according to law, meant 6 per cent. per annum. The mortgagor, it appeared, agreed to pay additional interest for further forbearance each year, and gave promissory notes for the amount of such additional interest, which notes were duly paid. Subsequently, the mortgagee instituted proceedings in Chancery to enforce payment of the mortgage debt and interest, and in taking the account of what was due the Court gave credit to the mortgagor for the amounts paid on these promissory notes as against the principal and six per cent. interest. Thereupon the mortgagee appealed, and it was

Held, (1.) (Reversing the decision of the Court below) that the mortgagor was not entitled to credit for the amount so paid. [SPRAGGE, V. C., dissenting.]

And (2) That although the Act then in force (16 Vic. ch. 80) allowed parties to lend money at any rate of interest, that might be agreed upon, still, in the event of their subsequently having to sue to enforce their securities they could not recover more than the sum actually advanced and six per cent. *Stimson* v. *Kerby*, *ante* vol. vii., page 510, over-ruled.

This was an appeal from the Court of Chancery, and came on to be heard on the 27th June, 1861: The Hon. Sir J. B. ROBINSON, Bart, C. J., The Hon. W. H. DRAPER, C. B., C. J. C. P., The Hon. J. C. P. ESTEN, V. C., The Hon. R. E. BURNS, J., The Hon. J. G. SPRAGGE, V. C., The Hon. W. B. RICHARDS, and The Hon. J. H. HAGARTY, JJ., presiding. The facts appear sufficiently in the judgment of the Court. Statement.

Mr. *Burton*, for the appellant. In *Stimson* v. *Kerby* (*a*), and the cases there cited, the law, it would seem,

(*a*) 7 Grant 510.

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considers that the party was oppressed, and advantage taken of him; that he is entitled to be restored to his original position. Those were cases under the usury laws, which prohibited more than a certain rate; but our act 16 Victoria, chapter 80, recites that it is expedient to abolish all prohibitions, and only provides that extra interest shall not be enforced. Here notes were given for the extra rate, and voluntarily paid. In *Smith* v. *Cuff*, referred to in a note to *Gibson* v. *Bruce* (*a*), it appeared that notes had been enforced by a third party. He also referred to *Wilson* v. *Ray* (*b*), *Bradshaw* v. *Bradshaw* (*c*), *Horton* v. *Riley* (*d*).

Mr. *Strong*, contra, contended that the law was the same, notwithstanding the Act abolishing prohibitions. That Act only removed the penalties, but left the rule against excessive interest as it was. He cited *Smith* v. *Bromley* (*e*), *Bosanquet* v. *Dashwood* (*f*).

Judgment.

SIR J. B. ROBINSON, Bart., C. J.—We do not see the mortgage in this case; but it was stated, and not denied, in the argument, that the sum of £375, secured by it, is made payable "with interest," which, under the law then in force, 16 Victoria chapter 80, section 3, must be taken to mean six per cent.

The parties, however, had agreed between themselves, that besides this ordinary and legal rate of interest—which must be taken to be the rate agreed upon when no other is specified—there should be paid £29 1s. 4d. as additional interest, or, as the plaintiff termed it upon his examination as a witness, a premium for forbearance for a year.

For this sum the defendant gave his promissory notes

(*a*) 5 M. & G. 403.
(*b*) 10 A. & E. 82.
(*c*) 9 M. & W. 29.
(*d*) 11 M. & W. 492.
(*e*) Doug. 697.
(*f*) Cases temp. Talbot, 38.

to the plaintiff, payable at three, six, nine, and twelve months, each note being for £7 5s. 4d.; and as the years came round he gave similar notes for the same sums, for the years respectively ending the 19th June, 1856, 1857, 1858 and 1859; and on the 19th June, 1859, he gave four notes for £8 8s. 9d. each, payable in three, six, nine, and twelve months, which made up the increased rate of interest a year to £35 15s., or nine per cent. on the £375. This was upon a new agreement, made in June, 1859. 1861. Quinlan v. Gordon.

The plaintiff seems to have stated the transaction with perfect candour, not hesitating to avow the excessive rate of interest which he had exacted.

"The notes," he says, "were for the excess of interest beyond six per cent. The first four were for the first year. When the year expired, I took four notes for another year for the excess, and when they expired I took four others for another year for the excess. The extension of the mortgage was from year to year; and unless *Gordon* had agreed to pay the excess in interest, I should not have extended the mortgage. I entered into a new agreement at the end of each year, and took these notes in pursuance of it. There is no doubt these notes did not include any part of the six per cent. secured by the mortgage. I made a new agreement for the excess in interest at the end of each year, and the notes were taken accordingly. The extension was from year to year." Judgment.

This account of the transaction was confirmed by another witness, the plaintiff's solicitor.

All the notes have been paid up by the defendant *Gordon*,—the other defendant, *Mills*, being a subsequent mortgagee of the same premises—and on the 19th May, 1860, he (*Mills*) tendered to the plaintiff the principal,

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£375, none of which had been paid; but the plaintiff declined to receive it, because he did not tender also the six per cent. interest secured by the mortgage, none of which had been paid, nor indeed demanded, till July, 1858, after which the plaintiff swears he did several times demand it.

After answer by the two defendants, it was referred to the Master to take an account of what was due on the mortgage; and he reported, on the 23rd October, 1860, that on that day there was legally due to the plaintiff on the mortgage only £362 12s. 8d.

The Master further certified, that he had taken the account upon the basis that all the payments which appeared in the account as credits to the defendant (that is, the sums paid on the several notes), should go in discharge of interest at six per cent. upon the £375, though it was contended for the plaintiff that those payments (admitted as being in excess of six per cent.) should not be brought into the account in any way.

Judgment.

The plaintiff appealed against that report of the Master, which appeal was dismissed by the Court of Chancery without costs, and the plaintiff has appealed against that judgment.

The question brought up by this appeal may affect a large number of cases of loans made, as the one in this case was, after the statute 16 Victoria, chapter 80, and before the 22 Victoria, chapter 85. The latter statute leaves no room for any such question in regard to transactions subsequent to its passing (unless possibly under particular circumstances); for it repealed the third section of 16 Victoria, chapter 80, which disabled parties from enforcing payment of any amount of interest beyond six per cent., though it made it no longer an offence to receive or contract for any such excess of interest.

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The plaintiff *Quinlan* insists that he is entitled to enforce the ordinary legal interest of six per cent. secured by his mortgage, notwithstanding the notes have been paid up which were given for the excess of interest above six per cent., and for that only.

The defendant insists, on the other hand, that he cannot enforce payment of the six per cent. under the mortgage, because he has already received more than six per cent. interest upon the loan, through payment of the notes which were given as a premium for forbearance—in other words, for interest, and for that only; that he has already had all the law can give him, and more; and that, besides being unable to enforce the six per cent. in addition to the money he has already received, he is bound, in equity at least, to account for—in other words, to refund—the excess above six per cent. which has been paid to him; and that it is right, therefore, to make that go in reduction of the principal, as is done by the Master's report.

Judgment

For all that appears, the money paid upon the notes was voluntarily paid, by which I mean not under any compulsion. The notes, if negotiable, did not get into the hands of any third party for value; against whom the defence, that they were given for a consideration that was illegal and void, could not have been urged. There is no evidence of fraud, or imposition, or of oppressive conduct on the part of the plaintiff, otherwise than it seems oppressive to exact such an interest as fourteen or fifteen per cent., by refusing to forbear except on such terms.

The question, therefore, amounts to this, whether the mortgagor can reclaim the excess, having paid it, for all that appears, illegally, and without resistance, and without remonstrance.

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The point has engaged the attention of the Court of Common Pleas in *Kaines* v. *Stacey* (*a*), and afterwards in *Jarvis* v. *Clark* (*b*).

Before these two decisions, the case of *Stimson* v. *Kerby* (*c*), arose in the Court of Chancery, in which reference was made to a judgment of Vice-Chancellor *Esten*, in a case of *Brown* v. *Oakley* which is stated in a note to the former case (*d*).

The Court of Chancery, in *Stimson* v. *Kerby*, decided in accordance with *Brown* v. *Oakley*, that in taking the account in a foreclosure suit, any excess of interest that had been paid above six per cent., on an agreement to pay a higher rate, should be allowed to go in reduction of the principal; and they came to that conclusion under the conviction that an action for money had and received would lie, in any such case, to recover back the excess of interest.

Judgment.

In the two cases in the Common Pleas, on the other hand, the defendant claimed a right to recover back the interest which he had voluntarily paid, by setting it off in an action brought for the debt and interest.

The Court determined against his right so to recover back the money which he had voluntarily paid, and not, as it appeared to them, on any illegal consideration, such as would give a right to the person paying to recover it back.

We have to dispose of that question after these conflicting decisions. I have considered the able judgments delivered in the Common Pleas by Mr. Justice *Richards* in *Kaines* v. *Stacey*, and *Jarvis* v. *Clark*, and also that delivered by the Chancellor in *Stimson* v. *Kerby*. They

(*a*) 9 U. C. C. P. p. 355.
(*b*) 10 U. C. C. P. 480.
(*c*) 7 Grant, 510.
(*d*) p. 514.

set out very clearly the arguments used on one side and the other. The question is so far new to me, that I have not hitherto been called upon to give an opinion upon it. All turns upon the object and legal effect of the 2nd and 3rd clauses of 16 Victoria, chapter 80.

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The second clause enacts, "That no contract to be hereafter made in any part of this Province, for the loan or forbearance of money or money's worth, at any rate of interest whatsoever, and no payment in pursuance of such contract, shall make any party to such contract or payment liable to any loss, forfeiture, penalty or proceeding, civil or criminal, for usury—any law or statute to the contrary notwithstanding."

The third reads thus: "Provided always, nevertheless, and be it enacted, that any such contract, and every security for the same, shall be void so far, and so far only, as relates to any excess of interest thereby made payable above the rate of six pounds for the forbearance of one hundred pounds, for a year; and the said rate of six per cent. interest, or such lower rate of interest as may have been agreed upon, shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid."

Judgment.

The first clause of the act is merely a repeal of some former enactments respecting interest, and the only other clause (the 4th) exempts from the operation of the statute all banks and insurance companies, and any corporation or association that had been theretofore authorized by law to lend or borrow money at a higher rate of interest than six per cent.

All, therefore, that requires to be considered, is the effect of the second and third clauses, which I have just given literally, and the preamble of the statute, which is in these words: "Whereas it is expedient to abolish

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prohibitions and penalties on the lending of money at any rate of interest whatever, and to enforce, to a certain extent and no further, all contracts to pay interest on money lent, and to amend and simplify the laws relating to the loan of money at interest."

Our Interpretation Act, chapter 5, Consolidated Statutes, Canada, section 6, sub-section 28, provides, "That the preamble of every (public) Act shall be deemed a part thereof, intended to assist in explaining the purport and object of the Act; and every such Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport be to direct the doing of any thing which the Legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best insure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning, and spirit."

Judgment.

It is clear, I think, from the preamble, if we were to judge by that alone, that the intention of the Legislature was, that individuals should be thenceforth free to lend their money not merely at the rate of interest of six per cent., to which they had before been limited, but any rate of interest whatsoever; but with this qualification only, that the lender should not be able to enforce, by judgment of a Court of justice, a higher rate of interest than six per cent. And the second and third clauses do in fact carry out precisely that intention; first, by abolishing all penalties against usury, and providing that no party contracting for any interest, however high, for the forbearance of money, or paying any money in pursuance of such contract, shall incur any loss, forfeiture, or penalty, or be liable to any proceeding, civil or criminal, for usury.

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After this enactment there could be no longer such an offence as usury in transactions between any individuals; for usury, properly speaking, consisted in extorting a rate for money beyond what was allowed by positive laws. Interest for money, but not exceeding the settled rate, being the lawful gain, and usury being the extortion of unlawful gain. So long as the statute was in force no rate could be said to be unlawful, the avowed intention of the Act being to abolish prohibitions against lending money at any rate of interest whatever.

Still it is quite true, as observed in the Chancellor's judgment, that the legislature did not intend to exclude by this Act all protection from the borrower. They provided for him this protection, that whatever rate of interest he might engage to pay, no contract to pay interest should be enforced against him to a greater extent than for six per cent. by the year.

Judgment.

This secured to him a *locus pœnitentiæ*, so that if he agreed to pay any higher rate than six per cent., and if the lender should attempt to enforce more, he must fail; for under the third clause, the borrower's contract to pay will be held void for the excess.

One effect of this law is very plain, namely, that for all interest above six per cent., the parties, while that Act was in force, must have dealt (so to speak) upon honor; and if the lender was not content to run the risk of the borrower repudiating his contract, as he certainly might do, he had to take care to get his bonus or extra interest in advance. But the defendant in this case contended that that is not the whole effect of the provision, for that the lender, who has received the payment of interest beyond the six per cent., may be made to refund the excess as money paid upon a void contract. In *Stimson* v. *Kerby*, the Court of Chancery held that he could sue for it back again, and recover it, on the

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same principle that the borrower could recover back usurious interest which he had paid while the laws against usury were in full force. If the borrower could so recover back the excessive interest, then undoubtedly in taking the account in this case before us, it would be right to give credit to the mortgagor for all the excessive interest he had paid as so much money paid by him held by the mortgagee to his use.

If it is meant by that, that the mortgagor in this case, when he had paid any of his notes, which were given exclusively to secure the excess of interest, and that only, could have brought an action against the mortgagee and recovered the money back, I cannot take such a view of the statute, for that would completely nullify the provision which legalizes the payment of any rate of interest whatever, that is, permits it, though it withholds the aid of law for enforcing any contract to pay more than six per cent.; and it would limit the effect of the Act to the abolition of penalties, and to securing the lender against the loss of his principal, and of all interest upon it, by taking or agreeing to take above six per cent.

Judgment.

But I think it is plain, upon the whole statute, that the intention was to go further, and to permit the payment of any rate of interest that the parties might agree upon, and to divest such payment of the charge of illegality, in the absence of fraud such as would upon general principles invalidate a contract in law or equity. I do not see on what principle an excess of interest, voluntarily paid under a contract made since this statute passed, can be restrained.

In *Smith* v. *Bromley* (*a*), Lord *Mansfield* thus narrated the action which was then brought for money had and received on the ground that the plaintiff had paid it

(*a*) Douglas, 696.

upon an illegal consideration: "It was iniquitous and illegal," he said, "in the defendant to take the forty pounds, and therefore it was so to detain it." But it was not illegal, though it might be unreasonable and oppressive, for the mortgagee in this case to keep the amount which had been paid to him on the notes, for the law being in force did not prohibit any amount of interest being paid by a borrower, and I do not see how we can hold the lender bound to refund money which he was at liberty to receive without violating any prohibition, for the statute in terms says that it was intended to abolish all prohibition, and without rendering himself liable to any loss, forfeiture, penalty, or proceeding, civil or criminal, for usury. 1861. Quinlan v. Gordon.

I think that there can be no distinction drawn between this case and *Dawson* v. *Remnant* (*a*), which turned upon the statute 24 George II., chapter 60, section 12, which prohibits any action from being brought for a debt deemed to be due for spirituous liquors sold to a party in less quantities than the value of twenty shillings, and so to get back his money; but Lord *Mansfield* said, "A set-off is in the nature of a payment. Had the defendant paid money on account of this demand, could he have recovered it back again? No; it would be a payment of a demand which by law, perhaps, could not be enforced, but which he having paid through a motive of honesty, the law will not allow it to be recovered back." The statute of 24 George II., it is true, does not say, in so many words, that the contract to pay for liquors so sold shall be void, while the third clause of the statute which we are now considering does make the contract void for the excess; but there is no substantial difference. Both contracts are void in this sense, that they could not be enforced just as a contract not in writing to pay the debt of another is void without a consideration. Judgment.

(*a*) 6 Esp. 24.

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There is no such general principle as that money voluntarily paid upon a void or upon an illegal consideration, can always be recovered back. In *Fulham* v. *Down* (*a*), Lord *Kenyon* is reported to have said that "where a voluntary payment has been made of an illegal demand, the parties knowing the demand to be illegal, it is not the subject of an action for money had and received. In law, if so held, it would subject all accounts and settlements between parties to revision."

The case of *Philpott* v. *Jones* (*b*), bears very strongly, I think, against what the defendants contended for in this suit, and also *Wilson* v. *Ray* (*c*), in which latter case, the plaintiff having given his bill to the defendant for a consideration clearly illegal (and in that respect stronger than the present case), being asked for payment at first resisted, but afterwards paid it, and then sued to recover the money back. The Court were unanimous in opinion that he must be nonsuited. "This plaintiff," the Chief Justice said, "might have refused payment; and if the defendant's agent, the drawer, had brought his action upon the acceptance, he had the opportunity of defending himself by the illegal nature of the consideration. He waived the advantage, and voluntarily paid the bill, with full knowledge of all the facts. I am of opinion that it is not now open to him to deny that he was liable."

Judgment.

The money paid in this case in excess of interest, was paid expressly upon the notes which had been given, and there can therefore be no question now about any right of the mortgagor to impute these payments to any other cause of action. In *Bradshaw* v. *Bradshaw* (*d*), *Erle* and *Bramwell*, in argument, make this admission: "No doubt, however void the transaction was, if the money

(*a*) 6 Esp. 26, note.
(*b*) 2 Ad. & Ell. 41.
(*c*) 10 Ad. & Ell. 82.
(*d*) 9 M. & W. 34.

were paid by the debtor at a time when he might have resisted the payment, he cannot recover it back; but here they say the payment was made because the plaintiff had no defence against the holder of the bills." The case was that of a *bonâ fide* holder for value; the Court took the same view. 1861. Quinlan v. Gordon.

I must say it seems to me perfectly clear that the Court of Common Pleas were right in holding as they did in the cases of *Kaines* v. *Stacey* and *Jarvis* v. *Clark* —that the money paid in excess of six per cent. interest upon a contract made after 16 Victoria, chapter 80, cannot be recovered back, and that the mortgagor has no claim on that ground to have the money paid in this case to take up the notes which were given for such excess set to his credit against the six per cent. interest secured by the mortgage and against the principal.

There is apparently more force, as it seems to me, in the clear ground which the mortgagor may take under the third clause, namely, that if the plaintiff in this suit (the mortgagee) be allowed to recover his debt, together with the legal rate of interest secured by the mortgage, after having received much more than six per cent. for interest through payment of the notes, he will be in effect receiving the aid of the Court of Equity to recover an excess of interest above six per cent., contrary to the spirit if not to the letter of the third clause. In considering this case, that view of it has at times struck me so forcibly, that I have sometimes thought that if my brothers, or a majority of them, were satisfied to concur in the judgment of the Court of Chancery on that ground, I would not differ from them, though I confess that the leaning of my mind has always been the other way; for, by applying the statute in that manner, we should in fact be compelling the plaintiff to refund the excess of interest, though that would not be consistent, I think, with the intention of the statute, which is Judgment.

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expressed to be to abolish all prohibitions against "lending money at any rate of interest whatever;" and besides, the very words of the third clause makes the contract void "so far, and so far only, as relates to any excess of interest thereby made payable above the rate of six pounds," &c.

Now the contract which the plaintiff comes to enforce is the covenant in the mortgage, which is, to pay £375 "and interest," which, when no other rate is mentioned, must mean six per cent. There is no higher rate made payable thereby—that is, by the mortgage—and therefore there is no authority under the Act for stopping short of the full sum which by it the mortgagor promised to pay; and that is all the plaintiff wants, for the mortgagor has paid him without resistance all the interest, which he could not have been compelled to pay by legal proceedings. And this, I think, is just what the Legislature meant; for the statute says, in effect, to lenders, "You may take whatever the borrower will agree to give you; but you can only compel him by action to pay you six per cent.; for all beyond that, a Court will hold your contract void."

Judgment.

The lender, in this case, can truly say to the Court: "As to the agreement beyond six per cent., there is no question, for I have received it, and legally received it, though the borrower was not bound to pay it. I only come to you to enforce payment of what I can legally recover, which I have not yet got."

To set off the payments made in discharge of the extra interest, against the contract for the debt and legal interest contained in the mortgage, would be carrying the power which disables the lender from enforcing at law any contract for more than six per cent., further than the Legislature seems to have intended. The effect of this view of the statute would, it is true,

enable the lender to recover the legal interest in addition to the illegal, which he has received; and he thus would get in all about fourteen per cent. Whatever may be our private opinion as to such a result being reasonable or desirable, we cannot look upon it other than as the Legislature must have meant it; for they have since, by a statute that admits of no doubt, enabled lenders not only to receive but to enforce any rate of interest that borrowers may agree to pay—thus doing away with the slight check upon exorbitant interest which they had provided by the other Act. No one, I think, who has seen such instances of the unfeeling abuse of this license as frequently comes to light in Courts of justice, can avoid having grave doubts of the wisdom and propriety of so entire a departure from the laws in restraint of usury; but we must administer the law as we find it.

Judgment.

A good deal of stress was laid, in the argument, on Lord *Talbot's* judgment in *Bosanquet* v. *Dashwood;* but that was a case decided while the laws against usury were in full force, and is not applicable to such a state of the law as was created by our statute 16 Victoria, chapter 80, which made it lawful to receive, and, as I think, to retain, any amount of interest.

In my opinion the judgment of the Court sustaining the Master's report should be reversed; and the Master should be directed to report what is due for principal and for interest under the contract, without reference to what the mortgagee received in payment of the notes.

ESTEN, V. C., gave no judgment.

SPRAGGE, V. C., delivered a written judgment dissenting from the opinion of the majority and sustaining the views expressed in *Stimson* v. *Kerby*, which, however has been mislaid, and cannot now be found.

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TO THE

PRINCIPAL MATTERS.

the knowledge of the son, improved thereon, After the death of the father the son sold and conveyed the lands, including the water frontage, to *W*, whereupon a bill was filed by the vendee under the father against the son and *W*, claiming absolutely the part of the water frontage which had been conveyed by the father, on the ground of acquiesence by the son, and that *W* had notice of the plaintiff's interest :

Held, that the registration of the deed under which the father and son claimed, was actual notice of the son's title, and that his acquiesence or lying by could not affect his interest, but at most could only be construed into a consent by him to the sale by the father of his own interest, and

Semble, that under the circumstances, if even registration were not actual notice, the acquiesence would not bind his reversionary interest; and that even if the plaintiff had acquired any equitable interest arising out of such acquiesence he could not enforce it against *W*, without proving actual notice to him of such equitable interest.

Bell v. Walker, 558.

See also "Municipal Corporations," 3.

ADMINISTRATION OF JUSTICE ACT.

The Administration of Justice Act (36 Vic. ch. 8, Ont,) may be considered as a Legislative recognition of the principle which has always prevailed in this Court, that the fitness of forum is the test upon the question whether a suit brought in this Court should be retained and adjudicated upon here or transferred to a Court of Law.

Falls v. Powell, 454.

ADMINISTRATION SUIT,

1. Where, on a motion for an administration order, it appeared that the application was by a party claiming for the support and maintenance of the wife and children of the deceased, and the questions raised were substantially the same as would be raised had a suit been brought by the wife for alimony, the Court refused the order, and directed a bill for the purpose to be filed, and made the costs of the application costs in the cause.

In re Foster, Griffith v. Patterson, 345.

2. An executor or administrator cannot, by paying off creditors of the estate, create a demand in his own favor, that will give him a right of retainer in priority to other creditors; all that he would, under such circumstances, be entitled to would be

to stand in the place of the creditors he has paid off; and, if there prove to be a deficiency of assets, he will only be entitled to be paid *pro rata* with the general creditors of the estate.

Willis v. Willis, 396.

See also "Infants' Estate, Sale of."

ADMINISTRATOR AD LITEM.

See "Parties," 3.

ADVANCEMENT.

See "Resulting Trust," 1.

ALIMONY.

1. A woman left her husband in consequence of disagreements without any threats of personal violence, or any well founded apprehension on her part of violence; and the husband expressed his readiness and willingness to take her back. The wife failed to return, however, and the husband left this Province and went to reside permanently in the United States. The wife, without any communication having passed from her to her husband, or any intimation of a desire on her part to renew their marital relations, and without any offer to live with him, or any expression of willingness to do so, filed a bill for alimony on the ground of desertion.

Held, that in the absence of an offer on her part to return to her husband, and a refusal by him to receive her back, she was not in a position to claim alimony; that the domicile of her husband was her domicile also, and that his being resident in the United States afforded no ground for dispensing with an offer by her to return to and live with her husband, it not appearing that she was ignorant of his place of residence,

Edwards v. Edwards, 392.

2. The Ecclesiastical Courts in England will not, for an isolated act of personal violence, declare the wife entitled to an act of separation *a mensa;* and this Court, following the same principle, will not, as a rule, for only one act of violence, make a decree for alimony. But where a husband had for several years indulged in the use of intoxicating liquors to such an extent as to have produced repeated attacks of *delirium tremens*, during which he became very violent; and his wife had, on one occasion when he became intoxicated, been compelled by reason of his violence to leave home and go to a neighbour's house, where she remained all night, and on the following day, in company with two of her neighbors, had returned to her husband with a view of inducing him to

abstain from drinking, when he assaulted her with a stick, inflicting several blows on her head; whereupon she ran away and he followed her, kicked at her, and told her to be gone, and otherwise conducted himself in a very violent manner, although this was the only instance in which he had, during eighteen years they had been married, ever struck her, the Court made a decree for alimony, the wife swearing that she was apprehensive of further ill treatment if she were to return to live with her husband; which decree on rehearing was affirmed by the full Court.

Rodman v. Rodman, 428.

See also "Amendment," 1,
"Practice," 4.

AMENDMENT.

In a bill for alimony the particular act of violence charged was stated in the bill to have occurred on the 30th of August, and the evidence shewed that it had been committed on the 31st of that month:

Held, that this was not such a variance as would disentitle the plaintiff to prove the act alleged; and if necessary an amendment would be allowed so as to state the date correctly as it could not be considered that the defendant had been misled by the mistake in the date.

Rodman v. Rodman, 428.

APPOINTMENT.

See "Interest," 1, 2.
"Will, construction of," 7.

ARRANGEMENT, DEED OF.

The rule in respect of compositions between a debtor and his creditors is, that a creditor cannot appear to concur in the composition and sign the deed, and at the same time stipulate for a separate benefit to himself outside thereof. However, where upon an agreement between a debtor and his creditors for an extension of time for payment of his liabilities, the deed of agreement stated that it should not "affect any *mortgage*, *hypothec*, *lien*, or *collateral security* held by any such creditor as security for any of said debts."

Held, that a creditor whose claim was fully secured by a mortgage on real estate and other collaterals, was not bound to communicate the fact to the other creditors at or before executing the deed of extension.

Henderson v. McDonald, 334.

ATTORNEY GENERAL.

See "Injunction," 1, 2.
"Parties," 1,

AWARD, (ENFORCING).

See "Riparian Proprietors," 1,

BANK STOCK.

See "Lien on Stock,"

BONUS.

See "Railway Bonus."

BY-LAW.

See "Railway Bonus," 1, 2, 3.

COLLATERAL SECURITY.

See "Arrangement, Deed of."

COMPENSATION TO TRUSTEES.

Per SPRAGGE, C.—A trustee, created by deed, is, without express agreement, entitled to compensation for his services as such trustee. [STRONG, V. C., dissenting.]

Deedes v. Graham, 258.

COMPROMISE.

A farmer died intestate, leaving two sons and two daughters and considerable property, most of which was in the possession of one of the sons. Two days after the funeral, at the suggestion of the sons, all went into town, the sisters being under the idea they were going to the Registry Office to make inquiries about the property, instead of which they were taken to see a lawyer about the estate; and while there, through the influence and importunity of the sons, and on the faith of their representations, some of which were not correct, and without full or correct information of the value of the estate, one of the daughters, in her husband's absence, and without any independent advice, executed a transfer of her interest in the estate to the son who was in possession, in consideration of his note for about one-fifth of the value of her share payable in six years without interest. There were moral reasons why she should have made a generous settlement with this son; but the settlement having been obtained as stated, was held by Vice Chancellor *Mowat* not to be binding, and on rehearing the full Court, considering the issue between the parties to be one of fact, refused to alter the decree.

 Cassie v. Cochrane, 545.

COMPROMISE OF PROSECUTION.

See "Deed of Settlement,"

CONSIDERATION, VALID.

See "Deed of Settlement,"

CONSTRUCTIVE NOTICE.

See "Tax Sale."

CONTINGENCY.

See "Will," &c., 3.

CONVERSION.

Where there is no absolute direction to sell, but discretion is given to the trustee to sell or not, there is no conversion; but the property remains of the character it possessed at the death of the testator until the trustee has seen fit in his discretion to change it by an execution of the power.

In re Trusts of Will of Anne Parker, 389.

CORPORATE SEAL.

A Railway Company being indebted to a bank, the officers of the Company arranged that the Bank should proceed to garnish certain debts due to the Company, the costs of which as between attorney and client the Railway Comyany was to pay;

Held, that the officers of the Company had authority, without a resolution of the board of directors, to enter into such an agreement, and that the same need not be under the corporate seal.

The Hamilton and Port Dover Railway Co. v. The Gore Bank, 190.

CORPORATIONS.

A Bank having executions against a Railway Company in the hands of the sheriff, the secretary of the Company, in order to avert a seizure of a quantity of railway iron, signed a letter agreeing that the Bank, out of moneys coming to their hands from certain garnishee proceedings taken by the Bank against debtors of the Company, might retain "a sufficient amount fully to cover all your solicitors' costs, charges, and expenses against you or against you and us, as between attorney and client or otherwise; as well as the costs, charges,

and expenses of your Bank, of what nature or kind soever. and after the payment of such, in the second place, to hold the surplus, if any, to apply on your executions against us." This letter was signed without any authority from the board of directors of the Company, although two members of the board were aware of it, and one of them, the Vice-President of the Company, authorized it:

Held, that this was not such an act as the officers of the Company were authorized in the discharge of their duties to perform; and that although the Bank granted the time asked for, they could not enforce payment of the amounts stipulated for:

The Hamilton and Port Dover Railway Co. v. The Gore Bank, 190.

See also "Mortmain."

COSTS.

1. A mortgagee exercised the power of sale contained in his security and realized $350; on a bill filed by the mortgagor for an account, it appeared that after deducting the amount due on the mortgage at the time of sale, together with the costs of the sale and of an action of ejectment, as also a payment made to the plaintiff before suit, the balance coming to the plaintiff was reduced to $139, the plaintiff was still held entitled to his full costs, "the subject matter involved" being the $350.

McGillicuddy v. Griffin, 81.

2. *Semble*. That although a defendant fails on the ground of demurrer assigned, and succeeds on a ground of demurrer taken *ore tenus*, the plaintiff will not be entitled to his costs, the English Order 14, of 1861, not having been adopted by this Court.

Wylie v. McKay, 421.

See, however, *Roche* v. *Jordan*, 573.

3. Where the result of a motion for an interlocutory injunction depended upon a question of law and not of fact, and the motion was reheard at the instance of the defendant, against whom an injunction had been ordered, the Court, on reversing such order, gave the defendant the costs of the motion as well as of the rehearing.

The Fire Extinguisher Co. v. the North Western (Babcock) Fire Extinguisher Co., 625.

See also "Fraudulent Deed."
"Pleading," 3.
"Practice," 2, 6.
"Specific Performance,' '1, 2.
"Undertaking and referen e as to Damages."
"Vendor and Purchaser."

CREDITORS, REHEARING BY.

See "Improper Allowance."

CROSS REMAINDERS.

See "Will," &c., 1.

CROWN LANDS.

1. The locatee of Crown lands located under the authority of the Act of 1868, has no power to sell or dispose of the pine timber growing thereon.

Hughson v. Cook, 238.

2. One *S*, was locatee of two lots of land, one a free grant, the other a purchase, which he transferred to the plaintiff. The agent of the plaintiff swore that some pine had been taken off these "lots in 1870-71 by some persons getting out square timber," and further that the defendant was the only person getting out square timber that season. After two years the Court considered this evidence too indefinite as to the locality of cutting and as to quantity cut; and the act complained of too old in date to warrant the Court in granting an injunction to restrain further cutting, *Ib.*

DEBTOR AND CREDITORS.

See "Arrangement, Deed of."

DECLARATORY DECREE.

Where a party in addition to a declaration of the true construction of a will is entitled to ask, as consequential relief, the administration of the estate, the case is within General Order 538; and the Court will make a decree declaring the proper construction of the will without directing the administration of the estate.

Murphy v. Murphy, 575.

DECREE.

See "Varying Decree."

DEED OF SETTLEMENT.

A married woman had left her husband, and had for some time been living apart from him on account of his alleged adultery, and the husband had not contributed in any way to

the support of her or her children, whom he allowed to remain with their mother; under these circumstances the wife was advised to take proceedings against her husband, under the Statute for not providing her and her children with food, &c., and also to file a bill against him for alimony. In order to compromise these threatened proceedings the husband made a settlement in favor of the wife and children. The husband in fact was then insolvent, but neither the wife nor the trustees had any knowledge thereof.

Held, that the settlement could not be impeached under the Statute 13 Elizabeth.

Mason v. Scott, 84.

DEED VOID IN PART.

See "Mortmain," 2.

DE DIE IN DIEM.

It is the bounden duty of the Masters in this Court to observe to the letter, the General Orders of the Court requiring references to be proceeded with in their offices *de die in diem*.

Falls v. Powell, 454.

DEMURRER.

[FOR WANT OF EQUITY.]

In a suit brought in this Court against an Insurance Company to recover for loss sustained, on the ground that the policy was not a perfected one, and therefore that the plaintiff had no remedy at law; but the allegations in the bill were, that the policy had been duly signed by the President and Secretary, and countersigned by the agent at I, (the place where the insurance was effected) and was ready to be delivered to the plaintiff.

Held, that these allegations must be taken in law to include a delivery of the policy, although it had not actually reached the plaintiff's hands; and on this ground a demurrer for want of equity was allowed.

McFarlane v. The Andes Insurance Co., 486.

See also "Account."
"Multifariousness."
"Pleading," 2, 3, 4, 5.
"Practice," 6.

DESCRIPTION OF CLAIM.

See "Deed, Arrangement of,"

FOREIGN CORPORATION.

By Acts of the Legislature of Canada and the State of New York respectively, a company was incorporated in either country for the purpose of constructing a Suspension Bridge across the River Niagara, with compulsory powers as to the taking of lands, &c., and having the right to impose tolls for the user of the bridge. The two companies so incorporated joined in a lease of the upper or railway floor of the bridge for the term of their charters, to a railway company, to be for their exclusive use, and the use of such other railway companies as

the lessees might arrange with. *The Erie and Niagara Railway Company* had, by Statute, authority to arrange for the passage over such bridge from Canada into the United States; but it was alleged that the lessees refused them permission to cross the bridge. Thereupon an information by *The Attorney General* of Ontario, at the relation of *The Niagara and Erie Company*, and a bill by that Company was filed against the two *Bridge Companies* and their lessees, complaining of such refusal; and praying a declaration, (1) That the lease of the bridge was *ultra vires*. (2). That *The Erie and Niagara Company* were entitled to the use of the bridge on paying reasonable tolls; and for an injunction restraining the defendants from preventing *The Erie and Niagara Company* using the bridge. The evidence shewed that *The Erie and Niagara Company* had not effected any actual connection with the bridge, and that it was not clear they could do so without passing over lands of the lessees; and that by their charter the American Bridge Company had the power of making a lease to one railway company exclusively. Under these circumstances, as the damage, if any, to *The Erie and Niagara Company* was only prospective, and they could not be said to have sustained any actual damage by the refusal of the defendants to recognise their right to use the bridge, the Court, at the hearing, dismissed their bill as against all the defendants; and also dismissed the information as against the American Bridge Company with costs; declared the lease of the bridge, as regarded the Canadian Bridge Company void, and restrained them from further acting thereunder; and,

Semble, that even if *The Erie and Niagara Company* had established a complete title to relief as against the Canadian Bridge Company, still, as this Court had no authority to interfere with the American Bridge Company, and could only have compelled the other defendants to permit the cars of *The Erie and Niagara Company* to cross as far as the Canadian Bridge Company's charter extended, *i. e.* to the centre of the bridge, and was thus unable to afford any effectual assistance, the Court on this ground also would have refused to interfere.

The Attorney General v. The Niagara Falls International Bridge Co., 490.

FOREIGN LAW.

It is not desirable, even with the consent of parties, that the Court should construe the law of a foreign country, instead of the fact of what is the law there being proved by lawyers of such foreign country.

Meagher v. the Ætna Insurance Co., and the Home Insurance Co., 354.

FRAUDS, STATUTE OF.

A party is entitled to to set up the Statute of Frauds as a defence to a suit to enforce a parol agreement respecting an interest in land, although the Statute has not been specially pleaded.

Wilde v. Wilde, 521.

See also "Resulting Trust," 1, 3.

FRAUDULENT ASSIGNMENT.

A person in embarassed circumstances proposed to assign a policy on his life, in trust, first to secure certain advances and then for the benefit of his wife. The advances were made and the assignment executed, but no trust in favor of the wife was declared or was required by the lender as a condition of the loan. Subsequently the trustee made further advances to the settlor, and in his evidence stated that the settlor might have absorbed the whole amount if he (the trustee) had seen fit to advance it. After the death of the settlor all the advances were paid and the residue of the insurance moneys invested for the benefit of the widow:

Held, that so far as the interest of the widow was concerned, the settlement was void.

Cotton v. Vansittart, 244.

FRAUDULENT DEED.

A bill was filed impeaching a deed as void under the Statute of Elizabeth, and the same was set aside with costs, as against the party beneficially interested; but without costs as against the trustees, as the ground upon which the same was set aside was not necessarily, and probably was not known to them.

Deavitt v. Scanlan. 352.

FRAUDULENT MISREPRESENTATIONS.

An Insurance Company filed a bill seeking to have a policy declared void, and delivered up to be cancelled, on the ground of fraudulent misrepresentations when the same was being effected. The facts set forth would, if true, have been a good defence to the action; but in the view that there should be but one trial of the questions of fact, and that in this Court alone could full relief be given in the event of the fraud being established, an injunction was granted to the hearing restraining proceedings at law to compel payment of the amount covered by the policy.

The National Life Assurance Co. v. Egan, 469.

HUSBAND AND WIFE.

A husband and wife were respectively residuary devisees under a will and they together with the other residuary devisees united in a conveyance purporting to transfer the property to the wife and her heirs so that none of the parties should have any estate, right, title, or interest therein:

Held, that the conveyance was inoperative at law so far as it assumed to pass the interest of the grantee's husband; but that it had the effect of constituting the husband a trusteee of the legal estate in favor of the wife: that in equity the wife had an absolute estate in the whole property to her separate use, and had therefore the same power of devising it as if she had been a single woman.

Davison v. Sage, 115.

ILLEGAL CONTRACT.

See "Usury."

ILLEGAL INSTRUMENT.

Where a party succeeds in establishing the illegality of an instrument he will not be allowed to enforce any stipulation that may be contained therein for his benefit.

The Attorney-General v. The Niagara Falls Suspension Bridge Co., 490.

IMPROPER ALLOWANCE.

A decree as drawn up in an administration suit directed the administrator to be charged with an occupation rent, "and that he should be allowed the various claims and allowances set up and asked for by his answer," the result of which was the allowance to him of several sums which, as against creditors, seemed to be improper, and the assets proved insufficient for payment of creditors in full. The Court at the hearing on further directions gave liberty to the creditors who complained of such allowance to rehear the cause, in order that the decree might be varied so as to give them an opportunity of disputing the claim, so set up by the administrator, in the Master's office.

Willis v. Willis, 396.

IMPROVEMENTS.

See "Repairs and Improvements.
"Tenants in Common," 3.

INFANTS.

See "Specific Performance."

INFANTS' ESTATE, SALE OF.

Infant children of an intestate obtained an administration order against their mother—the administratrix—and the Master found as proper to be allowed for their maintenance a sum to meet which the personal estate was inadequate, and on further directions a sale was asked of the realty to satisfy the sum so allowed: but the Court refused to sanction such sale, being satisfied that the suit had been instituted for that purpose merely, and was an indirect way of doing what ought to be doue under the provisions of 12th Victoria, and the order of this Court passed to carry that Act into effect; and as the report furnished only a small part of the information which would necessarily be laid before the Court under the Act and orde referred to.

Fenwick v. Fenwick, 381.

See also "Maintenance," 1, 2.

INFORMAL INSTRUMENT.

See "Portion," 2.

INFORMATION.

1. The Provincial Attorney-General, and not the Attorney General of the Dominion, is the proper party to file an information, when the complaint is not of an injury to property vested in the Crown as representing the Government of the Dominion, but of a violation of the rights of the public of Ontario.

The Attorney-General v. The Niagara Falls International Bridge Co., 34.

2. The Provincial Attorney-General is the proper person to file an information in respect of a nuisance, caused by interference with a Railway. *Ib.*

INJUNCTION.

See "Crown Lands," 2.
"Pleading," 2.
"Undertaking and Reference as to Damages."

INSOLVENCY.

Two mortgages were created by a debtor in favor of a creditor, whose claim consisted of promissory notes then current. It appeared that the debtor was in insolvent circumstances, and the Court considered that both the debtor and creditor contemplated the debtor going into insolvency, which he did shortly afterwards. On a bill filed by the assignee in insolvency to set aside these mortgages, the Court *held* them void as an "unjust preference" under the Insolvent Acts of 1864 and 1869.

Payne v. Hendry, 142.

INSTALMENTS.

[MORTGAGE PAYABLE BY.]

See "Interest," 3.

INSURANCE.

See "Tenants in Common," 1.

INSURANCE POLICY.

See "Demurrer for want of Equity."

INSURERS, PURCHASE BY.

See "Marine Insurance."

INTEREST.

1. The rule as to the allowance of interest from one year after the death of a testator does not apply, in the absence of express directions, where the bequest is by way of appointment under a settlement.

Deedes v. Graham. 258.

2. A testatrix, who, under her marriage settlement, had the power of appointment over certain moneys invested on mortgage, appointed certain parts thereof to her two daughters, and, until payment, to pay them the interest secured by the mortgage:

Held, on appeal from the Master's report, that he had properly allowed interest on the sums so appointed from the death of the testatrix, and not from one year after the death. *Ib.*

3. A mortgage made payable by instalments, with interest on each as it became due, contained a stipulation that if any of the instalments should remain unpaid for the space of thirty

days after the same became payable, that the whole principal sum, with interest remaining unpaid, should forthwith become due and payable. Default was made in payment of some of the instalments, the mortgagee, however, did not call in or insist upon payment of the whole sum remaining unpaid, but continued to receive payments from the mortgagor on account. On a bill to redeem the mortgagee claimed to be entitled to charge interest on the whole sum due at the time of each payment, in consequence of the default which had occurred:

Held, affirming the finding of the Master, that he could claim interest only on each of the instalments as it became due, according to the terms of the proviso for redemption.

McLaren v. Miller, 637.

IRREVOCABLE WILL.

The owner of the property may make a representation in respect of giving the same so as to form a contract sufficient to bind him to carry out the representation so made: and it will make no difference that the representation is, that the property is to be given by a revocable instrument, and the more so will this be the case, if in consequence of the representation the person to whom it is made changes his condition: where therefore a father wrote to his son stating that he had devised certain portions of his real estate to the son, and expressed a wish for the son to leave his then place of residence and settle beside the father, and that if he did so he would leave the land to the son at his death, and the son acting upon this expressed desire of his father, left his residence and went to live beside his father:

Held, that from that time the will was no longer revocable.

Fitzgerald v. Fitzgerald, 410.

JOINT AND SEVERAL LIABILITY.

See "Parties," 2.

JUDGMENT CREDITORS.

While the law respecting the registration of judgments was in force two judgment creditors having registered their judgments, the second one, in point of time, proceeded with his suit; the other did not, although his bill was filed in time, and he proved his claim in the Master's office in the other suit:

Held, that he had not lost his priority; and that it was unnecessary to revive his suit, which had abated meantime by reason of the death of some of the parties.

Myers v. Myers, 185.

JURISDICTION.

[OF COURT.]

See "Fraudulent Misrepresentations."

KEEPING STREAM CLEAR.

See "Riparian Proprietors."

LIEN ON STOCK.

A bank agent being about to make advances on the security of certain stock of another bank, applied to the bank officers to ascertain what claims the bank held against such stock, when he was informed there was overdue paper to the amount of $500; but before completing the arrangement as to the transfer of the stock, another claim which was then current in one of the agencies of the bank was returned unpaid:

Held, that the bank had a right to retain its lien on the stock for the additional sum before allowing the transfer of the stock to be carried out in their books.

Cook v. The Royal Canadian Bank, 1.

2. The owner of bank stock being about to assign the same, procured from one of the agents of the bank a memorandum on the back of a power of attorney for the transfer of the stock in the words: "No liability at Galt office":

Held, that this was not such a representation, made to the intending transferee, as bound the bank; and that the bank were entitled to hold the stock for the amount of a draft of $550, which had been discounted at the Galt office, and then in the hands of an agency in Montreal. *Ib.*

LIFE POLICY.

See "Fraudulent Assignment."
"Fraudulent Misrepresentations."

MAINTENANCE.

1. The Court will sanction the use of the *corpus* of an infant's estate, for his past as well as future maintenance, where the doing so is shewn to be for his benefit.

Goodfellow v. Rannie, 425.

2. Where the Court is satisfied that the question of maintenance arises incidentally in a suit, and that it was properly instituted in order to the administration of an estate, and not as an indirect mode of doing what ought to be done under the provisions of 12 Victoria, and the orders of this Court, made to

carry out the same, as the question of maintenance past as well as future can properly be dealt with, inasmuch as a great deal of the information required by the Statute and orders referred to can be evolved in taking the accounts in such suit; but where such a suit was instituted by a party asking for maintenance out of the *corpus* of the estate, the Court, as a check upon such suits, refused to make any direction as to maintenance, *Ib.*

MARINE INSURANCE.

The plaintiff, being owner of a vessel, insured the same for $8,000 against total loss only. The policy provided, amongst other things, that no act of either party, in the event of disaster, with a view to saving the property, should be considered as a waiver of acceptance of abandonment, but that such acts should be done without prejudice to either of their rights, and that no right to abandon should arise in any event, unless the amount which the plaintiff would be liable to pay under an adjustment as of a partial loss, exclusive of general average, should exceed half the amount insured; and it was expressly stipulated that the plaintiff should not have any claim under the policy for general average loss or particular average loss. While in the regular course of her employment the vessel struck on a rock in the River St. Lawrence, the plaintiff being on board at the time, on the 20th of July, in calm water, and where she was protected from the action of the winds. On the 6th of August the plaintiff, without attempting to rescue the vessel; but, as alleged, acting upon the advice of his captain and other disinterested parties, gave notice to the underwriters of an abandonment; which, however, they refused to accept, and ten days after they got the vessel off the rock, and carried her to a harbour in the United States, where they had her repaired at an expense of $3,000—one-fifth the declared value of the vessel—which sum the plaintiff neglected to pay. Thereupon the underwriters caused such proceedings to be taken against the vessel in the Courts of the United States as resulted in the sale of the vessel under process, at which the agents of the insurers became the purchasers in their own names, but in reality in trust for their principals. The insurers subsequently sold the vessel, and their vendee shortly afterwards resold her, and, owing to peculiar circumstances, at a very large advance. The plaintiff instituted proceedings at law to recover the amount of the policy, which resulted in favor of the defendants, and ten years afterwards filed a bill in this Court seeking to charge the insurers as trustees for him of the vessel;

Held, without reference to the delay in proceeding in this Court, that the insurers were entitled to hold the property

unaffected by any claim of the plaintiff, and the Court, although it considered the plaintiff entitled to any surplus that remained in the hands of the insurers after payment of the amount expended by them upon the vessel, were unable to grant him that relief, and dismissed his bill with costs.

Meagher v. The Ætna Insurance Co. and The Home Insurance Co., 354.

MARRIED WOMAN.

See "Partition."

MASTER'S OFFICE.

See "De Die in Diem."
"Practice."

MERCHANT'S ACCOUNT.

See "Arrangement, Deed of."

MISJOINDER.

See "Pleading," 3.

MORTGAGE—MORTGAGOR—MORTGAGEE.

The plaintiff, being owner of land, after having created a mortgage thereon, emigrated to Australia, and he subsequently remitted money to his agents in this country with which to pay off the incumbrance; but, instead of doing so they applied the money to their own use. Subsequently the holder of the mortgage to whom it had been assigned instituted proceedings in this Court to foreclose, to which suit an answer was put in on behalf of the plaintiff, but without his knowledge or consent, admitting the allegations of the bill, and that the full amount of principal and interest was due; whereupon a final order of foreclosure was, in due course, obtained, and the plaintiff in that suit conveyed to the defendant *A* for the consideration of $1002, the value of the property; and on the same day the defendants *M* and *S*, as attorneys of the plaintiff, conveyed the premises to *A*, who was ignorant of any fraudulent practices in the matter. The plaintiff having returned to this country, and ascertained the frauds which had been practiced upon him, filed a bill against his agents and the purchaser (*A*):

Held, that the plaintiff, so far as the purchaser was concerned, was bound by the statement in his answer, and was not entitled to relief as against him: that the fact of the pur-

chaser having heard before his purchase that the plaintiff had remitted money to pay the mortgage was not sufficient to charge him with notice that the foreclosure was wrongful; but, in view of the fraudulent conduct of the attorneys, the Court made a decree against them for the amount realized on the sale of the land, and directed them to pay the costs of the suit, including the costs of the purchaser.

McLean v. Grant, 76.

See also "Interest."
"Practice," 1.

MORTMAIN.

1. Municipal corporations are within the Statutes of Mortmain,

Brown v. McNabb, 179.

2. A deed may be good in part, though void in part. Where, therefore, a conveyance was made of lands, and the grantees contemporaneously executed a declaration of trust in respect thereof, as follows: first, to lease the lands until sold, and to sell them; to pay the annual proceeds to the settlor for life, and after the death of the settlor to pay the same, or in the discretion of the trustees a portion thereof, to *A M* during his life; and the trustees sold a portion of the estate, and after the death of the settlor a bill was filed impeaching the settlement as void under the Statute of Mortmain, which it admittedly was as respected the trusts declared of the *corpus* of the estate:

Held, that the trusts declared in favor of the settlor and *A M* were sufficient, however, to support he sale which had had been effected, and the bill, as against the trustees, the purchaser from them, and *A M* was dismissed with costs.

McIsaac v. Heneberry, 348.

MULTIFARIOUSNESS.

Since the Administration of Justice Act of 1874, whether a demurrer for multifariousness will now lie, in any case, where all the parties to the record are interested in each of the several causes of action, though distinct. *Quære*,

Brown v. Capron, 574, (note.)

MUNICIPAL CORPORATIONS.

1. Municipal corporations are within the Statutes of Mortmain.

Brown v. McNabb, 179.

2. Where a mortgage on land was executed to a municipal corporation for the purpose of securing a debt due to the corporation by its treasurer, and by the mistake of both parties the mortgage did not cover a part of the land which it was intended to mortgage, it was *held*, that the corporation was not entitled to a decree rectifying the mortgage, though a private person under the circumstances would have been so entitled. *Ib.*

3. Where the owner of property had executed a mortgage and release thereof to a municipal corporation, and the corporation afterwards sold the property with the knowledge of such owner and without objection by him until, as was alleged (though as to this the affidavits were contradictory), the purchaser had had seven years' quiet possession, during which time he had improved the property, the case was held a proper one for granting an injunction to the hearing restraining an action of ejectment against the purchaser. *Ib.*

NOTICE.

See "Acquiesence."
"Mortgage," &c.
"Tax Sale."

NOTICE OF PROCEEDINGS.

See "Practice," 3.

NUISANCE.

See "Foreign Corporation,"
"Information," 2.

PAROL TRUST.

Where a party fails to establish a parol trust in favor of himself and another, which his own evidence supports, he cannot afterwards insist upon a resulting trust or trust by operation of law.

Wilde v. Wilde, 521.

See also "Partition."
"Resulting Trust," 1.

PARTIES.

1. The Attorney-General of the Province is the officer of the Crown who is considered as present in the Courts of the Province, to assert the rights of the Crown, and of those who are under its protection.

The Attorney v. The Niagara Falls International Bridge Co., 34.

2. Sureties were jointly and separately bound; but a general account being necessary, the Consolidated Order 62, allowing proceedings to be taken against one of two or more persons jointly and severally liable, does not apply to such a case; and the allegation as to the insolvency of one of them is not sufficient to dispense with him as a party. That Order is only available where the suit is for a liquidated sum or for a single breach of trust.

Garrow v. McDonald, 122.

3. Whether in such a case the administrator *ad litem* sufficiently represents the estate of the principal debtor.—*Quære.* *Ib.*

4. The Legislature of Canada, by an Act, set apart a certain quantity of land along the line of a projected railway, to be granted to the company on completion of the railway; and a proportionate part of such lands on the completion of 20 miles of the railway; the company having completed a portion of the line of railway to an extent of more than 20 miles, applied for a grant of the proportion to which, under the Act, they claimed to be entitled, which was refused. The Company, thereupon, presented a petition of right against the Province of Ontario. It was alleged that the Province of Ontario had not along the line of the road sufficient lands to make the grant desired:

Held, that this formed no ground for the Province of Ontario insisting that the Province of Quebec should have been made a party to the proceeding.

The Canada Central Railway Co., v. The Queen, 273.

See also "Information," 1, 2.
"Pleading," 1, 2.
"Trustee and *cestui que trust*," 3.

PARTITION.

A testator having devised his real property to such of the persons named as should be living at the death of his widow, the parties interested came to an agreement for partition during the widow's lifetime; there were several questions between the parties; the plaintiff, who was one of the devisees, was induced to consent to the partition upon a distinct understanding with another of the devisees, that the latter should, after partition, hold a portion of her share in trust for the plaintiff; this agreement was not known to the other devisees; the partition would not have been agreed to by the plaintiff but for the promise stated:

Held, that the promise was not binding, both because there was no writing within the Statute of Frauds; and because the party making it was a married woman.

Morley v. Davison, 96.

PATENT, ASSIGNMENT OF.

The patentee for the manufacture of certain machines for the extinguishing of fires, assigned to another the right to manufacture such machines, reserving a certain royalty, with the right at any time within one year on the part of the assignee to absolutely purchase all the rights of the patentee under the patent for a sum named:

Held, notwithstanding such right of purchase, that the assignee was not entitled to the exclusive right of manufacturing and that the patentee could, notwithstanding such assignment, confer on other parties the right of manufacturing.

The Fire Extinguisher Co. v. The North Western (Babcock) Fire Extinguisher Co., 625.

PETITION.

See "Railway Bonus," 1, 3.

PETITION OF RIGHT.

An Act of the Legislature of Canada having provided that a railway company should be entitled to 4,000,000 acres of the waste lands of the Crown on completion of their road, and a proportionate quantity of such lands on completion in the manner specified of 20 miles of the line:

Held, that a petition of right presented to the Lieutenant-Governor of Ontario, addressed to Her Majesty the Queen, was the proper proceeding for the purpose of enforcing the claim of the railway company under the Act, against that Province.

The Canada Central Railway Co. v. The Queen, 273.

PINE TIMBRR.

[SALE OF.]

See "Crown Lands," 1.

PLEADING.

1. In a suit against one of two sureties of an assignee in insolvency and the administrator *ad litem* of the assignee, the bill alleged that *P* (the other surety,) was "without means or

PORTION.

1. The proper definition of a portion considered.

Mulholland v. Merriam, 152.

2. A man by an informal instrument assigned to a trustee all his estate and effects on the condition of the trustee paying to each of the children of the assignor $400. Subsequently the grantor conveyed to one of his sons a house and premises valued at $200.

Held, that the trustee could not set this up as part satisfaction of the $400 mentioned in the first deed; and that declarations of the father, made subsequently to the assignment in trust, and the conveyance to, and in the absence of, the son, were inadmissible to shew the conveyance was made, and intended to be in part satisfaction of the sum so secured to the son.

Ib.

POUNDAGE.

See "Sheriff's Poundage."

PRACTICE.

1. Following the ruling in *Henderson* v. *Brown*, (Ante, Vol. XVIII. p. 79), and other cases in this Court, the Court held the assignee of a mortgage bound by all the equities affecting it in the hands of the mortgagee; and the mortgagor, in a suit to foreclose, having set up that before notice of the transfer he had, at the instance of the mortgagee, incurred liabilities for, and paid off debts of, the mortgagee, equal to the amount due on the mortgage, a reference was directed to the Master to inquire as to this; and if found to be so the bill was to stand dismissed with costs; but if not so found, further directions and costs were reserved.

Baskerville v. Otterson, 379.

2. The decree in a cause gave the plaintiff the general costs thereof:

Held, that this did not carry the costs of rehearing an interlocutory order made refusing an injunction, and which order was reversed on rehearing; the practice requiring that, where costs of rehearing are intended to be given they must be expressly mentioned in the decree or order giving the costs of the cause.

Mossop v. Mason, 406.

3. In proceeding upon a decree *pro confesso*, the Master should exercise a discretion in requiring notice to be given to the defendants of such proceedings, or dispensing with

notice thereof: as a general rule the defendant should have notice, although it may be that it is not requisite to serve him with all warrants issued by the Master.

Robinson v. Whitcomb, 415.

4. Where with a view of obtaining a decree for alimony it is desired to give evidence of various acts of violence by the husband, it is necessary to set forth such acts specificially in the bill, in order that the husband may have notice of the acts charged against him, and so that he may, if he can, adduce evidence in rebuttal or explanation thereof; and this rule cannot be said to operate oppressively upon the wife, as the facts and circumstances charged, if true, must be all within her knowledge.

Rodman v. Rodman, 428.

5. Where a decree directing accounts to be taken in the Master's office, is afterwards varied on Appeal, the Master in his subsequent proceedings under such decree is bound to observe the principles enunciated by the order in Appeal, although such order does not in terms refer to the party against whom the decree had directed such accounts to be taken.

Gilbert v. Jarvis, 478.

6. Where a demurrer on record is over-ruled, and a demurrer *ore tenus* is allowed, the Court may in its discretion allow the plaintiff the costs.

Wylie v. *McKay*, *ante*, page 421, not followed.

Roche v. Jordan, 573.

See also "Administration Order," 1.
"Amendment."
"Costs," 1, 3.
"Declaratory Decree."
"Improper Allowance."
"Parties," 4.
"Undertaking and Reference as to Damages."
"Varying Decree."

PREFERENCE.

See "Insolvency," 1.

PRO CONFESSO.

See "Practice," 3.

PROFESSION.

See "Will," &c., 4.

PROSECUTION, COMPROMISE OF.

See "Deed of Settlement."

PURCHASE BY INSURERS.

See "Marine Insurance."

PURCHASE WITHOUT NOTICE.

See "Mortgage," &c.
"Tax Sale."

RAILWAY.

See "Information," 2.
"Foreign Corporation."
"Ultra Vires."

RAILWAY BONUS.

1. By the statute incorporating a Railway Company, it was enacted that if fifty persons, at least, of the qualified ratepayers within the portion of the county affected by the Railway should petition for the passage of a by-law granting aid to the undertaking, the council should pass such act, subject to the vote of the qualified ratepayers of such portion of the county:

Held, that it was not necessary that the petition should be signed by a proportion of the fifty persons from each locality in the portion of the county affected.

West Gwillimbury v. Simcoe, 211.

2. In giving notice submitting a by-law granting aid to a Railway Company for the approval of the ratepayers, the officers (whose duty it was to give such notice) had not posted up the clauses of the Municipal Act in reference to bribery, in the manner required by the Act:

Held, that this formed no ground for quashing the by-law. *Ib.*

3. A petition to a municipal council prayed for the passage of a by-law granting aid to a Railway Company, to be charged on a specified section of the county. In the section so specified were situated two villages, both of which were incorporated, but they were not named in the petition or in the by-law:

Held, no objection to the by-law. *Ib.*

RAILWAY STATION.

Prima facie the term "Railway Station," in a contract, means the station house.

Carroll v. Casemore, 16.

See also "Specific Performance," 1.

REALTY OR PERSONALTY.

See "Will," &c., 1.

REGISTRATION OF JUDGMENTS.

See "Judgment Creditors."

REGISTERED TITLE.

See "Acquiescence."

RE-HEARING BY CREDITORS.

See "Improper Allowance."

REMOTE CONTINGENCY.

See "Will," &c., 3.

RENTS AND PROFITS.

See "Tenants in Common," 2.

REPAIRS AND IMPROVEMENTS.

[AFTER SUIT.]

On taking an account of what was due to a plaintiff in possession who claimed under a vendor of real estate in a specific performance suit, the Master allowed certain repairs and improvements, some of which were made after the commencement of the suit. On further directions, the Court expressed the opinion that the only repairs made after suit commenced, that could be allowed, were such as it was the plaintiff's duty to make in order to save the premises from deterioration.

Hawn v. Cashion, 518.

REPRESENTATION BINDING ON PARTY.

See "Irrevocable Will."

RESULTING TRUST.

1. A man by arrangement with his wife and his two daughters—by a former marriage, one of whom was a minor—purchased lands and built thereon, and paid for the property out of moneys produced by the joint labour of himself, his wife and the daughters; the deed for the property was taken in the name of the wife, upon the understanding that she should hold the same for the benefit of herself and husband during their lives, and after their decease that it should go to the daughters. By his will the husband declared he had no real estate, but desired the wife to direct her executors to sell the property so purchased, and divide the proceeds between his two daughters and a daughter of his wife by a former husband.

Held, on appeal, affirming the decree of the Court below, that the purchase could not be treated as an advancement to the wife; that there was a resulting trust in favor of the testator, and that the trusts in favor of the daughters, if declared, having been so by parol only, were within the Statute of Frauds and therefore void.—[GWYNNE, J., dissenting.]

Owen v. Kennedy, 163.

2. A party claiming a resulting trust in his favour, arising out of a purchase of land, must shew that such purchase was made on his behalf, and that the money paid on account of it was his money.

Wilde v. Wilde, 521.

3. A father and son lived together on the same farm, of which they obtained a lease in their joint names, the son having for several years, owing to the infirm state of his father's health, the entire management of the farm; and the moneys he received from the sale of the produce thereof, he was in the habit of handing over to his mother for safe-keeping thus forming, as it were, a common fund. Subsequently he effected a purchase of the farm in his own, name, when he paid $1,000 on account of the purchase money derived partly from private funds, and partly from the fund held by the mother, and gave a mortgage with the usual covenants for the residue of purchase money, on which he subsequently made a payment of $1,520; $1,000 of which he borrowed from his wife, the balance being made up partly of funds of his own partly of funds obtained from the common purse. The father claimed that the purchase had been made for his benefit and the benefit of the son and his brother, and filed a bill to enforce such claim: the son answered denying having made the purchase in the manner alleged, and claiming to be the sole

owner of the property, subject to the support of his father and mother out of the same.

Held, per Curiam, that, in the absence of any writing signed by the son, nothing was shewn to take the case out of the Statute of Frauds; and even if the defence of the Statute were not set up, sufficient was not shewn to entitle the father to a decree on the ground of contract: [SPRAGGE, C., *dissentiente*,] or on the ground of a resulting trust in his favor, by reason of his having paid a portion of the purchase money. [SPRAGGE, C., *dubitante*.]

Wilde v. Wilde, 521.

REVOCATION IN EQUITY.

See "Will, Construction of," 5.

RIGHT, PETITION OF.

See "Petition of Right."

RIGHT TO MANUFACTURE.

See "Patent, Assignment of."

RIPARIAN PROPRIETORS.

1. The plaintiff and defendant owned adjoining lots through which a stream flowed freely in its course until the defendant threw logs and refuse wood into it, which had the effect of damming back the water on the plaintiff's land, whereupon the plaintiff instituted proceedings at law, which action, with all matters in difference between the parties, was referred to arbitration, when the arbitrators decided that the defendant should remove all the timber across the creek, and pay one-half the costs of the action at law. The defendant having refused to obey the award the plaintiff filed a bill for the purpose of compelling obedience thereto.

The Court under the circumstances made the decree as asked, and ordered the defendant to pay the costs of the suit.

Hodder v. Turvey, 63.

SALE.

See "Will," &c., 2.

SALVAGE.

See "Marine Insurance."

SEPARATE USE.

See "Husband and Wife."

SETTLEMENT.

See "Deed of Settlement."

SHERIFF'S POUNDAGE.

A sheriff is only entitled to poundage on the moneys actually passing through his hands. Where therefore the parties to a suit arranged outside the sheriff's office for the payment of $3000 on account of an execution in his hands, and the plaintiffs in the cause paid his poundage, on that amount as well as the moneys actually paid to the sheriff, the Court refused to allow them to charge the amount against the defendants.

The Hamilton and Port Dover Railway Co. v. The Gore Bank, 160.

SOUNDNESS OF MIND.

See "Testamentary Capacity."

SPECIFIC PERFORMANCE.

It having been ascertained that a railway company intended to have a station on the defendant's land, he contracted to sell to the plaintiff a quarter of an acre next to the railway station as soon as laid out. The company having afterwards located the station ground, but not the position thereon of the intended station house, it was *held* that the plaintiff's parcel could not be ascertained until the locality of the station house was determined, and that until then a bill to enforce specific performance was premature.

Carroll v. Casemore, 16.

2. The plaintiff under a verbal agreement, purchased certain lands from the ancestor of the defendants, to whom he paid the purchase money in full. The agreement provided that, upon payment of the purchase money, "a proper conveyance was to be executed" of the premises. It appeared that the vendor had given instructions to have a conveyance prepared in favor of the plaintiff, but that this was not commnnicated to the plaintiff, and formed no ground for his never having tendered any conveyance to the vendor for execution:

Held, that under the agreement the plaintiff was bound to prepare and tender a conveyance for execution; and that he was not entitled to his costs of a suit brought against the representatives of the vendor for specific performance of the agreement.

Mooney v. Prevost. 418.

3. In such a case, some of the defendants being infants, the plaintiff applied for the appointment of a guardian *ad litem*, and one was appointed accordingly. The Court, following the general rule, ordered the plaintiff to pay to pay the costs of the guardian, and refused to give the plaintiff any remedy therefor against the estate of the vendor. *Ib.*

SUBJECT MATTER OF SUIT.

Prima facie the sum realized on a sale under a power contained in a mortgage is the subject matter of the suit.

McGillicuddy v. Griffin, 81.

SUBJECT MATTER INVOLVED.

See "Costs," 1.

SUBSEQUENT GIFT.

See "Portion, 2.

SUCCESSOR.

See "Will," &c., 8.

SURPRISE.

See "Compromise."

SUSPENSION BRIDGE.

See "Foreign Corporation."
"Ultra Vires."

TAXATION.

See "Practice," 2.

TAX SALE.

One *Tripp*, being owner of certain land, executed a marriage settlement, under which his wife was entitled to the land for her life; the taxes afterwards fell into arrear, and the land was sold by the sheriff to pay them; by arrangement with the purchasers *Tripp's* widow became entitled to their interests in the property; and she having sold it to the defendant *G*, the purchaser at sheriff's sale conveyed to *G*. In a suit by the assignees of *Tripp's* heirs to set aside this sale, *G* claimed to be a purchaser for value without notice. The same solicitor

acted for the vendors and vendee *G*, in the transaction of the sale to *G*, and this solicitor knew then and before that *Tripp* had been the owner, and that he had executed a marriage settlement under which his wife was tenant for life, but he did not know or suspect she was bound to pay the taxes for which the land was sold, and he did not communicate to *G* that she was under any such obligation.

Held, that *G* was not affected by constructive notice of the liability; and the bill against him was dismissed with costs.

Monro v. Rudd, 55.

TENANTS IN COMMON.

1. One of several tenants in common being in sole possession of the premises and claiming to be solely entitled, insured the buildings on the property; the buildings having been destroyed by fire the insurance moneys were paid to the party insuring, and new buildings were erected by a person to whom he had contracted to sell the property:

Held, varying the decree pronounced, (*ante* volume xix., page 155) that the party insuring was entitled to appropriate the insurance money to his own benefit.—[SPRAGGE. C., *dubitante*.

Held, also, varying the original decree, that he was not entitled to any allowance in respect of the new buildings.

McIntosh v. The Ontario Bank, 24.

2. A tenant in common being in actual occupation of the joint estate forms no ground for charging him with rent. It would have been otherwise however if he had been in the actual receipt of rent from third parties.

Rice v. George, 221.

3. One of several tenants in common, or joint tenants, making improvements on the joint estate, is not entitled to be paid therefor; unless, on the other hand, he consents to be charged with occupation rent. *Ib.*

4. *Semble*, that one tenant in common selling timber off the joint property is not chargeable with sums realized therefrom. *Ib.*

TESTAMENTARY CAPACITY.

1. The question as to what degree of unsoundness of mind will incapacitate a person from executing a will, considered.

Ingoldsby v. Ingoldsby, 131.

2. A party who had at one time been insane, afterwards made a will. It was shewn that though he continued to be

eccentric in his habits, he had a clear appreciation of the value and extent of his property; as also of the objects of his bounty.

Held, therefore, that he was in such a state of mind as qualified him to make a valid disposition of his estate within the ruling in the case of *Banks* v. *Goodfellow*, L. R. 5 Q. B. 543. *Ib.*

TESTAMENTARY PAPER.

Where a testatrix, having duly made and published her will, subsequently executed a testamentary paper, not, however, so as to pass real estate: *Held*, that the disposition of personalty made thereby was substituted for the disposition made of it by the will, but the disposition made of the realty by the will was not affected.

In re Trusts of Will of Anne Parker, 389.

TIMBER, SALE OF.

Semble, that one tenant in common cutting timber off the joint property is not chargeable with sums realized therefrom.

Rice v. George, 221.

TRADE.

See "Will," &c., 4.

TRANSFER OF STOCK.

See "Lien on Stock."

TRUST BY PAROL.

See "Partition."

TRUSTEE AND CESTUI QUE TRUST.

1. The Court discountenances unnecessary or useless suits against trustees.

Liddell v. Deacon, 70.

2. The plaintiffs having become embarassed in their business, made an assignment of all their effects to the defendant, for the purpose of realizing the same and paying all their creditors, a list of whom was handed to the defendant on the execution of the deed of trust. Subsequently the plaintiffs furnished another schedule of their liabilities, embracing

several persons not mentioned in the original list of creditors. The defendant had paid several of those named in the first list, and in doing so had expended a sum greater than he had collected, and had become answerable for more than the residue of the estate would realize. The defendant refused to recognize the claims of the additional parties mentioned in the second list, and thereupon the plaintiffs filed a bill praying for an account of the defendant's dealings with the estate, and for an execution of the trusts of the deed: alleging that they had not any estate other than that assigned to the defendant, and that they were insolvent and personally unable to pay anything. The Court, in view of the fact that no fraud or improper conduct was alleged, and that even if the whole estate were realized, the defendant would still be a loser in the transaction, and that all the defendant had done, up to a date shortly before the filing of the bill, had been approved of by the plaintiffs; that he had received but a small sum since, and not enough to repay himself,—refused the relief prayed, and dismissed the bill with costs. *Ib.*

3. In such a case the defendant sought to shew that the creditors mentioned in the original schedule were the only ones he had agreed to pay, and that such was the agreement between himself and the plaintiffs on his acceptance of the trust: *Held*, that he was not at liberty to shew this, not having asked for a reformation of the deed of trust; and that even if he had done so, the absence of the parties sought to be excluded from the benefits of the trusts was an insuperable barrier to the defendant's being permitted to do so. *Ib.*

4. If under a will a trustee has a discretion to sell or not to sell real estate, the Court will not interfere by its advice or direction, but will leave the trustee to the exercise of his discretion,

In re Trusts of Will of Anne Parker, 389.

See also "Fraudulent Deed."
"Mortmain," 2.
"Pleading," 5.
"Will," &c., 8.

ULTRA VIRES.

The respective Legislatures of the State of New York and Canada incorporated certain parties for the purpose of constructing a suspension bridge across the Niagara River, for railroad and other purposes, with power to take lands, charge tolls, &c., and the two companies joined together in conveying to one railway company the exclusive use of the railway

portion of their structure, with power to make arrangements with other railway companies:

Held, that such assignment was *ultra vires* and void.

The Attorney-General v. The Niagara Falls International Bridge Co., 34.

See also "Foreign Corporation."

UNCERTAINTY.

See "Pleading," 5.

UNDERTAKING AND REFERENCE AS TO DAMAGES.

On obtaining an *ex parte* injunction restraining the sale of property, the plaintiff entered into the usual undertaking as to damages, and subsequently dismissed his bill; whereupon the defendant moved for a reference to the Master to inquire as to damages sustained by him, when in answer to the application, it was shown that since the dismissal of the bill, an increased price had already been offered, and that it was probable a still greater advance in price would be obtained on a sale. The Court, under the circumsiances, refused the application, but without costs, and reserved to the defendant liberty to renew his application, on which he should be at liberty to use the depositions and affidavits read on the present motion.

Featherstone v. Smith, 474.

UNDUE INFLUENCE.

See "Compromise."

UNJUST PREFERENCE.

See "Insolvency."

USURY.

A mortgage was created on real estate to secure £375 with interest, which, according to law, meant 6 per cent. per annum. The mortgagor, it appeared, agreed to pay additional interest for further forbearance each year, and gave promissory notes for the amount of such additional interest, which notes were duly paid. Subsequently the mortgagee instituted proceedings in Chancery to enforce payment of the mortgage debt and interest, and in taking the account of what was due the Court gave credit to the mortgagor for the amounts paid on these

promissory notes as against the principal and six per cent. interest. Thereupon the mortgagee appealed, and it was

Held, (1.) (Reversing the decision of the Court below) that the mortgagor was not entitled to credit for the amount so paid. [SPRAGGE, V. C., dissenting.]

And (2.) That although the Act then in force (16 Vic. ch, 80) allowed parties to lend money at any rate of interest that might be agreed upon, still, in the event of their subsequently having to sue to enforce their securities, they could not recover more than the sum actually advanced and six per cent. *Stimson* v. *Kerby*, *ante*, vol. vii., page 510, over-ruled.

Quinlan v. Gordon, *Appendix*, i.

VALID CONSIDERATION.

See "Deed of Settlement."

VARYING DECREE.

A bill was filed by a creditor against his debtor, to obtain the benefit of a vendor's lien, and the decree declared the lands (four parcels) subject to the lien for unpaid purchase money, and directed an account to be taken of what was due to the vendor and also to the plaintiff and other incumbrancers. It appeared that to one of the four parcels the vendor had not any title; and that the purchase had been of all at a gross sum of £2,000. After the accounts had been taken, one of the purchasers filed a petition praying for a reference back with a view of obtaining an abatement of the purchase money on account of such defect; but, as this would have been in effect a varying of the decree, which could only be obtained upon a rehearing, the relief was refused; and whether, after the delay that had occurred and the proceedings that had been taken, it would have been proper to grant leave to rehear. *Quære.*

O'Donohue v. Hembroff, 350

[ON APPEAL].

See "Practice," 5.

VENDOR AND PURCHASER

Where a vendor brought ejectment, and turned the heirs of the purchaser out of possession, he was held to have disabled himself from coming to the Court for specific performance, and could only do so in order to bind their interests in such a manner as to render the property saleable. Under such circumstances, the plaintiff having placed himself in a false position by reason of the proceedings at law, the Court deprived him of his costs up to decree, but gave him his costs subsequent thereto.

Hawn v. Cashion, 518.

VESTED INTEREST.

See "Will," &c., 10

WILL, CONTSRUCTION OF.

1. A testator directed his executors to collect and got in all his outstanding estate, and after payment of debts and funeral expenses to expend the proceeds in building on his property, and also after two years, with the consent of his widow, authorized them to sell his homestead or any part thereof in village lots, and to invest the proceeds in land or Government stocks as his widow might desire; and the yearly income of all his estate, real as well as personal, he gave to his wife for her support and the support of his children, for the term of her natural life, provided she remained his widow, but no longer than during the minority of his children if she should cease to be his widow, or enter into another marriage alliance or contract; nevertheless she was to be guardian of the children during their minority, and receive said incomes for their support and clothing until each became of age, and when the youngest became of age then the property was to go share and share alike, between his surviving children or their heirs.

Held, 1st, that the children took estates tail with cross-remainders in the realty.

Held, 2nd, that the widow had the power of making the estate realty or personalty at her discretion.

3rd, *Held*, also, that the power of sale having been given to the executors *qua* executors, and not by name, they could not, after having once renounced, execute such power.

Travers v. Gustin, 106.

2. A testator authorized his executors to sell his real estate consisting of his homestead and property in St. Thomas, but stated that it was not his will to have his property in St. Thomas disposed of until the proceeds of it could be laid out in real estate to a fourth better advantage and with the consent of the heirs. On a bill filed to have the rights of the parties declared and the affairs of the estate wound up, the Court referred it to the Master to inquire as to the propriety of selling both the homestead and the St. Thomas property. *Ib.*

3. A testator devised his real estate to his children in tail with cross-remainders; and in the event of their dying without issue he gave the same to his brother; and directed his widow to receive the whole of the rents, &c., during widowhood; and in the event of her marrying she was to receive one-half thereof during her life:

Held, that the contingency of the widow surviving all the

children was too remote to put her to elect between her dower and the provision under the will. *Ib.*

4. A testator directed that one of his sons, *W R*, should be educated for one of the learned professions over and above a child's share, and if brought up to a trade he was to receive £250 over and above a child's share. *W R* did not receive a professional education, but entered into the employment of a bank as a clerk:

Held, that he was entitled to receive £250 over and above a child's share. *Ib.*

5. A testator devised his real estate and personal property to two persons. After making his will the testator contracted to sell a portion of the real estate, but the contract was never carried out, and, after his decease in October, 1862, the parties interested under the contract agreed to rescind the same, which was done accordingly:

Held, that the contract operated in equity as a revocation of the will as regarded the beneficial interest in the real estate; that the interest in the contract passed to the legatees under the residuary clause; that the devisees being also legatees of the personal estate were entitled to the land, and that it did not go to the heirs-at-law.

Ross v. Ross, 205.

6. A testator by his will devised the real estate of which he should die possessed to his wife, "to hold the same forever, and to dispose of it in any manner she may think proper," and further, "the residue of my estate both real and personal I give to my beloved wife to have and to hold the same for her sole use and benefit, during the term of her natural life, and that she may dispose of the whole or any part of the said personal estate, as she may think proper, and at her death the residue of my real estate or personal estate, if any," he gave to other parties:

Held, that the widow took an estate for life in the residue of the personal estate with an absolute power of disposition; but that the deposit in a bank to her own credit of the proceeds of notes and mortgages which the widow had collected was not such a disposition thereof as to withdraw them from the residue of the estate and give her an absolute title thereto; but that the same remained to be administered as part of the testator's estate.

Green v. Carley, 234.

7. A testatrix appointed to a daughter certain moneys, "the interest thereof to be for her sole use during her life, and the principal to be left to all or any of her children she may have at her death;" by the settlement the power of appointment

was only among children, grandchildren not being objects of the settlement :

Held, notwithstanding, that the appointment was not absolute in favor of the appointee ; that she took only the interest of the fund during her life ; and that the principal went to the residuary appointee.

Deedes v. Graham, 258.

8. A testator, amongst other things, devised certain lands to his daughter *M A P*, upon certain trusts as to the application of the rents and profits in favor of his daughters so long as they remained single, and on the marriage of any the whole benefit of the trust to such of them as remained single, and the survivor of them till her death : and the testator further declared, " that in case of my said trustee or her *successor*, with the concurrence of my said daughters in said trust mentioned, and then surviving, may deem it prudent and expedient, they may sell and dispose of all said lands," and he further declared that none of his " married daughters, or any that may get married, shall, from time of said marriage, be participant, or have a control or claim on said trust estate or in the disposal thereof. * * * And I declare that in case of the death or marriage of my said daughter *M A P*, either before me or before the termination of the said trusts, then that my then unmarried daughters may and shall be, or those appointed under their hands and seals may and shall be, the trustees and executrixes or executors of this my will, and so on in like manner in case of the death of any such subsequently appointed trustees and executors, till the termination and completion of said trusts and final disposal of my said estate, it being my desire that no married daughter, on account of the influence that her husband might exercise over her, shall continue to act as my trustee or executrix." *M A P* married, and the plaintiff, who was the only surviving unmarried sister, had contracted with the defendant for the sale of a portion of the devised estate. On a bill filed by the vendor to enforce such contract :

Held, that the plaintiff had under the will power, as *successor* of *M A P*, to make a good title, and that it was not necessary for *M A P* to join in the conveyance.

Pegley v. Atkinson, 383.

9. A testator directed first that all his debts, funeral and testamentary expenses should be paid, and then that all his real and personal estate of every nature and description should be equally divided between his wife and mother, share and share alike :

Held, that the widow was not entitled to dower and to the

provision made for her by the will; but that she was put to her election.

McGregor v. McGregor, 450.

10. A testator devised his estate to trustees to invest for the benefit of his wife and children, and to give to each child on attaining 21 a sum of $1,000; and further directed that when his youngest child should attain the age of 21 years the trustees were to invest a sufficient sum to yield to his widow $400 a year; and all the rest and residue of his real and personal estate remaining after investing such sum to be equally divided among his children, share and share alike.

Held, that each child on attaining 21 took a vested interest in the residue of the estate.

Murphy v. Murphy, 575.

See also "Testamentary Capacity."

WILL, IRREVOCABLE

See "Irrevocable Will."

WILLS ACT OF 1868.

The fifth section of the Wills Act of 1868, which provides that no will shall be revoked otherwise than by "another will or codicil executed according to law, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is by law required to be executed," means a will, codicil or other writing executed with the same formalities as are required in the case of the will or codicil which it purports to revoke.

In re Trusts of Will of Anne Parker, 389.