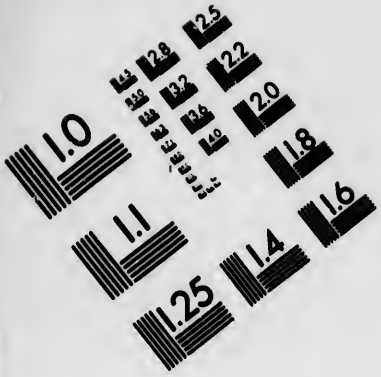

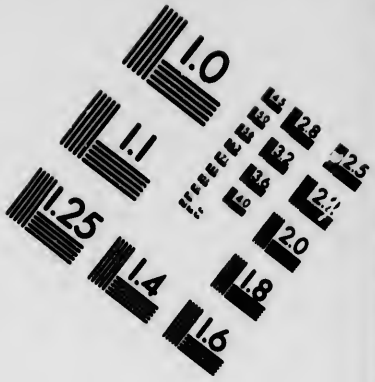

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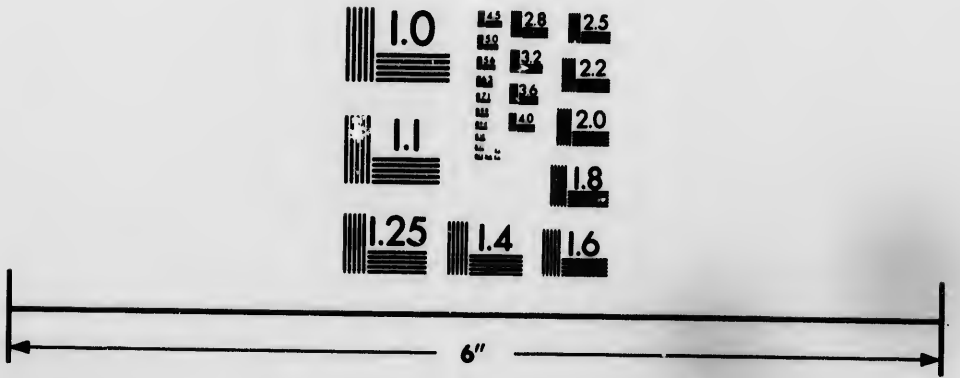

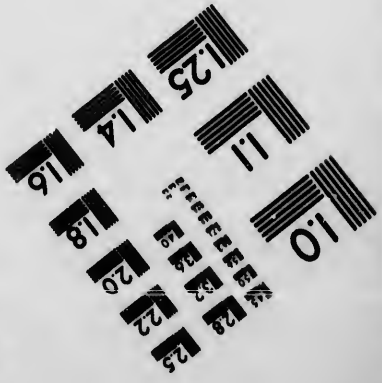

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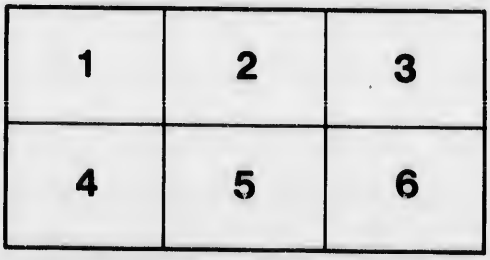

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING DECEMBER, 1864.

BY

ALEXANDER GRANT, BARRISTER,

REPORTER TO THE COURT.

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THE HON. P. M. S. VANKOUGHNET, *Chancellor.*

" J. GODFREY SPRAGGE, *Vice-Chancellor.*

" OLIVER MOWAT, *Vice-Chancellor.*

" JOHN A. MACDONALD, *Attorney-General.*

" JAMES COCKBURN, *Solicitor-General.*

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REPORTS OF CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

UPPER CANADA,

COMMENCING DECEMBER, 1864.

LANGLOIS v. BABY.

Conveyance for illegal purpose—Consideration against public policy.

Upon re-hearing the decree pronounced in this cause, declaring that a conveyance made for the purpose of enabling an irresponsible person to justify as special bail, was a transaction against good conscience and morality, was affirmed with costs.

This was a re-hearing of the decree as reported *ante* volume x., page 358, at the instance of the plaintiff, who was dissatisfied therewith. Statement.

The facts of the case are fully set forth in the former report.

Mr. *Blevins* for the plaintiff.

Mr. *Scott* for the defendant, *Baby*.

VANKOUGHNET, C.—I agree with the judgment of my brother *Spragge*, and think the petition of re-hearing should be dismissed with costs. What is against public law is against public policy. The law requires that

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bail shall be able to justify to a certain amount; and this they must do by virtue of property of their own; not held by them in trust for another, or under the control of another.—*Nicolls'* Bail. (*a*) I think this being so, it was *contra bonos mores* for the plaintiff to induce the bail to swear, and for the bail to swear that the property was his, if he held it on a secret trust for the plaintiff, and that this trust cannot be set up.

SPRAGGE, V.C., remained of the opinion expressed by him on the original hearing of the cause.

MOWAT, V.C.—The conveyance from *Langlois* to *Moynaghan* was absolute, and was registered. The declaration of trust was not registered. *Moynaghan* was thus made to appear the absolute owner of the property. The object of giving the transaction this form was to remove the objection *Moynaghan* had made to swear that he was worth £1,000, and also to prevent his sufficiency as one of the bail from being questioned. Independently of this property, it is admitted that *Moynaghan* was not worth the sum named. Mr. *Blevins* contended, however, that the conveyance in connection with the declaration of trust really gave him such an interest as qualified him, and that the transaction, therefore, was not objectionable. But he failed to make this out. The contrary seems clear (*Nicolls'* Bail); and I think it is impossible to doubt that it was from a knowledge of this, or an apprehension of it, on the part of *Langlois* and his attorney, that the declaration of trust was not embodied in the conveyance, or allowed to appear on the registry. A security by *Langlois* to indemnify would, of course, have been quite legal, but this transaction is admitted to have had another object, and one which I think we must hold a fraud on *Ford*, at whose suit *Langlois* was arrested, and a fraud on the law which regulates the bail to be given

Judgment.

(*a*) 1 Hodges, 77.

by a defendant. The grantor having chosen to make a conveyance of his property for a double purpose, the one purpose being legal and proper, but the other fraudulent and involving the making of a false affidavit by the grantee in a judicial proceeding, I think he has disentitled himself to the aid of a court of equity in getting back his property free from *Baby's* claim. I can find no satisfactory ground on which the case can be distinguished from those on which the judgment of my brother *Spragge* proceeded.

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Per Curiam.—Decree affirmed, and petition of re-hearing dismissed with costs.

JUSON v. GARDINER.

Lis pendens—Act abolishing the registration of judgments—Practice.

In September, 1855, one G. entered into a contract (which was never registered) with one M. for the sale to him of a lot of land; in October, 1857, the plaintiffs recovered and registered a judgment against G., and thereby acquired priority over M. on the lot sold to him, and in March, 1861, filed a bill against G. to enforce their judgment against the lot contracted to be sold to M. as well as against other lands of G., to which bill the plaintiffs (having no notice of the contract) did not make M. a party, a certificate *lis pendens* being however registered. In March, 1862, M. obtained from G. under the contract a conveyance of the lot, which he registered in September, 1862, and the plaintiffs becoming aware thereof applied *ex parte* on the 10th June, 1864, under the order of 29th June, 1861, for, and obtained, an order to make M. a party in the Master's office. *Held*, on appeal to the full court, (*Vankoughnet*, C., *dissentiente*) that the suit was not pending as against M. prior to the date of the order to make him a party. That therefore there was no suit pending against him on the 18th May, 1861, and in consequence, that the lien created by the registration of the plaintiffs' judgment against the lot, the subject of the contract was gone, and that M. was not a necessary or proper party to the suit, and that the order to make him a party should be discharged.

This was an application by way of appeal against an order of his Honor V. C. *Spragge*, refusing to discharge an order made in Chambers, whereby one *Malloche* was ordered to be made a party to this suit in the Master's office. The facts of the case are these:—On the 24th

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of September, 1855, *Malloche* contracted to purchase a village lot in Canton from the defendant *Gardiner;* the contract was never registered. On the 14th October, 1857, the plaintiffs registered a judgment against *Gardiner*, and thereby obtained priority over *Malloche* as to the lot in Canton. In March, 1861, the plaintiffs filed their bill against *Gardiner* to enforce their judgments against his lands, and among them the lot sold to *Malloche*, who was not made a party to the suit. A certificate *lis pendens* being registered in March, 1862, *Malloche* obtained from *Gardiner* under the contract a conveyance of the Canton lot, which he registered in September, 1862, and the plaintiffs becoming aware of it, applied under the Orders of 29th June, 1861, *ex parte* in Chambers for, and obtained, an order dated the 10th June, 1864, whereby it was ordered that *Malloche* be made a party to the suit in the Master's office as being interested in, or entitled to, the equity of redemption in part of the lands in question in the suit, and it was referred to the Master at London to make him such party. This Order was served on *Malloche*, who thereupon, on the 30th August, 1864, presented his petition to discharge it; and the following judgment was delivered thereon by

Statement.

SPRAGGE, V.C.—The bill was filed by the plaintiffs, registered judgment creditors, on the 21st March, 1861, against *Gardiner*, the judgment debtor, and others. *Malloche*, who makes the present application, contracted in 1855 to purchase from *Gardiner* certain land in the county in which the plaintiffs' judgment was afterwards registered; no conveyance was made to him till March, 1862, about a year after bill filed. By order of 10th June, 1864, *Malloche* was ordered to be made a party as interested in the equity of redemption. He was not served with notice of the application upon which that order was made, and now moves to set it aside on the ground that the judgment does not affect the land purchased by him. His counsel says correctly that it

would have been proper to make him a party when the bill was filed. This seems to me to concede the whole question, the plaintiffs' registered judgment then bound his land. What has occurred since to release it from the charge? It is said, the act abolishing the registration of judgments applies only to incumbrancers, and has been held to apply to those made parties in the Master's office after the act came into effect, but that *Malloche* is not an incumbrancer, and his being made a party afterwards cannot affect him, and therefore that he is not a proper party. Granting all the premises, I do not agree in the conclusion. 1864. Juson v. Gardiner. Judgment.

I think the bill having been filed before 18th May, 1861, the statute is out of the case as regards *Malloche;* he is in the same position as if the bill had been filed by a mortgagee who had registered his mortgage, and if a proper party when the bill was filed, he must, for all I can see, be so still. The application must be dismissed and with costs.

This judgment was appealed against to the full court.

Mr. *Blake* for *Malloche*. The defendant *Malloche* was the equitable owner of the lot in Canton when the bill in this case was filed, and should have been made a party to it to make the suit binding upon him: when this bill was filed, and on the 18th May, 1861, there was no process by which a part owner of an equity of redemption could be made a party in the Master's office, the general order authorizing this practice not being passed until the 29th June, 1861, *Malloche* therefore should have been a party to the bill originally or should have been added by amendment before the 18th May, 1861; not being a party to the suit on that day there was no suit pending against him then, for a suit is not pending against a party added by amendment till the date of the order to amend. *Calvert* on Parties,

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pp. 166, 344; *Byron* v. *Cooper*. (*a*) The lien of the plaintiffs' judgment therefore ceased on the 18th May, 1861, as against *Malloche* and as against the land of which he was the equitable owner, there being no suit pending as to him or the land on that day so as to bring the case within the 11th section of the act 24th Victoria, chapter 41. The case of *Bank of Montreal* v. *Woodcock* (*b*), is doubtful, and is not binding upon the full court. The judge who decided that case says that the point in question had been previously decided, but this previous decision, if it exists, cannot be found. Suppose a mortgagee, alleging that the defendant, the mortgagor, was entitled to the equity of redemption of, say 100 acres of land, whereas in fact he has sold 99 of them to another party, and afterwards he was to make this person a party in the Master's office as has been done here, would it be said that because there was this scintilla of a suit pending against one acre of the property, that therefore, as soon as the purchaser of the 99 acres was added, the suit would be pending as against the whole 100 acres from the date of filing the bill; and yet such is the effect of the decision in *Bank of Montreal* v. *Woodcock*. Suppose again, the suit was settled by the mortgagor paying the amount before any of the incumbrancers were made parties, the suit would then be at end, and none of the incumbrancers could carry it on for his own benefit, thus proving that the suit could not be pending as regards an incumbrancer till he is made a party. Even if the case of *Bank of Montreal* v. *Woodcock* is correct, it is different from the present one. There the party added was an incumbrancer, who, according to the universal practice of the court, could not be made a party to the bill. There is some reason therefore for presuming that if he could the plaintiff would have made him a party to the bill, and consequently in deeming him a party from the commencement of the suit, though only made in the

Argument.

(*a*) 11 Cl. & F. 119. (*b*) Ante vol. ix., p. 141.

Master's office; but here *Malloche* is not an incumbrancer, and when this bill was filed, and also on the 18th of May, 1861, could not have been made a party except to the bill, either originally or by amendment. The not making him a party was merely through the negligence of the solicitor, and there is therefore not the same reason for deeming him a party from the commencement, as in the case of an incumbrancer.

Mr. *Fitzgerald* contra. The suit must, in accordance with *Bank of Montreal* v. *Woodcock*, be considered as pending as regards *Malloche* from the date of the filing of the bill, and being pending then, the land is still bound by the judgment under the eleventh section of the act. The intention of that act was to abolish the lien upon the lands caused by the registration of judgments, save (under the eleventh section) as to those parties who should bring their rights into question before the court. The intention of the saving clause was to preserve the rights of any party who had done something in court to preserve his rights; even if the suit instituted by him were imperfectly constituted, yet, if he has brought his suit, it must be considered that the rights he had under his judgment when he filed his bill are preserved. As to the argument that payment by the mortgagor before the incumbrancers are made parties would put an end to the suit, and that therefore incumbrancers could not be considered parties from the beginning, that is answered by the consideration that where a bill is filed by a shareholder of a company on behalf of himself and all the other shareholders, if the party bringing the suit, by some act of his own, releases his interest in the suit, it would then be at an end, and none of the other shareholders could carry it on, yet it is nevertheless true that they would have been parties to the suit from the beginning, so much so that none of them could be examined as witnesses. *Burt* v. *The British National Life Association.* (*a*).

Argument.

(*a*) 5 Jur. N. S. 612.

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Mr. *Blake*, in reply.

VANKOUGHNET, C.—The plaintiffs having a registered judgment had, prior to the 18th of May, 1861, filed their bill in this court to enforce it, by sale of the lands of the defendant *Gardiner*. Prior to the registration of the judgment, a portion of the lands had been sold to one *Malloche*, under a contract in writing, which was never registered, and of which the plaintiffs had not notice till after the 18th of May, 1861, nor until *Malloche* obtained a deed conveying to him the fee in the premises sometime in the year 1862. Upon the application of the plaintiffs, *Malloche*, as interested in the equity of redemption was, under the General Orders of the court of the 29th June, 1861, made a party in the Master's office. It is contended that this was wrong on two grounds, 1st, that the plaintiffs' judgment having been registered before *Malloche's* right in the land appeared on the registry took precedence of it, and rendered the land, notwithstanding the sale to *Malloche*, subordinate to their right, and that therefore there was no necessity for joining him; and secondly, that *Malloche* could not be joined after the 18th of May, 1861, as the suit against him must have been pending on that day to enable the court to enforce a registered judgment against him. It seems to me that the one position is destructive of the other. On the 18th of May, 1861, the plaintiffs' suit was rightly constituted. They had before the court the legal estate, ignorant of any outstanding equity in *Malloche*. Their judgment being registered, took precedence of that equity of which they had had no notice. Despite it, they could have gone on and sold the lands, and the purchaser would have got a title freed from *Malloche's* equity, though he or the judgment creditor had notice of it prior to the sale, for the sale relates back to the registration, otherwise registration might in any and every case have become valueless. What then occurs to disturb this right of the plaintiffs, and to deprive them of the advantage they had thus gained? Notice merely of *Malloch's* equity, subsequently

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to the institution of the suit, could not, as *Malloche's* counsel contends, affect it, for the prior registration overrode that equity, and this court would never allow the legal right to be disturbed by any equity subsequently created or disclosed. This is a common maxim of the court applicable, I apprehend, as well to a registered judgment as to a registered title under the statute. The only right *Malloche* could have, would be a right to redeem; this would be a privilege allowed to him. Suppose the plaintiffs, knowing of his equity, had gone on and sold the land to a purchaser ignorant of it, would not that purchaser, under the registry laws, have got a perfect title to the land? and what then would *Malloche's* right have been? Would it not have been at most a personal remedy against the plaintiffs? Could he have made the plaintiffs return him the whole of the purchase money? Or, to make the case more simple, suppose *Malloche* to be the owner in equity of the whole of the land, could he have claimed more from the plaintiffs than the difference between the amount of their judgment and the purchase money of the land? or suppose before sale, the plaintiffs either knowing or ignorant of his equity, *Malloche* intervened, and asked to be introduced into the suit, would the court permit him to come in, and stop the plaintiffs' suit, (the plaintiffs having been ignorant of his equity, on the 18th of May, 1861;) or would not the greatest indulgence granted to him be to allow him to come in and redeem? Then what have the plaintiffs done now? They hear of *Malloche's* equity before the sale takes place, and they offer *Malloche* the right to redeem the land. They have the right to sell it by virtue of their prior registered judgment, notwithstanding *Malloche's* equity; but inasmuch as the most they are entitled to is the amount of the judgment, they say to *Malloche*, and say no more, "If you will pay us what is due us, we will not exercise our right of sale." The learned counsel says that this is the plaintiffs' right, and argues from it that *Malloche* is an unnecessary party. If *Malloche* disclaims, abandoning the privilege of

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redeeming, well and good; he could, but for a circumstance immediately to be adverted to, be struck out of the record. That circumstance is, that since the filing of the bill, and since the 18th of May, 1861, *Malloche* has received a conveyance in fee of the portion of the land which had been sold to him, and it is considered necessary to join him in order that he may be compelled to convey. If a sale had taken place by the sheriff under such circumstances, this would not be necessary, as the sale and the deed executed by him thereunder would have related back to the registration of the judgment, and have cut out any intermediate conveyance; and neither could a prior equity, not known at the time of the registration of the judgment, though existing before it, have been set up in this court, to affect the sheriff's deed. The plaintiffs had an equal right to proceed here as at law to secure the priority of their judgment. Will this court allow an equity to be set up here to intercept them which it would not have entertained against proceedings at law? Again I say, the defendant, *Malloche*, is merely offered a privilege which he would be at liberty to reject, and thus escape from the suit, had he not run away with a portion of the legal estate since the 18th of May, 1861. If the existence of his equitable title would not have prevented the plaintiffs from proceeding against the lands, surely his obtaining the legal title since cannot be allowed to have that effect, for if this were so then, though a plaintiff was *rectus in curia* on the 18th of May, 1861, all a judgment debtor would have to do would be, subsequent to that day, and during the progress of the suit, to sell and convey his lands bound by the registered judgment, and though it thus became necessary or proper to make such purchaser and grantee a party to the suit, either to permit him the privilege of redeeming, or to enforce against him the duty of conveying, it would be answered, "You cannot do this, because there was no suit pending against him on the 18th of May, 1861." Would not this be a gross fraud

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on the plaintiff and on the legislature if it could be permitted? and yet the same technical difficulty would exist there, as here, in adding a party to the suit after the 18th of May, 1861. Is *Malloche*, whose equity was not made known, whose contract was not registered, whose conveyance of the legal estate was not obtained prior to the 18th of May, 1861, in any better position than a purchaser subsequent to that date, the technical difficulty of proceeding against the one or the other, subsequent to the time last named, being precisely the same? The court would not allow a legal estate, acquired for the first time after the 18th of May, 1861, to stand in the plaintiff's way. With an equitable estate, the court will always deal as seemeth just, and an equitable estate, as against a legal estate or right, exists in the eye of this court for the first time when it is first known. Unless this view be adopted, the plaintiffs would be cheated by the defendant out of the benefit of the reservation in the 11th clause of the act of 1861. I think the same doctrine should be applied if the judgment debtor had been owner of an equity of redemption only in the lands. I do not consider the question of the justice of the effect of the statutes relating to registered judgments; I only speak of a legal right as affected by an outstanding equity.

Judgment.

Spragge, V.C.—Upon this application the short question appears to me to be whether, upon the acts in relation to the registration of judgments, and the act of 1861, (24 Victoria, chapter 41,) abolishing such registration, the parcel of land purchased by *Malloche* from *Gardiner* is or is not subject to the plaintiffs' judgment.

Assuming that the contract of sale from *Gardiner* to *Malloche* was an instrument capable of registration, the registration of the plaintiffs' judgment gave it priority over *Malloche's* unregistered contract. This is only by the operation of the statute 13 and 14 Victoria, chapter 63, as interpreted in *McMaster* v. *Phipps*, (*a*) which

(*a*) Ante vol. v., p. 253.

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statute enabled the judgment creditor to satisfy his judgment out of property which had ceased to be the property of his debtor, in case the purchaser from the debtor had omitted to register the conveyance, or other instrument under which he claimed, thus placing a registered judgment creditor upon the same footing as a purchaser for value without notice, a position at variance with the principle upon which *Beavan* v. *Lord Oxford* was decided, and which now, that the act is repealed, we may characterize as a most anomalous one.

Very clearly, as I think, the judgment creditor has no equity against the purchaser; the equity is all the other way. If he can bring himself within the act, and if he retains his rights after the act of 1861, we must give effect to those rights; but only because the acts repealed by that act gives them to him; not because they are supported by sound reason, or by any equity known to this or any other court. They are to be looked at as rights *stricti juris*, and to be enforced, if enforced at all, only because they are so.

Judgment.

But for the 11th section of the act of 1861, the plaintiff's judgment would, on the 18th of May, 1861, have ceased to affect the land in question. To preserve it beyond that day, it was necessary that a suit or action should, on or before that day, be pending in some court in Upper Canada, in which the judgment creditor should be a party. I agree in the definition of His Lordship the Chancellor, during the argument, that subject matter and parties are necessary constituents of a suit. It is hardly necessary to say that one party is not sufficient; and if a plaintiff bring a suit against the wrong party, one who has no interest, a mere stranger, or one who has ceased to have any beneficial interest, that does not constitute a suit pending. To put a familiar case. The statutes of limitations require actions to be brought within certain periods limited. Take an action of assumpsit, if the action were brought within six years against another

than the real debtor, it would not be an action commenced within the meaning of the act. 1864.

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To apply this test to this suit, and it will be convenient, as is done by the Chancellor, to treat it as if the land purchased by *Malloche* were the only land affected by the registration of the judgment; and this is not unfair to the plaintiffs, for *Malloche* cannot be prejudiced by the accident of the registration of the judgment having affected other lands besides the parcel in question. The test then is, was a suit, with the necessary constituents of a suit, pending on the 18th of May. A bill had been filed against a former owner of the land, one who had sold it, and had nothing in it but the bare legal estate, which he was bound to convey to the purchaser whenever he might be called upon to do so. The object of the bill was to sell the land, or to foreclose the equity of redemption; the only defendant had no interest to prevent either; he would not redeem, and he could not; and a test of this is, that if both *Gardiner* and *Malloche* had been made parties, and an inquiry had been directed as to which was entitled to redeem, the answer must have been that it was *Malloche*. The only party to this so called suit on the 18th of May was only a proper party at most as a mere formal party. The only person having any interest in the subject matter of the suit was not a party at all. Judgment.

It does not appear to me to help the plaintiffs that the individual whom they made defendant happened to have the legal estate. It is not the bare legal estate that the plaintiffs seek by their bill to affect, but the beneficial interest, and that was elsewhere. As understood in a court of equity, a suit is only really pending when there is at least some party defendant who has an interest in its subject matter. I suppose that such a suit as this, making a dry trustee a party, and that not an express trustee, is unknown in this court. It would be so much at variance with the principles upon which suits are

1864. Juson v. Gardiner. constituted in this court, that I apprehend the filing of such a bill could be looked upon only as a colorable commencement of a suit.

Nor do I think that the plaintiffs, having no notice of the sale to *Malloche*, can make any difference in his position. If they had a better equity than *Malloche* it probably would, but having no equity at all, it cannot.

Nor, as I view the question, is it material whether, in case this suit had proceeded without *Malloche* being made a party, and the land had been sold to a purchaser without notice, such purchaser could hold the land against *Malloche*, because if protected in his purchase, he would be protected upon grounds which do not at all apply to these plaintiffs.

Judgment. With regard to a sale at law, or in this court, relating back to the date of registration, so that the purchaser is not affected by *mesne* incumbrances, created by the judgment debtor; that can only be where the registration continues to bind the land down to the time of sale. Whether it did so in this case is the point to be determined. For the reasons I have given, I think the judgment had ceased to operate.

I have considered the case as if the bill had been filed in respect of the one parcel of land only which had been sold to *Malloche;* or, in other words, as if that parcel of land had been the only land of *Gardiner* in the counties in which the plaintiffs' judgment had been registered. It is clear, I think, from the case of *Byron* v. *Cooper*, that as against *Malloche* the suit was pending as against him, only from the date of his being made a party to it.

I think that after the 18th of May, 1861, the plaintiffs' judgment ceased to bind the parcel of land in question; and therefore that *Malloche* was not properly made a party.

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MOWAT, V.C.—I concur in the opinion formed by my brother *Spragge* on the re-hearing of the Order. The facts are these: the petitioner *Malloche*, on the 24th September, 1855, bought a village lot from the defendant *Gardiner* for $25, payable in work, and got *Gardiner's* bond for a deed, but did not register the bond. Shortly after his purchase, *Malloche* went into possession of the lot, erected buildings upon it, and otherwise improved it. There is no contradictory evidence as to these points, and the plaintiffs have not asked any further opportunity of controverting them. Two years after *Malloche's* purchase, viz., on the 14th October, 1857, the plaintiffs registered a judgment against *Gardiner*, and thereby obtained as against *Malloche* a prior lien on the lot. In March, 1861, the plaintiffs filed their bill in this court against *Gardiner* to enforce their judgment against his property, of which the lot in question was a small part. After the usual decree had been obtained in this suit *Gardiner* conveyed the village lot to *Malloche*. The plaintiffs do not appear to have had notice of *Malloche's* equity until after the registration of this conveyance, and he was not made a party to the plaintiffs' bill. The plaintiffs are now seeking to supply this defect and insist that, having filed their bill before the time limited by the 11th section of the 24th Victoria, chapter 41, they have not lost the priority over *Malloche* which the registration of their judgment had given them.

Judgment.

I think that we are not at liberty to regard that clause as keeping alive a judgment creditor's lien against any person who was not a party to his suit at the time limited by the clause. The case in 11 Clark & Finnelly, to which we were referred, seems quite in point. I fail to perceive any satisfactory ground for distinguishing the enactment as to pending suits which came in question there, and the enactment as to pending suits which is in question here. The act which was there the subject of controversy related to tithes, and

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the clause in it that concerns us now is the third, which is in these words: "This act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action [relative to any of the matters before mentioned] now commenced." In *Thorpe* v. *Mattingby*, (*a*) the suit had been instituted within the time required by this clause, but a new defendant, one *Plowden*, had been introduced by amendment after the time limited, and he set up the statute, first by plea, and afterwards by answer. The plea had been overruled, and it was said that "Lord *Abinger* disposed of the question on the argument of the plea by holding that the tithes were the subject of the suit, and that proceedings had been instituted within sufficient time with reference to the subject of the suit." *Alderson*, B., observed, "There is only one suit, and it must be good as to all or none. The defendant *Plowden* is clearly a party to a suit instituted within the time limited by the act." This is substantially the reasoning which was addressed to us in the present case on the part of the plaintiffs; but Lord *Cottenham* dissented from this construction when the case was appealed to the Lords. *Plowden* v. *Thorpe*. (*b*) His Lordship said: "Had it been necessary to decide that question, I should have found much difficulty in concurring in an opinion that a defendant against whom no proceedings were instituted until January, 1835, could not claim the benefit of the 3rd section, because the suit to which he was made a defendant by amendment, had been commenced against others within the prescribed time." The same point again came before the House of Lords, in the cited case of *Byron* v. *Cooper*, and was decided in accordance with the intimation which had thus been given by Lord *Cottenham*. Lord *Brougham*, whose views on the case were concurred in by the other law lords, said that "Each defendant is to be considered as sued by the proceeding which makes

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(*a*) 2 Y. & C. 438.

(*b*) 7 C. & F. 137.

him a defendant; and the date of his being added is the date of the suit's commencement *quoad* him. Consequently [his Lordship observed] the four last named and last added defendants in this case, were only sued in November, 1834, [when they were made parties to it;] and *quoad* them the bill and the suit bear the date of November, 1834. They do not fall therefore within the description of the third section of the statute. They are not defendants (to use the words of the statute) in a suit or action commenced within one year after the 16th of August, 1832, being the last day of the session in which the act passed."

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The clause in our act on which the plaintiffs reply, is in these words:—"Nothing in this act contained shall be taken, read, or construed to affect any suit or action on or before the 18th of may, 1861, pending in any court in Upper Canada, in which any judgment creditor is a party." We have seen that the Imperial Act declared that the Act should not be prejudicial to any plaintiff in any suit 'then commenced.' Our act declares that it shall not affect any suit 'then pending'; and as on the former act it was held that the exemption was confined to those who at the time specified were defendants to the suit then commenced; so on the latter I think we are bound, following this decision, to hold that the exemption is similarly confined; that the present suit *quoad Malloche* was not pending on or before the 18th of May, 1861, within the meaning of this clause; and that the plaintiffs' lien *quoad* him was destroyed by the statute.

Judgment.

The *Bank of Montreal* v. *Woodcock*, (*a*) was referred to in support of a different construction. In that case the late Vice-Chancellor *Esten* said, that "it had been decided in this court that the effect of the 11th section was to preserve the charge created by a judgment registered before

(*a*) Ante vol. ix., p. 142.

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the 18th May, 1861, the owner of which would be a proper party to a suit which was pending on that day." The decision alluded to cannot be found. But the learned Vice-Chancellor appears to have been himself of opinion that in view of the whole act, judgment creditors who were not parties to a suit at the time specified, are notwithstanding entitled to the benefit of the 11th section against the persons who at the time named were parties to the suit; but the present is not that case. The question before us is, not as to preserving the lien of an unnamed judgment creditor, whether on the principle of one judgment creditor representing all judgment creditors, or on any other principle on which the opinion expressed may have been founded, On the contrary, the question before us relates to judgment creditors who were themselves the plaintiffs in the suit that was pending at the specified date; and their object is to preserve their lien against persons who were not parties to the suit then, and whom there was no attempt for two years afterwards to make parties to it. In view of the cases in the House of Lords, I think we cannot yield to this claim, in deference to anything which was said, or to anything which was done, in the *Bank of Montreal* v. *Woodcock*. Nor have I been able to concur in the reasoning which has convinced his Lordship the Chancellor, that we may hold, or ought to hold, that the want of actual notice by the plaintiffs of *Malloche's* interest until after the specified date, enables them to claim the benefit of the 11th section.

Judgment.

DOUGLAS v. WARD. 1864.

Fraudulent judgment—Father and son—Practice—Examination of co-defendants

In a suit to set aside a judgment obtained by a son against his father, as being fraudulent against creditors, it was alleged by both that after the son had attained 21 years of age he had remained working with his father, as his farmer and overseer, the father promising to pay him what was just and right, but no sum as wages was ever named. This alleged agreement continued for about eight years, the son in the meantime having married and brought his wife home to reside in his father's house, both of them being clothed and maintained by the father. The father having become embarrased by reason of his being liable as indorser on notes of his brother, on some of which actions had been commenced against him, came to a settlement of accounts with the son, he demanding, and the father agreeing to give $15 a month to the son, and $5 a month to the son's wife, during her residence in the house, as wages. For the amount so agreed upon, the father gave his promissory note to the son, payable on demand, which note was immediately put in suit, and the action not being defended, judgment and execution therein were obtained before the plaintiff could recover judgment in her action which was defended. About the same time the father conveyed his farm to the son for $1,300, alleged to have been paid by the father of the son's wife, the property at the time being subject to several mortgages, one of them for $2,000 having been given by the father in payment of a small lot of land near Sarnia, but which neither the father nor son had ever seen.

The court [*Spragge*, V.C., dissenting,] under the circumstances, declared the judgment and execution fraudulent and void as against the plaintiff, and ordered the defendants to pay the costs of the suit.

Where the plaintiff examines several defendants before answer, the examination of the one cannot be read against the other defendants at the hearing of the cause.

Statement.

The bill in this case was filed by *Janet Douglass*, executrix of *William Douglass*, against *Abraham Ward*, *Joseph Ward*, *William Tyrrell*, and the sheriff of York and Peel, but it appearing at the hearing that, as against *Tyrrell*, who had not been served, the bill was premature, there being no execution against lands yet sued out, the plaintiff elected to dismiss as against him, with costs.

The facts upon which the bill was founded appear sufficiently in the evidence of the two principal defendants, *Abraham* and *Joseph Ward*, which it has been thought advisable to set out a length, with a view to a clear understanding of the circumstances.

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The defendant *Joseph Ward* swore. "I and my son lived together and still live together on the same farm; I am now only there occasionally: I and my wife live among our children, we have no regular home: the place *Abraham* has used to be our homestead: after the sheriff levied and sold under *Abraham's* execution I had no personalty left; the sale was in 1863; the sheriff seized at two different times; after I conveyed to my son, I had no property left except the land near Sarnia: I never saw the land: it is paid for: the price was between £521 and £550. In the spring of 1863, and the previous winter, I was in difficulties: I had not the means to meet all my liabilities: the debt the plaintiff sued upon was incurred as surety for my brother; I always thought myself free from it: when I was sued I thought I had a good reason for resisting judgment: I did not, to my knowledge, say I would never pay it; but I said I was not bound to pay it, that I was absolved from it: I was sued by the plaintiff in January, 1863: I think I did not put my property out of my hands in in order to defeat my creditors: before I conveyed to my son he had urged me for a settlement. His father-in-law paid me $1,300 in cash: I applied part of it in payment of pressing demands—more than $400 of it I think—and the rest I expended in the support of my family and myself: I have not followed any occupation since, and my health is not good. The agreement between my son and myself as to wages was made soon after he became of age; he asked for wages: I was in poor health at the time: I told him I could not do without him, and so wished him to remain: no sum was named as wages; I was to pay him what was just and right. He often asked me for money, but I begged off: I was hard up for money, as he knew: he never got any money from me: I thought I should be able to pay him in the year that I gave the note, but the crops turned out badly, and he saw I could not pay him, and he pressed me for a settlement, and for a note: he was married about three years before that: I gave him no money upon that occasion: he never kept my moneys in his hands: I furnished him with a trifle of money when he got married: it was by way of gift, not on account of debt. I have been in ill health for twenty years back. I used to keep two and three hired men; my son was overseer, and did the marketing under my directions: he always paid me the proceeds of what he

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sold at market: I paid the men and managed my own business of that sort. I did not go with Mr. *Tyrrell* to Mr. *Bull's* office: it is a mistake if so stated in my former examination. I was annoyed when my son sued the note: I had never been sued before; I did not think my son would have sued me: I would not have given the note if I had thought he would: I was surprised and grieved: I was not advised by any one to give the deed to my son: it was a bargain between him and me. I do not recollect Mr. *William Gamble* advising me to make an assignment for the benefit of my creditors. After my son sued me I reasoned with him about it: I expressed myself as displeased: we were angry with one another; he would not mind what I said. I got into a passion with him when he asked me for the note: he said he had often asked for money, and hoped at any rate to get some money by that time: he showed me what wages others had got: I thought he asked too much, but he said others got as much, and we settled upon the amount. I am a magistrate: I qualify upon the Sarnia property. There were mortgages upon my properties. *In Explanation:*—There were several mortgages upon my lands, amounting in all to about £1,750: three of them bore ten per cent. interest. In saying I was never sued before my son sued me, I except the suit of *Mathers* v. *McLean.*" Statement.

The defendant *Abraham Ward* swore. "I heard my father give his evidence: it is all correct so far as I know: I was living in the same house with him when he was served with a writ at my suit: we had some talk about it shortly afterwards—I had forgotten: I did not recollect it when I was examined before: I now recollect that he was rather angry about my suing him: he seemed angry; we did not go together to any lawyer's office until after I had sued the note: we went to Mr. *Bull's* office after I sued the note, but it was not about the note: I gave the note to Mr. *Tyrrell* to put it in suit: he was to do so at once. He and I agreed upon the amount of wages in the winter of 1862-3, a short time before the note was given: we had talked before, but did not then fix the amount: $15 a-month was talked of then: I believe no one else was present: we fixed the amount finally on the evening the note was given. Nothing was said about my suing him or about other creditors. I knew that

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Mathers and *McLean* had sued him; I did not know of the plaintiff suing him: I knew that he had indorsed for his brother, but I thought he was absolved from liability by the law. I had not heard that he had paid the debt: I did not know, when I got the note, of his being pressed by any one but *Mathers* and *McLean*; I sued the note because I thought he had put me off long enough: I had worked a long time and had got nothing, and I sued in order to get my right, and because, from the appearance of things, others might levy on the property before me. There was no arrangement or understanding of any sort that he should not defend my suit: I did not think he would defend it, for I could not see what defence he could make: there were no books of account kept between my father and myself when I was in his employ. I have brothers: I am the oldest: we lived together in the house: I paid over to my father what moneys I received for him: I kept no money beyond a trifle, a shilling or so: my father carried on no business except the homestead farm. It was always understood that my father was to pay me in money: he was to pay me whenever I might think proper to make a start for myself. I think the money was borrowed from the College Council to buy the 100 acres of the homestead: it contains 200 acres. I engaged in no business for myself. I heard my father say that he was free from indorsement for his brother: I do not recollect ever hearing him say that he would not pay *Mrs. Douglass*, or that she would never get a cent: I am positive I never heard him say that he would put his property in such a shape, or that he had put it in such a shape, that she should never get a cent. My father-in-law bid in the goods at the sheriff's sale.

Statement.

These defendants had previously been examined before a special examiner; their statements on that occasion varied in many material points from those made by them before the court; the more important points of difference, however, appear in the judgment.

The cause was brought on for hearing before His Honor Vice-Chancellor *Spragge*, when the bill was dismissed with costs.

The plaintiff being dissatisfied with this decree, obtained an order to re-hear the cause, which accordingly came to be heard before the full court. 1864. Douglass v. Ward.

Mr. *McMichael* and Mr. *Fitzgerald*, for the plaintiff.

Mr. *Blake* and Mr. *Bull*, for the defendant *Abraham Ward*.

Mr. *Burns*, for the defendant *Joseph Ward*.

On the opening of the case counsel for the plaintiff was about to read, as evidence in the cause, the examination of *Joseph Ward*, taken before a special examiner prior to the defendants putting in their answers; this counsel for *Abraham Ward* objected to, as not being sanctioned by the practice of the court; the most that could be done would be to permit the examination of each defendant to be read against himself. Had it been desired to make it evidence in the cause, the defendants should have been examined as witnesses at the hearing. Argument.

The court ruled that the examination of the defendants could not be used as evidence in the cause generally; but could be read only as against the defendant who had been so examined.*

VANKOUGHNET, C.—The question in this case is, whether or not a certain promissory note made by the defendant, *Joseph Ward*, in favor of the other defendant, *Abraham Ward*, his son, for $1.620, payable on

* Had the examination been after the coming in of the answer, it is submitted the same effect only could be given to it, the present practice, authorizing the *vivâ voce* examination of a defendant, being in substitution of that which formerly prevailed, requiring the defendant to make discovery in answer to interrogatories contained in the bill, and then the answer of one defendant could not be read against a co-defendant.

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demand, and dated the 30th of January, 1863, was and is *bonafidâ*, and was given, as alleged, in acknowledgment of a then pre-existing debt. The plaintiff, as a judgment creditor of *Joseph Ward*, impugns the validity of this note, and of the judgment recovered on it by *Abraham* against *Joseph Ward*. The defendants *Abraham Ward* and *Joseph Ward* were examined at the hearing of the cause, as witnesses before my brother *Spragge*, who determined that there was a good consideration for the note at the time it was given, and that the judgment founded on it should therefore stand. He believed, as I understand from him, the testimony of *Joseph Ward*, who, he states, gave his evidence in a frank straight forward manner, calculated to impress one with its truthfulness. If the testimony of *Joseph Ward* thus given stood alone, not in any way contradicted, impeached, or rendered doubtful by circumstances, or other facts or statements appearing in evidence in the case, I think that we ought not to interfere with the finding of the learned judge who heard the evidence, but should accept his report as conclusive. But if, admitting that *Joseph Ward* gave his testimony in the manner stated by the learned judge, and that there was and is nothing in it calculated to excite doubt or suspicion, we are still of opinion that it is so affected by circumstances surrounding the transaction, and by the statements of the defendant *Abraham* himself, as to render it unsafe to rely upon it, then I think we must exercise our own judgment upon the facts, and say whether, notwithstanding the apparent fairness of *Joseph's* testimony, it ought to govern. In other words, we should look at the case as if the full court had been sitting and had heard the testimony of *Joseph*, and had been equally impressed with my learned brother by his apparent truthfulness and candor, and then be called upon to say whether, notwithstanding this, we should place reliance upon it despite anything else appearing in the case. I have myself come to the conclusion that I would not have

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done so, and that on this rehearing I am bound to say so, and to find that the testimony of *Joseph* does not support a transaction impeachable on many grounds. I take the statement of the defendant *Abraham* himself on his examination before an examiner of this court within two months after the note was given to him by his father, before his answer to the bill was put in, and when all the facts were as fresh at least in his memory as they were eighteen months afterwards when he was examined at the hearing of the cause; and I find in it quite enough to shew that no presumption or implication of a debt due by his father to him would arise in respect of wages—the alleged consideration for the note. Before quoting from it, it may be as well to state, that both he and his father agree that the note was given to cover wages for eight years' service rendered by the son to the father, and three years' service rendered by the son's wife. *Abraham* says, "The note from my father to me was for wages; I had no security before I got the note. The wages were accumulating from the time I was twenty-one. I never had any memorandum from him (the father) about it; it was only a mutual understanding, (not stating when this was.) I got the note drew *so that I could recover my wages.*" In answer to a question, "Did you get the note so as to be able to sue on it?" *Abraham* says, "There was no understanding that I was to sue on it; at the time I got the note I had no intention of suing on it;" (and yet judgment was recovered on it on the 16th of February following its date:) "I do not remember how many days after getting it I put it into Mr. *Bull's* hands. My father did not hesitate in giving me the note. My father I think drew the note. The note is for $1,620, payable on demand. He did not say anything about expecting to be able to pay it on demand: there was no observation made as to the form of the note. *He offered me that kind of note.* I never thought at that time whether he was able to pay it on demand: I do not now think that he was then able to pay it on demand: I presented him with the note for payment before I sued; he said he could not

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pay it; it was at home, at the house I presented it to him: it was not on the day the note was made I presented it to him: I cannot tell how soon afterwards it was made. I was anxious to take care of my own, and it was with that view I sued it as soon as I did. When I presented the note to my father for payment and he said he could not pay it, I cannot say whether I then told him I should sue it: I gave the note to Mr. *Tyrrell*, who knew more about these things than I did: I gave it to Mr. *Tyrrell* to be collected: I have no recollection of my father suggesting my giving the note to Mr. *Tyrrell*: I will not swear that he did not do so: it was a matter of my own choice to give it to Mr. *Tyrrell:* no one suggested it: I did not tell him to put it into Mr. *Bull's* hands: Mr. *Tyrrell* afterwards told me he had put it into Mr. *Bull's* hands: I do not recollect my father having told me so: Mr. *Burns* was my father's lawyer: Mr. *Tyrrell* went where he pleased: I swear no person told me not to go to my father's lawyer. When I handed the note to Mr. *Tyrrell* he asked me what I wanted with it: I told him I wanted it collected: I gave it to Mr. *Tyrrell* in Toronto: I told my father I had done so, but I cannot say whether on the same day or not: I have no recollection of his making any remark: my object in getting the note from my father was to sue it: it was my understanding that I was to sue the note so as to get judgment before the other parties who were suing. I expect my father went to Mr. *Burns*, because most men go to lawyers when they get into trouble: I know he went to Mr. *Burns* to employ him to defend his interest. I cannot say who served my father with the writs of *Gill* and *Douglass:* I was not present when they were served: of course I felt a little uneasy about my own. I did not talk to my father about it at all. I do not know why my father did not go to Mr. *Burns* in my case: I do not know how long it takes to get judgment in case no defence is put in. I think it was about two or three weeks from the time I handed the note to Mr. *Tyrrell* before I got judgment against my father. I presented an account against my father before he gave me the note: he said it was reasonable: I think I have the copy of the account at home: it was for wages from the time I was twenty-one, and it amounted to $1,620: it was at the rate of £45 a-year, and to the time I got the note: it was for an even number of years: it was nine years: I am thirty years

Judgment.

of age; this was the first account I had ever presented to my father for wages: I drew up the account, leaving the figures blank, and then we talked it over, and £45 a-year was considered reasonable by both of us: no particular sum was agreed upon before. I have been married three years, and we have always been supported on the farm: I got money from my father whenever I needed it: I used to sell the grain off the farm: as a general thing there was no account kept between me and my father as to sales made, and so on: some times an account was kept: I just used whatever money I required for myself and my wife: no books of account were kept between me and my father: clothes for myself and for my wife were paid for out of moneys of my father. From the time I was twenty-one my father and I never had any settlement of accounts for my services. I have no lands except those in question: my father has other lands: they are in the west: somewhere in the Sarnia neighbourhood. There has always been a hired man kept on the farm: I always took my share of the work. It was not an understanding between me and my father that I was to sue the note I got from him: I believe my father would rather protect me than a stranger: I do not believe he did protect me by preferring me to others by allowing judgment to go in my case: I do not know what to believe about it: there was no defined arrangement between me and my father as to my wages: it was the understanding that he was to do what was right: there was no defined period set."

Judgment.

In explanation.—"I am the eldest son of *Joseph Ward:* I acted as a foreman under my father's control in working the farm: there was an agreement between me and my father that he would do what was right by me if I stayed with him after I came of age, and it was on the strength of this agreement I stayed with him: I think I would not have continued to work for him if it had not been for that agreement: after my father and I fixed the annual sum for my services at £45 a-year I was satisfied with it: I got the note because I wished some settlement: my father wanted money badly at the time I made the purchase: I think my father would have sold on the same terms to any one else: the $1,620 was for the services of myself since I came of age, and for the services of my wife since I was married."

Again he says, "My father and myself are on good

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terms, and always have been. I sued my father on the note. If he was displeased at it he did not express it; I think he was not displeased. I do not know who served him with the writ: I will not swear I did not. I do not know when my father was served with the writ: he never told me he was served with the writ; if he did tell me so I have no recollection of it. Since I sued my father I have only been away a few days at a time. Most of the time my father and myself are farming at home. We have had no conversation about my suit against him: he never made any request to delay the suit or otherwise: he never expressed any surprise that I should sue him. I swear I do not know who served the writ on my father: Mr. *Bull* was to go on at once, and I believe he did so." Now, upon this statement of the son, could any jury be told that there was evidence of any contract, express or implied, that the father was to pay the son wages? I think not. It

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is, on the son's statement, just one of those cases in which a child resides with a parent, living on the produce of a farm, enjoying a home, having all his wants and those of his wife supplied, taking and getting what he requires, without stint, without inquiry, without charge; content to live in plenty, and trusting to the future for any disposition of property or advancement which his father may make to him. According to the son's statement his every want was supplied; he took and used what money he required, rendering no account of it; and yet it is pretended that all this time he was under wages, which it is agreed, at the end of eight years, he is to receive in full, without any deduction whatever for the moneys, &c., he had been receiving and using for himself and his wife during all this term; although the father swears that he thought the rate of wages claimed by his son, at the time the note of the 30th of January was given, was too high, and that he objected to it on that ground. Then, too, the charge for the wife's services seems to me to cast much suspicion upon the claim, and to lead to the conclusion

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that it was trumped up at the moment. When one considers how she had lived in the family, it is, I think, a case in which the clearest evidence of contract should be furnished to support the claim. Then look at the circumstances under which the note was given. The father was sued by some, if not all of his creditors, and if not sued by all, threatened by those who had not actually sued. Desirous to avoid payment of these debts, as is evident from his own statement, his son presents to him an account in blank for wages; it is filled up at £45 a year, and £15 a year for his wife, and a note payable on demand is given, which is immediately put in suit, and a judgment by default obtained. To still further carry out his design of defeating his creditors, the father conveys his real estate, already encumbered, to his son for £1,300 in cash, although at the time, according to his account, this note was unpaid. It was not taken into account; was not spoken of at the time, according to the statement of the son, who paid this $1,300 (borrowed money) without knowing even what the incumbrances on the property were. The son was aware of these debts pressing upon his father, though he does say he cannot swear whether they were in suit or not at the time he got the note from his father. One of them must have been, the claim of *Mathers* and *McLean*, as according to the son's statement, they recovered judgment before he did. I do not think that the defendant *Abraham* can, by the testimony of his father, make out a stronger case for himself than appears by his own statement of a transaction to which he was as much a party as his father, and as fully cognizant. Then, on this occasion his counsel was present, and examined him in explanation, when he might have corrected any inaccuracies in his previous examination, and made the case as strong for himself as he properly could. The next occasion on which *Abraham* appears as deponent on his own behalf is when he swears to his answer in which occur the following paragraphs:

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"3. That I am now 29 years of age, and for the last 8 years I have worked for the said *Joseph Ward*, upon his farm, in the township of Etobicoke, as farm laborer and overseer, under an express agreement that I should be paid a fair and adequate remuneration for my said service.

"4. That said agreement was entered into between myself and the said *Joseph Ward* more than 8 years ago, and it was upon such express agreement that I continued to work for and oversee the farm of the said *Joseph Ward*.

"5. That during the said term of 8 years I frequently spoke to the said *Joseph Ward* about the amount of wages due me, at which time he always promised to pay me in full when I should require it, or wish to leave him

"6. That it was always understood between us that I should receive $15 per month for my said wages."

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This latter statement is distinct, in a distinct paragraph of the answer. It is urged that it is a mere slip—a statement introduced by the pleader, and sworn to by the defendant either thoughtlessly or ignorant of its purport. I should be very reluctant to hold a defendant to any mere statement of construction which might be considered the work of the pleader adopted by the defendant in ignorance of its real meaning, but here is a distinct statement of a fact to which, on his previous examination, the attention of the defendant had been called. This answer was sworn to on the 4th of May, 1863. If the pleader was not Mr. *Bull*, the solicitor and counsel of *Abraham*, who was present at his examination in March, and must have known what was then sworn to, then the counsel who drew the answer must have received instructions to make the statement referred to. No counsel would think of making a direct statement of fact without instructions, whatever license he might take in putting interpretations upon statements made to him. It is difficult to believe that the defendant did not understand this specific allegation, entirely

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at variance as it is with his previous oath, and one is the more inclined to believe that he did from his evidence at the hearing, which varies much from that given on his first examination, and which, so far as it is inconsistent with it, I entirely reject, as no reason is given or pretended why his later statement should be more correct than the one made so shortly after the transaction took place, to which both relate. As the difficulty of his position pressed upon him he seems to have become more reckless in his statements. The evidence, however, upon which the defendant *Abraham* now mainly relies is not his own, but that of his father. I have already said that I do not think he can make a better case for himself by his father testimony than by his own. *Joseph*, in his evidence at the hearing, after speaking of the claims pressing against him in the fall of 1862 and winter of 1863, and stating that he had not the means to meet all his liabilities, says, "*I think* I did not put my property out of my hands to defeat my creditors. Before I conveyed to my son *he had urged me for a settlement.* * * The agreement between my son and myself as to wages was made soon after he became of age. He asked for wages: I was in poor health at the time: I told him I could not do without him, and so urged him to remain: I was in poor health at the time: no sum was named as wages: I was to do what was just and right: he often asked me for money, but I begged off: I was hard up for money, as he knew: *he never got any money from me:* he never kept any moneys in his hands." Now, with regard to this statement, it is to be observed that the son does not allege in his first examination that he ever asked his father for wages before he presented him the account in blank on the 30th of January, nor that he ever demanded money from his father; but, on the contrary, he swears that he took and used what moneys of his father's he wanted. How are these statements reconcilable? Again *Joseph* says, "I thought I should be able to pay him in the year I gave the note, but the crops turned

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out badly: he saw I could not pay him, and he pressed me for a settlement and a note." Is this likely; that a man in *Joseph's* distressed circumstances expected to pay $1,620, for eight years accumulated wages, out of the crops of one year? Does the son say he pressed his father for a note? Again, he says his son "always paid me the proceeds of what he sold at market." Does the son say this? Although *Joseph* swears positively in his examination before Mr. *Bacon* that he went with Mr. *Tyrrell* to Mr. *Bull's* office, he swears now that this was a mistake as he did not go. Again he says, "I was annoyed when my son sued me: I had never been sued before:" (which afterwards he admits is a mistake) "I did not think my son would have sued me: I would not have given him the note if I had thought he would: I was surprised and grieved. * * After my son sued me I reasoned with him about it: I expressed myself as displeased: we were angry with one another: he would not mind what I said: I got into a passion with him when he asked me for the note: he said he had often asked for money, and hoped at any rate to get some money by that time: he shewed me what wages others had got: I thought he asked me too much, but he said others got as much, and we settled upon that amount." This evidence which I have quoted cannot be said to relate merely to collateral matters. It is important in two of the essentials of the case. In the first place, in regard to the terms on which the son lived with his father, whether as a member of the family, or as a servant seeking wages; and in the second place, as to the circumstances and purpose under and for which the note for the alleged wages was given. Now, not only are these statements entirely at variance with those of the son, made on the first examination, which alone, in my opinion, would be sufficient to deprive the son of any benefit from them, and to throw discredit upon them, at all events, so far as he seeks to use them, but are they consistent with truth? What object was there in giving the son this note of the 30th of January, payable on

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demand, if it was not to enable him to sue it forthwith? Why not have made the note payable at a distant day? The son swears that his father himself suggested the form of the note. Why, if *Joseph* did not wish to give the note, or did not wish to be sued upon it, did he not set it off against the purchase money of the land, or why did the son not insist upon this, if it was not understood between them that judgment and execution should be obtained against *Joseph* upon it, to sweep away all his remaining property? If, before he conveyed his real estate to his son, the latter had, as *Joseph* swears, urged him for a settlement, why did not the son insist upon so much of the money due him for wages going in discharge of the purchase money, instead of borrowing and paying his father $1,300 in cash? Can the statements of *Joseph* be believed, contrasted with the evidence of his son, and the surrounding facts? I have come to the conclusion that it cannot be relied on, however honestly and fairly it may have appeared to be given. If we are at liberty to look at *Joseph's* examination before the examiner, taken before his answer was put in, it will be found in most important particulars at variance, or at least inconsistent with his evidence in open court. Although *Abraham* ought to have the most interest in sustaining the note and judgment, one cannot fail to see that *Joseph*, who might well be indifferent, seems the most anxious of the two to make it out a *bonâ fide* transaction, a circumstance not unimportant, considering the nature of his testimony, Indeed it is evident that he intended and expects advantage to himself from the arrangements with his son. Can he then be considered as speaking without bias? As to the pretence that the defendant *Joseph* has a piece of land near Port Sarnia, which his creditors can get at, the only explanation we have as to it is that given in his examination before the examiner, in which he states that it is a farm lot of thirty or forty acres, which he purchased from Mr. *Tyrrell* for £500. with which sum he incumbered the property he sold to his son. Whether a farm lot of

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thirty or forty acres in the township of Sarnia is worth £500 does not appear, and but for the examination of the defendant, it is very probable his creditors would never have known of its existence.

Upon the whole, I think the note should be declared as given without consideration, and that the judgment founded on it is fraudulent, and void as against the creditors of *Joseph Ward*, and that the defendants should be ordered to pay so much of the costs of the suit as relates to it.

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Spragge, V.C.—Since the argument on re-hearing I have carefully gone over the depositions of the defendants before the examiner, their answers, and their evidence, and that of other witnesses in court, and the result, I must confess, has been to shake somewhat my faith in the truthfulness of the account given by the defendants of what passed between them upon the son coming of age; and I hardly need say that my doubts have been increased by the view of the case taken by his Lordship the Chancellor and my brother *Mowat*.

What weighed with me at the hearing was, that such an arrangement was highly probable under the circumstances; and it was sworn to by two men whom I was unwilling to believe capable of the fabrication of a deliberate falsehood upon oath.

It is put by counsel for the plaintiffs, that the evidence, especially of the son, amounts to no more than this, that the father promised only generally, to do what was right by his son, and that there was no agreement for wages. I do not so read the evidence. If true, it proves an agreement for wages, the amount to be settled at some future time. I think such an arrangement probable. I have often said that such a claim set up by a son should be jealously scrutinized by the court.

A son frequently remains with his father assisting him upon his farm upon the faith of his compensating him in some other way than by the payment of wages. Such was often the case in regard to the eldest son before the abolition of the law of primogeniture. In such cases it would be a surprise by one upon the other if, on the one hand, a claim were made for wages, or, on the other, for maintenance and clothing; and such claims when made have been discountenanced by the courts.

But the circumstances of this father and son were widely different. The father was embarrassed and in ill health: his farm was heavily mortgaged. The son was his own master, and in a position to earn wages elsewhere. If, upon the son coming of age, anything passed between him and his father as to his remaining and working the farm, it would almost certainly be that he should receive wages. That the son should remain as an expectant upon his father's bounty, the son being, as he was, one of five children, would be mere fatuity. The only other alternative is that the son, after coming of age, determined upon staying with his father without compensation, or hope of compensation, in any shape, and that they so agreed. This also may be discarded as most improbable.

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I think, therefore, that what both father and son concur in swearing took place, did in all probability take place; the circumstances are all in its favor. The question is, whether, because of certain discrepancies in their statements, we are to discredit them. I do not attach much weight to the circumstance of no wages having been paid during the whole period; for it is easy to understand that the father, having pressing occasion for all the money earned by the farm, would be likely to defer his son's claim to those of others, from time to time, until the pressure of other claims compelled him to make a choice. But the discrepancies are certainly

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serious: there are some that it is difficult, some that it seems impossible, to reconcile. I should not, however, from my experience upon circuit, set down a witness as unworthy of belief because, upon giving his *vivâ voce* testimony, he stated facts differently from what he had stated them in answer or by affidavit. This arises from carelessness, very censurable carelessness certainly, but still from carelessness in not seeing that the deponent's meaning was accurately expressed in the written document. Still, after making allowance for this, it is not to be denied that there are discrepancies and inconsistencies between the different statements of the same party, and between the statements of the two parties in relation to the same transaction, which shakes one's confidence in their truthfulness. The evidence of the father at the hearing impressed me favorably—more favorably than that of the son. I thought he told the truth in regard to what passed upon his son's coming of age. The other members of the court, assuming that his demeanor was in his favor, that to all appearance he was candid and truthful, still think that his evidence and that of his son outweighed by circumstances to which they attach great weight; that there is much to discredit them, and that the proper conclusion upon the whole evidence is, that there was no such agreement for service and wages as is set up. It may be that they are right. The inclination of my opinion is still the other way, and I cannot concur in reversing the decree.

Judgment.

MOWAT, V.C.—The plaintiff on the 16th of March, 1863, recovered judgment against the defendant *Joseph Ward*, for £299, 11s. 2d., damages, and £13 4s. costs, and placed a writ of execution against his goods in the sheriff's hands; and the object of this suit is to set aside a prior judgment and execution against *Joseph* in favor of his son, the defendant *Abraham*, as being a fraud against *Joseph's* creditors. The defendants deny the fraud, assert the good faith of the transactions

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which have taken place between the father and son, and say (amongst other things) that when *Abraham* came of age he remained with his father, (a farmer,) and worked for him under a verbal agreement that he should receive wages for his services; that when the son married he took his wife to his father's house; that his father agreed to pay for her services also; that the father in this way became indebted to the son for eight years' services of himself, and three years' services of his wife; that on the 30th of January, 1863, they came to a settlement, and the amount then due the son, as admitted by the father, was $1,620; that for this sum the father gave the son a note, payable on demand; and that the son brought an action on this note, and recovered the judgment which is now in question.

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It is well settled that proof of services rendered by relatives to one another, living under the same roof, does not in law imply a contract that such services shall be paid for. The law, in the absence of evidence either way, presumes the contrary, *Davies* v. *Davies*, (*a*) and the courts in this country have justly viewed with special disfavor claims for services made against a father's estate by children living with him as members of his family. It has been considered that to encourage such actions would have a most dangerous tendency, especially in reference to the rights of *bonâ fide* creditors, and it is a settled rule that no such action will lie without an express contract between the father and child that the latter "shall serve for wages, as any other hired person would do." *Sprague* v. *Nickerson*. (*b*) I may add that if public policy demands that an express contract shall in such cases be shewn, so also with equal distinctness it must require that the evidence of such express contract shall be clear, disinterested, and free from reasonable suspicion.

(*a*) 9 C. & P. 87.

(*b*) 1 U. C. Q. B. 284

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Then what evidence is there of an express contract in the present case? The defendants have given no evidence of it by witnesses called by themselves; but the plaintiff has read the son's examination before the examiner shortly after the filing of the bill, and the depositions of the father and the son at the hearing; and these contain what evidence there is of an express agreement. The plaintiff also wished to read against both defendants the examination of the father before the examiner, but this was objected to on behalf of the son, and I have therefore considered the case without reference to that examination.

What the son said on the subject before the examiner in answer to questions by the plaintiff's solicitor, was this: "There was no definite arrangement between me and my father as to my wages: it was the understanding that he was to do what was right: there was no definite period set." In answer to a question by his own solicitor, he added the following explanation: "There was an agreement between me and my father that he would do what was right by me if I stayed with him after I came of age."

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The father's account of the matter at the hearing was this: "The agreement between myself and son as to wages was made soon after he became of age: he asked for wages: I was in poor health at the time: I told him I could not do without him, and so wished him to remain: no sum was named as wages: I was to pay him what was just and right."

Now I think this evidence is insufficient to establish an express contract such as the law requires, for several reasons.

I think it insufficient, because it is the unsupported testimony of the very parties interested in establishing an express contract. The father is interested as well as

the son, for it is plain from the evidence that the transaction, if sustained as against his creditors, secures a home for the father; and if the transaction is not sustained he must begin the world anew. If there can be any cases in which it would be safe or proper to accept the unsupported evidence of persons so situated, as sufficient of itself to establish an express contract of hiring between father and son, I think that such cases must be extremely rare, and that the present case is not one of them.

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I further think the evidence insufficient, because at best it gives only the present recollection of the parties as to a conversation which occurred eight or nine years ago, and the exact terms of which it is essential for us to know, in order to form a satisfactory judgment upon it for the purpose for which it is offered. A very slight change in the language employed would deprive the conversation of all appearance of a contract.

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I also think the evidence insufficient, because in some most important particulars of the alleged agreement the evidence does not support the answer of the son. His answer states the agreement to have been "that [he] should be paid a fair and adequate remuneration for [his] said services;" and further states, "that it was always understood between [them] that [he] should receive $15 per month for his said services;" "and that his board and clothes were to be independent of his wages." It was on the basis thus set forth, namely, of $15 a month, over and above board and clothes, that the alleged settlement took place; and there is not one word to support the allegations of the answer in regard to either point; and on the contrary both defendants, in their evidence, distinctly admit that no sum whatever was named until the time of the settlement. There is a like absence of any evidence as to the alleged agreement that the board and clothing should be in addition to

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the wages, and also as to the alleged agreement to pay the wife wages.

I think the evidence also insufficient, because a definite agreement must be established in order to maintain a claim like that in question; and the son expressly declared, in his examination before the examiner, that "there was no defined agreement between him and his father as to his wages." What passed between them he calls in one place an understanding, and in another an agreement; but, whether he designates it as an understanding or an agreement, all that in either case it amounted to, according to his own evidence, was, "that his father was to do what was right;" "that his father would do what was right by him if he stayed with him after he came of age." I think we cannot assume the alleged agreement to have been more definite in its character or terms, or more favorable to the son, than the son in his evidence thus states it to have been. What he there tells us of it fairly implies, I think, that the amount and mode of the compensation were meant to be entirely at the will and according to the judgment of the father. It would naturally depend upon his father's means from time to time; and consistently with all that we are told took place, he might have contemplated making the compensation in money or in land, and either in his lifetime or by his will. The son might not unnaturally be on the whole content with such an understanding; sons have often remained long under the parental roof with no other understanding. The son here may even have thought it best for his own interest to remain and unite his exertions with those of his father and family for their common benefit. A father's prosperity is to the advantage of his children; the more he acquires, the more he can give them; and they are sufferers by his adversity, as well as he is himself. But whatever, in the present instance, the son's motives may have been, whether they

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are to be found in filial affection or in his opinion at the time of what was for his interest, I think, looking at the whole of the evidence, that he was satisfied to trust entirely to his father's discretion and future means as to what should be right between them if he remained. I think there was no contract between them, and no idea on the part of either that they had made a contract which the son was to have the power of suing upon, if the father should fail to fulfil it.

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I think this view is entirely confirmed by the subsequent acts of the parties. It is admitted that for eight years the alleged agreement was allowed to lie dormant. No memorandum was made of it during all this time. It is part of the son's own testimony, notwithstanding, that he got money from his father whenever he needed it; that of the proceeds of sales made from time to time of farm produce he used what money he required for himself and his wife; that he and his wife got their board from his father; and that they got their clothing from him also, or paid for it with his money. But no charge was made for anything by the father against the son; and no credit was given by the son to the father. In fact, no account whatever was kept between them. No entry was made between them by either in any book; and no account was prepared until the father had become insolvent and his creditors were expected to take all his property. And now to account in part for all this, the story is, that the board and clothes of both the son and his wife were to be in addition to their wages, instead of both or either being in lieu of wages or being a set-off against their wages; and that any money the son got from the father during his eight years' service was by way of gift. The circumstances appear to me to indicate very strongly that the son was not working on the terms of an ordinary hired servant, as the defendants say he was.

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I further think the evidence insufficient to sustain

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the defence, because, while the defendants admit now that no sum was named for the son's wages until eight years' service had been completed, there is no evidence whatever, not even in the examinations of the defendants, that the sum allowed was a fair and reasonable sum to allow for the services performed. Two things were surely necessary for the defendants to establish: first, that there was an express contract that the son should be paid (to use the words of the answer) "a fair and adequate remuneration for his services;" and secondly, that the sum allowed was a fair and adequate remuneration. The second point is quite as important as the first; and as, confessedly, we cannot assume without distinct proof that there was an express contract, so neither do I see on what principle we can assume without evidence that $5 a-month, in addition to board, clothing, and personal expenses, is a fair allowance for a female servant; or that $15 a-month, in addition to board, clothing and personal expenses, is a fair allowance for a farm labourer, who, we are told, was also overseer when other farm servants were employed, and who "did the marketing" under his father's directions. Considering the relationship of the parties and the circumstances of the case, I am clear that the onus of proof in regard to both the points referred to was on the defendants.

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But when the transaction of the 30th January, 1863 is considered in connection with the other transactions of the same period between the father and the son, the difficulty of sustaining it is immensely increased. The contention of the plaintiff is, that all these transactions formed so many parts of a scheme between the father and son for defrauding the father's creditors: placing his property beyond the reach of the creditors and at the same time interfering as little as possible with the father's enjoyment of it. The evidence appears to me to go far towards supporting this contention. At the date referred to the father was confessedly

insolvent, and his creditors were pressing on him and were expected almost immediately to sweep away all his property. He had for some time been "hard up" for money, but by the winter of 1862-3 his difficulties had increased beyond redemption. The son was aware of all this. In January, 1863, a number of persons brought actions against the father, and their claims amounted to a considerable sum. Certainly one and probably all of these actions were brought before the alleged settlement between the father and son took place; and the son knew of them when they were brought; his father told him of them. An account is said to have been made out on which the settlement took place; but when this so called account is produced it is found not to be drawn out in the usual way accounts are drawn out before a settlement, but to commence with declaring that the settlement had already taken place.

This so called account was for precisely eight years' wages of the son, and precisely three years' wages of the wife; there was no fraction of a year in either case; and the account does not even name the date from or to which these wages were charged. No credit is given, and it appears from the evidence that none was asked, for any payment or set-off whatever. The father drew the note which was given for the amount, and it was his own unsolicited act to make it payable on demand, though he knew he could not possibly pay it. The son's object in getting the note, as he himself admits, was to secure it so as to get judgment before the other parties that were suing, an object perfectly legitimate if the debt was due and the transaction *bonâ fide*. Immediately after getting the note he delivered it to a friend to put it in suit for him, because, as he states, from the appearance of things he feared others might levy on his father's property before him. The father put in an appearance to all the suits except the son's; no appearance was filed in the son's suit; a

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judgment was therefore obtained therein on the 19th October (1863); and an execution upon it was put into the sheriff's hands before any other creditor got execution, except one firm who appear to have commenced their suit in the previous autumn. Under these circumstances, all the father's goods and chattels were seized and were bid in at the sale by *Abraham's* father-in-law. They yielded an amount far below the amount of the son's execution. While these goods were under seizure the father, notwithstanding his confessed difficulties and hopeless insolvency, bought from a friend a lot of land in the west, which, eighteen months afterwards, he acknowledged that even then he had never seen, gave a mortgage for the purchase money (over £500,) not upon the lot bought but upon the homestead which was already heavily mortgaged, and thereby reduced by £500 the value or apparent value of his interest in the homestead. On the very next day he conveyed the homestead, subject to the mortgages, to the son, not in satisfaction of the debt said to be due the son at the time, but for $1,300 cash. Indeed the supposed debt, as we are frankly told, was not once alluded to by either party throughout this transaction; and yet according to the son's evidence, and though he was living at the time in the same house with his father, and though the bargain was made between them there, the father did not tell, and the son did not know, what the father wanted the money for or why he wanted to sell the property. The $1,300 was borrowed, we are told, by the son from his father-in-law, who shortly afterwards bought in the goods at the sheriff's sale. I think it clear, from the dates and the evidence, that the loan was arranged before the purchase of the Sarnia lot was made, and in contemplation of it, though I assume that, so far as the vendor of the Sarnia lot is concerned, the sale by him was perfectly valid and binding. Three weeks after so borrowing the money the son had forgotten whether he had given a note for it or not. The son, we are told, agreed to pay the mortgages on the property, and they

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amounted to £1,750; but three weeks afterwards he had forgotten and could not tell within £500 the amount of them; said they amounted to £1,250 or more; and could not tell whether this was near the mark or not. Of the $1,300, the father says he applied $400 or more in paying pressing demands, the particulars of which we hear nothing of; and the remainder, not to pay his debts, but to the support of himself and his family. After all these transactions no difference, so far as we are informed, is to be seen at the farm. The father and his family, the son and the son's wife, lived together there previously; they continued to live there afterwards; and they live there still, or did so when this cause was heard. There was no change in their abode, and none that we hear of in their mode of living. No change, as the son admits, was contemplated when he agreed to become the owner or nominal owner; and none has hitherto taken place, nor is any now in contemplation.

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The examples I have given of alleged forgetfulness on the part of the son, I think there is no accounting for, if the transaction in question were *bonâ fide*; but they are quite intelligible if the alleged debt and purchase were mere pretences contrived by others, whose scheme the son was merely the passive though willing instrument of carrying out.

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The facts connected with the son's purchase of the homestead may receive further development in case the plaintiff, after she issues her execution against lands, should be advised to take proceedings to set that transaction aside; but taking together all the facts of the case as they appear to us now, on the evidence of the father and the son, in reference well as to the son's purchase of the homestead as to the debt said to be due by the father to the son, I think that if there consists with these facts, a possibility of honesty, it is such a possibility as a court cannot judicially act upon. Fraud, to give it a chance of success, must assume some

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appearance of fair dealing; and there seems to me no more of that appearance in the transactions of these defendants than must be expected in every case of attempted fraud.

There are many other things in the son's statements which seem to me utterly to destroy the value of his testimony on any disputed point, if the facts already adverted to need any addition for this purpose. Thus he says in his answer, "It was always understood between us, that I should receive $15 per month for my said services." But so far is this statement from being true, that both the father and the son in their subsequent examinations have admitted that no rate was agreed to before the settlement which is now in question; and the so-called account is stated to have been for this reason rendered in blank as to the rates.

Judgment.

Again, the period named in this so-called account for the son's services is eight years, and the same period is named in the son's answer; but so little impression had the important fact of the period he had charged and been allowed for made on his mind, that in his examination, three weeks afterwards, the period he swears to is nine years instead of eight, making a difference of one whole year.

Then again, in one part of his examination he said, "At the time I got the note I had no intention of suing it;" but after other matters had been talked of, that point was again pressed upon him, when he admitted: "My object in getting the note from my father was to sue it. It was my understanding that I was to sue the note so as to get judgment before the other parties who were suing."

In his examination three weeks after the settlement, speaking of having sued his father, he said: "If he was displeased at it he did not express it. I think he

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was not displeased. * * I do not know when my father was served with the writ. He never told me he was served with the writ. * * We have had no conversation about my suit against him. He never made any request to delay the suit or otherwise. He never expressed any surprise that I should sue him. * * My father did not hesitate in giving me the note." As to putting the note in suit, he said: "I told my father I had done so. * * I have no recollection of his making any remark." But the father, in his evidence before the court, gave a very different version of these matters. He said, "I was annoyed when my son sued the note; * * I was surprised and grieved. * * After my son sued me I reasoned with him about it; I expressed myself as displeased; we were angry with one another. * * He would not mind what I said. I got into a passion with him." The son was then put into the box, and contradicted his own account given when the transaction was recent. He said, "I heard my father give his evidence. It is all correct, so far as I know; I was living in the house with him when he was served with the writ at my suit. We had some talk about it shortly afterwards. I had forgotten—I did not recollect it when I was examined before I now recollect that he was rather angry about my suing him; he seemed angry." Is it possible that the son recollected a fact of this kind eighteen months after it occurred, which three weeks after its occurrence he had no recollection of, and even swore that it had not occurred? Is it possible to exclude from one's mind the conviction that father and son thought at the hearing that there would be less appearance of collusion if the father was said to have been angry at the son's proceedings; and that it is to this we owe the flat contradiction between the son's sworn statements on the two occasions?

Judgment.

I believe that the impression my brother *Spragge* formed of the son from his manner in giving evidence, was unfavorable to him. But in regard to the father

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the reverse was the case. The father's manner was like that of an honest witness; but though a truthful or an untruthful manner is an aid, and often a valuable aid, in judging of the credibility of a witness, it is certainly no infallible test of it. Falsehood is often able to clothe itself in the garb of truth; and I must say that I think the disputed facts here are of such a character that, under the acknowledged circumstances of the case, they ought not to be held established by the unsupported evidence of any witness so mixed up with all that is suspicious about the transactions in controversy as *Joseph Ward* was, no matter who such witness may be, or how plausible may be his tone, language, and demeanor in giving his testimony. I think also that even *Joseph's* deposition, when carefully considered, is open to much observation.

Judgment.

On the whole case, my opinion is that the judgment and execution of the defendant *Abraham* should be declared fraudulent and void as against the plaintiff; that the plaintiff is entitled to the money levied under *Abraham's* execution; that *Abraham* and *Joseph* should pay the plaintiff's costs; that the sheriff should have his costs from the plaintiff, and that they should be repaid to her by the defendants *Abraham* and *Joseph Ward*.

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MOORE v. RIDDELL.

Mortgage—Partnership debt—Separate security by one partner—Application of payments.

One partner of a firm gave as security for half of the partnership indebtedness a mortgage on his separate real estate, the other partner gave an indorsed note for the remaining portion of the debt; subsequently payments were made to the creditor on account of the joint debt, which he credited on the note, claiming to hold the mortgage for the entire balance.

Held, that an assignee of the mortgagor was entitled to have one-half of all sums which had been paid out of the partnership assets on account of the debt credited on the mortgage security.

This was a suit to foreclose a mortgage executed by the defendant *Andrew Riddell*, for the sum of $1000, in favor of the plaintiff; a decree was made referring it to the Master to take the usual accounts between the parties, when the Master found the sum of $568 principal, together with interest and costs due to the plaintiff, and reported the same accordingly; such sum of $568 being the amount of principal money remaining due by the partnership firm of *Monaghan* and *Riddell* to the plaintiff, in respect of their dealings with him as a merchant. Statement.

From this report the defendant *Riddell* appealed on the grounds stated in the judgment, which appeal was dismissed, and the order dismissing the same was set down by *Riddell* to be re-heard before the full court.

Mr. *Blake* and Mr. *Wells* for the appellant.

Mr. *C. S. Patterson* and Mr. *J. C. Hamilton* for the plaintiff.

Reed v. *Bordman*, (*a*) *Cummings* v. *Glassup*, (*b*)

(*a*) 20 Pick. 441.

(*b*) 1 U. C. Q. B. 364.

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Young v. *English*, (*a*) *Haywood* v. *Lomax*, (*b*) *Chase* v. *Box*, (*c*) *Perris* v. *Roberts*, (*d*) *Lindley* on Partnership, 350, were amongst other authorities referred to.

VANKOUGHNET, C.—On the hearing before me of the appeal against the Master's report, the only question argued was one of fact upon the evidence, and that was as to whether the agreement alleged to have been made by plaintiff to apply the moneys received from the firm of *Monaghan & Riddell*, on the mortgage given by *Andrew Riddell*, one of the partners, charging certain real estate with one-half of the debt due by the firm to the plaintiff, had been made out, and I decided in the negative and dismissed the appeal. I inquired of the learned counsel who argued the appeal, if in the absence of agreement the plaintiff would not have a right to hold the security and the other surety severally for any balance that might be due, and I understood him to express the opinion that he might do so. On the rehearing, however, it was contended that each surety (the mortgage representing in effect one of them) had a right to insist that the moneys received by the plaintiff should be applied ratably in the reduction of the respective amounts for which the sureties were liable, and the case of *Perris* v. *Roberts* was cited in support of the position. An examination of this and other authorities has satisfied us that the surety has this right. The Master of the Rolls, in the case of *Pearl* v. *Deacon*, seems to assume it as settled law. From the case of *Bardwell* v. *Lydall*, (*e*) the rule appears to be the same at law as here. We were yesterday furnished with a note of the case of *Coates* v. *Coates*, (*f*) which confirms this doctrine, as stated in 24 Beav. 186. The case will therefore go back to the Master for correction on this head, the mortgage to be reduced in

Judgment.

(*a*) 7 Beav. 10.
(*b*) 1 Ver. 24.
(*c*) 2 Free. 261.
(*d*) 1 Ver. 34.
(*e*) 7 Bing. 489.
(*f*) 9 L. T. N. S. 797.

amount by one-half of the moneys received by the plaintiff on account of the debt of the firm to which this mortgage had relation. We all concur in thinking that the agreement has not been proved. 1864. Moore v. Riddell.

SPRAGGE, V.C., concurs.

MOWAT, V.C.—This is a re-hearing of an order of his Lordship the Chancellor dismissing an appeal from the Master's report. The facts are these: The defendants *Andrew Riddell* and *John Monaghan* were partners in trade, and the present suit relates to a debt of $2,000 due by them to the plaintiff. For this sum the plaintiff, in December, 1859, accepted from them security, viz., a mortgage on private property of *Andrew Riddell* for $1000, and a note of the firm endorsed by one Mrs. *Reeve* for the other $1000. Her name was obtained through the instrumentality of *William Monaghan*, a brother of *John*, and who appears to have acted for *John* in the business of the firm generally. Mrs. *Reeve* understood her note to be given as a continuing security, but the evidence disproves the statement that there was a like understanding in reference to the mortgage. In November, 1860, the debt being still due, the firm gave the plaintiff, as collateral security, ten promissory notes of $100 each, made by the firm and indorsed by *Robert J. Riddell*, a brother of *Andrew*, and payable at intervals of a month. Seven of these notes and part of the eighth have been paid out of the partnership funds. The balance due on the eighth note and the whole of the two remaining notes are unpaid. In January, 1861, the defendant *Andrew Riddell* executed an ante-nuptial settlement of the property, subject to the plaintiff's mortgage; and the plaintiff, on the 13th January, 1863, filed his bill against *Andrew Riddell* and *Robert Johnson*, the trustee of the marriage settlement, claiming to hold the property for the balance of the debt due the plaintiff by the firm. Judgment.

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The defendants claim that the payments made on the notes should have been applied in discharge of the mortgage; or if not, that one-half should have been so applied. The latter point appears not to have been raised before the Chancellor.

The ground of the defendants' contention is that, as they say, it was distinctly agreed with the plaintiff when the mortgage was given, that the first payments the firm should make should be applied to the satisfaction of the mortgage; that this agreement was expressly renewed when the ten notes were given; that *Andrew* had refused to give the mortgage, and that *Robert* had refused to be a party to the notes, until the plaintiff had consented to such application of the first payments; and that the sums subsequently paid on the notes, were all paid and accepted by *Moore* on the distinct understanding that they should be so applied, and in reliance by *Riddell* on the agreement that had been made for this purpose. The plaintiff denies that there ever was any such agreement or understanding. His oath and that of *Andrew Riddell* are directly at variance. The only other express evidence of the alleged agreement on either occasion is that of *Robert J. Riddell*, who narrates the conversation he had with the plaintiff before the ten notes were given. *William Monaghan*, who is evidently a most willing witness for the plaintiffs, has given evidence supporting the plaintiff's case very strongly and distinctly. The case depends on the comparative credit which, under all the circumstances of the case, is to be attached to the testimony of these two witnesses respectively.

Judgment.

The onus of proving the agreement or understanding, or a specific appropriation subsequently, rests with the defendants. The plaintiff has not to prove a negative, and cannot be charged with negligence in not having provided himself with the means of distinctly proving a negative. On the other hand, if the facts

are as the defendant *Andrew Riddell* alleges, it would have been natural and easy for him to have had the agreement put in writing when the mortgage was given, or afterwards when the notes were given. Or if he could make the appropriation as he made payments on the notes, he might have put it in his power to give now either written or other irrefragable evidence of such specific appropriation. Clear and distinct evidence is not the less necessary when it is considered that the purpose is to avoid payment of a just debt, and to give *Andrew* himself and his family the benefit of holding his property free from the debt. But instead of such evidence, all we have is the contradicted testimony of a single witness, who is a near relative of *Andrew's*, and was closely connected with him in business. An attentive examination of the whole evidence, in connection with the observations made upon it by counsel on both sides, satisfies me that the utmost either party could reasonably hope to make out from it, would be that there is a slight probability that the truth is on the one side rather than on the other. But first the Master, and afterwards his Lordship the Chancellor, came to the conclusion that the weight of evidence was not with the defendants but against them; and I think there is nothing in the evidence that would warrant us in reversing this conclusion and holding the defendants' case to be established. In a case like this our judgment cannot properly or safely turn on a slight probability of the truth being on the defendants' side rather than on that of the plaintiff.

Judgment.

The other point taken for the defendants on the rehearing before us, and which was not taken before the Chancellor, remains to be considered. It is said that, if the payments were not specifically appropriated, the law will appropriate them ratably between the two securities: and this view, I think, is correct. The case cited of *Perris* v. *Roberts*, seems to support it; here there were originally two debts, one secured by the

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bond of a third person, and the other a simple contract debt, for which there was no security. The debtor stated an account of both debts, and gave a bill of sale to the creditor towards satisfaction of the whole amount; and it was held by the Lord Chancellor that the money raised by the bill of sale should be applied proportionably to the two debts. I do not see any substantial difference between this case where two debts, one secured by bond and the other by the debtor's own simple contract, were subsequently blended, and the case before us, where one debt was subsequently secured, part by mortgage and part by an indorsed note. There certainly seems quite as strong reason in the latter case as in the former, for holding that all payments made generally should go to reduce the two portions of the debt ratably.

Judgment.

Pearl v. *Deacon* (*a*), which was not cited at the bar, is to the same effect. There a loan had been made by the defendants of £250 to one *Pearson*, for half of which the plaintiff had indorsed a note, and for the other half one *Castles*, who does not appear to have been a party to the suit, had indorsed another note. The defendants afterwards took a mortgage from *Pearson*, without the plaintiff's concurrence or knowledge, to secure the loan, and had realized from the property embraced in it £116, which they wished to apply to another claim they had against *Pearson*. The Master of the Rolls, after holding they had no right to do this, declared his opinion to be, that "whatever the defendants have received ought to be applied ratably in discharge of the whole debt, and that the plaintiff is only liable to pay half the balance." *Pearl* v. *Deacon* was appealed on other points, but no objection was made before the Lords Justices, to this mode of applying the payments.

The view taken in these cases of the rights and liability

(*a*) 24 B. 186.

of a surety for part of a debt, accords with that taken in the cases which his Lordship the Chancellor has brought to our attention, viz., *Bardwell* v. *Lydall* (*a*), *Raikes* v. *Todd* (*b*), *Paley* v. *Field* (*c*), and *Coates* v. *Coates*.

On the authority of these cases, I think we must hold that the payments made on account of the $2,000 debt, must be applied ratably, in discharge of the whole debt, and that as the mortgage was originally a security for but half the debt then owing, so now it is a security for but half the balance still unpaid. Mrs. *Reeve's* note is the plaintiff's security for the other half. The Master having charged the whole balance against the property, I think that, to this extent, his report must be varied.

Judgment.

EARLEY v. MCGILL.

Specific performance—Fairness of contract.

A contract to be specifically performed must be equal, fair and certain in its terms, and founded on good consideration. Where therefore a woman, under the impression that she held a life interest in two acres of land, when in reality she was entitled to the fee thereof, and also an annual allowance of £10, partly in cash and partly in produce, charged upon other lands, agreed to sell her interest in such two acres to the owner of the other lands, in consideration of his paying her the £10 all in cash, the court, under the circumstances, refused to enforce the specific performance of the agreement

The bill in this cause was filed by *Francis Earley*, of the Township of Clarke, against *Mary McGill*, widow of *John McGill*, formerly of that township, yeoman, who died in the year 1840, possessed of a farm of land, and having first made his will, as set forth in the judgment.

(*a*) 1 DeG. and J. 461. (*b*) 1 Per. & D. 138.
(*c*) 12 Ves. 435.

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Mary McGill selected two acres under the terms of the will, which were enclosed by a fence, and a house erected thereon, in which she resided until 1860, receiving from the plaintiff, who had purchased the remainder of the premises from the devisee under the will, the annual sums of £5 in cash, and £5 in produce, and the necessary fuel for her fire, as provided in the will. In May, 1860, Mrs. *McGill* expressed her desire to go to Wisconsin, to reside with her son, one *Copeland*, and requested the plaintiff to pay the whole £10 per annum in cash, as more convenient to her when absent from the Province. It was stated in evidence that neither party thought that Mrs. *McGill* had more than a life interest under the will, but that the whole £10 was treated as an annual charge upon the land.

Statement.

The plaintiff asserts that a memorandum was then drawn up in his house, and duly executed by Mrs. *McGill*, in the following words :—"In consideration of being paid my yearly portion in cash, as per will, I give up all my right and the free use and occupation to *Francis Earley*—2 acres of land and all thereon, and discharge him from the fuel, as per will, for my natural life. Signed this 29th day of May, 1860. Clarke, six concession, number 30. MARY MCGILL."

This agreement was drawn by one of the plaintiff's daughters, in the presence of two other persons, who gave evidence to the effect that the defendant signed it voluntarily. A settlement of accounts was then come to between the plaintiff and the defendant, who soon after went to Wisconsin.

In March, 1863, the defendant claimed rent for the two acres, of which the plaintiff had taken possession on her departure, and the plaintiff refusing to pay more than the £10, according to the agreement, the defendant brought an action of ejectment to recover possession of the two acres.

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The bill in this cause was then filed, praying for an injunction to restrain that action, and for specific performance of the agreement under which the plaintiff claimed to be entitled to all the right and interest of the defendant to the two acres, and to a conveyance in fee thereof on securing to her for her life the payment of the £10 annuity.

The plaintiff had been in occupation of the premises since the departure of the defendant in 1860, and had fenced and improved the same, and charged that this would also entitle him to specific performance of the agreement, even though it were not sufficiently reduced to writing to satisfy the statute.

The cause was heard and evidence taken at the fall sittings at Whitby.

Argument.

Mr. *C. S. Patterson* and Mr. *J. C. Hamilton*, for plaintiff.

Mr. *Hector Cameron* and Mr. *J. L. Galbraith*, for defendant.

SPRAGGE, V.C.—The plaintiff files his bill for the specific performance of a contract entered into, as he alleges, between himself and the defendant, in relation to a small piece of land in the township of Clarke. The defendant is devisee under the will of her late husband. The devise is in the following words: "I give and bequeath unto my beloved wife *Mary McGill*, two acres of land, being part of the south sixty acres of lot No. 30, in the sixth concession of the township of Clark, that she may choose, except where the dwelling house now stands, and ten pounds each and every year during her natural life, that is to say, five pounds in produce of the above 60 acres of land, and if she shall choose to live separate from my son *Robert McGill*, to be furnished with sufficient fuel for one fire;

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and to have a house built on the above two acres of land, fourteen feet by sixteen, and one cow, one bed and necessary covering to the same, four chairs, one table, and necessary furniture for keeping house." He devises fifty-eight acres of the same sixty to his son *Robert McGill*, in the same terms; and bequeaths to him the residue of his goods and chattels, and appoints his wife executrix. This is the whole of the will. It is dated the 18th of March, 1840, and the testator died shortly afterwards.

Shortly after his death his widow selected two acres of the south-west corner of the lot, and elected to live separately from *Robert McGill;* and accordingly a house was put up for her on the two acres, in which she lived up to the year 1860; when, as the plaintiff alleges, the agreement was made of which he seeks specific performance.

Judgment.

The plaintiff had, in the meantime, purchased from *Robert McGill*, by portions at a time, the land devised to him; and by conveyances made in 1851, the first dated the 3rd of March, thirty-three acres are conveyed as all the south part of the lot not already conveyed to the plaintiff; the second, dated the 29th of April, is of 100 acres, being the south half of the lot. In the first are the words: "Subject to a dower in his the said *Robert McGill's* father's will in favor of *Mary McGill*, widow, &c." In the second the words are: "Subject to dower to *Mary McGill*, widow, as specified in the will of the late *John McGill.*" In the bill the plaintiff puts it that he purchased from *Robert McGill* the whole of the fifty-eight acres, and all his interest in the said two acres, and he claims under his agreement with the widow to be equitably entitled to all her right in the two acres, to the free use and occupation thereof, and to a conveyance of all her right therein, upon securing to her the payment of ten pounds annually.

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The plaintiff claims under a written agreement, the authenticity of which is questioned, and failing the written agreement, upon a parol agreement partly performed. The alleged written agreement is as follows: "In consideration of being paid my yearly portion in cash as per will, I give up all my right and the free use and occupation to *Francis Earley*, two acres of land, and all thereon, and discharge him from the fuel, as per will, for my natural life-time, signed this 29th day of May, 1860. Clarke, sixth concession, No. 30." The plaintiff claims that the words, "for my natural life-time," refer only to the fuel, and he claims that if the defendant took a fee under the devise he is entitled to it. The day before the above date the plaintiff had settled with the defendant for the previous nine years, evidently as being accountable to her from the time of his last purchase from *Robert McGill*. Her annuity for that period amounted to £90, and was found in arrear to the amount of £20 5s. 10d., of which he then paid her £10 5s. 10d.

Judgment.

So far from any consideration emanating from the plaintiff for the purchase of these two acres of land, he is under this agreement made to hold it upon terms less burthensome than are imposed by the will; and the defendant, instead of receiving some valuable consideration for parting with her interest, is actually made to forego a portion of what she was entitled to, and to part with her land at the same time. The consideration put forward is, payment of five pounds, half the annuity, in cash instead of produce, which was no doubt a convenience to her, as she contemplated residing abroad, and probably for the remainder of her life; but the difference to the plaintiff between payment of that sum in produce and in cash, if any thing, could not be equal to the value of the fuel he had to furnish, and the use of the land and house which he was to have.

It was in fact a most unequal bargain, as well as a

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bargain without consideration on the part of the person seeking specific performance.

It is also open to the objection, that it was entered into either under a mistake as to the interest of the defendant, or that it was a most unconscionable bargain. The plaintiff claims the whole interest of the defendant under the will, and that interest, I am of opinion, is a fee simple. The defendant attempted no disposition of this land, although she had a son of her own with whom she proposed to live; and from what is said here and there in the evidence, I gather that she thought she had only a life estate: whether the plaintiff was of the same opinion may be questioned. If not, he left her to enter into the contract with a mistaken impression as to the nature of the estate she was parting with.

Judgment.

The contract appears to me to be wanting in consideration, in equality, in fairness, and open to the objection that it was entered into under mistake. I am satisfied that it is not a contract which this court ought specifically to execute.

I dismiss the plaintiff's bill upon the grounds that I have indicated, assuming that the agreement put in is a genuine one. Upon its genuineness I abstain from saying anything. I give the defendant the whole of her costs.

LEITCH v. LEITCH. 1864

Note given without consideration—Pleading—Demurrer.

Where the maker of a promissory note was sued thereon, and instead of raising the defence at law, that the note had been given without consideration in that, save as to part, no value had been received by the maker, pleaded that the plaintiff in the action was not the holder of the note, and a verdict was rendered against the defendant for the full amount thereof, for which execution against lands was sued out and placed in the sheriff's hands; whereupon the defendant in the action filed a bill to restrain proceedings at law. A demurrer for want of equity was allowed.

The bill in this case was filed by *John Leitch*, against *William Leitch* and *John Sharpe*, setting forth that in November, 1858, plaintiff was a creditor of defendant *Leitch*, a brother of plaintiff, in about £850, which was secured by certain transfers and mortgages of real property and chattels, at which time the defendant *Leitch* was also indebted to other parties in about £241; and that being so indebted he, with assent of the plaintiff, sold his farm, farming implements, stock and crops, which assent of plaintiff was given upon the understanding that his claim should be paid out of the proceeds of such sale, at which sale several of the creditors bid for the property sold, and amongst them the plaintiff, who bid off property and became the purchaser thereof to the amount of £1130, out of which plaintiff was to pay £200 to another creditor, and discharge his own claim against defendant *Leitch*, but owing to the default and neglect of said defendant, and the existence of such executions at law, plaintiff never obtained any of the property bid off by him, notwithstanding which, at the request of defendant *Leitch*, plaintiff was induced to give, and did give, his promissory note for £1130, defendant saying that he required such note simply as a memorandum of the amount bid off by plaintiff, at the auction sale, and the same was not to be parted with, or

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made use of for any other purpose, for which note plaintiff had never received any value whatever; notwithstanding which, defendant *Leitch* did, before the note fell due, transfer and deliver the same to defendant *Sharpe*, who, after the note became due, sued on and recovered judgment against plaintiff for the full amount thereof and interest; but which said action, plaintiff alleged, was commenced and carried on at the request of defendant *Leitch*, and that *Sharpe* had not given any consideration for the note, and that he had full notice of the manner in which defendant *Leitch* had obtained the note, and the agreement as to the same: that in the action on the note plaintiff pleaded, that *Sharpe* was not the holder thereof, and that upon the judgment obtained by *Sharpe* execution had been issued against lands of plaintiff, and the same had been duly advertised for sale. The bill also stated that *Sharpe* at times, alleged he had received the note to be held by him, to secure payment of a debt previously due to *Sharpe*, and a small sum due to one *Foulds*; which amounts plaintiff offered to pay, and prayed a delivery up of the note and an injunction to restain proceedings at law.

Statement.

To this bill the defendant *Sharpe* put in a general demurrer for want of equity.

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

Mr. *Crickmore*, contra.

VANKOUGHNET, C.—As I understand the plaintiff's contention, the bill presents his case in three aspects.

1st. That the promissory note was given without value or consideration, and on the express agreement that the payee was not to part with it or use it, and that the defendant *Sharpe*, who, as indorsee, has recovered

judgment at law for the full amount of the note against the plaintiff, the maker, gave no consideration for it. 1864. Leitch v. Leitch.

2nd. That though *Sharpe* gave consideration for the note, yet that he had notice, or good and sufficient reason to believe, or suspect, the circumstances under which the note was given, and that therefore, even though a holder for value, he ought not to recover.

3. That though *Sharpe* may have received the note without notice, yet that he took it in security for a pre-existent debt, much less than the amount of the note, and as trustee for the payee of the balance. The bill alleges that the note was indorsed over to *Sharpe* before it became due. It appears to me that if any of these statements would furnish ground of relief, they were equally available as a defence at law to the suit there upon the note. That suit must have been tried more than a year before this bill was filed, from the facts set forth in the bill. I have stated the plaintiff's alleged grounds for relief more favorably for him than he has done in his bill, for I should have coupled the second allegation with the third one, inasmuch as the bill distinctly negatives any consideration paid by *Sharpe* for the note, unless it be the pre-existing debt for which it was taken in security, and this it does not admit directly, but merely argumentatively, and as a thing that may perchance be proved. If *Sharpe* was a holder without consideration, as is the principal case made by the bill, then he could have been successfully resisted at law. If he be holder of the note only for a portion of the amount of it, and is entitled to that (which is the alternative case made by the bill) then, as to the residue, a good defence could have been made at law upon the facts alleged in the bill. If those facts be true, the case is one of great hardship upon the plaintiff; but I think it important to the termination of litigation, that parties, having defences at law, should be

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compelled to set them up there, and not be allowed, after neglecting to do so, to fly to this court with charges of fraud, which were equally cognizable by the other tribunal. It is contended that the bill can be sustained for the purpose of having the note delivered up to be cancelled. But as I have decided that I ought not to interfere with the verdict at law, I cannot make this a ground of relief. The note, I suppose, has been impounded in the court of law in the usual way, and there is no pretence of any danger to plaintiff from its getting afloat again. I allow the demurrer.

Demurrer allowed with costs, but leave given to plaintiff to amend, if so advised.

DENNISON v. DEVLIN.

Practice—Abandoned motion—Motion refused.

Where a motion stands over and afterwards the party moving gives notice of abandoning the application, the costs which are given against him are not those of an abandoned motion, but of a motion refused.

In this case a notice of motion for an injunction had been served by the plaintiff on the defendant. When it was brought on, time was asked to answer affidavits, which was granted, and the motion stood over accordingly. Subsequently the plaintiff served the defendant with a notice that he intended abandoning the application.

Mr. *Rae* for the defendant asked, under the circumstances, that the order to be drawn up should give costs as of a motion refused, not of an abandoned motion only, and cited *Dugdale* v. *Johnson* (*a*) as directly in point.

Mr. *Donovan* contra, contended that the defendant was entitled to the costs of an abandoned motion only.

MOWAT, V.C.—The case of *Dugdale* v. *Johnson* governs this, and the order must give the costs as of a motion refused.

(*a*) 5 Hare, 92.

MUIR v. DUNNET. 1864.

Delivery and registration of deed—Security in favour of parties not named in it—Right of assignee of mortgage without notice—Registration.

Where a party executed a mortgage and had it registered, but did not, for some time, give it to the mortgagee, and this security was afterwards sold to a third party, who was not aware of the facts, it was held entitled to priority over another mortgage previously executed, but not registered till after the other security had been registered, although registered before the other had been delivered to the mortgagee.

Mortgage held good in the hands of an assignee for value without notice, though the parties for whose benefit it was given were not named in it or shown by any writing.

Registration of a mortgage held not to be invalidated by the mortgagee signing it, and also the witness to the execution of the instrument subscribing his name to it, after it had been registered.

The bill in this case was filed to foreclose the plaintiff's mortgage, and also for a declaration that it had priority over another mortgage held by *Moodie*, one of the defendants, to whom it had been sold and assigned by *Thomson*, another defendant, *Dunnet* being the mortgagor.

It appeared that *Dunnet*, being largely indebted to *Muir*, the plaintiff, gave him a mortgage, by way of security, which was executed in January, 1857; but which was not registered till the 29th day of August following. On the 14th day of May, 1857, *Dunnet* executed a second mortgage of the same premises, in favour of the defendant *Thomson*, apparently to secure a specified sum of money, but without any mention of trusts for third parties. This was registered on the 24th of August following; but the mortgagee did not know of its existence till October, when *Dunnet* gave the mortgage to *Thomson*, told him of his giving it to secure various sums of money due to connections of *Thomson*, also

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advances then made on the strength of it by *Thomson's* firm, none of whom had any knowledge of the previous mortgage to the plaintiff, nor was the trust shown by any writing whatsoever.

Thomson afterwards sold and conveyed the mortgage, for the full amount secured thereby, to *Moodie*, who applied to the county registrar, previously to taking the assignment, and was informed that the mortgage formed the first lien on the premises: *Moodie* then took an assignment and paid the money. The bill, which was taken pro confesso against *Dunnet*, the mortgagor, charged that *Moodie's* mortgage was executed and assigned with notice of the plaintiff's, and that it was not duly registered. The answer pointedly denied notice.

Upon the hearing of the case, before his Lordship the Chancellor, at the Brockville circuit in September, 1864,

Statement.

Mr. Deacon, for the plaintiff, contended that there was no delivery of *Moodie's* mortgage till October, when its existence first became known to *Thomson* the mortgagee, and that the absence from the memorial of the name of the witness to the execution by *Thomson*, (who now appeared as a subscribing witness,) invalidated the registration, as being contrary to the statute, (Consolidated Statutes of Upper Canada, chapter 89, section 19.) He further contended that the mortgage could not inure to the benefit of parties not named in it, or in any writing whatever, and that *Moodie* stood in no better position than *Thomson* would have done, had no assignment been executed.

Mr. McGregor, for *Moodie and Thomson*, argued that registration was tantamount to actual delivery, which was not necessary to the execution; that the signing of the mortgage by *Thomson*, subsequently to registration, was mere surplusage, which did not invalidate the regis-

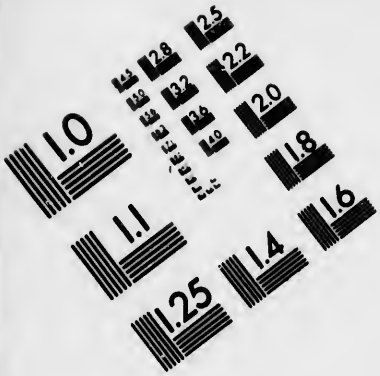
tration under the statute, and that, although *Moodie* took subject to the equities between *Thomson* and *Dunnet*, yet as the security was quite good in the hands of *Thomson*, as against *Dunnet;* and as *Moodie* was a purchaser in good faith, for value, and without notice, his mortgage was entitled to the priority due to its prior registration under the statute. He further contended that *cestuis que trustent* need not be named in a security intended for their benefit, in order to render it good in their favor, and that the trust is valid without being shown by writing, *Doe dem. Garnons* v. *Knight*, (*a*) *Sear* v. *Ashwell*, (*b*) *Worrall* v. *Jacob*, (*c*) *Childers* v. *Childers*, (*d*) *Jeffries* v. *Alexander*, (*e*) *Mackechnie* v. *Mackechnie*, (*f*) *Montreal Bank* v. *Baker*, (*g*) *Rathbun* v. *Rathbun*, (*h*) *Lewin* on Trusts, page 139 and 495, Stat. 29, Car. II, ch. 3, sec. 8, *Fagg* v. *James*, (*i*) and 1 *Story's* Equity Jur. 57, 8th sec. were referred to by counsel. His Lordship overruled Mr. *Deacon's* objection to the registration immediately after the argument, and reserved judgment as to the other points.

After looking into the authorities,

Vankoughnet, C.—A number of authorities have been furnished to show that there was no completed transaction between *Dunnet* and *Thomson* before the registry of the plaintiff's mortgage, because, in fact, the mortgage remained in *Dunnet's* hands and custody, until after the registration of the mortgage to the plaintiff, which was the first one executed, and the creation of the second mortgage, though registered first, was without the knowledge of the mortgagee or grantee named in it, and in fraud of the plaintiff.

Judgment.

(*a*) 5 Barn. and Cress. 671. (*b*) 3 Swan. 411, n.
(*c*) 3 Mer. 270.
(*d*) 3 K. and J. 310, 315, and 1 DeG. and J. 482, 495.
(*e*) 8 H. L. C. 594. (*f*) Ante, vol. VII, page 23.
(*g*) Ante, vol. IX, page 97, 298. (*h*) 6 Barbour, 98.
(*i*) 8 Law Times 5.



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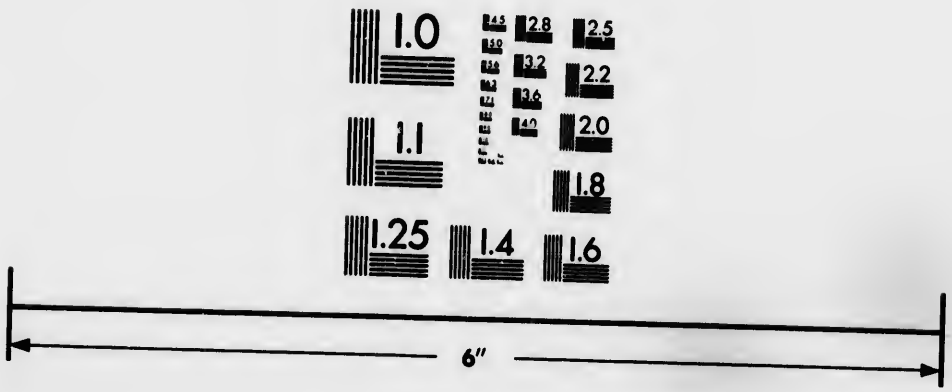

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However the case might stand as between the original parties to the mortgage and the plaintiff, I think I must hold that, as regards the assignee of it, the defendant *Moodie*, there was a complete execution of the mortgage by delivery, when it was put on registry; (*Childers v. Childers*;) and that *Moodie*, being a purchaser for valuable consideration without notice, or the means of ascertaining the facts, (for he was not bound to consult the registry for conveyances subsequent to his own,) is entitled to priority over the plaintiff. I make the usual decree for redemption and foreclosure, giving no costs to *Dunnet* or *Thomson*: plaintiff and *Moodie* to have the usual costs in such a suit.

Cuthbert v. Cuthbert.

Trustee and cestui que trust—Partition—Crown lands.

The defendant by answer having submitted to account, as trustee, the court made a decree for an account and partition, although without such submission in the answer, there was no evidence of the defendant holding the property in trust.

Statement.

The bill in this cause was filed by *John Cuthbert* and *Thomas Cuthbert* against *Ellen Cuthbert*, their mother, *Maria Barber*, their sister, and her husband, *Charles Barber*, praying, under the circumstances therein stated, and which are fully set forth in the judgment, a declaration that the plaintiffs were entitled to the lands in question; for an injunction to restrain the sale thereof, and also an account of the dealings and transactions of the defendants in respect of the said estate.

Mr. *Fitzgerald* for plaintiffs.

Mr. *Blake* for defendants.

Vankoughnet, C.—This bill was filed originally in

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Cuthbert v. Cuthbert.

respect of two lots of land, viz., the west half of lot No. 1, and the west half of No. 2, in the 5th concession of the Township of Mono. The bill was amended by striking out all claim to relief as to the latter lot, except a declaration that *Thomas*, one of the plaintiffs, was entitled to it solely in his own right as the purchaser thereof from the Crown since the filing of the bill. The facts are shortly these: One *John Cuthbert*, the father of the plaintiffs and of the defendant *Maria Barber*, formerly *Cuthbert*, and the husband of the defendant *Ellen Cuthbert*, died in 1845, seised of the east part of the Gore lot 33, in the 5th concession of Albion, and entitled to purchase the said west half of lot No. 2, in Mono, a clergy reserve lot, as the assignee of the interest therein of the original lessee, and leaving *George Cuthbert*, his eldest son and heir at law. Some time afterwards, and in the life time of *George*, the lot in Albion was sold for taxes and purchased by the late Mr. *Radenhurst*, who shortly after, at the solicitation of the widow, on being paid a small sum, conveyed to her the land, as the bill alleges, in trust for the children of the deceased. There is no evidence of this, beyond the circumstances that when the widow obtained the land from Mr. *Radenhurst* she was accompanied by her eldest son *George*, then a mere youth. This alone would not warrant the inference that the widow took in trust; and but for a statement in her answer, and for a submission contained therein, I should have felt bound to dismiss the plaintiffs' bill. Subsequently the widow sold this lot in Albion for $500; of which, she admits, she applied $300 for the purchase of the said west half of No. 1 in the 6th concession of Mono, the price of which it seems was also $500. How the $200 was made up—whether wholly by the mother, or the children, or by both, as I assume it to have been, does not clearly appear. The plaintiffs contend that this lot in Mono must stand in the place of the lot in Albion, and that the defendant *Ellen*, having obtained a deed

Judgment.

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Cuthbert v. Cuthbert. as co-heirs of their brother *George*, who, I should have mentioned, died in 1855. The widow *Ellen* denies in her answer, and on her *viva voce* examination at the hearing, that she took the deed from Mr. *Radenhurst* in trust, and she says, "I took the conveyance from him to myself innocently, and supposing that I had a perfect right to do so." After meeting some of the statements of the bill, explaining others, and setting forth how the lot in Mono was paid for, in the last paragraph of her answer she says, "I submit to this honourable court that as the widow of my deceased husband, *John Cuthbert*, in the bill named, I am entitled to my dower and thirds, of and in his estate, both real and personal, and that upon the death of my eldest son *George*, intestate, and without issue, I am entitled to an estate for life in the said real estate, and I claim that it may be so decreed, and that I am entitled to be re-imbursed the various sums of money paid by me in discharge of my husband's debts, and on account of the said land; and I further submit that the plaintiffs and the defendant herein are equally entitled as co-he law of my said son *George*, to the inheritance of the said real estate, and interest therein, and I pray that it may be so decreed, and that the rights of all parties may be declared," and proper directions given.

Judgment.

Now this is exactly the decree which the court would have made if the defendant *Ellen* had taken from *Radenhurst* a deed of the land as trustee for her eldest son *George*, then his father's heir-at-law; and as the defendants have submitted to such a decree, and indeed prayed for and asked it, I think I have no alternative but to make it, and declare the rights of the parties accordingly. It is not at all unreasonable, but natural to suppose that the defendant *Ellen* did take the deed from *Radenhurst* in trust for her son. She was merely in effect redeeming the land from the sale for

taxes, and by the position she has assumed in her answer, she seems willing and desirous that she should be treated as having so acted. I think, therefore, that I must treat the west half of the lot No. 1 in Mono, as the property of the plaintiffs and the defendant *Maria*, subject to the widow's life estate therein. I do not think it necessary to make any enquiry as to how the land was paid for. The widow admits having received $500 for the lot in Albion, and this was the sum paid for the lot in Mono. The bill alleges that the defendant is administratrix of her husband's estate, and she says she has paid debts of his out of her own moneys. If this be so, she is entitled to be re-imbursed them; but as this could only be done by sale of the real estate, her interest in it would be subject to sale as well as the interest of the children, and therefore it would perhaps not be worth her while to take an account. The mother and sons appear to have lived together, and to have worked the other piece of land on which they resided, and by their conjoint labor have probably cancelled their obligations to one another. It is one of those small family matters in which a taking of mutual accounts would be almost impossible, and more costly than the interest of the parties in them is worth. As to the clergy reserve lot, the west half of lot No. 2, in the township of Mono, I make no decree. The plaintiff Thomas appears to have purchased it from the Crown, representing himself as the occupant of the lot, as he in fact was; but he was such as the lessee of his mother. The Crown has not had all the facts before it; but only one instalment of the purchase money has been paid, and no patent has issued; and the Commissioner of Crown Lands can therefore deal with the case upon a proper representation of the facts.

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Judgment.

Upon the statement in the plaintiff's own bill, and upon the fact that *Thomas* was the lessee of his mother at the time of his purchase from the Crown, the sale to him

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can be cancelled by the Crown, if, upon a full statement, the Crown thinks it improper to sell to him. No one had any legal claim upon the Crown, but merely upon its grace, and how this may be dispensed, it is not for me to say. If the Crown confirms the sale to *Thomas*, this Court, I apprehend, cannot interfere. The defendant *Maria* adopts her mother's position and asks for a partition, and this I suppose she is entitled to have, of the west half of lot No. 1, in Mono, subject to her mother's life estate in it. I give no costs to either party. It is melancholy to see such a contest between an aged woman and her two sons, grown up men. I had hoped, after the intimation I gave, that these family difficulties would have been settled without the aid of a decree.

Judgment.

WILSON v. CORBY.

Insolvent Act of 1864—*The assignee entitled to the aid of this court against persons improperly interfering with the execution of his duties.*

V. and *D.*, traders, made an assignment to the plaintiffs on the 9th of January, 1865, as insolvents, and in pursuance of the provisions of the Act of 1864. A judgment at law having been obtained against *V.*, his interest in the partnership assets was sold for a nominal consideration to *C.*, who had notice of the insolvency proceedings. *C.* then entered into possession of, and otherwise interfered with the partnership goods, so as to hinder the plaintiffs from exercising the duties of their office: an injunction was therefore granted on application of the assignees, to restrain the defendant from further interference.

The bill in this cause was filed on the 24th of January, 1865, by *Frederick M. Wilson* and *Archibald McKeand* against *Louis Romain Corby*.

The circumstances of the case are fully stated in the judgment delivered on a motion for injunction to restrain the defendant from interfering with the property assigned to the plaintiffs.

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Mr. *R. Martin* in support of the application.

Mr. *Blake*, Q.C., contra.

Chapman v. *Koops*, (*a*) *Holmes* v. *Mentze*, (*b*) *Parker* v. *Pistor*, (*c*) *Taylor* v. *Jarvis*, (*d*) *Garbett* v. *Veale*, (*e*) *Flintoff* v. *Dickson*, (*f*) *Partridge* v. *McIntosh*, (*g*) *Mair* v. *Bacon*, (*h*) *In re The London and Eastern Banking Company*. (*i*)

SPRAGGE, V.C.—The plaintiffs are assignees by voluntary assignment, under the Insolvency Act of last session, from *Caleb H. VanNorman* and *Daniel Dewey*, traders, lately carrying on business in Hamilton. The assignment was made on the 9th day of January last. Before the date of the assignment, two writs of execution against goods were placed in the hands of the sheriff of the county of Wentworth for execution; these writs were issued upon judgments recovered against one of the partners, *VanNorman:* and after the assignment to the plaintiff, the interest of *VanNorman* in the partnership property was sold by the sheriff, and the defendant became the purchaser, at the sum of one dollar. At the sale, and before his purchase, the defendant was informed that the partnership was insolvent; and the fact that it was so insolvent is sworn to by two persons who were in the employ of the firm, and perfectly competent to form a correct judgment in the matter. The defendant when told at the sale of the insolvency of the firm, said that he purchased on speculation, and whether the interest he purchased was of any value or not, it gave him the right, as he was advised by counsel, and which he meant to try, of putting a man in possession

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(*a*) 3 Bos. & Pull. 289.
(*b*) 4 Ad. & Ellis, 127.
(*c*) 3 Bos. & Pull, 288.
(*d*) 14 Q. B. U. C. 128.
(*e*) 5 Q. B. 408.
(*f*) 10 Q. B. U. C. 428.
(*g*) Ante Vol. I., p. 50.
(*h*) Ante Vol. V., p. 343.
(*i*) 2 DeGex & J. 484.

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and keeping him there, and so of preventing the assignees from removing, or dealing with the partnership goods; and that he would exercise that right, unless some claim that he made was settled. What the defendant actually did is thus stated upon affidavit. "The defendant immediately on the termination of the said sale, forcibly and against the will and protest of the plaintiffs, as such assignees as aforesaid, put a man in possession, and then put another man in possession, and has ever since had, and still keeps, sometimes one man and sometimes another man in such shop, in possession of such goods and chattels there, with instructions to hinder and prevent, and who do hinder and prevent, the plaintiffs from removing and selling, and from, as such assignees as aforesaid, winding up the said insolvent estate pursuant to the Insolvent Act of 1864." A case is thus made out of obstruction of the plaintiffs in the exercise of their official duty. The conduct of the defendant appears to have been either wholly vexatious, or pursued in order to coerce the assignees into a settlement of the defendant's claim, probably the latter. Looking at what passed at the sale, and the price paid, it does not wear to me the aspect of a *bona fide* purchase of anything. I am led to believe that the defendant purchased, not in order to acquire any beneficial interest in the partnership effects, but in order to acquire a legal position, which would enable him so to obstruct and annoy the assignees as would induce them in effect to buy him off.

Judgment.

This application is for an injunction; and it is opposed on the ground that the plaintiffs' remedy is at law. It is objected that it is a bill for the specific delivery of certain chattels, which are of no peculiar value, and in regard to which there is no trust between the parties.

It is denied by the plaintiffs that there is any remedy

at law, inasmuch as the purchaser at sheriff's sale has acquired the rights of the partner, whose interest he has purchased, and is tenant in common with the assignees, as he would have been with the other partner, if there had been no assignment—his rights as a purchaser relating back to the delivering of the writ to the sheriff—and it is contended that as the partner whose interest was sold had a right to possession in common with the other partner, so the same right, not divested by the assignment, passed to the purchaser at sheriff's sale. I think the plaintiffs are right in their position, that a purchaser at sheriff's sale, under execution for the separate debt of one partner, becomes tenant in common with the other partner; and that as to the whole of the goods. Before the sale each partner was possessed *per my et per tout;* and after the sale the purchaser was subrogated to the position of the partner, whose interest he had acquired. So, it is said in some cases upon the point, that the sheriff, upon execution for the separate debt of one, seizes the whole of the goods. *Heydon* v. *Heydon*, (*a*) *Johnson* v. *Evans*. (*b*) It would seem to follow from this that a strict legal right of possession passed to a purchaser by the sheriff's sale, as would pass upon the sale of the interest of an ordinary tenant in common by the sheriff; and the language of some of the cases implies this: and in an American case, *Phillips* v. *Cook*, (*c*) in which an elaborate judgment was given, such was the opinion of the court. I am unwilling on this interlocutory application, to express any decided opinion upon the point. Perhaps no branch of the law is in a more unsatisfactory condition. It appears to me to be enough, if the plaintiff's alleged remedy at law is doubtful and inadequate, to give him a title to relief in this court.

Judgment.

(*a*) 1 Salk. 392. (*b*) 7 M. & G. 249.
(*c*) 24 Wendell 396.

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It is suggested that the plaintiff's proper remedy is by action of trover, or perhaps by replevin. In trover the right to certain goods claimed on one side of assignees in bankruptcy, and on the other by strangers, is frequently tried; but the cases that I have seen are of certain goods claimed by the assignees to belong to the bankrupt estate, and where the assignees are proceeding to wind up the estate, and the question of property in the goods, which are the subject of the action, does not materially obstruct the winding up of the estate: not like this case, where probably no question of property can arise at all, and where the right of the defendant, if he has a right, is exercised *strictissimi juris*, and to the obstruction of the duties of the assignees. The position of the defendant is a peculiar one. In pointing to law as the proper forum for a remedy to the plaintiffs, he is obliged to say that he has no legal right to the possession of the goods which he has taken. I doubt if it can lie in his mouth to take that ground; he holds possession in virtue of an assumed legal right, the exercise of which is certainly injurious to the plaintiffs, and those whom they represent; and when they come to this court his answer is, that his possession is without right. Then, as to the necessity for intervention and its effect. Supposing the defendant has no legal right of possession by which he could defeat an action at law, he could continue what would in that case be a wrongful possession until judgment at law could be obtained; at the earliest some three months from this time. Its effect would be exceedingly injurious to the estate, while on the other hand an injunction, which would remove this obstruction, could not operate injuriously to the defendant, assuming him to have a beneficial interest; for the partnership estate must be wound up in order to ascertain what, if any, his interest is; and it is being wound up by a course of proceeding under the authority of the law; and again, if the estate is insolvent, as it is sworn to be, the defendant has

Judgment.

acquired nothing by his purchase at sheriff's sale, for it is settled law, that a creditor of an individual partner is entitled to nothing out of the partnership estate, until after the partnership debts are paid.

Then further, the defendant is a purchaser for a nominal consideration. I confess I have great doubts whether the sheriff ought to sell for a nominal consideration: the object of a sheriff's sale is to realize money by the sale of that which the writ commands him to sell: where the purchase money is nominal, this object is not attained, no purpose is served thereby, but the bad one of giving the purchaser some speculative right. He buys generally a right to bring an action, or, as in this case, to intervene in some legal proceeding. I am very much inclined to think such a sale and purchase against the policy of the law. It is no answer to say that what was bought was probably not worth more. In this case it was probably worth nothing, beyond the power it might give of causing annoyance and mischief. In *Wilson* v. *Shier*, (*a*) there was a sheriff's sale of an interest in land, which was sold for five shillings, and the late Vice-Chancellor said, "I think we must regard the sheriff's sale as a nominal sale, and one conferring no title. The price is nominal, and stamps the same character upon the whole proceeding." An observation in which I entirely concur. Judgment.

It is said for the defendant, that it would be mischievous to take the winding up of the estate out of the hands of the assignees. I agree that it would be so, unless some necessity for it should arise which I do not foresee. It is asked by the bill only in the alternative. The injunction is to enable the assignees to proceed with their duty, and it does not follow that any more will be necessary. In *Thorpe* v. *Goodall*, (*b*) Lord *Eldon*

(*a*) 8 Grant, 630.

(*b*) 17 Ves. 393.

1865. observed, "After a bankrupt has repeatedly questioned the validity of his commission, and thwarted his assignees in its progress, the court will in due time, when his conduct appears vexatious, restrain him from further disputing it."

I think this a proper case for the granting of such an injunction as is asked by the bill.

CLARK v. EBY.

Demurrer—Prayer for further relief—Specific performance—Infants.

The widow and infant heirs of C. were entitled to certain premises, subject to a mortgage to E. By agreement between the widow, E. and W., the premises were conveyed to W., upon a verbal understanding that he should retain a part of the premises, equal in value to the sum due on E.'s mortgage, which he was to assume, and that he should convey the remainder of the land to the widow for the benefit of herself and children. The conveyance to W. having been made by E., the widow and infant heirs filed their bill, seeking a specific performance of the agreement to convey the portion agreed on to them. On demurrer for want of equity, held, following *Graham* v. *Chalmers*, that the specific relief sought could not be decreed, but that under the general prayer and the case stated, the plaintiffs were entitled to some relief, and the demurrer was therefore overruled.

Statement.

The bill in this case was filed by *Maria Clark*, and *James D. Clark*, and *Wilford P. Clark*, the widow and infant heirs at law of the late *Douglas D. Clark*, of Berlin, against *Isaac Eby* and *George Wright* defendants. The facts alleged are fully stated in the head note and judgment.

The prayer of the bill was, first, that the court might decree specific performance of the agreement, the plaintiffs offering to perform the same on their part; 2nd, that the defendant *Wright* might be ordered to convey to the plaintiffs, some or one of them, that portion of

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the land conveyed by *Eby* to him, to which he was not entitled under the contract alleged in the bill; 3rd, for an injunction to restrain an action of ejectment, brought by the defendant *Wright*, to dispossess the plaintiffs of the premises, and for further relief.

The defendant, *George Wright*, demurred to the bill for want of equity.

Mr. *J. McLennan*, in support of the demurrer.

Mr. *J. W. Hancock*, contra.

Counsel referred to *Mitford* on Pleading, 35, and *Story*, sec. 42, and *Graham* v. *Chalmers*, (*a*) and the authorities there cited.

Judgment.

SPRAGGE, V.C.—The circumstances of this case, as disclosed by the bill, are very peculiar. The plaintiffs are the widow and two children of one *Douglass D. Clark*, who is dead, whether intestate or not does not appear. *Clark* mortgaged certain premises to *Eby* to secure the sum of $400; the mortgage contained a power of sale. After *Clark's* death, the mortgage money being in arrear, and the widow and children having no means of paying it, *Eby* consented to an arrangement proposed by the widow, for the benefit of herself and her children, which was substantially this: the widow made a bargain with the defendant *Wright* for the sale to him of a portion of the mortgaged property, together with what the bill calls a very small piece of land not comprised in the mortgage, for the sum of $600, which was somewhat more than sufficient to cover the mortgage debt and interest due to *Eby*. In order to carry this out *Eby* was to go through the form of a sale of the mortgaged premises under his

(*a*) Ante vol. ix., 239.

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power of sale, to convey to an agent, who should purchase the whole of the mortgaged premises, and that agent was to convey to *Wright* that portion which he had bargained for with the widow, and to convey the residue to the widow, or to the heirs of the mortgagor. It is so put in the bill. The sale took place, and *Eby* conveyed to the agent, *Bowman*; and *Bowman*, with the assent of all parties, upon a suggestion that as a matter of conveyancing, it would be convenient that he should convey the whole to *Wright*, in order to his conveying the residue to the widow, did so convey to *Wright*, and in order that, as stated in the bill, the title of the widow to the lands might by this plan be made good. And the bill alleges that *Wright* did promise so to re-convey. Afterwards, as the bill states, *Wright* intimated that he would keep the whole of the lands himself. Afterwards, again, he took this ground, that he would re-convey to *Bowman* the whole of the land conveyed if the amount he had paid, $600, were re-
Judgment. paid to him within a week. Subsequently the plaintiffs, by their solicitor, applied to *Wright* for a conveyance to the heirs or to the widow of what is called the residue of the land, which he refused; and subsequently brought ejectment to turn them out of possession. The prayer of the bill is for specific performance, and for an injunction to restrain proceedings in ejectment, and for general relief.

It is obvious, from what is stated on the face of the bill, that *Wright* has not obtained by the conveyance made to him that which he was to get under his agreement with the widow. He was to get an absolute estate in that portion of the mortgaged premises, which he agreed to purchase; and it is plain, from what is stated, that he took a redeemable interest, inasmuch as what took place could not bar the infants of their equity of redemption. The widow therefore, not having given or caused to be given what she was

to give, and the purchaser not having gotten what he bargained for, she cannot have specific performance; and as to the infants, their being infants is a reason for no bill for specific performance being maintainable by them. But the question upon the demurrer remains whether there is any equity against *Wright* upon the facts stated; and if so, whether it can be decreed upon the bill framed as it is, and with the prayer that it contains.

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First, as to whether the plaintiffs have any equity against *Wright*. There was land, consisting, say of two parcels, one of which was to be conveyed to him as purchaser; the other to be conveyed to, or for the benefit of, the plaintiffs: this purpose was intercepted by a suggestion that it would be convenient if both were conveyed to *Wright*, and that he could convey the one, of which he was not the purchaser, to or for the benefit of the plaintiffs, and *Wright* assented to this and promised to convey accordingly. And upon this the conveyance of both parcels was made to him, and he now refuses to convey to the plaintiffs that parcel which he agreed so to convey. This brings the case within a familiar head of equity. It is not indeed alleged in the bill that the proposal that the whole land should be conveyed to *Wright* emanated from him, but that I conceive is not necessary; and in some of the cases to which I have referred, does not appear to have been the case. If he was an assenting party to such an arrangement, receiving a conveyance which he knew was made to him upon the faith of his doing a particular act, it is a fraud on his part not to do that act. *Wright* has no answer to this equity, except that which I have suggested as an answer to a bill for specific performance. But that cannot, I apprehend, be an answer to this equity *per se*. There may be a very great disproportion between the value of the right he withholds from the plaintiffs and the value of the right

Judgment.

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of which he has been disappointed. It may be a reason for putting the plaintiffs upon terms before obtaining their right, but not, as I think, a ground for denying their right altogether.

It is suggested that the bringing of the action of ejectment by *Wright* was in the exercise of his right as a mortgagee; the only position he could occupy under the circumstances. But as stated in the bill, (and upon demurrer, I must go by that,) it is put as brought upon a claim of legal and absolute right to the whole of the property conveyed. Nor does it seem to me that his offer to re-convey the whole premises, provided the money he had paid to *Eby* were re-paid in a week, is any answer to the plaintiffs' equity. It amounts to a dictation of terms to which the plaintiffs were not obliged to submit—re-payment within a week, or the alternative of forfeiting to *Wright* the premises which he was bound to convey to them.

Judgment.

The framer of the bill appears to me to have misconceived the equity of the plaintiffs. But, upon the grounds which I have stated, I think the plaintiffs have an equity to relief, though not to the relief specifically prayed by the bill, at least in the shape in which it is put by the bill. It remains to be considered whether, under the prayer as it is framed, the plaintiffs are not entitled to relief. The prayer concludes with praying for "such further and other relief as under the circumstances is just."

Upon the question whether a plaintiff who prays for specific relief to which he is not entitled, may not, under the prayer for general relief, have such relief as the facts stated entitle him to, I refer to *Wilkinson* v. *Beal*, and *Hiern* v. *Mill*. referred to by me in *Graham* v. *Chalmers*, upon rehearing. These cases are cited by Lord *Redesdale* and by Mr. Justice *Story*, in their

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treatises on Equity Pleading, and, after stating that the relief must be agreeable to the case made by the bill and not different from it, they add that the court will not in all cases (*Story* says ordinarily) be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendants may be surprised or prejudiced. Sir John *Leach*, in *Wilkinson* v. *Beal*, puts the rule thus: "If a party prays particular relief, to which he is not entitled, he may nevertheless, under the prayer for general relief, have such relief as he is entitled to, upon the case alleged and proved."

I do not think it would be at all straining the rule to grant, in this case, the relief to which the plaintiffs are entitled under the prayer as it stands. Even the specific prayer is not wide of the mark; for what it asks under the name of specific performance, is in effect a conveyance of the land not purchased by *Wright*; and it is to have such a conveyance that is the fruit of the equity which is, in my judgment, the result of the facts stated by the bill; so that the great fault of the bill is in misconceiving the plaintiffs' equity, and in framing the prayer technically erroneously, in accordance with that misconception. I must therefore overrule the demurrer with costs.

Judgment.

I may add, that the case itself does not seem to me to present any great difficulty; and that the court may be able to make a decree which will do justice to all parties.

The arrangement made by the widow, the mother of the infant plaintiffs, was probably a beneficial one for her and them. An inquiry could be directed whether it was for their benefit, as was done in *McDougall* v. *Barron*, (*a*) and if found to be so, it could be carried out by the court. *Wright* would thus obtain an absolute title to what he purchased, and the widow and infants would

(*a*) Ante vol. ix., p. 450.

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have the benefit of the residue, which ought to be conveyed to them according to their respective rights as dowress and heirs of the mortgagor, that is if he died intestate; as to which there should be an inquiry.

Judgment.

I throw this out in case the parties should be disposed to acquiesce in it, to save further litigation; but of course without prejudice to any opinion I may hereafter form, in the event of the case ever hereafter coming before me for judgment. If the parties should now take such a decree as I have suggested, I think it should be without costs. I have made this suggestion under the idea gathered partly from the nature of the case, and partly from what fell from counsel in argument, that the leading facts of the case are not in controversy.

HARRISON v. PATTERSON. 1865.

Administration—How far one of several executors is liable for default of his co-executors. Executors right of retainer and to be recouped for moneys advanced by them to the estate—Crooks v. Crooks considered.

The testator A. M. had been in partnership in business with one J. A. and died without any settlement of accounts, appointing A., P. and L., his executors. The testator had, besides his share of the partnership assets, a large amount of personal property, and also real estate, which he specifically devised to his four sons, then infants, and appointed A. their guardian. The executors received the rents of the real estate, and applied them to the maintenance and education of the testator's children. The real and personal estate having proved insufficient for the payment of debts, the executors were held liable to account to the creditors of the testator for the rents received by them, and applied to the maintenance and education of the children.

Executors finding it impossible to wind up the estate of the testator, so long as certain partnership accounts remained unsettled, became personally liable to the surviving partner for the payment of a sum supposed to be equal to his share in the estate, and he thereupon released to them all his interest in the partnership estate, which was by them wound up; and the proceeds applied in liquidation of the testator's debts. On a reference to the Master, this arrangement was found beneficial to the testator's estate, and the same was so declared by the court and the executors were held to be entitled to a first charge on the proceeds of the estate for the moneys paid by them to the surviving partner, and for what they still owed him on their personal obligation; as also the amount of commission allowed them by the judge of the Surrogate Court.

Statement.

The bill in this cause was filed by *John Harrison*, and all other creditors of *Alexander McGlashan*, late of the City of Toronto, merchant, deceased, who should come in and contribute to the expenses of the suit, against *Andrew McGlashan*, *Robert Dunn Patterson*, and *James Leask*, executors of the testator's will; and against the four infant children of the testator.

A decree was pronounced directing the usual accounts and inquiries, by his Honor V.C. *Esten*, as reported ante vol. 7, page 531.

It then appeared that the testator had, up to the time

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of his death, been in partnership in the leather business, with one *James Atcheson*, and the Master certified specially that "subsequent to the death of the said testator, the said *James Atcheson* and the trustees under the testator's will came to a settlement, in respect of said partnership business, and that two of the said trustees, viz., *Andrew McGlashan* and *R. D. Patterson*, became bound by bond, dated 20th March, 1858, to said *Atcheson*, for the payment to him of £1,125, with interest in one and two years from that date, and that thereupon the said *Atcheson* executed an indenture, whereby he released and assigned all his interest in said partnership assets and property, as in said indenture mentioned, except as therein stated, and that the said trustees claim that the said sum and interest, for which they became bound to said *Atcheson*, ought to be paid out of the assets of the estate of said testator, before the payment of the other debts owing by said testator's estate, such estate having received and realized from the assets of the said partnership estate the sum of £4635 6s. 6d. as stated in the accounts of the said trustees, filed in the Master's office."

Statement.

On the cause coming on for hearing on this report, the real estate of the testator was directed to be sold for the payment of debts, and the Master was directed to inquire and report whether the arrangement with *Atcheson* was for the benefit of the estate, giving the grounds for the opinion he might form.

The Master having reported specially on this point, and found in favour of the executors, it was decreed that they were entitled to be indemnified and recouped, as to the *Atcheson* claim, out of the proceeds of the estate; but it also appearing that the executors had received and applied to the maintenance of the testator's children a large amount of rents of his real estate, it was held that such expenditure could not be allowed, as against creditors.

The other facts of the case appear in the judgment.

Mr. *Fitzgerald*, for the plaintiff.

Mr. *J. Hector*, Q.C., for the infants defendants.

Mr. *J. C. Hamilton*, for the executors.

Spackman v. *Holbrook*, (*a*) *Robinson* v. *Alexander*, (*b*) *Addis* v. *Knight*, (*c*) *Sanders* v. *Christie*, (*d*) *Re Babcock*, (*e*) *Lewin* on Trusts, 200, *Kinderly* v. *Jervis*, (*f*) *Spalding* v. *Shalmer* (*g*).

SPRAGGE, V.C.—It is conceded that the estate of *Alexander McGlashan*, personal and real, is insufficient for satisfaction of debts, therefore the amount expended by the executors and trustees for the maintenance and education of the children of the testator cannot be allowed to them as against creditors, although such expenditure may, doubtless, have been made in the belief that the estate was solvent; but still at the peril of the executors of that amount being disallowed. A larger amount has been received, *i. e.*, of personal estate and rents and profits together, than has been expended for the purposes of the estate, and the plaintiff claims that all the executors and trustees are liable to make good the difference. I think, as to the moneys received by them individually, each is liable to make good only what he has himself received, whether as executor or trustee; this is the settled rule, unless circumstances are shewn, and none are shewn in this case, to vary it. For what was received by the solicitor employed by them, all are liable. The personal estate was so received, and a small portion of the rents and profits of the real estate; but, as the amount properly expended exceeds both these sums, there is no joint liability for the excess of the receipts over disbursements; that excess must be made good by the individuals receiving it, *i. e.*, by *Andrew*

Judgment.

(*a*) 6 Jur. N. S. 881.
(*b*) 2 C. and F. 717.
(*c*) 2 Mer. 117.
(*d*) Ante vol. i., p. 137.
(*e*) Ante vol. viii., 409.
(*f*) 22 Beav. 1.
(*g*) 1 Vern. 302.

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McGlashan's estate, he being now dead, and by *Patterson, Leask* having himself received nothing; but here a difficulty arises, which is not cleared up by any thing that I find in the Master's reports. If the amount of receipts over disbursements corresponded with the amount received by *Andrew McGlashan* and *Patterson*, the case would be simple enough; the latter would just make good the former; but the fact being that the deficit being considerably smaller than the aggregate of the amount received by them individually, it follows that between them a portion of the moneys so received has been properly applied, but whether by one of them only, or if by both, what sum by each, is not shown to me. As put in argument by the gentleman representing the executors, and as put in a written statement of amounts which he handed in to me, he claimed that there was shewn an excess of expenditure over receipts in the personal estate, and of deficit in the rents and profits of the real estate. If this were so, there might be a sum to be paid out to *Leask*, but it is not borne out by the report, though at first sight, from the order in which the receipts from the various sources and the disbursements are stated in the report, it might appear to be so, but, upon the whole report, I take it that the expenditure was from both funds.

Judgment.

It was material to *Leask* to establish that, as a trustee, he was not accountable for what was received by his co-trustees, and it was material to the estate of *Andrew McGlashan* to establish the same thing, as he had received less than *Patterson*, and it was also material for whichever of those two had made disbursements for the estate to shew it. And further, it was material for the plaintiff to shew it, in order to fix the amount of liability of each, for he should have been prepared for its being held that each trustee was liable only for what was received by himself. Until this is ascertained, I do not see what personal order I can make against

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Patterson, except to this extent, that taking it for the present that he has received £646, after crediting him with the sum of £226 allowed to him by the Surrogate, and that Mr. *McGlashan* had received £265, making together £911, and that £588 is the sum to be made good by these two trustees, and that the whole difference, £331, has been paid by *Patterson*, the utmost that the plaintiff can claim in that case would still be the sum of £315, to be made good by *Patterson*.

At present I can make no order against the estate of *Andrew McGlashan*, partly because the fact I have referred to has not been ascertained, and also because I do not know whether his personal representatives have assets in their hands. Upon this fact to be ascertained, and as to the respective amounts paid by *Andrew McGlashan* and *Patterson*, the estate of the former and the latter must be represented by different solicitors and counsel. I think the order may properly go against *Patterson* to the extent I have indicated, if it is clear that the real estate is not sufficient to satisfy the debts; if, for instance, the sum named as the upset price of the land remaining unsold would not be sufficient.

Judgment.

With regard to the fund in court and its distribution, which I understood to be acceded to be all parties, the sum payable by the executors to *Ahcheson*, by way of compromise of his claim upon the estate of *McGlashan*, seems to be a primary charge. The plaintiff asked that the amount of the compromise may be paid to him instead of to *Atcheson*, on the grounnd that his debt, proved in this suit, was a debt due by *Alexander McGlashan* and *Atcheson* as partners. Assuming that the Master reports the debt due to the plaintiff to be such partnership debt, which he does not report, whatever may have been his intention, it is clear that there could be no such finding so as to affect *Atcheson*, who is not a party to this suit, and it is clear also that I cannot make such an order as

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All that I can see, my way at present in doing, is to order the payment into court of £315 by *Patterson*, referring it back to the Master to ascertain what amount of the rents and profits, received by *Andrew McGlashan* and *Patterson* respectively, were by them applied for the purposes of the estate.

In pursuance of the directions contained in the decree dated the 19th of April, 1864, following the above judgment, the Master reported the facts stated by his Lordship the Chancellor, before whom the cause came for final adjudication.

Mr. *Fitzgerald* appeared for the plaintiff.

Argument. Mr. *C. S. Patterson* and Mr. *J. C. Hamilton* for the executors.

Mr. *R. Sullivan* for the infant defendants.

The following authorities were referred to in addition to those above noted:—*Tardrew* v. *Homell*, (*a*) *Crooks* v. *Crooks*, (*b*) *Fenny* v. *Priestman*, (*c*) *Loomes* v. *Stotherd*, (*d*) *Blackborough* v. *Davis*, (*e*) *Stahlsmidt* v. *Lett*, (*f*) *Yost* v. *Crombie*, (*g*) *Sharman* v. *Rudd*, (*h*) *Haynes* v. *Forsham*, (*i*) *Hill* v. *Walker*, (*j*) *Horne* v. *Shepherd*, (*k*) *Burge* v. *Brutton*, (*l*).

(*a*) 7 Jur. N. S. 937, and 2 Giff. 530.
(*b*) Ante vol. iv., p. 615.
(*c*) Ante vol. i., p. 133.
(*d*) 1 Sim. & Sm. 458.
(*e*) 1 Salk. 38.
(*f*) 1 Sm. & Giff. 415.
(*g*) 8 U. C. C. P. 159.
(*h*) 4 Jur. N. S. 527.
(*i*) 11 Hare, 93.
(*j*) 4 Kay & J. 166.
(*k*) 3 Jur. N. S. 806.
(*l*) 2 Hare, 373.

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THE CHANCELLOR.—It appears, from the various decrees and reports of the Master made in the cause, that the executors of the late *Alexander McGlashan*, being the defendants *Patterson* and *Leask* and the late *Andrew McGlashan*, (whose representatives are parties to this suit) received of the testator's personal estate £8,234 9s. 5d., and that they properly paid and expended for the testator's debts and expenses connected with the estate, £8,697 12s. 11d., being thus in excess of their receipts by £463 3s. 6d. The judge of the Surrogate Court has allowed to *Patterson*, one of the executors, as his commission, £226 (the other executors waiving all claim to any.)

The Master has found and the court has decreed that it was for the benefit of the estate of *Alexander McGlashan* that the executors *Patterson* and *Andrew McGlashan* became personally liable to one *Atcheson*, who had formerly been a partner of the testator, for the sum of £1,125, and interest from the 20th March, 1858, as the amount of his interest and share in the partnership assets, and procured his release of the estate and of the partnership from all claims, and it is ordered that this claim of *Atcheson* should stand a primary charge on the testator's estate. Judgment.

Rents and profits of the testator's real estate came to the hands of *Patterson* and *Andrew McGlashan*, and were misapplied by them in maintaining the children of the testator and otherwise, and, pending final inquiries by the decree on further directions made on the 19th April, 1864, the defendant *Patterson* was ordered to pay into court, subject to the further order of the court, to the credit of the cause the sum of £315, being a sum received by him on account of the rents of the testator's real estate, and not paid out or applied by him for the proper purposes of the testator's estate. This portion of the decree does not appear to have been acted on, but the Master proceeded with the

1865. Harrison v. Patterson. further inquiries directed and with the sale of the testator's real estate, ordered to be sold to meet his liabilities chargeable against it. On the 29th November, 1864, the Master made his further report, and by it finds that there is a balance of rents and profits of the real estate of the testator of £993 19s. 4d., received by defendant *Patterson* and not properly applied by him to the purposes of the estate, (the sum of £315, already ordered to be paid by him being included in this amount) and that there is a balance of rents and profits of £259, received by *Andrew McGlashan*, deceased, and not properly applied to the purposes of the testator's estate; and that no part of the rents and profits of the real estate had been received by the other executor *Leask*. On the one hand, the plaintiff demands that these balances be paid into court. On the other hand, the defendant *Patterson* and the representatives of *Andrew McGlashan* claim that, for the sum paid by them for the testator's estate over and above the personalty come to their hands as found by the Master's report stated above, they are entitled to be reimbursed in priority to all the creditors of the estate; that *Patterson* is also entitled to retain or receive the sum allowed to him by the Surrogate for commission before the debts are paid; and lastly, that they are entitled to retain the amounts found due by them for rents and profits, to meet the demand of *Atcheson*, for which they are personally bound, for which he has no claim on the estate, and which has been created upon it a primary charge, which can now only be for the protection and advantage of the executors.

Judgment.

In *Crooks* v. *Crooks*, my predecessor discussed at some length the right of an executor to retain a debt due him by his testator out of rents and profits, or the produce of sales of the real estate, and seemed inclined to think the executors had that right. It is not, however, the same question here. For any amount of the debts which the personal estate was insufficient to

meet the real estate was liable. The executors have advanced, as it were, upon this estate; they have laid out more than they received, and I think they are entitled to be recouped this sum and interest out of the first proceeds of the real estate by rents, sales, or otherwise. There would have been just so much less of the real estate for the creditors if the executors had not made the advance. 1865. Harrison v. Patterson.

I think also that *Patterson* is entitled to the allowance here for commission, in preference to all the creditors. It is allowed him for his services, and is therefore part of the expenses incurred in administering the estate, and, as such, is one of the primary charges before payment of debts.

As to the amount claimed to be retained by the executors to meet the claim of *Atcheson*, some little difficulty arises from the directions in the former decrees in regard to it, but this is not insuperable. *Atcheson* is not a party to the suit. He has no claim, and has proved none, upon the estate now in administration here. He has chosen to abandon it and look to *Patterson* and *Andrew McGlashan* alone for the amount awarded to him, and that amount for which they became responsible is declared to be a primary charge on the estate. Whether they pay *Atcheson* or not, is nothing to the court. He is entitled to proceed against them, and has a judgment against them, and I think that they have a right to receive out of the estate sufficient to enable them to meet this demand. Whether this be done by allowing them to retain sufficient of the balances in their hands, or the whole, if necessary, for the purpose, or by calling it into court and paying it out to them again, is immaterial. They ask to be allowed to retain, and I permit it, subject however, as to this as well as to the sum advanced by them, over and above the personalty received by them, to an arrangement among themselves and *Leask* as to their respective interests in the Judgment.

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moneys in court and ordered to be paid in. I do not know, for instance, what proportions have been paid by the several executors of the amount to which they are entitled to credit; nor do I know that the representatives of *Andrew McGlashan* are willing that *Patterson* shall retain the whole of the large balance found due by him, and which they have an interest in seeing applied to the payment of *Atcheson's* claim. The amount of this claim, with the sum to be reimbursed the executors, I understand, exceeds the moneys in their hands and in court. The Registrar can ascertain this.

Judgment.

STEINHOFF v. BROWN.

Mortgagor and Mortgagee—When mortgagee being also owner of equity of redemption is chargeable with occupation rent and profits —Receiver—Costs.

In a redemption suit by the second mortgagee against the first it appeared that the equity of redemption had become vested in the first mortgagee, and that he had entered into possession of the premises, and had cut and removed timber therefrom, to a greater value than the amount due on his mortgage.

Held, that the first mortgagee was only bound to account for the value of such timber and occupation rent as was taken or received by him as mortgagee, and not for that taken or received in his other capacity, as owner of the equity of redemption; but that the second mortgagee might ask for a receiver.

This was an appeal from the report of the Master, the suit being by a second mortgagee against the first for redemption.

The Master had charged the defendant with the value of timber cut by him, and the sum so found exceeded that secured by the first mortgage. To this the defendant objected as not being warranted by the evidence, but it appeared that the defendant was also owner of the equity of redemption in the premises, subject to the plaintiff's

mortgage, and it was not shown whether the defendant had enjoyed the premises as mortgagee or owner thereof. 1865. Steinhoff v. Brown.

Mr. *Spencer* for the plaintiffs, who appeal on the grounds, amongst others, that the Master had improperly computed interest on the amount of the mortgage after it had been paid off, and that he had charged defendant with the timber cut at its value as standing timber only.

Mr. *J. W. Gwynne*, Q.C., contra.

SPRAGGE, V.C.—It appears to me that this appeal must be decided upon a ground not taken in argument before me, or in the Master's office.

The position of the parties is this, as I gather from the papers before me. The position of the plaintiffs that of second mortgagees, the position of the defendant that of first mortgagee, and also owner of the equity of redemption, and being also in possession of the mortgaged premises. He cut a quantity of timber off the premises, and an injunction was granted to restrain further cutting. By the decree the plaintiffs were declared entitled to redeem the defendant in respect of his first mortgage, and to be redeemed by him in respect of their second mortgage, and of what they should pay in redeeming the defendant; and as to the timber cut by the defendant, it was referred to the Master to take an account of it, and to set off the value of it against what should be found due to the defendant upon his first mortgage, and to state the balance. Judgment.

The Master reports the value of the timber at a sum exceeding by a few dollars the amount due to the defendant, so that his mortgage is thereby paid off. The appeal is by the plaintiffs, on the ground that the Master has found the value of the timber at too small a sum.

Now the decree I apprehend must have proceeded upon this principle, that the defendant, combining the

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character of first mortgagee, and owner of the equity of redemption, his possession, as between himself and the second mortgagee, would be referred to his character of first mortgagee until his mortgage was paid off. I do not see that his continued possession after he was paid off, could be referred to that character, being entitled as he was to possession as owner of the equity of redemption. A continued possession of a mortgagee, after being paid off, would be wrongful; he ought to deliver possession to the mortgagor. Being both, would it not be assumed that what would be rightfully done if separate, was in legal effect done, the characters being combined; and so what he received after ceasing to be a mortgagee, except nominally, he would receive as owner, and for that would not be bound to account; the proper remedy for the second mortgagee in such case, I suppose, would be the appointment of a receiver.

Judgment.

The decree seems to proceed upon the position of the parties being what I have supposed them to be, otherwise in declaring the rights of the parties it would, I apprehend, have declared the plaintiffs entitled to have the excess, if any, in the value of the timber beyond the amount due to the defendant on his mortgage applied to the plaintiffs' mortgage.

If I am right in my view of the case, it is immaterial how much beyond the defendant's mortgage money was the value of the timber; but if the plaintiffs are entitled to the excess, then I should send it back to the Master to review his report, for the defendant as mortgagee in possession was bound to account for what he made of the timber, not merely for its value as standing timber; and the Master should have required him to bring in an account of the proceeds of the timber, so far as it was sold and of the value of that on hand.

I think the appeal should be dismissed, but, under the circumstances, without costs.

JOHNSON v. CASS. 1865.

Practice—Notice of motion by leave of Court.

Where an injunction is granted to a particular day, which is not a motion day, and the writ is served, together with a notice of motion, for that day to extend the injunction, the notice is not irregular, though it omits to mention that such notice is given by leave of the court.

In this case an injunction had been granted *ex parte* on the 1st of March, to stay waste until and inclusive of Thursday, the 9th of March, and leave was given to the plaintiff to move on that day to extend the injunction. All these particulars were set forth in the order, directing the injunction to issue.

The injunction and notice of motion to extend it were served on the defendant, but the notice did not mention that leave had been given to move on Thursday, and on the motion being made,

Mr. *Blake*, Q.C., for the defendant, objected that the notice was irregular for the omission, Thursday not being the usual day for motions.

MOWAT, V.C.—It does not seem to me to be necessary in such a case to mention the leave. Statement.

An injunction is never granted to a particular day, except in connection with leave to the plaintiff to move on that day to extend it. That being the invariable practice of the court, the service of the motion to extend, and of an injunction naming the day up to which such injunction is to have force, is sufficient intimation to the defendant that it is by leave of the court that the motion is to be made on the day specified. Vide also, *Chaffers* v. *Baker*, 1 Jur. N. S. 32.

I have the less hesitation in coming to this conclusion, because I think that in an urgent case it would be the duty of the court to extend an injunction *ex parte* for a few days, to afford time to serve a new notice, if through a slip the first could not be acted upon.

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BAGLEY v. HUMPHRIES.

Married Woman, reference to arbitration by—How far binding when affecting her real estate.

A. having duly made his last will and testament, whereby he devised certain real estate, in separate parcels, to *B.* and *C.*, afterwards incumbered these lands, which incumbrance was unremoved at the time of death. *B.* was a *feme covert*, and questions having arisen between *B.* and *C.* as to the amount of the incumbrance to be borne by each, they by mutual bonds, in which *B.* and her husband joined, agreed to refer such questions to arbitration, and an award having been made between these parties,

Held, that *B.*, being a *feme covert* could not enter into such an agreement to refer, and that the provisions of the law, as to conveyances by married women of their real estates, did not apply to agreements to refer, and that therefore such agreement and award were not binding on her.

Statement. The bill in this case was filed by *Emma Ann Bagley*, wife of *John Bagley*, of the Township of Percy, by *William Jex*, her next friend, against *Henry W. Humphries*, *Samuel Stein*, and *George Hart*, executors of the last will and testament of *Israel Humphries*, deceased, and *John Bagley* and *Israel Humphries*. The main object of the bill was the administration of the said *Israel Humphries*. By his will the said testator duly devised to the plaintiff "the west half of Lot No. 18, in the third concession of the township of Percy, and enough of the east half of lot No. 17, in the third concession of the said township, to make 95 acres, and also half his personal property, after all his just debts were paid."

To his son, the defendant *Israel Humphries*, the testator devised the remaining part of lot 17 aforesaid, with the exception of a certain part thereof already sold, and certain other premises.

After making his will, the testator having become indebted to the defendant *Henry W. Humphries*,

conveyed to him the lands above mentioned so devised to the plaintiff and *Israel Humphries*, to secure such indebtedness.

On the fourth of March, 1858, the plaintiff and her husband *John Bagley* entered into a bond under seal, whereby they became bound to *Israel Humphries*, in the penal sum of £1000, wherein the incumbrance to *Henry W. Humphries* was set forth; and it also recited that differences existed between the plaintiff and *Israel Humphries*, as to the amount of such incumbrance which should be borne by each, and in order to settle such matters in dispute, it had been mutually agreed to refer them to the award of *Andrew Black* and *William Pollock*, and of such other third person as they should appoint; and it was conditioned and agreed that the said obligors would well and truly abide by the award of the said arbitration, or any two of them.

Israel Humphries also became bound in like manner. Statement.

The arbitrators so appointed duly entered upon the reference and made their award on the 10th day of March, 1848, whereby they, amongst other things, awarded that the plaintiff and her husband should pay and assume of the debt due *Henry W. Humphries* the sum of £356, and that *Israel Humphries* should pay the sum of £458.

The defendant *Israel Humphries* set up that this award had been accepted and acted upon by the plaintiff and her husband, and that the same was binding on them, and should be taken into consideration, and followed in the administration and partition of the estate.

It was objected that the award, having reference to real estate of a *feme covert*, must be invalid as against her, and that though she might otherwise have power to refer, the agreement not having been executed in

1865. Bagley v. Humphries. accordance with the provisions of the law, as to conveyances by married women, was not binding on the plaintiff. The bill prayed for an administration of the testator's estate, and other relief. All questions, however, except that raised as to the validity of the award, were disposed of at the hearing.

The cause came on for the examination of witnesses and hearing before his Honor Vice-Chancellor *Spragge*, at the sittings of the court at Cobourg.

Mr. *A. Crooks* and Mr. *Nanton* for the plaintiff.

Mr. *Armour* for defendants *Humphries*, *Stein* and *Hart*.

Mr. *Blake* for the defendant *Israel Humphries*.

Judgment. SPRAGGE, V.C.—The only question noted by me as remaining to be determined, is, whether the arbitration and award set up by *Israel Humphries* is binding upon the plaintiff and her estate. I think it is clear from the authorities that it is not.

Certain lands were devised to the plaintiff, and certain other lands to *Israel Humphries*; and between the making of the will and the death of the testator, he made a mortgage covering the lands devised to both; and the question referred to arbitration was how much of the mortgage money should be charged against the lands of each respectively. The lands were simply devised to the plaintiff; not settled upon her so as to give her a power of disposition over them: and they were therefore not her *separate estate* in the proper meaning of the term.

Emery v. *Ware*, (*a*) was a case where there was an

(*a*) 5 Ves. 846.

agreement to sell real estate; the price to be fixed by arbitration. Lord *Eldon* said, "But I must look into the competence of some of these defendants as married women. I have no conception that as against them such an agreement could be enforced, binding their interest by agreement which could not be bound by conveyance." And so in this case the interest of the married woman could not be bound by conveyance, that is, by conveyance simply; certain guard for her protection being necessary beyond the execution of a conveyance by the wife and her husband.

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Davis v. *Page*, (*b*) is very shortly reported. It is only said that a reference to arbitration was proposed, one of the parties being a married woman, in respect of her interest in real estate, Lord *Eldon* thought he could not permit the reference. It was then asked that it should be referred to the Master to inquire whether it would be for the interest of the married woman that the cause should be referred; and this also Lord *Eldon* refused.

Judgment.

In *Strachan* v. *Dougall*, (*a*) before the Privy Council, these two cases were referred to and followed. Lord *Kingsdown*, by whom judgment was delivered, thus refers to the point: "The question raised by the appellant is, that the award set up in the plea of the respondents *Dougall* and wife * * is invalid; and this he urges upon various grounds, the principal being that some of the parties to the submission being married women, were incompetent to enter into such an agreement, as it related to freehold estate and interest in land; and that although the other parties were competent to concur in such agreement, yet, that the fact of some of the parties being under the disability of coverture, an award so made was not binding upon him. We think that this objection is fatal, and that an award founded on such agreement was invalid."

(*a*) 9 Ves. 350. (*b*) 7 Moo. P. C. 365.

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I was referred to *McGill* v. *Proudfoot*, (*a*) as an authority that a married woman is competent to submit to arbitration questions affecting her real estate. It is so stated in the digest, but erroneously. It did not become necessary to decide the point, but the opinion of a majority of the court was against it.

I thought at first that the award set up in this case might possibly be supported upon the ground, that the land devised to the married woman was chargeable with the whole of the mortgage debt, in common with the land devised to *Israel Humphries*; and that the object of the arbitration was not to alienate, or to impose any new burthen, but only to ascertain what proportion of the mortgage debt was properly chargeable against each; and perhaps the guards provided by the statute for the protection of married women are but little needed in such a case. But the principles applying to the real estate of married women are against this idea. As to her real estate she is competent, I do not say to agree, but to convey; but supposing her competent to agree in regard to it in the same way as she may convey it; it could be only in the same way, with the same guards and formalities as are required to make her conveyance effectual. It seems to follow that she and her husband cannot by bond of submission, as was done in this case, agree to refer to arbitration.

Judgment.

This is one of several points which arose at the hearing. As between these parties there is a reference to the Master, and costs and further directions will be reserved.

(*a*) 4 U. C. Q. B. 40.

SANBORN v. SANBORN. 1865.

Duty of Guardian ad litem of Infants.

When the guardian for infant defendants, being notified, did not appear at the hearing, and their interests, which were not fully ascertained, were not represented, the court refused to pronounce a decree in their absence, removed the guardian, appointed another in his stead, and directed the cause to be again brought on.

The bill in this cause was filed by *William Sanborn*, *David L. Youngs*, *Joseph W. Duryea* and *Henry C. Shannon* against *Rose J. Sanborn* and *Hattie Sanborn*, an infant under the age of twenty-one years.

The objects of the suit are sufficiently explained in the judgment.

Depositions had been taken, and the the cause was set down for hearing at Toronto, when

Mr. *Roaf*, Q.C., appeared for the plaintiffs. Judgment.

No one appeared for the gentleman who had been appointed guardian *ad litem* by the Master at London.

SPRAGGE, V.C.—At the hearing of this cause, the interest of the infant defendant was wholly unrepresented, although it appeared that the guardian *ad litem* had been duly notified. I expressed my dissatisfaction with this, and said that it would be proper that counsel should appear for the infant. This has not been done, and the matter had escaped my recollection. Upon looking over the papers I see that the plaintiffs, four in number, file their bill as surviving partners of *W. E. Sanborn*, against his heiress-at-law the infant, and his administratrix and widow, in respect of certain land conveyed to *W. E. Sanborn*, which land was purchased with partnership moneys, for, and was used for, partnership purposes. The plaintiffs allege that *W. E. Sanborn* was entitled to only one-twelfth share in this land, and there is some evidence that such was the extent of his

1865. Sanborn v. Sanborn. interest; though I hardly see how such can be the case, as by the articles of partnership, which are produced, it appears that the partners are entitled in equal proportions, and the purchase was with partnership moneys. Further, the bill prays that this land be sold and the proceeds distributed in the proportion to which the parties are, it is alleged, entitled. No account is prayed of the partnership dealings.

Judgment. I do not, however, propose to do more now than provide that the interest of the infant shall be represented, and to that end I direct that the guardian *ad litem* be changed, and that Mr. *Taylor* act for the infant. The guardian who has neglected to appear is not to have his costs.

GORDON v. ROSS.

Mortgagor and mortgagee—Bankrupt—Power of sale.

Where a mortgagor becomes bankrupt the mortgagee is not compelled to go in under the act, but may proceed to sell the property under a power of sale in his mortgage.

This was a motion for an injunction to restrain the sale of a steamboat by a mortgagee under a power of sale contained in his mortgage. The plaintiff was the assignee in insolvency of the mortgagors.

Mr. *Hoskin* for the motion contended that under the Insolvency Act of 1864, section 5, sub-section 5, a mortgagee's only remedy was to file a claim in the matter of the insolvency, when the proceedings would be taken which that sub-section points out. He referred also to 9th and 12th sub-sections.

Mr. *Crombie* contra, referred to the 4th and 5th sub-sections as shewing that it was not compulsory on the mortgagee to proceed under the insolvency.

MOWAT, V.C., refused the injunction, and held that a mortgagee was not obliged to file a claim, but was at liberty in lieu thereof to exercise the power of sale contained in his mortgage.

HENRY v. THE AGRICULTURAL MUTUAL ASSURANCE ASSOCIATION. 1865.

Insurance—Interim receipt by agent, how far binding—Principal and agent.

The agent of an insurance company, employed to receive applications, on application by the plaintiff, and receipt from him of the usual premium, gave to the plaintiff a receipt therefor, "subject to approval by the Board of Directors, money and note to be returned in case application is rejected." It was alleged that this was verbally understood between the agent and the assured to be a final agreement for the policy and an acceptance of the risk. The directors having refused to effect the proposed insurance, and returned the premium note given by the agent. *Held*, not liable to make good a loss.

Held also, that the agent's authority did not extend to the making of final agreements for insurance or to the insuring temporarily of property, not of the classes specified in printed circulars of the company, or such as they were accustomed to secure.

The bill in this cause was filed by *William Henry*, of the township of Stanley, yeoman, against the Agricultural Mutual Assurance Association of Canada and *George W. Keily*, and set forth that the plaintiff, on the 20th of August, 1863, entered into a contract with the defendants, then carrying on business under the Act ch. 52 of the Consolidated Statutes of Upper Canada, for insurance to the amount of $800 on his dwelling house and furniture, and on the grain then stacked, or cut down and about to be stacked on the plaintiff's farm, being lot No. 13, in the 10th con. of the township of Stanley; that no sum in cash was paid by the plaintiff, but that he gave his promissory note for $12.50, payable to the company on demand, in such proportions as might be required by the board of directors thereof, together with another promissory note for $3.59, payable to the defendant, *George W. Keily*, the agent of the company, which was for the cash premium on the said insurance, and for the expenses of survey and policy. Statement.

Mr. *Keily* then gave the plaintiff the receipt, dated

1865. the 20th of August, 1863, set forth at length in the judgment.

Henry v. Agricultural Mutual Ass. Association.

The plaintiff alleged that the agent *Keily* then led him to understand that the policy would certainly issue immediately on his return to the main office of the company at London, and that he might in the meantime consider himself secured against all loss by fire, on the premises so insured.

To this the Association said in their answer that the authority of *Keily*, as agent, did not extend further than the giving such interim receipt to the applicant, to be acted on or rejected by the directors, as they might think fit. That on consideration of the application soon after, the directors refused the risk, and returned to the plaintiff the said promissory notes with a letter from *Keily*, informing the plaintiff that the application was not accepted, which letter was directed to Bayfield post-office, the address given by the plaintiff to the agent.

Statement.

On the 18th of October, 1863, a fire occurred on the plaintiff's premises, by which the grain claimed to have been insured was destroyed. The plaintiff, not having gone to the Bayfield post-office for some time, did not receive the letter rejecting his proposal till the day after the fire took place. He prayed a specific performance of the agreement and for payment of the damages occasioned by the fire.

Mr. *Keily* in his answer admitted the genuineness of the receipt above referred to, but he denied that he then represented that the risk would certainly be accepted by the company, but alleges that he then stated that he was doubtful whether it would be accepted or not: that he afterwards heard suspicious statements as to the plaintiff's character, and on the 24th of August, 1863, returned the application and promissory notes to the plaintiff, with a letter addressed to Bayfield

post-office, informing him that the risk would not be accepted. 1865.

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He denied that the risk ever was accepted by the Association.

The cause was heard at Goderich, when evidence, oral and documentary, was adduced, the material parts of which are clearly stated in the judgment.

Mr. *Macara* was for the plaintiff.

Mr. *Roaf* for defendants.

SPRAGGE, V.C.—The plaintiff's case is that the defendants the Insurance Company, through their agent the defendant *Keily*, contracted to insure from loss by fire certain stacks of grain on the plaintiff's premises. The plaintiff's "proposal" dated 20th August, 1863, was to insure his dwelling-house for $40, its contents for $60, and stacks of grain for $700; the only question is as to the stacks of grain. At the date of the proposal, the grain was still in the field: it was afterwards put into stacks and was destroyed by fire on or about the 18th of October. There was no barn upon the plaintiff's premises. Bearing the same date as the proposal was a receipt given by *Keily* in the following terms, being a printed form furnished by the company filled up by *Keily*. Judgment.

Stanley, 20th August, 1863.

"Received of *William Henry*, premium note for twelve $\frac{50}{100}$ dollars, and two $\frac{00}{100}$ dollars, (being sixteen and two-thirds per cent. on note,) in cash, which is duly indorsed on the note, together with one dollar and fifty cents for survey and policy fee for an assurance of $700 $\frac{00}{100}$ with the *County of Middlesex Mutual Fire Insurance Company*, agreeably to his application to that effect, subject to approval by the Board of Directors, money and note to be returned in case application is rejected. Mem.—If applicant does not receive his policy within four weeks and is not notified of the risk

1865. Henry v. Agricultural Mutual Ass. Association.

being declined, he is recommended to write to the secretary on the subject, addressed to London, C. W.

Cash premium - - $2.09.
Survey and policy 1.50.

$3.59.

Signed, GEO. W. KEILY,
Agent and Surveyor."

It is not disputed that *Keily* was the agent of the company to receive proposals and give receipts: and it is admitted that such receipts in a proper case operated as an interim assurance from their date. In other words, such a receipt was a contract to insure, subject to the approval of the Board of Directors. The question is whether *Keily's* authority as agent extended to the insurance; and whether the plaintiff had reason to believe that *Keily* had such authority. As to what passed at the insurance I have the evidence of a brother of the plaintiff, and of *Keily* himself. I need only observe, that if *Keily* represented that he had authority beyond the ordinary authority of such an agent, or beyond the limited authority which appeared upon the papers executed between the parties, *Henry* believed such representations at his peril, as they could not affect the company. I do not say that *Keily* made such representations; I am inclined to believe his evidence upon that point rather than that of the plaintiff's brother, which was given with an evident bias for the plaintiff. I am of opinion, from both the oral and documentary evidence, that *Keily* had no authority to effect an interim insurance upon grain in stacks, where there was no barn. The first condition of insurance on the back of the policy runs thus: "This Company assures farm buildings, isolated dwellings, the out-houses belonging to them, country school-houses, churches and meeting-houses, with their contents, only." The company did sometimes insure stacks of grain in a barn-yard, along with grain in a barn: and I suppose there was nothing to prevent their insuring stacks of grain where there was no barn, if they thought fit; but

Judgment.

it was contrary to their practice; and I apprehend the agent had no authority to go beyond the ordinary conditions of insurance, or, at most, to anything outside of these conditions, not sanctioned as a practice of the company. 1865. Henry v. Agricultural Mutual Ass. Association.

But the applicant for insurance had a right to assume that the agent had the ordinary authority of insurance agents receiving applications, unless informed otherwise by the agent or by papers, to which he the applicant was a party. The evidence does not shew me whether the insurance of stacks of grain is beyond the ordinary authority of insurance agents. But the printed form of application contains information as to what is insurable: the applicant makes this his own act. It is given to him by the agent as containing the form of application which he is to make, and informs him of what the company is prepared to insure, and by inference that it insures only what is enumerated. This printed form enumerates in a column or margin dwelling-houses and their ordinary contents, barns, sheds, driving-houses and their ordinary contents. Judgment.

In larger type, on the right hand of the paper, are these paragraphs:—

"☞ If insurance be wanted on any property not mentioned in the margin it may be inserted in writing.

"☞ Only farm buildings, dwellings, the out-houses belonging to them, country school-houses, churches, meeting-houses, and the out-houses belonging to them, are insured."

The last paragraph contains a longer list of what is insurable than the column or margin, but limits what is insurable to what is specified. Lower down in the paper is another enumeration of particulars printed in such a manner as to be likely to catch the eye, first in large

1865. type "Dwelling-house," then a list of particulars in regard to it to be filled up by the applicant. After this, in the same type, "Barns, sheds, &c.," followed by the like particulars.

Henry v. Agricultural Mutual Ass. Association.

Now this proposal is not a proposal only, but contains notes by the company for the information of parties applying to insure. If it informs applicants that it insures only certain classes of property, it necessarily informs them that their agents' authority extends only to the insurance of such property. It might be that this information was conveyed in such a way or form, that a person of ordinary intelligence, and giving such ordinary attention as a prudent man would give to a matter of business, might not observe it: I mean a person of that class with which this company professed to deal: the company calls itself at the head of the proposal "A Purely Farmers' Association:" and I should be disposed, if the language used were ambiguous, or if the information as to the classes of property which only the company would insure, were inserted in an obscure place, where the applicant would not look for such information, to hold the information not conveyed: but I cannot say that the paper is faulty in either of these respects. If read through by *Henry*, and it was his business, if he desired to be safe, either to read it or have it read to him, he would have learned that the company did not insure stacks of grain, and therefore that *Keily* had no authority to do so. If he omitted this common business precaution, it was either because he was careless, or because he trusted to what *Keily* said to him. If he did either it was his own fault, and he, and not the company, should bear the consequences: I desire to add, that I by no means intend to say that he was misled by *Keily*.

Judgment.

In this view of the case, it becomes unnecessary to consider the effect of the notification by *Keily* to *Henry* that his application was rejected. I only observe, in regard to it, that it was through his own culpable

negligence that he did not receive the letter. The receipt which he kept informed him that he might expect his policy, if it were granted to him, within four weeks, and recommended him, if he did not receive it within that time, and was not notified of the risk being declined, to write on the subject to the secretary, addressed to him at London, C.W. He had given his own post-office address as "Bayfield;" so that he was instructed to look for a letter at the Bayfield post-office, either sending his policy or declining his application, within four weeks. Within two weeks, as I gather from the evidence, if not within one, *Keily's* letter was at the Bayfield post-office, and must have remained there six weeks or more; it was only taken out by *Henry* the day after the fire. If he had not been guilty of very great negligence, he would have been informed, (whether in a shape to relieve the Company, if liable, I do not say,) that he would receive no policy, and he would have received back the money and notes which he had given to *Keily*. This takes away any seeming hardship that might perhaps otherwise appear to be in the plaintiff's case.

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Judgment.

I decide the case, however, upon the other ground, that *Keily* was not the company's agent to insure any but certain classes of property, within none of which the property in question came, and that this was communicated to the plaintiff by the paper called a "proposal," to which he was a party. I must therefore dismiss his bill, and with costs.

1865.

BUCHANAN v. DINSLEY.

Conveyance to defeat creditors—Sub-purchaser.

A. being largely indebted to *B. & Co.*, and the owner in fee of certain real estate, conveyed the same to his son, without consideration. *B. & Co.* recovered judgment against *A.*, on which an execution against his lands was issued in May, 1864, but in February previous the son had conveyed the premises in question to *D.*, taking, as the consideration for his purchase thereof, his promissory notes not yet due, and still unpaid. Evidence establishing collusion between *A.*, his son, and *D.* was adduced, and both the conveyances were declared fraudulent, and the lands held subject to the plaintiffs' judgment debt.

Statement.

The bill of complaint in this cause was filed by the Hon. *Isaac Buchanan*, *Adam Hope*, and *Charles J. Hope*, plaintiffs, against *Edward Dinsley*, *John Dinsley*, and *Orrin L. Doan*, defendants, and set forth that on the 22nd day of August, 1863, the defendant, *Edward Dinsley*, was indebted to the complainants upon certain promissory notes, and that he was then also seized in fee of certain lands, which by an indenture, made on that day, and for a nominal consideration, he conveyed to his son, the defendant *John Dinsley*, who is charged to have then had notice of the plaintiff's claims, and to have acted collusively and with the purpose of defeating them. The plaintiffs recovered judgment against *Edward Dinsley*, for the sum of $3,386, and caused a writ of execution against his lands to be issued to the sheriff, in whose bailiwick the lands were, on the 23rd of May, 1864.

On the fourteenth day of April, 1864, the defendant, *John Dinsley*, conveyed the premises in question to his co-defendant, *Orrin L. Doan*, for the consideration of $2,000, payable as follows, the sum of $60 down, the promissory note of *Doan* for $440, payable at 3 months, and the remainder in three instalments of $500 each, payable yearly. *Doan* was alleged to have had notice of the plaintiff's claim, and to have acted in collusion with his co-defendants.

The prayer of the bill was for a declaration that the

conveyance from *Edward Dinsley* to his son was fraudulent, as against the complainants, that the same might be cancelled, and the lands sold under the plaintiffs' execution; second, that the sale to *Doan* might also be set aside, as done *mala fide*, and without good consideration, or that *Doan* might be declared a trustee for the plaintiffs of the notes and purchase money, and that they might be applied in satisfaction of the plaintiffs' claim. Evidence was taken and the cause heard at Goderich, when it was conceded that the plaintiffs had established their case as against the *Dinsleys*; and the only question left for consideration was their rights against *Doan*.

Mr. *Roaf* for the plaintiffs.

Mr. *Blake* for the defendant *Doan*.

The bill had been ordered to be taken *pro confesso* against the defendants. Argument.

SPRAGGE, V.C.—It was conceded at the close of the argument that, as against *John Dinsley*, the deed from *Edward* his father to him must be declared fraudulent and void.

As against *Doan*, it is resolved into a question of costs, the plaintiffs being satisfied to receive the unpaid purchase money due from [illegible]n to *John Dinsley*. If the plaintiffs had sought no more by their bill, he would have been a necessary party only for the purpose of restraining him from paying his purchase money to *John Dinsley*, and he would have been entitled to receive his costs. But the bill makes a case against him of notice, and primarily seeks the land itself, the purchase money being asked for by way of alternative relief, and it is contended that notice is proved; but the plaintiffs prefer, it is said, to take the purchase money.

The consideration expressed in the deed is nominal—5s.; and *Doan* certainly had no reason to suppose that

1865. there was any valuable consideration for the deed. I cannot therefore very well understand how he can swear, as he does by his answer, that he had no notice that the conveyance was voluntarily and without consideration. Further, *Doan's* own examination shews that he knew enough of the circumstances of the father to have reason to believe that the deed was made to the son for no honest purpose. He was his near neighbor in a small village, living but a little more than 100 yards from him. He says that he first heard about four years ago that the father was losing money on his farm; further, that two or three years ago he understood that he had lost a good deal of money. In another place he speaks of him as a man in low circumstances, and with a large family. He admits also that he knew of his having been interested in the store in Blyth, and says he did not know whether he was successful or not. A deed from a father, known to *Doan* to be in such circumstances, and with a large family, to one son, who, eight months afterwards says he is twenty-two years old, and upon the face of it voluntarily, is the title under which *Doan* purchased in February, 1864. *Doan* could not but see that the father was stripping himself and the rest of his family almost bare of property; for a few village lots of no great value were all that was left to him. It could scarcely be by way of advancement to this son, for he would hardly impoverish himself and the rest of his family for such a purpose. It is impossible, to say the least of it, but that he must have suspected, looking at the circumstances of the father and the age of the son, without even the common pretence that the father was indebted to the son for services or otherwise; knowing also that the father had been interested in the store at Blyth, and that these plaintiffs had furnished goods to this store, it is impossible but that he must have suspected that this deed was given for the purpose, to use a common phrase in such cases, of protecting the land from creditors; and if he had reflected in the matter, as he ought to have done, and as probably he

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Judgment.

did, that these plaintiffs were the creditors against whom it was to be protected. 1865.

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I made the foregoing note shortly after the close of the case. I have again gone carefully over the evidence, and am confirmed in the opinion I then formed. I think there was on the part of *Doan* a wilful blindness, or a negligence so gross as to be evidence of fraud, within the cases of *Jones* v. *Smith*, (*a*) *Hind* v. *Dodd*, (*b*) and other cases of that class. I think there was that at the least; and that is sufficient to affect a party with notice, even when there is *bonâ fides*; but I doubt in this case if there was *bonâ fides*. I incline to think *Doan* knew enough to convince him, and that the conviction in his own mind was, that the conveyance from the father to the son was to defeat creditors.

Judgment.

Ryland v. Alnutt.

Married Woman—Ante-nuptial settlement—Law of Lower Canada.

By an ante-nuptial settlement made in Lower Canada, in 1833, according to the laws there in force, it was agreed between the parties to the proposed marriage that no communion of property between them should exist, but that each should hold and continue to enjoy what each then had or should thereafter acquire. In 1848 certain goods and chattels of the husband were sold at sheriff's sale, on executions against the husband, and, having been bought in by a third party, were, by a deed of donation, conveyed to the wife for her separate use. The parties having removed to Upper Canada, brought with them these goods, which were seized under executions, issued on judgments obtained against the husband.

Held that the marriage settlement and deed of donation properly vested the goods therein mentioned in the wife, and that they were not liable to seizure for her husband's debts.

The bill in this cause was filed by *Mary Pitt Ryland*, by her next friend, against *Henry Alnutt*, *Joseph*

(*a*) 1 Hare 43. (*b*) 2 Atk. 275.

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Ryland v. Alnutt.

Aussem, John White, Henry J. Thorp, sheriff of the County of Prince Edward, and *George H. Ryland,* husband of the plaintiff, and alleged, that in and prior to the month of April, 1833, the plaintiff, being a *feme sole,* residing at Quebec, was possessed of personal property to the value of $1500, or thereabouts.

That an intermarriage was agreed on between her and the defendant, *George H. Ryland,* and thereupon an ante-nuptial settlement was duly made and entered into before two notaries at Quebec, according to the laws there in force, when it was agreed that each should, notwithstanding such intermarriage, possess and enjoy all the estate and effects they severally then had, or might thereafter obtain or possess, in every respect free and clear from any claim or demand of the other of them.

Statement.

In 1848, certain of the goods of Mr. *Ryland* were seized under executions against him at Quebec, and bought at the sheriff's sale by one *Edward Ryan,* who, by deed of donation, conveyed them to the plaintiff.

In 1856, the plaintiff came to reside near Picton, in Upper Canada, bringing with her many of the goods, so conveyed to her by Mr. *Ryan* The defendants *Alnutt, Aussem,* and *White,* having obtained judgment against Mr. *Ryland,* issued executions thereon to the sheriff of Prince Edward County, under which the above and other goods were seized. The bill was then filed, setting forth the above facts, and praying for an injunction to restrain the sheriff and the execution creditors from proceeding to sell the goods, as belonging to the plaintiff. The other facts fully appear in the judgment. Evidence was produced at the hearing, proving the proper execution and validity of the ante-nuptial settlement and deed of donation according to the law of Lower Canada.

The cause was heard and evidence taken at Belleville. The following authorities were cited:—*Storey* on the

Conflict of Laws, sections 143 to 163; *Wilts* v. *Campbell*, (*a*) *Head* v. *Head* (*b*).

Mr. *C. S. Patterson* and Mr. *J. C. Hamilton* appeared for the plaintiff.

Mr. *W. M. Britton* for the execution creditors.

The bill was taken *pro confesso* against the other defendants.

SPRAGGE, V.C.—By articles of ante-nuptial settlement, made between the plaintiff and the defendant *George Herman Ryland*, bearing date 19th of April, 1833, it was provided that after their marriage there should be no communion of property between them, but that whatever each then had, or should in any way thereafter acquire, should be the separate property of each. The parties were residing at the time in or near Quebec.

Judgment.

In 1848, the furniture, horses, carriages, and the like effects, in and about the house at Beauport, near Quebec, were sold in execution. The whole were purchased by Mr. *Edward Ryan*, of Quebec, and by instrument of donation, dated 22nd June, 1848, the whole were conveyed by way of gift to the plaintiff, for her separate use. About two years after this the plaintiff, with her husband and family, removed to Montreal, and continued to reside there until 1856, when they removed to Picton, in Upper Canada, at which place they have since resided, with this exception, that Mr. *Ryland*, who is Registrar of the county of Montreal, resides only occasionally at Picton, the duties of his office requiring his general residence to be at Montreal.

The defendants, other than Mr. *Ryland*, are creditors, having executions against the goods of Mr. *Ryland*, in

(*a*) 12 Ves. 492. (*b*) 3 Atk. 511.

1865.

Ryland v. Alnutt.

the hands of the sheriff; and the sheriff has seized a quantity of household furniture and effects, a horse, a carriage, and some other articles. The bill seeks to protect all that has been seized, as the separate property of the wife; the greater part under the marriage settlement and the donation, and the residue under the marriage settlement alone.

It is conceded, on behalf of the creditors, that those articles which were conveyed to the plaintiff by the donation are exempted from seizure; but it is denied that the exemption extends any further, and I think the creditors are right upon this point. The bill seeks to exempt them, on the ground that they have been purchased by the plaintiff, and are therefore her separate property, under the marriage settlement; but there is no evidence as to how or by whom they were purchased, and it is not even alleged in the bill that they were purchased with the moneys of the plaintiff, or that she had any means of her own wherewith to purchase them. If it were shewn that she had converted into money any of the property acquired from Mr. *Ryan*, and had with the proceeds purchased other articles, I should hold that the newly purchased articles stood in the place of those sold, and I should hold the same in regard to articles exchanged; and upon this ground I exempt from seizure a horse, which appears by the evidence to have been exchanged for one of the horses acquired from Mr. *Ryan*. I am asked to go further and to presume that the articles purchased were purchased with the moneys of the plaintiff. The presumption, I apprehend, must be the other way. The husband is in the receipt of an income; and it is his legal, as well as his moral duty, to support his wife and children according to his means and their condition: the wife, so far as appears, has no income of her own. The inference must be that the expenses of the household, whether in the way of maintenance, or of providing necessary or fitting furniture, are defrayed out of the moneys of the husband, even

Judgment.

though the immediate purchase be made by the hand of the wife. It is said that some few articles comprised in the donation have been sold, but for how much, or how the money was applied, is not shewn.

I can only exempt from seizure those articles that are indentified as comprised in the donation, and will hand to the Registrar a list of them, adding thereto the horse to which I have referred. Of five carpets comprised in the donation, the evidence states that two still remain; of two oil cloths one, and of two sofas one. The readiest way of ascertaining which these are will be by affidavit to be made by the plaintiff and her eldest son. Those not so identified must be subject to seizure.

As to the costs, the plaintiff and the creditors are each to a certain extent right, and to a certain extent wrong. The bill, by some oversight I suppose, omits to make any case upon the *proces verbal* under which the goods were sold at Beauport, and the donation from *Ryan*, but goes upon the ante-nuptial settlement only; and the answers are silent as to the *proces verbal* and donation. The interrogatories and cross interrogatories were however as to both; and the evidence and argument at the hearing proceeded upon the assumption that both were in issue. The creditors have claimed to seize articles which the plaintiff is entitled to; and on the other hand the plaintiff has sought to exempt from seizure articles liable to seizure upon the creditors' execution. I think the proper way to deal with the costs is to divide them, or rather to give costs to neither party.

Judgment.

1865.

GUNN v. MCDONALD.

Duty and liability of mortgagee as trustee for mortgagor.

A mortgagee of land, part of which was taken by a railway company, was offered £100 as compensation for the land so taken, which he refused; and the matter having been referred to arbitration £30 only was awarded. On a bill filed to redeem—*Held* that under the circumstances he was chargeable with the sum awarded and no more.

This was a redemption suit, and a reference had been made to the Master to take the accounts, in doing which he charged the defendant with an item of £100, under the circumstances stated in the head note and judgment. From this report the defendant appealed. There was a cross appeal by the plaintiff, but it is unnecessary to further refer to it.

Mr. *Proudfoot* for the defendant.

Mr. *McLennan* contra.

Judgment.

SPRAGGE, V.C.—The bill is to redeem, and the decree directs accounts to be taken between mortgagor and mortgagee. One of the objections taken by the defendant to the report is that he is charged with the sum of £100, being the amount offered to be paid to him by the Grand Trunk Railway Company by way of compensation for land taken for purposes of the railway, instead of the sum of £30, the amount awarded to him.

I have no facts before me upon this point, except that £100 was offered; that the defendant refused it, as too small a sum, and preferred to have an arbitration under the act; and that the arbitrators, instead of awarding a larger sum, as claimed by the defendant, awarded a smaller sum than had been offered by the railway company. This is charged as wilful neglect and default, and it not being shewn by the defendant that he consulted

with the plaintiff as to the propriety of accepting the offer of £100, it is insisted that it was his duty to do so; and that if he had done so the loss that has occurred might have been avoided.

Fry v. *Fry* (*a*) before Sir *John Romilly* is referred to, in support of this charge; that case was decided expressly upon the ground that the executors had been guilty of negligence in not selling the property for many years. The trust was to sell it as soon as it could conveniently be sold after the testator's decease. It is certainly a judicious course for a trustee to consult with his *cestui qui trust* when the course he is about to take may admit of question. It would have been judicious in this case if the defendant had consulted the plaintiff, that is, if he had been accessible; but I do not find any authority for saying that it is the duty of a trustee to consult his *cestui qui trust*. In *Buxton* v. *Buxton* (*b*) before *Lord Cottenham*, when Master of the Rolls, a trustee, whom it was sought to charge with the loss upon a sale of Mexican bonds, was urged by a co-trustee, who was also a *cestui qui trust*, as was also the defendant, to sell the bonds, and the Master reported that, in his opinion, the defendant took an unnecessary and unreasonable time to dispose of the bonds, and that he ought not to have speculated on their rise and fall. But *Lord Cottenham*, being of opinion that the defendant had exercised his best discretion, and that if he erred it was an error in judgment, held the defendant not liable for the loss.

Judgment.

In the case before me I have no reason to suppose that the defendant did not exercise his best discretion, and I cannot even say that the course he took was not a sound exercise of discretion; for if it was probable that more than was offered would have been obtained by arbitration he acted wisely, though the result was unfortunate: and that more has been obtained in many

(*a*) 27 Bea. 144.
(*b*) 1 M. & C. 80.

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Gunn
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McDonald.

cases by arbitration, we know from cases before the court. If the defendant had accepted the £100, the plaintiff would most likely have complained that it was too small a sum, and that the defendant ought to have taken the course which the legislature has pointed out for the ascertainment of value between railway companies and the owners of land taken for railway purposes. I think the Master erred in charging the defendant with the £100; and that he should have been charged only with the amount awarded, and that the objection must be allowed.

Bell v. Manning.

Principal and surety—Release of the debtor.

The payee of a promissory note indorsed for the accommodation of the maker, having obtained judgment against the maker and indorser, executed a release to the maker, reserving all his rights against the indorser.

Held, that he was entitled to do so, and might still proceed to enforce the judgment against the indorser.

Statement.

The bill in this cause was filed by *Robert Bell* against *James Manning* and *Edward Taylor Dartnell*, and set forth that on the 3rd of September, 1859, the plaintiff, at the request of the said *Dartnell*, and without consideration, became indorser of a promissory note, then made by *Dartnell*, for £200, payable three months after date, and afterwards delivered to the said *Manning*. That *Manning* prosecuted an action at law for the recovery of the amount due on the said note against said *Dartnell* and the plaintiff, in which judgment was recovered for £228 2s. 1d. damages and costs. That it was afterwards agreed between *Manning* and *Dartnell* that on payment of the sum of £200 sterling to *Manning*, on account of certain dealings between them, that *Dartnell* should be discharged from all liability on the

foot of the judgment, and this being done, a release was duly executed by *Manning* in favor of *Dartnell*, which, however, expressly reserved all *Manning's* rights against the plaintiff.

Manning proceeded on his judgment, and had seized certain lands of the plaintiff in execution thereunder.

The plaintiff thereupon obtained an order from Mr. Justice *Hagarty*, in Chambers, staying the sheriff's proceedings under the execution till the then next term, in order that the plaintiff might in the meantime apply to this court, or then move the Court of Common Pleas, for such relief as he might be entitled to.

This bill was thereupon filed, praying a declaration that plaintiff had been released from further liability as such surety, and for an injunction to stay the action at law.

Statement.

The plaintiff now moved for an interim injunction, when the affidavit of the defendant was filed, which, among other things, alleged that he was not aware that the plaintiff was an accommodation indorser merely, but had been informed by *Dartnell*, when the note was made, that the plaintiff had joined therein for good consideration; that *Dartnell* was then also indebted to him, *Manning*, on a mortgage, and that the object of obtaining his release of the judgment on payment of the £200 sterling, which was obtained through Major *Marindin*, a friend and relative of *Dartnell*, was to obtain a discharge of the mortgaged land, and that he, *Manning*, would only agree to execute such release with the reservation of his remedy on the judgment against the plaintiff.

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

Mr. *A. Crooks*, Q.C., for the defendant, *Manning*.

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SPRAGGE, V.C.—I understand Mr. *Roaf* to concede, and I think quite properly, that in the case of creditor, principal debtor, and surety, it is competent to the creditor to give an express release to the debtor, and at the same time effectually to reserve his rights against the surety.

The point is expressly decided in *Price* v. *Barker*, (*a*) and I think upon this very satisfactory ground, that the intent of the parties gathered from the whole of the instrument is to govern. It is thus put by *Coleridge*, J., who delivered the judgment of the court upon the question: "whether the general words of the release are restrained by the proviso, so that in order to give effect to the whole instrument, we must construe it as a covenant not to sue, instead of a release, * * two modes of construction are for consideration, one that according to the earlier authorities the primary intention of releasing the debt is to be carried out, and the subsequent provision for reserving remedies against co-obligors and co-contractors, should be rejected, as inconsistent with the intention to release and destroy the debt, evinced by the general words of the release, and as something which the law will not allow, as being repugnant to such release and extinguishment of the debt: the other that, according to the modern authorities, we are to mould and limit the general words of the release, by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions, by preserving the rights against parties jointly liable." It was very well put by counsel for the plaintiff, that the reason of the general principle that a discharge of the principal discharges the surety is this, that if it precludes the surety from his remedy against the principal, the surety is defrauded; and if it leaves the remedy of the surety against the principal unprejudiced, it is a fraud upon the principal: but that this dilemma

Judgment.

(*a*) 4 E. & B. 760.

does not exist where the principal himself consents, that the remedy against the surety shall continue, for then it follows that he cannot complain of being in consequence sued by the surety.

Price v. *Barker* is not so strong a case as this, for in this case the rights against others are not reserved in general terms as in that case, but expressly against the surety himself. In that respect it resembles *Solly* v. *Forbes*, (*a*) decided as long ago as 1820, and upon which counsel for the defendant, in *Price* v. *Barker*, observed that it was impossible to construe the instrument as an absolute release, inasmuch as there was a reservation of right to sue the very party supposed to be releas

But as the law upon the point is not contested, it is unnecessary to pursue the subject further, and it remains to consider the grounds upon which Mr. *Roaf* seeks to take this case out of the general rule. He contends that upon the whole it appears to have been the intention and agreement of the parties, that is, *Dartnell* and *Manning*, that *Dartnell* should be discharged, not only as to the mortgage, but as to the judgment, and that the discharge should be absolute and unqualified. It is clear that it was to be so as to the mortgage, but as to the judgment, which is a separate debt, this only is clear, that *Manning* was not to enforce it against *Dartnell*. The instrument of release recites the judgment which is against the plaintiff and *Dartnell*. It does not in terms release the judgment, but does in terms release *Dartnell*; and these words are introduced, "Saving my rights against the said *Robert Bell*." Upon the face of the instrument, therefore, the plaintiff is still liable. We must look elsewhere for evidence of the intent and agreement upon which the plaintiff relies, that not only was *Manning* not to sue *Dartnell*, but that he was to take

Judgment.

(*a*) 2 Bp. & Bing. 38.

1865. no course which could indirectly make *Dartnell* liable to pay the judgment debt.

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In the first place, such intent and agreement is contradicted by the terms of the release; for if the rights against *Bell* reserved by *Manning* were enforced, it is plain; and is so plain, that it must have struck any layman of intelligence, not to say a lawyer as Mr. *Dartnell* is, that *Bell's* rights over against *Dartnell* would immediately arise. The frame of the release not releasing the judgment, but only one party to it, is also against the plaintiff's contention; and the reservation of rights against *Bell* is interlined in the instrument by *Dartnell* himself (at the instance of *Manning*), and after some discussion, as *Dartnell* says. He thus introduces that, the necessary consequences of which was, that if acted upon, his discharge could not be absolute and unqualified, and I cannot doubt that he perceived this. The evidence should be very strong and clear to get over the effect of all this.

Judgment.

Assuming that the plaintiff may go outside of this document, as it contains only part of the agreement, or rather was the carrying out of only a part of the agreement, and it does not appear that any concluded agreement shewing the terms of settlement between the parties was put into writing; I have read the affidavits, the correspondence and other papers.

The parties to the transaction, *Dartnell* and *Manning*, differ as to what passed when the note upon which the judgment is recovered, made by *Dartnell*, indorsed by *Bell*, was given to *Manning*. *Dartnell* says *Manning* knew from him that *Bell* was accommodation indorser. *Manning* denies this, and says that *Dartnell* represented that *Bell* was indebted to him in the amount. It is not very material, but I find that in a subsequent letter from *Dartnell* to *Manning* he speaks of *Bell* being indebted to him. Subsequently, the mortgage debt and the judg-

ment debt, running at the same time, payments were made upon each, £70 being paid upon the judgment. The mortgage debt was agreed to be compromised by *Manning* taking two-thirds and discharging it. *Dartnell* appears to have been particularly anxious to discharge the mortgage, as it was upon what is called his homestead. He alludes to it in a letter to *Manning* of the 14th of December, 1863, and, referring to the judgment, says, "*Bell's* matter I would need to have let rest as it is, until," &c., and other passages shew that he then contemplated one settlement for the mortgage debt and another for the judgment. In April, 1864, the parties were in treaty for a settlement. and it was agreed that $1000 should be paid by *Dartnell* to *Manning*. *Dartnell* says, this was to be in satisfaction of all claims; while *Manning* says it was to be in satisfaction of the mortgage only. A memorandum was at that time drawn up by *Dartnell*, as to which they also differ; but I observe that it provides for an assignment of the mortgage to the person who should advance the money; and as to the judgment, that *Dartnell* should be released, not that the judgment itself should be released; it was not signed by either party.

Judgment.

On the 18th of August, in the same year, a letter was written by *Manning* to *Dartnell* in these words: "I have written to Major *Marindin* to-day, saying that if he would remit me £200 stg. by return mail I would give a discharge in full. You had better come down and let us have a definite understanding." This letter is relied upon as shewing that it was the intention of the parties that *Dartnell* should be absolutely discharged. It is material to see how this letter came to be written, and to what it relates. We find Mr. *Dartnell's* own account of it in his affidavit.

"8. That a brother-in-law of mine, Major *Henry Marindin*, of the city of Dublin, being desirous of

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relieving me from any claims upon me by the said *James Manning*, caused my eldest daughter, *Elizabeth Morton*, who was then with him in Ireland, to write to me to say that although Mr. *Manning's* claim upon the said mortgaged lands was foreclosed, and he had only a claim on me personally, yet he would advance two hundred pounds for Mr. *Manning*, provided said *Manning* would give up all deeds, &c., referring to said mortgaged lands, and release all claim now and hereafter on either the said land or on me personally, said sum to cover all expenses that had been incurred; and that if said *Manning* would agree thereto the money would be sent by return of mail in trust to a third party to pay to the said *Manning*, on the deeds and claim being surrendered.

"9. That immediately after the receipt of the said letter I forwarded same to the said *Manning*, and in order to save time I directed him to write to the said *Henry Marindin*, to intimate his views on the said proposal.

Judgment.

"10. That on the eighteenth day of August last the said *James Manning* addressed a letter to me, in which he said, 'I have written to major *Marindin* to-day, saying that if he would remit me two hundred pounds sterling by return mail I would give a discharge in full," as by paper writing now produced and shewn to me and marked 'B.' (which is a true copy of the said letter) appears."

Manning's letter must be taken to refer to such a discharge as is spoken of in the letter forwarded to him. The letter is short, and contemplates a definite understanding to be come to when the writer and *Dartnell* should meet.

The money was sent out to the Reverend *J. Smyth*, and by him was paid to *Manning*, in the following

October. Upon that occasion the release which I have already referred to was given, and *Manning* signed a receipt for the £200, which sum is expressed to have been forwarded by Mayor *Marindin* to pay the purchase of any claims that *Manning* had on *Dartnell* or his property, and it proceeds, that in furtherance thereof *Manning* handed to him certain papers, which are enumerated, and among them "release of judgment obtained against him." This paper is in the handwriting of *Dartnell*. I attach no importance to its phraseology: it must be read with the release which bears the same date, and which is quite unambiguous, as to the nature of the discharge given to *Dartnell*. 1865. Bell v. Manning.

In relation to *Dartnell's* accuracy of recollection as to what was agreed at the settlement, two letters written almost immediately afterwards are material. The first is dated the following day, Judgment.

"*Toronto*, 10*th October*, 1864.

EDWD. TAYLOR DARTNELL, Esq., St. Mary's.

Dear Sir,—Before I get Mr. *Leslie* to witness the papers I should like to know the amount you have entered in the discharge of the mortgage to Major *Marindin*, also a further guarantee that I have a right to collect my judgment against *Bell*, of Ottawa. The receipt I gave the Rev. Mr. *Smyth*, as I explained at the time, was on the condition that I was not to forfeit my right against *Bell*.

Yours truly,

Signed, JAMES MANNING."

"*St. Mary's, October* 13*th*, 1864.

Dear Sir,—My letter of the 11th runs: 'The law is, that if a release of a judgment to one party expressly reserves the right against the other party, all the rights and remedies against him remain unimpaired. That exception was made in the release to me, and you need no other document, and I will certainly give no guarantee

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of any kind, the intention being, that my legal obligation of any kind to you should be extinguished by the payment of the £200 stg. just made. The sum filled in was the face of the mortgage, £444.'

As a man of honor, I ask you to send me the quit claim deed at once, with Mr. *Leslie's* and his son's attestations. If I do not receive it by return of mail, my course is very simple and effectual to obtain it. I trust you will not render resort to it necessary.

Yours truly,
Signed, EDWD. TAYLOR DARTNELL.
JAS. MANNING, Esq., Toronto.

Judgment.

I cannot grant relief to *Bell* upon *Dartnell's* affidavit, contradicted, as it is, upon the material points by the affidavit of *Manning;* and I do not know that I could do so without such contradiction, looking at the affidavit in connection with the documentary evidence. Apart from *Dartnell's* affidavit, the passage to which I have referred in *Manning's* short letter of the 18th August, that, upon receiving a remittance of £200 sterling, he would give a discharge in full, is the only piece of evidence in support of the plaintiff's contention that *Dartnell* was to be absolutely and unqualifiedly discharged; and to give effect to the plaintiff's contention, I must find that not only was that promised by that letter, but that in October when the parties came to a final settlement, and when formal papers were drawn, it continued to be the intention and agreement of the parties. I am quite unable to come to that conclusion. What was purchased by that sum of £200 sterling, representing the same sum, I apprehend, that was spoken of on a former occasion as $1,000, appears to me intelligible enough. The great object of *Dartnell* and of his brother-in-law, Major *Marindin*, was to save the house and premises in which *Dartnell* resided. The primary object was to pay off the mortgage; but the property would not be thereby effectually preserved, if *Manning* could the next day sell the same premises under his judgment; and to prevent his remedy aganst *Dartnell*, upon that

judgment he was released. Of course, unless the surety was also discharged, he could proceed against *Dartnell* in the event of *Manning* enforcing the judgment against him, but that was a more remote danger, and one which *Dartnell* might be content to incur rather than the immediately threatened danger from *Manning*. Besides, if *Bell* were indebted to *Dartnell*, that debt would form the subject of a set-off. In the letter of the 14th of December, *Dartnell* to *Manning*, the writer says, "I am in communication now with *Bell* to see if I cannot get even the balance he owes me." It is not difficult to understand that it might be a great object to *Dartnell* to get a discharge from *Manning* of all direct liability to him, even though *Bell* might be left still liable. But it is not necessary to shew reasons and motives for all that was done. We find that *Dartnell* did think it worth while to take a release of his own liability to *Manning* upon the judgment, although it in terms made a reservation which, upon being exercised, would bring upon him a liability from another quarter.

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Bell v. Manning.

Judgment.

What I determine in this case is not at variance with the judgment of Sir *William Page Wood*, in *Webb* v. *Hewitt*. (*a*) The arrangement in that case was, in the judgment of the Vice-Chancellor, an absolute satisfaction of the debt, by a conveyance from the debtor to his creditor of the whole of his lands and personal estate. He said, "there can be no doubt that the agreement was an equitable discharge, which would of course release the surety; * * there is neither a giving of time, nor the mere circumstance of release, but an actual sale. The debt is satisfied and gone. * * It was in either view a complete sale. The debt is gone in equity, and it is impossible to reserve a right against the surety in such a transaction as that." The agreement entered into did not contain a reservation of right

(*a*) 3 K. & J. 438.

1865. Bell v. Manning. by the creditor against the surety; but the creditor's contention was, that it was part of the agreement between him and the debtor that such right should be reserved. And the Vice-Chancellor held that if such reservation of right had been inserted in the agreement, it would have been a nullity, adding, "If a man, in consideration of the debt due from his principal debtor, agrees to buy the whole of the debtor's property, he has been paid: and if he has been paid, he cannot reserve his rights. That is the simple point to which the case is reduced."

There are certainly dicta in *Webb* v. *Hewitt* which my judgment in the case does not follow; but these dicta were not necessary to the decision of the case; and *Price* v. *Barker*, establishing a different doctrine, was not cited to the court.

Judgment. There is a minor point in this case which I must also decide against the plaintiff; it is, that *Manning* agreed that he would proceed to levy against *Bell* only £25, being the amount of costs to which it is alleged *Manning* said he had been improperly put by *Bell*. This is expressly denied by *Manning*. I have oath against oath upon the point, and it is to be observed, that the reservation of right against *Bell* is unqualified: if it was to be limited to £25, one would expect to find it so limited in the reservation, especially in one penned by *Dartnell* himself.

How I ought to deal with the case is another question. I think the plaintiff's case fails; but this is an interlocutory application, and I proceed in part upon affidavit evidence; and if the plaintiff should succeed at the hearing, as possibly he may, the money, if levied in the meantime, may be absolutely lost to him; there is evidence in this case which shews danger in that respect. I think that any money levied should be paid into court,

or the plaintiff may prevent a levy by paying the money into court. But this should be upon the terms of the plaintiff hearing his cause at the ensuing sittings, at Toronto; the defendant *Manning*, of course, throwing no obstacles in the way of his doing so. 1865.

In re Peter Milne.

Lunacy—Practice—Costs.

This court in a proper case will, upon petition, quash a commission of lunacy and the inquisition taken under it without putting the party to the expense and delay of a traverse; but in such a case, where the alleged lunatic had so conducted himself as to afford grounds for the application being made against him, the court, while quashing the inquisition which had been taken, refused to charge the party applying for the commission with costs.

The circumstances giving rise to the present application are set forth in the judgment.

Mr. *Blake*, Q.C., and Mr. *Wells*, for *Peter Milne*.

Mr. *Morphy*, Mr. *Taylor*, and Mr. *Kingstone*, for the petitioner, Mrs. *Milne*.

In addition to the authorities mentioned in the judgment, counsel referred to and commented on *Wheeler* v. *Alderson*, (*a*) *Sherwood* v. *Sanderson*, (*b*) *Ex p. Tomlinson*, (*c*) *In re J. B.*, (*d*) *Portsmouth* v. *Portsmouth*, (*e*) *White* v. *Wilson*, (*f*) *Ex p. Holyhead*, (*g*) *Phillips* on Lunacy 247; *Taylor's* Medical Jurisprudence, 836-9. Statement.

Vankoughnet, C.—In June, 1864, a commission was issued in this case to inquire of the alleged lunacy of one *Peter Milne*. Under it a jury was empanelled, and,

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(*a*) 3 Hagg. 574.
(*b*) 19 Ves. 280.
(*c*) 1 V. & B. 557.
(*d*) 1 My. & Cr. 538.
(*e*) 1 Hagg. 355.
(*f*) 13 Ves. 87.
(*g*) 11 Ves. 9.

1865. by inquisition returned into court, *Milne* was, on the
In re Milne. 21st August, 1864, found a lunatic.

The matter comes before me on cross petitions: the one to quash the commission and inquisition on two grounds; first, that *Milne* has been untruly found a lunatic; secondly, that the proceedings attending the execution of the commission were irregular, or, if these fail, for liberty to traverse. The other petition is for the appointment of a committee to the person and estate of the alleged lunatic, and for a Receiver *ad interim*.

If I grant the prayer of the petition first referred to, on the first ground urged by it, the further consideration of the case is thus rendered unnecessary. At the outset, I have to consider what jurisdiction I possess on this head. In *Shelford* on lunacy, at page 119, it is said "the Lord *Chancellor* will sometimes discharge a commission and
Judgment. inquisition without putting the party to the expense and trouble of a traverse, or *Monstrans de Droit*, provided, on inspection and examination, he be fully convinced of the soundness of his understanding." The Court of Chancery in this country is, in matters of lunacy, clothed by statute with the powers of the Lord *Chancellor*. On reference to the authorities cited by Mr. *Shelford*, in support of the passage from his work just quoted, they will be found to rest apparently upon the authority of Lord *Coke*, as given in 9 Rep. 31, *a*: which is, however, confined to a case of idiotcy. Now, there is a great distinction between a case of idiotcy and insanity, observable in the exercise of the jurisdiction by the Lord *Chancellor* to quash an inquisition. An idiot is of unsound mind from his birth, and if the *Chancellor*, on examination of the pretended idiot, be satisfied that he is not an idiot, the finding him such by the jury would manifestly have been wrong. But a man may have been a lunatic—that is, laboring under insanity at the time of inquisition found, and yet have completely recovered

from it at the time of his examination by the *Chancellor*; and the question that presented doubt to my mind was, would an inquisition be quashed where the finding was or might have been right at the time? Lord *Hardwiche*, however, a great authority on all subjects of jurisprudence, and well versed in the law relating to these matters, says, *In re Heli*, 3 *Atk.* 7, 635, that the same power to quash an inquisition finding lunacy exists as in the case of idiotcy, though the consequences be different; by which I understand him to mean that whereas in the case of idiotcy the crown would not be answerable for rents, &c., received from the estate up to the time of the inquisition being quashed, yet that in lunacy the crown, or the committee of the alleged lunatic, must account to him for what had been received by it; in the one case, the crown took absolutely to its own use: in the other, it was a mere trustee. See also *Ex parte Roberts* (*a*). This point was not raised before me; but it was argued that I could not review the evidence and quash the commission and inquisition, merely because of its insufficiency, and *Ex parte Roberts*, *Ex parte Hall*, (*b*) and *Rochfort* v. *Eby*, (*c*) were referred to. These cases do not establish the proposition. But, holding, as I do, that the court may, upon a review of the whole case and the examination of the alleged lunatic, supersede the commission in its discretion, it is unnecessary to say whether this could be done upon a review of the evidence alone, or of it with additional evidence of third parties. It is however necessary to consider well the evidence taken under the commission, in order to a proper and useful examination of the party affected by it, that the court may, upon the whole information thus obtained, decide whether it will dispose of the matter summarily, or being doubtful, direct a traverse. In *Snook* v. *Watts*, (*d*) the Master of the Rolls says:—

Judgment.

(*a*) 3 Atk. 308.
(*b*) 7 Ves. 261.
(*c*) 1 Ridway, 546.
(*d*) 11 Beav. 105.

1865. In re Milne. "The rule of law upon this subject has been stated with perfect correctness by both sides. The finding of the jury upon a commission of lunacy that a party is lunatic, throws the burden of proof on those who contend the contrary. The presumption is not then, as it would otherwise be, in favour of sanity or soundness of mind, but the contrary must be proved; that is, they who allege the sanity of a person at a time subsequent to that at which he has been found lunatic under a commission, have the burden cast on them of proving the soundness of mind of such person. There is no subject, I conceive, more difficult to investigate and satisfactorily to adjudicate upon in courts of justice than the state of a man's mind, with reference to his sanity or insanity, for the purpose of determining whether he is legally bound by or answerable for his acts; and independent of the difficulty of forming a distinct idea of what ought to be understood by the expression 'soundness of mind,' it is, in many cases, most difficult to determine what indications of alleged unsoundness ought to be relied upon, and to distinguish between an insane man's delusions, and the erroneous opinions or the mistaken notions of a man who is admitted to be generally of a sound mind. A man may be subject to some delusions, and one of the means, and perhaps the most accurate means, of adjudging whether these apparent indications ought to be relied upon, as proving a general unsoundness of mind, is by a comparison of the alleged acts of insanity with other acts of the same person and the general course of his life: so that on questions of insanity, a great deal more is to be taken into consideration than the particular acts of imputed insanity. Where a man's ways and general course of life are such as to indicate sanity and a knowledge of his affairs, proof of one or more particular acts, though very strange in themselves, and though affording some grounds for imputing insanity, would not be a sufficient proof to shew that all his acts were done under the delusion of

Judgment.

insanity. On the other hand, when a man is thought by various persons to have been insane at a particular period, and to have so continued ever since, proof of one or more acts done afterwards, apparently in the manner of a man of sound mind, would not, if unaccompanied by other proof and the application of some test or inquiry, prove that the acts done were done under circumstances free from delusion, or what is quite as much of importance, free from the influence to which persons acting under insane delusions are confessedly liable."

1865.
In re Milne.

In re Dyce Sombre, (*a*) the Lord Chancellor observes, "There is often great difficulty in ascertaining whether there exists unsoundness of mind of a character to subject the party to the operation of a commission; but when the jury have affirmed that proposition by a verdict unquestioned, the great seal has been most cautious in superseding it. Cases continually arise in which it is done; but although delusions and even general insanity may exist, and yet the great seal may withhold a commission, if not required for the protection of person or property, upon applications for a supersedeas, very different considerations regulate the discretion of the court. There may be no proof of the disease at the time, but it may be likely; it may still exist, but the patient may have the power to conceal it; the permanence of the restoration may be doubtful, and time is then taken for the proof of experience. But without anticipating what may be proper to be done in any case that may hereafter arise, I have not in my recollection any case in which a commission has been superseded, where any declared illusion continued; and when the physicians tell me that the existence of a delusion is not inconsistent with soundness of mind, they appear to consider the delusion as a separate disease, whereas it is, in fact, only a symptom or result of a

Judgment.

(*a*) 1 MacN. & G. 116.

1865. In re Milne. diseased mind: it may exhibit itself more or less distinctly, but so long as it exists at all, there must be an unsoundness, the origin of its existence. When, therefore, they tell me that, notwithstanding an existing delusion, the mind is sound, and that the commission ought to be superseded, they appear to me to involve themselves in a contradiction in the duty they undertook to perform, which, if otherwise decorous, would invalidate the advice they offer to me, as to superseding the commission."

And again he says, in subsequent passages of his judgment, "The most satisfactory proof of the recovery from an unsound state of mind is the conviction of the non-reality of the delusions which arose from the disease.

"In his letter to me of the 12th January, 1849, in commenting upon several of the opinions attributed to him as delusions, he attempts to explain and justify them, and does not admit any conviction of these having been delusions."

Judgment.

Fully impressed with the language which I have quoted, and the importance and delicacy of the task imposed on me, I will, before referring to the facts of this case, collect together from some of the principal cases the rules, maxims, and considerations by which the court is governed, as well in issuing and maintaining a commission of lunacy, as in determining what amounts to insanity, sufficient to justify a finding that a person is of unsound mind, or, in technical statute phrase, a lunatic.

The commission of lunacy, being in the nature of the old writ *de lunatico inquirendo*, directs the commissioners "to inquire by the oath, &c., whether *A. B.* is a lunatic, or enjoys lucid intervals, so that he is not sufficient for the government of himself, his manors, lands, goods, and chattels, &c."

1865.

In re Milne.

The inquisition finding the lunacy declares, "that at the time of the taking the inquisition *A. B.* is a lunatic, and does not enjoy lucid intervals, so that he is not sufficient for the government of himself, his lands, &c." The grant of the custody of the person and estate of a lunatic recites such finding, and declares, "that for the tuition of such lunatic, and for the management of his estate," it belongs to the Crown to provide. In *ex parte Cranmer*, (*a*) Lord *Erskine* says, "The inquiry is whether his capacity is of that kind that fits him for the government of himself and the management of his affairs. I must have that returned." In *ex parte Hughes*, (*b*) the Lord Chancellor *Cottenham* says, in refusing a commission of lunacy, "The court always regards two objects—first of all, the protection of the party himself; and, secondly, the protection of his property." The Imperial statute 25 & 26 Victoria, ch. 86, in sec. 3, enacts, that "the inquiry shall be confined to the question whether or not the person, who is the subject of the inquiry, is at the time of such inquiry of unsound mind, and incapable of managing himself and his affairs." These being the objects for which the court grants a commission and assumes the guardianship of the person and property of the lunatic, I think it convenient here to extract from some of the leading cases decided by eminent judges, the test which, in their opinion, should be applied to determine whether or not a man is of unsound mind, and so, not sufficient for the government of himself and his affairs.

Judgment.

In *Freer* v. *Peacocke*, (*c*) Sir *H. J. Fust* says, "It is not every unfounded opinion which is an insane delusion, or which would operate against the validity of a will propounded; but it must be, to constitute a delusion, a belief in that, the existence of which no

(*a*) 12 Vesey at p. 553-4. (*b*) 13 L. Times, 541.
(*c*) 11 Jur. 247.

1865. In re Milne. rational person would believe, and hence it is pleaded as an insane delusion. There is perhaps established an unfounded dislike to his sister and other members of his family; but it is not an insane dislike; it is not founded upon circumstances of the non-existence of which it was impossible in any way to satisfy him with respect to the conduct of his sister and these relations." And again he says, at page 250, "The true criterion of insanity is delusion, and it is only a belief of facts which no rational person would believe that is insane delusion." Sir *John Nichol*, in *Dew* v. *Clark*, (*a*) says, "That mere eccentricity is not enough to constitute mental unsoundness—nor great caprice, nor violence of temper; but that there must be an aberration of reason, a belief of facts which no rational person would have believed." Lord *Brougham*, commenting on this language in *Waring* v. *Waring*, (*b*) says, "Perhaps, in a strictly logical view, this definition is liable to one exception, and at least exposed to one criticism, that it gives a consequence for a definition, and it may be strictly accurate to term 'delusion,' the belief of things as realities which exist only in the imagination of the patient."

Judgment.

In *Ditchburn* v. *Fearn*, (*c*) Lord *Campbell*, delivering the judgment of the Privy Council, says, "There being no suggestion that the testator was subject to frenzy or fatuity, she must shew that upon some particular subject or subjects he was under a delusion as to facts *within his own observation, and that he actually believed in the existence of facts which a rational man, from the use of his senses, under the same circumstances, would have known not to exist.* It has been said that a gross exaggeration of slight circumstances would amount to insane delusion—as if a person sees a mole-hill, and insists it is a mountain, and so on; this is true, but hardly

(*a*) 3 Add. 97. (*b*) 12 Jurist, p. 948, & 6 Moore, P. C. 341.
(*c*) 6 Jurist, 201.

amounts to a qualification of the general doctrine, for as to the excess, there is a delusion with regard to facts in the party's own observation, and he actually believes in the existence of facts which a rational man, from the use of his senses, under the same circumstances, would have known not to exist. But he is not to be considered of unsound mind for entertaining any opinions, however unfounded or absurd, nor from a pretended belief on non-existing facts assumed for the purpose of deception." The case was heard before Lords *Campbell*, *Brougham* and *Wynford*, and Sir *S. Lushington*.

1865.
In re Milne.

In *Creagh* v. *Blood*, (*a*) the Lord *Chancellor*, speaking of the delusion under which the lunatic laboured, says, "He was suffering under a delusion, one part of which was a belief that some persons were attempting to poison him. That might have been bottomed on some error, and it might have admitted of explanation, for somebody might have attempted to poison him at some period, and he might have believed that the attempt was still kept up. But another branch of his delusion (for it was all one delusion, his mind being weak and infirm, and without any power to rectify itself in relation to the matters on which it wandered) was one on which there could be no mistake. He believed himself to be formed in a way in which no human being ever was formed, without a bottom to his stomach. The evidence of his senses in every act of his life, every meal he partook of, must have satisfied him that this was a delusion. *It could not be founded on truth, nor was it within the bounds of possibility:* and therefore, if his mind was sound, every minute of his existence must have satisfied him that it was a mere delusion."

Judgment.

In the somewhat celebrated case of *Greenwood* v. *Greenwood*, reported by Mr. *Curteis* in the beginning

(*a*) 8 Irish. Eq. 438.

1865. In re Milne. of the 3rd volume of his Ecclesiastical Reports, Lord *Kenyon*, in his charge to the jury, reports the evidence of *John Turner*, the servant of the alleged lunatic, as follows :—

"He *Turner* lived with the family twenty years: that they lived upon the most friendly and affectionate terms: that there was no disagreement between the brothers; he was in the room when the father died; the sons came into the room very much affected. Mr. *John Greenwood* said he would try to be a father to his sister. The next day Mr. *Greenwood* was taken ill of something like an ague. Mr. *Livie* bid the witness to mix some brandy and water, and put an egg into it, and carry it up to Mr. *Greenwood;* he mixed it and carried it up, and Mr. *Greenwood* drank it; when he sat down to dinner he again complained that he was chilly; his brother then proposed to send for an apothecary; the apothecary was sent for; the testator went to bed: he had asked the witness what he had given him in the brandy and water, and seemed to suspect something bad was put into it; medicines were sent; the brother asked him to take the medicine, he did take it, he then said, "You are a villain, you begin betimes," and he said he was sure there was something poisonous put into the brandy and water by his direction. In the morning he was much better; he said he had been made acquainted with what he said of his brother over-night, and was sorry he had used those harsh expressions. The next day he became worse, and the same sort of suspicions returned again, and he began to be deranged; that he had thought he had seen his father in the room, sometimes he whistled, sometimes clapped his hands together, and became quite deranged. On the next day he seemed cool and collected, and much better in mind, but it was impressed on his mind then, that he was going to die; he said he thought he had no occasion to make a will, as what property he had would go to his brother and sister; they might divide the property between

Judgment.

them, only he wished to leave a £1000 to Mr. *Jones*; that he had no further occasion to make a will. Afterwards he mentioned his suspicions that something had been given to him in the brandy and water, to take away his life while he was confined; the witness did not know of any constraint used but what was necessary; as for himself, he told the brother he durst not wait upon him, he had so alarmed him with threatenings and imprecations. On 7th May, he said the deceased had symptoms of the chillings, which caused him to be extremely suspicious and doubtful of every body; the witness observed that at his dinner he cut off all the outside of his meat, and only ate the inside, and likewise his bread; he refused eating vegetables, salt, butter and cream; that he filled his tea kettle for himself; afterwards he had a tin kettle bought, which he kept for himself, and he declared that he had this tea kettle bought, that nothing might be brought to him, but what he himself approved. In July, 1787, the witness says he told Mr. *Greenwood* how uneasy his behaviour to him, the witness, had made him, and asked what was the occasion of it: Mr. *Greenwood* said the witness need not be surprised, considering what he had done for him. The witness proceeded to ask if he accused him; Mr. *Greenwood* said, he must be conscious that he had given him something in the brandy and water, and must be assured of his villainous conduct towards him; he knew it was done by the direction of his brother: that he had meant to put a stop to it himself, but upon further consideration he found it would give him more pleasure to make a public example of his brother. The witness endeavoured to defend his brother; the testator said he was convinced of it—it was impressed upon his mind—it could never be erased; if an angel were to come down from heaven to tell him to the contrary, he would not believe it; he said his friends had treated him with treachery and deceit. He asked the witness if he would go with him to Lisbon; he agreed to go with him: three or four days before he went, he said, he meant to

Judgment.

1865. In re Milne.

sell his carriage and live stock at Little London; the witness said he was sorry to hear it, on account of his brother and sister, who were then unprovided with a comfortable residence; he said that he did not think so; that his sister might go and live with her friends, they would be glad to see her, but as for that villain his brother, he should provide a habitation of a different sort for him, and in the meantime he might go about his business. The witness saw the journal in August or September, 1786, and he saw it several times afterwards in his hands, it seemed to engage his attention very much; he heard the cousin, in whose favor the will is made, reading part of the journal to the testator a few days before he left England; he was on the other side the wainscoat; he heard Mr. *Abram Greenwood* read it; he said, the testator told him he was going to make his will; he desired him to shut the door and let nobody in; that Mr. *Abram Greenwood* was with him on the forenoon of the day on which the will was made. The will was made between the 6th and 7th of December, and he went on the 8th. After they arrived at Lisbon the deceased told the witness he expected a letter from England, and hoped to hear that villain his brother was laid fast; he then said, he was not asked anything respecting this account that he gave about the reading the journal on the last trial; that it did not occur to him as material; he said, that it did not strike him that this behaviour of *Abram Greenwood*, in reading the paper, was at all improper, had he thought it improper he would have mentioned it. Between July, 1786, and July, 1787, he never expressed the cause of his disgust to witness till he inquired of him; he said his looks, deportment and manners in general, shewed something was amiss; he said sometimes that his brother was very expert in employing doctors to give him medicines to injure his health, or to that purpose: that he understood what he was about. The witness says he informed Mr. *Greenwood* of the conversation he had with his brother; that neither he nor Mr. *Greenwood* ever proposed to do any thing

Judgment.

in consequence of that behaviour. He did not insinuate to Mr. *William Greenwood* that his master was mad; that he would not insinuate it to him, because he thought it was something material; he says, Mr. *William Greenwood* certainly knew that Mr. *John Greenwood* was going to Lisbon; that he was certain Mr. *William Greenwood* did not dare to propose anybody to go with him to Lisbon, because it would have deranged him; at least, his brother would have been extremely dissatisfied if he had proposed it." 1865. In re Milne.

After commenting upon this and the other evidence in the cause, his Lordship, in addressing the jury, is reported to have said, "This long account is the evidence on one side or the other, and the question now is, for you to draw the fair result that ought to be drawn from this evidence, and I can only leave off where I began, by stating to you that the inquiry, and the single inquiry in the cause, is, whether he was of sound and disposing mind and memory, at the time when he made his will; however deranged he might be before, if he had recovered his reason at that time, he was competent to make his will. And I take it a mind and memory competent to dispose of his property; when it is a little explained, perhaps may stand thus—having that degree 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 those persons were that then were the objects of his bounty, then he was competent to make a will. Judgment.

Gentlemen,—The conduct which he held to his brother certainly is considerably unaccountable; if whenever his brother's name occurred, instantly a fit of delirium had seized him, then I should conceive that he was not competent to make his will; but if his mind remained entire, if he had new raised up prejudices against his

1865. In re Milne. brother, though upon improper grounds, yet if they were such prejudices as might reside in a sound mind, it is hard that those prejudices should lead to conclusions unfavorable to his brother; but hard as the case may be, it is better that a thousand hard cases should take place, than that we should remove the land marks by which man's property is to be decided. It is for you to look at that conduct to his brother, to see whether it is evidence of a derangement of mind, or whether only an unreasonable prejudice, which he indulged against his brother; if it be the last, that did not unfit him to make his last will and testament. A multitude of instances there have been, where men have taken up prejudices against their nearest and dearest relations; it is the history of every week in the year, and the history of almost every family, at one time or other, that harsh dispositions have been made—that unreasonable prejudices have taken place—that one child, standing equally near in blood, has been preferred to another; and if once we get into digressions of that kind, then we get upon a sea without a rudder. Where will you stop? What partiality will be enough to set aside a will? and what partiality will you give way to, and say the will is good? These are questions which the most correct and acute mind that ever addressed himself to the consideration of questions will not be able to settle. You are to consider whether his mind was entire to make the disposition, not whether the disposition was whimsical, cruel; what none of you, retiring to your own bosoms, and collecting your own feelings, would have made; but to see whether it was the disposition of this man's mind, exercising the faculties of his mind at a time when in possession of those faculties. If you think that whenever that topic occurred to him, it totally deranged his mind and prevented him from judging of who the objects of his bounty should be, according to his own will, then the will cannot stand, and then you will find for the defendant, but if you think that he was of competent mind to make his will, to exercise his judgment, however that might be disturbed

udgment.

by passions which ought not to be encouraged, then the will ought to stand. It is for you to decide, and the care and attention you have paid has made it unnecessary for me to say so much as I have said in addition to the evidence."

1865.
In re Milne.

The jury found that the testator, whose will was impeached in the case by the heir at law, was of sound and disposing mind at the time he executed it, notwithstanding the evidence above quoted and much other evidence given in the case to shew unsoundness of mind. This verdict I believe was never disturbed.

Fulleck v. *Allinson*,(*a*) was a case, in the character of some of the facts in evidence, very like the present. Probate of the will of one *John Monkhouse*, clerk, having been applied for, it was opposed on the ground that at the time of its execution the testator was laboring under an insane delusion. The evidence in support of this was, that the deceased was very eccentric in his habits; that one *William Harrison*, who had married his niece, came from Cumberland in 1817, at request of deceased, to manage his glebes; that until April, 1827, he and *Harrison* had been on good terms; that *Harrison* was by or through the influence of deceased, on the 16th April, 1827, appointed churchwarden and guardian of the poor of the parish; that a day or two after such appointment the deceased, under a delusion of mind, declared that the well of water at his house had been poisoned by an infusion of mercury or arsenic, or other poisonous matter, and expressed a belief that the same had been done by *Harrison* or some of his family; that the well was ninety feet deep, five feet in diameter at the top, and from twelve to fifteen feet at the bottom; that the deceased, in consequence of this delusion, would not permit the water from the well to be used, and from such time the water for his house was brought from the

Judgment.

(*a*) 3 Hagg. Ecc. Rep. 527.

1865. In re Milne.

well of *John Cover*, a labourer in his employ, to whom he sent directions to have the lid of his well fastened down by a chain and padlock, which was done; that the deceased, upon examination, being dissatisfied with them, *Cover*, by his desire, fastened the lid with an iron bar and a new padlock; that in the summer deceased was angry because there were chinks in the lid, and he helped to fill them up with chips; that there was no poison in deceased's well; that he subsequently thought the water spouts and tank of rain water, the butter, eggs, and milk, brought from *Harrison's*, were poisoned; that he also believed that his dog had been poisoned in 1826; that his friends had in vain endeavoured to argue him out of these delusions. The deceased died on the 15th October, 1828. In considering these facts and the provisions and language of the testator's very singular will, Sir *John Nicoll*, p. 542 of the report, says, "Now the presumption of law is in favor of sanity till insanity be clearly established in the matter. The alleged delusion in no degree respects the sister, who was opposing probate, who is the heiress at law of the real property, and the sole person entitled to the personalty under an intestacy. At all events, it was a monomania, for upon every other subject, from the time in question to his death, the deceased acts as a person of sound mind, memory and understanding, as much as he had ever been: he manages his house, he manages his property and farm, grants leases, receives tithes, keeps accounts, recognizes his will, holds rational conversation, and does church duty. A monomania to affect such an instrument, under such circumstances, should be clear in point of existence and decided in character beyond all doubt. That the deceased thought and believed that an attempt had been made to poison him, seems to be a fact established; but is it established that his opinion in that respect was a mere morbid insane delusion, rendering him intestable? The question is not whether the attempt to poison was really made, but whether he had grounds for suspecting it; or whether, as pleaded, the deceased had no rational grounds whatever for his belief.

Judgment.

"It seems pretty clearly established that he and his two servants were all taken ill together, with a complaint in the bowels and vomiting. The natural inference from this is, that something in their food had disagreed with each of them: it did not follow that it was poison, still less that it was poison purposely and maliciously introduced; but the coincidence was singular, and might naturally excite some alarm and suspicion. Another fact is, that there was some conversation between the two *Harrisons*, the boy and the girl, *William* and *Hannah*, about poisoning. Whether in consequence of this sickness something may have been said about poison, and repeated by the girl to the boy; or something said at *Harrison's* which the boy repeated to the girl, or how it happened, is not very material, but this conversation being repeated either to the deceased's housekeeper, or to the deceased, and coupled with the sickness, might increase suspicion. The deceased was old—he was nervous—he was suspicious; he thought his dog had been poisoned; he suspected young *Harrison;* these circumstances together might create suspicion without a mere deluded imagination. To a suspicious mind, 'trifles light as air are confirmations strong.'

Judgment.

"How does he act? As any rational person having the slightest suspicion of such an attempt would act. He goes to Godalming, consults a medical man, Mr. *Balchin;* he relates all the particulars, *Balchin*, neither from his relation, nor from his deportment, thinks it mere morbid imagination; he advises him how to act; to take precautions, to use neither the milk nor the water. The deceased re ates the same account to his solicitors; they have the same impressions and give the same advice; he is there two days, he has his codicil prepared; he copies it on his will, and he executes it. His solicitors and the witnesses have full opportunities of judging of his deportment, and there was neither in the facts which he stated, nor in his behaviour, anything to induce them to doubt his

1865. In re Milne.

sanity. They at least thought he had rational grounds at that time for his suspicions. Can, then, the court venture to say that this suspicion, founded on these circumstances, was insanity, such decided insanity, as rendered him at that time intestable and vitiated any civil act he could do?

"Under this suspicion of an attempt to poison his milk he has a clause inserted in the codicil to give £1 to provide wholesome milk. This records that he had the suspicion, but it goes no further; it does not prove that the suspicion was an insane delusion: the fact might be true or false, but he had the grounds for entertaining the suspicion already stated: he inserts in his will the same sort of record in respect to his dog, at least two months previously, before he is suspected of insanity, and there the fact was probably true, for at least in the opinion of others the dog had been poisoned.

Judgment.

"The time of this visit to Godalming, when the codicil was made, is the most important period; but there are various subsequent investigations for the purpose of ascertaining whether any attempt to poison the deceased had been really made: or rather the inquiry is, whether there was any ground to charge *Harrison*, and to take legal proceedings against him. The gentlemen who conduct these several investigations are satisfied that no attempt was made; that there was no sufficient evidence of the fact; and they probably came to a right conclusion that no attempt whatever had been made; that no poison had been infused either into the milk, or into the bucket, or into the well; but the deceased adheres to his own suspicion; they cannot convince him; it does not follow that he was at first insane; he was not believing impossibilities; he was not believing that trees could walk, nor that statues could nod, nor any thing naturally impossible, of the falsehood of which reason must at once convince him. An opinion against rational probability is not necessarily an insane opinion; it is not drawing right conclusions from manifestly false

premises, but erroneous inferences from premises which may be true. The deceased and his two servants had been simultaneously sick and ill. Some conversation about poison had taken place between the boy and girl. His dog had a strong appearance of having been poisoned three years before: he consults a medical man, relates all the circumstances and symptoms both to him and his solicitors, they advise precautions; he carries some milk to a medical man, *Balchin; Balchin* cannot analyse, but he compares it with some milk of his own, and they are different. 'It had,' says *Balchin*, 'a hot brackish taste, and imparted the same sensation to his tongue as if there had been corrosive sublimate put into it.' He was of opinion that the milk contained corrosive sublimate, and told the deceased there was something wrong in the milk. Here there is ground for the suspicion: here is a medical opinion confirming the deceased's opinion; that opinion might be erroneous; the taste might arise from some accidental cause; there might have been something infused into this milk, though not by *Harrison*. Certainly the deceased appears to have been sincere in his opinion that poisoning had been attempted; he adheres to that opinion. The gentlemen who investigate the matter cannot convince him that he is wrong in his opinion and that they are right. Even if all these investigations had made the impression deeper and his conviction stronger, till what was originally no more than suspicion at length grew into insanity, becoming a morbid delusion, which no proof nor reason could remove, still, that *ex post facto* delusion would not affect the validity even of the codicil. His whole conduct and deportment on the 23rd and 24th April were those of perfect sanity, supposing him to have any grounds of suspicion. The whole of his subsequent conduct is quite consistent with it; he retains his opinion founded on the circumstances referred to; but he manages his property, he occupies his glebe, he settles for his tithes, he keeps his accounts, he in some degree recovers his health and spirits. If insanity did exist, it is

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1865. In re Milne. monomania in the strictest sense and to a singular degree. When such circumstances arose to excite suspicion, the court is not prepared to say that monomania did exist when the codicil was executed.

"To invalidate an instrument in the handwriting of the deceased, prepared from his instructions, the solicitors, the medical person, the attesting witnesses, all concurring in opinion, and judging from the conduct and deportment that he was of perfect sound mind, the existence of insanity at that time ought to be clear beyond all doubt, in order to effect even the codicil; still less could this suspicion affect the will regarding personalty only, containing a disposition intended ten years, and as appears, during the whole of ten years, prepared two months before, and the execution merely delayed to get witnesses.

"In this view, it is proper to pronounce for the will and the other two papers; and, as far as the court has jurisdiction, for the codicil also."

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An anxious consideration of the evidence given in this case, and an interview with and examination of *Peter Milne* himself, lasting for two hours and a-half, have satisfied me that he is not insane, and was not so; or, at all events, that there is not sufficient to warrant the belief that he was so at the time of the issuing of the commission and the finding of the inquisition, and that it is my duty, therefore, to supersede and quash the commission and inquisition, and all proceedings had thereunder, and not to put the party to the delay, suspense, and cost of a traverse. The material facts of the case are as follows:—*Peter Milne* was married to his present wife about the year 1829; they had in wedlock several children; according to the affidavit and statement of *Peter Milne*, not denied by his wife, they did not live together very lovingly. In 1860 a suit for alimony was instituted in this court by Mrs. *Milne*,

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In re Milne.

against her husband. An answer on oath to the bill filed by her in that suit was put in by *Milne*, in which he states several facts, shewing the unhappiness which existed between him and his wife, the cause of which he attributes to her—and justly, if the allegations made by him are true. In his affidavit filed on this petition he incorporates, or asks to incorporate, this answer as part of it. The special statements in this affidavit Mrs. *Milne* answers pretty fully, but she does not meet the specific allegations in the answer, because, perhaps, they were not brought to her notice, as she only says she has heard read the affidavit of the petitioner; and yet it is to be presumed that she read the written defence made to her claims in the alimony suit. Whether these allegations be true or false, I have no means of deciding. They merely relate to matters which could be known to husband and wife alone; statements by the one to the other, giving rise to jealousy, and producing mutual recrimination, which were probably confined to the bed-chamber, and did not reach the ears of other members of the family. I must say that the statements in the answer, sworn as far back as July, 1860, were repeated with little variation by *Milne* in his conversation with me the other day, and many of them are, at least, uncontradicted. At the time of the institution of this alimony suit there was no allegation, nor any pretence made by Mrs. *Milne*, or any of the family, that *Milne* was insane, and yet the evidence of insanity was as strong before and at the time this suit was instituted, as it has been since. The alimony suit was compromised in 1860, by the petitioner agreeing to allow his wife a separate maintenance, ($400 a year,) she living apart from him; but this agreement was never acted upon, as the wife chose to return to live with him, and has continued to do so, with occasional absences, to the present day. In her affidavit filed on this petition, Mrs. *Milne* swears that she instituted the suit for alimony in consequence of her husband's ill treatment, believing that the same was occasioned only by his bad temper

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1865. and aversion to her, but that she was not then aware
In re Milne. he was unsound in his mind, and when she did become aware thereof, she considered it an explanation of such ill treatment, and therefore caused the suit to be stayed. How or when she became aware of this unsoundness of mind she does not state. This statement of Mrs. *Milne* for dropping the alimony suit is not supported by the evidence of Mr. *Cameron*, her solicitor in that suit. He speaks of the hard bargain *Milne* was trying to drive in the settlement, and of his ability and shrewdness. In the year 1858, according to Mrs. *Milne's* statement, but in the year 1859, according to that of *Milne* himself, an occurrence took place from which the latter conceived the notion or suspicion that his wife had administered to him poison, or some injurious substance, with a view to destroy his life. In the ninth paragraph of *Milne's* affidavit, filed with his petition, it is thus referred to:—"I have for the past five years, or thereabouts, entertained the belief that the said *Hannah Milne* did, upon more than one
Judgment. occasion, administer to me in my food either poison or some other injurious substance: I was first led to this belief by the knowledge that she hated me, as she many hundred times informed me, and by the belief that she would gladly see me out of the way, but mainly by the fact that I would sometimes, while apparently in perfect health, be suddenly seized with violent pain and burning in the stomach, inclination to vomit, and other strange and unaccountable symptoms. The first time that my suspicions were aroused was, I think, in A.D. 1859: I had been slightly unwell, and, according to a practice which I had indulged in for many years, I took a steam bath and a small dose of cayenne pepper: the pepper was administered to me by the said *Hannah Milne*, but the moment I swallowed the dose I was seized with the most sudden and violent symptoms that I had ever experienced; as I had been in the frequent habit of taking cayenne pepper without feeling any unusual effects, I became alarmed, and from the fact of my wife imme-

diately afterwards taking to her bed without apparent cause, and remaining there for about a week, as in fact she did, the suspicion of foul play on the part of my wife forced itself upon me: prior to this I never had the slightest suspicion of her: afterwards I used occasionally, while apparently in perfect health, after eating at my own table, to be seized with similar symptoms of more or less violence. I then consulted physicians on the state of my health, and as to the symptoms which I had experienced: I consulted Dr. *Rolph*, of the said city of Toronto, and upon describing my symptoms, he told me that they were the symptoms of poison: Dr. *Hall*, of Toronto, also told me that they were the symptoms of poison; and the circumstance which strengthened my suspicions was the fact of finding the bottle of poison alluded to in the depositions of *William Milne*, *Stephen Richards* and Dr. *Agnew*. I found this bottle in the drawer of a bureau in my house: I never had such a bottle myself, nor did I ever see such a bottle before, nor could I in any way account for its presence, nor have I ever heard of any attempt on the part of my wife, nor any one else, to account for it: upon taking this bottle to Dr. *Agnew*, and ascertaining that it contained arsenic, I admit that my suspicions were considerably strengthened."

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Dr. *Rolph* was not examined on the enquiry under the commission, but I thought it right to address him a note, inquiring if he remembered the circumstance to which *Milne* alludes in his affidavit, and he has been good enough to favor me with the following reply:—

"I remember being consulted on the case you mention by Mr. *Milne*: he expressed his apprehension of attempts to poison him. On that occasion I gave him some general advice, the exact particulars of which I do not remember, entertaining the suspicion, that it might be from jealousy, or other mental aberration: he subsequently brought me a considerable quantity (I think a quart or two) of matters ejected (as he assured me(from

1865. his stomach, which not a little surprised me, because, if
In re Milne. true, he might not unreasonably be under the above apprehension: on the other hand he did not appear to labor under any such gastric symptoms as could satisfactorily account for the ejection of such matter on the supposition of the administration of an irritant poison." The ejection, doubtless, was provoked by the emetics which *Milne* was constantly in the habit of taking to get rid of what he had swallowed when he felt unwell, as described in his affidavit. With regard to the phial of white powder mentioned by *Milne*, it appears from the evidence of Mr. *Richards* that *Milne* brought it to him at the time and told him where he had found it, as *Milne* describes the matter in his affidavit; that Mr. *Richards* advised *Milne* to have it analyzed; and the evidence of Dr. *Agnew* shews that *Milne* brought the bottle to him: that he tested it, and found arsenic in it, and told *Milne* so. Now so far, and very materially, *Milne's*
Judgment. statement is corroborated. There is no evidence beyond his own to shew where he found the bottle. It is suggested that he himself might have placed it where it was found, and put the arsenic into it. If this hypothesis were true, it would prove not insanity, but a malicious scheme, well contrived, by which he might support the accusation that attempts had been made to poison him. If the story of the poisoning was concocted by *Milne* with a view to injure his wife's character, and gratifying a feeling of hatred to her, it would be fatal to the allegation of insanity. It would shew malice and design, but not insanity. In answer to the paragraph which I have quoted from *Milne's* affidavit, Mrs. *Milne*, in the eighth paragraph of her affidavit, filed in answer to it, says:

"It is not true, as stated in the ninth paragraph of Mr. *Milne's* affidavit, that I ever hated him, or that I ever told him that I did so, or that I would gladly see him out of the way, or that I ever knowingly administered poison to him, or knew or suspected that poison was administered to him. The occasion in said ninth para-

graph referred to was shortly after my son's death, and in the year 1858, (and not in the year 1859, as in said paragraph stated) when I was steaming him he desired some cayenne pepper, and I thereupon requested my daughter to get some pepper and mix it for him, as I was then attending to him, and she went into the store and got some pepper and mixed it with water and handed it in a tea cup to me, and I immediately gave it to him, without in any way tampering therewith; and any illness thereafter was not in the remotest degree connected therewith; and I solemnly and positively say, that I never knowingly gave my husband any cause for believing that I hated him or wished him out of the way, or administered poison, or other injurious substance to him; and I say that I bear and have borne him no malice or hatred, but, on the contrary, I deeply sympathise with him in his present affliction, and my sole desire and motive in instituting and prosecuting the proceedings in this matter is to promote the welfare of himself and property, as I understand is accomplished in similar cases by such proceedings."

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Mrs. *Milne* appears to know well the occasion to which her husband refers; and as his steaming and taking cayenne was a frequent practice with him, this particular occasion of it must, from what occurred then or about the time, have impressed itself upon her mind—most probably from the charge against her insinuated, if not made by her husband. She does not say in her affidavit, or any where, that *Milne* had not on this occasion, and on other occasions as alleged by him, the illness and symptoms attending it which he describes. Indeed there would seem to be no doubt that he was affected at various times in the way he has mentioned. He was frequently in the habit of speaking on the subject, and among others to his legal adviser, Mr. *Richards*, who recommended him to bring in the matter discharged from his stomach and have it analyzed by a chemist. This *Milne* did, consulting here Professor *Croft*, and I believe a chemist in New York.

1865. In re Milne. The examination made shewed no trace of poison, and *Milne* was told so. He was also told, however, by one or more medical men, that a poison once administered might affect the stomach for a long time afterwards and cause unpleasant sensations. Apart from this belief in *Milne's* mind that poison had been and was being administered at times to him by his wife or through her agency, there is not the slightest pretence for saying that any act, word, or thought of his ever evidenced the slightest unsoundness of mind. On the contrary, apart from this subject of the poisoning, he is described by all the witnesses, as indeed I found him to be, a man of intelligence, of great shrewdness, of good business habits, superior to most of his class. He is described, as he appeared to me to be, a man of even temper and of benignant disposition; I should say a man of singularly mild temperament. He appears to have been a kind and intelligent and confiding parent and husband, (apart from the horrible suspicion he has so long entertained of his wife.) It is said that his farm has not been quite so well looked after of late years as it was in former years; that one spring several of his cattle died from neglect; that he allowed an old mill to tumble down, and accused his wife of procuring its fall from a desire to injure him; that he does not work his own mill; and that for twelve years back piles of lumber, amounting to 50 or 60,000 feet, have been lying at the mill, a portion of which is rotting; that the business of his store has almost entirely fallen off; and, in fine, that he does not work so hard as he used to do. Now, if this were all that was to be noticed in the life and habits of a man of 56 or 57 years of age, who, beginning the world with nothing, has amassed a property estimated as worth from $40,000 to $50,000, would any one but a madman dream of founding upon it a charge of insanity. But even these allegations are not unchallenged. Many respectable witnesses say that his property is as well managed as ever: that sawing timber is not as profitable a business as it was; that it would not pay to repair the mill; that

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Milne was wise in not cutting down his standing pine timber (of which it seems he has a large supply), as pine is scarce in the neighbourhood and increasing in value. *Milne* himself, whose judgment in such matters I would trust to as readily as to that of any of his neighbours, discoursed with me most sensibly on his own affairs, and I think he has shown great prudence in managing them. In regard to his store, he says business is not so good now as it was when the settlement was new; that there are many more stores now than then, to which the farmers can resort, and that he did not care longer to carry it on to any large extent. His saw-mill is twenty-four miles from town, and the price of lumber for the last few years, he says, would not remunerate him for the hauling it to town: that he has sold when he got the opportunity in the neighbourhood, (this appears from the evidence): that he has endeavoured to sell the lot several times to lumber dealers in town. In fact, he satisfied me that he knew how to manage his own property, quite as well, if not better, than any one I could select for the purpose. The evidence of several witnesses, who have known *Milne* long, and who have had business transactions with him, shew that at no time down to the present has *Milne's* capacity for business ever been impaired; careful and cautious, shrewd and industrious, just and honest, of good moral life and christian habits, he appears always to have been. Deprived by death some few years ago of his eldest son, for whom he seems to have entertained a deep affection; robbed of that son's body by the plunder of the grave in which he had placed it on his own farm; suspecting his wife for the last five or six years of designs upon his life; suffering from impaired powers of digestion, as some of the medical men testify, but indulging the thought, so full of horrors, that he was the victim of poison administered to him by the hand or agency of his own wife, the wonder is that *Peter Milne* has been able to attend to his business, and to conduct it in

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1865. In re Milne. the way he has done during these years of misery. Judging from the manner in which he has governed himself and his affairs, his suspicions and allegations in regard to the poison are either mere pretences put forward for some base or unkind purpose, or his mind and heart must be blinded and callous, or else he must have great control over the one and the other, evidencing a good mental and moral organization. The latter I believe to be the case. In the protracted interview which I had with him, his calmness, his powers of reflection and reasoning, the tenderness, apparently well regulated, with which he spoke of his living children and the one he had lost: aspirations for their welfare and their future; the faith he appeared to have in religion, the tone in which he spoke of his own domestic troubles, the resignation with which he appeared to have schooled himself to submit to them by the teachings of the Bible and other books to which he referred, impressed me much in his favour, and after he had left me I made in my notes' book the following entry: "I had a long interview to-day (lasting two and a half hours) with the alleged lunatic, and found him on every subject (except as to the attempted poisoning by his wife) most rational and reasonable: a man of intelligence and thought, and good powers of reflection; of good memory, well acquainted with business, shrewd and practical, more so than the ordinary run of men; of equable temperament, of apparently benign disposition and great affection for his children; quite free now from any belief that his neighbours attempted to poison him, and this, upon reasoning the matter over after the opinions expressed to him by medical men as to the causes of his illness at different times. But he seems unable to shake off the belief that his wife has made attempts on his life; he gives various reasons not absurd for this belief, though in my mind quite insufficient to justify it. He has stated occurrences in his married life, which, from his apparent truthfulness and uprightness of character, and the manner in which he detailed

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them, I have no right to disbelieve. Many things pass between man and wife to which they alone are witness— disputes leading to ill blood—expressions calculated to arouse suspicions and hatred—and, certainly, if only some of the things stated by him be true, he has had at least just cause of offence against his wife. It does appear, that they were not always happy [illegible] her. From the sickness with which he was afflicted, *Milne* is convinced that his wife did administer poison to him, although I think these symptoms the result of other causes. Still, can I say that his belief is insanity, or anything more than a prejudice resting on a very slight foundation?"

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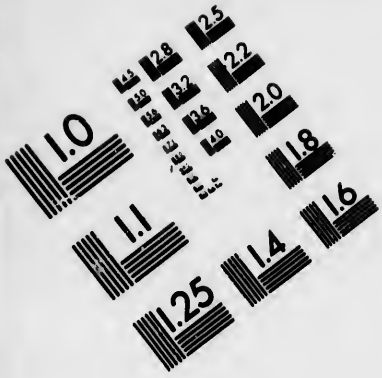
Although I have not changed the opinion thus recorded, and would have acted upon it at the time, had it been necessary to give an immediate decision, although I have frequently since asked myself, "why should this man be deprived of the government of himself and his property?" yet, I have thought it right to his family, right to himself, to ponder well over the case before finally disposing of it. I feel no doubt that *Milne* would be properly held responsible for any crime he might commit; and that, if he were wicked enough, as some of the witnesses suggest might be the case, to retaliate on his wife for the fancied wrongs he attributes to her, he would be liable to punishment, and that he perfectly understands this. What, then, are the reasons for treating this man as insane? Solely his belief, for years past, that his wife had more than once administered poison to him, and his belief for a time, and until within the last few months, that she had influenced certain of his neighbors to do the same thing. In addition, is adduced a statement of *Milne*, resting only upon the evidence of one *Leghman*, that he believed that his wife had managed to get poison into the cow's bag when, on one occasion, after drinking the milk which he himself had drawn from the bag, he experienced symptoms of illness similar to those which on other occasions he believed had been produced by poison. This latter statement



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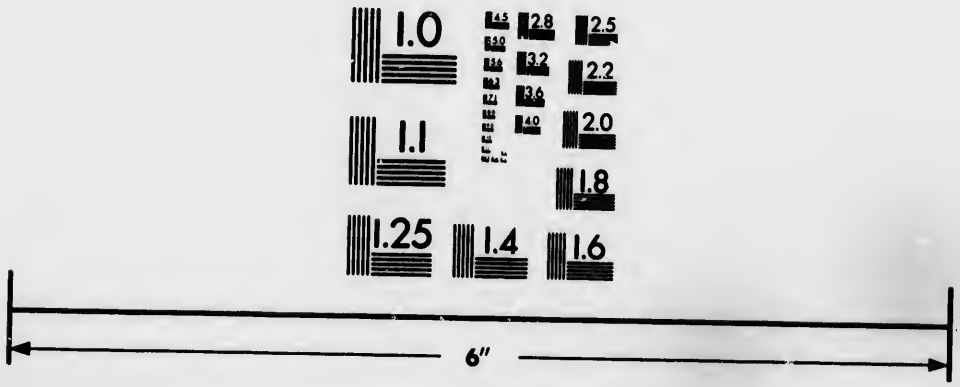

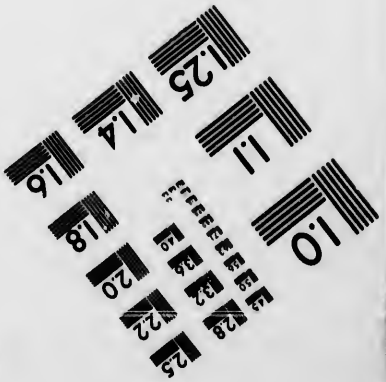

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may have been made in joke, or because of the bitter feelings engendered in his mind towards his wife, and indulged in as a mode of expressing or shewing them, or the witness may be mistaken as to the exact words *Milne* employed; and a very slight variation in the words would affect the sense in which they were used; or he may have entirely misunderstood *Milne* who, upon having his attention called by me with due caution to the use of the expression, stated his surprise when he heard *Leghman's* evidence in regard to it—his entire want of recollection of having used it—his certainty that he never meant to convey the notion that he believed in anything so absurd, and that he must have employed it, if at all, by way of reproach to his wife, and as indicating, by a figure of speech, how far he thought she would go in her attempts to injure him. I set this *Leghman* statement aside, as by itself of no value in judging of the state of *Milne's* mind at the time the language attributed to him was spoken. That *Milne* believed, and still believes, his wife had attempted to poison him, there can be no doubt. He frankly owned this to me, and gave as his reasons for it mainly those set forth in his affidavit and in his answer in the alimony suit. He had abandoned all suspicion of his neighbors, upon the explanation furnished to him by his medical advisers as to the causes, or probable causes, of his illness at certain times. His grounds for believing that at one time they were influenced by his wife to aid her in destroying him were, as he says, that after eating at certain of their houses he experienced exactly the same sensations and illness that befel him after eating at his own house, and which he had attributed to poison, and, he asks, was it not reasonable that the like effects should proceed from the same or the like causes? Rendered timid and apprehensive, and necessarily nervous and suspicious from belief of foul play at home, one cannot say that this process of argument, leading to the belief he formed, was unreasonable or insane. Consulting with his physicians, and reflecting upon the

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improbability of any neighbor or third person becoming a party to such a crime, and aware of no motive for it, he admits, and before the inquisition, according to the testimony thereat of Dr. *Doherty*, admitted that he was wrong in having made against his neighbors such accusations, and that he withdrew and abandoned them. I argued with him that if the symptoms which he experienced after eating at his neighbors' houses were precisely similar to those which he attributed to poisoned food at home, and if he admitted that notwithstanding those symptoms he had no just grounds for suspecting his neighbors of any attempted wrong, ought it not to follow, ought he not in charity, at all events, to believe that he had no just ground for suspecting his wife. He admitted the force of the reasoning, but denied its application. He said he felt he had no ground for suspecting his neighbors, but he had cause for suspecting his wife, and he could not get over that; and that although his sickness at neighbors' houses was not the result of poison there administered, yet that it may have been, as he was told it was possible to be, caused by the irritation and disorder produced in the stomach by poison administered on other occasions. I told him that I thought his digestion being bad, that suffering from dyspepsia, as the physicians said he had done, and the frequent taking of emetics—themselves probably containing more or less of poisonous matter—ought sufficiently to account for his diseased stomach. He said this was all well if he had not had the causes of suspicion already mentioned. His interview with Dr. *Rolph*, and the finding of the bottle of powder containing arsenic, seem to have confirmed him strongly in his belief of his wife's guilt. Has this delusion, calling it such for the purposes of the case, ever taken such possession of *Milne's* mind that it overmastered it; that it controlled in any way its action; or has had any influence upon him in the government of his property or the government of himself, beyond that change in his habits of living which a man, believing himself to be in danger

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1865. In re Milne. from those dwelling with him, would not unreasonably make? It is argued that it has had a pernicious influence beyond this. I do not find any evidence of it; on the contrary, the testimony is abundant to shew that neither *Milne's* powers or habits of business, nor his personal intercourse with others, nor his temperament or manner, was in any way affected by his unfortunate belief or suspicion. The witnesses say that if in gossipping conversation, or if in the progress of a matter of business, the subject of the poisoning were introduced, *Milne* would speak earnestly upon it, and rationally, furnishing the arguments and evidence which he thought proved it, and anxious to shew that he had not made an unfounded charge, first given to the world by his wife according to his account. So also they say that it did not withdraw his mind from the business in hand, beyond the mere time which would be consumed in speaking of it, and thinking of it while speaking. This I take to be the effect of the evidence. I refer particularly to that of Mr. *Cameron*, solicitor for Mrs. *Milne* in the alimony suit. It had not then the effect upon *Mil*[illegible] mind or conduct which insane monomania usually [illegible]

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Is not this a powerful, if not a conclusive argument, that his delusion was not, is not, an insane delusion? Insufficient to my mind as the grounds of his belief may be, delusion though it be he is labouring under, yet can I, can any one, with a mind differently constituted from his, not placed, and no one can be, in the exact position and in the circumstances which gave rise to suspicion in his mind—can I say that this belief which he has formed, which the evidence of the senses merely will not dispel; which rests upon facts, insufficient though I may think them as evidence, but which yet the senses did or could attest, is so extravagant, so absurd, that it must be called an insane belief, an insane delusion?

The line which separates an insane delusion from an unreasonable prejudice may often be very thin, but I have

in this case, no difficulty in seeing that line and fixing it as a boundary between *Milne's* prejudice and his alleged insanity. How often does a man who has quarrelled with his neighbor, living on bad terms with him, suspect and believe and carry to the grave the belief that that neighbor has poisoned an animal belonging to him or done his property some wilful injury, when there is not a particle of evidence to support the accusation, but yet when there is no evidence on the other hand to remove all ground for it? Begotten by suspicion out of prejudice, it becomes a fixed belief, and though a delusion, would a man be called insane because of it? I know the case of a man who was convinced, from certain symptoms, that he had swallowed a reptile. He had a constant gnawing at the stomach and a craving for food. He was a man of intelligence, of good business habits. The symptoms in time left him; but he always believed that he had swallowed this animal when young and small in a draught of water; that it had lived and died in his stomach, and been ejected through the bowels like ordinary food. This man was not insane, and no one thought he was, though he was always laughed at for his absurd fancy.

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I will advert for a moment to the medical testimony given in the case. Six physicians certify or testify that in their opinion *Milne* is of unsound mind, and many of these opinions are based upon what they consider *Milne's* unfounded belief; the character of which, as indicating unsoundness, they judge of by the tests given by medical and other writers on insanity. Six other medical men can find no trace of insanity in *Milne*. So far as the testimony of medical men of good intellect, accustomed to think and deal with cases of insanity, furnishes facts shewing certain peculiarities of mind which they have elicited by conversation with the patient or ascertained by observation, it is valuable as providing *indicia* by which to determine or aid in determining soundness or unsoundness of mind.

1865. In re Milne. A medical man of experience, from the habit of enquiry, which is necessary in his profession, acquires a readiness and a facility in extracting information from the subject of his inquiries, aided much by the confidence which his profession inspires, such as other men do not possess; his natural powers of observation are necessarily greatly improved and sharpened. The bill introduced into the parliament of Great Britain in 1862, under the auspices, I believe, of the *Lord Chancellor*, contained a clause excluding medical testimony altogether on inquiries into insanity. This clause was, however, and wisely as I think, omitted before the final passage of the bill, which became law in the shape of the act already referred to.

But the mere opinion of a medical man or of any other witness as to whether a man is sound or unsound in mind, is not only not evidence, but would be a very unsafe guide to a determination of the question. It is
Judgment. for the court before whom the inquiry is had to make this determination; and I confess I view with great distrust opinions based on theories, and metaphysical disquisitions upon mental organization. I should be greatly alarmed were I compelled to submit myself to an adjudication by such means. I do not mean to say that the studies of learned men upon the subject, their opinions, views and suppositions are not of value. On the contrary, they aid much in guiding the mind of the judge as to the character of the evidence which, under certain circumstances, may be material, and as to the questions to be put to witnesses and to the party himself alleged to be insane, with the object of testing the condition of his mind. In this case I have not felt that the medical testimony, conflicting as it is, and hesitating as a great part of it is, should influence my judgment.

If *Milne* cannot reconcile himself to live with his wife in feelings of security; if his unhappy apprehensions still pursue him, better for them both that they should live apart, and that he should make to her, as he is well able

to do, a proper provision for her support. The indulgence by *Milne* in these apprehensions of being poisoned may in time so act upon his mind as to end in a settled mania, overthrowing his reason, and thus subjecting him to the control of the court. I would strongly urge him to abandon them, as no real cause for them seems to exist; and I would also advise him not to form his opinions as to the mental or moral organization of mankind, or as to the treatment of diseases (and still less to act upon them), by the reading of such books as he left with me, as a specimen of those he has been in the habit of perusing. In the hands of men of science they can do no harm if they do no good; but they are very unsafe guides for unlearned minds.

Judgment.

My order is that the commission be superseded and all proceedings had under it quashed.

On a subsequent day the question as to who should bear the costs of the proceedings in this matter was spoken to.

Mr. *Blake*, Q.C., for *Peter Milne*.

Mr. *Kingstone*, contra.

In Re Wyndham, (*a*) *In Re F.*, (*b*) *Ex p. Loveday*, (*c*) *Ex p. Farin*, (*d*) *Ex p. Glover*, (*e*) were referred to.

VANKOUGHNET, C.—I do not think that after the remarks of the Lords Justices in *Re Wyndham*, and the subsequent passage of the Imperial Act 25 and 26 Vic.

(*a*) 31 L. J. N. S. ch. 720-5. (*b*) 33 L. J. N. S. ch. 333.
(*c*) 1 D. M. & G. 275. (*d*) 5 Ves. 832.
(*e*) 1 Mer. 269.

1865. chap. 84, I could hold that this court has the jurisdiction to award costs generally in lunacy. It is however contended here, that security for costs having been given, the court can permit the bond to be sued upon, and thus procure for the alleged lunatic his costs. I think I should not so act. Security was required, I suppose, as a precaution; but it could not have been intended to be available for costs, which it was not in the power of the court to award. It is then said that the costs of an interlocutory motion for an interim receiver, made after inquisition found, should be given to the alleged lunatic. If I had the power to order payment of such costs, I ought not I think to do so. The learned judge who ordered the commission *de luntico*, thought a *primâ facie* case of insanity had been made out. The jury found the insanity, and upon this the petitioner moved for a receiver. The commissioner tells me that he was not dissatisfied with the verdict of the jury, although I have differed from this opinion; still, when a man's conduct has laid him open to it, he cannot complain of the consequences.

In re Milne.

Judgment.

Fitzgibbon v. Duggan.

Sheriff's sale of land—Uncertainty of estate offered for sale.

Where a sheriff offered for sale, under an execution against lands, the interest of the debtor in certain lands, whatever that interest might be, not stating what it was, although the means of ascertaining what the interest was were convenient, and the interest itself was actually known to the judgment creditor and partially known to the sheriff, but not mentioned to the audience, the sale was set aside, because of the uncertainty of the interest or estate put up for sale; and the court also held that the sale could not be upheld, for the further reason, that the interest of the debtor was a life estate, which he had conveyed away absolutely, though for the purpose of a security only, and therefore that the statute for the sale of equities of redemption did not apply, the right to redeem not appearing on the face of the conveyance.

This was a suit to set aside a sheriff's deed of a lot of

land, in which the plaintiff claimed a life estate, under the circumstances stated in the judgment. 1865.

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The plaintiff in person.

Mr. *Boomer* for the defendants.

Spragge, V.C.—The question which stands for my decision is, whether the sale by the sheriff of the plaintiff's interest in the south half of lot 27, in concession D, of the township of Scarboro', ought to be set aside. The material circumstances in relation to the property, and the sale of it, as they appear in evidence, are as follows:—The plaintiff was entitled to a life estate in the property. On the 19th of February, 1853, he conveyed all his right, title and interest therein to *Asa Reynolds* and *Richard Stainton*, their heirs and assigns, for ever, for the consideration, as expressed in the conveyance, of £190. This conveyance was registered on the 7th of March, in the same year. The conveyance was, in fact, intended to indemnify the grantees for becoming bail, to the limits, for the plaintiff, who was at the time in the custody of the sheriff of York and Peel, for contempt, at the suit of one *Dexter*; for what amount, or whether for a money demand at all, does not appear; a bond shewing the above to be the object of the conveyance, and dated the same day, is put in; the bond was not registered. A reconveyance to the plaintiff is put in, dated the 23rd of October, 1854, executed by *Stainton* and wife, for all that appears, on its date; but noted to have been executed by *Reynolds* and wife, on the 20th of August, 1857, and which is not registered. Judgment.

The defendant *Duggan* recovered a judgment against the plaintiff, for attorney's costs, in the first division court of the county of York, and issued a *fi fa* against goods on the 15th February, 1853, which was returned *nulla bona*.

The Division Court suit was certified into the County

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Court on the 2nd of June, in the same year, and a *fi fa* against lands issued the following day, to which is appended a memorandum, styled in the cause, and as follows, "list of lands, lot 23, 3 con. King, and 27, in con. D, Scarboro," the last being the land in question in this cause; this writ was returned, "lands levied upon to the value of five shillings, which remain unsold for want of buyers." Upon this a *venditioni exponas* issued, which was received in the sheriff's office 10th August, 1854, it is marked for £26 1s. 7d. besides costs of writ and sheriff's fees. Under this writ the estate of the plaintiff in the land in question was sold at sheriff's sale, on the 2nd of September, 1854, for £32 10s., the purchaser being the defendant *Drummond*. The present sheriff, then deputy sheriff, thus describes, in his evidence, what was put up for sale under the writ. "We put up for sale the right and title of the plaintiff, whatever it might be, not stating what it was; I understood that he had a life estate in it, which was incumbered. It was given out at the sale that the judgment debtor had a life estate which was in some way incumbered; I do not know how incumbered or to what extent: it was considered doubtful whether his interest was worth anything."

The property sold was a farm of 99 acres, of which from 80 to 85 acres were cleared, and it is sworn to have been worth, to rent, from £70 to 80 a year.

The plaintiff, who conducted his cause in person, is a man in apparently good health, of middle age, and has a life estate in the premises; the nature of the incumbrance was not disclosed at the sale, and was probably unknown to the sheriff and his deputy. It was however known to the plaintiff at law himself, who was an attorney, and carried on the proceedings in his own cause, and himself personally examined *Asa Reynolds* in regard to the plaintiff's personal and real property, as to how the deed was made to *Reynolds* and *Stainton*; he asked if any money was

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paid, and *Reynolds* explained that it was given to secure them as bail to the limits, and Mr. *Duggan* then said he would take a "judgment" (execution is probably meant) "against the plaintiff's lands." There was therefore actual knowledge in the execution creditor and partial knowledge in the deputy sheriff, with the means of full knowledge. If no communication passed between the two in relation to the estate which the debtor had in the parcel of land seized, and noted upon the slip of paper annexed to the *fi. fa.*, I have no hesitation in saying that some communication ought to have passed. If what was within Mr. *Duggan's* knowledge had been made known to the audience at the sheriff's sale, it is manifest that a tangible, intelligible kind of estate would have been offered to them; they would have known what they were buying; whereas, put up for sale as it was, men bid for they knew not what; it was a haphazard kind of sale; the interest of the debtor, whatever it might chance to be; it might be worth something; it was considered doubtful whether it was worth anything; such a purchase is a sort of lottery, it may turn out a prize, or it may turn out a blank. It is really more like gambling than anything else.

Judgment.

The sheriff says the usual advertisement was issued, but there were no bidders; and that he thinks the sale was postponed from time to time in order to get bidders, and effect a sale; and he returned lands levied upon to the value of five shillings. It really seems strange that upon this return, if not before, an explanation should not have been given to the sheriff; or if not given spontaneously, have been sought for by him, as to what interest the debtor had in the land.

I am aware that it has been held (*a*) that a sheriff, levying upon a term of years under a writ against goods and chattels, is not bound to sell it as a term, having a particular commencement or ending; or having so many

(*a*) Palmer's case, 4 Rep. 74.

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years to run, but may sell all the interest that the debtor hath in it, "for by common intendment," as it is said the sheriff cannot have precise knowledge of the certainty of the beginning and the certainty of the end of the term; but I apprehend that in such a case the term is described in general, and the name of the landlord given, and that the sheriff is able to answer questions that may be asked of him, without however vouching for the accuracy of his information; for he is undoubtedly bound to sell to the best advantage, and if he were to say to the audience, I really know nothing about the term or whether there is a term at all, or if there is, whether it has expired; but I offer for sale his interest, whatever it may be; I cannot think that such a sale is a sale properly conducted. It would be open to many of the comments of Lord *Eldon* in Lord *Cranstoun* v. *Johnson* (*a*).

Judgment.

Mr. *Strong* was kind enough to refer me to a case lately decided by the Judicial Committee of the Privy Council in England, upon an appeal from India. The case upon appeal is reported in 6 *Moore's* Indian Appeals, which are not in this country, I believe. I have only seen a note of it in the digest to the Jurist, volume 4 N. S., page 99. It was held upon appeal that a sheriff's sale of the "right, title, and interest," of, what the note in the digest calls, an unascertained property, the debtor having an uncertain right in the property, was void; that the interest was not such as could be seized by the sheriff under execution. Without seeing more of the case than is given in the digest, I cannot say what bearing it may have upon this case. It is not improbable that it may have a very important bearing upon it. There are also three American cases, which bear upon the point raised in this case: *Tiernan* v. *Wilson*, (*b*) *Mowhawk Bank* v. *Atwater*, (*c*) *Stead's Executors* v. *Course*. (*d*) I have said as much as

(*a*) 3 Ves. 170.
(*b*) 6 J. C. R. 511.
(*c*) 2 Paige 54.
(*d*) 4 Cranch. S. C. R. 403.

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I think it is right to say at present, in regard to this sale, because I do not think that the bill is properly framed to impeach the conduct of the sale, upon the grounds to which I have adverted. The gravamen of the charge in the bill is, that there were sufficient goods and chattels, out of which the judgment debt might have been levied in the county, if not in the division, and that therefore there ought to have been no sale of lands at all. After setting out the personal property that might have been seized, the plaintiff alleges the issue of a writ against lands, and proceeds thus, "That a certain property situate, lying, and being in the township of Scarboro', comprising 100 acres, was advertised in the months of August and September, 1854; that the said W. B. *Jarvis* did then sell the right, title, and interest in the said farm of your complainant to the aforesaid *Andrew Drummond* for the sum of £32, or thereabouts; that your complainant had a life interest in the said farm," &c. This is alleged, as I read it, simply as a narrative of the fact of sale, (a sale being improper while there were goods,) not as a complaint as to the manner of the sale, and indeed a correct conduct of the sale is not inconsistent with the plaintiff's account of what was done.

Judgment.

The plaintiff has been his own pleader, as well as his own counsel, but it is needless to say that that circumstance cannot excuse imperfection in pleading; the court cannot hold a pleading to mean one thing when drawn by counsel, and another when drawn by a suitor himself. I think, however, the plaintiff should have leave to amend if he desires it, and upon payment, only, of the costs of the hearing, which I will fix at a liquidated sum of £7 10s., the depositions to stand, and each party to be at liberty to give further evidence.

In considering this case the question has occured to me whether the plaintiff had, at the time of the sale, any interest in the property saleable at law; the legal

1865. Fitzgibbon v. Duggan. estate being in *Reynolds* and *Stainton*. Was there any equity of redemption in the plaintiff within the meaning of the act for the sale of equities of redemption? And again, if so, must not an equity of redemption be put up to sale as an equity of redemption, and by that name?

After this judgment had been pronounced the plaintiff amended his bill, and further evidence was taken in the cause, and

Mr. *McDonald* appeared for the plaintiff.

Mr. *Boomer* for the defendants.

After taking time to look into the pleadings and evidence,

Judgment. SPRAGGE, V.C.—I have but little to add, to what I said when the case was before me upon a previous occasion. Further evidence has been given in relation to the sheriff's sale, which is confirmatory of that previously given. The sheriff, upon being recalled, says, he thinks it was known to the audience, or to those of them who had been present when the land was before offered for sale, that "*Fitzgibbon* had only a life interest, and this appearing to have been conveyed away, it was thought his interest was worth nothing: that was my impression as to the Scarboro' lot (the one in question), and as far as I know the impression of the bidders at the sale. I don't think anything was known of any bond back to *Fitzgibbon*. I am certain I did not know of it." Mr. *O'Donohue*, a purchaser of another lot of *Fitzgibbon's* at the same sale, says, "I bid on the second lot (the one in question), as well as on the first, and my bidding was purely speculative. on that, as well as on the other, I did not know what I was bidding for in either case."

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It is plain, then, that this property went to sale under the idea on the part of the sheriff, and as far as has been ascertained, on the part of the audience, also, that the execution debtor had had a life estate in the property which he had conveyed away; and therefore that his interest was, as the sheriff says, worth nothing, in other words that he had no interest; and what was sold must have been the chance that it might turn out, that in spite of appearances he had some interest; and this with the knowledge, and means of knowledge, to which I adverted in my former judgment.

Judgment.

Since this case was before me on the former hearing, the report of the case from India before the Judicial Committee of the Privy Council, to which I alluded, has been received. It is styled *Bebee Tokai Sherob* v. *Beglar*. (*a*) Land had been sold by the sheriff under a writ of *venditioni exponas*, as the land of *Gabriel Avietie ter Stephanoos*, whose title was derived under the will of *Avietie ter Stophanoos*, whose illigitimate son he was. The judgment of Lord *Kingsdown* describes the estate of *Gabriel* under the will; and his Lordship adds his comments upon such a sale, the sale being, as expressed in the sheriff's bill of sale, the right, title and interest of the said *Gabriel Avietie ter Stephanoos*, of, in, and to, (amongst other property), all that six anas, six gundahs, and two crantees, shares of an Talook estate, situate, lying and being at Rope Gunge, in the district of Dacca; the property was knocked down at R's 20, which was treated as a mere nominal sum. Lord *Kingsdown* said, "The will in substance is this: the testator declares that his son, *Gabriel*, shall be his heir and executor for the purpose of executing the intentions of his will, and thereby no doubt he became trustee for the purpose of executing the different dispositions contained in that instrument.

(*a*) 6 Moore's Indian Appeals, 510.

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Judgment.

Those dispositions were to this effect; there was first a charge by way of annuity of Rs. 1,200, in favor of the present appellant, all the debts were to be paid, there were very large legacies to be discharged, and after all these charges, debts, legacies and annuities, had been satisfied or provided for, as to the remainder of the estate *Gabriel* was to be tenant for life, with remainder to his sons. He therefore was entitled to nothing for his own benefit but a life interest in the residue of the real and personal property of the testator, after all the charges upon it had been satisfied and provided for, and after a full administration had taken place of the assets for the purpose of discharging these several dispositions. Now, was that an interest which could be sold under an execution issued in the supreme court against the property of the testator? We have the concurrent opinion of the two very highest authorities in this country on the subject, Sir *Edward Ryan* and Sir *Lawrence Peel*, who are most clearly of opinion that no such interest could pass under such an execution, and that therefore the bill of sale under it was absolutely null and void. Indeed the grossest injustice would be done if the transaction, as it has taken place could stand; for what is the effect of it? The effect of it is merely this: that there being some uncertain rights in some uncertain property in the district or city of Dacca, at a distance from Calcutta, it being uncertain whether the property was worth Rs. 100,000, or whether the interest of the debtor is worth anything: that property is put up for sale (that is, the right and interest of the debtor in that property is put up for sale), in Calcutta, and I think it appears here to have been bought for mere nominal sums, it being utterly impossible that there could be any satisfactory means of determining the value or procuring a fair price by the competition of purchasers acquainted with the value, or capable even of ascertaining the value of the property."

The observations of Lord *Kingsdown* are apposite to the sheriff's sale which I am considering, I mean of

course apart from the law of India, by which the case was governed. If the sale in India was open to the very grave objections pointed out by Lord *Kingsdown*, by reason of the value of the interest sold being so very uncertain, being indeed impossible of ascertainment by any purchaser, it does appear to me that the utter uncertainty of the interest sold in this case, lays the sale open to the same objections, and that these objections are not at all lessened by the fact that the uncertainty in this case might with due diligence have been removed.

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I do not say that in no case can a purchaser at sheriff's sale support his purchase, where the interest sold is an uncertain one. I do not desire to go out of this case. Here the interest of the execution debtor was a plain and tangible one, and that interest, with the means of information within reach, should have been offered for sale. I have already described what, instead of this, was offered for sale.

Judgment.

There is no evidence that this sale was brought about or conducted as it was by any undue practice on the part of the defendant *Drummond*, and I have no reason to think it was so. Still I think he cannot hold his purchase. I refer to, instead of repeating, the reasons which I gave in the case of *Henry* v. *Burness*, (*a*) where a sheriff's sale for taxes was set aside; desiring, however, to observe, in reference to the language quoted from *Hugenin* v. *Baseley*, that I do not impute to any one connected with this sale "fraud, imposition, or undue influence."

There is another ground upon which I apprehend this sale must fail. The conveyance to *Reynolds and Stainton* was absolute in point of form, though by way of security only, and it has been held in this Court, in *McCabe* v. *Thompson*, (*b*) that the statute for the sale

(*a*) Ante vol. viii., p. 354. (*b*) Ante vol. vi., p. 175.

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I confess I should have been better satisfied with the conduct of the plaintiff if, when he found the land advertised for sale, he had forbidden the sale, or explained, verbally or in writing, the circumstances of his title; and also, if he had come promptly to this court to be relieved from the sale, instead of delaying some three or four years before filing his bill, and then prosecuting his suit in a rather dilatory manner; but the defence of laches is not set up, and I do not suppose it would bar the plaintiff's right.

Judgment. I think the sale must be set aside, and an account directed of the rents and profits received by the purchaser, and of improvements made by him, and he should be allowed for the purchase money at sheriff's sale, with interest.

With regard to costs I think it right to take the same course that I took in *Henry* v. *Burness*. I do not find that *Drummond* was otherwise than an innocent purchaser. The interest of execution debtors has, it appears, frequently been sold by sheriffs in the way in which the interest of *Fitzgibbon* was put up in this case, and *Drummond* was unaware, so far as appears, that it could be ascertained. The original bill did not take the ground that the interest of the plaintiff was not saleable. The sheriff and Mr. *Duggan* are made parties only to fix them with costs. I cannot, under the circumstances stated in my former judgment, give them their costs, but I do not give costs against them. *Walton* objects that he is not a proper party, but he does not disclaim: he is made a party as tenant of *Drummond*, and his answer shews that he is such tenant. I do not think him an improper party. My conclusion is not to give costs to either party up to the hearing. The account

will be only between the plaintiff and *Drummond*, and as that is rendered necessary by the defendant's position, in which he is, in my judgment, in the wrong, he must pay the plaintiff's costs subsequent to the hearing. 1865.

BALL v. BALLANTYNE.

Fraudulent conveyance and judgment—Statute of 13 Elisabeth, ch. 5.

M. B., an unmarried woman, resided for some years with her sister and brother-in-law. He having become involved in circumstances, conveyed his real estate to *M. B.*, for the alleged consideration of wages due her as a hired servant. Promissory notes were also made and given to *M. B.*, by her brother-in-law, and on these notes becoming due judgment was obtained, under which *M. B.* sold the farm stock, and other personal property of her brother-in-law, becoming herself the purchaser. The evidence as to *bond fides* and good consideration for the transfer of the land and the giving of the notes was unsatisfactory, and the conveyance was set aside as fraudulent, at the instance of the creditors of the grantor.

Statement.

The bill in this cause was filed by *James Ball* and *John M. Garland*, as judgment creditors, having a writ of *fi. fa.* against the lands of the defendant *William Nicholas* in the hands of the sheriff unsatisfied. The defendants were the said *Nicholas* and *Matilda Ballantyne*, and the object of the bill was to set aside a conveyance, made by *Nicholas* and his wife to *Matilda Ballantyne*, of a farm of land, as void under the 13th Elizabeth, chapter 5, as being fraudulent, designed to defeat creditors, and without consideration.

The cause came on for the examination of witnesses and hearing before his Honor Vice-Chancellor *Spragge*, at the sittings of the court held at Brantford, in November last.

Mr *Wood* for plaintiffs.

Mr. *Blake* for defendants.

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Ball v. Ballantyne.

SPRAGGE, V. C.—The plaintiffs are judgment creditors of the defendant *Nicholas*, with writ against lands in the hands of the sheriff, and seek to set aside, as void under the 13th of Elizabeth, a conveyance made by *Nicholas* and wife to the defendant *Matilda Ballantyne* on the 9th of June, 1863.

Matilda Ballantyne is a sister of the wife of *Nicholas*, and is herself unmarried. She went to live in the house of her sister and her sister's husband, in the summer of 1852, (she says in July of that year,) and that she was hired at $3 a month, and that she continued to live there as a hired servant until June, 1863. She claimed ten and a-half years' wages against her brother-in-law, and in satisfaction took a conveyance of his farm, (which was subject to a mortgage,) and purchased at sheriff's sale, at her own execution, all his personal property.

Judgment.

It is clear, I think, that no hiring is to be presumed under the circumstances. The presumption would be that this young woman, the sister of a farmer's wife, living in her sister's house, and receiving board and clothing, what she received would be an equivalent for such services as she might render; and, on the other hand, her services would be an equivalent for her board and clothing.

Then, as to evidence of hiring, there is none besides that of the young woman herself, and that came out upon her examination. Her interest in giving the evidence is obviously very great; no less than the ownership of a farm, farm stock and utensils, and furniture. Her evidence, even supposing her uncorroborated evidence sufficient, should be looked at narrowly. According to her own account she had been about ten years an inmate of her sister's house before she received anything from any other quarter. She then received from her brother some trifling articles of dress,

worth not more than a very few dollars; shortly afterwards she received in cash $6, and the following year $2. It is inevitable that she must have been clothed at the expense of her brother-in-law; he dealt at the plaintiff's store, and she tries to make out that clothing for herself was not purchased there. Upon this she is contradicted. She says she was never at the plaintiff's store to buy goods, unless a pound of tea, or something of that sort, for her sister; that she never bought a shawl at the plaintiff's store. Against this one witness, *Harrie*, a book-keeper of the plaintiff, says he saw her at the store frequently, sometimes paying cash for what she bought, and sometimes buying on *Nicholas'* account, and that she appeared as well dressed as servant girls generally are. In this he is corroborated by *Nicholas Garland*, a brother of one of the plaintiffs. *Harrie* adds that he has kept house, and had servant girls, and that he generally found it took all their wages to keep them in clothing. He also proves that *Matilda Ballantyne* bought a black cashmere shawl at the plaintiff's shop, and had it charged to *Nicholas*, and that he afterwards saw her wearing a similar shawl. She is thus contradicted by two independent witnesses.

Judgment.

Further, there was an attempt to give an air of fair dealing to this claim for wages by the concoction of documents. Four notes are produced, one for £38, dated the 14th of December, 1856, a second for £72, dated the 14th of December, 1858, a third for the like sum dated 15th December, 1860; each of these notes was made payable twelve months after date. The fourth note was made in Hamilton, in June, 1863, by a professional gentleman, whom the parties, *Nicholas* and his sister-in-law, went to consult, and by whom the conveyance was drawn; and by whom *Nicholas* was sued; and which last note I am sorry to find antedated to the 15th of December, 1862. Now what *Matilda Ballantyne* says about these four notes is, "They were all given to me at the same time, I think." In another

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place she says, "I recollect the notes being given: I think three were given at the same time, and the other on a previous occasion." This might possibly look as if the earlier one had been given before the others, and its being in pounds while the others are in dollars, does, as suggested by Mr. *Blake*, look like it; but the young woman herself dispels the idea; she says she had settlements with *Nicholas*. "I had none," she says, "until I had been with him a good many years, the first settlement was in the *same year that I sued him*." And that was in 1863, though she says erroneously 1862. I think the only conclusion I can draw from this evidence is, that the three first notes were all drawn in 1863, notwithstanding their different dates, and notwithstanding that they are on paper of different sizes and description, all of which appear to me artful contrivances to make them look genuine.

Judgment.

There are other suspicious circumstances, but it is not necessary to enter into them. I cannot, upon the evidence of *Matilda Ballantyne*, unsupported as it is, and with so much against it, establish the improbable fact that there was a contract of hiring between her and her brother-in-law.

The plaintiff is entitled to the usual decree, with costs against both defendants.

Hyman v. Roots.

County Court—Costs.

Where a bill is filed to foreclose in respect of a demand not exceeding £50, the plaintiff will be entitled to his full costs, if it appear that there is an incumbrance beyond that sum.

This was a hearing on further directions of this case. The main facts appear, ante vol. x., p. 340.

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Hyman v. Roots.

The Mortgage from *Roots* to *Ellis*, covering lot 16, was made in June, 1854.

Roots then mortgaged lot 17 to *Carling*, in April, 1856, and afterwards mortgaged this lot to *McIntosh* in 1859. The plaintiffs in May, 1862, obtained an assignment of *Carlings's* mortgage; and *Lawrason*, in October following, bought the equity of redemption in lot 17 at sheriff's sale. *McIntosh*, as a subsequent incumbrancer on lot 17, was made a party in the Master's office, and it appearing on further directions that there was less than £50 due the plaintiff on the mortgage covering this lot, *McIntosh* objected that he should only be charged with such costs as would have been occasioned had the suit been brought in the County Court. It was on the other hand contended that the amount due on *McIntosh's* mortgage exceeding £50, the suit was still properly brought in this Court.

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

Mr. *Fitzgerald* contra.

Judgment.

Spragge, V.C.—When the bill was filed the plaintiff was the holder of two mortgages, the equity of redemption as to both being in *Roots;* and *Roots* could not redeem one without redeeming both. *McIntosh* was an incumbrancer upon one, and was entitled, as I have determined, to redeem the one without the other. The amount due the plaintiff upon this mortgage upon that lot being less than £50; the amount due *McIntosh* upwards of £300. Plaintiff necessarily brought his bill upon both mortgages, because entitled to be redeemed as to both by *Roots* and by *Rawrason;* but still there is reason in the contention that *McIntosh* ought not to be prejudiced thereby. *McIntosh's* equity, when he took his mortgages, was to redeem the small prior mortgage to *Carling*, and that is his equity still; the plaintiff having subsequently taken an assignment of that mortgage has

1865. Hymen v. Roots.

not affected it. If therefore *Carling*, filing a bill to realize his mortgage, could properly file it in the County Court, then plaintiff must be confined to County Court costs. He would have filed his bill against *Roots* or *Lawrason*, and *McIntosh* would be made a party either to the bill or in the Master's office. He being an incumbrancer to an amount exceeding £50, would the suit be proper in the County Court or in this court? In other words, has the County Court jurisdiction in such a case? I understand it has been decided in this court that it has not, and I suppose it could not admit of serious doubt.

Mossop v. Trust and Loan Company.

Decree for specific performance in favor of plaintiff's vendee, but without costs, under the circumstances.

A purchaser of land at public auction, from the Trust and Loan Company, filed a bill for specific performance, injunction and compensation, alleging misconduct of the company's agents at the sale and otherwise, and consequent damage to the plaintiff, which allegations were partly disproved by the evidence: however, as the delay which occurred in completing the title to the plaintiff was owing in a great measure to the defendants, the court, under the circumstances, made a decree for specific performance and injunction; but without costs or compensation.

Statement.

On the 10th day of May, 1861, the Trust and Loan Company sold at public auction the premises in question, being lot No. 17, in the 10th concession of the township of Goderich, with a saw-mill thereon, under a power of sale contained in a mortgage held by them. *Mossop*, the plaintiff, became the purchaser, for the sum of $3,250, signed the usual agreement and paid his deposit. Soon afterwards he went into possession of the premises without the knowledge or consent of the vendors; but after a time he left them.

Part of the purchase money was, by the conditions of sale, to be secured by mortgage, and accordingly the

Company's agents forwarded a mortgage to be executed some time after the sale, but the plaintiff objected to execute it till he saw the deed to himself of the premises, which was not forwarded to Goderich till September. The plaintiff, about the middle of August, was tendered the mortgage (drawn in the form usual with the Company.) for execution. The plaintiff then complained of having been kept out of possession, and claimed damages. He also refused to execute the mortgage till he could take advice. On the 23rd of that month, the agents of both parties agreed that the plaintiff should receive 150 dollars as compensation for being kept out of possession, the Company's agent being then ignorant that the plaintiff had in fact gone into possession soon after the sale. This arrangement fell through, however, and when the mortgage was tendered to the plaintiff for execution, afterwards, he declined to execute it; and his solicitors demanded 175 dollars for damages.

Statement.

The plaintiff appears to have left the premises about this time, and the defendants advertised them for sale. The plaintiff thereupon filed his bill, on the 23rd of October, setting forth the agreement, and alleging that the conditions had not been read at the sale; that the real conditions were different from those afterwards insisted on by the defendants, and that he had been improperly kept out of possession, and had consequently incurred serious loss, and it prayed for specific performance, an injunction to restrain a sale by the defendants, and compensation for being kept out of possession.

The defendants' answer admitted the sale, and subsequent payment on account, by the plaintiff, besides the deposit; but it denied that he had been improperly kept out of possession, and alleged that the conditions insisted on (being the Company's usual conditions) were duly read at the sale. This afterwards appeared in evidence. The other facts of the case appear from the judgment.

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On the hearing, Mr. *Blake*, Q.C., for the plaintiff, contended that he was entitled to specific performance, and an injunction; as he was entitled to see the deed before executing the mortgage, even if that document had been properly executed; and that he was entitled to compensation for having been improperly kept out of possession, and the consequent damage.

Mr. *McGregor*, for the defendants, argued that the plaintiff was clearly not entitled to any compensation, as it appeared by the evidence that he had gone into immediate possession and might have so continued if he had pleased. He further argued that the plaintiff's whole conduct had disentitled him to any relief in this court, and that at all events the false charges against the defendants contained in his bill (which were not only denied by the answer, but disproved by the evidence,) disentitled him to any costs.

Judgment.

SPRAGGE, V.C.—In the early part of the transactions, out of which this suit has arisen, the plaintiff appears to have been entirely in the right; he signed the contract of sale, he paid the first and second instalments of purchase money punctually. Upon that he was entitled to a conveyance, he at the same time giving back a mortgage for the balance of purchase money. The date of this is 10th June, 1861. The plaintiff was at the same date to have been let into possession of the property, that is, upon receiving a deed, and giving back a mortgage.

The defendants placed themselves in the wrong, in the first place, by not being prepared to give a deed until some time in July or August, the precise date is not fixed, and in the next place, by insisting upon the plaintiff's giving a mortgage, without, as far as appears, giving to the plaintiff an opportunity of examining by himself, or by his solicitor, if he desired it, the conveyance which he was to receive. The conditions of sale contained, it is true, this clause, "The company shall not be bound

to give to the purchaser a deed containing covenants for title, nor any conveyance other than the printed form of deed now used by the said Company." There was therefore less for the purchaser's solicitor to consider than in ordinary cases; but still, he had a right to see that the deed tendered was such an one as the purchaser was entitled to. The deed was prepared by the Company, under one of the conditions, as was also the mortgage, and the deed was sent up, ready executed, to the Company's solicitor at Goderich, where the sale took place. Properly it should have been sent up unexecuted, to be examined by the purchaser on his solicitor. As it was, inspection only was permitted; and it does not appear, by the evidence, that even that was notified to the purchaser or his solicitor.

The delay had complicated matters. The Company had not given possession, and, as it appears, declined to do so, until the mortgage should be executed. Upon this, a claim for compensation was made by the purchaser, which was acceded to, and a sum agreed upon; but, before it was paid, the solicitor for the Company had discovered, as he says, that the plaintiff had actually been in possession: and payment was refused. The plaintiff then refused to give the mortgage, on two grounds; that he had not yet his deed; and that he had suffered loss by the delay, for which compensation was refused. In this state of things the Company, after awhile, again offered the property for sale; and then this bill was filed. I should mention that there was no difficulty about the title; the purchaser's solicitor satisfied himself upon that head, the Company having promptly furnished the necessary papers.

Judgment.

Under the circumstances that I have stated, the plaintiff must be entitled to relief. He is entitled to an injunction, to restrain a sale to another, and to a decree for specific performance. The conduct of the plaintiff has, however, been by no means faultless; so

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much otherwise, indeed, that I at first doubted, after reading the papers, whether I ought not to refuse specific performance; but, as his conduct, in relation to the contract itself, was proper, I think it should only affect the costs.

It appears by the evidence, that he actually obtained possession from the former owner, immediately after the sale, and that he exercised various acts of ownership over the purchased property. This he concealed from the Company, while claiming compensation for not being let into possession. Even his own solicitor, while corresponding with the Company in regard to the possession, was ignorant of the possession that his client had enjoyed.

It is true that possession obtained in the way it was, is not the same thing as being let into possession by the vendor; but still, the claiming compensation as if out of possession, looks exceedingly like endeavouring to extort money under a false pretence.

Judgment.

Further, he called witnesses to prove matters which were at variance with fact: that cordwood had been cut and drawn off the land by the former owner, when, in truth, it was cut off other land; that the conditions of sale were not read out at the sale at all; or, if any were read, that it was by the auctioneer; that none were read by Mr. *Paton*, the Company's agent; and that, at any rate, certain conditions were not read. The evidence, on the other hand, is convincing that all the conditions were read aloud, and by Mr. *Paton* himself. He also insinuates that he was, in a measure, entrapped into signing the contract of sale, which is at the foot of the conditions, under the idea that it was a paper of a different character. This, I am satisfied from the evidence, was not the fact; and the paper itself makes it scarcely possible that it should be so.

There are also some minor points; and upon all of them, a good deal of evidence was taken, and the defendants were put to the expense of rebutting unfounded charges. This appears to me, therefore, to be a case in which, while relief is granted to the plaintiff, he should be denied his costs.

It is suggested by Mr. *Blake*, counsel for the plaintiff, that, in order to save the expense of inquiries before the Master, in the event of a decree for the plaintiff, the Company should pay the plaintiff interest on the instalments of purchase money paid by him, and that the Company should not receive interest on the unpaid purchase money until the delivery of possession: and I understand Mr. *McGregor*, to concede that what is proposed is reasonable. I am myself inclined to think that it is so. The possession obtained by the plaintiff does not appear to have been beneficial, as events turned out.

Judgment.

LAWRENCE v. HUMPHRIES.

Executor—Probate when necessary—Heirs of mortgagee when necessary parties to a foreclosure suit.

A bill filed by A. & B., as executors of the deceased mortgagee, to foreclose, did not allege that probate had issued to them.

Held defective on demurrer.

Held, also, that the heirs of the deceased mortgagee, or the persons beneficially interested under his will, are not necessary parties to such suit.

The bill in this cause was filed by *Francis Lawrence*, *John Lawrie*, and *Rachel Ferguson*, executors and executrix of *William Ferguson* deceased, against *Henry Humphries*, for the foreclosure of a mortgage made on the 23rd October, 1854, between the defendant of the first part and the said late *William Ferguson*, of the second part, which mortgage is now overdue.

1865. Lawrence v. Humphries.

The second paragraph of the bill stated "that by the last will and testament of the said *William Ferguson*, your complainants are entitled to the money secured by the said mortgage."

The bill did not allege that probate of the will had been granted to the plaintiffs, or any of them.

The defendant demurred to the bill on the grounds, first, that the devisee or devisees, heir or heirs at law, of the mortgagee ought to have been a party or parties to the bill; and, secondly, because it did not appear by the bill that letters probate of the will of the said *William Ferguson* had been granted to the plaintiffs by the proper court.

Mr. *Blevins* for the demurrer.

Mr. *John Patterson* contra.

Judgment.

SPRAGGE, V.C.—The bill was filed by three persons, describing themselves to be executors and executrix of a mortgagee, against the mortgagor, who demurs. There are two grounds of demurrer, one that the plaintiffs do not allege that probate of the mortgagee's will has been granted to them; the other that the parties entitled under the will, or by descent, to the legal estate in the mortgaged premises, are not made parties.

I think the first objection must prevail. The precise point was raised by demurrer in the old case of *Humphreys* v. *Ingledon*, (*a*) before Lord *Macclesfield*, and that case is quoted as authority for the point in the latest editions of the text books. There is indeed a dictum against it in another old case, *Humphreys* v. *Humphreys*, (*b*) before Lord *Talbot*; and there are some apparent anomalies in the practice; for instance, that a

(*a*) 1 P. Wm. 752. (*b*) 3 P. Wm. 351.

plaintiff may allege that he has obtained probate before he has obtained it; the reason being, that when he afterwards obtains it, it shall relate back to the death of the testator. But, upon the whole, I take it that the taking out of probate ought to be alleged, upon the well understood principle, that a plaintiff must not only shew an interest in the subject matter of the suit, but also that he has a proper title to institute a suit concerning it; and Mr. *Daniel* puts, as ad instance of this rule, that the executor of a deceased person has an interest in all the personal property of his testator, but till he has proved the will he has no title to assert his right in a court of justice.

Upon the other ground of demurrer I incline against the defendant. It is true he has a right, upon redeeming the mortgage, to have a conveyance of the real estate; and it has been held in the case cited, that a bill is demurrable if filed by the personal representatives of a mortgagee, unless the real representatives are also made parties; but it is the practice of this court to allow the latter to be made parties in the Master's office; and as the only purpose for which the defendant can need them as parties, is that they may convey, upon his redeeming, they are thus made parties at as early a stage of the suit as is necessary. It is suggested that the mortgagor might desire to pay off the mortgage before the hearing, and that the suit would not be properly constituted for that purpose; and at first sight the objection seems plausable; but the defendant is not thereby prejudiced. It is his right under the statute; (and it has been held (*a*) that, independently of the statute, the court might of its inherent jurisdiction give the same relief) to pay the mortgage money, interest and costs into court. The general order of this court allowing a mortgagor to pay instalments or interest in arrear into court is an exercise of that jurisdiction, and goes further

Judgment.

(*a*) Pearl v. Hull, 1 S. & S. 331.

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than the application to which I have referred. Of course the money, when paid in, could not be taken out of court until a proper conveyance was made by all proper parties to the mortgagor.

Judgment.

The rule as to parties, it has been often observed, is a rule of convenience, and as no inconvenience is occasioned to the mortgagor by the real representatives not being made parties to the bill, and costs may be thereby saved, I think the demurrer on that ground is not tenable.

As the defendant succeeds upon one ground of demurrer only, and fails on the other, that other being his principal ground of demurrer, I think it proper to give costs to neither party. I am the more disinclined to give costs to the defendant because it looks very much as if his demurrer was for purposes of delay.

Aikins v. Blain.

Demurrer—Suit pending for same cause of action—Executor's right to Compromise.

A. B. and *G.* were appointed executors. *B.*, as acting executor, received a large sum belonging to his testator's estate, which he failing to account for, a suit was commenced to administer the estate. This suit was compromised by the plaintiff therein, who was a beneficiary under the testator's will, and the co-executors who took security for the sum found due from *B.*, who agreed to cease all further interference with the estate, which was thenceforth to be managed by *A.*: *B.* continued to meddle with the estate; whereupon *A.* and *G.* filed a bill praying for an account, and for an injunction to restrain *B.* from all further interference with the estate. *Held*, on demurrer, that the proceedings in the former suit and its pendency were no bar to the relief sought.

The bill in this cause was filed by *James Cox Aikins* and *Thomas Graham*, two of the executors appointed by the will of the late *Martin Townley*, against *George*

Blain, another executor of said *Townley*, and *Margaret Blain*, *Mary Ann Burgess*, *James Burgess*, *Mary Graham*, and *Martha Rebecca Graham*, *Amelia Ellen Graham* and *Thomas Johnston Graham*, infant children of the testator's daughter, *Martha Graham*, and set forth the will of the testator, dated the 23rd of May, 1860, whereby he appointed the plaintiffs and the defendant, *George Blain*, his executors, and made a disposition of his property, real and personal, amongst the said other defendants, who now represent the estate.

The testator died in the month of November, 1861, and the plaintiff and *George Blain* thereupon proved the will and received probate thereof.

It was charged by the bill that the defendant, *George Blain*, took possession of all the goods and chattels, money and credits of the testator, and that he also received the proceeds of the testator's real estate, sold by the executors, under a provision and power of sale contained in the will, so that in the month of March, 1862, there was in the hands of the said *George Blain*, belonging to the testator's estate, the sum of $24,058, and that he also subsequently received various sums belonging to the said estate, for all which he refused to render any account. Statement.

It was further alleged, that a suit for the administration of the testator's estate had been commenced by the defendant *Mary Anne Burgess*, and that after a decree had been pronounced therein the defendant, *George Blain*, agreed to account to the plaintiffs and the said *Mary Anne Burgess*, in respect of his dealings with the said estate; that accounts were then taken, and the said *George Blain* was found to be indebted in the sum of $4,405.96, besides securities held by him and belonging to the estate; that it was further agreed that he should execute a mortgage over his individual property to secure the above sum, and should hand the same over

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to the plaintiff, *James Cox Aikins*, as managing executor and trustee, and that said *George Blain* should not thereafter meddle with the affairs of the estate. The said *George Blain* executed the mortgage, but it is alleged that he still retained certain sums and securities belonging to the estate, and in various ways interfered therein, especially by warning the debtors of the estate not to pay sums due the estate to the agent of the plaintiff, *James Cox Aikins*, and himself receiving moneys from such debtors.

The bill prayed for an injunction to restrain said *George Blain* from all further interference with the management of the estate; that he might be required to pay into court the moneys of the estate received by him; that accounts might be taken of his dealings with the estate, and that a Receiver might be appointed.

To the bill a general demurrer for want of equity was filed by the defendant *George Blain*, which was argued by

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

Mr. *Blake* contra.

Judgment.

SPRAGGE, V.C.—The bill is filed by two executors against the other executor, charging him with the receipt and appropriation to his own use of large sums of the testator's estate, and praying for an account and a Receiver. Parties beneficially interested under the will are also made defendants. So far a sufficient ground of suit is disclosed by the bill.

The defendant, *Blain*, demurs generally for want of equity, and alleges in argument two causes of demurrer; one, the pendency of another suit for the same cause of action; the other, certain dealings with the estate by the plaintiff, which the defendant, *Blain*, says were

improper. To take the last ground first; I am not prepared to say that the course taken by the plaintiffs was improper; I incline to think that it was not. As stated by the bill, I should think it probably judicious and calculated to benefit the estate, and that it was taken in good faith; and, moreover, some such course was occasioned, if not rendered necessary, by the misconduct of *Blain* himself; but assuming that it has not been a strictly regular or proper course, it does not disentitle the plaintiffs, or render it less their duty, to bring the defendant to account in this court, if their doing so is necessary for the protection of the estate; and there is certainly sufficient alleged in the way of misconduct on the part of *Blain* to shew that the filing of a bill against him was a proper course by his co-executors.

As to the pendency of another suit, the bill, in its narrative of proceedings, states that a bill was filed in April, 1863, by one of the legatees and devisees, on behalf of all, against the then executors for administration and account; and that after a decree had been pronounced the defendant *Blain*, on condition of the proceedings being stayed, made a certain offer of compromise, the particulars of which are set out, which was accepted by all parties and acted upon; and in pursuance of which *Blain*, with his wife, made a mortgage upon real estate to secure a sum of $4000, moneys of the estate; and he handed over to the plaintiff, *Aikins*, the books and papers of the estate. Judgment.

This bill proceeds to charge *Blain* with having received various moneys of the estate since this compromise, and in contravention of it. *Blain* now objects that that suit is still pending, and that this bill is therefore improper.

The pendency of another suit for the same cause has been, in the cases I have seen, objected by plea. I

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do not say that the objection may not be taken by demurrer, but, if so taken, all those facts which are necessary to be alleged to constitute a good plea must appear upon the bill. Suppose the allegations in the bill were instead made by plea, would it be a good plea? For instance, that the decree—the nature of which is not stated, or even that a decree was made in the strict sense of the term, but merely that a decree was pronounced; but supposing a decree regularly made, drawn up, and entered, it does not appear that it was such a decree as would give to the testator's estate all the relief that may be obtained upon this bill. Nor does it appear by averment or by necessary intendment, that such suit is now pending. In *Foster* v. *Vassall* (*a*) the allegations as to the pendency of the suit were required to be certain and particular, and a general averment of the continued pendency of the suit was held not sufficient. In modern cases this has been held not necessary, but upon a reason that does not apply where the objection is taken by demurrer, viz., that the practice is not to set down the plea for argument, but to take a reference to the Master to inquire whether the suit is for the same cause, and whether it is still pending. Upon the Master's report upon these points —and the Master may always report special circumstances—the court may, I apprehend, deal with the suit as may be just, and only allow the second suit to be affected by the first, where the defendant falls properly within the spirit of the rule, "*nemo debet bis vexari*, &c. A maxim scarcely applicable to the defendant *Blain*, assuming, as I must, upon demurrer, all the allegations of the bill to be true.

Judgment.

Further, it may be, that the bill in the legatees' suit did not embrace the whole subject in question in this suit as completely as the bill in this suit does: in that case, the course of the court would be to retain the

(*a*) 3 Atk. 587.

present suit, making such order as to the costs of the former suit, if any, as would be just to the defendant. The rule is so stated by Lord *Redesdale*, (*a*) for which he cites *Crofts* v. *Wortley*. (*b*)

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Besides, it is by no means clear, that the pendency of a suit by another person in another right, though for the same object, would be a bar. In *Huggins* v. *The York Buildings Company* (*c*) a suit was brought by the administrator of a judgment creditor, and was revived by the executor of the administrator, which was considered to be wrong; and thereupon the same executor took out administration *de bonis non*, and then filed another bill of revivor, and the defendant pleaded the pendency of the former bill of revivor. Lord *Hardwicke* overruled the plea, on the ground that the second bill of revivor, though filed by the same person, was filed in a different right; and Mr. *Daniel*, (*d*) referring to the above case, says, that it seems that a plea of the pendency of another suit for the same cause will not lie in any case, where a decree dismissing the original suit would not be a bar to a new proceeding.

Judgment.

I think neither ground of demurrer is tenable, and that the demurrer must be overruled with costs.

(*a*) p. 248.
(*b*) 1 Ca. in Chy. 241.
(*c*) 2 Atk. 44.
(*d*) Am'n Ed., p. 725.

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FINLAYSON v. MILLS.

Mortgage—Purchase of Equity of redemption by mortgagee—Merger.

Where a mortgagee of lands buys up the equity of redemption, taking a conveyance to himself, his charge will merge or not, according to what may appear to have been the bargain between the parties to the transaction at the time of his obtaining the transfer.

Where a derivative mortgagee took a conveyance from the original mortgagors, and there was no express stipulation as to whether there should be a merger or not; but the conveyance taken from the mortgagors was therein declared to be made in consideration of the settlement of a suit of foreclosure between the parties to the deed, and in satisfaction of the grantee's lien, claim and interest on the property, and subject to the lien and interest of the original mortgagee; and the grantee gave to one of the mortgagors a bond of indemnity against any claim that the original mortgagees might have against him in respect of the original mortgage debt.

Held, that the debt to the grantee (the derivative mortgagee) was at an end, and that the balance due the original mortgagee was the only charge on the property.

Statement.

The bill in this cause was filed by *Hugh Finlayson*, *J. McQuaig*, and *Isaac Buchanan*, against *Samuel Mills*, *J. Buchan*, *William Freeland* and *Alexander Spottiswoode*, setting forth that in June, 1856, *Spottiswoode*, agreed to sell certain lands in the township of Blenheim, to *Currie*, *Buchan*, and *Freeland*, and for £2,500, part of the purchase money, a mortgage was to be given, but which had not, owing to a dispute as to the terms, been executed, although the deed to them had been executed and delivered by *Spottiswoode*, when on the 2nd July, 1857, he assigned all his estate to the plaintiffs, for the benefit of creditors; that *Mills* claimed to be a creditor of *Spottiswoode*, to the amount of £1130, as being a balance due him on the dissolution of a partnership which had at one time existed between him and *Spottiswoode*, and which had been dissolved in August, 1856, and to secure which *Spottiswoode* executed an instrument in May, 1857, creating a mortgage on part of the premises, to secure payment of the sum so due him: that subsequently and in the year 1859, *Mills*, without the con-

sent of *Spottiswoode* or plaintiffs purchased from *Buchan*, *Freeland* and *Currie*, their interest in the property conveyed to them, and agreed to assume their position, as to the contract with *Spottiswoode*, and indemnify them against the unpaid purchase money. The plaintiffs submitted that under the circumstances they, as assignees of *Spottiswoode*, had a first lien on the property for the unpaid purchase money, to the extent of the difference between the £2,500, due by *Buchan*, *Freeland* and *Currie*, in respect of their purchase, and the £1,130 due to *Mills*, and the bill prayed relief accordingly.

The defendant *Mills* answered the bill, setting up that it had been with the consent of the trustees that he had effected the purchase, the intention being that he should hold the land freed of the vendor's lien, in discharge of the sum so due him by *Spottiswoode*, the lands having become so depreciated in value as not to be worth that amount. Statement.

The other material facts, bearing on the point in issue, are clearly stated in the judgment.

The cause came on to be heard upon the pleadings and evidence before his Honor Vice-Chancellor *Spragge*, at the sittings of the court in Hamilton.

Mr. *Strong*, Q.C., and Mr. *C. G. Crickmore*, for plaintiff.

Mr. *Roaf*, Q.C., for *Buchan* and *Freeland*.

Mr. *Proudfoot* and Mr. *D. G. Miller* for *Mills* and *Spottiswoode*.

SPRAGGE, V.C.—The facts, so far as they are material to the case, are shortly these.

The defendant *Spottiswoode*, in June, 1856, conveyed with other lands the north halves of lots 19 and 20, in the 6th concession Blenheim, to *Currie*, *Buchan* and *Freeland*, a portion of the purchase money was paid, and a large sum, a little under or over £2,000, remained unpaid.

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The plaintiffs allege that a mortgage was to have been given to secure this balance, but this is not proved, and no mortgage was given. *Spottiswoode* was a vendor, having a lien for unpaid purchase money.

In Febrnary, 1857, *Currie* assigned to his co-purchasers his interest in the purchased property. In May of the same year, *Spottiswoode*, being indebted to the defendant *Mills*, in the sum of £1,130, assigned to him all his right, title, interest and property, in the north halves of lots 19 and 20, to secure that sum. The sale to *Currie*, *Buchan* and *Freeland*, and the fact of a portion of the purchase money remaining unpaid, are recited in the assignment. In July of the same year, *Spottiswoode* assigned all his real and personal estate to the plaintiffs, for the benefit of his creditors.

Judgment.

The position of the parties, so far, appears to be this. *Spottiswoode* assigns his vendor's lien first to *Mills*, to secure his debt to him for a less amount than the unpaid purchase money, and then assigns generally to the plaintiffs, which carried to the plaintiffs the right to receive the balance of the unpaid purchase money. The next material fact is, that *Mills* purchased from *Buchan* and *Freeland* the land itself, whether the halves of 19 and 20, or the whole of the land sold by *Spottiswoode*, does not seem to me to be material. He had previously commenced a suit in this court against *Buchan* and *Freeland* and *Spottiswoode*, and the plaintiffs in this suit; and that suit was compromised by the conveyance of the land by *Buchan* and *Freeland* to *Mills* —no money passed upon this sale. *Mills*, in his answer, says, that the lands had so fallen in value that they were not worth the amount of his debt against *Spottiswoode:* that *Buchan*, *Freeland* and *Spottiswoode* were all insolvent, and that the plaintiffs, as he is informed by his solicitor, had notice of the proposed compromise, and acquiesced therein. The consideration is not more definitely stated. *Mills* and *Buchan* and *Freeland* differ as to whether *Mills* was to indemnify them against the

claim of the assignees of *Spottiswoode* for the balance of purchase money, beyond the amount due to *Mills* himself; but however that may be, *Mills* became and is the owner of the land upon which the vendor's lien existed; and this bill is filed to enforce that lien. *Mills* claims to be a mortgagee, within the statute 14 and 15 Vic. ch. 45. He claims that he is first mortgagee, and that plaintiffs are assignees of a second mortgagee, or of one who stands in that position, and that his acquiring what, for this purpose, we must call the equity of redemption, does not postpone him.

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I am of opinion that *Mills* does not come within the protection of the statute. To make it apply, there must be two mortgages, each forming a charge upon the same property. If *Spottiswoode* were a mortgagee, there would be two mortgages in one sense, a mortgage to him, and a mortgage by him to *Mills*, but they would not be two mortgages within the act. *Mills* would not be prior mortgagee, but a derivative mortgagee; and there would be only one mortgage, in the sense in which the act treats of mortgages; and an assignment of that one mortgage. All that can be said is, that the assignment gave the assignee a right to receive a portion of the mortgage money, in priority to the right of the mortgagee to receive any portion of it. Whether the provisions of the act might properly have been made to apply to such a case it is not for me to say, but I cannot so read the act as to apply them to it.

Judgment.

But in fact, there is in this case no mortgage at all within the meaning of the act, but an assignment of an equity, and *Mills* was not a mortgagee of freehold or leasehold property within the act. The title in the Consolidated Statutes, "An act respecting mortgages of real estate," and the whole tenor of the act, shew this. I incline to think that the proper conclusion as to the purchase is, that the consideration was the unpaid purchase money, and, if so, the case is clear. The whole was due

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to *Spottiswoode;* he pledged a portion of it to *Mills; Mills* has the land and cannot claim to retain out of the purchase money more than the portion of it due to himself; as to the difference, unless he accounts for it to the vendor, he has both the land, and so much of the purchase money.

Apart from the act, the plaintiffs' case, as against *Mills* is that they, the plaintiffs, have a vendor's lien upon certain real estate of which *Mills* became the owner with notice of the vendor's lien; and whatever may have been the consideration, as between *Mills* and the original purchasers, the plaintiffs cannot be affected thereby unless assenting parties to some arrangement whereby their lien should be extinguished. There is no evidence of this; all that there is in the way of evidence is that one of the plaintiffs, as trustee of *Spottiswoode*, approved of the proposed compromise of the suit, a suit to which he with his co-assignees were parties.

Judgment.

The original purchasers seem to have been made parties in order to a personal remedy against them. That point, whether there is a personal remedy, has not been argued. *Spottiswoode*, I assume, is made a party as being entitled to a resulting trust upon the assignment to the plaintiffs.

Thereupon a decree was drawn up declaring the plaintiffs entitled to be paid the amount which should be found due in respect of the unpaid purchase money coming to *Spottiswoode*, after deducting the £1130 due to *Mills*, and giving them relief consequent thereon.

The defendant *Mills* being dissatisfied therewith, set the cause down for re-hearing before the full court, when the deed of the 1st of March, 1859, was produced for the first time.

Mr. *Strong*, Q.C., for the plaintiffs.

Mr. *Blake*, Q.C., and Mr. *Spencer* for defendant *Mills*.

Mr. *Roaf*, Q.C., for the defendant *Freeland*. [*Buchan* having died since the original hearing.]

Waring v. *Ward*, (*a*) *Hatch* v. *Skelton*, (*b*) *Squire* v. *Ford*, (*c*) *Mayhew*, on Merger, page 119, *Fisher*, on Mortgages, sec. 789, were referred to and commented on by counsel.

VANKOUGHNET, C.—The words in the deed of the first of March, 1859, reciting that the conveyance to *Mills* was in satisfaction of his debt, and the last written words, dispose of the question of intention, even if that were to govern to the full extent contended for by Mr. *Blake*. These words leave no doubt as to the contract of the parties, from which the intention must be gathered.

I agree with my brother *Spragge* in his judgment, that the statute relating to the purchase of equities of redemption does not apply to this case.

SPRAGGE, V.C., remained of the opinion expressed by him on the original hearing.

MOWAT, V.C.—Some question was raised as to whether, according to the bill, the legal estate in the property in question passed to *Currie*, *Buchan*, and *Freeland*. But, however this may be, there is no doubt that these persons from the time of their purchase from *Spottiswoode* until they transferred their interest to *Mills*, were, at all events, equitable owners of the property; that *Spottiswoode* had a lien or charge upon it for the unpaid purchase money; that the effect of his mortgage to *Mills* was to give *Mills* a first charge for his debt, and to make *Spottiswoode's* claim for the balance a second charge; that *Mills*, having thus the first charge, took from *Currie & Co.*, the owners of the estate, in equity if not at law, a release of their equity of redemption; and that, by means either of the mortgage from *Spottiswoode* or of the deed from *Currie & Co.*, *Mills* obtained the legal estate. Judgment.

Prima facie, according to English law, the effect of

(*a*) 7 Ves. 337. (*b*) 20 Beav. 453.
(*c*) 9 Hare 47.

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these dealings of *Mills* undoubtedly was to merge his charge in the estate, and to leave the balance due *Spottiswoode* the only encumbrance on the property, as the decree pronounced it to be. Lord *St. Leonards*, in *Garnett* v. *Armstrong* (*a*) states the English rule thus: "The cases establish that if you with a prior incumbrance, buy the estate which is subject to a subseqnent incumbrance, you let in the second incumbrance to the injury of your first incumbrance; that in fact you lose your incumbrance.

Counsel for *Mills* did not dispute this general rule, but they conteded that the doctrine of merger, as so laid down, depends on intention; that *Mills* had no intention to merge his debt when he agreed for or accepted the release of *Currie & Co.'s* equity; and that, at all events, the Act respecting mortgages, (22 Vic., ch. 87), protects and keeps alive the charge of *Mills*, notwithstanding his purchase.

Judgment.

We were referred to *Mayhew* on Merger, 119 *et seq.*; *Tudor's* Leading Cases, 845 *et seq.*; and *Fisher* on Mortgages, 312 *et seq.*, for the cases which establish that it is the intention of the party taking the equity of redemption that governs; and this certainly is so, where the party becomes owner of the estate by inheritance or devise. In that case it is for such party alone to determine whether he will keep alive the charge, or will allow it to merge; no one can claim a right to interfere with his wish. The question generally arises between his real and personal representatives after his death; for if there is no merger, his personal representatives are entitled to the debt; and if it merges, the heir takes the estate free from the debt. In such a controversy, if it appears that the party expressed an intention as to the merging, or keeping alive, of the charge, effect is given to such intention. If there is no express evidence of intention either way, an intention

(*a*) 2 C. & L. 449.

gathered from his acts will do. In case his intention does not appear, either by express evidence or by his acts, the merger will not take place if there is any other large incumbrance on the property: for, as in that case it may with some probability be assumed to have been for his interest that the charge should remain on foot, as a protection against the other incumbrance, his intention is assumed to have been in accordance with his probable interest. If the other incumbrance is extremely small, as compared with the value of the property, so that he cannot reasonably be supposed to have had any interest in keeping alive his own charge as a protection against it, the intention to keep it alive is not presumed, and the merger takes place. (*a*) So, where there is no evidence of an expressed intention either way, and no other incumbrance on the property, and it is therefore a matter of indifference to the owner whether the charge subsists or not, a merger takes place.

Judgment.

But where the owner of a charge becomes the owner of the estate, not by devise or inheritance, but by bargain and purchase, the case is somewhat different. Here it may not be the wish, or expressed intention, or interest, of such owner alone, that is material; the interest of the debtor, whose estate he has acquired, is material also. But, no doubt, if the contract between them contains an express stipulation, or manifests a clear intention by both parties, that the charge should be kept alive, notwithstanding the purchase, this may be done. Whatever doubt on this point existed formerly, none exists now. (*b*) In *Cooper* v. *Cartwright* (*c*) Sir *W. Page Wood* laid it down as now clear that "in the ordinary case of the sale of a mortgaged estate, if the

(*a*) Richards v. Richards, Johns, 754.

(*b*) Bailey v. Richardson, 9 H. 734; Watts v. Symes, 1 DeG. McN. & G. 240.

(*c*) Johnson, 686.

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mortgagee and the mortgagor concurred in desiring to have the mortgage kept on foot, they would be entitled to have the contract for purchase performed in the way they wished." Accordingly, the learned Vice-Chancellor proceeded to shew that the terms of the contract shewed conclusively that the mortgage in question was to be kept alive, and added: "Therefore the case is precisely the same as if the plaintiff [the vendee] and *Cartwright* [the original mortgagor] had both come to the vendors [*Cartwright's* assignees in bankruptcy] and said that they concurred in desiring that the mortgages should be kept alive. The only possible question that can arise is one of form as to the mode in which the assignees are to be discharged from the mortgage debts."

Judgment.

No doubt, also, as the law now stands, if the contract contains no express stipulation on the subject, the vendee has a right, as against the vendor, while the contract remains *in fieri*, to have it carried out in such a form that a merger may be avoided, provided he takes care that the vendor is effectually discharged from the debt; for, to use again the language of Sir *W. Page Wood* in the case already quoted: "It is a matter of pure indifference to the vendor whether his debt is actually discharged, or whether he is personally discharged from all personal liability with respect to it," and the question is merely one of "convenience to the purchaser, not involving any matter of substance affecting the vendor," who is not permitted "to raise objections to the form of the conveyance."

In the present case, the defendant, *Mills*, does not allege in his answer that there was any contract on this point either way; and the only evidence about it is that of his own attorney, who says no more than that it was no part of the agreement that *Mills* should pay off *Spottiswoode*. But neither was it, so far as we are informed, a part of the agreement that *Mills* should not pay him off; or that *Spottiswoode* should be paid by

Currie & Co.; or that they should obtain a release from *Spottiswoode* or his assignees; or that *Spottiswoode* or his assignees should give such a release. In the absence of any agreement on the subject, the legal implication is that *Mills*, as the purchaser of the equity of redemption, should pay *Spottiswoode's* claim. (*a*) The omission to make any express stipulation may have been from a knowledge of this legal implication, and in reliance on it; or it may have been in ignorance of it, and from want of thought; but as to this there is no evidence, nor do I say that in this case such evidence would be material.

But, though there was no express agreement, can the intention, and therefore an agreement, be made out by implication from the form of the instruments by which the bargain was carried out? There were but two documents: the deed of release from *Currie & Co.* to *Mills*, and a bond of indemnity from *Mills* to *Currie* individually against *Spottiswoode's* claim. *Buchan* and *Freeland* say, that they, too, were to have had a bond of indemnity; but this is denied by *Mills*, and there is no evidence of it. These instruments do not appear to have been hastily prepared or executed. The deed of release alone has been produced. It was drawn by *Mills'* solicitor, and was sent to Mr. *Freeland*, the solicitor for *Buchan* and *Freeland*. Mr. *Freeland* added a description of some other lands, and got the deeds executed by his clients and *Currie*. *Mills'* solicitor received the deed (executed) on the 12th of April, 1859, subject to the costs *Mills* had agreed to pay. It was subsequently accepted by *Mills*, after a conversation with his solicitor about the additional description which Mr. *Freeland* had introduced; and was registered by *Mills* on the 5th of November. This deed is expressed to be made, "in consideration of the settlement of a suit" of foreclosure "between the present parties" to the deed, "and others,

Judgment.

(*a*) Barry v. Harding, 1 J. & La T. 485.

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and in satisfaction of a certain lien or claim of £1130 and interest, which *Mills* had on the property;" and the release is declared to be subject, as to all the lands described in it, to the lien and interest of *Alexander Spottiswoode* therein. In view of all this language, I think that the deed, instead of affording evidence of an intention to maintain the charge, contains the clearest intimation of an intention to destroy it; for what *Mills* has to make out is, in effect, that the release was not to be a satisfaction of the debt, and that *Mills* was to take, not subject to *Spottiswoode's* interest, but free from it.

The parol evidence contains nothing that forbids the conclusion which is to be drawn from the deed. On the contrary, Mr. *Mills'* solicitor expressly states in his evidence, that "it was part of the agreement that *Buchan* and *Freeland* were not afterwards to be liable to *Mills*."

Judgment.

The same witness informs us it was part of the agreement, "that in order to induce *Currie* to join in the conveyance, *Mills* should execute to him a bond to indemnify him against any claim that the assignee of *Spottiswoode* might make against him." It is not alleged that *Buchan* and *Freeland* were to indemnify *Mills* against this liability, and the effect of the bond would therefore be that *Currie* might at any time afterwards compel *Mills* to pay *Spottiswoode* or his assignees, in order to free *Currie* from his liability, *Ranelagh* v. *Hayes*, (*a*) *Lee* v. *Rook*, (*b*) *Pember* v. *Mathers*; (*c*) or *Currie* might, if he chose, pay the whole debt himself, and sue *Mills* for it on his bond of indemnity.

Under all these circumstances, I do not see how it is possible for a court to hold that *Spotttswoode's* debt to *Mills* still subsists, and that the plaintiffs must pay it or lose their own share of the purchase money.

(*a*) 1 Vern. 189. (*b*) Mosely. 318. (*c*) 1 B. C. C. 53.

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The answer says that the property was not worth more than enough to pay the amount due *Mills*: that the plaintiffs consequently did not intend to redeem the property; and that *Buchan* and *Freeland* were insolvent when *Mills* took his release. But no evidence whatever has been given of these statements; and, though it is alleged that *Buchan* and *Freeland* are insolvent, it is not even alleged that *Currie* was insolvent. If the alleged insolvency of the other two had been capable of proof, and had been proved, the fact would obviously be quite immaterial for any purpose in this suit, in the face of the undisputed solvency of *Currie*, their co-debtor to *Spottiswoode*.

Then it is said that Mr. *Buchanan*, one of the plaintiffs, consented to the arrangement between *Mills* and *Currie & Co.* But what if he did? He is not objecting to it now; it is *Mills* that is objecting to it. *Buchanan* and his co-trustees, not only do not object to the arrangement, but they have filed this bill to have it carried out according to its just legal effect. Had it been otherwise, I do not know that the court could attach much importance to the so-called consent. It is stated to have been given in what appears to have been a casual conversation between Mr. *Buchanan* and Mr. *Mills'* solicitor, at an hotel in Toronto, when no one else was present, and no communication on the subject is alleged to have been had with Mr. *Buchanan* before or afterwards, or any communication whatever with Mr. *Buchanan's* co-trustees.

Judgment.

The argument from the Consolidated Statute respecting mortgages (22 Victoria, ch. 87,) remains to be considered. It is urged that this statute entitles *Mills* to insist on his debt notwithstanding his purchase. But I cannot so read the act. I cannot suppose that the act was intended to put it out of the power of parties to give priority to a subsequent incumbrance. The object of the legislature rather was, I apprehend, to prevent a

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merger of the debt by the operation of any technical rule where such a result would contravene the intention of the parties, and not to prevent a merger where a merger is necessary to give effect to the intention of the parties. At the time of the passing of the act, the provisions of which now form this chapter of the Consolidated Statutes, some legislative enactment for this purpose was, no doubt, supposed to be necessary. In *Toulmin* v. *Steere*, (*a*), Sir *William Grant* had cited two cases, which he said were "direct authorities to shew that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor, consequently, a mortgage which he has got in, against subsequent incumbrances of which he had notice." Mr. *Fisher*, in his book on Mortgages, page 445, understands this case as having laid down, "that the purchaser of an equity of redemption *cannot* keep up a charge for his own benefit." So, Mr. *Mayhew*, in his book on Merger, (1861), after stating that "A purchaser of an equity of redemption may now, by paying off the first mortgage out of the purchase money, and shewing an intention to do so, stand in the mortgagee's place against the next incumbrancer," adds: "The case of *Toulmin* v. *Steere* was considered an authority against this position." (*b*) Yet, before the passage of our Act, *Toulmin* v. *Steere* had been almost uniformly recognized as an authority in equity; and in this court two cases had occurred, in the year 1850, which were decided on the doctrine of merger; (*c*) and the court had in both cases found it necessary to give effect to the doctrine, under circumstances of great hardship to the defendants.

Judgment.

The Act in question was passed soon afterwards, (Aug., 1851), and provides, by the 1st section, that a purchase of the equity of redemption may be made by a mortgagee

(*a*) 3 Mer. 210.

(*b*) See Dart on Vendors, to the same effect, p. 590, 3rd ed.

(*c*) Emmans v. Crooks, ante vol. i., p. 159; Meyers v. Harrison, ante vol. i., p. 449.

without merging his debt; and, by the 2nd section, that in such case a subsequent mortgagee cannot foreclose or sell "without redeeming or selling, subject to the rights of the prior mortgagee." Any doubt as to the validity or effect of such a transaction in this country was therefore removed.

The course of judicial decision appears to have done the same thing, or nearly the same thing, in England, since the passing of our statute. It was in December, 1851, that *Watts* v. *Symes* (*a*) was decided. In that case Lord Justice *Knight Bruce*, after quoting Sir *Wm. Grant's* language, in *Toulmin* v. *Steere*, said: "With the greatest deference to the authority of that eminent Judge, I always doubted, and still doubt, whether the cases mentioned by him go that length." The notice that the purchaser had of the incumbrance, to which Sir *Wm. Grant* gave priority, was constructive notice only; and the prior mortgagee joined in the purchase deed and conveyed the legal estate to the use of the purchasers. In *Phillips* v. *Gutteridge*, (*b*) (1859), there were two mortgages for £300 and £400 respectively, on separate leasehold properties. The mortgagor died, charging both parties with an annuity. His executor agreed with *Catherine Phillips* tha he should pay off the two mortgages, and lend the exec s £500 more. She did so, and the mortgagees and executors joined in a new mortgage to her for the £1200. Nothing was done, therefore, on which an argument could be founded for keeping alive the mortgages beyond what appeared in *Toulmin* v. *Steere*; yet it was held, first by V.C. *Stuart*, and afterwards by the Lords Justices, that there was no merger. Lord Justice *Knight Bruce* said: "The conveyance may not have been perfect, but there can be no doubt as to the intention of all parties to preserve

Judgment.

(*a*) 1 DeG. McN. & G. 240. (*b*) 4 DeG. & J. 531.

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The law of the court, both under the statute and independently of the statute, therefore, now is, that a mortgagee may take a release of the equity of redemption without merging his debt; but I think that in this case *Mills* has not done so; that, on the one hand, we have no evidence whatever that he was not content to merge his debt in the estate he was acquiring, and that, on the other hand, we cannot give the natural and fair effect to the express bargain between the parties, or to the intention which it manifests, without holding that the debt of *Mills* is extinguished, and that the plaintiffs' claim is the only charge on the property. (*b*) I think the decree should be affirmed.

Judgment.

Elmsley v. Madden.

Heirship—Admission of—Practice.

Where a bill was filed to obtain the opinion of the court as to the validity of certain bequests in a will, and the heirship of the defendant, who claimed to be heir and next of kin, was not admitted by the defendants who claimed the bequests, a preliminary reference was directed to the Master, to inquire who was heir and next of kin; and further directions and costs were reserved.

This was a suit instituted by the executor of *James Flynn*, against the person claiming to be his sole heiress at law and next of kin, and to which the legatees mentioned in the judgment were made parties.

At the hearing,

Mr. *F. W. Kingstone* appeared for the plaintiffs.

(*a*) *Vide* also Bailey v. Richardson, 9 Hare, 734. (1852.) Cooper v. Cartwright, John, 686.

(*b*) Woodruff v. Mills, 20 U. C. Q. B., 58.

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Elmsley v. Madden.

Mr. *Crombie* for *Ann Jane Madden.*

Mr. *R. Sullivan* for the *Society of St. Vincent de Paul.*

Mr. *Hector*, Q.C., for the *House of Providence.*

Mowat. V.C.—The testator, *James Flynn*, devised all his property, real and personal, to his executors; empowered them to sell his real estate, and give certain legacies, no question as to which seems now to exist. Subject to these legacies and to the payment of his debts, the testator directed his executors to pay to the Society of *St. Vincent de Paul*, of Toronto, £100; to appropriate £15 for masses for the testator's soul; and to pay over the residue of his estate to the *House of Providence*. The validity of these gifts was doubted, and this suit was in consequence brought to obtain the opinion and decision of the court respecting them. Judgment.

The defendants are *Ann Jane Madden* and the representatives, or supposed representatives, of the two Charities. The bill states that the defendant *Madden* claims to be the testator's sole heiress-at-law and next of kin, but does not say that she is so, nor do the other defendants admit that she is. The cause came before me on motion for decree, and the only evidence is the defendants' answers. A reference was asked by the other defendants to inquire whether the defendant, *Madden*, is what she claims to be, or who the testator's heir-at-law or next of kin is. Counsel for the plaintiff consented to such reference being ordered, and no objection was made to it on behalf of the defendant *Madden*.

The bill seems demurrable on the ground of the insufficiency of its allegations as to the heirship; *vide* Lord *Uxbridge* v. *Staveland* (*a*) *Egremont* v. *Cowell*, (*b*)

(*a*) 1 Ves. Sen. 56. (*b*) 5 B. 620.

1865. Elmsley v. Madden. *Plumbe* v. *Plumbe*, (*a*) *White* v. *Smale*, (*b*) *Smith* v. *Kay*, (*c*) but no such objection was taken by the defendants; and I shall direct the inquiry which is asked.

I have given some consideration to the questions which were argued as to the validity of the bequests; but no judgment can be pronounced until it is ascertained that all proper parties are before the court.

Judgment. The enquiry had better also cover the statements of the bill as to the *House of Providence* and the Society of *St. Vincent de Paul.* as the defendant, *Madden* does not admit them by her answer. The general order of the court will be sufficient authority for stating, in addition to these, any facts that may by material. Further directions and costs will be reserved.

GOULD v. BURRITT.

Practice—Master's report—Reference back to Master.

Where both parties had proceeded on the assumption that the evidence before the Master, on taking the accounts under the decree, would be before the court on further directions, and had in consequence allowed mutual claims of interest and commission to be submitted by the Master to the court, without his setting forth sufficient to enable the court to dispose of them; and the report was, besides, so expressed as to render the defendants chargeable with sums for which it did not appear to have been intended to make them liable, the court, on further directions, referred the case back to the Master to review his report.

This was an administration suit, and came on to be heard on further directions, and as to the question of costs, under the circumstances stated in the head-note and judgment.

(*a*) 4 Y. & C. 345. (*b*) 22 B. 75.
(*c*) 7 H. L. 750.

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Gould v. Burritt.

Mr. *J. K. Kerr* for the plaintiff.

Mr. *John Patterson* for the defendants, the executors.

Mr. *Richards*, Q.C., for the defendant *Bacon*.

MOWAT, V.C.—The decree in this cause directed the usual inquiries and accounts in respect of the real and personal estate of the testator, *William Simpson*, and reserved further directions and costs. The Master, to whom the reference was directed, made his report; and the cause came on to be heard before me pursuant to the reservations in the decree.

The defendant *Bacon* claimed his costs of the suit, and the other parties did not dispute his right to them; they may, therefore, be paid; but I have reluctantly come to the conclusion that the proceedings are not in such a state as to enable me to decide the other questions in the cause. Judgment.

The points argued were, as to the right of the plaintiffs to interest against the defendants, the executors; and as to the rate of interest which should be allowed; and as to the right of the defendants to commission; and at what rate. These questions were incidental to the accounts which the Master took, and might, under the General Orders of the court, have been decided by him; and I find it impossible for the court now to dispose of them satisfactorily upon the facts which the Master has set forth in his report. Indeed, counsel on both sides assumed this to be so. Mr. *Kerr*, for the plaintiffs, asked a reference as to the rate of interest which the estate had been paying to creditors, as being (he argued) some guide in regard to the rate which the executors should pay to the estate; and the learned counsel for both parties, in their arguments on every point, referred to the evidence, accounts, and exhibits, in the

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Master's office. Both parties have evidently been proceeding, throughout, on the assumption that the report was to be read by the court in the light of the evidence, papers and books which the Master had before him; and that the Master's findings might be both explained and supplemented by a reference to these, for all the purposes with which the court has to deal on further directions. Yet the settled practice is clearly against such a course; and it would be extremely inconvenient, and add greatly to the expense of suits, if the practice were not so.

This misapprehension of the practice under which the parties appear to have proceeded, has led to other inaccuracies. Thus, both parties have been assuming that, in respect to the personal estate, the executors were only chargeable with their actual receipts; yet, by the form of the report, they would be held chargeable with all the outstanding debts. The Master does not distinguish, either, the receipts of the one executor from those of the other executor, but appears to charge both executors jointly with the whole; and I doubt, from the course of the argument and the papers I have seen, whether this also is not against both the understanding of the parties and the Master's intention.

Judgment.

Under these very peculiar circumstances, the only order which it seems possible for me to make is to refer the whole report back to the Master, to be reviewed. The parties would do well to consider whether it may not need amendment in some particulars to which I have not adverted; and I hope that it will not be thought necessary, in the new report, to repeat the detailed inventory of furniture and chattels contained in schedule C., and that it may be found practicable to shorten the report in other respects.

I think I ought not to give to either party the costs of the present abortive hearing. The order may be for

payment of the defendant, *Bacon's*, costs of the suit by the executors, out of the money in their hands, but without prejudice to the question of who should ultimately bear them. The Master will be directed to review his report, and further directions and costs, with the exceptions I have mentioned, will be reserved as by the original decree.

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SHUTTLEWORTH v. ROBERTS.

Practice—Disclaimer—Costs.

A creditor filed a bill to set aside a deed as fraudulent against creditors, and the grantee by his answer disclaimed and alleged that the deed was executed without his knowledge or consent, and that when he became aware of it, he had repudiated it.

Held, that the grantee, having been properly made a defendant, was not entitled to his costs.

The facts appear sufficiently in the head note and judgment. At the hearing

Mr. *Burns* for defendant *Lally*, submitted, that having disclaimed in the suit, and having always repudiated all interest in the property under the deed made to him, and which had been so made without his privity or assent, he was clearly entitled to his costs— citing, amongst other cases, *Bellamy* v. *Brickenden*. (*a*)

Argument.

Mr. *Moss*, for the plaintiff, contended that this afforded no ground for giving *Lally* his costs. His duty was to have reconveyed the property. His not having done so, clearly disentitled him to costs, if it did not render him liable to pay them. *Furber* v. *Furber*, (*b*) is a clear authority for this position.

MOWAT, V.C.—This is a suit by the plaintiff, as

(*a*) 4 K. & J. 672.

(*b*) 30 Beav. 523.

1865. Shuttleworth v. Roberts.

execution creditor of the defendant *Roberts*, to set aside a conveyance made by *Roberts* in favor of the defendant *Lally*, as being a fraud on creditors. *Lally*, by his answer, disclaimed all estate and interest under the deed, and stated that the deed was executed without his knowledge or consent; and that when he knew of its execution he entirely disapproved of it, and repudiated it, and had always done so; and he prayed to be dismissed with costs.

The question is, whether *Lally*, though properly made a defendant, is entitled to his costs.

Judgment.

The latest case cited on the point was *Furber* v. *Furber*, which was decided in 1862. That was the case of a will, and the disclaiming devisee declared that he had never accepted the benefit of the devise, and had always disclaimed it. I cannot distinguish such a case from the present. If a devisee, who had always disclaimed, would not be entitled to his costs, I think it impossible to hold that a grantee, who had always repudiated, is in any better situation. The case of *Furber* v. *Furber* is certainly in direct conflict with *Bellamy* v. *Brickenden*, which was decided in 1858, and was not referred to in *Furber* v. *Furber*. But after looking into all the cases that were cited, I see no sufficient reason for not following the latest of them.

Lally, therefore, having been properly made a defendant, the decree will not give him costs.

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Fixtures—Injunction—Execution Creditor.

A creditor having execution against lands cannot claim fixtures which do not belong to his debtor.

Where the owner of land sells the timber upon it, after a writ against his lands is placed in the sheriff's hands, and the purchaser cuts down and removes the timber before an injunction is obtained, he is accountable to the execution creditor for the timber so cut and removed.

The facts of the case, and the points relied on by counsel are fully stated in the judgment.

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

Mr. *Barrett* for the defendants, *Dale* and *Fitzgerald*.

Mowat, V.C.—The plaintiff, on the 28th July, 1863, placed a writ of *fieri facias* against the lands of *Wilbur Sage* in the hands of the sheriff of the county of Oxford. *Wilbur Sage* was at this time owner of a lot of land in Oxford, subject to a mortgage in favor of his father, *Sylvester Sage*. There was on this lot some valuable pine timber; and a steam saw mill had also been erected upon it, and was in operation. The bill alleges that while this writ was in the sheriff's hands, *Wilbur Sage* pretended to sell to the defendants *Dale* and *Fitzgerald* the pine timber, and the machinery of the mill, including the engine; that *Dale* and *Fitzgerald* had removed the engine and machinery from the mill, and were cutting down and removing the pine timber; that the land, without the machinery and timber, is not worth more than the mortgage debt due *Sylvester*, and that *Wilbur* has no other property. The prayer of the bill is that the engine and machinery may be restored to the mill, and not again be interfered with; that any further cutting or removing of the timber may be restrained by injunction, and that an account may be taken of the timber which *Dale* and *Fitzgerald* have already removed. Judgment.

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On the 21st of September, 1863, an injunction was granted on notice, restraining the defendants from cutting down any more timber, and from removing any they had cut after the 28th of July, 1863. On the 8th of October the cause was set down to be heard *pro confesso*, the defendants not having answered. On the 3rd of November a decree was made in accordance with the prayer of the bill, and on the 14th of December the Master, who was attended by both parties, made his report, finding, amongst other things, that the value of the timber cut and removed from off the land by the defendants, *Dale* and *Fitzgerald*, was £33 15s. The defendants afterwards applied for leave to answer on the 3rd of March, 1864, and the motion not being opposed, leave was granted on terms mutually arranged between the parties.

Judgment.

The defendants, *Dale* and *Fitzgerald*, by their answer, say that on the 8th of August, 1863, they purchased from *Wilbur* the land in question, including the pine timber, and the machinery in the mill, except the engine; that the engine belonged to *Sylvester Sage*; and that they purchased it from him on the same day they purchased the other property from *Wilbur*; that they had paid for the engine by taking up the note *Sylvester* had given for it; and that when they bought they had no notice of the plaintiff's writ; and they claim to be innocent purchasers for value, of both land and engine, without notice. They do not dispute, however, that the plaintiff is entitled to an injunction against their cutting any more timber; nor do they dispute that the plaintiff is entitled to sell *Wilbur's* interest in the land, notwithstanding their alleged purchase of it; but they claim the engine, which they say in their answer was not a fixture, and they insist that they were not accountable for the timber they removed before the injunction was granted, or that if accountable, they are entitled to pay the amount to *Sylvester*.

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Evidence on both sides has been gone into, partly before the late Vice-Chancellor, and partly before a commissioner. It appears from this evidence that, though *Wilbur* executed a deed to convey his whole interest to defendants, there was a private understanding that the timber only, and not the land, was sold to them, and that, subject to this, defendants *Dale* and *Fitzgerald*, were to hold the land for *Wilbur*.

The injunction will be continued so far as relates to the timber; and I think the defendants have failed to make out that they are not accountable for what they cut and removed after the 28th July, 1863. It was eleven days after the plaintiff's writ was in the sheriff's hands that *Wilbur* professed to dispose of the land or the timber, and the defendants, *Dale* and *Fitzgerald* do not pretend that they have paid the purchase money.

Judgment

Mr. *Roaf* contended that the plaintiff, as an execution creditor, is in the position of a mortgagee, and that the debtor *Wilbur* is in the position of a mortgagor; and the learned counsel referred to the rule that a mortgagor is not accountable to the mortgagee for rents received by the mortgagor while in possession of the property. But though a mortgagee cannot recover from the mortgagor rents received by him, he is entitled to any arrears, even of rent, which may not have been actually paid over to the mortgagor by tenants, whether the tenancy commenced before or after the giving of the mortgage. *Pope* v. *Biggs*. (*a*) So also a mortgagee has been held entitled to recover against a mortgagor's assignees the value of fixtures removed by them from the mortgaged property. *Hitchman* v *Walton*. (*b*) If a mortgagee can thus recover for past rents, why can he not recover for timber removed? If he can recover the value of fixtures, why not also of timber?

The learned counsel referred generally to the law

(*a*) 9 B. & C. 245. (*b*) 4 M. & W. 409.

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affecting mortgagors and mortgagees in the case of mines, as being in his favour upon this point, but I have found no decision which supports his argument. On the contrary, it has been expressly held that a mortgagee of a co-tenant, in such a case, is entitled to an account against the mortgagor and co-tenants of what is due to the mortgagor in respect of the past transactions of a mining company, and that the mortgagee's right is not confined to the workings of the mine subsequent to his claiming possession. *Bently* v. *Bates*. (*a*) It has, I believe, for many years been the practice of this court to restrain mortgagors, when the security is scanty, from removing timber already cut, as well as from cutting more; and the late learned Vice-Chancellor was evidently of opinion that these defendants were accountable for what they had removed, for his decree was to that effect. This view is also in accordance with the express decisions of the courts in the neighbouring States as to the rights of mortgagees in regard to timber. See *Hilliard* on Mortgages. (*b*) It would certainly be most unjust and unreasonable that a mortgagor should be at liberty, however scanty the security, to give any body the right of cutting and removing the timber, and thus destroying the estate, without there being any remedy in respect of what might be removed secretly, or before an injunction against the mortgagor could be obtained.

Judgment.

The defendants claim by their answer that if accountable they are entitled to pay the value to *Sylvester*. *Sylvester* is no party to the suit, nor was any objection for want of parties taken, either by answer, or at the hearing before me. But since the defendants set up *Sylvester's* prior claim, I do not think I can order the money to be paid to the plaintiff, without notice to *Sylvester*, his mortgage being prior to the plaintiff's execution. The money must, therefore, be paid into court by the defendants, to abide the further order of

(*a*) 4 Y. & C. Ex. 181. (*b*) Volume I., page 156, *et seq*.

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the court. The former decree, by a clerical error, directed the Master to find the value of the timber which had been cut *or* removed, but the finding of the Master was as to what had been cut *and* removed. I presume, therefore, that no purpose would be secured by another reference. If ordered, I think that under all circumstances it must be at the defendant's costs.

Then, as to the engine: was it the defendant *Wibur's*, or his father *Sylvester's*? *Wilbur* worked the mill in partnership with one *Pingstone*, and *Pingstone* and *Sylvester* both swear positively that the engine was *Sylvester's*. It is quite certain that *Wilbur* did not pay for it. It was bought from one *Carr*, and *Sylvester* gave *Carr* his own note for the price; *Wilbur* being no party to the note. *Carr* did not look to *Wilbur* for payment in any way. The note was afterwards taken up by the defendants *Dale* and *Fitzgerald*, this being the condition of their purchase of the engine from *Sylvester*. The plaintiff says that *Sylvester* had made a gift of the engine to his son, but the only evidence he has given of this is in statements made by *Sylvester* in two conversations, one which he had with the sheriff before the sale to *Dale* and *Fitzgerald*, and the other which he had with the plaintiff's solicitor after this suit was instituted. I see no ground on which the latter conversation, whatever it amounts to, can be evidence against the defendants. In the former conversation *Sylvester* said he had advanced means to his son to build the mill and purchase the engine: and again, that he had purchased the engine for his son. Now, as to one of these statements, we know it was not true that had he advanced money to purchase the engine, for the engine had not yet been paid for by any body; and as to the other statement of his having bought the engine for his son, it is not much to the purpose, for it is not denied that it was for the son's use, or rather, perhaps, for the use of the son and his partner, that the engine was procured; but the question is, whether the

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engine being so procured, *Sylvester* gave it to his son, as the plaintiff contends, or lent it to him, as the defendants contend. It is not disputed that the partners had at the same time the use of a large boiler belonging to one *Eastwood*, on precisely the same terms as the defendants say the partners had the engine upon; and I think it impossible, under all the circumstances, to hold that the express evidence of *Pingstone* and *Sylvester Sage* is outweighed, in regard to the engine, by anything *Sylvester* appears to have said in his conversation with the sheriff, or by any other circumstance on which the plaintiff relies. I think, therefore, in reference to this part of the case, that the engine must be taken to have belonged to *Sylvester*, and not to *Wilbur*, when sold to *Dale* and *Fitzgerald*.

Judgment.

Mr. *Barrett*, for the plaintiff, contended that the engine was a fixture at the time the plaintiff's writ was delivered to the sheriff, and that being a fixture, *Weeks* v. *McDonald* (*a*) is an authority that the plaintiff, as execution creditor, can claim it, whether it belonged to the execution debtor or not. But *Weeks* v. *McDonald* was the case of a purchaser for value, and not of an execution creditor, and the statute which renders mortgaged lands saleable under execution, (*b*) expressly declares that what the sheriff may seize and sell is "the legal and equitable interest of the mortgagor," and that what a purchaser takes under the sale is "the same rights as such mortgagor would have had if such sale had not taken place." I think, therefore, that *Weeks* v. *McDonald* does not apply to such a case, and that the plaintiff's lien did not extend to the engine.

As to the costs, I think the plaintiff should have the costs of the suit, except of taking the evidence which relates to the engine, and of these excepted costs I leave each party to bear his own.

(*a*) Ante vol. viii. p. 297. (*b*) 22 Vic. ch. 22, secs. 257 and 258.

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FISKEN v. WRIDE.

Specific Performance—Dilapidations.

A vendor who contracts for the sale of property of which he has not taken possession, is accountable to the purchaser for dilapidations by the parties in possession, before the vendor takes the possession from them.

A vendor in possession is, generally speaking, responsible for dilapidations that take place, before he shews a good title, where the dilapidations are such as a prudent owner or his tenants might have prevented.

Where buildings are torn down after a contract for sale and before the purchaser takes or was bound to take possession, the vendor is *prima facie* accountable for the loss.

This was a suit for specific performance; the facts of which sufficiently appear in the report of the case, on the hearing *ante* Vol. VII., page 598; and this was a petition presented in the cause, by the defendant, praying for compensation in consequence of dilapidations to the property in question, under the circumstances stated in the judgment. Statement.

Mr. *Hodgins*, in support of the petition.

Mr. *Blain*, contra.

MOWAT, V.C.—This suit was brought for the specific performance of a contract. The property to which it relates lies in the county of Essex, and consists, according to the bill, of 475 acres of land. At the time of the contract there were on the property, (besides mills, and perhaps some small buildings, not now in question), a wharf and dock, valued at $2,600, or upwards; and a large storehouse, two cottages, a barn, a cooper's shop, a carpenter's shop, and an ashery, valued together at $1,800. The property had belonged to one *Thomas Salmoni*, who mortgaged it to the *Trust and Loan Company*, and default being made in paying the mortgage money, the Company, in pursuance of a

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power of sale, sold the property to *John Fisken*, and took from him a mortgage on account of his purchase money.

Afterwards, and on the 22nd of July, 1857, *Fisken* entered into a contract for the sale of the property for £3,500 to the defendant *William Wride*, then and still a resident of Scarborough. An investigation of the title was entered upon by *Wride's* solicitor, but before the title was accepted, or the investigation completed, *Fisken* commenced the present suit. The bill was filed on the 5th May, 1858, but not served (as was stated at the bar), until the 15th of October. On the 18th November the defendant's answer was filed. On the 21st April following (1859) the cause was heard: and on the 23rd September a decree was pronounced referring it to the Master to inquire if a good title could be made; and if so, when it was first shown; and whether *Fisken* could procure the concurrence of the Trust and Loan Company in the sale. On the 20th February 1861, the Master reported that a good title could be made; that it was first shewn on the 31st May, 1860; and that *Fisken* could procure the Company's concurrence in the sale. On the 23rd April, 1861, the cause was heard on further directions, when it was decreed that the defendant should pay into court so much of his purchase money as was past due, and should execute a mortgage for the balance; and it was referred to the Master to ascertain the sums and settle the conveyances. On the 9th October, in the same year, the Master reported that the arrears of purchase money and interest were $2537 16s. 6d., and that the sum not yet due was £1750. On the 9th of December, the defendant was ordered to pay into court the former sum, and to execute a mortgage for the latter.

Judgment.

When the suit was commenced, *Fisken* had not obtained possession of the property from *Salmoni;* but three months afterwards, namely, on the 3rd of August,

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1858, he got possession, through the sheriff, of all except the wharf, and a village plot (which seems to have included an orchard.) A fortnight afterwards, namely, on the 17th of August, he, through his agent, rented to one *Ferres* so much of the premises as he had thus obtained possession of. In the following October and November most of the buildings on the property, with the exception of the mill, were carried off from the premises and destroyed, by persons to whom it is said in some of the affidavits that *Thomas Salmoni's* son had sold them, *Thomas Salmoni* being dead. A year afterwards, namely, towards the end of 1859 and in the early part of 1860, the planks and beams of the wharf were in like manner carried off, leaving nothing of the wharf but the piles on which it had been built. Large quantities of timber and cordwood are also stated to have been cut on the property, and carried away, since the date of the contract.

In April, 1862, the defendant filed his petition under the General Orders of this Court, stating these facts, alleging they had only come to his knowledge in January, (1862,) and praying that he might be allowed a compensation for the deteriorations, or that the contract might be rescinded. On the 15th May, his Lordship the Chancellor made an order referring it to the Master to inquire what damages had, through *Fisken's* neglect or default, been done to the premises since the Master's last report, and what compensation, if any, should be allowed to *Wride* in respect thereof.

Judgment.

Meanwhile *Fisken* was proceeding to enforce his rights under the decree and subsequent orders, and arrested *Wride*. On the 23rd May, (1862,) a few days after judgment had been pronounced by the Chancellor on the petition, an order was made that the defendant should be discharged from custody on executing the mortgage under the contract, and depositing it with the Master, to be held subject to the order of the court.

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The order on the petition was not drawn up for a long time afterwards, in consequence, it was said at the bar but not admitted, of negotiations for a settlement. After the order was drawn up, the defendant *Wride* set down his petition for rehearing before the full court; and on the 8th December last, (1864,) the court, on such re-hearing, gave liberty to both parties to file further affidavits shewing who was in possession of the property during the time of the alleged damage and dilapidations; by whom they were committed; and when first *Wride* had notice of them. Both parties have filed affidavits under the liberty granted by this order; and the facts of the case, as I have stated them, appear partly from these affidavits and partly from those filed previously. Neither party has cross-examined any of the deponents; and neither now asks for any further opportunity of doing so, or of giving further evidence, *viva voce* or otherwise. I assume, therefore, that no further light can be thrown on the points mentioned in the order.

Judgment.

In disposing of the case there are two principal points to be considered—First: Who, under the circumstances, is responsible for the deteriorations which have taken place? and, Secondly: Was the purchaser's petition in time?

The general principles applicable to the first point are well settled.

A purchaser must bear all damages which property sustains after the date of the contract, from causes which are necessarily beyond the control of either party; such deteriorations, for example, as arise from a flood, an earthquake, an accident by fire, and the like. But until the seller places the purchaser in a position in which the latter can prudently take possession, the seller must at his own risk take care of the estate; must see that tenants are not suffered to run in arrear, *Acland* v.

Gaisford, (*a*) *Wilson* v. *Clapham*; (*b*) that houses are kept in necessary repair, *Carrodus* v. *Sharp*; (*c*) that the land is cultivated in a husbandlike and proper manner, *Foster* v. *Deacon*; (*d*) and that the property is protected from injury as far as the watchful care of a prudent owner could protect it, *Ferguson* v. *Tadman*, (*e*) *Binks* v. Lord *Rokeby*. (*f*) And in reference to these obligations, the vendor is responsible to the purchaser for the acts and defaults of his tenants and agents in the management and care of the property, as well as for his own individual acts and defaults, *Foster* v. *Deacon*, *Magennis* v. *Fallon*, (*g*). Before the vendor shews a good title he can only get rid, to any extent, of the obligations I have mentioned, by the refusal of the purchaser to concur with him in some fair arrangement for the interim management of the property, *Harford* v. *Purrier*. (*h*)

Judgment.

In the present case, *Fisken*, the vendor, took upon himself to leave the former owner in possession of the whole of the property for more than a year after the contract to sell to *Wride*, and to leave him in possession of an important part of the property, (including the wharf, an orchard, and some village lots,) for more than a year longer, and in fact until the planks and beams of the wharf were removed and the wharf destroyed. Immediately on taking possession of the other portions of the property, *Fisken* appears to have leased them to a tenant for three years; and when this lease expired, he by his agent rented them for two years more to other tenants, who seem to be still in possession. We are not told whether these leases were verbal or written; but *Fisken* states, in his affidavit, that he did not permit any tenant to enter without the tenant's agreeing to give up possession

(*a*) 2 Madd. 28.
(*b*) 1 J. & W. 36.
(*c*) 20 Beav. 56.
(*d*) 3 Madd. 394.
(*e*) 1 Sim. 530.
(*f*) 2 Sw. 222.
(*g*) Moll. 561.
(*h*) 1 Madd. 532, *Sugden* V. & P. 644, 14th ed.

1865. Fisken v. Wride. whenever *Wride* should demand it. In all these dealings, in regard to the possession of the property, it is not alleged than *Fisken* had, or applied for, the concurrence of *Wride*, or even that he gave *Wride* notice of them.

A purchaser is not, generally speaking, under any obligation to take possession until a good title is shewn, for until then he cannot take possession with prudence. *Minchin* v. *Nance*. (*a*) The Master here reported that a good title was first shown on the 31st May, 1860, and it was before this date that all the dilapidations complained of took place. No evidence that was referred to in the argument would, I think, justify me in holding that *Wride* might prudently have taken possession at any date antecedent to the occurrence of these dilapidations; and I am therefore of opinion that the responsibility of guarding against them must be taken to have rested on the vendor. It was suggested, indeed, by Mr. *Blain* that Judgment. the locality where the property lies was in such a lawless condition, at the period referred to, that it was impossible for any prudence to prevent the destruction of the wharf and buildings. On the other hand, *Wride*, in one of his affidavits, ascribes to *Fisken's* tenants all the destruction of which the *Salmoni* family, whom *Fisken* left in possession, were not guilty. Neither statement has been proved; but I think, the dilapidations being established, the onus of shewing by evidence that he ought not, under the circumstances, to be charged with them, was clearly on the vendor, who, by his tenant, was in possession at the time, and not on the purchaser, who resided, and still resides, hundreds of miles away.

But is *Wride* in time with his petition for relief?

In dealing with a question of this kind the court has considerable discretion. It is not necessary to refer to the authorities which illustrate this; for if *Wride* had,

(*a*) 4 Beav. 332.

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as he says, no notice of the deteriorations until January, 1862, his petition was certainly in time. It was not contended that *Wride's* denial of earlier notice was not sufficiently broad or distinct for his defence ; and the only evidence which *Fisken* has given of notice before January, 1862, is by the witness *Gordon*, who refers to a conversation with *Wride* in September, 1858 ; and *Fisken*, in one of his affidavits corroborates the date ; but all the witnesses (with perhaps one exception), concur in declaring that the buildings to which the petition refers were not removed until October or November, 1858 ; and that the materials of the wharf were not interfered with for more than a year longer.

Wride himself, indeed, insists that the conversation with *Gordon* took place in September, 1859, which would be after the removal of the buildings, though before the destruction of the wharf. He declares *Gordon* at the same time assured him that scarcely anything had been touched ; that the damage was quite trifling : that, in fact, no damage of any amount had been committed. *Gordon*, in reply, does not deny that he made these representations ; and they certainly confirm his testimony, and *Fisken's*, as to the date of the conversation : for in September, 1858, it was quite true that no damage, or but trifling damage, had been done ; and in September, 1859, such statements would have been quite false. I may add that to exclude the purchaser's claim (not on its merits but) on the ground that the claim was brought forward too late, clear evidence ought, I think, to be given of the notice or other facts on the strength of which the exclusion is insisted upon.

Judgment.

The learned counsel for the plaintiff contended that the contract is not now *in fieri* ; that it has been carried into effect by the execution of the deed and mortgage ; and that any claim to relief has thereby been lost. This objection has in effect been disposed

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of by the order of the court on the re-hearing; for the evidence which the court thereby authorized the parties to give was wholly immaterial, if the objection now referred to is good. The learned counsel cited no case to show that performance of a decree or an order before a re-hearing or an appeal has been held to stand in the way of relief. Besides, by the Order of the 23rd May, 1862, the mortgage was directed to be deposited with the Master to abide the further order of court. It has, indeed, somhow passed since from the possession of the court to that of the vendor, but by what means counsel were unable to inform me.

As to the nature of the relief to which the purchaser is entitled, Mr. *Hodgins* argued, that such relief should be a rescission of the contract, and he referred to *McGennis* v. *Fallon*, (*a*) as shewing this. The destruction there, however, was of ornamental timber which no expenditure of money can restore, and the decision was distinctly put upon that ground. Here the deteriorations do not appear to be of that character. A new wharf may be built; new houses may be erected; the loss to the purchaser from the delay which the construction of them may occasion can be estimated; and there is no evidence or allegation that the timber and cordwood cut and removed had any particular value which a compensation in money would not adequately re-pay. The lateness of the period at which the subject of these deteriorations is brought to the notice of the court supplies an additional reason for not disturbing what has taken place in the suit, to a greater extent than justice to *Wride* seems absolutely to require.

Judgment.

On the whole, I think that there should be a reference to the Master, to inquire what deteriorations have taken place since the date of the contract, and what allowance ought to be made to *Wride* in respect of them.

(*a*) 2 Moll. 561.

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As the necessity for the petition and inquiry has arisen from the neglect by the vendor and his tenant of what I think were the obligations the law imposed upon him, the vendor, in regard to the property, I think *Wride* should have his costs of the petition, and of the proceedings upon it, including the reference I have mentioned, but, of course, not including the costs of the re-hearing before the full court. The amount which the Master may find allowable for compensation, and the amount he may tax for costs are to be set off against the purchase money. An account may also be taken, at *Wride's* cost, of any rents which have been received by *Fisken*, or those he now represents, since the date (whatever it is) up to which he has already accounted for the rents before the Master; and the amount, less the costs of ascertaining it, is to be allowed to *Wride*. The balance, which, after making these allowances, is found to be due by him, of the amount he was ordered to pay into court, he should pay in a month after being served with the Master's report. Further proceedings under the order of the 9th of December, 1861, are stayed.

Judgment.

In Re Brazill Barry v. Brazill.

Administration—Maintenance of Infants—Improvements of the real estate by the administrator when allowed.

The widow of an intestate, having obtained letters of administration, received and got in his personal estate, went into occupation of the real estate, received the rents and profits thereof, and spent a considerable sum in improving it. She also maintained the infant heirs of the intestate, to whom no guardian had been appointed.

Held, that the personal estate, and the proceeds or profits of the real estate come to her hands must first be applied towards payment of debts, then to reinburse her for sums spent in the infants' maintenance. No allowance was made to the administratrix for her improvements to the realty, but she was not to be charged with any increase in rental caused by such improvements.

The bill in this cause was filed, "In the matter of the estate of *Patrick Brazill*, late of the township of

1865. Brazill v. Brazill. Tecumseth, in the county of Simcoe, yeoman, deceased," by *Mary Barry*, by *James W. Barry*, her next friend, plaintiff, and *Eleanor Brazill* and *Katherine Brazill*, *Joseph Ambrose Brazill*, *Elizabeth Theresa Brazill* and *Patrick F. Brazill*, infant children of the said late *Patrick Brazill*, and *Thomas Barry*, husband of the plaintiff.

The bill alleged that the said *Patrick Brazill* departed this life, intestate, in the month of November, 1858, leaving him surviving the plaintiff, his widow, *Mary Ann McLaughlin*, and the defendants, other that *Thomas Barry*, who is the plaintiff's present husband.

Statement. Letters of administration of the estate of the intestate were granted to the plaintiff, on the 10th of February 1859. No guardian had been appointed for any of the infant defendants, but they had resided with and been clothed and maintained by the plaintiff.

The plaintiff on the 14th of March, 1852, purchased and received a conveyance from the said *Mary Ann McLaughlin* of her share and interest in the said estate, real and personal. The plaintiff claimed an allowance for the maintenance of the intestate's infant children, and for improvements and repairs done by her to his real estate, of which she admitted having been in the occupation, as fully set forth in the judgment.

The prayer of the bill was for administration of the estate, and distribution of the proceeds thereof, and for an allowance in respect of the maintenance of the intestate's children, and of the improvements made on the real estate.

The answer of *Eleanor Brazill*, admitted the matters alleged in the bill, and submitted to a decree. An answer was filed for the infants in the common form.

Mr. *E. Crombie* for the plaintiff.

Mr. *Kingstone*, for the infants.

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SPRAGGE, V.C.—The plaintiff was the widow of *Patrick Brazill*, and is administratrix of his estate: the defendants, with the exception of the present husband of the plaintiff, are children of *Patrick Brazill* and the plaintiff: the first named *Eleanor* has come of age, the other four are infants. The bill sets out several parcels of land, of which it states that the intestate died seised. It also states that at the time of his death he was possessed of personal property, consisting of mortgages, notes, goods, and chattels, of the value of $2000 or thereabouts. It states his indebtedness at the sum of $2400 or thereabouts, and that the plaintiff has discharged the same; leaving the plaintiff in advance to the estate, so far, in the sum of $400. As to the real estate, the bill says that the plaintiff occupied a portion of it for a short time; and that the residue has been let, at a yearly rental of from $300 to $450 per annum. The intestate is stated to have died on the 24th of November, 1858: a daughter was married before the death of the intestate, and the plaintiff has acquired her share of the real estate for $2183, which the bill states has been paid. It states that the plaintiff has made large and valuable improvements upon the real estate, (not stating their nature or upon what part of the real estate made,) whereby the value has been increased by the sum of $2860. It states the whole value of the real estate at $14,000. The bill further states that *Eleanor Brazill* and the infants have resided with the plaintiff since the death of the intestate; and still continue to reside with her; and that their shares of the rents are inadequate for the support, maintenance and education of the infants. No guardian has been appointed.

Judgment.

The bill prays for an administration of the estate; that an allowance may be made to the plaintiff for the past maintenance and education of the defendants, and

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for the future maintenance and education of the infants; also an allowance in respect of the increased value of the land by reason of the improvements; and an allowance also in lieu of the plaintiff's dower; and that the real estate may be sold and the proceeds distributed.

The only point debated at the hearing was the plaintiff's claim to be allowed for improvements. For the claim *Bevis* v. *Boulton*, (*a*) in this court was cited; but that case, and the cases upon the authority of which it was decided, were cases in which the question was, upon what terms the court would deprive parties defendants of the land upon which they had made improvements, in favor of an equity established by the plaintiff, and are not authorities for a direct claim for improvements, in the shape in which it is made by the bill. As to the claim for maintenance, the inquiry asked has not been objected to. In one view it would be proper, because the plaintiff is accountable for rents and profits received, and for their application: but if the fact of the children having resided with the plaintiff were established; and the rents and profits have not exceeded the amount, even the largest amount, mentioned in the bill, I should be satisfied, without putting the estate to the expense of an inquiry. In the first place, those rents and profits would be properly applicable to reimburse the plaintiff her alleged advances in the payment of debts beyond personal estate received, and then in the support of the heirs of the intestate.

Judgment.

But I cannot fail to see that the real object of this bill is not so much, if at all, the administration of the intestate's estate, as to procure allowances to be made for improvements and maintenance, and to sell the estate in order to realize such allowances. Apart from the claims for improvements and maintenance, there

(*a*) Ante vol. vii., p. 39.

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would be no occasion for the suit at all: the personal estate realized, and the debts paid, balance themselves, according to the plaintiff's own shewing, within about $400: and rents received amount to that sum, some five or six times told. And the plaintiff would scarcely have ventured in the face of *White* v. *Cummins* (*a*) to have instituted this suit, which would almost certainly have been at her own expense, if it were not intended to be the vehicle for claims for maintenance and improvements.

It is not put in the bill that the plaintiff is entitled as one of several tenants in common, to a partition, or sale of the real estate; but, the bill seeks to fasten a charge upon the real estate in respect of the plaintiff's claim, and to have the land sold to satisfy that charge.

This bill is not for the benefit of the infants; but if in fact the infants would be benefitted by providing for them an increased maintenance out of the corpus of the real estate, a petition for that purpose may properly be presented, and a guardian be appointed to take care of their interests. It does not seem to me that this can properly be done in this suit, which is for the benefit of the plaintiff, and is hostile to the infants, and is quite beside that, which is the legitimate purpose of a suit for the administration of an estate.

Judgment.

If the plaintiff is advised to proceed with this suit, she may take an inquiry as to past maintenance, but it will (as I view the case at present) be only useful as discharging the plaintiff in respect of rents and profits received. I disallow the claim for improvements. But in so far as the rents may have been increased, if they have been increased, by these improvements, the plaintiff should not be charged with the increased rental. If the cause is proceeded with, further directions and costs will be reserved.

(*a*) Ante vol. iii., p. 602.

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MacDonald v. Putman.

Solicitor and client—Privileged communications.

A defendant, one of the members of the firm of *C.* and *C.*, when proving a claim in the Master's office, was called on to produce "all the letters to or from Mr. *L.*, (his solicitor,) in reference to the questions involved in the proceeding of proving the claim of *C.* and *C.*, excepting such as passed in contemplation of *C.* and *C.* proving their claim in the present suit." *Held*, that he was bound to do so.

The distinction between the protection afforded to solicitors and clients respectively, with regard to communications made pending, or in anticipation of litigation, pointed out.

This was a motion by way of appeal from the certificate of the Master, from which it appeared that he had refused an order on Messrs. *Gilmour* and *Coulson*, creditors of the defendant, *Putman*, to produce certain correspondence between them and the attorney who had been acting for them at law, in their action against *Putman*. The grounds of the appeal, and the authorities cited, appear in the judgment.

Mr. *A. Crooks*, Q.C., for the plaintiffs, who appeal.

Mr. *Hector*, Q.C., contra.

Judgment.

Spragge, V.C.—A claim was made in the Master's office by persons trading under the name of *Gilmour* and *Coulson;* and a member of the firm, *Alfred Hiram Coulson*, was examined by the plaintiff touching their claim. In the course of the examination the solicitor for the plaintiffs asked the witness "to produce all the letters to or from Mr. *Lawder*, in reference to the questions involved in the proceeding of proving the claim of *Gilmour* and *Coulson*, excepting such as passed in contemplation of *Gilmour* and *Coulson*, proving their claim in the present suit." "Under the advice of his solicitor the witness refuses to produce them on the ground, that they are privileged communications

between *Gilmour* and *Coulson* and their solicitor." The Master held that he was not bound to produce them. I have taken the question and the Master's ruling from his certificate. The question is raised before me upon appeal from the certificate.

The short point is, whether the client, being the person interrogated, he is or is not bound to disclose what passed between himself and his solicitor in relation to that which is now the subject of litigation, there being at the time of such communication no suit pending or in contemplation.

A plain distinction runs through the cases, where the discovery is sought from the solicitor, and where it is sought from the client; and if in this case it had been the solicitor that had been under examination, I should have had no difficulty in holding, not only that he was not bound to answer, but that he was bound not to answer.

Judgment.

The distinction to which I have adverted has been the subject of repeated comment by eminent judges, as unsound in principle. In *Greenough v. Gaskell*, (*a*) the disclosure was sought from a solicitor, of professional communication between himself and his client *ante litem motam*, and Lord *Brougham*, in his very able judgment, while holding such communication privileged from disclosure by the solicitor, took occasion to remark: "To force from the party himself the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it."

In the case of Lord *Walsingham* v. *Goodricke*, (*b*) decided nine years afterwards, Sir *James Wigram*

(*a*) 1 M. & K. 98.

(*b*) 3 Hare, 122.

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In *Flight* v. *Robinson*, (*b*) heard the following year, Lord *Langdale* held the client bound to disclose communications between himself and his solicitor *ante litem motam;* and he held that compelling such disclosure was right in principle.

Judgment. The same point was decided by Lord *Cranworth*, then Vice-Chancellor, in *Hawkins* v. *Gathercole*, (*c*) upon the authority of Lord *Walsingham* v. *Goodricke*, and without expression of the learned judge's views whether it was right in principle or not.

Glyn v. *Caulfield*, (*d*) quoted by the plaintiff, is not upon the particular point in question here. It is probably referred to for the language of the Lord Chancellor, (Lord *Cottenham*, I take it, from the date of the argument,) "that professional privilege is a ground of exemption from production adopted simply from necessity, and ought to extend no further than absolutely necessary to enable the client to obtain professional advice with safety; beyond what is absolutely necessary for this purpose, it ought not to be allowed to curtail that most important and valuable power of a court of equity, the power of compelling a discovery."

(*a*) 2 B. P. C. 514.
(*b*) 8 Bea. 22.
(*c*) 1 Sim. N. S. 150.
(*d*) 3 McN. & G. at p. 474.

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Before the last two cases, which were decided in 1851, occurred the case of *Pearse* v. *Pearse*, (*a*) before Sir J. L. *Knight Bruce*, then Vice-Chancellor, decided in 1846. The question arose upon the settling of interrogatories in the Master's office between vendor and purchaser upon a question of title, and what his honor did was to direct, not that any of the interrogatories should not be answered at all, but that some of them should not be answered *then*. (p. 29.) The communications sought to be protected occurred *ante litem motam*; and the learned judge reviewed at length and with much force, the principle upon which disclosures by a solicitor are protected, while the like communications were not protected when the client was interrogated, and he argued, with great ability, against the soundness of any such distinction; and contended that *Radcliffe* v. *Furman*, being a case where discovery was sought from a trustee, was not a binding decision where discovery was sought of communications in regard to a man's own individual affairs. The report of *Richards* v. *Jackson*, (*b*) before Lord *Eldon*, he considered a very unsatisfactory one. The inclination of the learned judge's opinion was undoubtedly strongly against the distinction as a matter of principle; and he questioned the applicability of the authority upon which Sir *James Wigram* had mainly decided Lord *Walsingham* v. *Goodricke*, against his own view of what was sound in principle.

Judgment.

Sir *W. Page Wood*, in *Manser* v. *Dix*, (*c*) heard before him in 1855, expressed his full concurrence in the view of Sir *J. L. Knight Bruce*, in *Pearse* v. *Pearse*. The question there also arose upon an inquiry as to title, and Sir *Page Wood* distinguished it from Lord *Walsingham* v. *Goodricke*. "Upon that ground," he says, at page 460, "I think that the distinction is that the whole question in that case was not a question upon the title, but whether there had been a contract or

(*a*) 1 DeG. & S. 12 (*b*) 18 Ves. 472. (*c*) 1 K. & J. 451.

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not." But while the learned judge took this distinction between Lord *Walsingham* v. *Goodricke* and the case before him, he intimated very clearly that in his view all communications between solicitor and client ought to be protected, whether the disclosure of them were sought from the client or the solicitor.

But in a case heard before the same learned judge in 1858, *Lafone* v. *The Falkland Islands Company*, (*a*) his language in delivering judgment would seem to indicate a modification of his views upon this point. One of the grounds taken by Mr. *Rolt*, in favor of the disclosure sought, was, that the communications were made *ante litem motam*. His honor did not at all intimate his opinion to be that that circumstance made no difference; his language was, "But they have been sworn to be in apprehension of litigation, and it appears to me that I should be refining too much if, when there was a contemplated litigation of some sort, the precise character and form of that litigation not being ascertained, I were to hold that information obtained in contemplation of that litigation was not to be protected, because the frame of the suit was somewhat different from what was contemplated. In effect, it was a matter in which the company expected to be placed in litigation with an opponent, expecting that, they employed a solicitor, who says he wants certain information for their defence with regard to any litigation that can take place." This seems to assume that communications *ante litem motam* are not protected where the client is examined, and I think removes Sir *Page Wood* from the advocates of a contrary doctrine.

Judgment.

The present Master of the Rolls, in *Ford* v. *DePontes*, (*b*) laid down the rule very generally in favor of protection to the client when interrogated; but in *Thomas* v. *Rawlings*, (*c*) which appears to have been heard

(*a*) 27 L. J. Chy. 25. (*b*) 5 Jur. N. S. 993. (*c*) 5 Jur. N. S. 667.

subsequently, though reported earlier, he states the rule thus, speaking of discovery by a solicitor, "He is not bound to disclose communications made by the client to himself, provided those communications have some reference to the *lis mota*, either before and in anticipation of, or subsequent to the institution of proceedings." It may be doubted whether Sir *John Romilly* is correctly reported, for the qualification introduced has no place when the disclosure is sought from a solicitor.

In *Lawrence* v. *Campbell*, (*a*) Sir *Richard Kindersley* is reported as saying, "Whatever fluctuations of opinion have taken place on the question, it is not now necessary, in the case of an English solicitor, for the purpose of privilege and protection, that the communication should pass either during or relating to actual or expected litigation; it is sufficient if they are confidential between the attorney and his client in that capacity." The question before the Vice-Chancellor was whether the privilege extended to the case of a Scotch solicitor residing in England, consulted professionally by his client residing in Scotland. The disclosure was sought from the Scotch solicitor, and his honor, no doubt, stated the rule where the disclosure is sought from a solicitor. I think his words import this, and he would have hardly stated as settled law, that the rule as he stated it applied to disclosure by the client.

Judgment.

We find from the cases great difference of opinion among learned judges as to the soundness of the distinction contended for: Lord *Brougham*, Sir *James Wigram* and Sir *Knight Bruce*, and, at one time certainly, Sir *Page Wood*, holding the distinction unsound in principle, and that all communications between solicitor and client, at whatever time made, should be protected from dis-

(*a*) 28 L. J. Chy. 780.

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covery, whether sought from the client or the solicitor. On the other hand, Lord *Langdale* and Lord *Cottenham* have expressed contrary opinions, and it is not improbable that the Lord Chancellor took occasion to say what he did in *Glyn* v. *Caulfield*, in consequence of what had fallen from Sir *Knight Bruce*, in *Pearse* v. *Pearse*.

But whatever may have been the opinions of learned judges, the cases decided upon the point preponderate in favor of compelling the disclosure where the communication has not been pending, or in anticipation of litigation, and the disclosure is sought from the client. *Pearse* v. *Pearse* can hardly, indeed, be called a decision the other way, as that case, as well as *Manser* v. *Dix*, did not proceed upon the general question, but upon the discovery sought, being between vendor and purchaser upon a question of title.

Judgment.

In this state of the authorities, therefore, I must hold that Mr. *Coulson* was bound to produce the documents demanded of him by the plaintiff's solicitor. I allow the exception to the Master's certificate.

WESTBROOKE v. THE ATTORNEY-GENERAL.

Pleading—Misjoinder.

Several persons being in possession of separate portions of crown land filed a bill, claiming to have, by the invariable usage of the government, a pre-emptive right, each to the portion he was in possession of, alleging that a patent had been obtained for all the lands by a defendant through fraud, and praying that the patent might be rescinded. A demurrer to the bill for misjoinder was allowed.

The bill in this cause was filed by *Peter Westbrooke*, *James Reid*, and thirteen others, against *The Attorney-General* for Upper Canada, the *Corporation of the Town of Brantford*, and the *Grand River Navigation*

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Company, reciting the act incorporating the defendants, the *Company*, their right to acquire lands under certain restrictions for the purposes of the *Company*; that the *Company* had improperly made claim to a certain tract of land in the township of Brantford, containing 98½ acres, in portions of which the plaintiffs were respectively in possession of; and which tract comprised about one-half of the village of Cayuga; and setting forth particularly the portion thereof held by each plaintiff. The bill then stated the proceedings by which the defendants, the *Company*, obtained a patent for the lands, charging, that had the Crown been made acquainted with the fact of the possession of the plaintiffs, it would have refused to grant the lands to the *Company*; and prayed, under the circumstances, that the patent might be rescinded.

The defendants, other than *The Attorney-General*, demurred to this bill on the ground of misjoinder of plaintiffs, and for want of equity.

Mr. *Roaf*, Q.C., in support of the demurrers.

Mr. *Blake*, Q.C., contra.

Judgment.

MOWAT, V.C.—This case came before me on demurrers to the plaintiffs' bill by two of the defendants, the *Town of Brantford* and the *Grand River Navigation Company*. The learned counsel for these defendants argued that the bill was objectionable on the ground of multifariousness, or rather misjoinder, as well as for want of equity. I have come to the conclusion that the former objection is sufficient to dispose of the demurrers.

The object of the bill is to set aside a patent for certain lands, as having been issued through fraud, error, and improvidence. The plaintiffs allege that they were respectively, in possession of portions of the property for many years before the patent was applied for; that

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they have continued in possession until now; that they have made large improvements, each on his own parcel; and that these, and other facts which they set forth, were concealed from the Crown by the defendants, the patentees. The bill contains the usual allegations as to the custom of the government in dealing with unpatented lands which persons have taken possession of and improved; and alleges that if the facts set forth in the bill had been known to the Crown, the patent would not have been issued. The claim of the plaintiffs is not a joint claim; there is no part of the land in respect of which they set up any community of interest; but each sets up a separate and entirely unconnected and independent claim to consideration, in respect of the distinct parcel he occupies; and this being so, the objection is, that they cannot unite as plaintiffs in one suit.

Judgment.

Since the Orders of the 3rd June, 1853, an objection as to misjoinder of plaintiffs can seldom be taken with effect at the hearing of a cause; but it was not contended before me that the objection might not still be taken on demurrer; and what occurred in *Beeching* v. *Lloyd*, (*a*) is sufficient to shew that it may.

As to objections for multifariousness, Lord *Cottenham* observed, in *Campbell* v. *McKay*, (*b*) that "it is not very easy, *a priori*, to say what exactly is or ought to be the line regulating the course of pleading upon this point. All that can be done is, in each particular case as it arises, to consider whether it comes nearer to one class of decisions or the other;" namely, those in which the objection has been allowed, or those in which it has been overruled. Amongst the reported decisions on the subject of misjoinder, the one most like the present is *Hudson* v. *Maddison* (*c*); and, without making any

(*a*) 3 Drewry 227. (*b*) 1 M. & C. 621.
(*c*) 12 Sim. 416.

general observations on the cases, it is sufficient to say, that I am unable to distinguish that case satisfactorily from the present. The bill there was filed by five persons occupying separate tenements, to restrain the defendants from erecting a steam engine and chimney in the neighbourhood of the plaintiffs' houses, on the ground that the steam engine would be a nuisance to the plaintiffs; the Vice-Chancellor held that there was a misjoinder. This judgment was acquiesced in by the parties; and I cannot find that its soundness has ever been questioned since. Now, those five plaintiffs had as much a common interest in preventing the nuisance as the fifteen plaintiffs in this suit have in rescinding the patent. Mr. *Blake*, in resisting the objection for misjoinder, argued that the patent could not be set aside in part; that it must be set aside altogether or not at all. But a like observation is still more clearly true in regard to such relief as was sought in the case in *Simons*. The erection there, if interfered with at all, could not have been restrained as to one defendant, and yet proceeded with as to the others.

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The learned counsel for the plaintiffs further said, that two or more judgment creditors might unite in a bill to set aside a fraudulent deed executed by their debtor. In such a case there would perhaps be less ground for the apprehension that a defendant might have different answers to make to the several plaintiffs, than in some of the cases in which the objection for misjoinder has been allowed. But I am not aware of any decision in England or here to the effect suggested by the learned counsel. There are such decisions by some of the courts of the neighboring Republic; and Mr. Justice *Story*, in the text of his book on Equity Jurisprudence, has stated the doctrine in accordance with these decisions; but the terms in which he has stated it, and the notes he has added, plainly show that learned Jurist was of opinion that the proposition was

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not supported by English authorities, or even reconcilable with them. (*a*)

I am not satisfied that expense would be saved by sanctioning the bill in its present form, and am therefore of opinion, upon the whole, that the demurrers should be allowed.

SLATER v. YOUNG.

Practice.

A. having an interest in improvements for which, in a suit between *B.*, his vendor, and *C.*, *B.* obtained a decree, *Held*, that *A.* could not, by petition, make himself a party to such suit; and that his remedy was by bill.

This was a petition by one *Morrison*, setting forth that he was entitled to the value of certain improvements ordered to be paid for by the plaintiff, and praying to be added as a party to the suit.

Statement.

Mr. *A. Crooks*, Q.C., in support of the petition.

Mr. *Fitzgerald*, for the plaintiff, admitted that the petitioner was the person entitled to be paid for the improvements, but submitted that his right could not be enforced, if at all, by petition; but must be the subject of a new bill.

Mr. *Blake* for defendant.

The only question discussed was as to the regularity of the petition, in support of it the following authorities were referred to:

Dilly v. *Doig* (*b*), *The Mayor, &c., of York* v. *Pilkington* (*c*), *Weale* v. *The Middlesex Water Works*

(*a*) Vide Story, Eq. Jur secs. 286, 537*a*, ed. of 1852; Dilly v. Doig, 2 Ves. Jur. 486.

(*b*) 2 Ves. Jr. 486. (*c*) 1 Atk. 283.

Co., (*a*) *Lee* v. *Lee*, (*b*) *Lewis* v. *Clowes*, (*c*) *Dyson* v. *Morris*, (*d*) *Langdale* v. *Gill*, (*e*) *Commerell* v. *Hall*, (*f*) *Smith's* Practice, 804-807-8, (last ed.)

MOWAT, V.C.—The defendant *Torrance* purchased some land from one of several co-trustees, and entered into possession and made improvements. The court, on the hearing, set aside the sale and ordered that *Torrance* should be paid for his improvements, after deducting rents.

It now appears that before the institution of the suit *Torrance* had sold part of the property to one *Morrison*, and that the improvements on this part of the property were made by *Morrison*, and *Morrison* petitions that he may have the benefit of the decree, so far as relates to these improvements. The plaintiff consents to the prayer of the petition, but Mr. *Fitzgerald* objects that *Morrison* cannot proceed by petition, and that if he is entitled to relief he must file his bill.

Judgment.

I think this is so. I have examined all the cases referred to by Mr. *Crooks*. None of them is an authority for a person whose interest existed before the suit, and who was not made a party to it, bringing himself into it by petition; and the case does not come within any of the General Orders of this court.

A party who acquires an interest after a suit is instituted, is in a different position.

According to the old practice this case would clearly have been one for a bill, and for an original bill; not a bill of any of those classes of bills which the General Orders of the court have abolished, and for which other proceedings have been substituted. The petition must be dismissed.

(*a*) 1 J. & W. 358. (*b*) 1 W. R. 345, 375, S. C., 9 Hare xci., App.
(*c*) 10 Hare 62, App. (*d*) 1 Hare 413.
(*e*) 1 Sm. & Giff. 24. (*f*) 2 Drew 194.

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Practice—Set-off after bill dismissed.

On the dismissal of a bill, costs were taxed to the defendants and execution issued against the plaintiff, which was returned "*nulla bona*." Two of the defendants as administrators held moneys, part of which would, on distribution, belong to the plaintiff, and which they now applied for leave to set-off against the taxed costs. Under the circumstances the motion was refused.

Statement.

The decree reported ante vol. ix., p. 403, having been reversed and the bill dismissed with costs, by the Court of Appeal, such costs were taxed and an execution therefor issued by the defendants. It proved difficult or impossible to obtain satisfaction, and this was an application by two defendants, *Charles* and *John Black*, holding moneys of the intestate's estate in their hands, for an order to set-off the share of such moneys belonging to the plaintiff against the sum due for costs.

No distribution of such funds had been consented to by the plaintiff.

Mr. *R. Sullivan*, for the applicants, cited *Wilson* v. *Switzer*, (*a*) *Mileham* v. *Eicke*, (*b*) *Allen* v. *Impett*, (*c*) *Case* v. *Roberts*, (*d*).

Mr. *Rae* contra, contended that the court had in this suit no jurisdiction to interfere.

Spragge, V.C.—The plaintiff's bill stands dismissed out of court with costs; the defendants are *Charles Black*, *John Black*, and several others. *Charles* and *John Black* are administrators of the estate of *John Black*; and the plaintiff, as one of the next of kin of *John Black*, is entitled to a certain sum which is in the hands of *Chas.* and *John Black*, as such administrators;

(*a*) Chan. Cham. Reports 75. (*b*) 3 M. & W. 407.
(*c*) 8 Taunton 263. (*d*) Holt, N. P. C. 500.

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and to a further sum as one of the heirs of *John Black*, being rents and profits of real estate, which *Charles* and *John Black* have received. The defendants appear to be unable to obtain satisfaction of the above costs by writ of execution, and they ask for an order of this court allowing them to retain the amount out of the sums in the hands of *Charles* and *John Black*: they are all heirs and next of kin of *John Black*.

The first difficulty is as to the right these defendants have to come to this court in the matter. The funds in the hands of *Charles* and *John Black* are not under the control of this court; yet the defendants ask that two of their number may be permitted to make a particular disposition of them; and further, if they have a right to retain out of them the amount of these costs, there is nothing to prevent their doing so, when called upon to account for them, such application of them would be a proper accounting: and they do not need the intervention of this court. I do not say that they have such right: and it would not be for me to give any opinion as to whether they have or not, unless the practical interposition of the court becomes necessary.

Judgment.

None of the cases to which Mr. *Sullivan* refers me meet this difficulty. I must therefore refuse this application with costs.

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McFadgen v. Stewart.

Practice—Real estate partnership assets—Brief—Costs.

A bill was filed by a surviving partner against the representatives of the deceased partner, praying an account of certain partnership dealings, to which a demurrer for want of equity was allowed, on the ground that the relief sought was barred by the lapse of more than six years between the death of the deceased partner and the filing of the bill: but leave was given to amend, with a view of shewing that certain lands held by the deceased partner, and which had descended to his heir-at-law, had been purchased with partnership assets, and that therefore there was a resulting trust in favor of the plaintiff.

The court, being dissatisfied with the mode in which the argument was conducted, and the brief of the pleadings had been prepared, though it allowed a demurrer to the bill, liquidated the costs at $10 only.

Statement.

The bill in this cause was filed by *Colin McFadgen* against *Jane Stewart*, administratrix of the late *Hugh McFadgen*, his infant children, and *Robert Stewart*, and set forth that the plaintiff and the said late *Hugh McFadgen* formerly carried on business together as blacksmiths, in the township of Eldon, which business was conducted from the 9th day of September, 1845, till the death of *Hugh McFadgen*, intestate, on the 6th of February, 1853: that the said partnership firm acquired certain real estate as their joint property, but which was conveyed to the said *Hugh McFadgen* alone. The bill prayed that the affairs of the partnership might be wound up and settled under the decree of this court.

The defendant, *Robert Stewart*, husband of the administratrix, demurred to the bill for want of equity.

Mr. *Blevins*, for the demurrer, cited *Greig* v. *Green*, (*a*) *Hoare* v. *Parke*, (*b*) *Prance* v. *Simpson*, (*c*) *Tatam* v. *Williams*, (*d*) *Kobler* v. *Reynolds*, (*e*) *Lindley* on Partnership, 570.

(*a*) Ante vol. vi., p. 240.
(*b*) 6 Sim. 51.
(*c*) Kay 678.
(*d*) 3 Hare. 347.
(*e*) 26 L. J. Chy. 415.

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McFadgen v. Stewart.

Mr. *Hector Cameron*, contra, contended that more was sought by the bill than an account of the partnership. The lands having been bought during the existence of the partnership, it will be presumed they were so purchased with partnership moneys, in which case a resulting trust would arise: besides, the bill expressly states that plaintiff has paid off debts due by the partnership, and that he has also paid part of the purchase money of the lands since the death of *Stewart*.

SPRAGGE, V.C.—The plaintiff by his bill alleges that he was a partner in business with the late *Hugh McFadgen* from 9th September, 1845, to 6th February, 1853, when the partnership was dissolved by the death of *Hugh McFadgen;* and he alleges that he and *Hugh McFadgen* acquired as partnership property, and with the moneys of the partnership, certain lands therein described, which it alleges were conveyed to *Hugh McFadgen* alone, but which were in fact part of the assets of the partnership; and that on the death of *Hugh McFadgen*, intestate, the legal estate therein passed to his children, who are made defendants. Judgment.

The prayer of the bill is for an account of the partnership dealings and transactions only; there is no prayer for general relief. The bill was filed 30th Sept., 1864. The demurrer is by the husband of the administratrix, and is general for want of equity. The ground of demurrer urged upon argument is, that the claim for an account of partnership dealings was barred by lapse of time before the filing of the bill; and the cases cited shew that this objection may be taken upon general demurrer.

As put by the bill, there were partnership dealings; and in the course of the partnership dealings, lands were purchased; and the purchase of these lands and the legal estate in them having descended to the heirs of the

1865. deceased partner seems to be alleged, as shewing why
McFadgen v. Stewart. the heirs are made parties. The lands are called assets of the partnership, but whether it is thereby intended to be alleged that they are, as between the plaintiff and the estate of his late partner, personal estate, does not appear. I should rather infer that it is intended to be so alleged. By the frame of the bill and the prayer, the purchase of the lands is put as part of the dealings of the partnership, of the whole of which dealings an account is sought: and the account of which dealings as a whole is barred by the statute of limitations, or by analogy to it.

There may be a view in which the rights of the plaintiff as to those lands are not barred. If purchased with partnership moneys, there would be a resulting trust in favour of the partners, other than the one to whom they were conveyed. As to whether that would
Judgment. take them out of the rule applying to the taking of partnership accounts, I express no opinion. The rights of the plaintiff are not so put by the bill, but they are put otherwise by the bill; nor were they so presented in argument, and I must add that the case was very little argued.

I must allow the demurrer to the bill as framed, and with costs, which I fix at $10: and I fix them at that sum in part because the brief should be disallowed. It does not state when the bill was filed, a cardinal point in the argument; and contains a very erroneous copy of the bill. I had to send for the original to see what the bill really alleges and when it was filed.

ROLPH v. THE UPPER CANADA BUILDING SOCIETY. 1856.

Practice—Making parties to bill—Building societies.

Unless where the parties to be charged are too numerous to be made parties to the bill, or there is some other special reason, the 42nd of the General Orders of 3rd June, 1853, is confined to cases where no direct relief is sought against the parties to be added, or where the object is to bind their interests by the proceedings in a manner similar to what is provided for by the 6th of the same orders.

A decree was obtained in a suit by a shareholder of a building society, suing on behalf of himself and all other shareholders, for the administration of the assets of the Society, and charging the directors with losses which had been sustained:

Held, that persons who had ceased to be directors before the suit was commenced could not be made parties in the Master's office.

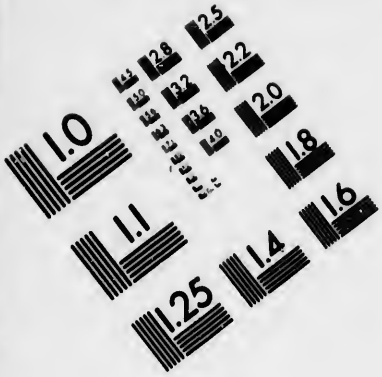
Statement.

This was an application by *Charles Magrath* and *Henry Rowsell*, to be discharged from being parties to certain suits (now consolidated) in respect of the affairs of the *Upper Canada Building Society*. They were made parties in the Master's office.

It appeared that four suits had been brought, each by a shareholder of the *Society* on behalf of himself and all other shareholders.

The only defendants were the President and Treasurer.

The bills were stated to be in substantially the same terms. The bill in which *Rolph* was plaintiff alleged that the company was incorporated in March, 1848; that the monthly dues payable by shareholders up to the 1st July, 1858, were ascertained, and were held by the President and Directors to be sufficient to pay up their shares in full; that no calls were made afterwards; that the directors had paid many shareholders in full, without taking into account losses, or probable losses, on bad investments, and without taking any security for the return, if necessary, of what was so paid; that the plaintiffs and many other shareholders had received



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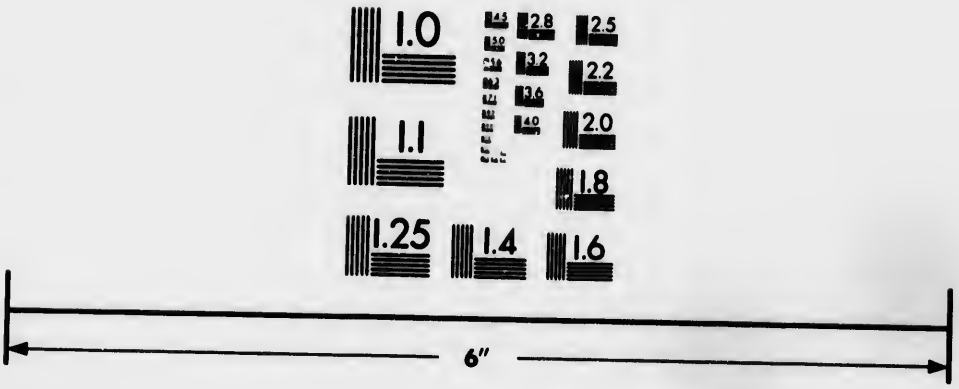

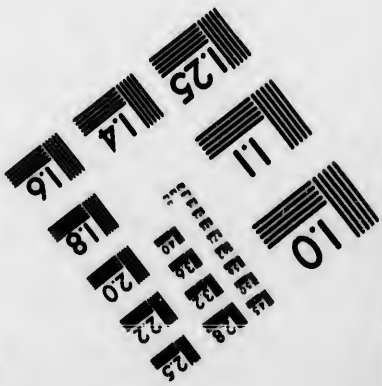

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1865. Rolph v. U. C. Building Society.

nothing on account of their shares; that the business of the *Society* had ceased; that no election of directors had taken place for several years; and that the directors last elected had continued to act since.

Statement.

Besides containing some charges of misconduct against the defendants, the President and Treasurer, the bill alleged that large sums which had been received since the *Society* ceased its operations had been improperly applied by the defendants and the directors, or by some or one of them; that the directors had invested the funds of the *Society* in bad and insufficient securities, from which considerable losses had resulted; that the borrowing members numbered several hundreds; that the non-borrowing or investing members, to which class the plaintiff belonged, consisted of more than one hundred; and that the names of the shareholders of either class, or of the directors last elected, were unknown to the plaintiff, and he asked a discovery thereof from the defendants.

The bill prayed for an account to be taken of all moneys received by the said directors and treasurer, or any or either of them, or which, but for their wilful neglect or default, might have been so received,—of all moneys they had expended, all advances and loans by the *Society*, all losses and all securities taken for losses, and all assets of the *Society*; that the assets remaining should be realized, and should be applied to pay the shareholders what they were entitled to; and that all necessary accounts should be taken, and directions given. The bill prayed also for an injunction and a receiver, and for general relief. The bills in two of the cases were taken *pro confesso* against both defendants, and decrees were made in 1862 against the defendants and the directors, according to the prayer of the bills; and it was ordered by each decree that the Master should make said directors parties in his office. Further directions and costs were reserved.

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On the 17th January, 1863, the parties who made the present application were served in one of the suits, with the proceedings appointed for making persons parties in the Master's office. On the 26th January, 1863, an order was made for the consolidation of the four suits; and that *Rolph* should have the conduct of the consolidated suit. On the 21st March, in the same year, an order was made directing the Master to make the same inquiries in the two suits in which there had been no decree, as in the two in which decrees had been pronounced. The present applicants were no parties to these orders, and were not named in them. An abatement shortly afterwards took place. When the suit had been revived an order was made (8th of February, 1865,) directing that the order of consolidation should be amended by adding thereto the names of the present applicants, as well as of some other persons who had also been made parties in the Master's office; that the consolidated suit should be in the same plight and condition as if all these persons had been parties to the order of consolidation; and that they should be at liberty to move against the order within fourteen days. All these orders were made by his Lordship the Chancellor in Chambers, and the present application was to Vice-Chancellor *Mowat* in court, in pursuance of the leave granted by the last order.

Statement.

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

Mr. *George Murray* contra.

MOWAT, V.C.—His Lordship the Chancellor has informed me that all the facts connected with this application were before him; and that he was of opinion that, under the circumstances, the two gentlemen who now apply ought not to be barred from making their application by the delay which has taken place since they were served with the decree, nor by any proceedings which

1865. have been had on their part in the Master's office under the decree.

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I shall only consider, therefore, whether, apart from all objections arising from their delay or acquiescence, they have a right to be discharged from being parties to the suit.

The decree was *ex parte*, and its terms were evidently not settled by the learned judge before whom the hearing appears to have taken place. It is manifestly impossible to decree parties to be liable who are not at the time parties to the suit, or represented in it. Yet the decree, as drawn up, does this. In the cases in which, by the 6th of the General Orders of 3rd June, 1853, interested parties are dispensed with, parties so dispensed with are not accounting parties, or parties against whom any direct relief is sought. The first seven rules refer to cases in which the parties dispensed with have, or may be presumed to have, the same interest as the plaintiff. The eighth rule is not of this character, but it merely enables the plaintiff to sue one of several persons against whom he has a joint and several demand, as a plaintiff always may at law.

Judgment

The 16th section of the 42nd Order enables the Master to add parties generally. There is no corresponding provision in England. This section, however wide in its terms, certainly does not give the Master authority to supply every defect of parties which the record was chargeable with originally, or which may arise from subsequent events. The court has expressly decided that persons interested as owners of the equity of redemption, cannot be made parties under it; and in making provision for that specific case, the court did not deem it fitting that the Master should receive authority to deal with it. The authority was expressly reserved to the court itself.

So, notwithstanding the 42nd Order, the court seems to have thought it necessary to make special provision for incumbrancers being made parties by the Master in a suit for the foreclosure or sale of mortgaged property (6th February, 1858.)

Mortgage cases having thus been specifically provided for, it would seem that, except where the parties to be charged are too numerous to be made parties to the bill, or where there is some other special reason, the 42nd Order must be confined to cases where no direct relief is sought against the parties to be added, or where the object is merely that they may be bound by the proceedings in a manner analogous to what is provided for by the 6th Order of 3rd June, 1853.

Where parties could not have been compelled to become parties by the Master, but have chosen to submit to the proceedings, they are no doubt bound; and where they have acquiesced for a time, the court would hold them to have thereby precluded themselves from objecting, where the facts disclosed shew that they would be proper parties to a bill, and that no paramount inconvenience would be the result of sanctioning the irregular mode in which they had been brought into the suit. On the other hand, delay and acts of acquiescence may have less weight where persons are added as parties against whom it does not appear that a bill would lie.

Judgment.

The present applicants were not directors when the bill was filed, and no case is made out against them in respect of their acts when they were directors.

I think it was not argued that they are now directors; or were so when the bill was filed. It appears from the uncontradicted statements of their affidavits that they had both ceased to be in any sense members of the company several years before the bill was filed; namely,

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Rowsell in 1855 or 1856, and *Magrath* in 1858; and that they never afterwards intermeddled with the company's affairs. There has been no election of directors since 1853; and, while the rules provide that persons elected directors shall continue directors until their successors are chosen, the rules also provide for two exceptions to this, namely a director's becoming disqualified, or resigning. These gentlemen having ceased to be members, it seems clear that they ceased at the same time to be directors.

As, then, they were not directors when the bill was filed, and cannot on that ground be joined as defendants, so, neither, is any special case made against either of them as a ground for making or continuing them as parties. No charge of misconduct against either is stated to have been made out by anything that has come to light in the cause. If proper parties at all, it must be on the ground that every one who was at any time a director, is a proper party under the decree and the practice of the court. But I do not think there is any authority that would justify me in so holding; and I am therefore of opinion that the motion should be granted, and these gentlemen discharged from being parties; but, under all the circumstances, without costs.

Judgment.

If hereafter facts should come to light shewing that they were guilty of negligence while directors, and that losses which they are liable to make good have in consequence been sustained, a bill may be filed against them, notwithstanding the present order.

THE ATTORNEY-GENERAL v. MCNULTY. 1865.

Grant from the Crown—Notice—Possession.

A patent was issued to *A.*, in consideration of improvements having been made on the land, but the benefit of these improvements had, on an arbitration between *A.* and *B.*, been adjudged to *B.*, and the adjudication was in no way impeached or discredited; and it was shewn to be the settled policy and practice of the Crown to issue patents in such cases to those entitled to the benefit of the improvements:

Held, that, though the award was known to the officers of the Government when the patent was issued, the patent should be set aside at the suit of the *Attorney-General*, as having been issued through fraud and in error and improvidence.

A plea of purchase for value without notice cannot be set up against the Crown.

Possession is notice of the title of the party having possession, without proving notice of such possession by the party charged with notice of such title.

This was an information against a patentee of the Crown, *John McNulty*, and against *Richard Cuthbert*, his vendee of part of the property, for the repeal of the patent, as having been issued in error or mistake within the meaning of the statute. Statement.

The relator was *Michael McGuire*, who, before the patent issued, had purchased the property from *Anthony McNulty*. *Anthony McNulty's* title will appear sufficiently on reference to the case of the *Attorney-General* v. *McNulty*, reported *ante* volume viii., page 324.

This case came on originally for hearing before the late Vice-Chancellor *Esten*.

Mr. *Brough*, Q.C., for the *Attorney-General*.

Mr. *Hector*, for the defendants.

ESTEN, V.C.—In disposing of this case I shall assume the facts which appear from the papers to have occurred, although they may not be legally

1865. proved, inasmuch as I think they are insufficient to prevent a decree for the avoidance of these patents.

Attorney-General v. McNulty.

It seems I was under some misapprehension in pronouncing the judgment in the former case. It appeared to me on that occasion that although the documents may have been in the possession of the Crown, their existence and effect were not present to the mind of the officer of the Crown when he directed the patents to issue. It appears, however, that when the Commissioner of Crown Lands ordered these patents to be completed, he was perfectly aware of the disputes which had existed between these parties, and of the arbitration which had been resorted to in order to settle those disputes, and of the award which had been made upon that occasion. These were the only facts which it was material that the Crown should know. The question is, whether, under these circumstances, it is proper that the court should declare these patents void.

Judgment.

The act of Parliament under which the proceeding is instituted, [16 Vic., ch. 159, secs. 18 and 21: C. S. C. ch. 22, sec. 25,] is remarkable in its phraseology, which indicates anxiety on the part of the Legislature to include every case that could possibly occur. First, it mentions all patents obtained by fraud,—a large class of cases. Second, all patents issued in error, which would seem to cover all other cases, for if a patent be improperly issued, it must be, it would seem, through fraud or through mistake without fraud. But the Legislature advances a step farther, and includes all patents issued "in improvidence." That is, as I understand the expression, patents issued, not through fraud nor in mistake, but hastily, incautiously, unadvisedly, to the injury of its own rights, or the rights of the subject. It is, I apprehend, quite clear that the Legislature, in enacting this provision, introduced no new law. The Crown always had the power to repeal its letters patent issued under such circumstances. The question is, whether these patents come under any of these heads.

1865.

Attorney-General v. McNulty.

I have already expressed the opinion that it was the duty of Mr. *McNulty* to mention in his petition the arbitration and award which had occurred in this case, and that their suppression, although he might have considered it as justifiable, must be regarded in this court as a fraud. It would appear, however, that these facts were known to the Government at the time the patents were issued, and therefore that their suppression was innocuous. Does it therefore follow that these patents are to be sustained, and that the Crown is to be precluded from recalling its act? The grant was unquestionably made in consideration of the improvements. The benefit of these improvements had been adjudged to *Anthony McNulty* by a tribunal chosen by both parties. It is quite clear that the Crown would consider this adjudication binding, unless it was in some way impeached or discredited. To award the patent to *John McNulty*, in consideration of improvements which had been adjudged to *Anthony McNulty* by arbitrators chosen by both parties to determine that question, was an improvident act. The Crown is authorized to repeal any patent issued hastily and incautiously to the injury of its own rights or the rights of any of its subjects. This patent was issued at the direction of the Commissioner of Crown Lands, without a due regard, as I think, to the rights conferred by the award.

Judgment.

It is not sufficient to say that these rights were not strictly legal rights: that the Crown could disregard them. The Crown intended to respect them: and its instructions to its officers were to respect them. These patents were issued in pursuance of this order in Council, and for the purpose of carrying it into effect. They were issued upon the sole authority of the officer of the Crown, without a due regard to rights which the Crown intended to respect. They were intended by the Crown to enforce rights which they in fact violated. They were issued, I think, "through fraud

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and in error and improvidence," within the meaning of the act of parliament, and ought to be declared void.

Under the circumstances, I think the decree should be without costs.

The Vice-Chancellor, after delivering the foregoing judgment, expressed a desire that a further argument should take place as to the right of the Crown against the patentee's vendee, who had set up the defence of a purchase for value without notice.

The further argument took place before Vice-Chancellor *Mowat*, when the same council appeared for the parties respectively.

Judgment.

MOWAT, V.C.—Two points only have been argued before me, namely, whether the defence of a purchase for value without notice is available against the Crown; and if it is available, whether notice is sufficiently proved against the purchaser.

On the first point *Cummings* v. *Forrester*, (*a*) 2 Institute, 713, and *Bacon's* Abr. Title Grant, H. 3, were cited as supporting the contention of the relator. No authorities were cited on the part of the defendant.

In *Cummings* v. *Forrester* Sir *Thomas Plumer* spoke of the jealousy with which the law regards questions involving the rights of the Crown, and observed:—"The power of calling back its grants when made under mistake is not like any right possessed by individuals, for, when it has been deceived, the grant may be recalled notwithstanding any derivative title depending upon it." This was not the ground on which the decision of the case proceeded, but I see no reason to doubt that the learned judge stated correctly the rule on which a court of equity acts in such cases.

The doctrine laid down is in accordance with the rule as to goods, that a sale in market overt, which would

(*a*) 2 J. & W. 334.

be sufficient to change the priority if the goods belonged to private persons, has no such effect where they belong to the Crown. 1865. Attorney-General, v. McNulty.

The principle on which this court allows the defence of a purchase for value without notice is, that the defendant in such a case has an equal equity with the plaintiff; and that between persons having equal equities, this court will not interfere on either side. But I take this rule to be inapplicable where the Queen is concerned; for amongst the many respects in which the rules of law with regard to the Crown, differ from those affecting private persons, is the established principle, that, where the right of the Queen and that of a subject meet at one and the same time, the right of the Queen shall be preserved. I apprehend this distinction is as obligatory on courts of equity as on courts of law; and that in the present case, the rule to be acted upon is not *potior est conditio defendentis*, but *detur digniori*.

This conclusion accords with the view taken by his Lordship the Chancellor, in *Stevens* v. *Cook*. (*a*) Judgment.

As to the second point argued before me, there is evidence that the relator was in possession at the time in question, but no evidence that the purchaser had notice of such possession. *Holmes* v. *Powell*, (*b*) is an authority that notice in such a case is assumed. Lord Justice *Knight Bruce* laid down the rule in these terms: "I apprehend that by the laws of England, when a man is of right and *de facto* in the possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, conflicting or inconsistent with the title or alleged title under which he is in possession, or which he has a right to connect with his possession of the property." But my opinion on the first point renders this second point immaterial.

The decree will therefore declare the patent void as against both defendants.

(*a*) Ante vol. x. 410. (*b*) 8 DeG. McN. & G. 572.

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BLAIN v. TERRYBERRY.

Misrepresentation by a married woman—Trustee and cestui que trust —Purchase by trustee.

Where a married woman joined with her husband in making misrepresentations to the executor of a deceased person in order to obtain possession of a chattel belonging to the testator, the court, upon appeal from the Master, *held* her to be responsible for such misrepresentation equally with a person *sui juris*, and overruled an objection to the finding of the Master, charging her with the value of the chattel.

Where a trustee deals with his *cestui que trust* for the conveyance to himself of any portion of the trust property, it rests with the trustee to shew that everything in connection with the transfer was fair and just.

Statement.

The decree directed the usual administration accounts, which were taken by the Master at Hamilton, who reported, among other things, that he had not charged the defendant with any interest received by him on the purchase money of the Kramer lot, the papers connected with which formed the subject of the claim *donatio mortis causâ* already adjudicated upon, ante vol. ix., 286.

The Master charged the defendant with a thrashing machine, as part of the testator's property, but found that in the distribution of the estate the plaintiff should be charged with its value, as being delivered by the defendant to her after testator's death; that the whole share of the testator's widow, under such distribution, belonged to the defendant, by virtue of a conveyance under seal, bearing date the 27th of November, 1863. After that the whole share of *Margaret Spawn* should be given to the defendant, it having been duly conveyed to him by an instrument, under seal, of the 19th of March, 1856.

The plaintiff, and *Mary* and *George Young*, *Elizabeth Blackstone*, and *Margaret Spawn*, made parties in the Master's office, appealed from the report on the following, amongst other grounds:—Because the defendant was not charged with interest on the purchase

money of the Kramer lot; because the Master reported that the plaintiff should be charged with the thrashing machine, while the evidence shewed that it was delivered to the husband of the plaintiff, and cannot be charged against her in a suit brought in her own right, and that as to that and other matters, the Master reported on matters not referred to him; and that the defendant could not hold the purchase from the widow, but must take it for the benefit of the estate; and so as to the purchase from *Margaret Spawn*; and that the deed from her only operates as a discharge of her interest, and not as a transfer to the defendant; and that she conveyed, while ignorant of the true state of facts, and that the conveyance was obtained from her by the fraud and misrepresentation of the defendant.

The defendant also appealed because the Master had erroneously charged him twice with one sum of $531.90. This was a plain mistake, and was corrected by the consent of the solicitors for the other parties.

Statement.

As to the conveyance by *Margaret Spawn* to the defendant, it appeared that a suit for specific performance had been brought by one *Vanwagner*, as assignee of *Kramer*, against *Terryberry*, (*a*) and evidence was given on the subject of the *donatio mortis causâ*, which was taken in the presence of Mrs. *Spawn's* solicitor. She had previously filed a bill against *Terryberry* for an account which was intended to question the validity of that gift, but upon hearing that evidence, this was no further proceeded with. *Vanwagner* v. *Terryberry* was heard in June, and decided in September, 1855. Long disputes had existed between Mrs. *Spawn's* husband and *Terryberry*; *Spawn* claiming certain lands by deeds from the testator, which *Terryberry* insisted were forgeries, and that the lands descended to him as heir-at-law; actions of ejectment

(*a*) See ante, vol. v., 324.

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had been brought, and a protracted litigation carried on between them with varying success. *Spawn* died in 1852, having by his will devised his real estate to trustees, for the benefit of his wife and children. The will contained a power of appointing new trustees, which had been exercised, and Mrs. *Spawn* substituted for a deceased trustee, and with *Vanwagner* and *Galbraith* were trustees of *Spawn's* estate. Under these circumstances the deed of the 19th of March, 1856, was executed, which was signed by these trustees, *Peter B. Sphon*, a relative and solicitor of Mrs. *Spawn* and *Terryberry*, and after reciting *Spawn's* will, the appointment of Mrs. *Spawn* as a trustee, and *Galbraith's* desire of being discharged from the trusts, *Peter B. Sphon* was substituted as trustee in *Galbraith's* place, and after further reciting the conflicting claims of *Spawn* and *Terryberry* to certain lands, and that the trustees had compromised the same with *Terryberry* and agreed to assign them to him for the consideration thereinafter mentioned, and that in consideration of that agreement and the premises, Mrs. *Spawn* had agreed to release her dower in those lands, and all claims and demands upon the estate or residue of the estate of the testator: it was witnessed that the trustees, in consideration of £625, conveyed and released the said lands to *Terryberry*, and Mrs. *Spawn* released her dower therein, and any claim she could in any way have to them, and it was further witnessed that Mrs. *Spawn*, in consideration of the premises, and of 5s., released, acquitted, and discharged *Terryberry* from all rights, claims, and demands whatsoever, both at law and in equity, and from all actions, complaints, and suits, for any and all rights, claims, and demands, of her, the said Mrs. *Spawn*, upon the estate or effects of the testator of whatever nature or description, and whether the same might be urged against *Terryberry*, as executor, or otherwise, howsoever, and particularly in respect of the *Kramer* lot, or the purchase money thereof: and then followed covenants that the trustees

Statement.

had done no act to defeat the intention of that deed, and for further assurance.

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Mr. *J. V. Sphon*, Mr. *J. Paterson*, Mr. *Crickmore*, and Mr. *McKeown*, for the appellants, argued that the Master erred in not charging the defendant with the interest received for the purchase money of the *Kramer* lot, which must be considered as much the property of the estate as the principal.

That the threshing machine was not a *donatio mortis causâ*, no delivery having b[illegible] made by the testator, and that it was given by *Terryberry* to plaintiff's husband, not to herself.

As to the conveyances by the widow and Mrs. *Spawn*, the Master had exceeded the reference, and should not have inquired or reported about them.

That *Terryberry's* position as executor wholly incapacitated him from dealing with his *cestuis que* trust, citing *Barton* v. *Hassard*, (*a*) *Watson* v. *Toone*, (*b*) *Hall* v. *Hallett*. (*c*)

Argument.

That the Master had rejected evidence to show the circumstances connected with the execution of the deed by Mrs. *Spawn*.

That on the evidence adduced the finding was erroneous; that in such a case the *onus* was thrown upon the defendant of showing that the plaintiff was fully informed of all the circumstances, and that a full consideration was given; that the consideration named in the deed was only 5s. for the release of this particular interest, and that the defendant had so stated it in an answer in another suit brought by one *Secord* against him, citing *Vandaleur* v. *Blagrave*, (*d*) *Munch* v. *Cockerell*. (*e*)

(*a*) 3 Dru. & War. 461. (*b*) 6 Madd. 153. (*c*) 1 Cox. 134.
(*d*) 6 Beav. 565. (*e*) 5 M. & C. 179.

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That if the deed were held valid, still, as to this interest, it was only a release, not a conveyance, and must enure, therefore, for the benefit of the estate, not for the individual benefit of *Terryberry*.

Mr. *Proudfoot*, for *Terryberry*, as to interest on the purchase money of the *Kramer* lot, said that all the facts appeared upon the report, and if the defendant were chargeable with the interest, it would properly come up on further directions; otherwise, if defendant were charged now, he might run the risk of having to pay compound interest.

As to all the matters objected to as exceeding the reference, they were such as, under the former practice, the Master had a right to consider when the decree contained a direction to state special circumstances. *Gayler* v. *Fitzjohn*. (*a*) And by our orders, the Master has the power to state these without specific reference. (*b*) *Carpenter* v. *Wood*. (*c*)

Argument.

The evidence proved the thrashing machine to have been given by the defendant to the plaintiff's husband on her representation that he desired to have it.

There was no law to prevent a trustee buying from his *cestuis que trust*. The rule is that he cannot purchase from himself. *Lewin* on Trusts, 3rd ed. 463; *Luff* v. *Lord*. (*d*) In *Barton* v. *Hassard*, there were circumstances of fraudulent concealment. *Watson* v. *Toone* was a purchase by a trustee from himself, attempted to be covered by the intervention of trustees. True, the trustee must be prepared to prove that the plaintiff was fully acquainted with her rights, and that an adequate consideration was given. He accepts that position here, and submits he has done so. As to the widow, she does not appeal, and the appellants have no right to

(*a*) 1 Keen. 469.
(*b*) Tayl. Ord. 143.
(*c*) Ante vol. x., p. 354.
(*d*) 11 Jur. N. S. 50.

appeal as to her interest. (On this point the Chancellor agreed with the defendant, and that matter was not pressed.)

As to Mrs. *Spawn*, her solicitor was shown to have had the fullest information; he was a trustee with her; the £625 was proved to have been paid, and the release in the deed was in consideration "of the premises, and of the sum of 5s," and it recited that the agreement was in consideration of £625 for her interest in the lands, and in her father's (the testator's) estate. This consideration runs all through, and formed the basis of the settlement; it was a sum in gross as a settlement of different claims, and the answer of *Terryberry* in the *Secord* suit set it out in the same terms. The parties were completely at arm's length throughout.

Though in terms a release to *Terryberry*, it was as effectual as an assignment. The recital showed it was intended to give him the interest; his money paid for it, and the release effectually prevents the plaintiff from impeaching it, and no one else has a right to the share thus given up by her. Argument.

So far as the appeal seeks to avoid the deed on the ground of fraud and misrepresentation, there is no evidence of any—it is in fact disproved; but were it otherwise, it cannot be impeached in the Master's office, not even by answer to a bill, on such grounds. It must be by a suit for the purpose, citing *Carter* v. *Palmer*, (*a*) *Kains* v. *McIntosh*. (*b*)

The refusal of the Master to take evidence is not made the subject of appeal, and cannot be discussed.

The Chancellor allowed the first ground of appeal on the subject of interest, and on a subsequent day said,

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(*a*) 11 Bli. N. S. 397. (*b*) Ante vol. x., p. 123.

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v.
Terryberry.

The Master has found there was no gift of the thrashing machine by the testator. If so, then the plaintiff and her husband practised a fraud upon defendant, which the Master seems to have found. I cannot say that the evidence does not justify this. It shews that the husband and wife combined to get this article, and a married woman is as responsible for a misrepresentation as a person *sui juris*. It is just that she should be made responsible here, and I think the evidence was sufficient to warrant the Master in finding her equally responsible, and therefore overrule this exception.

Judgment.

It is quite true that a trustee, in dealing with his *cestuis que trustent* must shew that everything is fair and above board, but here, upon the evidence, I cannot see any unfairness had been practised. The only deception or ignorance of Mrs. *Spawn* which is suggested, is that *Jacob Terryberry*, the executor, made a claim to a portion of the property as a *donatio mortis causâ*. It is not said that he concealed any of the facts from Mrs. *Spawn*, but on the contrary, it appears that she was aware of the evidence on which his claim rested. It was a somewhat doubtful question whether this claim could be sustained; with some difference of opinion, the judges decided against it. His sister, Mrs. *Spawn*, settled this and other disputes with *Jacob* for a certain sum, and conveyed to him her interest in the estate. After the lapse of twelve years it is sought to impeach or question this transaction on the ground of concealment and undue advantage taken by *Jacob*. I don't see any thing unfair in the matter. Both he and his sister were mistaken as to his rights, but having divers matters in dispute between them, they settled them together, and it would be most difficult, if not impossible, now to readjust them, and I therefore allow the settlement to stand.

I think, looking at the whole transaction, that the effect of the release from Mrs. *Spawn* to *Jacob* is to give him her share for his own benefit.

ROBSON v. CARPENTER. 1865.

Redemption—What is capable of registration—Foreign bankruptcy—Notice to debtor and solicitor.

In July, 1859, *F.*, being a member of the firm of *R. M. & Co.*, mortgaged certain lands, the property of the firm, to the defendant *C.* In September, 1860, by the "Act and Warrant," (under Imperial Act 19 & 20 Vic., ch. 79,) the Sheriff Depute of Lanarkshire, in Scotland, all the real and personal estate of *R. M. & Co.* in Canada, as well as in Scotland, became vested in *R.* under the bankruptcy laws of that country, as trustees; and in August, 1861, the equity of redemption vested in *R. & B.* as trustees. In June, 1861, *C.*, being ignorant of the proceedings in bankruptcy, filed his bill of foreclosure against *F.*, who took the copy served on him to *R.'s* solicitor, but no notice was taken of it; and, in 1862, a final order of foreclosure was obtained and registered by *C.*, who, in 1863, conveyed to defendant *G.* In 1864, *R. & B.* filed the present bill for redemption.

Held, that the "Act and Warrant," though containing no attestation clause; without a witness to its execution, and specifying no lands in Upper Canada, was capable of registration.

Held further, that the transferee of real estate transferred in general terms, must at his peril register the instrument, under which he claims, in the city, town, township, or place in which the lands lie; and that the conduct of the plaintiffs, after service upon *F.* and notice to *R.'s* solicitor, disentitled them to redeem.

Statement.

The bill in this cause was filed on the 31st of December, 1863, by *George Robson*, and *Alexander Black*, and *William Ross*, *James Mitchell*, and *John Fisken*, against *Austin Burke Carpenter*, setting forth that *Fisken*, in July, 1859, created a mortgage on certain lands in the county of Northumberland, for securing $300 and interest, at which time he with the defendants *Ross & Mitchell* were carrying on business as merchants, under the style or firm of *Ross, Mitchell & Co.*, and that the premises so conveyed were partnership lands, although standing in the name of *Fisken* alone.

That on the 23rd of August, 1860, under and by virtue of the Bankruptcy and Real Securities (Scotland) Act, 1857, and The Bankruptcy (Scotland) Amendment Act, 1860, sequestration of the estates and effects which

1865.
Robson v. Carpenter.

then belonged, or should thereafter belong to the plaintiffs, *Ross, Mitchell* and *Fisken*, as a company or individually, before the date of their being discharged, was duly awarded by the Lord Ordinary, officiating on the Bills in the Court of Session in Scotland, under which sequestration the plaintiff *Robson* was duly appointed trustee on the sequestered estates of the said *Ross, Mitchell & Fisken*, which was subsequently duly confirmed; and thereby all the estate and effects, real and personal, of the said *Ross, Mitchell & Fisken*, wheresoever situate, or of whatsoever nature, and whether belonging to the said parties individually, or as co-partners, became and were transferred to and vested in the plaintiff *Robson*, according to the said several statutes.

Statement.

That at a meeting of the creditors *Ross, Mitchell & Co.*, called under the 139th section of the Bankruptcy Act of 1856, *Ross, Mitchell & Co.* made certain offers of compromise in respect of all their debts, to be paid in twelve and twenty-four months after their final discharge, and, amongst other things, offered as security for the due payment of such composition, upon their being discharged of their debts, and re-instated in their said estate, to assign to the plaintiffs *Robson* and *Black*, and the survivor of them, the whole estates which were then vested in *Robson*, which offer, at a subsequent meeting of the creditors, held in April, 1861, was accepted by a majority in number, and four-fifths in value of the said creditors, and by indenture dated the 21st of August, 1861, made between *Ross, Mitchell* and *Fisken*, of the first part, and *Robson* and *Black* of the second part, all the said estates which were set out in a schedule to the said conveyance, were duly conveyed to the plaintiffs *Robson* and *Black*, to hold the same in trust for securing the payment of the said composition: that *Ross, Mitchell & Co.* had not yet fully paid the said composition.

That amongst the lands comprised in the said schedule

and assigned by the said indenture, were the lands so mortgaged to defendant: that by such warrant duly issued by the Sheriff Clerk Depute of the county of Lanark, dated the 18th of June, 1861, granted in terms of the said Bankruptcy (Scotland) Act, 1856, and acts explaining or amending the same, *Ross*, *Mitchell*, and *Fisken*, were discharged of all debts and obligations contracted by them, or for which they, or either of them, were or was liable at the date of the sequestration, and such sequestration was declared to be at an end, and the said bankrupts re-instated in their estates, reserving, amongst other things, the claims of creditors for the composition against the bankrupts.

The bill further alleged that on the 1st June, 1861, the defendant filed his bill in this court against *Fisken*, to foreclose his equity of redemption in the premises comprised in his said mortgage, and on the 16th May, 1862, a final order for foreclosure was made in that suit: that at the date of filing such bill *Robson*, as such trustee, was entitled to the equity of redemption in the said premises, and was a necessary party to the suit of foreclosure, and that before the final order was made therein *Robson* and *Black* became entitled to such equity of redemption, and they thereupon became necessary parties to the said suit: that neither *Robson* nor *Black* was made a party thereto, nor had they any notice thereof: that *Robson* and *Black* were entitled to redeem the said premises, which they had offered *Carpenter* to do, and pay him whatever sum might be found due; but that he had refused to allow them to redeem. Statement.

The prayer was that *Robson* and *Black* might be let in to redeem on the usual terms.

The defendant by his answer denied all knowledge of the facts alleged in the bill as to the bankruptcy of *Ross*, *Mitchell*, and *Fisken*, or of the sequestration of

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their estates, and alleged that he dealt with *Fisken* as the absolute owner of the property, and that he had no notice from *Fisken*, or otherwise, of any other person having any claim thereto: that he had duly registered the final order for foreclosure on the 16th or 17th of May, 1861, in the proper office, and on or about the 12th of February, 1863, he, the defendant, had sold and conveyed the said premises to one *Amelia J. Gillbard*, for $1,200, and that she was then the sole and absolute owner thereof: and that he, the defendant, never had any notice, nor was he aware that any person other than *Fisken* claimed the property until served with the bill in this cause.

Statement.

Upon the coming in of the answer, the plaintiffs amended their bill, making Mrs. *Gillbard* and her husband parties claiming the same relief as against them; Mrs. *Gillbard* not having paid more than one instalment of $136, and ten instalments of a like sum each, still remaining unpaid.

The defendant had been examined by the plaintiffs, and he had sworn that he had sold the premises in question together with other property to Mrs. *Gillbard*, she having refused to purchase unless such other property was included in the deed; and that only one instalment had been paid on account of the purchase money. And *Fisken* having been examined by the defendants, stated on his examination that "at the time I was served with the bill of complaint at the suit of the defendant *Carpenter* I handed the bill to Mr. *Patrick Freeland*, attorney and agent for *George Robson* under a power of attorney. *Robson* was then acting as trustee in bankruptcy for our firm * * * Mr. *Freeland* was solicitor for the entire estate after the act of bankruptcy at the time I handed him the bill."

The defendant *Gillbard* and wife answered the amended bill denying all knowledge of the facts alleged

in the bill as grounds for allowing the plaintiffs to redeem, and stating that they thought *Carpenter* was the absolute owner of the property. The instrument termed the act and warrant vesting the property in *Robson* was as follows:

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"Act and Warrant of confirmation of the trustee on the sequestrated estates of *Ross, Mitchell & Co.*

At Glasgow the fourth day of September, eighteen hundred and sixty years.

"The Sheriff substitute of the County of Lanark has confirmed and hereby confirms *George Robson*, accountant in Glasgow, trustee on the sequestrated estates of *Ross, Mitchell & Company*, sometime carrying on business as merchants in London and Toronto Canada West, and now carrying on business as merchants in Glasgow and Toronto Canada West as a company, and *William Ross* presently residing in Glasgow, *James Mitchell* presently residing in Edinburgh, and *John Fisken* presently residing in Toronto Canada West, the individual partners of said company as such partners and as individuals: and the whole of the estates and effects heritable and moveable and real and personal wherever situated of the said *Ross, Mitchell & Company, William Ross, James Mitchell* and *John Fisken*, are transferred and belong to the said *George Robson*, as trustee for behoof of the creditors of the said *Ross, Mitchell & Company, William Ross, James Mitchell* and *John Fisken*, in terms of the "Bankruptcy (Scotland) Act, 1856," and the "Bankruptcy and Real Securities (Scotland) Act. 1857," and "The Bankruptcy (Scotland) Amendment Act, 1860: and the said *George Robson* has as trustee aforesaid in terms of the said acts, full right and power to sue and recover all estates, effects, debts, and money belonging or due to the said *Ross, Mitchell & Company, William Ross, James Mitchell* and *John Fisken*.

Statement.

(Signed) JAMES GIBBONS,
Sheriff, Clerk, Depute of Lanarkshire."

Sigd. W. B.

And in the margin was the following memorandum authenticating the same:

1865. Robson v. Carpenter.

"Edinburgh, 1st November, 1860, authenticated by me one of the Judges of the Court of Sessions in Scotland, in terms of act of Parliament 19th and 20th Victoria, chapter seventy-nine, section 73.

(Signed)

F. MACKENZIE."

Mr. *Roaf*, Q.C., for the plaintiffs.

Mr. *C. E. English* for the defendants.

The points relied on by counsel appear in the judgment.

SPRAGGE, V.C.—The plaintiff *Fisken*, by mortgage of 21st July, 1859, mortgaged certain real estate to the defendant *Carpenter*, *Fisken* being then a member of the firm of *Ross, Mitchell & Co.*, and the real estate mortgaged being the property of the firm; the firm at the time carrying on business both in Canada and Scotland.

Judgment.

In August, 1860, the firm having become bankrupt, sequestration was awarded and the plaintiff *Robson* was appointed trustee of their estate under the bankruptcy laws of Scotland, and by an instrument called an Act and Warrant under the hand of the Sheriff, Clerk Depute of Lanarkshire, dated 4th September 1860, all the estate, real and personal, of the bankrupts, became vested in *Robson*. It is not disputed that by this instrument the real and personal estate of the bankrupts in Canada, as well as in England, became vested in *Robson*, and consequently the equity of redemption in the premises in question was in him, until certain other proceedings were taken in August 1861, whereby the equity of redemption became vested in the plaintiffs, *Robson* and *Black*, as trustees, and in *Ross, Mitchell* and *Fisken*.

On the 1st of June, 1861, *Carpenter* filed his bill of foreclosure against *Fisken*, in ignorance, it appears, of

the proceedings in bankruptcy, and of any person other than *Fisken*, having any interest in the mortgage premises. *Fisken* was served with the bill and took it immediately, it would appear, to Mr. *Freeland*, the solicitor in Canada, of the bankrupt estate. It seems that neither *Fisken* nor Mr. *Freeland* notified *Carpenter* or his solicitor that the equity of redemption was not in *Fisken*.

Proceedings went on in the foreclosure suit, and on the 14th of May, 1862, a final order for foreclosure was obtained which was registered shortly afterwards. In February, 1863, *Carpenter* conveyed the land comprised in the mortgage, with other lands, to the defendant *Amelia Gillbard*, who has paid as yet, only a small part of the purchase money. The conveyance, *Carpenter* to *Gillbard*, has been registered.

Under these circumstances the plaintiffs file their bill to redeem, and the principal question made upon argument is, whether the instrument of 4th September, 1860, which has not been registered in Upper Canada, is capable of registration.

Judgment.

The instrument is a formal one, given under the Imperial Act 19 & 20 Vic., ch. 79. It is signed *James Gibbon*, Sheriff, Clerk Depute of Lanarkshire, and is authenticated by one of the judges of the Court of Session in pursuance of the act. It contains no attestation clause, nor is there any witness to its execution unless the initials *W. B.* to the left of the signature of Mr. *Gibbons* are intended to be there as attesting the execution of the instrument.

It must be conceded that the instrument does not seem to fulfil all the requirements for registration pointed out by our Registry Act. It does not describe any lands in Upper Canada, nor mention that any lands in Upper Canada belonged to the estate of the bankrupts

1865. as a firm, or individually, and it has no witness to its execution.

Robson v. Carpenter.

There being no witness to the instrument is not a difficulty which has been felt to be insuperable in England. In *Moore* v. *Culverhouse*, (*a*) a letter from a mortgagor to the solicitors of the mortgagee, directing them to hold the deeds relating to the lands mortgaged, after payment of that mortgage in favor of Messrs. *Reid & Co.*, of Liquorpond Street, to secure them, as second mortgagees, a sum named, as lent by them to the writer, was held to be a conveyance by way of mortgage of the equity of redemption, and registrable under the statute of Anne.

The instruments registrable under the Statute of Anne are "Deeds and Conveyances," and the provision as to witnesses to the memorial, and that one of them shall also be a witness to the instrument registered, are similar to those in our acts. How the difficulty was got over does not appear. In the previous case of *Wright* v. *Stanfield*, (*b*) heard before the same learned judge some thirteen months before, these difficulties were suggested; and the Master of the Rolls held the instrument then in question not registrable on other grounds, as appears by *Moore* v. *Culverhouse*, and Lord *St. Leonards*, referring to both cases, questions the later of the two, but only on the ground that it was an equitable mortgage to which the statute does not apply, a distinction that does not apply to the instrument in question in this suit.

Judgment.

There being no lands specified in the instrument may be another difficulty. What are transferred are generally "the whole of the estates and effects, heritable and moveable, and real and personal, wherever situated." I think, however, and should be prepared to hold, until the contrary is decided, that the transferree of real estate transferred in general terms must at his peril

(*a*) 27 Beav. 639. (*b*) 27 Beav. 8.

register the instrument under which he claims in the "city, town, township, or place," in which the lands lie. Any other construction of the act would exempt from the necessity of registration, wills containing a general devise of real estate, and conveyances conveying real estate generally. In trust deeds for the benefit of creditors there is often a description of some land with a general conveyance of all other lands of which the debtor may be seized. If a *bona fide* purchaser from the heir in the one case and from the debtor in the other, were not protected, the consequences would be most mischievous.

1865.
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It has not been contended, nor, although I had at first some doubt upon the point, do I think it could be successfully contended, that the act and warrant was not a conveyance or assurance capable of registration. I think it is. It is the act of a public officer, and the effect given to it by the Imperial Statute is to vest the real and personal estate of the debtor in the trustee.

Judgment.

I must, therefore, under the authorities to which I have referred, hold the "Act and Warrant" of the 4th of September, 1860, registrable under our registry law. But in addition, the Imperial Act itself contains a provision for its registration. Section 102, after declaring the effect of the instrument, contains this proviso, "Provided also that where, according to the laws of England, Ireland, or other Her Majesty's dominions, any deed or conveyance would require registration, enrolment, or recording, the act and warrant of confirmation shall be so registered, enrolled, or recorded, according to the laws of England, Ireland, or other Her Majesty's dominions; and if any purchase is made by any person for valuable consideration, and without notice of the sequestration prior to the registration, enrolment, or recording of the said act and warrant of confirmation, such purchase shall not be

1865. invalidated by the existence of such act and warrant, or the subsequent registration, enrolment, or recording thereof."

Robson v. Carpenter.

A doubt might be suggested whether the words "would require registration, enrolment, or recording," mean, in order to give validity, or in order to give priority to the instrument; but I think the provision in the same clause, in favor of purchasers for value without notice, shows that priority was meant. The effect, then, of this provision must be that in Upper Canada a purchaser for value without notice is protected, unless the act and warrant is registered, and I apprehend that the trustee is bound to present it for registration, and the registrar bound to register it under the authority of the Imperial Act, and that, probably without proof of any kind, for the statute declares that the instrument, authenticated as is the one put in this case, shall be received in all courts and places within England, Ireland, and Her Majesty's other dominions as *prima facie* evidence of the title of the trustee. In fact the instrument *proves itself*, and I should think that that circumstance alone, without going to the registration clause in the Imperial Act, would make the instrument registrable under our registry law, notwithstanding its not being attested by any witness.

Judgment.

There is, I incline to think, this further reason why the plaintiffs should not be allowed to redeem. *Fisken* was served with the bill two days after it was filed, and carried it to the solicitor for the trustee, *Robson*, in whom the estate was then vested. Yet the suit was allowed to proceed, and the bill was taken *pro confesso*, and other proceedings, had without intimation from any quarter, as appears by the examination of *Carpenter*, of there being any one but *Fisken* interested in the redemption of the property, or of there having been any transfer of interest whatever. The service on *Fisken* was notice to the other members of his firm, and *Robson* I must take to have also had notice, and I have no

reason to doubt that he actually had notice. Yet all these parties leave the mortgagee in ignorance of what had occurred, to proceed with his suit, to obtain his final order for foreclosure, to deal with the estate as his own, to sell it some nine months after final order to purchasers as innocent as himself of all knowledge of this transfer of interest, and then more than ten months after this sale, and more than two years and a-half after notice of *Carpenter's* bill to foreclose, they file their bill to redeem. I cannot help thinking that such conduct, upon principles well understood in this court, disentitles these parties to redeem.

1865. Robson v. Carpenter.

Judgment.

I think the plaintiffs' bill ought to be dismissed with costs.

Harrison v. Armour.

Equitable mortgage, by deposit of title deeds—Registration.

Where a mortgage was created by the deposit of title deeds, and the borrower signed a memorandum stating the sum loaned and times for repayment: and agreeing to execute a writing to enable the lender to transfer, or control the mortgages so deposited:

Held that this memorandum did not require registration to secure its priority over a subsequently registered incumbrance: such memorandum not being in the language of the act "a deed, conveyance or assurance affecting lands."

This was a suit to enforce payment of a sum of £1000 and interest, by sale of the defendant's interest in certain mortgages deposited by him with the plaintiff, the defendant on the occasion of making such deposit having signed a memorandum shewing the amount borrowed and the times at which the same was to be repaid. In taking the accounts under the decree, the Master allowed the claim of the plaintiff, in priority to that of one *Fanson*, a judgment creditor of *Armour*, and who had registered his judgment.

From this report of the Master, *Fanson* appealed,

1865. Harrison v. Armour. contending that he was entitled to priority over the plaintiff, the plaintiff having omitted to register the memorandum so signed by the defendant, and thereby lost his priority as against his judgment which had been duly registered. In support of the claim of the plaintiff, it was insisted that this was not such a document as could be registered.

Mr. *Fitzgerald* for the appeal.

Mr. *Kingstone* contra.

Spragge, V.C.—The point argued is whether the following paper is registrable; or requires to be registered.

"*William Armour* to *Robert Armour*....	£500
James J. Bailey to *Robert Armour*....	1493
Wm. John Fraser to *Robert Armour*...	240
Johnston & White to *Robert Armour*....	140
	£2373

Judgment.

I have this day borrowed from Mr. *Duncan B. Harrison* one thousand pounds, and I have deposited with him the above mortgages as security for the repayment, one-half at two months and one-half at six months: and I agree to execute any power of attorney or other writing to empower said *Duncan B. Harrison* to transfer or control the same.

September 28th, 1857.

Robert Armour."

In the case which I have just disposed of, *Robson* v. *Carpenter*, I considered two cases before the Master of the Rolls, *Wright* v. *Stanfield*, (*a*) and *Moore* v. *Culverhouse*. (*b*) In the former case the paper was in this form, "Memorandum. In consideration of your having this day advanced and lent to me the sum of £125, for which I have given you my warrant of attorney, I hereby agree to charge my leasehold houses situate in Grosve-

(*a*) 27 Bev. 8. (*b*) 27 Beav. 639.

1865.

Harrison v. Armour.

nor Street, Pimlico, with the payment of the same; and I hereby undertake at your request and at my own cost, to execute a proper assignment of the said premises as you may direct," &c. This paper the Master of the Rolls held not registrable; but he held the paper in *Moore* v. *Culverhouse* registrable. Counsel distinguished the latter case from the former on the ground that in the former the contract was merely executory, the mortgagee having agreed to execute at a future time an assignment; and which assignment, therefore, it was impossible to register until it had been completed. Whereas in the latter case there was an equitable assignment which vested the equitable interest in the Messrs. *Reid:* that the latter was an executed contract, and a complete equitable assignment of the existing interest of *Coney*, and nothing more remained to be done by him. By comparing the papers in the two cases, it will be seen that the one in the earlier case is not less formal than the other. The only distinction attempted to be drawn was the agreement in the earlier case to execute an assignment. And to this Sir *John Romilly* seems to have acceded.

Judgment.

There is an older case of *Sumpter* v. *Cooper*, which was not referred to in *Moore* v. *Culverhouse*, (*a*) though it had been cited in *Wright* v. *Stanfield*. In that case an equitable mortgage was created by deposit of title deeds, and sometime afterwards the depositor executed an assignment to the depositee, but which assignment was not registered; and it was contended that whatever lien was obtained upon the premises by the depositee, as equitable mortgagee, was merged when he took an absolute assignment of the same property, and that by that assignment his title must stand or fall. The judgment was given by Lord *Tenterden*, after taking time to consider. Upon this point, it is very short. "As to the statute of Anne, we think it cannot be held to apply to

(*a*) 2 B. & Ad. 223.

1865. Harrison v. Armour.

the case of an equitable mortgage. It refers only to the registration of deeds, and where there is merely a lien or equitable mortgage created by the deposit of deeds; there is no instrument to be registered."

These three cases are thus noticed by Lord *St. Leonards:* (*a*) after giving instances of instruments not requiring registration, he says, "nor does an agreement to assign a leasehold estate as a security for a loan," and for this he cites *Wright* v. *Stansfield;* he proceeds, "for the statute does not apply to the case of an equitable mortgagee," for which he cites *Sumpter* v. *Cooper*. He then refers to *Moore* v. *Culverhouse*, in which he says, "the Master of the Rolls held otherwise, and considered that his own decision was the only authority the other way, and he thought his former decision rested on different grounds; but in the case of *Sumpter* v. *Cooper*, in 1831, the court of King's Bench expressly decided that the statute did not apply to the case of an equitable mortgage;" and he then adds the words of Lord *Tenterden*, "It refers only to the registration of deeds, and where there is merely a lien or equitable mortgage created by the deposit of deeds, there is no instrument to be registered." It is clear enough that where an equitable mortgage is created simply by the deposit of deeds, there can be no instrument to be registered; but I think it is evident that both Lord *Tenterden* and Lord *St. Leonards* meant that the memorandum of deposit, which, though it is not essential to the validity of an equitable mortgage, ought, it is said, always to be made and signed when title deeds are deposited, is not an instrument which requires registration. What is meant I have no doubt is, that it is the deposit which creates the equitable mortgage; that the memorandum is not a deed or conveyance, or in the language of our statute a deed, conveyance or assurance affecting lands, but simply a memorandum showing as a piece of evidence

Judgment.

(*a*) V. & P. 14 Ed. 727.

the purpose for which the deposit of title deeds is made, a purpose which may be shewn by parol, but is better shewn by a memorandum in writing, and it is on this ground, I apprehend, that Lord *St. Leonards* questions the case of *Moore* v. *Culverhouse*.

1865.
Harrison v. Armour.

But supposing both the cases before Sir *John Romilly* to be good law, this case falls rather within the one in which the instrument was held not to require registration; the paper in this case as in that containing, in addition to the memorandum, an agreement to execute a transfer, the ground upon which in the later case, the earlier one was supposed to be sustainable.

Judgment.

My conclusion is, that the paper in question did not require registration, and that the appeal from the Master must be disallowed, with costs.

With regard to the state of the law in respect of instruments incapable of registration, but which create equities to which the court is bound to give effect, it is a question for the legislature. In this case, as it happens, there is no real hardship, as the party seeking priority is a judgment creditor, who has no equity whatever to be preferred to the plaintiff.

1865.

MILLER v. MCNAUGHTON.

Costs—Administration order.

A legatee filed a bill against executors and another person, between whom and the executors it was charged improper dealings had taken place with the estate. The charges so made were not sustained in evidence, and the plaintiff was therefore ordered to pay the costs of the defendants to the hearing, and allowed only costs of and subsequent to decree; and cross-charges of improper conduct having been brought against the plaintiff by other legatees made parties to the suit, and not substantiated; the costs incurred in resisting such charges were directed to be paid by the parties making them.

This was a hearing on further directions of the case, reported *ante* vol. ix., page 545. The plaintiff *Mary Miller*, a legatee of *Graham Lawson*, the testator, of whom the defedants *John McNaughton* and *Ninian Lindsay* were the executors, had in her bill alleged that the executors had collusively cancelled, or refused to take proper means to collect, a debt of $700, due from one *John G. Scott*, also a defendant, to the estate.

Statement.

The plaintiff failed to sustain this allegation, and the bill as to *Scott* was, at the hearing, dismissed with costs, but the costs of the executors were reserved. Other charges of mal-administration were also alleged in the bill, but not sustained in evidence before the Master.

The court, on the hearing, on further directions, refused the plaintiff any costs prior to decree, considering the case one proper for an administration order only; and directed the costs of the executors to decree to be borne by the plaintiff.

Other legatees, made parties in the Master's office, made charges against the plaintiff, with the view of proving a forfeiture by her of her legacy under a defeasance clause in the will. Evidence having been taken and costs incurred in prosecuting these charges unsuccess-

fully, it was contended that the parties making them ought to bear the costs so occasioned.

Mr. *Proudfoot* for the plaintiff.

Mr. *J. C. Hamilton* for the executors.

Mr. *R. W. Adams* for an infant defendant.

Mr. *J. Livingstone* for other defendants.

The following authorities were cited by counsel: *Sharples* v. *Sharples*, (*a*) *Bartlett* v. *Wood*, (*b*) *Duckles* v. *Nothard*, (*c*) *Colchester* v. *Lowten*, (*d*) and *Hodgins* v. *McNeil*, (*e*.)

Judgment.

SPRAGGE, V.C.—As the circumstances of this case have turned out upon evidence, no reason appears to exist why the plaintiff should not have proceeded to obtain an administration order upon notice. The allegations in the bill, in relation to the note alleged to be due by the defendant *Scott*, are not sustained in evidence; and the bill was dismissed as against him. The case against *Scott*, and against the executors in connection with that case, and other charges against the executors, which as the facts really appear upon evidence are, to say the least of them, unnecessarily introduced into the bill, were, as I infer, the reasons why a bill was filed. By this course the estate has been put to considerable expense, and as this has been occasioned by the plaintiff, I must give against her the costs of the executors up to the decree.

I think the plaintiff entitled to her costs of, and subsequent to, the decree. I do not mean the costs of

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(*a*) McClelland, 586, S. C. 13 Price 745.
(*b*) 4 L. T. N. S, 693.
(*c*) 7 L. T. N. S, 62.
(*d*) 1 V. & B. 246.
(*e*) Ante vol. ix., p. 305.

1865. the hearing, but of the decree and costs subsequent. She is a residuary legatee. In *Sharples* v. *Sharples*, the plaintiff filed his bill as a residuary legatee, and also as a creditor, and the Lord Chief Baron, while giving costs against him as creditor, held him entitled to costs as a residuary legatee, upon grounds which apply to this case: he held him not bound to receive and acquiesce in the unsupported statement of the executors; but that he had a right to have an account of the estate taken with the sanction of oaths, and all the other guards against deception which a court of equity can supply; and he intimated that if the executors had offered an inspection of the accounts, the legatee would still have a right to have them taken in the court. Mr. *Daniels*, in his last edition, states the rule in the same terms as laid down by the Chief Baron.

Miller v. McNaughton

I think it right to say that the executors stand free from all reproach in the administration of the estate. They may have erred in judgment in leaving a portion of the estate out upon personal security: but they seem to have taken legal advice; and their doing so does not seem to have been complained of even by the plaintiff, who appears to have been particularly keen in looking after her own interests. It is only complained of by the bill, by amendment, and is not made the ground of any application upon further directions.

Judgment.

The costs payable to the plaintiff out of the fund may be set off against the costs payable by her. The infants are, of course, entitled to their costs. There appear to be also costs which have been incurred in prosecuting an enquiry directed at the instance of legatees other than the plaintiff, as to whether the plaintiff had forfeited her share of the estate by offering obstruction to the execution of the testator's will by the executors. This inquiry appears to have been prosecuted some length and then abandoned. The costs of the order

directing the inquiry are by the order made costs in the cause; but the costs of prosecuting the inquiry, which has been unsuccessful, ought not to fall upon the estate, but be paid by the legatees who obtained the order to the plaintiff, who resisted it. Liberty may be reserved to all parties to apply.

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Miller v. McNaughton

Smith v. Roe.

Executors—Administration suit—Investment of moneys of testators—Costs.

Although the rule is, that executors or trustees will be charged with what they ought to have made, with what they actually did make, or with what they must be presumed to have made, out of the moneys of the testator, come to their hands; still, where such moneys had, before the repeal of the usury laws, been invested in first-class security at the rate of six per cent. per annum, the court, on appeal from the Master's report, considered the executors were not called upon, at the risk of being charged with the extra amount of interest, to call in those moneys and re-invest the same at the rates, as the evidence shewed, moneys could have been loaned at. It also appearing that part of the money of the estate had been loaned by the executors to themselves, they were charged with the higher rate of interest thereon.

Where the report of the Master shewed that the conduct of the executors, in neglecting to prepare accounts or afford information reasonably called for by the legatees, had given rise to the suit, the court charged the executors with the general costs there, but set off against such general costs, certain costs occasioned by unfounded claims set up by the bill.

This was an administration suit, instituted by the two married daughters of the late *Angus McArthur*, claiming as beneficiaries under his will, against *William Roe*, *John Holmes*, *Duncan McArthur*, (executors and trustees under the testator's will,) and others, alleging several acts of maladministration on the part of the trustees, and praying an administration of the estate by the court.

Statement.

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Smith v. Roe.

A decree was by consent drawn up, referring it to the Master to make the usual inquiries, and take the accounts of the estate, and to report any special circumstances bearing upon the question of costs. In pursuance of this decree the Master made his report, stating several acts of improper dealing with the estate, setting forth at considerable length the evidence establishing such improper dealing: that the executors had loaned the moneys of the estate at six per cent., while a higher rate of interest before and since the repeal of the usury laws could have been obtained by the purchase of mortgages, had that course been adopted, such a course being authorized by the will; and he charged them with interest at that rate as well on moneys which they had improperly loaned to each other, as on those lent to third parties. It also appeared, that about two months before the commencement of this suit, the solicitors of the plaintiffs had written a letter addressed to the executors, calling upon them for information as to their dealings with the money, but that none such had been furnished; nor was any notice of such request taken by the executors until after the bill had been filed.

Statement.

From this report of the Master the plaintiffs appealed upon the ground, principally, that the Master should have charged the defendants with interest at a higher rate than six per cent. per annum.

This appeal came on for argument before the late Vice-Chancellor *Esten*, when the report was referred back to be reviewed, his Honor stating: "I think that this report should be remitted to the Master for reconsideration. The wholesome rule seems to be established by the more modern authorities, that an executor or trustee shall be charged with what he ought to have made; with what he actually did make; or with what he must be presumed to have made. The rule is still the same in England, that an executor simply

neglecting to invest the fund, but making no profit from it, and preserving it, will be charged with only four per cent. interest; but it is observable, that his duty in most cases would be to invest in the three per cents, and that four per cent. therefore is rather more than he would have made had he done his duty. Whether, under the same circumstances, he would be charged in this country with only six per cent. if it should appear that he could have made more is questionable. It seems from the case of *Penny* v. *Avison*, (*a*) that the interest in England includes both five per cent. and annual rests. In this country it will undoubtedly include six per cent. if not a greater rate of interest and annual rests. The first question in this case is, whether the executors ought to have received more than they did. They could only have done so up to August, 1858, by buying mortgages, and I am not prepared to assume that there was such an abundance of *bona fide* mortgages in the market as to justify me in imputing default to these executors because they did not invest the trust money in securities of that description during that time. The Master, however, should, I think, inquire whether, since the repeal of the usury laws, more than six per cent. could not have been realized, and whether, therefore, the executors ought not to have obtained it. With regard to the time which elapsed between the death of the testator and the repeal of the usury law, two questions seem to present themselves: one, whether executors acting as these executors did, that is retaining moneys in their own hands, and applying them to their own use, but giving security, do not stand in the same position as trustees who use the trust moneys in their trade, and who are presumed to make compound interest at a certain rate, five or six per cent., perhaps more, and are not allowed to controvert that presumption. I think it very reasonable so to hold, as the mischievous practice of trustees dealing with the trust estate in any

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(*a*) 3 Jur. N. S. 63.

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way, for their own benefit, ought to be checked whenever an instance of it occurs. It is true that a trustee giving security stands in a better position than a trustee who has used the trust moneys without giving security; but the court must mark its displeasure in some way, and cannot impose a lighter penalty than six per cent., and annual rests. It is true that the court does not proceed on the principle of inflicting a penalty, but doubtless the object of the rules that have been established is to discourage practices which are all the more detrimental, because if not bearing a dark tinge of delinquency, they are likely, if not checked, to become frequent. The other question is, whether the executors, handing the moneys of the estate to one another, are not responsible each to the full extent, and I think they should be held liable to that extent, just as a trustee handing the trust moneys to his friend, who uses them in his trade, will be held equally liable with the friend himself. I think, therefore, that the Master should review his report in the particulars I have mentioned. I may observe that the conduct of the executors may affect the disposition of the costs, but if the satisfaction awarded by my judgment be accepted, it may be considered as a compensation, and may destroy the effect of the acts of the executors as to costs."

Judgment.

Thereupon an order was drawn up, referring it back to the Master, to inquire at what rate of interest the defendants (the executors) could, since the passing of the Act, (22 Victoria, chapter 85,) have safely invested the money of the estate, and if the Master should find that they could have safely invested the same at a higher rate, then to take an account of the amount that might have been received: but prior to the said act, interest at six per cent only should be charged, and on such sums as the executors had used or retained the Master was directed to compute interest, with

annual rests, in the manner indicated by the foregoing judgment. 1865.

Smith v. Roe.

The defendant *McArthur*, one of the executors, being dissatisfied with this order, set the case down to be re-heard before the full court.

Mr. *McLennan* for the plaintiffs.

Mr. *G. D. Boulton* for *McArthur*.

Mr. *Blake*, Q.C., for the other two executors.

At the conclusion of the argument the court directed the order to be varied by striking out the clause as to annual rests, it appearing that such interest as had been paid had been paid annually. The court also directed the Master to inquire, "whether, under the circumstance, since the repeal of the usury laws, the executors were bound to get, and could have obtained, a greater rate of interest than six per cent. per annum on the moneys of the estate, and if so, it is ordered that the said Master do charge the said executors therewith accordingly." Statement.

Upon the case coming again before the Master, the defendants made an admission, which was drawn up and signed by the solicitors of the defendants, the trustees, in the words following:

"The defendants above-named admit that since the repeal of the usury laws they could have obtained eight per cent. per annum upon the moneys of the estate in the pleadings mentioned upon good securities, except moneys secured upon the mortgage of *Charles Thompson*, in the pleadings mentioned. The defendants, however, further state that, acting upon the discretion given them under the will of the said testator, they considered it more beneficial for the said estate to allow the original investments to remain where the parties were willing so to do, rather than incur the risk and delay in making fresh investments; the original

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investments being made upon first class securities, and the defendants therefore state and submit that, under the circumstances, since the repeal of the usury laws, they were not bound to get a higher rate of interest than six per cent." And the Master thereupon made his report charging the executors with interest on all sums since the repeal of the usury laws, at the rate of eight per cent. per annum.

From this report the executors appealed, on the ground that the defendants, as executors, were not bound to get in moneys invested at six per cent., and find out investments at a higher rate.

Mr. *Blake* for the executors.

Mr. *McLennan* contra.

Judgment.

VANKOUGHNET, C.—Taken together, I do not understand the admissions of the executors to amount to more than this, that had they withdrawn the moneys invested, they might have obtained eight per centum interest on them by fresh loans. I do not understand them to mean that they had any offers for these moneys at eight per cent., or that they were aware of any particular investment they could have made at that rate, or anything more than that money fetching that rate of interest in the market on good securities, they could have obtained it. The subsisting investments were all made by the executors before the repeal of the usury laws at six per cent. interest per annum, which was all that at the time they were justified in stipulating for. Six per cent. is the legal rate still when there is no express contract to the contrary. It is the rate which the law fixed as fair and reasonable, if not the legitimate rate. The moneys were properly secured at it when the usury laws were repealed, and upon first class securities, and I do not think the executors acted unwisely or indiscreetly, or in abuse of the trust reposed

in them, by not calling in these moneys, and running the risk and delay of getting fresh investments, even though eight per cent. was the ruling rate paid in the market by parties in want of money. Months might have elapsed before a satisfactory title could have been made out to lands offered in security, and all this time the moneys would have been lying idle, delay might have been incurred, and expense too, in getting the moneys. All this would not have excused the executors from getting in outstanding moneys, and investing them if they were not already well invested, at a reasonable rate of interest; but as they were so invested at a rate which the legislature had pronounced reasonable, I think the executors not blamable for not disturbing the investment, and seeking a higher rate. They state that in the exercise of their discretion, they thought it best for the estate to leave the investments as they were. The testator necessarily intrusted them with a discretion in the execution of the trusts reposed in them. The duties of a trustee and executor are sufficiently onerous, responsible and hazardous, without throwing upon him the burden of hunting up borrowers at a rate of interest beyond the normal rate which the law recognizes. I think parties interested in an estate which is left for them to the care of others, strangers to it, cannot expect this, but must content themselves with reasonable exertion and watchfulness on the part of their trustees. If an executor, having moneys to invest, were offered eight per cent. for it on a first class security, and refused it and invested at six per cent., the payment of the eight being equally certain and well secured, the case would be a different one; for this court has sanctioned loans of trust funds in its custody at eight per cent., though of the policy of this I have had occasion before to express my doubt. I think the report must go back to the Master on this head. The executors submit to be charged with eight per cent. on the moneys retained by them in their own hands.

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Judgment.

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Subsequently the case was brought on to be heard on further directions, when the question whether the executors should receive their costs out of the estate or simply be deprived of them; or whether, as the plaintiffs insisted, they should be ordered to pay them, was the one principally discussed.

Mr. *McLennan* for the plaintiffs.

Mr. *Blake*, Q. C., and Mr. *G. D. Boulton*, for defendants.

The authorities referred to appear in the judgment of

SPRAGGE, V. C.—[before whom the case was heard.] This bill is filed by two specific and residuary legatees against the executors, adversely against the three acting executors, charging them with various acts of improper conduct. The decree, which was by consent, directed an account, and *inter alia*, that the Master might report upon facts bearing upon the question of costs. The estate was of considerable amount, upwards of £8,000, and in the hands of the executors for administration from 1848, when the testator died. The bill was filed on the 5th of January, 1860. The chief point debated on further directions has been the question of costs; one of the most troublesome of the questions that arise in administration suits; and in regard to which it is difficult to gather from the authorities any settled rule.

Judgment.

The Master's finding upon the facts bearing upon the question of costs is of considerable length. He finds that considerable amounts of the funds of the estate were borrowed by the executors themselves, and other sums lent by them to Mr. *Maconchy*, their agent, in the settlement of the estate. He reports that one of the executors, *Roe*, states in his evidence, "the legatees knew the executors borrowed money of the estate, and they never objected to it. Mrs. *McArthur* (co-execu-

trix and widow of testator) knew also and assented to it." The Master only reports that such evidence was given, without finding the facts as it was referred to him to do. He finds that upon these loans the interest was paid irregularly. He finds that moneys of the estate in the bank were not kept separate from the private account of the agent, and that the legatees were paid by the private cheques of the agent. As to the keeping of the accounts of their dealing with the estate, he reports: "As to the allegations in the said pleadings, that no proper account books have been kept, and generally as to the same and the accounts, I find that the said account books have not been kept in such way or manner as it was the duty of the executors to keep them, especially, taking into consideration the fact of their having employed an accountant or agent for the purpose, and no book was kept which was a contemporary record of all receipts and payments in respect of the said estate. The book kept during the currency of said *Maconchy's* management was not at first produced under the order for production issued in the cause, but one compiled from it or based thereon; the original book having been kept and made up in a very inferior manner to the one so compiled. The original books would not at most times during the currency have afforded to the persons interested in the estate information of the condition and state of the accounts in many important particulars. Many of the entries are without dates and not made when the transaction occurred, being in fact made in gross to the extent of a page or more at one time, and were therefore not contemporaneous with the transactions to which they refer; and the said book was not indexed or paged until after the commencement of this suit. That some leaves of the said book have been taken out. And the said *Thomas Maconchy*, in reference thereto, states in his depositions, 'The pages or leaves which appear to have been torn out I tore out myself; there were none torn out for the purpose of hiding anything; it was because of mistakes. Sometimes I might find that entries made were previously entered, and then I tore out the leaf; there was no intention of concealment.'"

Judgment.

As to the interest account not being regularly made up and credited, he reports, "As to the allega-

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tions in the said pleadings mentioned in respect of interest not having been regularly made up and credited, I find that an account was kept of each mortgage investment; and when it was wished to ascertain the total amount of interest received up to a particular date, the said agent extracted from such accounts of each separate mortgage investment the amount of interest received and thus compiled a special interest account, but these special interest accounts were made up at intervals of several years only; and the former of these accounts appears to have been superseded by others more recently compiled; and such interest accounts were made and kept in a confused and unsatisfactory state."

As to the loans to the executors themselves, the Master reports an opinion of counsel, given to the executors shortly after the testator's death, in which, among other points, is the following passage: "The other executors can purchase a mortgage against one of the executors, and so can one of the executors mortgage property for the estate, on loans made to the one." This was mistaken advice—*Passingham* v. *Sherborn*, (*a*) and besides, does not cover all that was done, for the loans to the agent were on his personal security; but he was a man of such good standing that it was not considered that the money lent to him was in any danger.

Judgment.

It is hardly necessary to say that the Master reports several points in which the dealing of the executors with the estate, and their conduct in not keeping proper accounts was unquestionably improper.

It would be unprofitable to go through the many cases to be found in the books on the subject of the misconduct of the executors, and how the court has dealt with them in the matter of costs. Some judges have dealt very leniently with executors as a matter of policy, lest if dealt with otherwise, men might be deterred from as-

(*a*) 9 Bea. 424. 434.

suming what was often an onerous and troublesome duty; while others again have visited all dereliction of duty with more severity, both as to costs and to charging with interest. Perhaps the rule laid down by Sir *Thomas Plumer*, in *Tebbs* v. *Carpenter*, (*a*) is, so far as it goes, as sound a rule, that is, as a general rule, as can be found in the books. "If a suit would have been proper and the executor a necessary party, though the executor had not misconducted himself, he ought not to pay *all* the costs of that suit, though in the course of the suit it appears he has misconducted himself; but if the misconduct of the executor was the *sole* occasion of the suit, he ought then to pay the costs."

But this rule certainly has not been always followed. *Williams* v. *Powell*, (*b*) was a case of great misconduct on the part of an executor, and it is difficult to see what occasioned the suit except his misconduct; but Sir *John Romilly* gave him the costs as of an administration suit, and gave against him the rest of the costs. The reason is not given, but it was probably one that has been given in other cases, that the executor has a right to have the estate administered in this court. The late Vice-Chancellor *Esten*, in *Wiard* v. *Gable*, (*c*) apportioned the costs, upon the authority of that case, in the same way. In two later cases, however, before Sir *John Stewart*, *Eglin* v. *Sanderson*, (*d*) and *Wroe* v. *Seed*, (*e*) the whole of the costs were given against defaulting executors. And a late case in this court, before his Lordship the Chancellor, *McLennan* v. *Heward*, (*f*) is a decision in the same direction. There is, however, this distinction between that case and this, that though against the estate of an administrator, it was rather, as intimated by the Chancellor, against the deceased as agent, he having been agent in respect of the moneys for which his estate was called to account,

Judgment.

(*a*) 1 Madd. 290.
(*b*) 15 Bea. 461.
(*c*) Ante vol, viii., p. 458.
(*d*) 8 Jur. N. S. 329
(*e*) 9 Jur. N. S. 1122.
(*f*) Ante vol. ix, p. 279.

1865. and having afterwards administered to the estate of the person whose agent he had been.

Smith v. Roe.

Since *White* v. *Cummins*, (*a*) it cannot be considered the law of this court that an executor is entitled, as of course, to have the estate administered at the expense of the estate in this court; and the estate in question would seem to fall within the rule of *White* v. *Cummins*. The Master reports that he has taken no account of the testator's debts, the parties represented before him, the executors among others, being satisfied that none now exist; and he reports also that there is no personal estate outstanding. I find difficulty therefore in apportioning the costs.

It would be out of the question to give the executors their costs in the face of all that is reported by the Master. I must give the costs against them, unless I see that, notwithstanding what is reported, their conduct has not occasioned the suit. It is urged for them that the real question has been, whether the executors were not bound to get in moneys invested at six per cent., and invest them, since the law allowed them to do so, at a higher rate. The court has held that they were not bound to do this: nevertheless, executors acting zealously for the interests of the estate, might have notified parties with whom moneys were invested, that they should expect a higher rate; and intimate that the money might be called in for re-investment elsewhere unless a higher rate were paid; but unfortunately the executors were themselves borrowers, and it was not their interest to get a high rate of interest upon investments. In taking the accounts they have consented to be now charged with eight per cent, but that does not alter the question. I do not mean to dissent from the ruling of the court; but it was a fair question, under the circumstances, to bring before the court; and what is of more

Judgment.

(*a*) Ante vol. iii., p. 602.

importance, it finds no place in the plaintiff's demand for information or in the bill. 1865. Smith v. Roe.

It is also urged, that in lending to one another the funds of the estate, they acted under the advice of counsel, that they might do so; and *Angier* v. *Stannard*, (*a*) is cited to shew that in such case they cannot be visited with costs. In the case cited a trustee had refused, under advice of counsel, to do a certain act. In this case the questionable act was for their own benefit, and was certainly improper, so improper that in *Passingham* v. *Sherborne*, Lord *Langdale* said if the act then done, a lease to a trustee by the trustees, had not been expressly authorized by the will, he would have visited the transaction with costs: but it is said the legatees did not complain; that ought not to excuse the executors, they ought not to have done what was wrong, even if the wrong was not complained of.

Judgment.

Further, it is urged that the bill was filed hastily. A letter was written eight and a half weeks before bill filed, perfectly courteous in its terms, asking for information, and concluding thus: "As executors, you are aware that it is your duty to have your accounts at all times ready; but if they are not in such condition, as to enable you to supply us with the information required immediately, please communicate to us the time you will need for the purpose."

Partly through accident, no answer or even acknowledgment was sent to this, until the day after the bill was filed; but it was not then too late. If the executors had then made a proposition which the plaintiffs ought to have accepted, and did not accept, the court would certainly give no costs against the executors. It is said that too much was asked by this letter; that executors are not bound to render accounts, but only to have them ready for inspection. I agree

(*a*) 3 M. & K. 572.

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that they are not bound to do more; but it was information that was asked for, and the answer should have been that the accounts were ready for inspection, or if not, a day should have been named for their being so.

Some claims were made by the plaintiffs in the Master's office beyond what they were entitled to. When parties become litigants they, or the professional gentlemen who represent them, generally do this. It does not follow that if the executors had acted correctly the plaintiffs would have filed a bill to enforce unfounded claims

I think the conduct reported by the Master on the question of costs was of such a nature as to give proper occasion for filing a bill, and that the proper conclusion is, that it was the sole cause of the suit being brought in the sense in which the words are used in *Tebbs* v. *Carpenter;* and that the plaintiffs are entitled to the general costs of the suit against the three acting executors. On the other hand, the costs occasioned by unfounded claims set up by the plaintiffs must be taxed against them, and set off against the general costs. They are probably so very much less than the general costs that it would not be right to make the circumstance of there being costs each way a reason for giving costs to neither party.

Judgment.

Upon the directions, other than as to costs, I understand, there is no contest; they will therefore be as asked by the plaintiffs.

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EMES v. EMES.

Executors and their accounts—Delay in administering—Acknowledgment of indebtedness—Statute of limitations.

A testator, a short time before his death in 1841 and during his last illness, signed a statement by which he acknowledged himself indebted to his father, one of his executors, in the sum of £73 8s. 5d. His will contained direct authority to his executors to sell his real estate for the payment of his debts. In 1843 the executors obtained an administration order, and the father sought to have his claims against the estate, including the amount so acknowledged, paid by a sale of the land. These claims were resisted by the widow and the heir-at-law, the testator having been in a weak and dying state when he signed the acknowledgment. The father had, until about 1861, been in the occupation of the land, and a surcharge was put in against him for the rents and profits.

Held, that mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt: that the statute of limitations does not bar the claim of an executor against the estate of his testator: that an executor is not justified in keeping an estate open and unadministered in order to obtain interest upon a claim which he has against the estate; and that delay on the part of executors to sell lands, which by the will are saleable for payment of debts, will render the executors liable for rents and profits.

Statement.

This was a suit for the administration of the estate of *Ezekial Emes* deceased, in which a reference has been made to the Master, to take and make the usual accounts and inquiries, in pursuance of which he made a report, from part of which an appeal was made, on the grounds stated in the head-note and judgment.

Mr. *Hector*, Q.C., for the appeal.

Mr. *S. M. Jarvis* for parties proving claims against the estate.

Mr. *Blain* for the co-executor.

VANKOUGHNET, C.—The testator died on the 24th of August, 1841, having, on the 14th of August preceding,

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made his will, which is not impeached, and under which, indeed, with the assent of all parties, his estate at this distance of time is being administered. The testator had in June previously made a will similar in purpose to the one admitted to probate, but not containing, as does the latter, direct authority to his executors to sell his real estate. On the 9th of August, 1841, the deceased executed a memorandum, by which he acknowledged himself indebted to his father, one of the executors of his last will, in the sum of £73 8s. 5½d., according to account annexed, which he declared to be just and correct. The subject of this account is a quantity of stock and farming implements which the father had purchased from the estate of his deceased son *Silas*, and which he left upon a farm of his that *Silas* had occupied for the use merely, as he alleges, of the testator, to whom, after his son *Silas'* death, he had leased the farm at a moderate rent. The father admits having made the testator a present of a yoke of steers, a chain and drag, plough and milch cow. The contention on the other side is, that the father gave all this stock, &c., to his son, and that at his death it formed part of the testator's estate; and the Master, on the inquiry before him, has so found. This finding forms one of the grounds of the present appeal. It seems that in the winter of 1840 and 1841 the testator was injured by the fall of a tree, and that of this injury he died. That in January, 1841, his father removed him to his own house, and then took possession of the stock, &c., in question. Evidence is given of statements by the father that the stock was the testator's, and evidence is also given of statements by the testator that he only had the use of the stock. Evidence is given, also, of the conduct of father and son in regard to it, leading to opposing inferences. This evidence, of a character always unsatisfactory, is of no value of itself, if the testator, in a sound state of mind, really signed the memorandum already referred to, as it furnishes the

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best evidence of the terms upon which he chose at the time to deal with his father in regard to it. There is no evidence whatever that the testator was of imbecile mind; that he was even subject to insanity—or even during his illness wandered mentally. All that is pretended is, that at the time this memorandum was prepared he was so weakened by suffering, and so indifferent to what was passing around him, that he could not and did not understand any matter of business. I think that the preponderance of the evidence of opinions as to the capacity of the testator to understand and be able to exercise a judgment upon any matter of business submitted to him, and to act upon it at the time this acknowledgment of account was given, is in favor of his ability to do so. Some of those admitted to be the most respectable witnesses, called to impeach the documents, say they will not swear that he ever lost his senses. The most they seemed to have observed when visiting him was, that, wearied and languid, with the hand of death upon him, he took little or no interest in conversation; sometimes not noticing those in the room, nor answering remarks addressed to him. This indifference to the gossip which so often attends a sick man's chamber is no evidence that he is incapable of forming an opinion, and acting upon it so far as his physical strength will allow. But amid this conflict of opinion, we have the clear unshaken testimony of *Fanny Chapman*, the subscribing witness to the memorandum, that it was read over to the testator: that he spoke on the subject of it; clearly understood it; and in her presence pronounced it right.

Judgment.

This it seems to me settles the question. In additional support of genuineness, is the fact that the testator, growing worse every day, executed on the 14th of the same month of August his will, which no one impeaches, and that by this will, as well as that of June, he evidently does not think himself the owner of the stock—of considerable value—for he makes no allusion to it, though

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he disposes of a few articles of personalty, and provides for the payment of his debts out of his real estate, as the primary fund, so far as his language will make it such: in this last will—setting apart as the only personalty applicable to the payment of his debts—his gun, and clock, and steel-traps: and bequeathing specifically certain articles of personalty; while he no where alludes to the stock, &c., in question here. There is no evidence either that the testator, from the time he was removed to his father's house, ever claimed this property. Upon the whole, therefore, I think that this claim should be allowed, and that the stock in question did not form part of the testator's estate. I do not think the statute of limitations bars the claim: but while arriving at this conclusion, I deem it right to state, that no executor has a right unnecessarily to keep an estate open and unadministered so that he may claim interest. I should have felt it right in this case to deprive the claimant *Silas Emes* of all interest, were it not that there was no personalty out of which the money due him could have been paid; and that the Master has found that in his management up to 1847 of the real estate, out of which the debts were to be paid, that estate has been improved and increased in value. I therefore allow him six years' interest upon the amount admitted by the testator to be due him. I have had some doubt as to the rents and profits charged to the executor *Silas;* but looking at all the circumstances, I am not disposed to disturb the Master's action in this respect. The executors ought early to have discharged the duties of selling the property confided to them by the will. They did not do so; and in the meantime the executor, *Silas Emes*, appears to have exercised complete control over it, dealing with it as he pleased, and putting upon it occupants. It is true that this court held that the brother, *Henry Emes*, was entitled to be protected in the possession till the valuation could be made, and his assent to a purchase

Judgment.

in compliance with it ascertained; but looking at the dealings of the executor, *Silas*, with the property; his neglect to obtain in a reasonable time a proper valuation, and a decision from *Henry* one way or the other as to the purchase, (*Henry* being his son, and apparently under his control); and that he put all the parties who occupied the land into possession of it, I think the Master was justified in charging him for the period fixed by him, with an occupation rent, and I see no reason to quarrel with the amount named. I think, also, that the Master was wrong in rejecting *Calvin Emes*, the co-executor of *Silas*, as a witness in support of the claim of the latter. His interest, as a co-executor, was to resist the unpaid claim of *Silas*, not to support it, and *Silas* might, if he could have sued him, have called him, as any other creditor could, as a witness in any cause.

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1865. WESTBROOKE v. THE ATTORNEY-GENERAL.

Grant from the Crown—Setting aside—False representations made to Government.

A bill was filed alleging that by an act of the legislature the Grand River Navigation Company were empowered to take such land as might be necessary for the purposes of the act, subject to payment; and in case of dispute arbitrators were named to determine the amount; and compensation was in the same manner to be made for any Indian lands required for the undertaking. The bill alleged that the company having claimed, as being necessary for the purposes of the work, a tract of land, containing about ninety-one acres, and forming part of the village of Cayuga, which was then occupied and improved by several parties, an arbitration was had in respect thereof on the 30th of October, 1847, when an award was made directing the payment of £159 5s., for the right of the Indians therein, but that no notice was given to the occupiers of the land, nor was anything further done in the matter until January, 1864, when the assignees of the company applied to the government for the absolute purchase of the land, untruly representing, as the bill alleged, that the company had gone into possession under the award, and were then in peaceable possession; that the only improvements made on the land were so made by squatters with knowledge of the company's right; and the applicants were thereupon allowed to purchase for the sum awarded, and interest, although in reality the land, by the improvements of the occupiers, was then worth ten times the amount. The bill prayed to set aside the patent as having been issued through fraud, error, improvidence and mistake: a demurrer by the patentees for want of equity was overruled.

Whether, although a person may have been entitled to a grant from the Crown, yet if, on his applying therefor, he knowingly makes grossly false representations to the government, the patent may not be set aside.—*Quære.*

Statement. On the delivery of the judgment, as reported ante p. 264, upon the question of misjoinder, counsel for all parties desired that the court should treat the bill as if amended so as to remove that objection, and that judgment might be pronounced upon the demurrer for want of equity.

Mr. *Blake*, Q.C., for plaintiff.

Mr. *Roaf*, Q.C., contra.

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MOWAT, V.C.—After I had given my opinion on the demurrers for misjoinder, the plaintiffs' counsel asked leave to amend the bill so as to remove the objection for misjoinder; and, in anticipation of such amendment, both parties have expressed a desire that I should, without a new argument, give judgment on the other objections to the bill. This, therefore, I now proceed to do.

The bill states, in substance, (amongst other things,) that Her Majesty was and is seized of the lands in question, in fee, in trust for the benefit of the Six Nations Indians; that the defendants, *The Grand River Navigation Company*, were by Statute 2 William IV., chapter 22, empowered to take such land as might be necessary for the purposes of the act, and to contract with the owners and occupiers either for the absolute purchase of the land, or in respect of the claims to which such owners and occupiers should be entitled in consequence of the construction of the Company's works; that, in case of disagreement, arbitrators appointed by the act were to determine disputes; that if any part of the navigable channel to be made by the Company should pass through the lands of the Indians, compensation should be made therefor to the Indians, in the same manner as in the case of other individuals; and that no land should be taken possession of until the purchase money was paid.

Judgment.

The bill further alleges that the Company claimed, or pretended to require, for the purpose of the navigation the land now in question; that on the 30th of October, 1847, it was pretended to be arbitrated upon, and an award was made directing the Company to pay to the Indian Department £159 5s., for the right of the Indians in ninety-one acres, and £16 for their right in the remaining eight acres, of such land; that the ninety-one acres embraced the larger portion of the village of Cayuga; that the plaintiffs, or those under whom they claim, had then considerable improvements on this

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property; that no notice of the arbitration was given to any of them, and that no account was taken by the arbitrators of their improvements; that it had theretofore been, and still is, the invariable law, usage, and custom of the Crown, in respect of lands held as these were, to give to such settlers as the plaintiffs the pre-emptive right to the land so settled; and, in the event of the settlers refusing to purchase at the required price, to give them the reasonable value of their improvements, to be paid for by the person to whom the Crown should sell the land; that nothing was ever done by the Company towards adopting the award; that they did not pay the money awarded, or take possession of the property; that the land in question was unnecessary for the purposes contemplated by the act; that it rises almost precipitously to a very considerable height from the margin of the Grand River; that forty acres of it are covered with houses, gardens, and other improvements; that the value of the land as now improved is $16,000, and upwards; and that the plaintiffs, until very recently, were in ignorance that there had been an award, and had, in such ignorance, paid large prices for the pre-emptive right to portions of the land, in reliance on the invariable usage of the Crown already mentioned.

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The bill further alleges that the defendants, *The Corporation of Brantford*, claimed the land, as assignees of the same and of all the other property of the Company, by means of transactions which it is not material for me to detail; but the bill states, that the Corporation of the town, at the time such claim accrued, had full knowledge of all the circumstances I have mentioned.

The bill further alleges that having such knowledge, the Corporation of the town, as the representatives of the Company, applied to the Crown on the 13th of January, 1864, for the absolute purchase of the land, and offered to pay the amount which had been awarded by the arbitrators seventeen years before, with interest; that,

on this application, the Corporation of the Town falsely represented that the Company had gone into possession of the property under the award, and were then in peaceable possession of it; falsely represented that the award was binding, and had always been complied with and treated as binding; falsely stated that the land was required for the purposes of the Company, and was such as the company was authorized to take and arbitrate on; and falsely represented that the only improvements on the property were made by some squatters who had entered after the making of the award, and with knowledge of the Company's title thereunder: that by means of these misrepresentations the application of the Corporation was successful, and the Corporation was allowed to purchase at $1373.78, or about one-eleventh of the present improved value of the property; and that, had the facts been known to the Crown, the patent would not have been issued.

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The bill prays that the patent may be cancelled or rescinded, as having been issued through fraud, error, improvidence, and mistake.

Judgment.

This is the substance of the bill, omitting such only of its statements as it is not material to repeat for the disposal of the demurrer.

Mr. *Roaf*, for the demurrer, argued that the Company had a statutory right to the patent, and that the case, therefore, essentially differed from those cases which had been litigated hitherto, and in which the Crown had a discretion to grant a patent or not. This argument would apply in answer to an information by the Attorney-General, as well as to a bill by any of the present plaintiffs.

Did any such statutory right to the patent exist?

I can discover no ground for affirming the existence of such a right.

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There is certainly no ground for doing so in those portions of the Company's act which are set forth in the bill; nor, I think, is there any such ground in any of the enactments which the bill does not set forth.

The statute, in fact, contains no provisions whatever for the Company's obtaining either a patent for Indian lands, or a conveyance of the lands of private proprietors; and the powers which statutes of this kind give must be construed strictly. *Everfield* v. *Mid Sussex Railway.*(*a*) The Company were empowered to set out and ascertain the lands they required; to arbitrate in respect of their value, and to take possession of them and use them after they had been paid for. So far as relates to the use of such lands for the purposes of the Company, no patents and no deeds seem to have been necessary. *Bruce* v. *Willis.*(*b*) After payment the lands were the Company's for the puposes of the act. Before payment, I think the Company was in the position of a purchaser who had not completed his purchase. If, on payment, this Company had a right to a conveyance from the owners, then, in the case of lands theretofore granted by the Crown to individuals, that right would have been enforcible in this court; and I think a delay of seventeen years after an award would, under the circumstances, be a complete bar to a suit for the purpose. It is out of the question to suppose that this company, or any company with like powers, could lie by for seventeen years after taking the steps necessary to ascertain the amount to be paid; could find it quite practicable to do without the land all that time; and could, after the land had enormously increased in value by improvements and otherwise, demand a conveyance of it, as a matter of course, at the original price, with simple interest. I think such a case would not be arguable in a court of equity.

Judgment.

If this court would refuse to enforce such a claim

(*a*) 5 Jur. N. S. 776. (*b*) 11 A. & E. 463.

in the case of a private owner, I think it clear that in the case of Indian land the Crown was at perfect liberty to refuse an application for a patent, assuming the facts to be as stated in the bill. 1865. Westbrooke v. Attorney-General.

Indeed, not only was the Crown at liberty to refuse such an application; not only would the refusal be the violation of no legal right of the Company; but, were the facts known to be as the bill alleges, the Crown would probably have considered it a plain and obvious duty to take that course in the interest of the Indians—not to speak of the interest of those persons whom, according to the bill, the company had allowed for seventeen years to remain in possession of the property, improving it, and dealing with it, in ignorance of the award and of the Company's claim, and in reliance on what is alleged to be an invariable custom of the Crown, securing to persons, situated as they were, the value of their improvements, and the option of buying the property whenever it should be put into the market.

Judgment.

But the Corporation of the Town, in desiring a patent, desired something more than, I think, the statute gave the Company a right to; and this being so, I see no reason to doubt that, even putting aside the lapse of time, the Crown had from the first a perfect right to decline issuing a patent, if the Crown saw that the land was not required for the purposes of the act; or that the price awarded or offered was inadequate; or that persons were in possession who had equitable claims which the Crown had, in all other cases, respected; or that, for any other reason, the application, if acceded to, would work injustice or hardship to others. In short, I see no reason to doubt that the Crown might, with perfect propriety, have declined to move at all, or except on such terms as, under the circumstances, might seem just and reasonable.

I think, therefore, that there was a discretion in the Crown to refuse the application; that the case is not

1865. distinguishable in that respect from the cases in which the relief prayed for by the bill has been granted by this court; and that, if it is true, as the bill alleges, that the demurring defendants by false representations, prevented the Crown from exercising that discretion, the patent ought to be cancelled by this Court.

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To prevent misconception, I ought to add that if these defendants had made out a statutory right to obtain a patent on paying the sum offered, I am not prepared at present to say that they were justified, in point of law, in obtaining their legal right by the aid of false representations to the Crown. I am not prepared to hold that even when a person is really entitled to a grant from the Crown, he may safely make any representations, or commit any frauds, however gross, that may facilitate his obtaining it; and yet, this is what I must hold, if I am to yield to the argument which was addressed to me on the part of the defendants.

Judgment.

The learned counsel for the defendants further urged that the plaintiffs, as occupiers of Indian lands, had not, under the circumstances set forth in the bill, that right to file a bill of this kind, which the unauthorized occupiers of other Crown lands possess; and that the only remedy is by information in the name of the Attorney-General. But after referring to the enactments which were relied on, and to the allegations of the bill, I have failed to satisfy myself that there is any solid foundation for the distinction contended for.

On the authority, therefore, of *Martin* v. *Kennedy*, (*a*) and of the other cases which have followed that case, I am of opinion that, assuming the objection for misjoinder to be removed or withdrawn, a demurrer to this bill is not sustainable.

(*a*) Ante vol. ii., p. 80; vol. iv., p. 460.

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PATERSON v. MCMASTER.

Will—Construction of—Sale by executors to legatees.

P. having an estate estimated at £60,000, by will provided that after payment of the debts and certain pecuniary legacies, a sum sufficient to secure an annuity of £500 per annum during her life should be invested for the use of the widow; that £5,000 should be invested for each of his four daughters, and that the residuary estate should be divided equally among the testator's three sons *J.* *P.* and *W.*, when *W*, the youngest, should attain majority: And in case the value of the estate should not prove sufficient, after providing for the widow's annuity and the daughters' portions, to produce £7,000 for each of the sons, then that a ratable reduction should be made from the share of each child. The testator also directed that after the decease of his wife the sum set apart for securing her annuity should be equally divided amongst his children. The testator by his will provided that in case his sons desired to continue his business, that his executors should afford them facilities for so doing, and should sell to them at a fair valuation the store and stock in trade.

Stock was being taken at the time of the testator's death, and the goods in hand were, in accordance with his custom, valued, by adding 75 per cent. to their sterling price, at the sum of £13,990. The sons *J.* and *P.*, having agreed to continue their father's business, were charged in the books of account with that sum.

The estate proved to be of only half the value at which it was estimated at testator's death, so that there was insufficient, without taking into account the value of the stock, to realize the widow's annuity and the portions for the daughters. The sum at which the stock had been valued was proved to be about twice its actual value, and evidence was adduced proving that no actual consent or agreement had been given by *J.* and *P.* to be charged with it at its estimated value.

Held, that there had been no absolute sale of the stock to them, and that they were only chargeable with it at its actual value; that the sum required to be set apart to raise the annuity for the widow was such a sum as being invested at 6 per cent. per annum, the legal rate at the time of testator's death, would produce £500 per annum; and that the principal sum was, under the above provision, distributable, on the death of the widow, among all the testator's children.

The bill in this case was filed by *William Paterson*, third son of the late *David Paterson*, against *William McMaster*, *Peter Paterson* and *John Crawford*, his executors, and *John Paterson*, *Peter Paterson* the

1865. younger, *Sarah Merrick*, wife of *J. D. Merrick*, *Mary Paterson*, *Margaret Paterson*, and *Maria Paterson*, the other children of the testator.

Paterson v. McMaster.

The bill alleged, that the defendants, *John Paterson* and *Peter Paterson* the younger, should be charged with £13,990, being the sum at which the stock in trade of the testator, assumed by them at his death, had been valued, and asked the direction of the court as to how a sum directed by the testator's will to be set apart for the use of his widow, now deceased, should be apportioned among the devisees.

The bill also prayed for an administration of the estate under the direction of the court.

The terms of the will and the other circumstances affecting the estate appear sufficiently in the judgment.

Argument.

Mr. *Crooks*, Q.C., for plaintiff.

Mr. *Blake*, Q.C., and Mr. *S. H. Blake*, for the legatees, *James* and *Peter Paterson*.

Mr. *McLennan* for the executors.

Mr. *S. J. Vankoughnet* for the infant defendants.

Mr. *Strong*, Q.C., for other defendants.

VANKOUGHNET, C.—In this case two questions were raised: the first, as to whether or not the executors of the late *David Paterson* had sold to his sons *John* and *Peter* the stock in trade left by the testator at his death at a certain price to be paid by them for it.

The second, as to the proper effect to be given to the testator's will in favor of his wife.

Upon the first question, I am of opinion there was no sale to the sons. The testator immediately before his

death, and his executors afterwards, as also those interested in his estate as beneficiaries, estimated it as worth £60,000. After providing for the specific legacies bequeathed by the testator, the residuary estate given to his sons *John*, *Peter* and *William*, would, on the above estimate of the value of his property at the time of his death, have greatly exceeded the sum—£13,990—at which it is alleged the executors sold the stock in trade of the testator to *Peter* and *John*, whom it is sought by this bill to make liable for that amount, as so much due by them to the estate. Just before and at the time of the testator's death, the usual annual taking of stock was being had, and it was completed after his death. The testator by his will provided that his "stock of goods should be valued and sold *or otherwise disposed of* as my said trustees (being his executors) shall consider best for the interest of my family." The testator by his will also expressed the desire that all facilities should be given to his sons for carrying on business, having due regard to the provisions for his wife and daughters—they being the only other legatees. Immediately after the testator's death it was agreed between the executors and his sons *Peter*, *John* and (*William*, the plaintiff, being then a minor) that stock of the goods on hand should not be taken afresh, but that that which was just being completed should answer for the purposes of the estate, and that *Peter* and *John* should take the goods and carry on the business, and, if called upon, account to the estate for the goods on that stock estimate. It was thought by all parties at the time that this stock of goods would or might properly form part of the residuary estate, and that without it there would be ample to pay off the other bequests in the will, and that therefore *Peter* and *John* would never be called upon to account for it except to their brother *William*, who was equally entitled with themselves to the residuary estate, and whom it is alleged it was intended to bring into the partnership on his arriving at full age. The goods at the estimated stock value were charged

Judgment.

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in the books of the estate to *Peter* and *John* as so much assets of the estate, and were entered in the books of *Peter* and *John* as so much merchandize on which they were to trade. From these circumstances I am asked to draw an indisputable conclusion that *Peter* and *John* agreed to purchase these goods, and to pay the estate for them, at the estimated stock value. Mr. *McMaster*, who, as one of the executors, took an active part in the arrangement made with the two sons, swears that there never was any sale of the goods made to them at any price; that it being supposed the residuary estate would greatly exceed the value of the goods these were handed over to or left in the possession of the two sons, who, if ever it became necessary, were to account for them to the estate, and the estimated stock value was entered in the books and kept as a record of the amount of property assumed by the two sons, according to its stock value as usually ascertained; and he and others engaged in trade swear that no one would think of purchasing out a stock of goods at the value put upon them in taking stock for the mere purpose of a stock estimate. Mr. *McMaster* swears that he never contemplated a sale to the sons at this valuation. Now, if the executors were suing these two young men at law upon this alleged contract of purchase, could a jury in the face of the evidence of Mr. *McMaster*, who would there be one of the plaintiffs, find that the defendants agreed to pay for the goods the price claimed? I think not. The whole circumstances seem to me to shew that the goods were left with the two sons *in specie* as part of the residuary estate to which they were entitled under the will,—an error, no doubt, as things have turned out, for unexpected demands were afterwards made upon the estate, and a portion of it, consisting of realty, became in time greatly depreciated in value; and these two sons, *Peter* and *John*, must account to the estate for the value of the goods at the price which they were fairly worth; and the estimated stock value will furnish a basis for ascertaining this;

Judgment.

but when there was no intention on one side to sell or on the other to buy at an assumed fixed price to be paid, I cannot hold that there is any such price binding on the parties. A question not now before me may arise as to how *Peter* and *John* should account to their brother *William* for th·· dealing with this portion of the estate left with them as residuary estate, in which he had an equal interest. The other question arises upon the clauses in the testator's will, which provides that his trustees "are to invest in such stocks or securities as they think proper an amount sufficient to secure to my beloved wife an annuity of £500 p.a. for her life," and that after the death of his wife "the principal invested to secure her annuity shall be equally divided among my said children, share and share alike." The sons who are entitled to the residuary estate are interested in making this sum as small as possible, and say the executors might easily have secured investments at eight or ten per cent. per annum. What they might have done I don't know and cannot speculate upon. They have not in fact made any investment to secure the annuity. The widow is now dead. The testator died in April, 1856. Stocks yielding eight or ten per cent. might perhaps have been safely purchased by the executors. Perhaps mortgages might have been purchased at a discount; but nothing was done. Money could not have been loaned at more than six per cent., for the usury laws had not then been abolished. The executors would have been quite justified, and should, as prudent men, I think, have invested the moneys of the estate, on real estate alone, and this at six per cent., to yield the annuity. The widow was entitled to demand from them indisputable, or the best security for the payment of her annuity; and this being so, I think I must declare that a sum which, at six per cent., would have yie'ded £500 a year is divisable among the legatees.

Judgment.

1865.

RATZ v. TYLEE.

Vendor and Purchaser—Principal and Agent—Costs.

The defendant was a trustee under the will of *P.* for the sale of the property in question. In 1834, a friendly suit was instituted in England (where the trustees and all the parties interested under the will resided,) for the execution of the trusts of the will, and a decree was made for the appointment of a receiver, and the sale by him of the testator's lands in Upper Canada. A receiver appointed in this suit having died, a considerable period elapsed before another was appointed. During this interval the Canadian solicitors for the estate continued to sell the lands, and manage the property as theretofore, under the authority of the trustee. While they were so acting, the plaintiff applied to them to purchase the land in question. A clerk of the solicitors, who attended to the business of the estate, had been authorized by them to buy a few lots for himself at the prices at which they were for sale to others; and, acting upon the strength of this general authority, he, without their knowledge, entered into a contract in his own name and behalf, with the plaintiff, for the sale of the lot at £250, and gave the plaintiff his own bond for a deed, and received from him the purchase money. The plaintiff supposed the clerk was acting for the defendant, and was authorized to act for him. The clerk sometime afterwards entered in the solicitor's book of sales, and subsequently in an account transmitted to the defendant, a sale of the lot to another person at £150, and charged the plaintiff with that amount as assignee of the pretended purchaser. A deed of conveyance to the plaintiff, reciting a sale to him at £150, was prepared by and under the directions of the clerk, and was transmitted by the solicitors with other deeds to the trustee for execution, and retained by the latter for some time, but was not executed:

Held, that there was not any contract which this court could enforce against the trustee; but as a suit was to some extent necessary to ascertain the truth satisfactorily, and the same was rendered unnecessarily expensive by the unqualified denial of the defendant that the solicitors had any power to sell lands; the court, on dismissing the bill, refused the defendant his costs.

Statement.

This was a suit for the specific performance of an alleged contract for the purchase of lot No. 5, in the sixth concession of Pilkington.

This lot was part of a large tract which was vested in the defendant, as trustee under the will of the late Major-General *Pilkington*. General *Pilkington* died

on the 6th of July, 1834; and on the 17th of December, in the same year, suits were instituted in the Court of Chancery, in England, for the administration of the real and personal estate of the testator. A receiver was subsequently appointed; and directions were given respecting the sale by him of the testator's lands in Canada.

The first receiver was the late Judge *Hagerman*, who, it appeared, had been appointed on the 18th of December, 1838. He died on the 15th of May, 1847. On the 24th of June, 1851, Mr. *Brock* was appointed receiver. He died in 1854. Mr. *Lapenotiere*, the receiver, was appointed some years subsequently. There was no receiver in the interval between Mr. *Hagerman's* death and Mr. *Brock's* appointment, or between Mr. *Brock's* death and Mr. *Lapenotiere's* appointment. Each of the two first receivers held a power of attorney from the defendant to sell lands, collect moneys, and manage the estate generally.

Statement.

On the appointment of Mr. *Hagerman* to the Bench, the firm of *Strachan & Burns* succeeded to his professional business, and commenced acting as solicitors in the management of the *Pilkington* estate in 1840. Thenceforward, until some years after the transactions in which the plaintiff was concerned took place, the business of the estate in Canada was managed by the successive Law firms of *Strachan & Burns*, *Strachan & Cameron*, *Cameron, Brock & Robinson*, and *Cameron & Robinson*. Mr. *Cameron's* connection with the latter two firms being merely a nominal one.

Most of the land had been sold before the defendant's purchase, but large sums were due from persons who had made purchases previously.

In June, 1854, the plaintiff, through one *D. S. Shoemaker*, applied by letter to Messrs. *Cameron* and

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Robinson for the purchase of the lot in question. *Shoemaker* subsequently left the country. It was not shewn that this letter had been received or seen by Messrs. *Cameron* and *Robinson*, but having been opened at their office in the usual course of business, the letter passed into the hands of one *Edward Shortis*, who for some time previously had kept the books and papers, and attended to the affairs of the estate for the receiver and solicitors, and who continued to do so for some years after this. *Shortis* thereupon assumed to sell the lot for his own benefit to the plaintiff for £250; whether this was done by letter or by personal communication, did not appear.

On the 26th of June, 1854, *Shoemaker* remitted £50 15s. to *Cameron & Robinson*, as the first payment on the lot under this agreement. This letter was also received by *Shortis;* and *Cameron & Robinson* knew nothing of it. The plaintiff afterwards executed a bond to *Shortis*, dated the 1st of July, 1854, for £250, payable £50 down, and the balance in five equal annual instalments, with interest. On the back of this bond there was a receipt, signed by *Shortis*, for the first instalment. *Shortis*, on his part, appeared to have executed a bond to the plaintiff conditioned for the conveyance of the lot on payment of the £250; but this bond was not produced at the hearing, though *Shortis* was subpœnaed to produce it.

Statement.

It appeared that a book had been kept in the solicitor's office, in which the transactions of the receiver and solicitors in relation to the estate were from time to time entered. No entry was made in this book of the sale in question, or of the receipt of the plaintiff's money; but *Shortis* subsequently made entries in it relating to the lot, under date of the 1st of January, 1855, which was six months after his sale to the plaintiff. The first entry was of a sale to *Shortis* himself, not naming a price. This entry he

subsequently cancelled. He then, on the same page, and under the same date, charged the lot at £150, against the plaintiff as "assignee of *W. A. C.*" These last words were written in pencil; and the evidence shewed that the initial letters, "*W. A. C.*," meant *W. A. Campbell.* On the opposite side of this account, *Shortis* credited the plaintiff, under the same date, with £15, as a part payment. All these entries were fictitious. There had been no sale to *W. A. Campbell;* no transfer by *Campbell* to the plaintiff; and no sale on behalf of the estate to the plaintiff himself at any sum; and no payment of £15.

On the 16th of February, 1855, the plaintiff, through *Shoemaker*, paid *Shortis* the balance of the purchase money, though it was not yet due, and got his receipt for the amount. In 1856, an account was prepared by *Shortis*, on behalf of the solicitors, for transmission to the defendant in England, which professed to set forth the solicitors' transactions relating to the estate, for the years 1854 and 1855, and the lot in question was mentioned in this amount as sold to "*W. A. Campbell,*" for £150. Mr. *Robinson* signed and forwarded this document; but it appeared that he made no minute examination of it, relying implicitly on the accuracy and fidelity of *Shortis*, who prepared it.

Statement.

The custom in the management of this estate was for the conveyances to purchasers to be prepared in the office of the solicitors for the estate, according to a form which had been settled in England while Mr. *Hagerman* acted as receiver; and for these conveyances to be transmitted from time to time to the defendant for execution; and this was often done before receipt of the purchase moneys. Amongst the deeds so transmitted in 1857, was one which purported to carry out a sale of the lot in question to the plaintiff, on behalf of the estate, for £150. Though these deeds were forwarded by Mr. *Robinson*, it

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appeared that, as in the case of the accounts, from his confidence in *Shortis*, he did so without any examination of the deeds by himself. The defendant did not execute any of these deeds until long afterwards, and he never executed the deed intended for the plaintiff.

There was no written evidence of a sale of these lands beyond what has been mentioned; but there had been a verbal assent by Mr. *Robinson* to the purchase by Mr. *Shortis* of several lots belonging to the estate at the same prices at which the lots were for sale to others. Mr. *Robinson*, in his examination, assumed that the lot in question was one of those which *Shortis* selected under this authority; but there was no evidence of his having so selected or purchased the lot before he sold it to the plaintiff. In the reports transmitted to the defendant most or all of the lots selected or purchased by *Shortis* were entered by him as sold to other persons.

Statement.

It did not appear when the plaintiff took possession of the lot. The only witness who spoke of improvements having since been made on it, said they were not of any great amount. Their character was not stated.

The cause came on for examination of witnesses and hearing before his Honor V. C. *Mowat* at the Toronto sittings in the spring of 1865.

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

Mr. *D. B. Read*, Q.C., and Mr. *Strong*, Q.C., for defendant.

For the plaintiff the following, amongst other authorities, were cited: that the Statute of Frauds should have been pleaded though the contract was disputed. *Heys* v. *Aspley*, (*a*) *Ridgway* v. *Wharton*. (*b*)

(*a*) 9 L. T. N. S. 356.
(*b*) 3 DeG. M. & G. 677, S. C. 6 H. L. Ca. 238.

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That the course of dealing is sufficient to establish the agency without proof of express authority to the agent. *Wilson* v. *West Hartlepool Railway Company*; (*a*) and that the principal is bound by his ratification, though it took place in ignorance of some of the facts—*Hilbery* v. *Hatton*. (*b*). As to the ratification, *Wright* v. *Vanderplank*, (*c*) *Dimsdale* v. *Dimsdale*, (*d*) were also referred to. If the evidence does not accord with the case made by the bill leave to amend should be given, *Price* v. *Salusbury*, (*e*) *Knox* v. *Gye*, (*f*) *Firth* v. *Ridley*, (*g*) *The Earl of Darnley* v. *The London, Chatham and Dover Railway Co.* (*h*)

On the part of the defendants, it was argued that the English Court of Chancery had jurisdiction to make the decrees and orders referred to in the pleadings, citing *Penn* v. *Baltimore*; (*i*) that the powers of the defendant as trustee were superseded by such decree and orders—*Lewin* on Trusts, last ed. 293, 306, 389—but that this court should not enforce against a trustee a contract such as here set forth—*Sneesby* v. *Thorne*, (*j*) *Mortlock* v. *Buller* (*k*) *Fry* on Specific Performance, 113. Argument.

It was also contended that the suit was defective in not making some of the *cestuis que trustent* parties—*Fry* 89, and cases there cited. Knowledge of all facts is necessary to make a ratification by principal binding —*Storey* on Agency, sec. 243.

Mr. *Crooks*, Q.C., in reply.—If it should be considered that the evidence adduced by plaintiff is not sufficient in all respects, the court will direct an inquiry to supply any omissions—*Barnett* v. *Randall*. (*l*)

(*a*) 11 Jur. N. S. 124, S. C. 10 Jur. 1064.
(*b*) 33 L. J. Ex. 190.
(*c*) 2 K. & J. 1.
(*d*) 3 Drew. 556.
(*e*) 32 Beav. 446.
(*f*) 10 Jur. N. S. 908.
(*g*) 33 L. J. Ch. 598.
(*h*) 33 L. J. ch. 9.
(*i*) 2 Wh. & Tud. 767
(*j*) 1 Jur. N. S. 536, 1058.
(*k*) 10 Ves. 292.
(*l*) 3 Mer. 466.

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Reference was also made to *Sugden* on Vendors and Purchasers, 216 (4th ed.) and *Dart* on Vendors, 671 (3rd ed.)

MOWAT, V.C.—[After stating the facts to the effect above set forth, proceeded as follows:]

The plaintiff sets up by his bill a contract binding on the defendant, for the sale of the lot in question to the plaintiff for £250. But it is manifest that there was no such contract. *Shortis* had no shadow of right to sell as the agent for the defendant or for the solicitors; and there is no evidence of his having even professed to sell in any such capacity. His own name alone appears in the bond and receipts relating to the transaction in question; and the express evidence to the same effect is distinct. Whatever else the receiver and the solicitors entrusted to *Shortis*, it appears that they did not attempt, or profess, to assign to them the duty of making sales, and that in no other instance did he ever assume the right to make a sale.

Judgment.

Nor can the plaintiff claim relief as assignee of *Shortis*; for, apart from any defence founded on the fiduciary position of the defendant, it is clear that the verbal bargain with *Shortis* was void, not only as not being in writing, but because of the prior transaction with the plaintiff for a larger price, and of the effect of this in connection with the relation of *Shortis* to the estate, and to the solicitors and agents for the estate.

The fictitious entries made by *Shortis* in the solicitors' book, and in the account transmitted to the defendant, cannot possibly create a valid contract with anybody.

Assuming that no valid contract was made in this country, the plaintiff next relies on a subsequent ratification by the defendant himself, as giving validity to a sale to the plaintiff. There is not alleged to have been

any express and deliberate ratification of any sale of this lot. It is obvious, also, that there cannot be a ratification, either express or implied, of a sale that was never communicated to the defendant; or of a sale that was never made. Now a contract with the plaintiff for £250, or with *Shortis* for any sum, had not been communicated to the defendant at the time of its alleged ratification: a sale, on the part of the estate, to the plaintiff for £150 was communicated; but, confessedly, such a sale was never made. I have read the mass of correspondence which has been put in evidence, and which extends to a period subsequent to the plaintiff becoming aware of the defendant's repudiation of any sale to him; and I am satisfied that this correspondence supplies no ground for holding the defendant to have ratified any sale of the lot to the plaintiff, or for holding the defendant to have disentitled himself, by acquiescence, to set up any defence he may have to the plaintiff's bill.

Judgment

On these grounds I think it clear that, had the property belonged to the defendant himself as beneficial owner, the plaintiff would not be entitled to the relief he seeks against him.

The obstacles in the plaintiff's way are immensely increased by the defendant being a mere trustee of the property; and by the restriction even of his powers as trustee, through the operation of the proceedings in England for the administration of the true estate. A beneficial owner might, after a full knowledge of all the circumstances, have confirmed, if he chose, such a sale as is in question. But it would have been a breach of duty on the part of a trustee to confirm a sale at £150 to either *Shortis* or the plaintiff; and it is only a sale at that sum that there is the slightest pretence for saying the defendant confirmed. A sale at any sum, or under any circumstances, would not, I think, be specifically enforced here, if proved to be a substantial

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violation of the directions of the Court of Chancery in England, and such, therefore, as the plaintiff could not enforce by a suit in England.

As to the costs of this suit: There is no doubt that a fraud was perpetrated on the plaintiff by the confidential clerk and agent of the defendants' own solicitors, and of the late receiver. The defendant's solicitors had the management of the estate in Canada; and it was to them that the plaintiff applied to purchase: it was to them he remitted the first instalment of the purchase money: it was to the person who, under them, was in the habit of receiving payments for the estate, keeping its accounts, and transacting its business, though not of making sales, that the plaintiff paid the balance of his purchase money. The plaintiff is stated in the evidence to be a foreigner, to speak English imperfectly, to be unable to write English, and not to be conversant with writings or with business; and I have no doubt he believed, all along, that he was dealing with the English proprietors, through the agents whom they had authorized to act for them. The evidence which has been adduced demonstrates that in this the plaintiff was in error: but this suit was probably necessary to ascertain the truth satisfactorily; and the suit has been rendered unnecessarily expensive by the defendant's sweeping denial of any authority on his part to the solicitors to sell lands, while the evidence shows, if not a previous and formal authority to them to sell, yet that such sales were in fact made; that but few lands at this time remained unsold; that the solicitors confessedly had authority to receive the purchase moneys due in respect of all previous sales, and that the new sales by the solicitors were recognized to such an extent as, under the circumstances, would probably be sufficient to make out a case of general agency, as regards persons dealing with the estate, if the defendant had been beneficial owner, and the case had turned on the question of the authority of Mr. *Robinson* as his general agent.

Judgment.

Under all the circumstances, I think it would be unjust, as between the plaintiff and defendant, to make the plaintiff pay the whole costs of the litigation; and I therefore dismiss the bill without costs. 1865.

DARBY v. GREENLEES.

Specific performance—Waiver of title.

Where a contract for sale of building lots provided for immediate possession and for the payment of the purchase money in eight annual instalments,

Held, that the erection of two workshops on the lots by the vendees was no waiver of their right to examine the title; nor was the division of the property between them, when they dissolved their partnership, nor the acceptance of a conveyance at another time of another lot said to depend on the same title.

In a suit against purchasers for specific performance the court refused, under the circumstances of the case, to order the purchase money into court, pending a reference as to title, though the defendants were in possession of the property.

This cause was heard at the Toronto sittings in the spring of 1865. Statement.

The suit was for the specific performance of a contract.

On the 6th of August, 1853, the defendants contracted with the late John S. Macaulay, for the purchase of certain parcels of land, in the bill called building lots, in the city of Toronto. The purchase money was to be paid with interest in eight equal annual instalments; and the contract provided that the purchasers might occupy and enjoy the property until default made in paying the purchase money according to the terms of the sale, subject nevertheless to impeachment for voluntary or permissive waste.

The defendants entered into possession of the pro-

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perty and erected thereon two buildings, which were described as carpenters' shops. There was no evidence of their size or value.

The vendor died on the 23rd December, 1855. By his will he appointed his widow executrix. She died on the 29th December, 1861. The bill was filed by her executors, and the vendor's heirs, one of whom was still an infant.

The bill contained a general charge that the defendants had accepted the title, and prayed a declaration to that effect. The answer denied such acceptance; and this dispute was the principal matter argued at the hearing of the case.

Argument.

Mr. *Vankoughnet*, for plaintiffs, cited *Commercial Bank* v. *McConnell*, (*a*) *Fleetwood* v. *Green*, (*b*) *Margravine of Anspach* v. *Noel*, (*c*) *Burroughs* v. *Oakley*, (*d*) *O'Keeffe* v. *Taylor*, (*e*) *Dennison* v. *Fuller*, (*f*).

Mr. *Roaf*, Q.C., for defendants, cited *Morin* v. *Wilkinson* (*g*) *Paul* v. *Blackwood* (*h*) *Crooks* v. *Glenn* (*i*) *Chantler* v. *Ince*, (*j*) *Thompson* v. *Brunskill*, (*k*) *Gamble* v. *Gummerson*, (*l*).

MOWAT, V.C.—This bill is for the specific performance of a contract; and the question argued at the hearing was whether the title had been accepted.

It was not claimed that there was any express acceptance of the title.

Some reliance was placed on the circumstance of payments having been made on account of the pur-

(*a*) Ante vol. vii, p. 330.
(*b*) 15 Ves., 594.
(*c*) 1 Madd. 310.
(*d*) 3 Swans. 170.
(*e*) Ante vol. ii, pp. 95-305.
(*f*) Ante vol. x. p. 498.
(*g*) Ante vol. ii, p. 157.
(*h*) Ante vol. iii, pp. 394-403.
(*i*) Ante vol. viii, p. 239.
(*j*) Ante vol. vii, p. 432.
(*k*) Ante vol. vii, p. 542.
(*l*) Ante vol. ix, p. 193.

chase money; but payments are no waiver where the contract contemplates immediate possession, and provides for payment by instalments. 1865. Darby v. Greenlees.

But the learned counsel for the plaintiffs relied principally on certain other acts of the defendants, not stated in the bill, but ascertained from the plaintiffs' examination of the defendant *Downey* at the hearing. The defendants raised no question as to the right of the plaintiffs to avail themselves of these facts under the general charge which the bill contains; but so much importance cannot in fairness be allowed to them as if the defendants' attention had by the bill been called to them, and to the use intended to be made of them.

One of these facts is the erection of two workshops: but the weight of such a circumstance is manifestly much inferior to that of felling timber and clearing land, which *Hook* v. *McQueen*, (*a*) decided to be no waiver of the right to a good title. (*Vide Fox* v. *Birch*, (*b*) *Osborne* v. *Harvey*, (*c*) *Stevens* v. *Guppy*, (*d*) *Burroughs* v. *Oakley*, (*e*) *Wright* v. *Griffith*, (*f*).) These lots are described in the contract as building lots; and except by making some improvements upon them, the stipulated possession, during the eight years over which the instalments were spread, could not have been made beneficial. Judgment.

Another fact is, that the defendants were partners in business when they made the purchase; and that they afterwards dissolved partnership, and made some sort of division of this property between themselves. We are not informed of any of the particulars or terms of this division; nor whether it was agreed upon or carried out by any written instrument. I am unable to see on what ground I could, upon the evidence, hold such

(*a*) Ante vol. ii, p. 309.
(*b*) 1 Mer. 106.
(*c*) 1 Y. & C. C. C. 116.
(*d*) 3 R. 171.
(*e*) 3 Swans. 170.
(*f*) 1 Irish Ch. 595.

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a division to be a waiver of the defendants' right to an investigation of the title. The division did not prejudice the vendor or his representatives; and how can an intention of the defendants to waive their rights against them be inferred from it? Why should they leave this part of their partnership assets undivided for years, until this question of title should be determined? Acts of waiver are acts from which the court infers an intention of waiver; and I do not perceive the slightest indication of such an intention, in the mere fact that these partners, at the dissolution of their partnership, made some division of this property between them.

Reliance is also placed on the fact of *Downey's* having said to the plaintiffs' solicitor that he would pay the balance of the purchase money when the solicitor was prepared to give him a deed. I am satisfied that the defendant meant, by this expression, a deed which would vest in him a good title to the property. I would not be dealing fairly with the language of an unprofessional man in the position of the defendant, if I should put upon his words any other construction.

Judgment.

It is also said that the same defendants bought another lot from Mr. *Macaulay*, which, a witness states, depended on precisely the same title as the lots in question, and that they accepted a conveyance of it. We know nothing of the circumstances under which this was done, nor are the dates specified. I see no reason why a man may not accept without question the title of one lot, bought at one time, and decline to waive an investigation in the case of another lot, bought from the same vendor, at another time.

On the whole, I think that no acceptance of the title has been proved, and that the defendants have a right to the usual reference.

The plaintiffs asked that in that event the balance of

the purchase money should be paid into court forthwith. 1865.

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It is not in every case of possession by the purchaser that the money is ordered into court, pending a reference as to title. (*a*) Here, possession was taken in pursuance of the contract; the property had previously been unoccupied and unproductive; the defendant's have exercised no act of ownership that operates prejudicially to the vendors: they have paid up all the interest and a considerable portion of the principal; there is no evidence of their having ever been requested to pay the balance; on one occasion the plaintiffs proposed an extension of time at eight per cent., and the defendants declined an extension on that condition; on the only other occasion that the evidence shows any communication to have taken place on the subject, the defendants manifested their readiness to pay the balance of the principal whenever the plaintiffs were prepared to perform their corresponding obligations in reference to the transaction; and the present suit has arisen from no fault of the defendants, and from no dispute with them, but because of the infancy of one of the vendor's heirs. Under these circumstances, I do not think that the authorities would support the direction asked for. Judgment.

The decree will reserve further directions and costs until after report.

Shaver v. Allison.

Principal and Surety.

W. owed *A.* $400. To secure this debt *S.* as surety, joined with *W.* in a promissory note to the creditor (*A.*) for the amount, payable at a future date with interest. *W.*, the principal, without notice to the surety (*S*), agreed in writing to pay interest at 15 per cent. as a condition of the note being accepted, and of the time mentioned in the agreement being given;

Held, that the surety was discharged from liability.

This cause was heard at the examination and hear-

(*a*) Sugden, V. & P. 229 to 231.

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ing term of the court, held at Toronto in the spring of 1865, before His Honor V. C. *Mowat*.

The facts are sufficiently stated in the judgment.

Mr. *Blake* for the plaintiff, cited *Lee* v. *Jones*, (*a*) *Hamilton* v. *Watson*. (*b*)

Mr. *Fitzgerald* for the defendant.

MOWAT, V. C.—The plaintiff, as surety for the defendant *Andrew Ward*, signed a note jointly with *Ward* for $400, payable to the defendant *Andrew Allison*, or order, ten months after the date thereof, with interest; and the bill prays that it may be declared that the plaintiff is not liable on this note, and for consequential relief.

Judgment.

Ward, at the date of the note, was indebted to *Allison* in the sum of $400, and the note was intended as a security in respect of this indebtedness. *Allison*, however, declined to accept the note from *Ward*, or to give the ten months' time to pay the debt, unless he got interest at 15 per cent. He says, in his answer, that he had theretofore been receiving interest on the debt at that rate. The evidence as to that is contradictory. At all events, *Ward* agreed to pay interest at 15 per cent. on the amount, and a memorandum to that effect was indorsed on the note, and was signed by *Ward*. The plaintiff had no notice of this bargain; and such a bargain was certainly a variation of the contract for which the plaintiff understood he was becoming security. But it is clear law, that any variation whatever in a contract, as between the principal and his creditor, avoids a surety's obligation, unless he is a party to the variation.

I think that this point is sufficient to dispose of the

(*a*) 11 Jur. N. S. 81. (*b*) 12 Cl. & F. 109.

case. The plaintiff alleges that, after the note became due, there was a bargain between *Allison* and *Ward* for extending the time of payment. But the evidence as to this is contradictory. 1865. Shaver v. Allison.

I think the defendant is entitled to a decree with costs.

[Affirmed on rehearing the 2nd of June, 1865.]

Robinson v. Dobson.

Foreclosure—Infants—Practice.

In a foreclosure suit a question was raised as to whether the equity of redemption in the principal portion of the mortgaged premises was in the defendants, against whom the bill had been taken *pro confesso*, and who did not appear at the hearing, or in the other defendants, some of whom were infants; the court refused to decide this question at the hearing, at the instance of the defendants who appeared.

This cause was heard at the spring sittings at Toronto. The suit was for the foreclosure of a mortgage. Statement.

Mr. *Foster*, for the plaintiff, asked for an immediate decree against the infant defendants, referring to *Croxon* v. *Lever*, (*a*).

Mr. *Taylor*, for the infants, contended that a deed to the church mentioned in the judgment was void for want of registration, and referred to the statutes, 9 Geo. IV, ch. 2, s. 4, 12 Vic. ch. 91, 16 Vic. ch. 126, 24 Vic. ch. 43.

Mr. *Blevins* for *Joseph Moore*.

Mowat, V.C.—This is a foreclosure suit. The plaintiff is assignee of a mortgage executed in 1856. On the 7th October, 1858, the late *William Moore*, who was then owner of the equity of redemption, conveyed the mort-

(*a*) 12 W. R. 237. S. C. 10 Jur. N. S. 287.

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gage property, except a small strip of sixteen feet wide, to *James Dobson* and others, "Trustees of the chapel of the Canadian Wesleyan Methodist, New Connexion, in the village of Yorkville." This deed is not produced. The bill states that it was not registered until the 25th of June, 1860, which was considerably more than twelve months after the execution.

William Moore died intestate as to this property; and some of his heirs are infants.

The bill is filed against his heirs and the trustees; and was taken *pro confesso* against the trustees, and against all the adult heirs of *Moore*, except one *Joseph Moore*, who has put in an answer.

Judgment.

It was argued on behalf of the infants, that the deed to the trustees was void for want of registration, under 9 George IV, ch. 2, section 4. This is a question, however, in which the plaintiff has no interest whatever. It is a question between co-defendants: and the trustees of the chapel, who are the parties to insist on the validity of the deed, were not represented by counsel at the hearing. I think that in their absence I cannot with propriety consider the question at this stage of the cause; and, possibly, it may not be necessary to determine it at any future stage.

I think the decree should be the usual one, referring it to the Master to inquire whether a foreclosure or sale will be most for the benefit of the infants, and containing the other usual directions.

I think that the answer of the defendant *Joseph Moore* is not such as he ought to have put in; and if the expense of the suit has been increased by it, as the plaintiff alleges, that defendant is to be charged personally with the excess.

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SANBORN v. SANBORN.

Partnership property—Lands bought for purposes of trade.

Persons engaged in the "oil business" purchased land, on parts of which they sank wells, and leased or sold other portions thereof to various persons desirous of extracting the oil from them. *Held*, that such lands were part of the partnership assets and to be treated as personal property.

In cases where if money belonged to an infant residing in Upper Canada, the court would invest it for the benefit of the infant, the court will, where the infant is resident in a foreign country, direct the moneys to be invested for his benefit in the securities of such foreign country.

The facts of the case appear in the report of this case, ante page 123, and in the judgment. Statement.

Mr. *Roaf*, Q.C., appeared for the plaintiffs.

Mr. *Taylor* for the infant defendant.

SPRAGGE, V. C.—My opinion is, that under the articles of co-partnership, both the parcels of land in question were, as between the partners, part of the partnership funds and estate.

As to one parcel, the partners were lessees, with privilege of purchase: and they did purchase with partnership moneys, and used the land in their trade. What their trade was appears by the articles. The intestate, *William E. Sanborn*, had been in what is called the oil business, upon certain lands, part of which he had purchased, and part of which he held upon lease; and had, as the articles recite, executed divers and numerous leases, indentures, and agreements, leasing and agreeing to lease, and otherwise disposing of various small portions of said lands to different parties; reserving to himself, his executors, &c., certain rents and advantages to be paid in oil and otherwise. The articles further recite that "*William E. Sanborn* had

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theretofore been dealing and trafficing in oil, procured from said premises, and was the owner of certain horses, waggons, barrels of oil," and other things enumerated. And the articles state the business of the partnership to be "procuring oil from said premises, refining and selling the same, leasing and otherwise disposing of said oil lands; for profit, and doing a general business in respect to said oil trade as to said parties shall seem proper and profitable."

It is conceded that the parcel of land purchased by the partners was part of their stock-in-trade, and I think no other conclusion could be come to.

As to the other parcel of land, the articles recite that *William E. Sanborn* was theretofore the owner of it. That and the leased lands he had dealt with as stated in the recital, to which I have referred, and the articles recite that he had deeded to each of the other parties to the articles an undivided one-fourth of all his interest in the said lands, leases, agreements, and all other the goods and chattels thereinbefore mentioned.

Judgment.

It is clear that this land was not acquired as an investment, either originally by the intestate, or upon the formation of the partnership by his partners. It was to be used for the purpose of extracting oil from it; the consequences of which are as yet unknown. It may be a mere usufruct of the land, or it may be a consumption of all that is valuable in the land itself. This was part of the business of the partnership. Another part was the leasing and otherwise disposing of the lands for profit. All this negatives the idea of investment, and gives to the lands the character of stock-in-trade.

I do not propose to go through the authorities upon the point. I will refer only to two, *Crawshay* v. *Maule*, (*a*) before Lord *Eldon*, a case of lands and coal and

(*a*) 1 Swan. 495.

iron mines; and *Wylie* v. *Wylie* (*a*) in our own court, a case in which a portion of the partnership business was the buying and selling of lands. The plaintiffs have continued to carry on the business since the death of the intestate, under a provision in the articles of partnership. They are the other parties to the original articles, together with one brought into the business since, with assent of all parties. They ask for a vesting order. This they are entitled to, with the assent of the personal representative of the estate of the deceased partner—that is, upon payment of costs: but I think I ought to be informed what is proposed to de done in regard to the beneficial interest of the infant, in whom the legal estate is now vested. The intestate has now been nearly a year and a-half dead.

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Sanborn v. Sanborn.

Subseqnently an application was made to his Honor on behalf of the mother of the infant, for payment over to her of the share of the estate belonging to the infant, and an affidavit from the mother was produced stating in what manner she intended investing the same.

Mr. *Downey* for the application.

Spragge, V. C.—The mother of the infant, who is also administratrix of the estate of the intestate, states in her affidavit that she is willing to deal with the interest of the infant as the court may direct; but that if left to her own discretion she would invest the moneys in question in this cause, to which the infant is beneficially entitled, in United States securities. Judgment.

She describes herself as now residing at the city of Erie, in Pennsylvania, her former residence having been in the Township of Enniskillen. It is suggested orally that her husband was a resident of the States, and

(*a*) Ante vol, iv., p. 278.

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came to Canada only for the purpose of engaging in what is called the oil business, and that since his death his widow has moved back to the States with her child, intending to make the States their permanent residence. If this be verified upon affidavit the court will not desire to have the infant's moneys invested in Canada. In that case, supposing Pennsylvania to be their intended future residence, the court will desire to be informed how funds belonging to infants which come into the hands of the courts of that State are dealt with by the laws of that State; whether they are paid into court for the benefit of the infant, and invested for their benefit under the direction of the court, or what course is taken in relation to such funds. This court will direct the moneys of the infant defendant to be placed at the disposal of a proper United States or State court, that will cause the same to be invested for the benefit of the infant. An affidavit from an expert—

Judgment.

a legal practitioner of Pennsylvania, or other State, which may be the intended future residence of the infant and her mother should be produced. If, according to the laws of the State, the moneys would be paid to the personal representative of the intestate, that should be stated.

Dickson v. Draper.

Infants—Parties—Practice—Foreclosure.

Where a mortgagor had conveyed his equity of redemption to the trustees of his marriage settlement in trust for his wife for life, remainder to his children; and a bill of foreclosure was filed after his death against the trustees and widow, to which bill the children, being infants, were not made parties: the court granted a decree containing the usual reference to inquire whether a sale or foreclosure would be more beneficial to the infants; and gave liberty to the Master to make the infants parties in his office if he should see fit.

This was a suit for foreclosure. The mortgagor by an ante-nuptial settlement conveyed his equity of

redemption to trustees in trust for the use of the mortgagor and his intended wife during their joint lives; and after his death, if the intended wife should survive him, then in trust for her during her natural life or so long as she should remain unmarried; and after her death or marriage, then that the trustees or the survivors of them, and the heirs of such survivor, should convey and transfer the said estate to such person as the mortgagor should appoint by his last will and testament; and in default of such appointment, then to such person as should be lawfully entitled to the same.

1865.
Dickson v. Draper.

Mr. *Blake*, Q.C., for the defendants, objected that the infants were necessary parties.

Mr. *McLennan* contra, cited *Goldsmid* v. *Stonehewer*, (*a*), *Craig* v. *Templeton*, (*b*) *Doody* v. *Higgins*, (*c*) *Read* v. *Prest*, (*d*) *Hanman* v. *Riley*, (*e*).

Mowat, V.C.—Of the decided cases *Seffken* v. *Davis*, (*f*) seems most in point on the question of parties in this case: and, having reference to the course taken in that case, and to the peculiarities of our own practice, I think the decree in the present case should contain the usual reference to the Master, to inquire whether a foreclosure or sale will be more for the benefit of the infants; and should authorize the Master to make the infants parties, if, under the circumstances that may be shewn to him, he sees fit to do so.

Judgment.

(*a*) 9 Hare, App. 38.
(*b*) Ante vol. viii. p. 483.
(*c*) 9 H. App. 32.
(*d*) 1 K. & J. 183.
(*e*) 9 H. App. 40.
(*f*) 6 Kay App. 21.

1865.

Randall v. Burrowes.

Trustee and cestui que trust—Costs.

It is the duty of a trustee to use reasonable diligence to have the accounts of the trust ready, and to render them within a reasonable time after they are asked for on behalf of the *cestuis que trustent;* and where a trustee wholly neglected this duty, though he offered his books for inspection by the parties interested, he was charged with the costs of the suit up to the hearing.

This was a suit by the plaintiffs on behalf of themselves and all other creditors of one *George K. Burrowes,* and prayed for an administration of the estate and a receiver.

Statement.

Burrowes, on the 11th of February, 1860, assigned to the defendants *Thomas Haworth* and *John Kesteven,* all his estate, real and personal, for the benefit of his creditors; the deed providing, amongst other things, that, to cover their expenses, the trustees should retain five per cent. commission on their receipts. *Haworth* had been the acting trustee. *Kesteven* (against whom the bill was taken *pro confesso,*) was stated in the bill to be, and to have long been, in insolvent circumstances.

Haworth, also, on the 23rd of April, 1864, made an assignment of his property for the benefit of his creditors. Subsequently, although at what date was not stated, his trustees re-assigned to him, on credit, the goods he had assigned to them, and his creditors gave him a discharge.

The bill complained that *Haworth,* as Trustee, had not rendered any account to the creditors of *Burrowes.*

It appeared from the evidence that, within a year after the assignment, the plaintiffs, through their solicitors, applied to the defendant *Haworth* for the accounts, and that they renewed the application several times afterwards; that *Haworth* declined to give any statement,

but told the solicitor he was at liberty to examine the books of the estate at any time he thought proper. On the 11th of March, 1863, the solicitors of the plaintiffs addressed to *Haworth* the following letter:

Thomas Haworth, Esq., Toronto. Re Burrowes.

"Dear Sir,—We are instructed by Mr. *Randall*, a creditor of this estate, to ask you for a statement thereof; that is to say, an inventory of the property and effects which came to your hands; an account of what has been disposed of, and an account of the residue.

"Your kind attention at an early date will oblige."

In answer to which, *Haworth* wrote to the solicitors of the plaintiffs on the following day, as follows:

"I am in receipt of your note in reference to the estate of *Burrowes*, and in reply, beg to state that the detailed accounts asked for will be submitted at a meeting shortly to be held (if possible this month) by the creditors." Statement.

No such meeting as this letter suggested was ever held; and up to the time of the filing of the bill, on the 6th of June, 1864, the accounts asked for were never furnished to the plaintiffs or any other of the creditors; the only account which *Haworth* ever produced was a statement of his cash receipts from the estate, and of his payments and charges on account of it. This statement he produced at a meeting of the creditors on the 25th March, 1862. At the hearing, he produced a like statement made up to the 30th June, 1864, but which was not verified. By this statement the defendant claimed that his receipts fell considerably short of the payments he had made and the allowances he was entitled to as trustee. The creditors had not received anything under the trust deed.

Mr. *Kingstone* for the plaintiffs, contended, that under the circumstances the plaintiffs were entitled to a

1865. Randall v. Burrowes. receiver, citing *Harrold* v. *Wallis*, (*a*) *Langley* v. *Hawk*, (*b*) *Evans* v. *Coventry*, (*c*) *Harris* v. *Harris*. (*d*) And as to the costs up to the hearing, *Springett* v. *Dashwood*, (*e*) *Kemp* v. *Burn*. (*f*)

Mr. *John Paterson* for the defendant *Haworth*.

MOWAT, V.C.—The plaintiffs are clearly entitled to a receiver as prayed—*Harrold* v. *Wallis*, (*g*), *Harris* v. *Harris* (*h*).

The plaintiffs also ask for costs against the defendant *Haworth*, chiefly on the ground of his neglect and refusal to render accounts. The defence which the defendant sets up in his answer for not having rendered accounts is, that they were long and intricate, and that he was for that reason unable to give them immediately when called upon; but he says, that the books of the estate were always open for every one, who pleased, to examine them. If the length and intricacy of the accounts were such as to excuse their not being ready at the moment of their being first called for, the circumstance is certainly no excuse for their not being ready, or not being rendered, at all. As a trustee, the defendant was bound to use reasonable diligence to have the accounts ready, and was bound to render them within a reasonable time after they were asked for; and I take it to be the rule of this court, as laid down by the Vice-Chancellor in *Springett* v. *Dashwood*, (*i*) that when a trustee neglects these duties, unless there are some extraordinary circumstances to explain his conduct, he ought to pay costs. *Vide*, also, *Kemp* v. *Burn*, (*j*) *Attorney-General* v. *Gibbs*, (*k*) and the cases there cited.

Judgment.

(*a*) Ante vol. ix, p. 443. (*b*) 5 Madd. 46.
(*c*) 5 D. M. & G. 911. Anon 12 Ves. 4.
(*d*) 29 Beav. 107. (*e*) 2 Giff. 521.
(*f*) 4 Giff. 348. (*g*) 9 Grant, 443.
(*h*) 29 Beav. 107. (*i*) 2 Giffard, 521.
(*j*) 4 Giffard, 348. (*k*) 1 DeGex & S. 156.

I do not say that every one of the creditors under a deed of this description is, under all circumstances, entitled to demand a copy of the accounts at the expense of the estate. But this defendant has given no creditor a copy of any of the accounts, and he does not allege that he ever even prepared such accounts as the creditors were entitled to have. The statement produced at the meeting of creditors in 1862, was confined to his own receipts and charges up to that date, and did not contain any information whatever respecting the outstanding estate. After that time the defendant never produced to the creditors as a body, nor to any of the creditors individually, any statement or account whatever: but, on the contrary, he expressly declined giving any statement, intimating that he considered he was bound to do no more than allow an inspection of the books of the estate. In this I feel bound to say that he mistook his duty, and the rights of his *cestuis que trust.*

Judgment.

The defendant has also put the plaintiffs to the expense of proving their debts at the hearing, which, from the information that the evidence shews he had respecting them, I do not think he ought to have done; especially as, by the practice, the plaintiffs' debts have again to be established in the Master's office.

I think *Haworth* must pay the plaintiffs' costs up to the hearing.

The decree will contain the other directions usual in such cases, and will reserve subsequent costs and further directions until after the Master makes his report.

I shall give no special directions as to the charges of wilful neglect or default, made in the bill; or as to the special claims set up in the answer. The Master will have full power to deal with these under the General Orders of the court.

1865.

LUNDY v. MCCULLA.

Set-off—Evidence.

In the view of equity the setting off one demand against another between the same parties is extremely just; and where there is any technical difficulty in the way of its being done without an agreement, the court accepts slighter evidence of such an agreement than is usually required in order to establish disputed facts.

This case was heard before Vice-Chancellor *Mowat*, at the spring sittings, 1865, in Toronto.

The bill was filed for an account of certain partnership transactions between the plaintiff and the defendant, and for an injunction to restrain an action at law, which had been brought by the defendant to recover the amount of a due-bill for $275, dated 13th January, 1864, signed by the plaintiff, and expressed to be for money lent, which the plaintiff thereby promised to repay on demand.

Statement.

The plaintiff and defendant afterwards entered into partnership in buying wheat, and the articles of partnership bore the same date as the due-bill. The money was to be provided by the two equally.

Their wheat transactions resulted in a loss, amounting, it was alleged, to $1200. Most of the money required for these transactions had been raised on credit.

The bill alleged that, after the partnership was entered into, it was agreed that the $275 should be applied as part of the money which the defendant was to supply. The defendant denied this. He stated in his answer that he believed the plaintiff expended the money in buying wheat, but that these purchases were on the plaintiff's own account.

Mr. *Donovan* for the plaintiff, cited *Jeffs* v. *Wood* (*a*)

(*a*) 2 P. W. 128.

Clark v. *Cort*, (*a*) *Smith* v. *Muirhead*, (*b*) *Rawson* v. *Samuel*, (*c*). 1865.

Lundy v. McCulla.

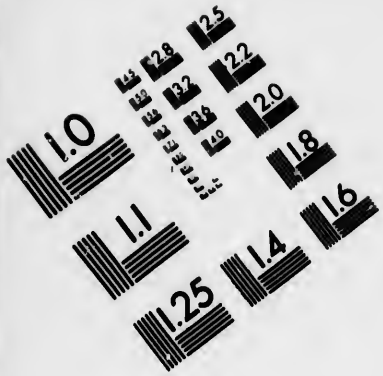
Mr. *Ferguson* contra.

Mowat, V.C.—The evidence which the plaintiff offers of the alleged agreement consists of expressions and conversations of the defendant: and considering them, it is proper to bear in mind that what the plaintiff seeks is, in effect, to set-off against the amount of the due-bill, what is coming to him on the partnership account. In the view of equity, the setting off one demand against another between the same parties, is extremely just; though there are sometimes considerations which forbid its being done. If more than this sum is coming from the defendant to the plaintiff on account of the partnership transactions, it is certainly not reasonable that, pending the taking of the partnership accounts, the defendant should seek to compel the plaintiff to pay this sum. It is from a strong sense of the want of equity there is in such a course, that, where there is a technical difficulty in the way of setting off one demand against another in the absence of an agreement for setting it off, this court accepts slighter evidence of such an agreement than is usually required in order to establish disputed facts. Judgment.

To make out the alleged agreement in the present case, there are three witnesses. The plaintiff and defendant were also examined before me, each at the instance of the other, but no question respecting the alleged agreement was put to either.

One of the witnesses, *Joseph Lundy*, after stating that he had several times heard the plaintiff asking the defendant to bring down the due-bill, and the defendant promising to bring it, says further, "I asked *McCulla* once whether the due-bill, he and the plaintiff spoke

(*a*) Cr. & Ph. 154. (*b*) Ante vol. iii. p. 610.
(*c*) Ib. 161.



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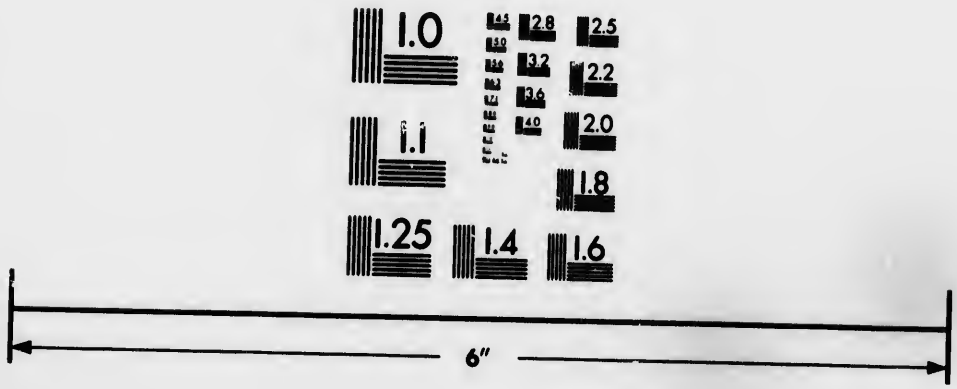

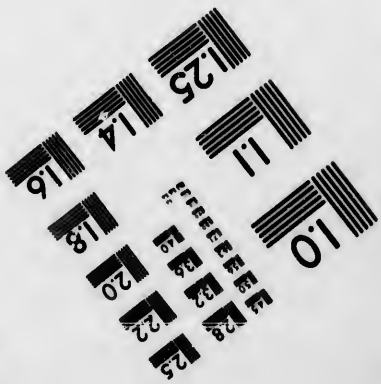

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about, was to apply on the wheat transactions, and he said it was." This testimony, if it stood alone, and if there was no reason for doubting the witness' accuracy, would be sufficient to establish the plaintiff's case. There is no contradictory evidence: and there was nothing in the manner of the witness, nor is there anything in the facts of the case, that would justify my disbelieving his evidence.

Mr. *Ferguson* contended that, in the conversations spoken to by the other two witnesses, if they are to be relied upon, the defendant gave a somewhat different account of the matter. But the defendant's statements are not evidence in his own favour, however they may be evidence against him; and in the conversations to which these two other witnesses depose, the defendant spoke, with equal distinctness, as to the money having been given and employed for partnership purchases. *Wright*, one of them, cannot recollect whether the defendant said that he had paid the money before, or after, the partnership was formed; but the conversations, as reported by him, and still more clearly by *Peterson* the other witness, certainly imply that, at the time, they understood the defendant to mean that the advances were made by him after the partnership was formed: and Mr. *Ferguson* correctly urged that this is not the case made by the bill. On the contrary, the bill alleges, and both parties swear, that the advance was made before the partnership agreement was signed; and the difference between them is only as to whether there was an agreement afterwards, that the money should go to the partnership account. If, therefore, the witnesses *Wright* and *Peterson* understood, and recollect accurately, this part of the conversation which the defendant had with them, the defendant probably expressed himself as he did because he was in the habit of regarding the money as in effect advanced on the partnership account, though it had been originally lent by him to the plaintiff individually, it having, on or about the same day

Judgment.

and before it was expended, been by agreement assigned to the partnership. Such a mode of expression was not unnatural or improbable. The conversations, at all events, support the bill so far as relates to the money having, with the defendant's concurrence, been applied for partnership purchases; and this is really the only point in question.

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Lundy v. McCulla.

It is further to be observed that the plaintiff, in his evidence, stated that he had put about $300 of his own money into the partnership concern. He did not profess to give the exact amount, not having his books with him to refer to. He stated further, that "this was not the same money as he got from *McCulla* and gave the due-bill for, but was over and above the due bill;" and that all the defendant advanced, after signing the partnership agreement, was $62. These circumstances, brought out on the part of the defendant, afforded further corroboration of the plaintiff's case, if that were necessary.

Judgment.

On the whole, I think that the plaintiff's case is sufficiently proved: and that the injunction must be continued. The partnership accounts will be taken in the usual manner.

I shall reserve the costs until after the Master makes his report; as the result of the account may be an element for consideration in disposing of them.

1865.

DENNISTOUN v. FYFE.

Mortgage—Costs.

A. the equitable owner of property, had it conveyed to his son, a minor, in trust for *A.* himself. *A.* afterwards signed the son's name to a mortgage of the property to a creditor, and added his own name as a witness.

Held, that the instrument, though void at law, created a valid charge in equity.

This cause was heard in Toronto at the spring sittings of 1835. The facts sufficiently appear in the head note and judgment.

Mr. *Roaf*, Q. C., and Mr. *S. Wood*, for plaintiff, referred to *Spirett* v. *Williams*, (*a*) *Buckland* v. *Rose*, (*b*) *Barrack* v. *McCullough*. (*c*)

Mr. *Blake*, Q.C., for the defendant, *W. H. Fyfe*, cited *Barling* v. *Bishopp*, (*d*) *Jenkins* v. *Vaughan*. (*e*)

Mr. *Rae* for *W. Johnson Fyfe*, the infan

MOWAT, V.C.—This is a bill by the plaintiff, an execution creditor of *W. H. Fyfe*, against *William Johnson Fyfe*, and *William Fyfe* the elder, praying that certain real estate in the village of Meaford may be declared chargeable with the debt due to the plaintiff,
Judgment. and that a certain mortgage claimed by the defendant, *William Fyfe* the elder, may be set aside as fraudulent.

The bill alleges that the property in question was purchased and paid for by *W. H. Fyfe*, the debtor; that *W. H. Fyfe* thereby became the equitable owner; that he thereupon, viz., on the 14th December, 1859, procured the vendor to convey the property to the

(*a*) 11 Jur. N. S. 70.
(*b*) Ante vol. vii. p. 440.
(*c*) 3 K. & J. 110.
(*d*) 29 Beav. 417.
(*e*) 3 Drew. 419.

debtor's son, the defendant *William Johnson Fyfe*, a minor; that this conveyance was, as respects the son, without consideration, and was made to him with a view to his holding the property for the benefit of his father, and protecting it against creditors. I think these statements of the bill are proved by the evidence.

The defendant, *William Fyfe*, the elder, father of *W. H. Fyfe*, claims to be a creditor of the latter to an amount exceeding $2,000, and to have a charge on the property for that sum, under a paper writing, purporting to be a mortgage in his favor from the infant defendant, dated the 28th April, 1861, and purporting to be signed by the infant. The name of the infant was really signed by *W. H. Fyfe* himself; and he also subscribed his own name as a witness.

The bill alleges that this mortgage was made without consideration, and with intent to defeat and delay *W. H. Fyfe's* creditors. This supposition was, under the circumstances of the case, a natural one; but the evidence establishes satisfactorily that *W. H. Fyfe* did owe *William Fyfe* the elder the debt claimed, and that the mortgage was really given, on the application of *William Fyfe* the elder, to secure this debt.

Judgment.

The bill further charges that, the grantor being an infant, no estate passed by the mortgage, and that the mortgage is void and of no effect. It is quite certain that no estate passed at law by the mortgage, but I think it created a valid charge in equity.

As the bill alleges that *W. H. Fyfe* was equitable owner of the property, and that the conveyance to his son was voluntary and was made for the benefit of *W. H. Fyfe*, the facts in reference to the mortgage must be taken to be, that the equitable owner signed in the name of his trustee a mortgage on the property to secure a debt due to a creditor, and added his own name as a sub-

1865.

Dennistoun v. Fyfe.

scribing witness. I think that, as between *W. H. Fyfe* and the creditor, this instrument, being so signed by the former, was clearly binding. It was an equitable mortgage on the property, or a contract for a mortgage; and a mortgage, or a contract for a mortgage, is enforcible in equity against, not only a trustee, but against voluntary grantees, to whom the estate may have been conveyed for their own benefit. *Lister* v. *Turner*, (*a*) *Vide* also *Buckle* v. *Mitchell* (*b*) and *Daking* v. *Whimper* (*c*). Mr. *Roaf* contended that this doctrine, as to voluntary grantees, does not apply where the settlor did not himself make the conveyance, but merely purchased the property and got the vendor to convey it to the object of the settlor's bounty. But the bill does not set up the case which this argument supposes. It does not allege that the conveyance to the son was for the son's benefit; and, though it had, the case of *Barton* v. *Vanheythuysen*, (*d*) is an express authority against the position contended for. (*Vide* also, *Barrack* v. *McCulloch* (*e*).

Judgment.

I think, therefore, that the bill, so far as it seeks to impeach the mortgage, must be dismissed; but without costs as respects *William Fyfe*, the elder. *Thompson* v. *Webster*, (*f*) *Hale* v. *Saloon Omnibus Co.* (*g*).

The plaintiff must pay the costs of the guardian of the infant defendant.

The property appears to be worth less than the mortgage debt; but the plaintiff is entitled, if he desires it, to a decree for redemption or sale, according to the alternative relief prayed by his bill.

(*a*) 5 Hare 281. (*b*) 18 Ves. 100. (*c*) 26 Beav. 568.
(*d*) 11 Hare 126. (*e*) 3 K. & J. 110.
(*f*) 4 DeG. & J. 600. (*g*) 4 Drewry, 500.

1865.

DOUGLASS v. WOODSIDE.

Principal and agent—Costs.

An agent had not answered for some months urgent letters received from his principal in England. The principal thereupon being alarmed, employed solicitors here to see to his interests in the matter; but the agent, though repeatedly applied to by such solicitors during nearly three weeks, gave the solicitors no information, or even an interview, and they consequently filed a bill for an account and injunction.

Held, that the defendant, by reason of his neglect, must pay the costs up to the hearing, though the court was satisfied his neglect did not proceed from any dishonesty on his part, or any intention of withholding information from his principal.

This cause came on for the examination of witnesses and hearing, before his honor V. C. *Mowat*, at the last spring sittings in Toronto.

Mr. *Roaf*, Q. C., and Mr. *S. Wood*, for plaintiff, referred to *Makepeace* v. *Rogers*. (*a*)

Mr. *Blake*, Q. C., for defendant, referred to *Hutchinson* v. *Rapelje*. (*b*)

MOWAT, V. C.—This is a bill against an agent for an injunction and an account. Judgment.

The plaintiffs reside in England, and are trustees and executor and executrix, under the will of *Jol Harvie*, formerly of Toronto, and who at the time of his death, had real and personal estate in Upper Canada. On the 21st September, 1862, they appointed the defendant, (a resident of Toronto) their attorney and agent, to get in the personal estate, and to manage the real estate, in Upper Canada, with very full powers.

It is of the defendant's receipts under this authority that the bill prays an account; and the plaintiff's right

(*a*) 12 L. T. N. S. 12. (*b*) Ante vol. ii. p. 533.

1865. Douglass v. Woodside.

to such an account is not disputed: the only question is as to the costs of the suit. The bill asks for costs against the defendant, and the answer asks for costs against the plaintiffs.

For the purpose of disposing of this question, the transactions between the parties before the 22nd of January, 1864, were not stated to be material. On that day Mr. *Douglass*, the executor, wrote to the defendant, giving him instructions respecting matters of apparent importance, which required the defendant's attention. This letter the defendant did not answer or acknowledge. On the 22nd of March, Mr. *Douglass* wrote again, in a tone of much anxiety, respecting the same matters, and respecting certain dividends and interest coming to the estate, and then long past due. This letter also received no reply or acknowledgment. In fact, from some date antecedent to the letter of the 22nd of January, until the 23rd June, the defendant wrote but one letter to the plaintiff, or to any one on his behalf. This one letter is dated the 10th of March, and does not contain any reference to the matters respecting which Mr. *Douglass* wrote in January. The defendant apologised in it for his negligence in not attending to the plaintiffs' matters sooner, and stated that he had been so busily engaged with the charter of a new bank here, that his whole time had been occupied, but that he would be able to give to the plaintiffs' business every attention thenceforward. He referred to one of the mortgages, and said he had received the interest upon it, and would remit the amount by the next mail. What the amount was, the letter does not mention, but it appears, by the account subsequently rendered by the defendant, to have been very small. The defendant neglected to make the intended remittance by the next mail; nor did he make it, or write again to his principals, for three months afterwards, when the matter had been placed in the hands of the plaintiffs' solicitors, Messrs. *Smith* and *Wood*, of

Judgment.

Toronto. These gentlemen, on the 9th of June, notified the defendant that the plaintiffs had placed the affairs of the estate in their hands; and from that time until the bill was filed, they employed themselves actively, by letter and otherwise, in endeavoring to get from the defendant information regarding the estate; but they utterly failed even to obtain an interview with him, or an acknowledgment of their letters. After eighteen days of these unavailing efforts, they filed the present bill. 1865. Douglass v. Woodside.

When the defendant found that a bill had been filed, he wrote to Messrs. *Smith* and *Wood* a note, informing them that he had forwarded back to England the deeds and papers belonging to the plaintiffs. This, it appears, he did on the 23rd of June; and he sent with the deeds his own account as agent, and a bill of exchange for a small balance which the account shewed to be due from him. He sent no information with these papers, and gave the solicitors none. He gave the solicitors no list, either, of the papers he had returned, and no copy of the accounts he had sent; nor did he even inform them that he had sent any account or any remittance. Judgment.

I cannot say that the plaintiffs did wrong in placing the matter in the hands of their solicitors when they did. I think the defendant's omission to make the remittance promised in his letter of the 10th of March; his omission to answer Mr. *Douglass'* urgent letters of the 22nd of January, and 22nd of March; and his omission to give the information the plaintiffs were entitled to, and which Mr. *Douglass* so anxiously asked for, made the course which that gentleman took an exceedingly natural one; and I see nothing in it that I can pronounce blameable.

I cannot, say, either, that the solicitors were wrong in filing the bill when they did. The defendant's neglect had been the occasion of the matter being

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Douglass v. Woodside.

placed in their hands; and I cannot affirm that, after eighteen days of further effort on their part had failed to obtain the slightest information from the defendant, or even an interview with him, they were not entirely justified in instituting proceedings. The defendant says in his deposition, that he did not, and would not, recognise them as agents; but he does not intimate, in his deposition or his answer, that he had at the time, or has now, any doubt respecting their authority, or that he made any inquiry or suggestion whatever about it.

I cannot say that the solicitors, having filed the bill, were wrong in proceeding with their motion for an injunction. I think the statement in the defendant's note to them, that he had sent the deeds and papers to the plaintiffs in England, was calculated to increase, and not remove, the suspicion, however unfounded the suspicion may really have been, that the defendant was not acting honestly. The transmission of these deeds and papers to England was evidently without justification. They could be of no service there. It was in Canada, as the defendant knew, that they were needed. I think the conduct of the solicitors was what, under the circumstances, a reasonable prudence may well have dictated in the interest of their clients.

Judgment.

I see no reason to doubt that the defendant's apparent negligence, before Messrs. *Smith* and *Wood* were employed, arose entirely from the pressure of his other engagements; and that his conduct afterwards is to be attributed to a little temper at the solicitors' having been employed. But the result is that, without entertaining any doubt of his uprightness of purpose throughout the transactions in question, I yet feel that he has so acted as to leave the court no ground on which, consistently with justice to the plaintiffs, he can be exempted from the costs of the suit up to the hearing.

Subsequent costs will be reserved.

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WALTON v. ARMSTRONG.

Vendor and purchaser.

Where vendors had not furnished an abstract of title notwithstanding repeated notices, and had at length brought an action at law on a note given by the purchaser for part of the purchase money, the purchaser filed a bill alleging that, by reason of the delay, the contract was at an end, and praying an injunction to stay the suit at law. The vendors failing to justify their neglect, the court granted the injunction.

The facts giving rise to this suit appear sufficiently in the judgment. The prayer of the bill was, that the contract might be declared to have been abandoned by the defendant, and that the same might be rescinded, and the promissory note given by the plaintiff delivered up to him: that the defendants might be restrained by injunction from further prosecuting the action on the said note: and that the defendants might be ordered to pay the costs of the suit; and for further relief. Statement.

Mr. *Roaf*, Q.C., for plaintiff, referred to *O'Keefe* v. *Taylor*, (*a*) *Thompson* v. *Brunskill* (*b*).

Mr. *Fitzgerald*, for defendants, cited *McDonald* v. *Garrett*, (*c*) *King* v. *Wilson* (*d*).

MOWAT, V.C.—On the 19th December, 1863, the plaintiff contracted to purchase from the defendants certain houses and land in the Township of Scarborough for £600. The original conditions of sale were that the purchaser should pay in cash £100, and the balance in a month. But when the plaintiff bought, the defendants accepted his promissory note for the £100, instead of cash.

In the latter part of January, 1864, a verbal com-

(*a*) Ante vol. ii, pp. 95, 305.
(*b*) Ante vol. vii, p. 542.
(*c*) Ante vol. vii, p. 606.
(*d*) 6 Beav. 124.

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munication passed between the plaintiff's agent and the defendants' solicitor as to an abstract of title. On the 2nd February, the plaintiff employed Messrs. *Taylor* and *Rae*, of Toronto, solicitors in the matter; and they on that day wrote for an abstract to Mr. *Wilson* of Whitby, the defendants' solicitor. On the 5th they wrote again, in consequence of the plaintiff having in the meantime received a letter threatening him with an action for the purchase money. No answer having been received by Messrs. *Taylor* and *Rae*, to either of their letters, they, on the 11th February, wrote again in very urgent terms, for the abstract, stating that, unless it was furnished in ten days, the plaintiff would claim damages.

Judgment.

After the expiration of the ten days, namely, on the 23rd February, they wrote once more, notifying the defendant's solicitor, that, unless the abstract was furnished that week, the plaintiff would consider the contract at an end.

A day or two before the date of this letter, Mr. *Wilson* appears to have forwarded a paper intended as an abstract, though Messrs. *Taylor* and *Rae* had not yet received it. It is not contended that this paper was a sufficient abstract; or, that, in the sense in which the term is used in conveyancing, it was an abstract at all. Immediately after being received, viz., on the 25th of February, it was returned to Mr. *Wilson*, with observations shewing what was needed; but, no notice whatever being taken by him of this communication, the plaintiff's solicitors, on the 9th of March, wrote to him a letter, holding the contract at an end, because no abstract had been furnished.

It is not contended that the time mentioned in the letter of 11th February, or of the 23rd February, was, under the circumstances, too short to permit a proper abstract to be prepared or furnished; or that a proper

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abstract was in course of preparation; or that the defendants, before the receipt of the letter of the 9th March, declaring the contract at an end, had intended to furnish any other abstract; or that anything else was done or doing, towards satisfying the plaintiff's demand for an abstract, beyond what I have mentioned. Mr. *Wilson*, in his evidence, says expressly, that after the so-called abstract was returned until he sent the plaintiff's solicitors the writ, he did nothing to close the matter except having one conversation with Mr. *Taylor*, which took place in the end of March, of which I shall speak hereafter. The writ was sent on the 10th of May: the present bill was filed on the 17th May.

Primâ facie, this conduct of the defendants was an acquiescence in the plaintiff's notices, and was an abandonment of the contract. The defence which is set up to meet this case is, in effect, that the plaintiff was not entitled to an abstract. The defendants say that until he employed a solicitor, the plaintiff had not intended to demand an abstract. But it is not pretended that he expressed any intention on the subject either way; and probably he was not lawyer enough to know anything about an abstract. He certainly never intended to waive a good title; and even an acceptance of title binds a purchaser, so far only as he is made cognizant of the title. *Bousfield* v. *Hodges* (*a*).

Judgment.

The answer further says that the plaintiff accepted the title, by directing the tenants to pay their rent to him, and by other acts. These allegations are not established by the evidence; and I may add that even acceptance of rent does not necessarily involve an acceptance of the title.

The defendants chiefly relied on another circumstance. On the 19th January, the plaintiff heard that the buildings which the advertisement had described as being on the property sold, were not upon it, but were on the

(*a*) 33 Beav. 94.

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highway. The contract did not allude to the advertisement or to the buildings, but referred to the defendants' deeds for the description of the property sold. The plaintiff at once informed the defendants of what he had heard, and of his apprehension that the defendants could not, in consequence, give him a good title. Only once was any allusion subsequently made on either side to this difficulty about the buildings, and this was in the conversation between Mr. *Taylor* and Mr. *Wilson*, in March, of which Mr. *Wilson* speaks in his evidence. Mr. *Wilson*, on this occasion, inquired whether, if the title was shewn to be satisfactory in other respects, the plaintiff would still object that some of the buildings were on the highway; to which Mr. *Taylor* replied that he would. It is not easy to understand how a different answer could have been looked for.

Judgment.

Mr. *Fitzgerald* contended that the plaintiff was bound to give some preliminary proof as to the buildings not being on the land described in the deeds, before the defendants could be called upon to prove the contrary. But whether this is so or not, no question as to such proof had been raised on either side. The controversy was merely as to the plaintiff's getting an abstract; and this he was certainly entitled to. How, indeed, could he give the proof referred to, without being even put in possession of the metes and bounds of the property to which the deeds related, and which it is one object of an abstract to furnish? For all that appears, the plaintiff, when the proper time arrived, would have made no objection to give the preliminary proof which the defendants contend for, if this had been asked.

It is not clear that the plaintiff has a legal defence to the note for the deposit, and I think he ought not to be refused relief here.—*Thompson* v. *Brunskill.* (*a*)

The decree must be with costs.

(*a*) Ante vol. vii., p. 548.

WEIR v. MATHIESON. 1865.

University—Injunction—Removal of professor—Costs.

An injunction granted to restrain trustees of a university founded by Royal Charter removing a professor thereof.

By letters patent under the Great Seal, issued on the 16th of October, 1842, certain persons therein named were created a body corporate by the name of "Queen's College, at Kingston," with the style and privilege of a university, with power to appoint professors and other officers, and in case of complaint made to the trustees to institute inquiry, and in the event of any impropriety of conduct being duly proved, to admonish, reprove, [illegible]end, or remove the person offending:

Held, that the professorships in the institution were offices of freehold, and that the trustees had not the power at their discretion without such inquiry of removing the professors, but that they held their appointments *ad vitam aut culpam*; that this court would by injunction prevent the trustees from improperly interfering with the professors in the discharge of their duties: and where a professor had been improperly removed, the court, on decreeing him relief, and in order to do him complete justice, ordered him to be paid out of the trust funds of the institution his arrears of salary; and ordered such of the trustees as had acted in such improper removal to pay the costs of the suit.

Statement.

This was a bill by the Rev. *George Weir* against the Rev. *Alexander Mathieson* and twenty-five others, trustees of Queen's College, at Kingston, and the College; setting forth that by royal letters patent, issued the 16th of October, 1842, certain persons therein named were created a body corporate by the name of "Queen's College, at Kingston," with perpetual succession as a College, with the style and privileges of a University for the education and instruction of youth and students in arts and faculties; that the letters patent further declared, that for the better execution of the purposes set forth in them, and for the more regular government of the corporation, there should be twenty-seven trustees; and amongst other powers conferred on the trustees, it was declared that they should for ever have full power and authority to elect and appoint for such college, a principal and such professor or professors,

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master or masters, tutor or tutors, and such other officer or officers as to the trustees should seem meet, and further, "that if any complaint respecting the conduct of the principal, professor, master, tutor, or other officer be at any time made to the board of trustees, they may institute an inquiry, and in the event of any impropriety of conduct being duly found, they shall admonish, reprove, suspend or remove the person offending, as to them may seem good. Provided always, that the grounds of such admonition, reproof, suspension or removal, be recorded at length in the books of the said board."

Statement.

That in the year 1853 the Rev. *John Cook*, D.D., (first principal of the college, and one of the defendants,) was directed by the board of trustees to proceed to Scotland, and procure professors for the college; and plaintiff, who was then filling the permanent office of Rector of the Grammar School of Banff, was desired by him to accept the professorship of Classical Literature in Queen's College, and in September of that year, plaintiff, being still in Scotland, accepted such office at a salary of £350 a year; and in October following entered upon the discharge of the duties of such professorship, and was then duly confirmed by the board of trustees, since which time plaintiff had continued faithfully to perform and discharge the duties thereof until the month of February, 1864, when he was hindered and prevented in the discharge of such duties by the wrongful, improper and illegal acts of the trustees; they having, on the 18th day of that month, passed the following resolution:

"*Resolved*, that from the facts which have come to the knowledge of the trustees, and the present alarming state of the college, the trustees deem it necessary, and in the interest of the college, to remove Professor *Weir* from the office of Professor of Classics, and Secretary to the Senatus, and in the exercise of their power to

remove at discretion, they hereby do remove him from these offices accordingly forthwith; and that the treasurer do pay to him his salary in full to the end of the present session, and for six months thereafter, in lieu of notice; and that the secretary be instructed to communicate this resolution to Mr. *Weir*," which on being communicated to plaintiff, he refused to recognise as valid, or to acquiesce therein in anywise: and notwithstanding such resolution plaintiff endeavoured to perform, and would have performed the duties of his professorship, but that the board of trustees had excluded him.

The bill further alleged, that by means of gifts, donations and bequests from numerous members of the Church of Scotland, and others, and from other sources, the college was possessed of a large property, and from the annual income arising therefrom, and from any grant of money from the legislature, the board of trustees paid and discharged the salaries of the professors and other expenses of the college, in accordance with, and under, and subject to, the directions, provisions, powers and authorities in the said letters patent contained; that the Royal Charter was granted to the intent that the members of the Church of Scotland in Canada might have and enjoy a university and college, with similar powers and privileges, and upon the model of the University of Edinburgh, and the charter, in making provision for the appointment and removal of professors, had in view professors enjoying similar offices, and fulfilling similar duties to the professors in the University of Edinburgh; and that similar customs and usages should apply to and be associated with such professorships, and that the nature of such offices and employment should be similar in the two universities. In the University of Edinburgh the tenure of the office of a professor is *ad vitam aut culpam*, that is, during the life of the incumbent, unless removed for impropriety of conduct; and the plaintiff submitted

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that, under the charter, such is the tenure of the professorship held by him in Queen's College, and such was the condition under which he accepted his appointment.

The bill further alleged, that the resolution of the 18th of February was passed by the board of trustees without the plaintiff being present—without his being notified or requested to appear before the board—without his being notified of any charge or complaint being preferred against him; and without the board having called upon him to make any defence; and without having asked from him any explanation whatever.

Statement.

The bill further alleged, that such resolution had been passed by the board of trustees acting on an *ex parte* statement of the defendant *Leitch*, the principal of the college, which statement had been read to, but not entered on the minutes of the board: that at a meeting of the trustees held on the 26th of February, 1863, they assumed to pass certain statutes or ordinances, which the plaintiff alleged to be illegal, amongst others, one declaring that all officers should be appointed by, and hold office only during the pleasure of the trustees, except in cases where a special agreement had been or might be made: that the trustees might on their own motion, and without complaint being made, deal with the principal, professors and other officers, when they saw cause, without recording the grounds of censure, suspension, or removal; and on removal, such officer should be entitled to claim salary up to the date of his removal: that the passage of these statutes created great dissatisfaction and discontent amongst the professors, and that the alarming state of the college referred to in the resolution of the 28th of February, 1864, was solely caused by these obnoxious statutes, and the refusal of the trustees to pay any regard to the remonstrances made to them in respect to such statutes,

and the plaintiff did not cause or originate such a state of things: that the meeting of the trustees of the 9th of February, 1864, was illegal and contrary to the charter, not being duly summoned or convened, it professing to be an adjourned meeting from the third of the same month, when only three of the trustees were present, who had no power to adjourn, and no notice was given, as prescribed by the charter, to the other trustees, of the meeting on the 9th.

Other charges were introduced into the bill as to the defendant *Leitch* influencing the trustees against the plaintiff, but these it is considered are immaterial to the present report: and the bill asserted that even if the statements of the defendant *Leitch* were true, the trustees were not justified in passing the resolution complained of. The prayer was that the resolution might be declared illegal and void, as having been passed at a meeting not duly held; when no complaint was made against the plaintiff, and no impropriety of conduct on his part proved; that it might also be declared that such resolution was a breach of trust, and contrary to the charter, inasmuch as such resolution was passed without proper deliberation and consideration, and under the influence of prejudice; that the statutes referred to might be declared illegal and void; that it might be declared that plaintiff was entitled to hold and enjoy his said office in the college until duly removed or suspended therefrom for impropriety of conduct, duly proved, as contemplated by the charter; that the said resolution might be cancelled, and the trustees restrained from in any way interfering with, or impeding the plaintiff in the discharge of the duties of his office, and from withholding his salary in respect thereof; and that such of the defendants, the trustees, as voted for such resolution, and the defendant *Leitch*, (who was absent from the meeting at which it was passed,) might be ordered to pay plaintiff his costs.

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Upon the filing of the bill an application was made during the vacation of 1864, before the late Vice-Chancellor *Esten*, for an injunction to restrain the trustees, as prayed by the bill, which, upon argument, he ordered to issue, his Honor observing,

"I have perused the charter and statutes. I think that the trustees have power to appoint for life, or for a term of years, or during pleasure; but that an appointment made generally must be deemed to be during good behaviour, and while the duties of the office are performed. I think that the 15th clause was obligatory, or was intended to insure an investigation in case of reasonable complaint. By the principles of the common law no man can be dismissed from his office without inquiry, and an opportunity of defending himself; I think, therefore, that the dismissal of Mr. *Weir* was illegal. He could doubtless recover the emoluments of his office, but I think he has a right to the protection of this court, which would not permit another to be maintained in his office while he recovers his salary at law. The legal remedy would be inadequate. I think that a person appointed under the trustees has a right to the protection of the court, and that trustees transcending their powers should be restrained by injunction. I disclaim, of course, all authority to interfere, if the trustees, proceeding in due course of law, pronounce a decision which is deemed to be erroneous. In this case the jurisdiction of the visitor would be invoked, whose decision cannot be reversed by this court; but this proceeding appears to me to be *ultra vires*."

Statement.

Eighteen of the Trustees, as also the College, subsequently answered the bill, the leading points raised by the answers of the trustees were that the trustees had power to appoint professors, masters, tutors and other officers, for such time as they thought proper; that many professorships in the colleges of the United Kingdom and of Europe, as also of Canada and elsewhere in

America, were and are not held for life; that the usages of the University of Edinburgh varied much from the provisions relating to Queen's College by the charter; that, in points not provided for by the charter, the usages of that University were not intended to be binding on Queen's College; and that plaintiff was not appointed for life; nor did he accept the appointment on condition that it should be for life.

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That the authority of the Rev. Dr. *Cook*, referred to in the bill, was contained in a resolution passed by the trustees on 15th July, 1852, whereby the Rev. Dr. *Mathieson* and the Rev. Dr. *Cook*, or whichever of them might be in Scotland, were authorized to seek out and recommend for appointment by the board, professors to fill the vacancies existing at that time in the college.

Statement.

That after the plaintiff had been nominated under the authority of certain resolutions set out in the answer, a resolution was passed on the 8th of June, 1854, stating "that the appointment of Professor *Weir*, be approved of and confirmed from the period of his arrival at Kingston;" that the provisions of the charter respecting the trial of complaints made to the board do not take away any discretionary power which the trustees otherwise had, but are only obligatory where such discretionary power exists: and submitted that the board had such discretion to dispense with the services of the plaintiff as such, in the same manner as they could remove any officer of the college, subject to his receiving any payment on account of salary to which the law under the circumstances might entitle him; and that the trustees having, in the exercise of such discretion, dispensed with the services of the plaintiff, their act or motives could not be questioned in this court: denied any improper motive for such removal, asserted that such was done after full discussion by the board on the 9th and 10th days of February, 1864, and from a conviction that the conduct of plaintiff made his removal absolutely

1865. Weir v. Mathieson. necessary for the best interests of the college; many of the facts and circumstances, shewing such necessity to exist, being within the personal knowledge of the trustees.

The answers further submitted that the plaintiff had no right to raise any question as to the regularity of the meeting of the board at which he was removed, his removal being, as the defendants contended, discretionary with the board; also, that Queen's College, being founded by Royal Charter, her Majesty was the visitor thereof, and the plaintiff's only remedy was by petition to the Crown.

The cause having been put at issue, was brought on for the examination of witnesses and hearing before his Lordship the Chancellor, at the sittings of the court, at Kingston, in the autumn of 1864, when evidence was gone into at some length as to the conduct of the plaintiff and the feeling existing on the part of several of the trustees towards him, which it is not necessary to recapitulate. At the hearing a decree was made in favour of the plaintiff, the Chancellor stating, "My brother *Esten*, on the argument of the motion for injunction, has, I find, found the employment of the plaintiff by the defendants was during good behavior, in other words, *ad vitum aut culpam*; and that this court has jurisdiction and ought to interfere to protect him in the enjoyment of his office. These are the only two questions of law in the case, and I think I should hold that they having been disposed of by my learned brother, the plaintiff is entitled to a decree, as it is admitted that if his tenure be such as the Vice-Chancellor decides it to be, he has not been properly removed therefrom, although I doubt the jurisdiction of the court to interfere.

Statement.

"The evidence before me in no way alters the character of the case as presented by my brother *Esten*.

"The decree will be to restrain the defendants from

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interfering with the exercise by the plaintiff of his duties or office as classical master; from appointing any one in his place, and from withholding from him his salary until he is legally removed.

"The defendants must pay the plaintiff his costs."

The defendants thereupon set the cause down to be re-heard before the full court.

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

In discussing this case the court will have to consider and determine two questions which arise in it: first, the tenure by which the plaintiff held the office to which he has been appointed; and, secondly whether the court can properly interfere for the protection of the plaintiff in the event of its being considered that such appointment created a freehold, or *quasi* freehold, in the office.

Argument.

It is shown by the minutes of the board that the Rev. Dr. *Leitch*, Principal of Queen's College, at the time he was asked to accept that appointment, held a situation in Scotland, *ad vitam aut culpam*, and his appointment in the College not having been for any specified time, the trustees by resolution expressed the opinion that that appointment was for life: at the time plaintiff was appointed he also held a situation *ad vitam aut culpam*, and therefore the same reasons were applicable to his case as to that of Dr. *Leitch*. The general rule in Scottish Universities is, that professors hold their chairs for life. In Queen's College, the principal, and all professors, are and must be chosen in the same manner; and if the trustees are right in their contention as to their power to remove any of the professors, they must have that power as regards the principal also, their status under the charter being alike; a result which could never have been intended. The language of the charter

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here, shews that all the professorships were to be held for life, and provides a means for the removal of any of the incumbents only on complaint being made, and such removal to be by a majoriiy of the trustees; thus clearly negativing the right of arbitrary dismissal, as is contended for by the trustees: in other words, the appointment to office exhausts the power of the trustees, except where complaint is properly made and sustained, when a removal may be made for cause. The express powers given by the charter are narrower than those which the trustees say are implied and are in effect embraced in the implied powers, a result which is absurd.

The general rule that such offices are freeholds, or *quasi* freeholds, is applicable to this case, and determines the tenure when there is no express contract.

Argument.

They also contended that the facts fully establish the existence of a trust; the trustees holding the funds from which plaintiff's salary came, in trust for him, and others in like manner; that plaintiff, as a member of the corporation, was entitled to file a bill, on the ground that the trustees, in dismissing him improperly, had been guilty of a breach of trust; and also on the ground that the university was a public charity. They also contended, that the trustees appointed by the charter of incorporation were the visitors, and it was not necessary therefore to appeal to the Crown; that the trustees had agreed to act visitatorially in dismissing the plaintiff, and that having exceeded their authority by dismissing him at pleasure, such dismissal was a nullity, and that relief should be given in this court.

They referred, amongst other authorities, to *The King* v. *Richardson*, (*a*) *Attorney-General* v. *Pearson*,

(*a*) 1 Burr. 536.

(*a*) *In re Phillips' Charity*, (*b*) *In re Fremington School*, (*c*) *Dummer* v. *Chippenham*, (*d*) *Phillips* v. *Bury*, (*e*) *Willis* v. *Childe*, (*f*) *Comyn's Digest Franchise*, (*g*) *Dougars* v. *Rivaz*. (*h*)

Mr. *Strong*, Q. C., and Mr. *McLennan*, for defendants. The only ground on which plaintiff can at all rest his case, is that this is a charity; the leading case on this point is *Phillips* v. *Bury*, referred to by the other side. It is a prevailing principal in all such cases, that there must be a visitor. When no visitor is named, the founder is held to be such; but that rule is applicable only in the case of private charities, not where it is founded by Royal Charter.

It is out of the question to contend that the trustees are visitors in this case; they are the persons appointed to manage the institution—they are in fact the persons to be visited.—*Phillips* v. *Bury*, referred to in *Duke's* Charitable Uses, 256. The charter being silent as to visitors, the Crown must be held to be entitled to all the privileges of visitors.—*The King* v. *Catherine's Hall*. (*i*)

Argument.

The next point is as to the internal management of the college: in all matters relating to that, the visitor's jurisdiction is conclusive; *Phillips* v. *Bury* is a clear decision on this point. The jurisdiction of the court is clearly stated by Mr. *Haddon* in his work on the administrative jurisdiction of the Court of Chancery, (pp. 166-7.) and rests it upon the ground of trust. Here there is no trust, and the case of *Willis* v. *Childe*, relied on by the other side, was a case of express trust.

(*a*) 3 Mer. 353 pp. 295 & 402.
(*b*) 9 Jur. 959.
(*c*) 10 Jur. 512,
(*d*) 14 Ves. 245.
(*e*) 2 T. R. 346.
(*f*) 13 Beav. 117.
(*g*) F. 32, 34.
(*h*) 28 Beav. 233.
(*i*) 4 T. R. 233.

1865. Any contract of hiring, especially for personal service, is not such a contract as this court will specifically perform; in the present case there is no mutuality between the parties.

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[Mr. *Blake*, Q. C.—We do not rest the case on the ground of specific performance.]

The bill is clearly rested on the right of specific performance; and although that relief is not in terms asked for, still such is the effect of the prayer.

This court will not enforce a contract to build a house; but where money has been left to build, the court will enforce execution of the trust. This it is true may be said to be a very thin distinction, but the reason why the court interferes in the latter case is plain, it is that there is no legal remedy for the party entitled. In this case no such objection exists, and the plaintiff can proceed either by *mandamus* or by action to enforce payment of the stipulated salary; the frequency of action is not a sufficient reason for overcoming the objection to the court pronouncing a decree such as is here sought.

Argument.

As to the tenure of office; the 15th section of the charter points out the course to be taken in the case of complaint being made against professors and others; and the 19th section authorizes the trustees in their discretion to abolish any of the chairs in the college.

[*Spragge*, V. C., that may be so. If, as is contended for by the other side, the professor has a freehold in his office; that of course can only be while the office continues to exist.]

Nothing can be more untenable than the argument attempting to place this on the same footing as the University of Edinburgh; there it is questionable if a

professor can be removed for any cause. Professor *Leitch*, it is shewn, before he would consent to accept the appointment, insisted upon it being made during good behaviour; that fact, however, instead of being in favor of the view contended for by the plaintiff, supports the construction put upon the contract by the trustees. 1865. Weir v. Mathieson

The Attorney-General v. *Magdalene College* (*a*), *In Re Berkhampton Free School*, (*b*) *The Attorney-General* v. *Deadham*, (*c*) *The Attorney-General* v. *Clarendon*, (*d*) *In Re Queen's College, Cambridge*, (*e*) *In Re Oxford College*, (*f*) *Pickering* v. *Ely*, (*g*) *Stocken* v. *Brocklebank*, (*h*) *Johnson* v. *Shrewsbury & Birmingham Railway Co.*, (*i*) *Horne* v. *The London & North Western Railway Co.*, (*j*) *Ogden* v. *Fossick*, (*k*) *Brett* v. *East India & London Shipping Co.*, (*l*) *Peto* v. *The Brighton, &c., Railway Co.*, (*m*) were, with other authorities, referred to and commented on by counsel.

The other points taken by counsel appear sufficiently in the judgment.

The judgment of the court was delivered by

Spragge, V. C.*—This case has been exceedingly well argued on both sides. Judgment.

The first point that I propose to consider is the tenure by which Professor *Weir* held his office. I take that first, because, in my view of the case, it depends on

(*a*) 10 Beav. 502.
(*b*) 2 V. & B. 134.
(*c*) 23 Beav. 350.
(*d*) 17 Ves. 491.
(*e*) Jacob 1.
(*f*) 2 Phil. 521.
(*g*) 2 Y. & C. C. C. 248.
(*h*) 3 McN. & G. 250.
(*i*) 3 D. M. & G. 914.
(*j*) 10 W. R. 170.
(*k*) 11 W. R. 128.
(*l*) 3 N. R. 680.
(*m*) 1 Hem. & M. 468.

* Mowat, V. C., gave no judgment, having been concerned in the case while at the bar.

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that, whether this court has jurisdiction in the matter before us. Upon this point the nature of the institution, whether public or private, is material; as to that I think there is no room for doubt. It is a college and university, and the reason of its institution is thus set forth in the Royal Charter: "Whereas the establishment of a college, within the province of Upper Canada, in North America, in connection with the Church of Scotland, for the education of youth in the principles of the Christian religion, and for their instruction in the various branches of science and literature, would greatly conduce to the welfare of our said province." It is, in my opinion, a corporate body, constituted by Royal Charter for the advancement of religion and learning generally, in Upper Canada, and so of a public nature.

Judgment.

The head of such an institution, in the absence of anything defining the tenure of his office, and taking it out of the general rule, holds his office *ad vitam aut culpam*. This is as clear from the case in the House of Lords of *Gibson* v. *Ross*, (*a*) cited by the defendants, as from any of the older cases. In that case the master of an academy, established by Royal Charter, at Tain, in Rosshire, had been dismissed by the directors and managers of the institution; and the question was as to the tenure of his office, and the court in Scotland, and the House of Lords, upon appeal, both held that the institution was private and local; the circumstance of its being incorporated by Royal Charter making no difference. Lord *Cottenham*, by whom judgment was delivered, observed, "It is clearly established that a private society would have the right to dismiss a master: and there is no difference here between these parties and any other private society, except that these parties are incorporated." In another passage he states the different rules applying to public

(*a*) 7 Cl. & Fin. 241.

and private schools. "A public schoolmaster," he says, "is a public officer, and as such he cannot be dismissed without an assigned and sufficient cause." But it is clear that in the case of a private trust, this rule does not apply. That is a clear and well settled principle of law.

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Weir v. Mathieson.

Attorney-General v. *Pearson*, heard in 1817, was the case of a minister of a dissenting congregation; and Sir *Samuel Romilly*, contending against the removal of the minister, at discretion, instanced the case of public schools, and said, that whenever the trustees had endeavoured to keep the master dependant upon them by a limited appointment, the court had uniformly resisted the introduction of any such limitation. This shews that it must have been well understood in his day, that the tenure of office of the master was during good behaviour.

Judgment.

In the matter of the Free Grammar School of Chipping, Sodbury, (*a*) before Lord *Lyndhurst*, the appointment of the master was general. It was by the bailiff and burgesses, confirmed by the bishop. The master was afterwards removed upon some disagreement, as to what was to be taught in the school. The Lord Chancellor held the removal by the bailiff and burgesses improper; they had, he said, exercised the power of appointment; and he added, "but I do not find anywhere that they have a right to remove the schoolmaster, as long as he shall continue to conduct himself with propriety in his office," and more to the same effect.

In the case of *Phillips'* Charity, the master was appointed to office "so long as he shall continue to discharge the duties of the said school to the satisfaction of the trustees and feoffees of Mr. *Phillips'* Charity." A petition was presented by Mr. *Newman*, the schoolmaster, to the Court of Chancery, in 1839, and it was

(*a*) 8 L. J. Chy. 18.

1865. Weir v. Mathieson. thereupon declared by the then Vice-Chancellor that Mr. *Newman* "was entitled to hold the office of schoolmaster, and to the emoluments thereof, so long as he should well conduct himself, and be competent to the performance of the duties thereof." Sir *J. L. Knight Bruce* held such to be his tenure of office, as settled by the order, upon the matter coming before him, without, however, expressing his own opinion upon the point.

There are other cases which bear more or less upon the same point, but the authorities I have quoted appear to me to establish that, as a general rule, the master of an educational establishment, which is a "public charity," as this institution is admitted to be, holds his office during good behaviour.

Judgment

I think no sound distinction exists between professors in this university, and the masters of public schools. The head of this institution clearly, I think, stands upon the same footing, and I think the charter shews that he and all the professors hold their office by the same tenure; that they are all, in the language of Lord *Cottenham*, "public officers."

There are considerations in favor of such being the tenure of office, urged by Mr. *Blake*; some drawn from the provisions of the charter, especially the 15th and 16th clauses, and some resting on other grounds, which are of considerable weight, but into which I do not find it necessary to enter.

But, it is contended that the appointment in this case was in effect, though not in terms, *dum bene placito;* and that there is nothing in the charter restrictive of such appointment. I do not know that the charter would not prevent an appointment to office of that tenure, even if it had by contract been so expressly

limited. What was said by Sir *Samuel Romilly* leaves room for doubt upon that point; but here the appointment is general, and must be taken to be of such tenure as would flow from the nature of the office. It is to be remembered, too, that this engagement was not made in Canada, where it is said appointments of this nature are understood to be *dum bene placito*, but in Scotland, where the contrary seems to be understood. I gather this in part from the evidence, and in part from the case of *Gibson* v. *Ross*, which was a Scottish case; and from the cases in the Scotch courts referred to in that case.

1865.
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I do not attach much weight to the argument deduced from the power possessed by the trustees to reduce the number of chairs in the University. That power seems to be quite consistent with the tenure of office, being during good behaviour, as long as the chairs exist; in other words, an office *ad vitam aut culpam*, subject to the abrogation of the office itself. Nor can I say that the implied engagement, involved in the tenure of office claimed by the plaintiff, is unreasonable and improbable; as the defendants contend, in the face of what I find to have been the practice for many years both in England and Scotland, in regard to offices of a cognate character.

Judgment.

The question of jurisdiction was strongly contested at the bar, and, in connection with it, the question as to where the visitatorial power of this university resides. My own opinion is, that whoever be visitor, this court has jurisdiction. The functions of the visitor are in relation to matters of interior economy and management; and as to those matters, it may be granted that they are exclusive; but that is not inconsistent with the jurisdiction of this court in relation to public charities. Several of the cases cited arose in regard to the application of the revenue. The *Attorney-General* v. The *Foundling Hospital* (*a*), is an instance of this. In

(*a*) 2 Ves. Jur. 41.

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Birkhampstead Free School (*a*), an order was made by the court, declaring that the warden of All Souls' was visitor of the school, but that the revenues were subject to the jurisdiction of the court, which order Lord *Eldon*, upon the matter coming before him, pronounced to be "perfectly agreeable to law," and in another passage he says, "the court has, in fact and practice, acted upon the ground of such jurisdiction, of which there is no doubt."

In the *Attorney-General* v. *Locke* (*b*), the governors of the charity, who were also visitors, were made accountable to the court, *quoad* the estates of the charity.

Judgment.

In most of the cases it is put upon the ground of trust; the governing body of a public charity hold their powers in trust, and a court of equity, as to matters not falling within the proper functions of the visitor, sees that the trusts are properly carried out; in some cases, on behalf of individuals, who are aggrieved by the improper exercise of the trust; in other cases, on behalf of the Crown, as *parens patriæ*. *Green* v. *Rutherforth* (*c*), is an instance of the former. The trust was to present to a rectory. The bill was demurred to on the ground that the jurisdiction was in the visitor, not in the court, but was overruled. The observations of Lord *Hardwicke* are valuable; he says, "It is sufficient to shew that the visitor, though general, could not give an adequate remedy in many cases on this trust," and he refers to the case of *Eton College*, where, as he says, the court held that "the bare averment of a visitor would not preclude the jurisdiction of this court; but the extent of his authority must appear, that the court may be satisfied he can do complete justice; and therefore," he says, "a mandamus was awarded." Lord *Hardwicke's* opinion evidently was that in cases of this nature a court of

(*a*) 2 V. & B. 134 (*b*) 1 Ves. 462.
(*c*) 3 Atk. 164.

equity should exercise its jurisdiction, unless satisfied that there was an adequate remedy elsewhere, upon the same principle as a court of common law would grant a mandamus.

Rex v. *Barker* (*a*) was an application for mandamus, directed to the trustees of an endowed dissenting chapel, to admit a minister duly elected. Lord *Mansfield* observed, "Here is a function with emoluments, and no specific legal remedy," and the mandamus was granted. These cases are opposite to the contention by the defendants, that this court has no jurisdiction, because, as they contend, the Queen is visitor.

Dawson v. *Corporation of Chippenham*, (*b*) was a bill by the master of a public school for improper dismissal; a demurrer to the jurisdiction was overruled. *Willis* v. *Childe* (*c*) was a similar case, and the bill was sustained. In the *Attorney-General* v. *Sherborn School*, the point was again discussed with the same result. In the *Attorney-General* v. *Dedham School*, (*d*) the question was again discussed in connection with the authority of the visitor. Sir *John Romilly* observing that "this court does not interfere with the visitatorial power, unless it finds a breach of trust." *Dougars* v. *Rivaz*, (*e*) before the same learned judge, is a strong case in favor of this bill. The plaintiff was the pastor of a French Protestant Church in London, which had been incorporated by Royal Charter by Edward VI., and which was possessed of certain revenues, out of which the salary of the pastor was paid. The elders and deacons, who formed the governing body, deposed the plaintiff from his office, and withheld from him his salary. For the plaintiff, it was insisted that the matter complained of was cognizable by

Judgment.

(*a*) 3 Beav. 1265.
(*b*) 14 Ves. 245.
(*c*) 13 Beav. 117.
(*d*) 23 Beav. 350.
(*e*) 28 Beav. 233.

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this court, as it involved the due performance of a trust in respect of the trust funds under the control of the defendants, and that this was a matter distinct from the visitatorial power of the Crown. The defendants objected to the injunction, contending that the court could only interfere in cases of trust, and that in that institution no trust could be shewn to exist for the plaintiff. Sir *John Romilly* held that the court had jurisdiction, and granted relief. His remarks are apposite to this case. "It appears that the funds of the institution are under the control of the governing body, and the defendants have practically the power of withholding from the plaintiff the emoluments assigned to and accepted by him. This constitutes a trust which they have to perform, and which they are bound to perform, in favor of the person who fills the office of pastor; and assuming the plaintiff to be wrongfully deposed, I am of opinion the relation of trustee and *cestui que trust* does exist between the elders and deacons and the pastor. * * * The visitor visits the corporation with respect to corporate matters; but that circumstance does not remove from this court the jurisdiction or obligation to exercise its functions of enquiring whether the duties attaching to the defendants, so far as they have a trust to perform towards the minister, have been properly exercised by them."

Judgment.

The case of *Pickering* v. *Bishop of Ely* is distinguishable from this case; in that it was not a case of a public charity, nor was there an endowment of any kind, or revenues upon which to fasten a trust. Sir *J. L. Knight Bruce*, who decided that case, could not have intended to deny the jurisdiction of the court in the case of a public charity, for in the case of the *Phillips' Charity* and the *Fremington School*, decided not long afterwards, he upheld jurisdiction.

Mr. *Strong* distinguishes *Willis* v. *Childe* and *Dou-*

gars v. *Rivaz*, from the case before us, on the ground that those were cases of trust. I do not see that this is less so. Mr. *Strong* says, and I agree with him, that Queen's College is what in law is called a charity; I think unquestionably a public charity; and he says, what is probably correct, that the Queen is visitor. How if there are revenues of such an institution, as there must be, or it could not be carried on, those revenues must be administered by the governing body; and that body must administer them for the purposes declared in the charter, and therefore necessarily in trust, and I apprehend it can make no difference whether those revenues are derived from endowment or from benefactions year by year. However derived, the trust is the same. This case I think is not distinguishable from those referred to. The trust gives this court jurisdiction, and is outside of the visitatoral power, which, as Mr. *Strong* contends, affords the only remedy.

Judgment.

I may here notice the objection that this is in effect a bill for specific performance. It is not more so than those of the masters of public schools, which have been referred to; and does not rest upon that head of jurisdiction, but upon trust. There being a trust, it cannot be an objection to relief upon it, that it originated in a contract. The agreement seems to amount to this. There is a contract, but of a nature which this court will not specifically perform, and therefore, although there be a trust proper for this court to execute, the court will decline its ordinary jurisdiction in regard to trusts, and refuse to execute them. I cannot accede to this.

The next point is as to whether this suit is rightly constituted, supposing the court to have jurisdiction, or whether it should not have been by information, or by information and bill. I think it is rightly constituted as it is. *Dummer* v. *Corporation of Chippenham*, *Willis* v. *Childe*, and *Dougars* v. *Rivaz*, already referred to, were all suits by the individual aggrieved, and in the latter

1865. Weir v. Mathieson. case, while it was objected by the learned counsel for the defendants, among them Sir *Hugh Cairns*, that the corporation ought to have been made a party defendant, it was not objected that a bill by the plaintiff was not proper. The same suit, with the suit of the *Attorney-General* v. *Dougars*, (*a*) illustrates in what class of cases the proceeding is proper by bill, and in what by information. In the former suit the Court gave costs against the defendants, and they paid them out of the funds of the charity; and the information was filed in part on the ground of that misapplication of the funds. Thus, to correct the individual wrong, consisting of deprivation of office and its emoluments, a bill was sustained; while, to correct the public wrong of a misapplication of the funds, an information was sustained.

Judgment

I may here observe, that it does not appear to be necessary to shew that the payment of the funds to another improperly appointed to the office, will not leave sufficient for the payment of his salary, to the person deprived of office. This does not seem to have been an element in any of the cases. It is sufficient to shew a breach of trust affecting the fund, out of which the party instituting the suit is entitled to be paid.

It has been doubted in this case, whether the court can properly go so far as not only to reinstate the plaintiff, but also to direct that his arrears of salary be paid to him. I have not felt pressed with any difficulty on that score. The court finds the act of removal, done as it was done, *ultra vires*, and therefore a nullity. The plaintiff, it follows, has all along been, and still is professor; he has been improperly debarred from executing his duties, and his salary has been improperly withheld from him. The court declares that he still is professor; and that he has been dismissed and ought to be restored, but that he has been and is professor; and so in effect

(*a*) 10 Jur. N. S. 966.

declares that he is entitled to what appertains to his office, *inter alia*, salary. The proper officer would surely be justified, and it would be his duty, to pay him his salary, without express direction in the decree to that effect, and, if so, it cannot be wrong to give such express direction; moreover, it would not be in accordance with the practice of this court to give such incomplete remedy, as would be given if the court left him to seek payment of his salary by proceedings elsewhere. The presence of the Attorney-General cannot, I apprehend, be necessary for this purpose, as it is only a consequential direction upon that, for the determining of which he is not a necessary party. I had come to this conclusion before observing that in the case of *Phillips'* charity, the arrears of salary were expressly directed to be paid. It is not to be doubted that it was decreed in other cases also, though the reports do not happen to mention it.

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I think the decree should direct the payment of the plaintiff's costs by the defendants, by whose votes his dismissal was effected, and that they ought not to come out of the funds of the institution. I have already referred to the direction in *Dougars* v. *Rivaz*, and *Attorney-General* v. *Dougars*, upon that point; the reason for this, and it is obvious enough, is given in the latter case: the like direction was made in the case of *Phillips'* charity.

Judgment.

It is perhaps hardly necessary to say that it has not been a question for the consideration of this court whether just grounds do or do not exist for the removal of the plaintiff from his professorship. He has been removed upon the assumption by the trustees that they had the right to remove him in their discretion. If his tenure of office be such as in our opinion it is, he could not be so removed; *that*, and his remedy in this court are the questions that it has been our province to decide.

1865. Weir v. Mathieson. It was concluded in argument, that if the plaintiff's tenure of office was *ad vitam aut culpam*, the deprivation of office which had taken place in his case was not regular, and could not be sustained.

McKenzie v. Yielding.

Specific performance.—Costs.

M. executed a mortgage in *Y.'s* favor for £50, over lot No. 11, he then also holding a lease renewable in perpetuity of lot A. at a rental of £4 per annum.

The rent being in arrear, judgment was obtained and execution issued by the lessor against *M.* therefor; *Y.* then agreed with *M.* to pay this execution, *M.* to assign to him the lease of lot A.; and further, it was agreed that if the lessors "will give to the party of the first part *(Y.)* a deed in fee simple or a lease perpetually renewable at the present rent, he, the party of the first part, will discharge and "release a mortgage," &c., being that above-mentioned.

Y. afterwards obtained a conveyance from the lessor of lot A., but it did not appear that such was made for the sum contemplated at the time of the agreement between *Y.* and *M.*

Y. afterwards pressed for payment of the mortgage debt, when *M.* made excuses for delay, and did not rely on the agreement as a bar to *Y.'s* claim.

Y. having commenced an action of ejectment on his mortgage, *M.'s* bill to stay it and to have the agreement and subsequent purchase by *Y.* construed into a satisfaction of the mortgage debt, was dismissed with costs.

Where an answer improperly impugned the motives of the solicitor who filed the bill, the court, although it dismissed the bill with costs, directed the costs of the answer to be disallowed to the defendant.

Statement. The objects of this suit and the facts involved are sufficiently set forth in the judgment.

The case came on for the examination of witnesses and hearing before his Honor V. C. *Spragge*, at Ottawa.

Mr. *Fitzgerald* for the plaintiff.

Mr. *Matheson* for the defendant.

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SPRAGGE, V.C.—This is a very peculiar case, and I find it difficult to come to a satisfactory conclusion as to what was really the agreement between the parties.

In February, 1847, the plaintiff being indebted to the defendant in a small sum, £50 5s., gave a mortgage, dated the 19th February of that year, to the defendant to secure that amount upon a lot of land which may be shortly called lot No. 11, in Gloucester. The plaintiff was at the same time lessee from the Ordnance Department of another parcel of land in the same township, of 50 acres, which may be called lot letter A. The plaintiff had originally owned lot A., and in 1830, sold it to the Ordnance Department for £80, and the Ordnance Department granted him a lease for thirty years of the same land at a rental of £4 a-year, the rental being calculated upon the purchase money at five per cent. interest. In 1847 this rent had become greatly in arrear, and legal proceedings were taken for its recovery, and an execution for £48 against the goods of the plaintiff was placed in the hands of the sheriff. Upon this an agreement was entered into between *McKenzie*, the plaintiff, and *Yielding*, out of which this suit has arisen.

Judgment

It was agreed that *Yielding* should pay the execution, which he did; and that *McKenzie* should assign his lease of lot A. to *Yielding*, which was also done. An agreement dated 10th August, 1847, was then drawn up by a professional gentleman, Mr. *Robinson*, and was executed by *Yielding* and delivered to *McKenzie;* and thereby *Yielding* agreed, in consideration of the assignment of the lease to him by *McKenzie*, to pay off the execution; and the agreement proceeds in these words, "And if further the principal officers of her Majesty's Ordnance will give to the party of the first part (*Yielding*) a deed in fee simple or a lease perpetually renewable at the present rent, he, the party of the

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first part will discharge and release a mortgage," the mortgage being the mortgage of the 19th February, in the same year. It will be noticed that the agreement is silent as to the price at which *Yielding* might be permitted to purchase; so that taken literally, if the Ordnance Department should sell to *Yielding* at any price the mortgage was to be discharged; while it was only to be discharged, in the event of a lease perpetually renewable being given, in case the rent should not exceed that reserved by the then current lease.

It may be that the written agreement truly expresses what the parties actually agreed. It was at *Yielding's* option to purchase or not, and in case of his purchasing he would, supposing the written agreement to be the true agreement, only purchase in the event of his being able to do so at such a sum as, together with the mortgage money, would amount to such a sum as he would be willing to give: but then the same might be said in the event of his obtaining a renewable lease, when, should the rental be named, he would only take a lease for a reason similar to that which might induce him to purchase. It looks rather like an omission;—as if the price in case of a purchase had been by mistake left unprovided for, and this is the more probable, as the purchase money by the Ordnance Department was a sum upon which the rent was computed, and the parties might not unreasonably have supposed that if the department would renew perpetually upon that rent, it would, if it sold at all, sell upon that rent capitalized.

Judgment.

But I do not mean to say that it would be safe so to construe the instrument, or upon the evidence before me, looking also at the instrument itself, to reform the agreement by inserting such a provision. The question before me is a different one. *Yielding* did purchase at £200, not £80: this was in 1861, and he shortly afterwards called upon *McKenzie* for payment of his mortgage. *McKenzie* sets up that the mortgage is in

equity discharged, *Yielding* having purchased the land. To support this defence he must shew that the true agreement between him and *Yielding* was, that if purchased at any price the mortgage was to be discharged; he produces the agreement itself, upon which I have already commented. On the other hand, his conduct when called upon to pay the mortgage is inconsistent with that being the true agreement. A letter from Mr. *Lewis*, *Yielding's* solicitor, calling for payment of the mortgage, was carried to him by a Mr. *Thorp*, who appeared to me to be a perfectly trustworthy witness. *Thorp* was a clerk in the employ of *Yielding*; he read the letter to *McKenzie*, who said he could not pay at once, but would send his son with a payment in a day or two, and would pay the balance by the sale of wheat. He referred to what he called an old agreement between him and *Yielding*, to the effect that if *Yielding* got the land from the Ordnance Department at the same rate as he had it, he was not to pay the mortgage, but he said as *Yielding* had had to pay more, he would have to pay it; that he expected at the time that he would not have to pay it, as he thought *Yielding* would get the land at the same rate as himself; but that he had had to pay more.

Judgment.

Literally, the words "at the same rate" would imply the same rental, as *McKenzie* held at a rental, but *McKenzie* was speaking of a purchase that had been made; and when he said that *Yielding* had had to pay more, he must have meant that he had been obliged to purchase at a higher rate than was contemplated by the agreement; so that a purchase at a certain rate must have been intended, according to the true agreement of the parties.

I agree perfectly with all that has been said of the danger of proceeding upon admissions made in mere casual conversations, but this was not an admission of

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that character; it was a matter of business, and it was more than an admission, it was conduct: for *McKenzie* not only admitted his liability to pay, and explained how his liability arose, but pointed out the mode in which he proposed to discharge it.

A son of *McKenzie*, who was present at the interview between his father and *Thorp*, was called to contradict the latter. I will only say that the evidence of the son did not at all shake my belief in the truthfulness and accuracy of what was said by *Thorp*.

Mr. *Lewis*' letter was the subject of conversation in *McKenzie's* family after the interview with *Thorp*. The son, who had been present at the interview, *Kenneth*, was sent to Mr. *Yielding*, and he saw both him and Mr. *Lewis*, and he took the agreement with him. A sum of £20 was paid on account of the mortgage by another son *John*, the eldest. The time is not accurately fixed: *John* thinks it was in August; *Kenneth* thinks it was two or three months after the receipt of the letter; *John* says he paid it without instructions from his father. *Kenneth* says that it may very possibly have been mentioned in his father's house after the £20 was paid that a second sum of the same amount was to be paid: that is, he adds, before we consulted a lawyer.

Judgment.

I take it from the evidence that before a lawyer was consulted, the talk in the family was as to how the mortgage was to be paid off, and that there was no denial of the liability: and all this time the agreement was in their hands, and *Kenneth* at least could read. When a lawyer was consulted, the question was, the construction of a written instrument, not, as up to that time it had been, what was really the understanding and agreement of the parties.

My conclusion upon the whole is, that *McKenzie* is now setting up the legal construction of a written instru-

ment against the real agreement entered into between himself and *Yielding*. *Yielding* made an enormous profit out of this land; he got deducted from the purchase money, which was to have been $1,000, the sum of $200, being the arrears of rent he had paid for *McKenzie*; upon what ground, I find it difficult to imagine: and he sold for double the amount he was to have paid the Ordnance Department. *McKenzie* may have thought it hard and illiberal in *Yielding*, under these circumstances, to call for payment of the mortgage; but, nevertheless, he can only relieve himself from payment by shewing that he was to be relieved upon a certain contingency, and that that contingency has occurred; and this, I think, he has failed to shew.

Judgment.

Discarding extraneous circumstances, the position of the parties appears to be this: *Yielding* is the holder of a mortgage against *McKenzie* and is proceeding at law by ejectment: *McKenzie* must establish some equity against the enforcement of this legal right; he sets up an agreement that in a certain contingency it should not be enforced, and produces a written instrument. I think upon this alleged equity the whole question is open. We cannot see whether the plaintiff's alleged equity exists without ascertaining what really was the agreement between the parties; the written instrument upon the face of it raises doubts whether it really expresses the whole and true agreement of the parties; and the weight of oral testimony is, in my judgment, against the equity set up by the plaintiff. I must therefore dismiss the plaintiff's bill with costs. I should have mentioned that I have read the evidence taken *de bene esse*, and considered it in the conclusion at which I have arrived: a very large proportion of it is, I am sorry to say, irrelevant. I think it proper also to notice that a portion of the answer very improperly impugns the motives of the solicitor who filed the bill; and I think it right, for that reason, to disallow the answer in the costs.

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Elliott v. Jayne.

Mortgage—Merger on assignment to holder of equity of redemption.

Premises having been twice mortgaged were sold at sheriff's sale to S., who afterwards obtained an assignment to himself of the first mortgage.

Held that he might still claim the sum due on the first mortgage, no merger having taken place.

Semble, that in this respect our law is more favorable to S's position than English law would be.

The bill in this cause was filed for foreclosure by *Henry Elliott* against *John Reynolds Jayne*, *Thomas Shaw*, *John Ashton* and *William Bentham*.

Statement.

The Master at Whitby reported that there was due to the plaintiff on a mortgage, dated the twenty-first of September, 1854, the principal sum of £100, besides interest and costs of suit.

He further stated that the defendant *Thomas Shaw* on the 15th March, 1861, purchased the equity of redemption in the mortgaged premises, subject to the plaintiff's mortgage, and to another prior mortgage made to the defendant *John Ashton*, and that by deed dated the 1st day of May, 1862, *Ashton* for good consideration assigned his mortgage to *Shaw*, and that "The charge subsisting on the lands in favour of *John Ashton* has under the circumstances aforesaid become merged in the equity of redemption."

From this finding *Shaw* appealed.

Mr. *A. Crooks*, Q.C., for the appeal.

Mr. *Gwynne*, Q.C., contra.

Spragge, V.C.—The question is whether the defendant *Shaw* can set up a mortgage made by the defendant *Jayne* to one *Willson* in 1854, in priority to

the mortgage made by the defendant *Jayne* to the plaintiff in 1857.

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The first connection of *Shaw* with the mortgaged premises was, that he purchased at sheriff's sale the equity of redemption of *Jayne* therein; and the same was conveyed to him by sheriff's deed in March, 1861. Afterwards *Jayne* acquired the first mentioned mortgage from one *Ashton*, who then held the same. Upon this the Master's finding is, that *Shaw* agreed to purchase from *Ashton* all the right and interest of *Ashton* in the mortgage, and in the lands therein comprised; and that *Ashton*, by indenture of 1st May, 1862, in consideration of $550, assigned to *Shaw* his interest in the mortgaged premises and in the mortgage money.

The point raised appears to have been determined in *Watts* v. *Symes*, (*a*) before the Lord Justices. In that case there was a mortgage in 1844; a second mortgage, to another mortgage in 1845; and a sale of the equity of redemption in 1846. Before the sale was completed the first mortgage required to be paid off, and the purchaser at the request of the mortgagor paid to the first mortgagee the amount of the mortgage debt, and there was a conflict of testimony as to whether the purchaser had, upon making the payment, stipulated for a transfer to him of the first mortgage, for the benefit of the security. The mortgagor-vendor signed a memorandum acknowledging that the purchaser had agreed to purchase; and had at his request paid the first mortgagee £1,200 in discharge of her mortgage out of the purchase money. By the same memorandum the mortgagor agreed to exempt an assignment of his interest; and declared that until the same was executed the purchaser should stand in the place of the first mortgagee and have the full benefit of her mortgage security. No assignment was executed, when the

Judgment.

(*a*) 1 D. M. & G. 240.

1865.

Elliott v. Jayne.

second mortgagee filed his bill; and one of the questions was whether the prior mortgage debt had been extinguished by the payment to the first mortgagee: and counsel for the second mortgagee contended that the first mortgage debt was paid off, without any stipulation that it should be kept alive; and that the case was brought within *Toulmin* v. *Steere*, (*a*) and other cases which had followed it. But the court held the purchases entitled to stand in the place of the first mortgagee. Sir *J. L. Knight Bruce* in delivering judgment impugned the authority of *Toulmin* v. *Steere*, in which case Sir *William Grant* had said that, "One purchasing an equity of redemption cannot set up a prior mortgage of his own," and added "nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice." The Lord Justice assented to the first part of Sir *William Grant's* proposition; but denied the others; and Lord *Cranworth* concurred with him in holding the purchaser in the case before them entitled to hold the mortgage which he had got in, against the second mortgagee.

Judgment.

It is settled law that the purchaser of an estate may get in outstanding incumbrances without merging them: and that there shall be no merger if the owner of the estate manifests an intention to keep the incumbrances alive, and its being his interest that they should be kept alive is evidence of such being his intention. It is good conveyancing to have them assigned to trustees, but it does not seem to be necessary, *Davis* v. *Barrett*, (*b*) *Lord Clarendon* v. *Barham*, (*c*). The law upon the point was considered in a late case at the rolls; *Swinfen* v. *Swinfen*, (*d*) where Sir *John Romilly*, while holding that there was a merger in the case before him, fully recognised the principle that it was a question of intention. The finding of the Master in this case shews that

(*a*) 3 Mer. 210.
(*b*) 14 Bea. 542.
(*c*) 1 Y. & C. Chy. 688.
(*d*) 29 Bea. 199.

not only was it the interest of *Shaw* that the mortgage be got in should not be merged, but that it was his intention to keep it alive.

It is to be observed that the law in Canada goes further in allowing the owner of an estate to keep alive a charge upon it than does the law in England. It allows that which both Sir *William Grant* and Sir *J. L. Knight Bruce* agreed could not be done in England—namely, that one purchasing an equity of redemption can set up a prior mortgage of his own; and it is quite in accordance with the principle of our law to hold that the purchaser of an equity of redemption, not being an incumbrancer, may get in a mortgage and hold it against subsequent incumbrancers.

The decree in this case is one rather favorable to the second mortgagee; it does not put him to redeem the prior mortgage but directs a sale, and if the estate is of sufficient value he will be paid in his order; if not of sufficient value, it will be proof that it was the interest of *Shaw* that the mortgage which he got in should be kept alive: and therefore against the merger contended for.

Judgment.

For these reasons I must hold the Master in error in finding that the first mortgage was merged.

1865.

CLARKE v. RUTTAN.

Lunacy.

A special act, passed in Upper Canada in 1827, authorized a commission to issue to inquire into the lunacy of one P. V.; and, if he should be found a lunatic, the act directed a committee of his estate to be appointed, and authorized such committee to sell his goods and lands; and to invest the proceeds in bank stock or real securities; and enacted that whatever remained of such investments at the lunatic's death, should be distributed among his legal representatives according to law:

Held that such residue was personal estate, and was to be distributed among the next of kin.

This cause was heard before His Honor *V. C. Mowat*, at the sittings of the court held at Belleville in the spring of 1865.

Mr. *Hodgins* for the plaintiff.

Mr. *Dougall* and Mr. *Dicmond* for the defendants.

Judgment.

MOWAT, V.C.—This bill is by three of the co-heirs and next of kin of the late *Peter Vanalstine*, a lunatic, against certain others interested in his estate, and against the committees appointed under an act passed in Upper Canada in 1827, and entitled, "An Act to provide for a commission of lunacy and idiotcy in the case of *Peter Vanalstine*." (10 Geo. IV., ch. 19.)

The Act authorized the committee to sell any of the lands, hereditaments, goods, or chattels of the lunatic: and directed them to invest the money in bank stock or real securities; and to apply the annual income to the maintenance of the lunatic; and enacted, "that all and every of the said moneys, undisposed of at the death of the said *Peter Vanalstine*, shall be distributed according to law amongst the legal representatives of the said *Peter Vanalstine*."

The bill alleges that the lunatic had no goods or chattels; and that his lands were sold under the authority of the act.

The lunatic died on the 15th February, 1864: and the object of the bill is to have the surplus of his estate ascertained, and paid over according to the rights of all parties therein.

I think that the proper decree will be a reference to the Master at Belleville to pass the accounts of the committees who are defendants; to take an account of the real and personal estate, respectively, belonging to the lunatic at the time of his death; and what part of the personal estate arose from the sale of his real estate; and to ascertain who his heirs and next of kin are. Further directions and costs must be reserved.

Judgment.

The only question discussed was as to the disposition of the money which remains from the sale of real estate; whether it goes to the co-heirs, or to the next of kin, of the lunatic: a question which, in the state of the family, happens to be of practical importance.

I think that the next of kin are entitled.

The Act does not suggest, or appear to contemplate, the separation, for any purpose, of the moneys that should arise from the sale of chattels and lands, respectively. The produce of both is constituted a common fund, out of which, indiscriminately, all costs are to be paid; and the balance is to be invested in bank stock or real securities. What may remain undisposed of at the lunatic's death is spoken of as a single fund, and is directed to be distributed "according to law," among the legal representatives of the lunatic. I think that this word "distributed" was used in reference to the statute of distributions, and that that statute is the "law" according to which the legislature meant the distribution to be made of the whole fund.

1865. What other law could Parliament have had in view?

Clarke v. Ruttan.

There was, at the time of the act, no law in Upper Canada regulating the disposition, as between the heir and next of kin of a lunatic, after his death, of money arising from the sale of his real estate; nor was there any court in Upper Canada in which the right of the heir in such a case, if any right he had, could be enforced against the next of kin. In 1792, the Parliament of Upper Canada enacted (32 Geo. III, ch. 1,) that, in all matters of controversy relative to property and civil rights, the laws of England should be the rule for the decision of the same. But at that date there was no law in England authorizing the sale of a lunatic's real estate. The first statute giving such authority was passed at a later date, (43 Geo. III, ch. 75).

Judgment.

Somewhat analogous questions had certainly arisen in England.

One of these was whether the produce of timber, cut by order of the court on the land of a lunatic, belonged in equity to the testator's real, or to his personal, representatives; and in *Exparte Bromfield*, (*a*) *Oxenden* v. *Lord Compton*, (*b*) and *Re Phillips*, (*c*) it was held that the money went to the personal representatives. See also *Browne* v. *Groomsbridge*, (*d*). But the Master of the Rolls in the late case of *Cook* v. *Dealey*, (*e*) did not consider that a general rule was established by these authorities.

There had also been occasion in England to consider the converse case, namely, where personal estate of a lunatic had been expended on his land, was the heir entitled to the benefit of such expenditures? or should the amount be made good to the next of kin?

(*a*) 3 B. C. C. 510.
(*b*) 2 Ves. Jr. 69.
(*c*) 19 Ves. 118.
(*d*) 4 Madd, 495.
(*e*) 22 Bea. 196.

1865.
Clarke v. Ruttan.

On this point the authorities were and are hopelessly conflicting, as will be found by comparing the cases already cited, and *Sergison* v. *Sealey*, (*a*) the *Earl of Leitrim* v. *Enery*, (*b*) and *Re Cross*, (*c*) with *Oxenden* v. *Lord Compton*, (*d*) *Exparte Hinde*, (*e*) *Weld* v. *Tew*, (*f*) *Re Badcock*, (*g*) and *Re Leeming*, (*h*). Indeed the court seems in many such cases to exercise a discretion, and not to hold itself bound by any fixed and stringent rules.

In view of all the circumstances, I do not think it would be reasonable to hold that the law, to which the legislature referred, was any rule which such cases may be supposed by analogy to have suggested. Judgment.

I think, however, that a formal declaration on the subject must be deferred till further directions, as I cannot assume that all the persons interested in the question are before the court.

(*a*) 2 Atk. 412.
(*b*) Drury, 330.
(*c*) 1 Sim. N.S. 269.
(*d*) 4 Br. C.C. 379.
(*e*) Amb. 706 N.
(*f*) 1 Beatt. 266.
(*g*) 4 M. & C. 440.
(*h*) 7 Jur. N.S, 115.

1865.

WHITE v. HAIGHT.

Possession—Reforming deeds—Pleading—Parties.

The defendant's mother was in possession of a farm at the time of her second marriage, and the defendant, who was her son by a former marriage and was a minor, lived with her. On the death of her second husband, the defendant, who had just come of age, continued with his mother on the farm and managed it:

Held, that he could not claim the farm against a person to whom the mother subsequently mortgaged it.

A. being in possession of the east-half of a lot, claiming title thereto, executed a mortgage on the west-half. On a bill against the heir of *A.* to reform the mortgage by substituting the east-half for the west-half, it was shown that *A.* had no claim to the west-half, and that that portion of the lot was an improved farm, of which others had, for many years, been in possession. The defendant neither admitted nor denied the mistake:

Held, that the mistake was sufficiently established to entitle the plaintiff to a decree for reforming the mortgage.

To a bill by a mortgagee for a sale after the mortgagor's death, the personal representative of the mortgagor is a necessary party; but not to a bill for foreclosure.

This cause was heard before His Honor V.C. *Mowat*, at Belleville, on the sixth of May, 1865.

Mr. *Diamond* for the plaintiff.

Mr. *Holden* for the defendant.

Judgment. MOWAT, V.C.—This is a bill to reform a mortgage executed by the defendant's mother, who is dead intestate; and for a foreclosure or sale. The defendant in his mother's sole heir-at-law.

A question was raised as to the sufficiency of the evidence of the execution of the mortgage. I think that the evidence on this point, in connection with the admissions made in the answer and at the hearing, is abundantly sufficient.

1865.

White v. Haight.

The principal defence is that the mortgaged property belonged to the defendant, and did not belong to his mother.

The title, whichever had it, was by possession. One *Smith* had been the owner. He died in possession in 1817, intestate, and without issue. His widow continued in possession. She had had several children by a former husband, one *Ingersoll*, and amongst these was the defendant's mother, then *Mary Ingersoll*. After the death of *Smith*, his widow married one *Dorland*, whom she survived. The defendant's father, *Haight*, died in 1831 or 1832, and the defendant's mother, the mortgagor, thereupon went with her son, the defendant, then about nine years old, to live with Mrs. *Dorland* on the property in question; and they continued there until Mrs. *Dorland's* death, which took place soon afterwards, viz., some time in 1832. Mrs. *Dorland* left a will devising this property to Mrs. *Haight* and others. These others made no claim under the will, but allowed Mrs. *Haight* to remain in sole possession; partly perhaps because the testatrix had not acquired a title to the property, having been but seventeen years in possession. In 1834, Mrs. *Haight* married one *Robinson*, who thenceforth lived with her on the property, until his death, in 1843.

Judgment.

The defendant was about eleven years old at Mrs. *Dorland's* death. He lived on the property with his mother thenceforward until his mother's death, in 1863, and he has retained the possession since then. The mortgage was executed in 1859, twenty-six years after Mrs. *Dorland's* death. The defendant alleges that he managed the farm after *Robinson's* death, and that the possession thereby became his, and ceased to be his mother's; and that in 1859 he, and not she, was entitled to the property, he having then been twenty-six years in possession.

His mother had been ten years in possession when

1865. White v. Haight.

Robinson died, and during this period the defendant was a minor. He does not claim against her by possession until *Robinson's* death; and *McArthur* v. *McArthur*, (*a*) is a clear authority that a son, by remaining in possession with his mother, and managing the property, does not thereby acquire any right to the property against her, or against any one claiming under her. *Vide* also *Doe Groves* v. *Groves*, (*b*) *Foster* v. *Emerson*. (*c*)

I think, therefore, that this defence fails.

The alleged mistake in the mortgage which the bill seeks to reform is naming, as the mortgaged property, the west-half of the lot, instead of the east-half, to which alone Mrs. *Haight*, the mortgagor, had any title. The mistake is not denied by the answer, but it is not expressly admitted. The defence set up assumes that the mortgage is on the east-half, as plaintiff alleges it was intended and supposed to be; and the only specific allusion which the answer makes to the alleged mistake is this: he says, "I have no knowledge whatever of a mistake having been made in executing the said mortgage, as I know nothing of the circumstances connected with the giving of the said mortgage."

Judgment.

It is clear that Mrs. *Haight* had never any title whatever to the west half of the lot, and had never been in possession of it, or pretended to have any claim upon it. It was an improved farm which had been for many years in the possession of others. I think I must assume, on this evidence, that the property intended to be mortgaged was the other half of the lot, which Mrs. *Haight* was in possession of, and no doubt considered her own; and that the mortgage should be read as if it named the east-half—*Hutchins* v. *Scott*. (*d*)

Taking the evidence in connection with the answer,

(*a*) 14 U. C. Q. B. 544.
(*b*) 10 Q. B. 486.
(*c*) Ante vol. v. p. 135.
(*d*) 2 M. & W. 809.

I think it quite sufficient to entitle the mortgagee to a decree for reforming the deed. 1865. White v. Haight.

It was not suggested that, under the circumstances, the plaintiff was in a less favourable position for obtaining this relief than if he had been the original mortgagee.

The bill prays for a foreclosure or sale. There can be no sale where the personal representative of the mortgagor is not a party to the suit, unless a special case is made in the bill to dispense with the rule. No such case is made by this bill. The decree will therefore be for forelosure. Judgment.

KERR v. BAIN.

Fraudulent conveyance.

Where a debtor executes a fraudulent conveyance, in respect of which relief in equity may have to be sought, the proper course for the creditor is, not to have the property sold by the sheriff at a great undervalue, and then to come into equity to have the sale confirmed, but to come into equity in the first instance to have the fraudulent conveyance set aside, and the property then sold.

Where an execution creditor purchased property at sheriff's sale at one-sixth of its value, the court held that effect could only be given to such a transaction as a security for the debt and costs; and not as an absolute purchase.

This case was heard before His Honor V.C. *Mowat*, at the Brockville sittings, in May, 1865.

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

Mr. *Radenhurst* and Mr. *Regan*, for the defendants.

MOWAT, V.C.—The plaintiffs were execution creditors of the defendant *Alexander Bain*; and on the 22nd of August, 1863, they purchased under their own execution, and in the name of *George Kerr*, one of the plaintiffs,

1865. Kerr v. Bain.

certain lands in the county of Lanark. *Alexander Bain* had previously, and on the 14th of May, 1861, conveyed the principal part of these lands to his brother, the defendant *Archibald Bain*; and the allegation of the bill is that this conveyance was fraudulent against the plaintiffs as creditors of the grantor.

On the 14th of July, 1864, *Archibald* executed a mortgage to the defendant *Purkiss*, of the same lands, *Purkiss* having at the time full notice of the sheriff's deed to the plaintiff *George Kerr*. The bill prays that the deed to *Archibald* may be declared fraudulent and void against the plaintiffs, as vendees at the sheriff's sale, or as creditors of *Alexander*; that their title under the sheriff's deed may be affirmed; or that the property may be sold, and the proceeds applied to pay what is due to them.

Judgment.

I think it is clearly established, by the examinations of the brothers and by the other evidence, that the conveyance to *Archibald* was colorable; that the consideration was a pretended consideration; and that the purpose of the transaction was to defeat or delay *Alexander's* creditors.

It was contended on behalf of the defendants, that there could be no fraud, because *Alexander*, soon after the conveyance in question, by means of mortgages, either paid or secured all his creditors except the plaintiffs, and offered good security to the plaintiffs, though they declined to accept it and insisted on being paid. It was also argued, that the evidence shewed that, at the time of *Alexander's* conveyance to his brother, his assets considerably exceeded his liabilities. But if the truth of these allegations had been established beyond controversy, that would not be sufficient to support the transaction. *Alexander* was unquestionably a good deal embarrassed at the time; his creditors were pressing him, and he was unable to raise money to satisfy them.

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The law does not compel a creditor to give time to his debtor. Nor, if time is refused, does the law hold the debtor justified in making a colorable conveyance of any of his property in order to prevent its being sacrificed at sheriff's sale.

Then, it is said that *Purkiss* had no notice of the fraud, and that, consequently, his mortgage from *Archibald* cannot, in equity, be affected. But it is admitted that both he and his attorney had distinct notice of the sheriff's deed; and, according to the rule in such cases, having notice of this deed, he took his mortgage at his own peril, and had no right to take for granted, without further inquiry, that the deed was void, because his mortgagor told him it was, or because his mortgagor made to him representations which, if true, would shew it to be so. His mortgage must follow the fate of the conveyance to his mortgagor.

Judgment.

I think the proper relief will be a resale, and not a confirmation of the plaintiffs' title as vendees. Their purchase money appears to have been but a sixth part, or thereabouts, of the value of the property. I believe such a conveyance is valid at law; but it was held in *Wilson* v. *Shier*, (*a*) and *Malloch* v. *Plunkett*, (*b*) that in a suit by the purchaser this court would not enforce such a conveyance as an absolute purchase; and that, if relief is sought here, he must submit to surrender the property on receiving payment of his debt. In such a case, according to the view of a court of equity, as my brother *Spragge* pointed out in *Malloch* v. *Plunkett*, "The proper course for a plaintiff is to come to this court in the first instance, not to sell at law with an evident cloud upon the title, purchase at one-twentieth of the value, and then come to this court as purchaser."

(*a*) Ante vol. vi, p. 630.

(*b*) Ante vol. ix, 556.

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Kerr v. Bain.

The defendants, *Alexander* and *Archibald Bain*, must pay to the plaintiffs their costs up to the hearing. The plaintiffs will also have a lien for their costs on the proceeds of the sale, in priority to *Purkiss*. *Purkiss'* mortgage and costs will, in effect, be the second incumbrance on the property.

Fraser v. Rodney.

Voluntary deeds—Trusts—Practice—Amendment.

A deed having been executed by a husband and wife under such circumstances as to make the conveyance voluntary, the court held that the onus was on the grantee, of proving that the grantors understood the nature and effect of the deed; and, as it did not appear to have been explained before being executed, the deed was held invalid.

A deed purporting to convey land to *M.*, was executed by the plaintiff under circumstances that disentitled the grantee to hold it as a valid deed entitling him to the beneficial interest in the property. The grantee, *M.*, having afterwards sold and conveyed the land to *R.*, receiving part of the purchase money and a mortgage for the balance:

Held, that on confirming the title of the purchaser (*R*), the plaintiff was entitled to the balance of the mortgage money from *R.*, and to a decree against *M.* for what *M.* had received.

Amendments may be made at the hearing of causes under the new practice, as at *Nisi Prius*.

This was a case heard before His Honor V.C. *Mowat*, at the spring sittings, held at Cornwall, in 1865.

Mr. *Fitzgerald*, for the plaintiff.

Mr. *Bethune* for defendant *Rodney*.

Mr. *McGregor* for defendant *McMillan*.

Judgment.

Mowat, V.C.—The occasion of this suit is a deed executed by the plaintiff and her husband on the 13th of April, 1863, and which professes, in consideration of $800, to convey to the defendant *John P. McMillan*,

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in fee, lot No. 4, in the tenth concession of Winchester, in the county of Dundas. The plaintiff impeaches this deed on various grounds, and seeks relief against *McMillan*, and against the defendant *Robert Rodney*, to whom *McMillan* conveyed the lot a few months after obtaining the deed.

The history of the lot is this. It was devised to the plaintiff in 1838. In 1844 she married her present husband, the defendant *William Fraser*. On the 6th of July, 1845, he, with her concurrence, sold the lot to the defendant *Rodney*, for £50, which appears to have been the full value of the lot at the time. *Fraser* was at this time a minor, and the deed was not executed with the formalities required by law for the conveyance of land by a married woman. But the purchase money was duly paid, and *Rodney* immediately entered into possession, and made improvements on the land, and has been in possession ever since.

Judgment.

In 1863 the defendant *McMillan* learned the invalidity of the deed from *Fraser*, as *McMillan* himself declares; and on the 15th of April obtained from the *Frasers* the deed now in question. *McMillan* was at this time a law student; and he stated on his examination that there was also some relationship between the plaintiff and him, though what relationship was not mentioned. The *Frasers* appear to be persons in very humble life.

Mrs. *Fraser's* statement is, that after ascertaining the invalidity of the deed of 1845, *McMillan* was employed as her agent to endeavour to effect an arrangement with *Rodney*, and, failing this, to bring an action of ejectment against him.

McMillan denies this, but admits that he did not buy the lot, or pay the consideration named in the deed; and says that it was not intended that the consideration

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so named should be paid. He admits, also, that the deed was prepared by himself, and that neither the plaintiff nor her husband had any legal adviser in the matter. He states that he made a bargain with the plaintiff's husband that he should receive a deed of the premises executed by him and the plaintiff; that *McMillan* should then do as he himself thought proper in relation to the premises; that if he made anything by a sale thereof he was to give the *Frasers* what, if anything, he thought fit; and that if he made nothing, he was to pay nothing. Assuming that this is a correct account of his bargain with the husband, and that the wife was a party to it, the case would shew that the *Frasers* placed in *McMillan* the greatest possible confidence in the matter, by whatever technical name the relation of confidence may be designated.

Judgment.

McMillan had no conversation with Mrs. *Fraser* on the subject. He took for granted, he says, that her husband told her what had passed between them; but the husband did not tell him he had done so. Nor did she tell him so; and no evidence whatever is given to shew that the alleged bargain was in fact communicated to her.

McMillan says that the deed was read over by him to the plaintiff before she signed it, and his brother confirms this statement. Both say that the magistrates who signed the certificate were present at the time. One of these magistrates is the father of the *McMillans*, and he was not called as a witness: but the other, who was called by the plaintiff, swears that the deed was not read in his presence. *McMillan* does not allege that the whole deed was read, though he says the principal portions were. Whether read or not, there is not to be found in the evidence the slightest reason to believe that she understood what the instrument was. *McMillan* does not recollect that he even told her it was a deed of land, and he admits that he

did not give her any explanation whatever beyond reading the deed to her; and that she made no remark from which he could tell she understood its nature or effect.

Now the transaction, as stated by *McMillan*, was in effect a voluntary conveyance. He was to give nothing for it unless he chose. He accordingly paid the plaintiff $28, he says in small sums, out of the $500 for which he sold the lot to *Rodney;* and he does not affect to have any intention of paying the plaintiff anything more, but expressly claims to be under no obligation to do so. The rule of equity, as stated by the Master of the Rolls, in *Cooke* v. *Lamotte* (*a*) therefore clearly applies: "In every transaction in which a person obtains by voluntary donation a benefit from another, it is necessary that he should be able to establish that the person giving him the benefit did so voluntarily and deliberately, knowing what he was doing; and if this be not done, the transfer cannot stand." Judgment.

The onus of establishing this, being on the grantee, mere proof of the instrument having been read to the grantor is not sufficient. Here, as the Master of the Rolls said of the defendant in the case referred to, "he admits that he did not explain it himself, and therefore that he left it to the chance of her understanding or not. This, in my opinion, is not sufficient to enable me to say that this transaction shall stand." So in *Hoghton* v. *Hoghton*, (*b*) the same learned judge observed,—"The mere reading over of a deed would not be sufficient to satisfy me that the person hearing it read understood it. To an unprofessional person, however intelligent, and exerting the closest attention, the long and involved sentences and technical language of a deed render it frequently unintelligible; and even the court not unfrequently misapprehends the

(*a*) 15 Beav. 240.

(*b*) 15 Beav. 311.

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limitations and effect of the provisions of a deed read in open court, where the greatest pains are exerted to read it clearly and intelligibly. In my opinion, unless it is accompanied with an explanation of the contents of a deed, the reading over to an unprofessional person is more likely to confuse than to enlighten him."

On the whole, I think it is quite clear that, as between the plaintiff and *McMillan*, the deed in question is not a valid instrument, entitling *McMillan* to claim any beneficial interest in the property.

However, it purported to be a valid conveyance for value; and *McMillan* appearing thereby to be the owner, sold and conveyed the property to *Rodney*, for $500, which was its full value at that time; and of this sum he has received $400, and holds *Rodney's* mortgage on the place for the remaining $100. It is clear that if this sale had the effect of conveying a good title to *Rodney*, the plaintiff would be entitled to the purchase money which the sale produced. If the plaintiff chooses to recognize the sale to *Rodney*, the effect is the same; she is entitled to recover from *McMillan* the purchase money he has received, and the mortgage he holds for the balance.

Statement

But I think that, if she does not choose to confirm the sale to *Rodney*, she is not entitled to relief in equity. The bill states, and the evidence shews, that the certificate signed by the magistrate is not correct. She was not examined by them apart from her husband; and all that the magistrates did, before signing the certificate, was to ask the husband and wife if they signed with their good will. The magistrate who was examined at the hearing, and who was at the time of the transaction new to his duties, was under the impression that the instrument they were executing was a power of attorney. The remedy of the plaintiff against *Rodney* is, therefore, by an ejectment at law, and the case is

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not one in which this court should struggle to assist her against him. Against *McMillan* I think she is entitled to every consideration.

The plaintiff and her husband confirming the sale to *Rodney*, I think *McMillan* should pay the costs of all parties; and should pay to the plaintiff the $400 he has received from *Rodney*, with interest, less the $28 paid to the plaintiff.

The amount of *Rodney's* costs may be set off against the amount due by him on the mortgage. If the costs exceed the amount so due on the mortgage, the balance will be paid by the plaintiff and added to her costs against *McMillan*. If *Rodney's* costs fall short of the amount he owes, he will pay the difference. In either case all parties will join in a conveyance to *Rodney*.

Judgment.

In consequence of the view of the case which I have thus taken, the bill may require some amendment; and I think that the application made to me at the hearing for leave to amend should be granted. The Chancellor and my brother *Spragge* inform me that since the new practice of hearing causes on the circuits was introduced, the court has adopted the practice of allowing amendments to be made at the hearing, as at *nisi prius*, in furtherance of justice, whenever necessary, and on such terms as may seem just; irrespective altogether of the rules of the court as to amending under the old system of procedure. Such amendments are allowed partly on the authority of the 14th section of the 9th order of 3rd June, 1853, and partly under the general jurisdiction of the court over its own procedure.

If the defendants insist on their objections to the frame of the bill, the draft of the proposed amendments may be submitted to me in Chambers. No answer to the amendments will be necessary. As a discouragement to inaccurate pleading, the amendments must be

1865. Fraser v. Rodney. at the cost of the plaintiff; and, with the same view, in case the defendants withdraw their objections to the frame of the bill, let fifty shillings be allowed to the defendant *McMillan*, against the costs he is to pay.

If the plaintiff and her husband do not consent to confirm the sale to *Rodney*, I think that the only course open to me will be to dismiss her bill with costs, as respects all parties.

McKinnon v. McDonald.

Title by possession—Father and son.

The defendant's father had for sixteen years been in possession of land, to which he had no title legal or equitable, and the legal owner then conveyed it to the defendant, a youth about twelve years old, who was living on the lot with his father, and continued to do so for eleven years thereafter, when the property was sold on an execution against the father: *Held*, that the possession after the execution of the deed was the possession of the son; that the father acquired no title thereby against the son, and that the sheriff's deed was void against the son, and should be set aside as a cloud on h's title.

This cause was heard before His Honor *V. C. Mowat*, at Cornwall, in May, 1865.

Mr. *Bethune*, for the plaintiff.

Mr. *McGregor*, for the defendant.

Judgment. Mowat, V.C.—The suit is brought to have a sheriff's deed, dated 10th May, 1861, delivered up to be cancelled, and to have the registration thereof vacated, as clouds on the plaintiff's title to the east half of lot No. 21, in the sixth concession of the Township of Kenyon.

The question is as to the ownership of his property.

The patentee was *John McGillis*. *McGillis*, on the 9th December, 1850, conveyed the property to the plaintiff.

The defendant claims under a sale upon a judgment and execution of his own against the plaintiff's father, whose name is the same as that of his son, the plaintiff: and alleges that the property was really the father's, either as being the *Alexander McKinnon* intended by the conveyance, or as being the beneficial owner. The answer also alleges that, if the conveyance was to the son, the consideration for it proceeded wholly from the father, and the conveyance was taken in the son's name, instead of the father's, for the purpose of delaying, hindering, and defrauding the defendant, a creditor of the father.

Both grounds of defence are disproved by the evidence.

Judgment.

The deed calls the grantee, *Alexander McKinnon*, junior; and it is not proved that the father was ever designated in that way; and it is the son, and not the father, who signed the deed as grantee. The parol evidence places it beyond doubt that the son was the grantee intended.

The evidence is equally clear that the consideration was not paid by *Alexander McKinnon*, the debtor. The lot was bought from *McGillis* by two of the debtor's brothers, *Dougall* and *Angus*, and was paid for by them. The plaintiff, at the time of the conveyance to him, was but twelve years old, but his father, the debtor, was a man of dissipated habits, and not to be trusted with property. This was the reason why his relatives gave the property to the son instead of giving it to himself; but of this, a creditor of the father cannot complain, since the property was not the debtor's when so conveyed to his son.

1865.
McKinnon v. McDonald.

Mr. *McGregor*, for the defendant, further contended that at the time of the sheriff's sale, the father had acquired a title by possession, and that the sheriff's deed transferred this title to the defendant.

The evidence on both sides shews it was in 1834 that the father went to live on the place. He had occasionally worked on the place previously with his brothers *Dougall* and *Angus;* but the possession until 1834 was in them, and not in him. He had therefore been in possession but sixteen years in 1850, when *McGillis* conveyed to the plaintiff; and had not therefore acquired a title by possession against any one. The plaintiff was at that time living on the lot with his father and his father's family, and has continued to do so ever since; and I incline to think that, under the circumstances at present in proof, the possession during this period, eleven years, must be deemed the possession of the son, he having had the legal title, *McArthur* v. *McArthur* (*a*), *Doe Groves* v. *Groves* (*b*), *Foster* v. *Emerson* (*c*), *McPherson* on infants, 28, 29. *White* v. *Haight* (*d*).

Judgment.

If, however, the defendant is advised that, under the circumstances already proved, or which can be proved, the father did acquire a title by possession, of which he, or the defendants as claiming under him, can claim the benefit against the plaintiff, I will hear further argument upon the point; and for that purpose a special application may be made for leave to set up this defence by supplemental answer, or to bring an action at law to establish it. I ought to add, perhaps, that, in all probability, such an application could only be granted, if at all, on payment by the defendant of the costs hitherto incurred.

Subject to this point, I think the plaintiff is entitled

(*a*) 14 U. C. Q. B. 544.
(*b*) 10 Q. B. 486.
(*c*) Ante vol. v, p. 185.
(*d*) Ante vol. xi, p. 420.

to a decree without costs—*Thompson* v. *Webster* (*a*), *Hale* v. *Saloon Omnibus Company* (*b*), *Dennistoun* v. *Fyfe* (*c*). 1865.

Raven v. Lovelass.

Waste—Account—Practice—Costs.

Where an injunction to stay waste was continued at the hearing, and it appeared that the extent of the waste committed did not exceed $20, the court refused to direct any account, and left the amount of the waste to be dealt with in any action for mense profits which the plaintiffs might be advised to bring.

Where a bill prayed specific performance of an agreement, and for an injunction against waste, and an account of waste committed, and the court was of opinion that the plaintiff's remedy, except as to the injunction, was at law, the decree was made without costs; the objection to the jurisdiction appearing by the bill, and not being raised until the hearing of the cause.

This cause was heard before his Honor V. C. *Mowat*. at the sittings of the court held at Cornwall, in the spring of 1865.

Mr. *McGregor*, for the plaintiff.

The bill had been taken *pro confesso* against *Joseph Lovelass*.

Dr. *Fitzgerald*, for the other defendants.

Mowat, V. C.—The plaintiffs claim to be the heirs of *Peter Raven*, deceased, and to be entitled as such to certain land in the township of Russell, of which the defendant *Catherine Raven* or *Lovelass*, and her children, who are also defendants, are in possession. The defendant *Catherine Raven* claims to be the widow of the deceased, and the defendant *Peter Raven* claims Judgment.

(*a*) 4 DeG. & J. 600. (*b*) 4 Drewry, 500.
(*c*) Ante vol. xi, p. 372.

1865. to be a co-heir with the plaintiffs. The deceased left no will.

Raven v. Lovelass.

The bill sets forth an agreement between the plaintiffs and defendants, by which the defendants agreed to give the plaintiffs possession of the land on the 1st day of November last, for a certain consideration therein mentioned; and the bill charges that the defendants have refused to give up the possession, and have commenced to waste, and are wasting, the premises. The bill prays for a specific performance of the agreement, and for an injunction, and for an account in respect of the waste committed.

An interlocutory injunction was granted on notice.

The defendants *Catherine Raven*, *Peter Raven* and *Anson Lovelass*, afterwards filed long answers, impeaching the agreement as invalid, and denying that they had committed any waste. The bill was taken *pro confesso* against the other defendant *Joseph Lovelass*.

Judgment.

On the cause coming on at Cornwall, the defendants' counsel, before any witnesses were called, admitted that the plaintiffs were entitled to a decree for an injunction to stay waste but disputed the plaintiffs' right to any account for waste; submitted that, assuming the allegations of the bill to be true, the plaintiffs' remedy on the agreement for possession was at law and not in equity; and claimed the costs of the suit, citing *Simpson* v. *Grant*. (*a*)

I gave judgment for the defendants on the question of jurisdiction, and consequently no evidence was gone into on either side, except as to the nature and extent of the waste committed. I reserved for consideration the plaintiffs' demand for an account or compensation in respect of the waste, and also the question of costs.

(*a*) 5 Grant, 273.

1865.

Raven v. Lovelass.

The waste actually committed was the pulling down of a small frame house or shed, which the defendants had assisted the intestate in building, and which was worth about $20. No defence is offered, and no explanation given, in regard to the pulling down of this house or shed. For all I see, it was a wanton act of destruction on the part of those who committed it, and justified the plaintiffs in apprehending that, if not restrained, the waste would not stop with this building. To the extent of the injunction, therefore, the suit has been successful; and I cannot say that it was useless.

As to the compensation demanded, the amount is so small that I think I should leave it to be dealt with in any action for mesne profits which the plaintiffs may be advised to bring.

There remains the question of costs.

Judgment.

It is not denied that the objection to the jurisdiction might have been taken by demurrer. The omission to take an objection by demurrer, does not necessarily deprive a successful defendant of the costs of the suit, *Simpson* v. *Grant* (*a*); but it is, no doubt, a circumstance of considerable weight, *Jones* v. *Davids*, (*b*), *Hill* v. *Reardon* (*c*), *Bell* v. *The London and North Western Railway Company*, (*d*) *Harrington* v. *Long* (*e*), *Padwick* v. *Platt* (*f*), *Williams* v. *Williams* (*g*), and cases collected in *Morgan* on Costs, 78, 79. The late case of *Webb* v. *England* (*h*), seems an express authority that, in a case like the present, the decree should be without costs. There answers had been filed, and evidence given; but the court decided against the plaintiff on the ground that it

(*a*) Ante vol. v, p. 278.
(*b*) 4 Russ. 278.
(*c*) 2 S. & S. 439.
(*d*) 15 Beav. 558.
(*e*) 2 M. & K. 595.
(*f*) 11 Beav. 503.
(*g*) 17 Jur. 434.
(*h*) 29 Beav. 57.

1865.

Raven v. Lovelass.

appeared by the plaintiff's bill that this remedy was at law. The Master of the Rolls, therefore, said, "I shall dismiss the bill without costs, because on the facts stated in the bill, the point of jurisdiction might have been decided upon demurrer." The present case is somewhat stronger in favor of the plaintiffs, as the objection appears in *Webb* v. *England* to have been taken by the answer, and this was not done in the present case; and this suit has also been partially successful. I think, however, that under all the circumstances, I should not make any apportionment of costs.

Judgment.

Reference was made on the part of the defendants to the County Courts' Act, (22 Victoria, ch. 15,) but I see nothing in its provisions which would support a different disposition of the costs than that I have mentioned.

The decree will therefore continue the injunction, and will give no costs to either party.

1865.

MALLOCH v. PLUNKETT.

Sheriff's sale—Financial conveyance.

The plaintiff had purchased at sheriff's sale, for a small sum, the interest of his debtor in property which the debtor had previously mortgaged for a large sum, the validity of the mortgage or the amount due upon it being doubtful, the court declined to enforce the purchase as absolute; but, the plaintiff submitting to have his deed from the sheriff treated as a security for his debt, the court made a decree on that footing.

This cause came on to be heard before His Honor V. C. *Mowat*, at the sittings of the court held at Ottawa, in the spring of 1865.

Mr. *Fitzgerald*, for the plaintiff.

Mr. *R. Sullivan*, for the defendants.

Judgment.

MOWAT, V. C.—The plaintiff, on the 22nd of June, 1861, recovered a judgment against the defendant, *Plunkett*, in respect of a debt which accrued several years before. On the 23rd of December, 1862, the plaintiff purchased the property in question for £10 10s., under a *fi. fa.* against lands, issued on this judgment. The sheriff's deed bears date the 9th of January, 1863.

Two years before the recovery of this judgment, but some time after the plaintiff's debt had accrued, *Plunkett* executed a mortgage on the property in favor of the other defendant, *Caldwell*.

The bill alleges that no consideration was given for this mortgage, and that it was given and accepted to delay and defraud *Plunkett's* creditors; and charges that, if this was not so, the mortgage was at all events given for far more than was due to *Caldwell*, and that *Caldwell* is only entitled to hold it for the amount actually due. The prayer is in the alternative, that the mortgage may be set aside, or that, if valid, the plaintiff

1865. Malloch v. Plunkett.

may be permitted to redeem on paying the amount really due. The defendants put in a joint answer asserting the validity of the mortgage for the full amount it mentions. At the hearing the plaintiff submitted to treat the mortgage as a valid security to the extent of whatever debt the Master should find to be really due to *Caldwell*, and submitted also to forego any claim under the sheriff's deed, on being paid his debt and costs.

The bill was in the first instance taken *pro confesso* against the defendants, and in that condition came on for hearing before my brother *Spragge*, (*a*) when he held that the deed to the plaintiff ought not to be enforced as an absolute purchase, but that the plaintiff was entitled to relief on the footing of a judgment creditor; and he directed that an account should be taken of what, if anything, was really due *Caldwell*. The decree to which the plaintiff now submits, is in effect the same as my brother *Spragge* has pronounced.

Judgment.

Mr. *Sullivan*, for the defendants, relying upon the judgment of the court on the first point, contended, that in granting to the plaintiff any relief, my brother *Spragge* had overlooked the fact that the judgment was not a lien on the land. But the report does not state that the decree proceeded on the ground of the judgment being a lien, nor am I at present prepared to say that that is the only ground on which the decree was sustainable. The plaintiff's deed seems to me rather voidable than void, in equity. I know of no authority for holding such a deed to be absolutely null and void, here, to all intents and purposes; while if the estate of the debtor was legal, I apprehend that at law the deed would be valid, *vide Raynes* v. *Crowder* (*b*,) *Fitzgibbon* v. *Duggan* (*c*). Whatever the rights of other

(*a*) 9 Grant, 558. (*b*) 14 U. C. C. P. 111.
(*c*) 11 Grant, 188.

creditors might be in this court, I do not see that the parties to a fraudulent assignment can claim any equity to have the deed held void here, since the only ground, on the other hand, for holding it void, would be that their own fraud had enabled the purchaser to buy at a low rate; and it may sometimes be for the interest of the other creditors to hold a purchaser of an equity of redemption bound by his voluntary purchase of part of the debtor's property. Here it is not for the interest of anybody but the plaintiff that his purchase should be deemed absolute; and as he is willing that his deed should be dealt with as a second incumbrance on the property for securing his debt and costs, I think he is entitled to a decree on that footing.

1865.
Malloch v. Plunkett.

The defendants endeavoured to make out that the whole amount named in the mortgage was really due to *Caldwell;* but there was no evidence of this except their own testimony, which was so unsatisfactory that I can place upon it no reliance whatever.

Judgment.

The defendants having failed to sustain the grounds of defence taken by their answer, the plaintiff must have his costs to the hearing. The Master will take the necessary account of what is due *Caldwell.* Subsequent costs are reserved.

1865.

FOLLIS v. PORTER.

Specific performance—Compensation—Deficiency.

The plaintiff sold to the defendant a lot of land; the contract did not mention the number of acres it contained; the conveyance stated the quantity to be 200 acres, more or less; the covenants did not warrant the quantity; part of the purchase money remained as a lien on the land, and many years afterwards, but before the purchase money was fully paid, the vendee discovered that there was a deficiency of 24 acres in the supposed contents of the lot: *Held*, that the vendee was not entitled to compensation from the plaintiff for deficiency as against the unpaid purchase money.

This cause came on to be heard before His Honor V. C. *Mowat*, at the Cobourg sittings, held in the spring of 1865.

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

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

Judgment.

MOWAT, V.C.—The plaintiff, on the 31st of October, 1844, conveyed to the defendant in fee, lot number one in the third concession of Douro. The deed describes the lot as containing 200 acres, "be the same more or less," and refers for a description to the original grant from the Crown, which names 200 acres as the quantity, and sets forth the metes and bounds of the lot. Part of the purchase money is still unpaid, and the prayer of the bill is, that the plaintiff may be declared entitled to a lien on the premises for what is still due to him, and that the property, or a sufficient part of it, may be sold to pay the same.

The answer alleges, that the defendant has "lately discovered that the said lot only comprises 150 acres, instead of 200 acres as stated in the deed of conveyance to her." It was admitted at the hearing, that there was a deficiency of twenty-four acres; and the only point argued was, whether that deficiency entitled the

defendant to claim a deduction from the unpaid purchase money, notwithstanding the execution of the conveyance and the great lapse of time. It is not alleged that the deficiency was known to either party at the time of the conveyance.

1865.
Follis v. Porter.

It is clear that the covenants in this deed do not extend to the number of acres in the lot; and in *McCall* v. *Faithorne* (*a*), my brother *Spragge* held, that in such a case a much greater deficiency than this did not entitle a purchaser to relief after conveyance, *vide*, also, *Clark* v. *Burnham*, (*b*).

Mr. *Sullivan*, for the defendant, contended however, that a vendee who has not paid his purchase money, though he has received the conveyance, is in as favourable a situation for claiming compensation as if no conveyance had been executed. But no authority for this proposition was cited. Lord *St. Leonards'* opinion is against it (*c*), and the cases of *Thomas* v. *Powell* (*d*), *McCulloch* v. *Gregory* (*e*), and *Miller* v. *Pridden* (*f*), are in the same direction (*g*).

Judgment.

If in the present case there had been no conveyance, resort would have been had to the contract; and the contract does not specify any quantity. But though it had specified the quantity in the same terms as the conveyance employs, I am not prepared to say that the defendant would have been entitled to any relief, even before conveyance. The cases do not define the precise effect of the words "more or less;" but it was held in *Winch* v. *Winchester* (*h*), that these words in a contract disentitled a purchaser to claim compensation for a

(*a*) 10 Gr. 324.
(*b*) 2 Gr. 647.
(*c*) Sug. V. & P. 551, 14th ed.
(*d*) 2 Cox. 394.
(*e*) 1 K. & J. 286.
(*f*) 3 Jur. N. S. 78
(*g*) See also Dart on Vendors, 487, 503, 3rd ed.; and Rawle on Covenants for title, 613, 614 (3rd ed.)
(*h*) 1 V. & B. 375.

1865. Follis v. Porter.

deficiency of five acres out of forty-one, there being no intentional misrepresentation proved.

The defendant may perhaps be entitled to compensation from the Government, under the Public Lands Act, 22 Victoria, ch. 22, sec. 24; but I am clear that she has no right to compensation from the plaintiff.

WILSON v. CRAMP.

Insolvency Act.

A voluntary assignment for the benefit of creditors, not executed in pursuance of the provisions of the Insolvency Act, is void as against assignees appointed under the Act, where such assignment was the act of insolvency on which the attachment was issued.

Statement.

The bill in this cause was filed by the assignee of *James D. McKay*, appointed under the Insolvency Act, (27 & 28 Victoria, ch. 17), against the assignees under a voluntary assignment previously executed by the insolvent. The instrument was the act of insolvency on which the attachment had been issued. The bill prayed that the assignment to *Cramp* and *Milroy* might be declared void as against plaintiff, and that they might be ordered to deliver up to plaintiff all the books of account, vouchers, deeds, papers and documents, and all the goods and chattels belonging to the estate, and to carry to plaintiff the land and premises conveyed to them by the said *James D. McKay*; and that *Cramp* and *Milroy* might be restrained from intermeddling with the said estate and effects, and from collecting the debts due to *McKay*, and from retaining the possession of any of the goods and chattels belonging thereto; and from selling or disposing of any of the property, real or personal, and that they might account for such portion of such property as had been converted into money, and pay the same over to the plaintiff; and for further relief.

The cause came on for hearing before His Honor V. C. *Mowat*. 1865.

Wilson v. Cramp.

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

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

MOWAT, V.C.—The question argued in this case was, whether an assignment for the benefit of creditors on which, as an act of insolvency, proceedings are afterwards taken in insolvency, is void as against the assignees appointed under the act.

I am clear that it is.

I think this apparent from the whole scope of the act. It is impossible to suppose that when the Legislature made such an assignment an act of insolvency, it was intended that the assignees appointed under the act should receive none of the property of the insolvent; and that, notwithstanding their appointment, the estate of the insolvent should be administered by the trustees whom the insolvent had himself chosen to name. Such a construction would render futile the enactment which makes such an assignment an act of insolvency, and would practically deprive the creditors of the advantages which the statute gives them for the winding up of the estate of the insolvent debtor. Judgment.

If, in addition to the clear evidence of the intention of the Legislature, which the object and scope of the act supply, a direct enactment declaring such assignment invalid against assignees under the act, was necessary, I think section eight contains enough for this purpose. Take, for example, the third subsection of that clause, which expressly renders null all contracts or conveyances made, and acts done by a debtor, with the intent fraudulently to impede,

1865.

Wilson v. Cramp.

obstruct, or delay his creditors in their remedies against him; or with intent to defraud his creditors or any of them, and which have the effect of impeding, obstructing, or delaying the creditors, or of injuring them. Now the deed of assignment manifestly impedes and obstructs creditors in those remedies which the Insolvency Act affords; and on this ground similar clauses in the English Bankruptcy Acts, (1 Jac. 1, ch., 15, sec. 2; and 6 Geo. IV., ch. 16, sec. 3,) were decided in England to include voluntary assignments for the benefit of creditors. *Stewart* v. *Moody* (*a*). As Lord *Ellenborough* observed in *Simpson* v. *Sikes* (*b*), "such a deed subjects the debtor's property to distribution, without the safeguards and assistances which the Bankrupt Laws provide."

Judgment.

The assignment in question also attempts in some respects to put the debtor's property under a different course of application and distribution among his creditors from that which would take place under the Insolvency Law. *Dutton* v. *Morrison*, (*c*). Thus, it does not give the priority secured by the Insolvency Act to the clerks and other employés of the insolvent.

Decree for plaintiff.

(*a*) 1 C. M. & R. 777.
(*b*) 6 Maule & Selwyn, 312.
(*c*) 17 Ves. 193.

1865.

MASON v. SENEY.

Voluntary deeds—Practice—Adding plaintiffs—The rule in Prosser v. Edmunds considered.

To sustain a deed of gift to a person standing in a confidential relation to the doner, the donee must establish by clear evidence that the nature and effect of the deed were fully and truly explained to the donor; that he perfectly understood them; that he was made alive, by explanation and advice, to the effect and consequences of executing it, and that the deed was a willing act on his part, and not obtained by the exercise of any of that influence which the confidential relationship of the donee put it in his power to employ; otherwise such deed of gift will be set aside.

Where a son, who had the entire management of his father's business,—the father being old, having for years been unable to attend to business,—obtained deeds of gift from his father and mother of their property, without the intervention of any adviser but the son himself, and failed to give such evidence as above mentioned; the deeds were set aside.

Where new plaintiffs are added by amendment, they have at the hearing the same rights, and the court has the same discretion in case of a misjoinder, as if they had been plaintiffs originally; and the court may, under the General Orders, treat such new plaintiffs as the sole plaintiffs.

Where the grantors were in possession of half the property conveyed, and had an undisputed life estate therein, but their title to the remainder in fee, subject to such life estate, was disputed: *Held*, that the rule laid down in *Prosser* v. *Edmunds* did not apply to their grantee of such half, and that the grantee might maintain a bill therefor.

In such a case, an objection taken at the hearing to a bill by the grantors and grantees against the adverse claimant of the whole property was disallowed.

Statement.

This was a cause heard before His Honor, V.C. *Mowat*, at the sittings of the court, at Cobourg, in the spring of 1865.

Mr. *Strong*, Q.C., and Mr. *Hector Cameron*, for the plaintiff.

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

1865.

Mason v. Seney.

MOWAT, V.C.—This suit relates to the south half of lot No. 15, in the fifth concession of the Township of Hope. The plaintiffs, *Robert Seney* and *Ann* his wife, are the father and mother of the defendant *Samuel Seney*, he being their youngest son. The other plaintiffs, *Mason* and wife, are, respectively, the son-in-law and daughter of *Robert* and *Ann Seney*. They have several other sons and daughters.

Benjamin Barnes, the father of *Ann Seney*, formerly owned the lot: and when the transactions in question commenced, he still owned fifty acres of it; and the plaintiffs, *Robert* and *Ann Seney*, owned the other 150 acres, under a deed executed by *Barnes* in 1850. *Ann Seney* was *Barnes'* only child, and heiress at law.

The object of the suit is to set aside a will obtained by the defendant, *Samuel Seney*, from *Barnes*, on the 19th March, 1852, and which purports to devise his remaining fifty acres to *Samuel*; and to set aside, also, certain deeds of gift of subsequent date, executed, or said to have been executed, by *Robert* and *Ann* in favor of *Samuel*, and relating to the same lot.

Judgment.

The defendants have entirely failed to sustain the validity of the will. It is quite clear, upon the evidence, that at the time of its alleged execution *Barnes* was not competent to make a will, and that obtaining his signature to the produced paper was a gross fraud on the part of *Samuel*.

Then, as to the deeds of [illegible] which he subsequently obtained from his father and mother:

The law of this court is extremely strict on the subject of voluntary deeds; and it is no less just than strict. The rules acted upon are thus stated in *Hoghton* v. *Hoghton* (*a*), in entire accordance with many authorities both before and since: "Where one

(*a*) 15 Beav. 278.

person obtains by voluntary donation a large pecuniary benefit from another, the burden of proving that the transaction is righteous, to use the expression of Lord *Eldon* in *Gibson* v. *Geyes*, falls on the person taking the benefit. But this proof is given, if it be shewn that the donor knew and understood what it was that he was doing."

"If, however, besides obtaining the benefit of this voluntary gift from the donor, the donor and donee were so situated towards each other that undue influence might have been exercised by the donee over the donor, then a new consideration is added, and the question is, not, to use the words of Lord *Eldon* in *Huguenin* v. *Baseley*, 'whether the donor knew what he was doing, but *how the intention was produced*.' Though the donor was aware of what he did, yet, if his disposition to do it was produced by undue influence, the transaction would be set aside."

"In many cases the court, from the relations existing between the parties to the transaction, infers the probability of undue influence having been exerted. These are the cases of guardian and ward, solicitor and client, spiritual instructor and pupil, medical adviser and patient, and the like; and in such cases the court watches the whole transaction with great jealousy, not merely for the purpose of ascertaining that the person likely to be so influenced fully understood the act he was performing, but also for the purpose of ascertaining that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit." Judgment.

The doctrine is more shortly expressed by the same learned judge, in the subsequent case of *Walker* v. *Smith* (*a*): "There are always two points to be con-

(*a*) 29 Beav. 394.

1865.

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sidered in these cases. First, whether the donor really made the gift; and, secondly, whether the influence of the donee, or recipient of the bounty, was improperly exercised on the donor, to induce the donor to make the gift in question. The burthen of the proof of the first always lies on the recipient of the bounty, to shew that the gift was intended to be given. * * * The strict burden of proof lies on the recipient of the bounty. He must prove every point of the case, not only the transfer, but that the transfer was meant to be made to him beneficially."

Judgment.

As to the kind of proof necessary to establish a deed of gift, even where there was no undue influence, the Master of the Rolls observed, in the same case: "I am of opinion that in all these cases, you must not take into account the evidence of the recipient himself; the gift must be established by separate and independent evidence."

In the passage quoted from *Hoghton* v. *Hoghton*, the court mentioned some of the relationships which have been recognised in equity as enabling one person to exercise undue influence over another. Those so mentioned are but examples, as the same learned judge has observed on many occasions. In the case of *Hobdag* v. *Peters* (*a*), he said: "I think the evil would be very considerable, and the rule of the court frittered away by technicality, if it were held, that this particular relation must be one which the court designates by a particular name, such as that of trustee and *cestui que trust*, guardian and ward, solicitor and client, or physician and patient. I said, in *Cooke* v. *Lamotte*, 'Lord *Cottenham* considered that it extended to every case in which a person obtains by donation a benefit from another, to the prejudice of that other

(*a*) 28 Beav. 351.

person, and to his own advancement; and that it is essential, in every such case, if the transaction should be afterwards questioned, that he should prove that the donor voluntarily and deliberately performed the act, knowing its nature and effect.'"

Other judges have laid down the rule with equal distinctness. Lord Justice *Turner*, when Vice-Chancellor, thus referred to it in *Billage* v. *Southees* (*a*): "No part of the jurisdiction of the court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and, in my opinion, this part of the jurisdiction of the court cannot be too freely applied, either as to the persons between whom, or the circumstances in which, it is applied. The jurisdiction is founded on the principle of correcting abuses of confidence; and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustee and *cestui que trust*, guardian and ward, attorney and client, surgeon and patient—to be merely instances of the application of the principle."

Judgment.

"It is said that the plaintiff intended to be liberal, and that this court would not prevent him from being so; and no doubt it would not, if such were his intention; but intention imports knowledge, and liberality imports the absence of influence; and I see no evidence in this case, either of knowledge, or of the absence of influence; and where a gift is set up between parties standing in a confidential relation, the onus of establishing it by proof rests upon the party who has received the gift."

(*a*) 9 Hare, 540.

1865.

Seney v. Mason

In *Cooke* v. *Lamotte* (*a*), the gift was to a nephew from an aunt, who had provided for him by her will.

In *Harvey* v. *Mount* (*b*), the doctrine was applied where the donor and donee were sisters. They had lived together for many years. The donee, *Grace*, had during this time been at the head of the establishment, and had managed everything relating to the family. The income of the other, *Sarah*, had been received by *Grace*; and she supported herself and *Sarah* out of their common funds; and the court held that one necessary consequence followed from this relative position, "namely, that *Grace* must have acquired a great ascendancy and influence over *Sarah*. Under all the circumstances, [Lord *Langdale* observed,] there must have been, and was, a great ascendancy on the part of *Grace*, and a great tendency to submission on the part of *Sarah*. Now that species of influence may be used for good or for evil; and, as the advice of one so circumstanced is received by the other as a command, submission may be easily effected."

Judgment.

In *Sharp* v. *Leach* (*c*), the deed impeached was subject to a limitation to the donor for life, with remainder to her issue; and the Master of the Rolls, referring to the impediments which the defendant had to overcome in order to sustain the deed, in consequence of the relation between the parties, said: "The donee was the only brother of the plaintiff; he was the person whom she consulted about the management of her property; she was living in his house at the time. * * It is said that before this deed was executed she intended to give the reversion of her property to her brother, and that this is shewn by her will and her letters respecting it. This, in my opinion, does not assist the defendant."

In *Griffith* v. *Robins* (*d*), the deed of gift reserved

(*a*) 15 Beav. 234.
(*b*) 8 Beav. 439.
(*c*) 31 Beav. 491.
(*d*) 3 Madd. 191.

a life interest to the donor. The relation which brought the case within the rules of law referred to, is thus described by the Vice-Chancellor, in his judgment: "The donor was altogether dependent on the kindness and assistance of others. *Thomas Griffith* had married her niece. [*Griffith* and his wife were the donees.] She had entire trust and confidence in them; and it may be stated that they were the persons upon whose kindness and assistance she depended."

In *Corsett* v. *Bell* (*a*), the donee was the donor's agent, with whose assistance he managed his affairs, who received his rents, and who was otherwise in his confidence.

So, also, the terms of the deed may be such as the court will infer from them alone undue influence, and throw on the donee the burden of proof that the deed was the voluntary act of the donor. Thus in *Sharp* v. *Leach* (*b*), referring to the improvidence of the transaction, as it affected the donor, the Master of the Rolls said:—"Upon this state of things I am of opinion that the contents and effect of the deed, (independently of the relation of brother and sister existing between the parties,) threw upon the defendant, the brother, the burden of proving the validity of the deed, that is to say, that it emanated from the pure uninfluenced will of the plaintiff, after having the extent and effect of the deed fully explained to her. I say the effect of the deed, because on an examination of these, it appears to me that a more improvident deed, so far as the plaintiff is concerned, it was difficult to frame."—Vide also *Harvey* v. *Mount* (*c*), *Ahearne* v. *Hogan* (*d*), *Hoghton* v. *Hoghton* (*e*). Judgment.

(*a*) 1 Y. & C. C. C. 569.
(*b*) 31 Beav. 494.
(*c*) 8 Beav. 450, 452.
(*d*) Dru. 326.
(*e*) 15 Beav. 308.

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In the present case, the relative position of the parties is thus stated by the son in his answer:—"Since I was about the age of twenty years, namely, in or about the year 1850, my father being old, and almost incapable for business, and to manage the farm, and I being the only son left at home, (my elder brothers having, as they became able, left to work for themselves,) I assumed the business and management myself, for and on my own account, and by and with the will and consent of my father and mother, I supporting and maintaining them, and they living with me, instead of me living with them." The relation thus described by the defendant himself bears a strong resemblance to that existing between the parties in *Harvey* v. *Mount* (*a*).

Judgment.

When examined as a witness in the cause, *Samuel* stated his position in this way:—"I managed all the affairs about the farm at the time. My father, at that time, took no management of the farm affairs. There never was any agreement between my father and myself as to the management of the farm. The family entrusted everything to me."

A stronger case of confidence in the donee, and of complete dependence upon him, than these statements manifest, has not often occurred.

It appears from the other evidence in the cause that, for years before *Samuel* assumed the control, his father had been unable to attend to business. Another son, *Robert*, had up to the time of his marrying and leaving the place, stood in the same relation to his father's affairs as *Samuel* thenceforward did. *Robert*, speaking of his father's position in his own time, as well as in *Samuel's*, says: "*Samuel* took charge of the homestead lot when I left. My father never pretended to manage the farm at this time, nor had he for many years. All

(*a*) 8 Beav. 440.

that he did was little chores about the place. He did not buy or sell, or do any business. * * From this time *Samuel* appeared to have a great deal of influence with my father and mother. He seemed to do as he liked about everything. They appeared to think everything he did was all right."

Samuel's position was, therefore, plainly such as to render it necessary for the defendants to establish by clear evidence that the old people really did make the deeds which the defendants claim under; that their nature and effect were fully and truly explained; that they, the donors, perfectly understood them; that they were made alive, by explanation and advice, to the effect, and consequences to themselves, of executing them; and that the deeds were willing acts on their part, and not obtained by the exercise of any of that influence which *Samuel's* position put it in his power to employ. It is almost impossible in such a case as the present to establish these necessary particulars, unless the donors have had the benefit of independent professional or other assistance in the transaction. *Vide Gibson* v. *Russell* (*a*), *Anderson* v. *Ellsworth* (*b*), *Muhallen* v. *Marum* (*c*), and cases cited *ante*. It is not pretended that these donors had such assistance: the donee himself was their only adviser.

Judgment.

The defendants set up three deeds, dated, respectively, the 13th August, 1852, the 23rd March, 1857, and the 29th January, 1859.

The last of these alleged deeds is not produced or proved. A memorial of such a deed, signed by *Samuel*, was registered on the 4th May, 1860; but the conclusion to which I have come upon the whole evidence is, that no such deed was ever executed.

(*a*) 2 Y. & C. Ch. 104. (*b*) 7 Jur. N. S. 1047.
(*c*) 3 D. & War. 317.

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The proposal for the deed of 1852, confessedly, came from *Samuel:* and it is not said that the deed of 1857 was the spontaneous suggestions of the donors. There is no evidence that either deed was explained to the donors before being executed; and no evidence of their having accurately understood, and fully perceived, their effect. Both deeds were most improvident, and such as no prudent or discreet adviser could have sanctioned their executing.

The deed of 1852 was obtained from the donors within five months after *Samuel* had got the fraudulent will from his grandfather. This deed, also, is not produced, nor is its non-production accounted for; but we learn from the memorial that the deed embraced the whole 150 acres which the donors then owned, and also all "the chattels and movable property now on the aforementioned south 50 acres," where they were all living at the time. But *Samuel* acknowledges that he had made no arrangement with the old people for the chattel property. He admits, also, as to the land, that the deed did not contain the whole arrangement between him and the old people: he admits that it was verbally agreed that he should convey to his brother *Robert* part of the property; and this he says he afterwards did; but the donors had no evidence of this agreement, had *Samuel* chosen to deny it. Nothing, certainly, could exceed the improvidence of such a transaction, taking as correct the account of it given by *Samuel* himself; nor could anything illustrate more strikingly the unlimited confidence the donors placed in the donor, and the unlimited influence which, even at this early period, he had acquired over them. At his urgent request, they stripped themselves of everything, making their very subsistence for the future dependent on his good will.

Judgment.

It is admitted that this deed was not executed with the formalities prescribed by law for the conveyance

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by married women of their estates, and that it is therefore void so far as regards the estate of Mrs. *Seney*. This defect was not known by *Samuel* until some time after the deed of 1857 was executed: and it is doubtful if the donors ever knew the defect, or its importance.

The deed of 1857 purports to be a release, for the expressed consideration of five shillings, of all the interest of the donors in the fifty acres which belonged to *Barnes* at the time of his death: and a lease of these fifty acres to the old people for life is said to have been executed by *Samuel* at the same time. But whether the old people parted with their whole estate, or secured for themselves a life interest in the property, the transaction is equally unsustainable. The fifty acres belonged to the plaintiff *Ann Seney*, the will under which alone *Samuel* pretends to have had claim to it being fraudulent and void; and in many of the reported cases in which the gift was set aside, the gift was not to take effect until the death of the donor, *Griffiths* v. *Robins* (*a*), *Corsett* v. *Bell* (*b*), *Cooke* v. *Lamotte* (*c*), *Sharpe* v. *Leach* (*d*). The lease was not registered until 1861, and was probably retained in *Samuel's* possession till about that time. Both circumstances afford further illustrations of the improvidence of the transaction, the absence of all proper advice, the influence of *Samuel*, and the confidence reposed in him.

Judgment.

In regard to each of the impeached deeds, the language of Lord *St. Leonards* in reference to the instrument impeached in *Ahearne* v. *Hogan* (*e*), is applicable to the letter: "There has not been the slightest attempt to prove that (the grantor) gave any directions for the preparation of it; no person was present at the contract for the assignment. In short,

(*a*) 3 Mad. 192.
(*b*) 1 Y. & C. Cl. 569.
(*c*) 15 B. 234.
(*d*) 31 Beav. 491.
(*e*) Drury, 324.

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there is no evidence of any one of the *res gestæ*, without which it would be impossible to sustain the transaction in a court of equity."

So also the language of Sir *J. L. Knight Bruce*, when Vice-Chancellor, in setting aside the instrument impeached in *Corsett* v. *Bell* (*a*), aptly describes the character of each of the deeds in question here: "That it was voluntary is not all; exhibiting no trace of good advice, marked with a strong character of improvidence, it was obtained by a confidential agent from his principal, for the benefit of the agent himself, who is asking a court of equity to support it, or to stand neutral concerning it, in the total absence of any evidence to shew under what or whose instructions, or under what circumstances, or with what degree of explanation, influence or knowledge, it was prepared and executed. I say with Lord *Eldon* and Lord *Cottenham*, that a man who engages in a transaction such as this, takes upon himself the burthen and obligation of clearly proving that it is fair and righteous. The defendant has not discharged himself of that burthen or obligation. It is impossible for me to suppose, that a person of ordinary prudence or discretion, properly advised, would have knowingly executed this instrument."

Judgment.

It was admitted at the hearing, that *Thomas Porter* could not claim to be a *bona-fide* purchaser for value without notice. Both defendants must therefore join in the reconveyance, which, the *Masons* consenting, had better be made to the *Seneys*.

It was objected, that the *Masons* could not maintain this suit alone, and could not join in the suit; that relief in a case of this kind is personal to the donors.

The *Masons* claim under a deed from the *Seneys*,

(*a*) 1 Y. & C. C. 578.

dated the 6th of October, 1862, respecting which, as between the several plaintiffs, there is no dispute.

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If it were necessary, I think that I might treat the *Masons* as defendants and the *Seneys* as sole plaintiffs, under the General Order of this Court as to misjoinder of plaintiffs. The regularity of this course, if the *Seneys* had been original plaintiffs, was not disputed; but it was contended that the circumstance of the *Seneys* having been made plaintiffs by amendment, was a difficulty. But I know of no authority for this distinction. It is said that it would be an anomaly to hold that the original plaintiffs were not entitled to relief, and to treat them as defendants and give relief to new plaintiffs. But so also the practice may be said to be anomalous of giving relief to an original plaintiff on an amended bill, when the bill as originally filed is demurrable, or of giving any relief to co-plaintiffs who were not parties to the suit originally. If the assignment to the *Masons* did not entitle them to maintain the suit, the propriety of allowing them, at the former hearing, to introduce the *Seneys* as co-plaintiffs, was proper to be considered. But the permission having been given, and acquiesced in, and the *Seneys* having availed themselves of the permission to become plaintiffs, and having in reliance on it assumed the responsibility and the expense of the litigation, and the case having again come down for hearing, and the evidence on both sides having been completed, I see no reason for now giving way to the objection. I apprehend, that under these circumstances, the more proper course is to hold that the case should be dealt with, for the purposes of the Order, as well as for the general purposes of the suit, precisely as if the *Seneys* were originally named as plaintiffs; that the parties have the same rights, and that the court has the same discretion.

Judgment.

But as to the northerly fifty acres, I am not aware

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of any authority for holding that the deed to the *Masons* is void. The *Seneys* were in peaceable possession of that portion of the lot through their tenant, and their right to a life estate thereon has never been disputed.

As to the other fifty acres, it would be necessary, before deciding in favour of the defendant's contention, to consider whether the late statute authorizing the sale of rights of entry, in connection with the construction which the statute has received at law, *Baby q.t.* v. *Watson* (*a*), has varied to any extent the rule laid down in *Prosser* v. *Edmonds* (*b*). Vide *Knight* v. *Bowyer* (*c*), *Anderson* v. *Radcliffe* (*d*), *Tapp* on Maintenance, 48. But I do not see that there is any occasion for going into that question in the present suit.

Judgment.

The defendants must pay the costs.

(*a*) 13 U. C. Q. B. 531.
(*b*) 1 Y. & C. Ex. 7.
(*c*) 4 Jur. N. S. 568.
(*d*) 6 Jur. N. S. 578.

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PROUDFOOT v. TIFFANY.

Trustees.

One of several trustees filed a bill against his co-trustees and his *cestuis que trust*, to be relieved from the trust, on grounds set forth in the bill. The other trustees, by answer, asked for the same relief on the same grounds which were applicable to all, and the *cestuis que trust*, most of whom were adults, submitted to the relief; the court granted a reference to the Master for the approval of new trustees in place of all the existing trustees.

In such a case the court, at the instance of the *cestuis que trust*, in granting the usual reference, added a direction that, if the Master on taking the evidence found sufficient reason for reducing the number of trustees, or for the appointment of one of the *cestuis qui trust* as one of the trustees or as sole trustee, he should report the facts and reasons to the court.

This cause came before His Honor V. C. *Mowat*, on motion for decree.

The plaintiff was one of the trustees and executors under the will of the late *George Sylvester Tiffany*. The trustees and the *cestuis que trust* were defendants.

The bill set forth certain unexpected difficulties that had arisen in the execution of the trusts, and prayed—(1st.) That the plaintiff might be relieved of his trusteeship, and that a new trustee might, if necessary, be appointed in his room. (2nd.) Or that the estate might be administered, and the trusts of the will executed and carried out, under the direction of the court. (3rd.) And that the accounts of the estate might be taken, and the plaintiff discharged in respect thereof upon duly accounting in the premises, in accordance with the provisions of the will and the practice of the court. Statement.

The other trustees claimed by their answers to be discharged also, for the same reasons as the plaintiff.

Edward Tiffany, one of the *cestuis que trust*, stated in his answer, that he was anxious to get the management of

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the estate, believing that he could and would devote more time and attention to it than any person who had no personal interest in making the estate as productive as possible; and that it was of the greatest consequence that some person should be appointed who would not only devote the necessary time to the estate, but who would also take a strong interest in it.

Some of the *cestuis que trust* were infants, and some of full age.

Mr. *Blake*, Q.C., for the plaintiff, referred to *Lewin* on Trusts, 583. *Hill* on trustees, 197—*Coventry* v. *Coventry*, (*a*) *Greenford* v. *Wakeford*, (*b*) *Barker* v. *Piele*, (*c*).

Argument.

Mr. *Cattanach*, on behalf of all the *cestuis que trust*, submitted to the discharge of the trustees, on their first accounting in respect of their dealings with the estate; and asked for authority to the Master to appoint one trustee instead of the three named in the will, and to consider the claim of *Edward Tiffany* to be such trustee.

Mowat, V. C.—I think there should be the usual administration decree; and a reference to the Master to approve of new trustees, in the place of all the existing trustees. To confine the decree to the relief of the plaintiff would merely have the effect of putting the estate or the parties, to the expense of a separate application by the other trustees.

As to *Edward Tiffany* being appointed sole trustee, this cannot readily be done. It is contrary to the practice of the court to sanction the appointment of a sole trustee, except in case of necessity—*In re Clissold* (*d*),

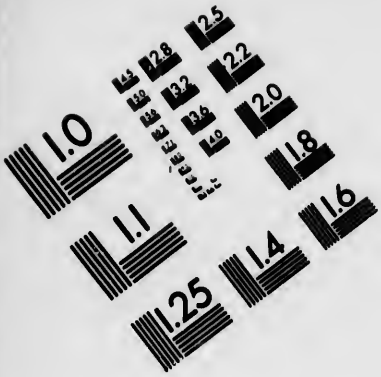
(*a*) 1 Keen, 753.
(*b*) 1 Beav. 581.
(*c*) 11 Jur. N. S. 436.
(*d*) 10 L. T. N. S. 642.

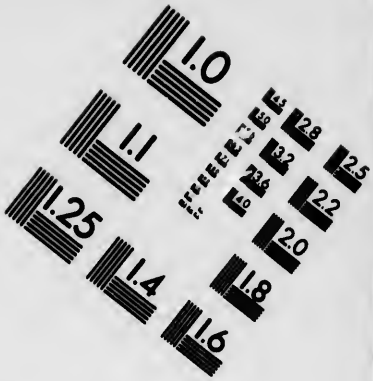
and especially where the settler has named several trustees. As Sir *W. Page Wood* observed in *Re Porter's* Trust (*b*), "There are many objections to a sole trustee."—See *Lewin* on Trusts (*c*). In *Re Dickinson's* Trusts (*d*), the same learned judge had said, "The court will never exercise its discretion so as to put infant's fund in the power of a sole trustee"; and *Re Ellison's* trusts (*e*), it was observed, "The court will not appoint one new trustee only, where there were originally more than one."

Even a reduction of the number from three to two is not regarded with favor. The observation of the learned Vice-Chancellor in *Bulkeley* v. *The Earl of Eglinton* (*f*) is sufficient to shew this: "The property is very considerable, and the original settlor thought it right to protect it by three trustees. I do not think it right to leave it to two. In the case of the decease of one, the property will be at the mercy of the survivor. I must have very clear affidavits as to the alleged impossibility of finding any third person willing to join these proposed new trustees." Judgment.

So, also, it has been held to be very undesirable to appoint a *cestui que trust* to be a trustee where this can be avoided. In *Ex parte Clutton* (*g*), Vice-Chancellor *Page Wood* remarked, "I have a great objection, of course, to appoint one of the *cestuis que trust* to be a manager of this property." "And in *Wilding* v. *Bolder* (*h*), the Master of the Rolls made the following observations: "I cannot depart from the rule I have adopted of not appointing a near relative a trustee, unless I find it absolutely impossible to get some one unconnected with the family

(*a*) 2 Jur. N. S. 349.
(*b*) 4th Ed. page 33.
(*c*) 1 Jur. N. S. 724.
(*d*) 2 Jur. N. S. 62.
(*e*) 1 Jur. N. S. 994.
(*f*) 17 Jur. 988.
(*g*) 21 B. 222.





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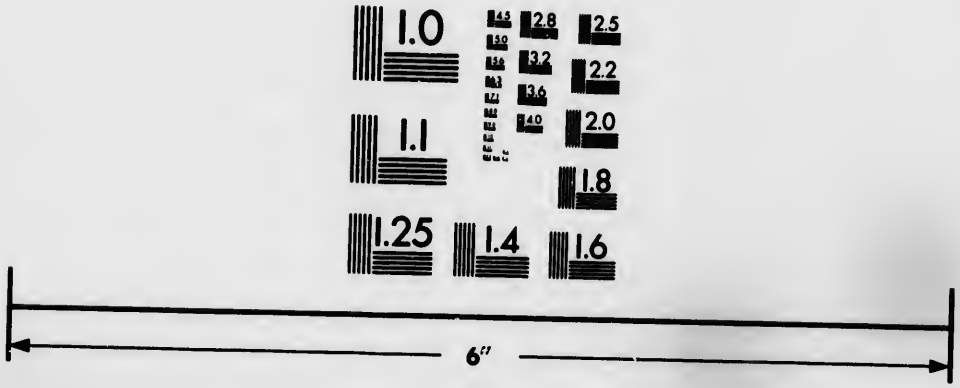

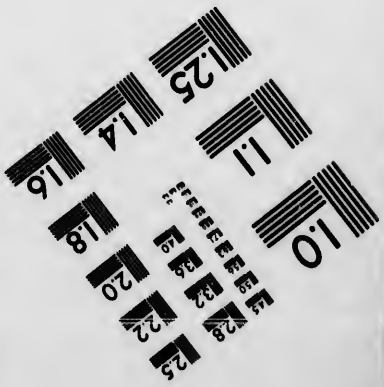

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to undertake that office. I have always observed that the worst breaches of trust are committed by relations, who are unable to resist the importunities of their *cestuis que trust*, when they are nearly related to them."

Having reference to these cases, I think that all I can do to meet the views of the defendants is to add to the general reference for the approval of new trustees, a direction that, if, upon the evidence which may be laid before the Master, he finds sufficient reason for the appointment of fewer trustees than three, or for the appointment of *Edward Tiffany* as one of the trustees, or as sole trustee, he shall report the facts and reasons to the court.

Judgment.

Further directions and costs are reserved.

COCKBURN v. GILLESPIE. 1865.

Principal and surety—Pleading—Parties.

Where a surety pays a debt and claims an assignment of a judgment which the creditor had recovered against the debtor, and it is doubtful whether the payment is a satisfaction of the judgment, the creditor may properly make the assignment and leave the debtor to set up that defence if proceedings are taken on the judgment.

To a suit by a surety against the creditor for an assignment by him of a judgment recovered against the debtor, the debtor is a necessary party.

This cause was heard before His Honor V.C. *Mowat*, at Cobourg, on the 24th of May, 1865.

Mr. *Crickmore*, for the plaintiff.

Mr. *J. F. Dennistoun*, for the defendants.

MOWAT, V. C.—The defendants, *Gillespie & Co.*, recovered a judgment at law against *John Montgomery Campbell* and *Henry John Standley*, who are not defendants in the present suit. On this judgment a writ of *fi. fa.* against goods was issued and placed in the hands of the sheriff, at Cobourg, who made a levy on certain goods of *Campbell*. Thereupon *Campbell*, as principal, and the plaintiff, as surety, entered into a bond to the sheriff, bearing date the 12th of August, 1859, conditioned for the delivery of the goods to the sheriff on demand. The goods were not so delivered; and the plaintiff was, in consequence, sued on the bond, and a verdict was recovered against him for the amount due from the original debtors, with interest and costs. Judgment.

The plaintiff subsequently paid the amount to the attorney by whom both suits at law were brought; and thereupon applied for an assignment of the original judgment, which *Gillespie & Co.*, the defendants, refused to give. The object of the present suit is to compel the defendants to execute such an assignment.

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At the hearing the defendants contended that the plaintiff was not entitled to this relief, as the judgment had been satisfied by the levy, or by the payment; and they contended also, that the original debtors, *Campbell* and *Standley*, are necessary parties to this suit.

I am of opinion that the objection for want of parties must prevail.

The relief prayed is never granted to a surety unless the court is of opinion that the assignment can be made available by the plaintiff.—*Dowbiggen* v. *Bourne* (*a*). The defendants, *Gillespie & Co.*, have no interest in that question whatever. The original debtors are the persons, and the only persons, interested in resisting the plaintiffs' demand; and it is contrary to the course of this court to adjudicate on the rights of parties in their absence.

Judgment.

Two cases, however, were cited, in each of which similar relief was said to have been prayed though the principal debtor was not a party to the suit.—*Armitage* v. *Baldwin* (*b*), and *Pearl* v. *Deacon* (*c*). But on examining these cases I find they do not support the plaintiff's contention.

In *Armitage* v. *Baldwin*, the creditor, *Armitage*, had recovered two judgments, one against the debtor, *Hamer*, and another against his bail in the action; and on being paid by the surety, *Milton*, he had assigned to *Milton* both judgments, and was co-plaintiff with him in the chancery suit. The object of the suit was to establish a charge on the estate of the bail, who was a defendant, and not to acquire any right against the debtor, *Hamer*, who was not a party.

So in *Pearl* v. *Deacon* (*d*), the debtor was certainly not a party, but the relief sought was not against him.

(*a*) 2 Y. & C. Ex. 462.
(*b*) 5 Beav. 278.
(*c*) 24 Beav. 186.
(*d*) 24 Beav. 186.

He owed the creditor two debts, one, for half of which the plaintiffs were sureties; and the other, for rent which the plaintiffs were not responsible for; and the only question was whether the proceeds of a sale of furniture belonging to the debtor were applicable to the debt for which the plaintiffs were liable, or to the rent; and all the parties interested in that question were before the court.

It is to be observed also, that in neither case was there any adjudication that the debtor was not a necessary party to the suit.

No case on this point was cited to me on the part of the defendants. Of the cases cited on the merits, in every one in which the debtor was the party interested in resisting the relief prayed, I find that he or his representatives were before the court. I refer to *Hodgson* v. *Shaw* (*a*), *Copis* v. *Middleton* (*b*), *Drew* v. *Lockett* (*c*), and *Parsons* v. *Briddock* (*d*). So also in other cases that I have examined, including *Goddard* v. *Whyte* (*e*), *Jones* v. *Davids* (*f*), *Dowbiggen* v. *Bourne* (*g*), and *Woffington* v. *Sparks*, (*h*). Judgment.

The cause must therefore stand over, with liberty to the plaintiffs to amend by adding parties. I reserve the costs of the day until the cause comes on again.

It was conceded on the argument that the right of the plaintiff to the assignment depends on the question whether what has taken place amounts to a satisfaction of the judgment or not. If the judgment is satisfied, the plaintiff is clearly not entitled to a decree for an assignment of it. But if the judgment is not satisfied,

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(*a*) 3 M. & K. 191.
(*b*) T. C. R. 224.
(*c*) 32 Beav. 499.
(*d*) 2 Vern. 608.
(*e*) 6 Jur. N. S. 1364.
(*f*) 4 Russ 277.
(*g*) 2 Y. & C. Ex. 462.
(*h*) 2 Ves. Senr. 563.

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he clearly is entitled to such a decree; and this question of satisfaction is a purely legal one. Now the defendant's refusal to grant an assignment has no doubt arisen from a proper desire to act fairly between these parties; but the effect of their refusal is merely to throw upon this court, in the first instance, the decision of a purely legal question, instead of allowing it to be decided at once by a court of law, as probably it must be ultimately. Would not every purpose of justice be attained, and perhaps double litigation be avoided, if the defendants should execute the assignment, and leave the debtors to set up their own defence at law, in answer to any proceedings that the surety may take upon the judgment? The learned judge who decided *Dowbiggen* v. *Bourne*, was so strongly impressed with the convenience of this course, that, though he was of opinion that the judgment there was satisfied, and that the bill must be dismissed, yet he refused to give the creditor his costs. I say nothing as to whether such a decree is, or is not, in accordance with the present practice of courts of equity in such cases, but I have thought it right to make the observations which I have made, in order that all parties may consider whether the interests of the debtors, or the ends of justice, really require the continuance of the litigation in this court.

Judgment.

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McDONALD v. McCALLUM.

Partners—Assignment—Insolvency.

Two partners, before the passing of the Insolvency Act, assigned their joint estate and separate estates together, for the benefit of their joint and separate creditors, *pari passu*. An assignee under the Act having been afterwards appointed, he filed a bill to set aside the previous assignments, on the ground that, to put the separate creditors of each on an equality with the joint creditors in respect of the joint property, and of the separate property of the other partner, was a fraud on the joint creditors. But it appearing by evidence that the separate estates of both partners were solvent, and that the equality complained of was an advantage to the joint creditors, the bill was dismissed with costs.

This cause was heard before His Honor V. C. *Mowat*, at Cobourg, on the 24th of May, 1865.

Mr. *Roaf*, Q.C., for plaintiff.

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

MOWAT, V.C.—The plaintiff is assignee under the Insolvency Act, of the respective estates of *William G. Strong* and *Thomas Scott*. The defendant is assignee under two assignments executed by the same persons for the benefit of their creditors, before the passing of the Insolvency Act. The object of the bill is to set aside these assignments as fraudulent against the creditors of the assignors. Judgment.

The impeached assignments embrace all the joint estate of *Strong* and *Scott*, and all the separate estate of each, and the trust is stated in the bill to be "for the payment, ratably and in proportion, without preference or priority, of all the creditors of the said *William G. Strong* and *Thomas Scott*, or of either of them, their just debts."

The plaintiff submits that the assignments are fraudulent and void as against him; inasmuch as

1865. McDonald v. McCallum. they improperly, and without any good reason or consideration therefor, entitle the separate creditors of each to share ratably and in proportion with the joint creditors, not merely the separate property of their debtor, but the joint property also, and the separate property of the other assignor.

The bill contains no charge as to the comparative value of the joint estate and separate estates, or as to the comparative amount of the joint debts and separate debts.

The defendant, on the other hand, alleges, and has proved, that it is the joint estate alone that is insolvent; and that the separate property of each is more than sufficient to pay his separate debts. I see no reason for holding this evidence to be inadmissible and it shews indisputably that placing the separate creditors on the same footing as the joint creditors, is a boon to the joint creditors, instead of being a fraud on them, as the bill complains.

Judgment. Several other objections were made to the plaintiff's right to relief; but as my opinion is against the plaintiff on the main question in the cause, I shall not observe upon the other objections.

The bill must be dismissed with costs.

WILSON v. CHISHOLM. 1865.

Insolvency—Pleading—Parties.

A bill was filed by assignees under the Insolvency Act to set aside a settlement executed by the insolvent, on the marriage of his daughter, with a secret trust in his own favor. The bill charged that the insolvent defendant was in the enjoyment of the property, and prayed costs against all the defendants. A demurrer by the insolvent, on the ground that he was not a proper party to such a bill, was allowed.

This cause came before His Honor V. C. *Mowat, on* June 27th, 1865, on demurrer by the defendant *Milton Davis*, to the plaintiff's bill for want of equity, and because the demurring party is not a proper party to the bill.

Statement.

The plaintiffs were the assignees of *Davis* under the Insolvency Act; and the bill alleged that on the marriage of the defendant, *David Black Chisholm*, to the defendant *Cynthia*, daughter of *Milton Davis*, *Davis*, being then insolvent, executed a fraudulent deed, conveying to the defendants *Benjamin E. Charlton* and *Duncan Chisholm*, the greater part of his property, on pretended trusts, in favour of the daughter and her husband, and their issue; that the purpose of this deed was to defraud the creditors of *Davis*; that there existed at the time of the execution of the deed, and exists still, a secret arrangement or understanding between all the parties that the property should be so held and managed by the trustees, that *Davis* might retain and enjoy the benefit thereof, without the interference of his creditors; and that he and his family are now using the settled property and are maintained out of the income derived from it.

The bill prayed that the deed might be set aside and the defendants ordered to pay the costs of the suit.

Mr. *R. Martin*, for the demurrer, cited *Lloyd* v.

1865. Wilson v. Chisholm. *Lander* (*a*), *Fenton* v. *Hughes* (*b*), *Whitworth* v. *Davis* (*c*), *Ambury* v. *Jones* (*d*), *Rose* v. *Gannel* (*e*), *Gilbert* v. *Lewis* (*f*), *Mitchell* v. *Knott* (*g*).

Mr. *Strong*, Q.C., and Mr. *E. Martin*, contra, referred to *Fraser* v. *Thompson* (*h*), *Colombine* v. *Penhall* (*i*), *Gilbert* v. *Lewis* (*j*), *Le Texier* v. *The Margravine of Anspach* (*k*), *Beadles* v. *Burch* (*l*), *Bowles* v. *Stewart* (*m*), *Lonsdale* v. *Littledale* (*n*), *Innes* v. *Mitchell* (*o*).

MOWAT, V.C.—The objection to this bill for want of equity was not argued, and was plainly not sustainable; but I think that the objection that the demurring defendant is not a proper party to the bill, must be allowed.

Judgment. The late case of *Gilbert* v. *Lewis*, has expressly decided that a bankrupt is not a proper party to a bill for setting aside a fraudulent transaction which took place before the bankruptcy, even though he is charged with being a party to the fraud, and though costs are prayed against him. This case is directly in point.

Mr. *Strong* endeavored to distinguish it, chiefly on the ground that, in the transaction impeached in the present case there was a secret trust in favor of the bankrupt, and that the bankrupt is now in the actual enjoyment of the property in accordance with such trust. But if I am to recognise the authority of the case before the Lord Chancellor, I do not think that these

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(*a*) 5 Madd. 288.
(*b*) 7 Ves. 287.
(*c*) 1 V. & B. 547.
(*d*) Younge 199.
(*e*) 3 Atk. 439.
(*f*) 1 DeG. J. & S. 38.
(*g*) 1 Sim. 497.
(*h*) 4 DeG. & J. 659.
(*i*) 1 Sm. & Giff. 209.
(*j*) 2 Johns. & Hem. 452.
(*k*) 15 Ves. 164.
(*l*) 10 Sim. 332.
(*m*) 1 Sch. & Lef. 227.
(*n*) 2 Ves. Junr. 451.
(*o*) 4 Drew 37.

circumstances constitute a sufficient ground for holding it not to apply to the present case.

1865.

Wilson v. Chisholm.

That decision was on the case of a bankrupt. One reason given for allowing parties to a fraud to be made defendants in certain cases, though no relief except costs is prayed against them, is that the plaintiff may be assured of his costs.—*Le Texier* v. *The Margravine of Anspach*, *Bowles* v. *Stewart*. And it must be admitted that this reason can seldom be applicable to the case of a bankrupt.

It is to be observed, also, that Lord *Westbury* did not hold that a demurrer by a bankrupt would lie, where the bill was constructed for the express purpose of obtaining a discovery from him and contained allegations showing that unless the discovery sought from him was given, there would be a failure of justice. But the present bill is not of that character. Judgment.

Following the authority of *Gilbert* v. *Lewis*, I must allow the demurrer with costs.

1865.

GILL v. TYRRELL.

Practice—Costs.

Where a conveyance is set aside as void against creditors, a sale ordered, and costs up to the hearing given against the defendants; these costs should be paid by the defendants immediately, where it is manifest the property is not sufficient to pay the creditors in full.

The bill in this case was filed to set aside certain conveyances between the defendants, *Ward* and *Tyrrell*, as being fraudulent and void as against the creditors of *Ward*; and a decree was pronounced in favour of the plaintiff for the relief sought, together with the costs of the suit.

On settling the decree the Registrar made the costs payable by the defendants personally, only in case the sale of the property did not realize sufficient to pay plaintiff's claim in full. Thereupon a motion was made to vary the minutes.

Statement.

Mr. *Fitzgerald* for the plaintiff, referred to *The Bank of Upper Canada* v. *Thomas* (*a*), in which he said that his Lordship the Chancellor had decided that in such cases the costs should be paid immediately.

Mr. *S. Blake* for defendants, referred to *The Bank of British North America* v. *Rattenbury* (*b*), in which he stated that the late *V. C. Esten* had decided that the costs in these cases should only be charged against the defendants personally in case of a deficiency.

MOWAT, V. C.—This was a suit by an execution creditor of *Joseph Ward*, to set aside certain deeds of land, as void against creditors. The decree was in favour of the plaintiff with costs, and a sale of the land was ordered.

(*a*) Ante vol. ix, p. 321, on other points.
(*b*) Ante vol. vii, p. 383, on other points.

1865.

Gill v. Tyrrell.

In settling the minutes a question arose as to whether the costs up to the hearing should in such a case be ordered to be paid immediately, or whether they should merely be added to the plaintiff's debt, and the defendants ordered personally to pay them only in the event of a deficiency, decrees hitherto having been drawn up in both ways. No reported case deciding the point was cited on either side.

It was not alleged that the property was sufficient to pay all *Joseph Ward's* creditors, and that there is any hope of a surplus. I think that the order in such a case should be for the immediate payment of the costs.

Judgment.

In the alleged conflict of authority, I express no opinion as to what the rule is where a surplus is expected.

Chalmers v. Piggott.

Purchase at Sheriff's Sale.

Where property worth £1500 had been sold at sheriff's sale for £90 5s, in consequence of the title being disputed, the court refused to give effect to the Sheriff's deed as an absolute purchase.

This cause came on to be heard before His Honor V. C. *Mowat*, at the sittings of the court at Peterborough, 27th May, 1865.

Mr. *Sidney Smith*, Q. C., and Mr. *Roaf*, Q. C., for the plaintiff.

Mr. *Blake*, Q. C., and Mr. *Blain*, for the defendant.

Mowat, V. C.—This suit relates to the west half of lot No. 5, in the eleventh concession of the township of Emily.

1865.
Chalmers v. Piggott.

On the 7th of May, 1851, the sheriff of the county in which this lot lies executed a deed purporting, for the expressed consideration of £90 5s., to convey to *Charles Perry*, under executions against *Bartholomew Piggott*, all the interest of *Bartholomew Piggott* in the whole lot.

The executor and executrix of *James G. Armour*, deceased, held a mortgage from *Bartholomew* on the west half of the lot for £41 9s. 4d., and the first of the executions was in an action of covenant on this mortgage. On the 2nd of April, 1853, the executor (it was said) being dead, the executrix and her husband executed a deed purporting to transfer to Perry the mortgage and mortgaged premises.

In 1855 *Perry* appears to have recovered possession of the east half of the lot in an action of ejectment, *Perry* v. *Piggott* (*a*); and in 1858 he executed the deed under which the plaintiff now claims the lot.

Judgment.

The defendant is in possession of the west half of the lot, claiming title to it. The plaintiff insists that the instruments under which the defendant claims are fraudulent and void; and the bill prays that these instruments may be delivered up to be cancelled, as clouds on the plaintiff's title; and that the defendant may be ordered to deliver up to the plaintiff the possession of the property.

The west half of the lot is sworn to be worth $3000, and the east half to be worth as much; the whole lot being thus worth about fifteen times what was paid for it at the Sheriff's sale.

The title of *Bartholomew* to the lot was disputed, and the extent of his interest in it was doubtful at the time of the sale. This was, no doubt, the reason of the purchase being effected at so small a sum: the purchase was the purchase of litigation.

(*a*) 12 U. C. Q. B. 372.

In a similar case, *Malloch* v. *Plunkett* (*a*), my brother *Spragge* refused to give effect to the sheriff's deed; and expressed his opinion to be that in such a case the proper course for a plaintiff at law was to come to this court to remove the cloud on the title before any sale under the execution. I thought it my duty to follow this decision in *Kerr* v. *Bain* (*b*), and I shall continue to follow it until the point is considered, and determined otherwise, in full court or in the Court of Appeal.

If the plaintiff is willing to give up the lot on being paid the amount due on the mortgage, and any additional sum paid at the sheriff's sale, with interest, and all costs, including the costs of this suit, I think that he may have a decree to that effect. Judgment.

Otherwise the bill must be dismissed with costs.

HUTCHINSON v. EDMISON.

Administrator.

S. took out letters of administration to the estate of an insolvent, at the request of a simple contract creditor, and was on the following day served by the latter with a summons for his debt. The administrator took no steps to ascertain, and made no inquiry, whether there were any other debts, but allowed judgment to go against him by default, and all the chattel property of the intestate to be sold under the execution. *Held*, at the suit of a specialty creditor, that the administrator's conduct did not entitle him to set up the defence of no notice of the specialty debt, and that the amount produced by the sale must be applied in due course of administration.

This cause was heard before his Honor V. C. *Mowat*, at the sittings of the court at Peterboro', in the spring of 1865.

(*a*) 9 Grant, 547. (*b*) Ante vol. 423.

1865.

Hutchinson v. Edmison.

Mr. *Roaf*, Q.C., and Mr. *Dumble*, for the plaintiff.

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

MOWAT, V. C.—The plaintiff holds two mortgages executed by *Alexander B. Edmison*, since deceased, each covering different land, and the defendant *Thomas H. Edmison*, the deceased's father, holds a prior mortgage on the property which is covered by one of the plaintiff's mortgages. Each of the three mortgages contains a covenant for payment of the money thereby secured. The defendant *Edmison* was also a simple contract creditor of the deceased.

Alexander died on the 13th July, 1863, intestate and insolvent; and the defendant *Scott*, at the request of the defendant *Edmison*, took out letters of administration, which bear date 16th March, 1864. On the following day the defendant *Edmison* issued and served *Scott* with a summons, in respect of the simple contract debt. *Scott* did not appear, and on the 28th March judgment was entered; execution was issued, and all the chattels of the deceased were sold thereunder, in due course.

Judgment.

The bill charges that *Scott*, in these proceedings, was guilty of a breach of his duty; that the defendant *Edmison* was a party aiding therein, and is bound to make good the amount he has received, and to apply the same in payment of the mortgages.

I think that *Scott* was guilty of a breach of his duty as administrator. The law requires specialty debts to be paid before simple contract debts, where there are not assets enough to pay all. An administrator who pays a simple contract debt without notice of a specialty debt, is not liable in respect of the latter. But the exemption is subject to this just and reasonable condition: "Provided a reasonable time has elapsed since the

testator's death; for such payment, if precipitate, would be evidence of fraud." *Williams* on Executors, (*a*).

This accords with the rule as stated by *Lord Hardwicke* in *Hawkins* v. *Day* (*b*): "I am of opinion, with regard to the defendants in general, that the payment of debts by simple contract by an executor in a reasonable way, and without fraud, or laches on his part before, and without notice of debts by specialty, is a good administration in point of law."

So, also, if an administrator, without notice of a specialty debt, allows a judgment to be recovered against him for a simple contract debt he is exempt from liability. But this must be subject to a corresponding condition; for I apprehend that the exemption was never designed to shield an administrator who is sued, any more than an administrator who pays voluntarily, when he has taken no step whatever to get information, and his ignorance of specialty debts arises from his choosing to be ignorant of everything relating to the affairs of his intestate. Judgment.

The administrator here, in his examination before me, made the following statements: "The defendant, old Mr. *Edmison*, applied to me to become administrator, and I consented. He gave no reason for asking me.

"I heard a talk that *Hutchinson* had mortgages. I made no inquiry about them on hearing of this. I made no inquiry when I was appointed, as to what debts were due. I took no means whatever to find out. I made no attempt to defend Mr. *Edmison's* suit.

"I cannot say how long after I was appointed, I heard about the mortgages. I heard of the mortgages before the sale. I heard of them before my appointment; but I did not know that they were not paid."

(*a*) 5th ed. p. 926; p. 3. bk. ii., ch. 294. Toller 192.
(*b*) 1 Dick. 157.

1865. Hutchinson v. Edmison.

The administrator's appointment appears thus to have been solicited, and made use of solely to serve *Edmison's* objects. The only act *Scott* ever did as administrator seems to have been to receive service of *Edmison's* summons.

Edmison denies that he had notice of the plaintiff's specialty debts before the sheriff's sale. But two witnesses prove the contrary; and the probabilities of the case support their testimony.

To allow the chattels to go to the payment of the simple contract debt, was a breach of duty on the part of *Scott*, and was brought about through the contrivance of the defendant *Edmison*, and with knowledge on his part of all the facts. Trust property having thus in violation of the trusts on which it was held, come to *Edmison's* hands, with notice, I think that the ordinary consequences must follow. I do not see on what principle I could hold that the form in which the wrong was done protects the transaction. *Vide Stewart* v. *Stewart* (*a*).

Judgment.

I have considered the arguments which the council for the defendants founded on the evidence of the solicitor, as to what passed between him and the plaintiff when no one else was present, no memorandum of the arrangement he mentions having been made or signed by the plaintiff. I am of opinion that I cannot hold the plaintiff's rights to be prejudiced by this evidence.

The proceeds of the sale must therefore be applied towards payment of the specialty debts.

The plaintiff is entitled to the costs up to the hearing, as against *Edmison* and *Scott*.

(*a*) Ante vol. x., p. 169.

GIBSON v. ANNIS. 1865.

Will—Construction—Practice—Costs.

Where a testator by his will gave the residue of his real and personal property to his executors and trustees in trust, to sell the same, and, after satisfying certain charges, to expend and apply, for the maintenance and education of his minor children, such sums as they thought necessary for this purpose, and in subsequent parts of the will provided that such children were to draw, or be entitled to, equal shares of his estate, and that each should receive his or her share of the proceeds of the real estate, on marrying or arriving at maturity; and that, until then, the shares of such children should be invested and paid out as they required the same as aforesaid:

Held, that their maintenance and education were a charge on their own shares only, and not on the whole residue.

A trustee who severed in his defence, because his co-trustee had refused to act in conjunction with him in the management of the estate, was under the circumstances refused his costs.

Statement.

This was a hearing on further directions, and as to costs reserved.

The bill was for the administration of the estate of the late *Ezra Annis*, and for the execution of the trusts of his will; and was brought by *Mary Gibson*, one of the legatees named in the will, against the executors and trustees, *Henry W. Annis* and *John M. Lowes*.

At the hearing the usual administration degree was made, and further directions and costs were reserved.

All parties interested under the will were made parties in the Master's office.

The Master by his report found, amongst other things, that the receipts of the defendant *Henry W. Annis* amounted to $3021.59, and his payments to $213.50 more, or $3235.09, besides $2021.10, paid by him to or for the legatees *George*, *Louisa* and *Jane Annis*, which the Master disallowed as against the general estate of the testator, and held to be chargeable against the individual shares of these legatees. He found also that *Lowes* had

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received $356.28, and paid $214.13 only, and that there was due from him on a mortgage he had given to the testator $602.94, making a balance against *Lowes* of $745.09, in respect of these items. The Master set off the sum of $213.50 overpaid by *Annis*, against the $745.09, and found against both trustees the balance of $531.59 as due to the general estate. But the Master found that *Lowes* had paid $810.39 to or for the three last named legatees, which the Master disallowed.

The finding of the Master in respect to the respective sums advanced by the executors to or for these legatees was based on his construction of the residuary clause of the will, whereby the testator gave the residue of his real and personal estate to *Henry W. Annis* and *John M. Lowes*, in trust, to sell the same, and to apply the proceeds, first, to pay the testator's debts and funeral and testamentary expenses; second, to invest what remained, and thereout to pay an annuity to the testator's widow, and "then to expend and apply for the support, maintenance and education of my said son *George*, and daughters *Georgina*, *Silva*, *Jane* and *Louisa*, such sum or sums of money, yearly, as they, the said trustees, may deem necessary and sufficient; and to pay the same, in their discretion, either to my last mentioned children, or to the persons who may have the care and control of the said children, until they, the said children, shall respectively marry, or arrive at the age of twenty-one years; in either of which cases the moneys due each child shall be paid to him or her, said children to draw or be entitled to equal shares of my said estate. And whenever, and as often as, any of my real estate (except the land hereinbefore devised to the said *Elizabeth Dornan*), shall be sold, the proceeds thereof shall be divided, or set apart for my children in such manner that the said *George*, *Georgina*, *Silva*, *Jane* and *Louisa*, shall have equal shares, and the said *Elizabeth Dornan*, *Charlotte Lowes*, wife of the said *John M. Lowes*, and *Mary Gibson*, wife of *James O. L.*

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Gibson, shall, each, have one-half as much as either of their said unmarried sisters; and, upon and so often as such division is made, the respective shares of the said *Elizabeth Dornan*, *Charlotte Lowes*, and *Mary Gibson* shall be respectively paid to them; and the shares of my other daughters and my son *George* shall be respectively paid to such of them as shall be married, or arrived at the age of twenty-one years, except my daughter *Silva*. And the shares of such of my children as shall be unmarried and under twenty-one years, shall be invested for the benefit of such children, and paid out as they require the same, as aforesaid. And the share belonging to my said daughter *Silva*, shall, in the discretion of my said trustees, either be paid to her after she arrives at the age of twenty-one years, if that event happens before her marriage, or invested as aforesaid, and laid out, expended, and disposed of as she may require the same for her support and maintenance until she marries. And on the happening of that event, the balance, remaining in the hands of the said trustees, of her share of said proceeds, shall be paid to her as soon as it conveniently can. And in case either or any of the said children shall die before receiving all his, or her, or their shares or share of my estate, leaving no lawful issue, such share or shares shall be equally divided among the surviving children before mentioned, except my son *Henry*, one of the said trustees."

Statement.

Mr. *A. Crooks*, Q.C., appeared for the plaintiffs.

Mr. *Jones*, for the children of *Elizabeth Dornan*, now deceased, cited as to the trustees' costs, *Course* v. *Humphrey* (*a*).

Mr. *Blake*, Q.C., for *Henry W. Annis*.

(*a*) 26 Beav. 402.

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Mr. *Cochrane*, for *Lowes*, cited as to costs *Reade* v. *Sparkes* (*a*), *Gaunt* v. *Taylor* (*b*), *Kampf* v. *Jones* (c), *Lewin* on Trustees (*d*).

The other parties though served did not appear.

MOWAT, V.C.—With reference to the questions discussed upon the construction of the will in this cause, I think that, if there was any residue of the personal estate beyond the charges upon it, such residue belonged to the testator's son *George* and the unmarried daughters named in the will, to the exclusion of the married daughters.

Judgment.

I think that the Master was right in holding that the support and education of the minor children are charged by the will upon their respective shares of the estate, and not on the whole estate of the testator. The general direction to the trustees, to expend and apply for this purpose such sums as they might deem necessary, must be construed with reference to the provisions that follow; and these expressly declare that the minor children were to draw, or be entitled to, equal shares of the testator's estate; that each should receive his or her share of the proceeds of the real estate on marrying, or arriving at maturity, though at this time others would still be minors: and that, until then, the shares of such children should be invested and "paid out as they require the same as aforesaid." I think these provisions are sufficient to shew that the testator did not contemplate that the maintenance or education of any of his children was, in any event, to be paid out of the shares of the others. I think that such a construction is not required by the language of any part of the will, and would defeat the equality which the testator had prominently in view.

(*a*) 1 Moll. 10.
(*b*) 2 Beav. 346.
(*c*) 1 C. P. Coop. 13.
(*d*) 857, 3rd ed.

The report charges the trustees jointly with the amount of *Lowes'* mortgage. It was not alleged that there is any ground for this beyond what appears on the face of the report and schedules; and these show no reason for charging *Annis*. No danger of the debt being lost is pretended, and no case of wilful default or neglect by *Annis* is suggested in respect of it. The charge is plainly, therefore, an error; and may be corrected by a proper declaration in the decree to be now made.

It was suggested that there was a lien for this debt on Mrs. *Lowes'* share of the testator's estate. If any of the parties desire it, the decree may be expressed to be without prejudice to any such claim.

Judgment.

The only other question argued was as to the costs of the two trustees, they having severed in their defences. Their right of one set of costs between them, was not disputed. But the questions discussed were, whether they are entitled to more; and if not, to whom the one set of costs should go?

Annis claims the whole, and states in his answer that he applied to *Lowes* to join him in the defence, and that *Lowes* declined to do so, and insisted on employing a separate solicitor. *Lowes*, in his answer, states that *Annis* excluded him from the management of the estate, and refused to act in conjunction with him. These statements have not been proved, but the argument proceeded on the assumption that they were true. Counsel for *Lowes* contended that the alleged exclusion justified *Lowes* in severing his defence. But the cases cited do not support that contention.

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The argument seems founded on some supposed analogy of the law as to partners. But the relation of partners differs essentially from that of executors and trustees. Between partners there must be mutual confidence; and each, in the absence of any stipulation to the contrary, has a right to insist on joint management. Each, also, is responsible for the acts of the other, within the scope of the partnership. But these rules are not necessarily applicable to the case of executors and trustees. See *Lewin* on Trusts (*a*).

The *cestuis que trust* do not complain of the large share which *Annis* took in the management; and *Lowes*, who alone complains of it, does not pretend that *Annis* was guilty of any mismanagement; or that he occasioned by his conduct any loss to the estate; or that he withheld from *Lowes* any information; or that he deprived him of free access to the books and papers relating to the estate.

Judgment.

Lowes complains, indeed, that, at some period antecedent to the suit, *Annis* refused to deliver to *Lowes* the inventory of the personal estate; but I do not know that he was bound to deliver it. Inspection of it is not stated to have been refused.

There is nothing in the difference between these parties that the authorities would justify me in holding a sufficient ground for charging the estate with more than one set of costs for the trustees; and nothing in the conduct of *Annis*, as stated by *Lowes* himself, to

(*a*) 200, 205, 4th edition.

make it proper that *Annis* should be deprived of any of the costs he has unavoidably incurred in the present suit. I refer to *Gaunt* v. *Taylor* (*a*), *Attorney-General* v. *Cuming* (*b*), *Hodson* v. *Coates* (*c*), *Hughes* v. *Key* (*d*), *Course* v. *Humphrey* (*e*), *Attorney-General* v. *Wyville* (*f*).

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The Master finds that bad feeling existed, and still exists, between the trustees, arising chiefly out of the different constructions they respectively placed on the will. If from bad feeling, however arising, the one party chose to incur expense which the other put it in his power to avoid, the expense must be borne by the party who incurred it.

Judgment.

Annis must have his costs as between solicitor and client, and there will be no costs to or against *Lowes*.

(*a*) 2 Beav. 346.
(*b*) 2 Y. & C. 156.
(*c*) 2 Jur. N. S. 429.
(*d*) 20 Beav. 396.
(*e*) 26 Beav. 402.
(*f*) 28 Beav. 464.

1865.

PERKINS v. VANDERLIP.

Mortgages.

V. executed a mortgage on certain property to A., then sold part of the property to H., then mortgaged the residue with other property to P., who obtained an assignment from A., of his mortgage, and filed a bill of foreclosure against V. & H. The proper form of the decree in such a case stated.

This was a motion for a decree of foreclosure.

The defendant *Vanderlip*, the mortgagor, had executed several instruments in respect of the lands in question, in the following order:—

1. Mortgage to *Archer* on a tract of 105 acres, of which mortgage the plaintiffs have now an assignment.

Statement. 2. Conveyance of 12 acres of the 105 to *John Hazel*, with covenants for freedom from incumbrances. *John Hazel* devised these 12 acres to the defendant, *Neal Hazel*.

3. Mortgage by *Vanderlip* to the plaintiffs on the residue of the 105 acres and other property.

The question argued was, what, under these circumstances, should be the decree.

Mr. *Catanach*, for plaintiff.

Mr. *McKenzie*, for *Hazel*.

The bill was taken *pro confesso* against *Vanderlip*.

MOWAT, V.C.—An account should first be taken of what is due the plaintiffs for principal, interest and costs in respect of the first mortgage.

Both defendants will then have the usual time to redeem, or be foreclosed.

If *Vanderlip*, the mortgagor, redeems, the plaintiffs should assign to *Hazel* the twelve acres free from incumbrances; and *Vanderlip* will pay *Hazel's* costs.

An account is then to be taken of what is due to the plaintiffs on the other mortgage, and the mortgagor is to redeem or be foreclosed.

If *Hazel* and not *Vanderlip*, redeems the plaintiffs at the time first appointed, the plaintiffs are to redeem him by repaying *Hazel* the amount paid by him, with interest and costs; otherwise the plaintiffs to stand foreclosed.

In case of such foreclosure of the plaintiffs, the mortgagor is to redeem *Hazel* or be foreclosed.

In case, however, the plaintiffs redeem *Hazel*, *Hazel* is to re-assign to the plaintiffs all but his own twelve acres.

The usual subsequent accounts are then to be taken, and directions given, as between the plaintiffs and the mortgagor. Judgment.

If the plaintiffs are willing to save the delay and expense of such a decree, and to avoid the circuity of being first paid by *Hazel*, and afterwards repaying him, the decree may, with their concurrence, provide for the immediate release to *Hazel* of the twelve acres, and for paying *Hazel* his costs, adding these to the plaintiff's own. The decree will then be in other respects the usual decree for the mortgagor to redeem the plaintiffs, by paying principal and interest due on both mortgages, and costs, in six calendar months.

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BURNHAM v. DENNISTOUN.

Vendor and purchaser—Equitable execution.

W. had an interest in land as vendee but had made default in paying the purchase money and otherwise. The plaintiff B. and one H. had executions in the sheriff's hands on judgments recovered at law against W., H's execution having priority. The plaintiff B. and D. (the latter having the control of H's execution), severally inquired of the vendor whether if he purchased at sheriff's sale, the vendor would give him the benefit of the contract, and each had received a favorable answer. The defendant D. became the purchaser at sheriff's sale at a fair price. Meanwhile, the vendor had brought an action of ejectment to put an end to the original contract; and after the sheriff's sale executed a writ of *habere facias possessionem*, but subsequently accepted D. as the assignee of the contract, and received payment from him of arrears without objection by B. Two years afterwards B., who had kept alive his execution against W's land, filed a bill against D., claiming that he, B., was entitled to a lien on the interest acquired by D. in the land under his agreement with the vendor. Bill dismissed with costs.

This cause came on to be heard before His Honor V. C. *Mowat*, at Peterborough, in the spring of 1865.

Mr. *Blake*, Q.C., for plaintiff.

Mr. *Roaf*, Q.C., and Mr. *J. F. Dennistoun*, for the defendants.

Judgment.

MOWAT, V. C.—The bill in this cause seeks relief in respect of a lot of land in the township of Otonabee, and of certain lots in the village of Keene. The only controversy at the hearing was with reference to the Otonabee lot; and the adverse parties to this controversy are the plaintiffs, on the one side, and the defendant *Robert Dennistoun*, on the other.

The lot belongs to the University of Toronto; and *Joseph West*, since deceased, entered into an agreement, in 1855, for the purchase of it for £325, payable one-tenth down, and the balance with interest, in nine equal annual instalments. The instalment due in 1856 was only paid in part. Still less was paid in 1857; and

nothing was paid afterwards. In 1861, the vendee, or his representatives, allowed the lot to be sold for taxes, and the College was obliged to pay the redemption money.

The plaintiff's claim in respect of the lot is on an execution at the suit of two of the plaintiffs, *Mein* and *Brouse*, against the lands of *Joseph West*, in the hands of his administrators. This writ was placed in the sheriff's hands on the 25th of January, 1862, and the interest of the plaintiffs *Mein* and *Brouse* therein, was assigned by them to the plaintiff *Elias Burnham*, on the 4th of March, 1862. *Burnham* immediately notified the University of this assignment.

Long before this writ was issued, there had been a writ against *West's* lands in the hands of the same sheriff, at the suit of one *Humphreys*, on which the sheriff had advertised the lot; and, failing to obtain a purchaser, his return was, in part, "lands on hand for want of buyers." This writ either *Burnham* was not aware of when the plaintiff's writ was delivered to the sheriff, or he considered it as abandoned and unavailing. However, afterwards, namely, on the 1st July, 1862, a writ of *fi. fa.* and *venditioni exponas* was issued by *Humphreys*, and delivered to the sheriff, endorsed to levy £346 12s. 2d., besides costs, interest, and sheriff's fees.—*Mein* v. *Hall*, (*a*). The validity of this writ is not now contested.

Judgment.

On the 23rd of May, the College solicitors wrote to *Burnham*, stating that they had been instructed to take proceedings to recover the purchase money; and they intimated that they were about to bring an ejectment to put an end to the contract.

On the 26th of May, *Burnham* replied, stating that he wished to make the land available under his execu-

(*a*) 13 U. C. C. P. 518.

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tion, and that he intended to buy it at the sheriff's sale, unless it brought more than enough to satisfy his writ; and that, in case he bought, he would at once make arrangements to satisfy the University the balance of the purchase money; and he gave several reasons for not paying until then. On the 10th of June he wrote again to the same effect.

About this time Mr. *Dennistoun*, who had the control of *Humphreys'* execution, opened negotiations with the College, with a view of making the property available, for *Humphreys'* benefit. For this purpose he meant to buy under *Humphreys'* execution, but he intimated that he did not consider that the deed he would obtain from the sheriff would pass much title; and he therefore desired the College to put an end to the contract before recognising him as their vendee, and before he paid to the College any money.

Judgment.

On the 18th July, Mr. *Burnham* having become aware of *Humphreys'* writ, wrote to the College solicitors respecting it, informing them that the property was advertised to be sold under *Humphreys'* writ, on the 29th instant; and that to protect his own interest he might have to buy at the sale; and he wished to know whether, on production of the sheriff's deed, and payment of the balance of *West's* purchase money, the College would convey the lot to him (*Burnham*).

On the 21st July the solicitors replied, stating that they had commenced proceedings in ejectment, with a view to put an end to the existing contract; but that the Bursar would give a deed to any one who would then pay the balance of principal and interest, and all costs.

Dennistoun, however, and not *Burnham*, became the purchaser, at the sale. His purchase money was £302; and on the 18th of August, 1862, the sheriff executed

a deed purporting to convey to him all *West's* interest in the land. The lot was at this time unoccupied; and some time in the following November the College appears to have got formal possession of the lot from the sheriff, under a writ of *hab. fac. pos.* In December, *Dennistoun* was accepted by the College as purchaser of the lot, on condition of his paying the arrears of principal and interest due to the College on *West's* contract, with all the costs which the College had incurred. This he did, and accordingly he was, on the 22nd of December, entered in the College books as the assignee of the contract. Though that was the form in which the transaction was entered in the College books, *Dennistoun* appears to have been under the impression that he was accepted and entered as a new purchaser.

The University was a party to the bill originally, but was dismissed at the hearing with costs, at the instance of the plaintiffs. Judgment.

The bill sets forth *Dennistoun's* purchase at the sheriff's sale, but says nothing of the subsequent transactions with the College. The prayer is, that it may be declared that the plaintiffs are entitled to equitable execution against the land, and that the land is liable in this court for the payment of their debt, and that it may be sold to pay the same.

The plaintiffs' claim, as it appears in the light of the facts in evidence, has certainly not much equity in it. Mr. *Burnham* expressly declined to pay the College anything without first purchasing the property at sheriff's sale, and he endeavoured to induce the College to recognise the purchaser under an execution against *West's* representatives, the very thing he now complains of their having done. He knew of the sheriff's sale before it took place, contemplated purchasing thereat himself, and had the same opportunity of purchasing that Mr.

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Dennistoun had. He does not allege that he objected to the sale until two years afterwards, when this suit was instituted. Without a word of warning that we hear of, he allowed *Dennistoun* to be recognised by the College as the transferree or purchaser, and for that purpose to pay a large sum of money and assume a personal liability to the College for the unpaid balance, *Dennistoun* thereby preventing a sale by the College to a stranger. The plaintiffs do not allege that the property was worth more than the sum given by *Dennistoun* at the sheriff's sale, over and above what was payable to the College; nor do the plaintiffs now dispute that *Humphreys*, by virtue of his execution, had at this time a prior lien to theirs. But they claim to have discovered since that *Burnham* himself, and *Dennistoun*, and the College, were all technically wrong as to the course which should have been pursued; that the course actually taken, though it did injustice to nobody, was irregular and invalid; that the effect of it was to give *Burnham* the first lien on the property after payment to the College; and that *Dennistoun's* intervention and payment of his own money, and assumption of the balance demanded by the College, have but served to keep alive the original contract for the plaintiffs' benefit, and to the injury of *Dennistoun* himself.

Judgment.

Is this contention well-founded? I do not think it is.

At the time of *Dennistoun's* recognition as purchaser, the College had a clear right to resume the property and rescind the contract. An action of ejectment had accordingly been brought by the College, judgment therein had been obtained, and a writ of *hab. fac. pos.* had been issued and executed, for the express purpose of acquiring the right of selling the property to a new purchaser, as the College solicitors declared to both *Burnham* and *Dennistoun*. By these proceedings, the right of *West*, and of the plaintiffs and others

claiming through or under *West*, was as effectually put an end to as if no such right had ever existed. Was, then, the right of the plaintiffs revived by what occurred subsequently?

After the contract was at an end, the College might undoubtedly have sold to any stranger, either on the same terms as the contract with *West* provided for, or on any other terms. Or they might have agreed to give any stranger the benefit of the contract. *West*, or those claiming under him, could not have complained of this, so far as the College was concerned, for all right against the College had been forfeited. They could not have complained of it as concerned the purchaser, because there would, in the case supposed, have been no privity between them and the purchaser. Now on what principle can *Dennistoun* be held, because he had a sheriff's deed, to have been in a worse position than a perfect stranger would have been in, who had no deed?

Judgment.

If *Dennistoun* had been guilty of any fraud as against the plaintiffs, I could understand the plaintiffs' contention. Or if he had occupied any fiduciary, or quasi-fiduciary relation to the plaintiffs, when he entered into the transaction with the College, the plaintiffs might claim the benefit of his proceedings. But neither fraud nor trust is pretended. Just before the transaction of which the plaintiffs claim the benefit, they had clearly no interest at law or in equity in the property, and both the College and *Dennistoun* occupied antagonistic positions to them. What, then, was there to prevent the College and *Dennistoun* from dealing with the property in any way they could mutually agree? What right had the plaintiffs to interfere with them? The transaction was clearly not intended by either party for the plaintiffs' benefit; and if not, what have the plaintiffs to do with the form which either party, or both parties, gave to the transaction?

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The Bursar, indeed, in his evidence stated, that "Mr. *Dennistoun* would not have been placed in his present position, save on the assumption that he was by virtue of the sheriff's sale the transferree of *West*." But if the Bursar was under any misapprehension as to the legal value of the sheriff's deed, he was in no ignorance of the facts on which its legal value depended; and if he was under any misapprehension of the law, such misapprehension is not pretended to have been produced by *Denniston*, or to have been known to him, or to have been shared by the solicitors who advised the Bursar. *Dennistoun*, indeed, had frankly told them how little importance he attached to the sheriff's deed. It is not pretended, either, that the Bursar was under a mistake about the position of the College in the matter; for when the solicitors advised him respecting Mr. *Dennistoun's* proposal, they expressly stated that the College was at liberty to sell to any one. Could the College now set up this alleged misapprehension of the Bursar as against *Dennistoun*? The College, however, is quite satisfied with the transaction. On what ground of equity can the plaintiffs be entitled to take advantage of the Bursar's supposed misapprehension, when the College neither could do so, nor desires to do so? I am quite unable to perceive any.

Judgment.

It is unnecessary to remark upon the other objections which were urged against the plaintiffs' right to relief.

The bill must be dismissed as against *Dennistoun* with costs. The plaintiffs must also pay the costs of the other defendants, so far as the suit relates to the Otonabee lot.

MOORE v. CLARK. 1865.

Equitable Estate—Lien—Fieri facias.

Where a writ of *fieri facias* or sequestration is plural in the sheriff's hands it forms a lien on the defendants' equitable estate, from the date of such delivery, and not merely from the date of the plaintiff's filing a bill to enforce the same.

This was an appeal by the plaintiffs from the report of the Master at Hamilton.

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

Mr. *English*, contra.

Hatherton v. *Bradburne* (*a*), *Dundas* v. *Dutens* (*b*), *McCarthy* v. *Goold* (*c*), *Morrogh* v. *Hoare* (*d*), were, amongst other cases, referred to.

MOWAT, V.C.—The plaintiffs were declared by the decree to have a lien on the equitable interest of the defendant *Clark*, in the rents of certain lands mentioned in the bill, for the amount of their executions at law. The decree contained the usual directions to the Master to enquire as to other liens and incumbrances, "on the said equitable interest of the defendant in the said land and premises;" and ordered a sale "of the equitable interest of the defendant in said premises." Judgment.

The legal estate in the premises was outstanding; but it was admitted that *Clark* was entitled in equity to the rents and profits for five years.

Before the plaintiffs' claim accrued, a writ of sequestration was in the sheriff's hands against *Clark*, and several *fi. fas.* against goods. The sheriff had

(*a*) 13 Sim. 599.
(*b*) 1 Ves. Jr. 196.
(*c*) 1 B. & Bea. 387.
(*d*) 5 Ir. Eq. 195.

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given notice of the sequestration to the tenants of the property, immediately on receiving the writ. The Master found that all these writs had priority to the plaintiffs'; and it was from this part of the report that the plaintiffs appealed.

It was contended on behalf of the plaintiffs that no lien on a debtor's equitable estate is created, by the mere delivery of a writ of execution to the sheriff; and that a bill by such creditor is necessary, not only to enforce such a lien, but to create it. The authorities cited do not support this contention; and the reverse was distinctly recognised as the law in the late case of *Gore* v. *Bowser* (*a*).

Judgment

It was further contended that a writ against goods was not sufficient to give a lien on *Clark's* interest; and that a writ against lands was necessary. But *Clark's* interest was for five years, and was therefore a chattel interest; and a writ against goods was, consequently, the proper writ for obtaining a lien upon it.

Then it was argued that a writ of sequestration did not bind the interest which the debtor had; that such interest, a right to receive the rents was, a mere *chose in action;* and *McDowell* v. *McDowell* (*b*), and other cases were referred to. But on this point it is sufficient to say that, I think, the debtor's title to the rents and profits for the five years gave an equitable estate in the land for that period. Co. Litt. 4 b. *Plenty* v. *West* (*c*).

The appeal must be dismissed with costs.

(*a*) 3 Sm. & Giff. 1.
(*b*) Ch. Chamb. 140.
(*c*) 6 Com. B. 201.

CLARKE v. RITCHEY. 1865.

Principal and Surety.

A. guaranteed to B. (a creditor of C.) certain composition notes, which B. was to indorse for the other creditors of C. B. represented to one or more of the creditors, before the composition was agreed to that he (B.) was to accept a like composition himself, but he had a secret bargain with C. that he should be paid in full:
Held, on grounds of public policy, that this secret bargain violated the whole transaction, and that A. was not liable to B. on his guarantee.

Various proposals having been made for a composition by all the creditors of an insolvent person, A. executed a deed to a trustee, reciting that an agreement to that effect had been come to, and conveying certain property to the trustee to secure any person or persons who might indorse the composition notes which the debtors were to receive. B., a creditor, indorsed the notes of the other creditors, but was to receive payment in full of his own demand:
Held that the trust deed was not a security for the notes he indorsed, the deed being available only if the composition was accepted by all the creditors.

Statement.

The bill in this cause was filed by *James P. Clarke* against *John Ritchey* the elder, *Samuel Lee* and *The City Bank*, seeking to remove *Lee* from the office of trustee; the appointment of a receiver of the rents of certain real estate conveyed by *Ritchey* to secure the creditors of his son *John Ritchey* the younger, and to restrain *The City Bank* from paying the rents of a portion thereof, to any person other than the receiver.

It appeared that *Ritchey* the younger, having become involved in the course of his business as dry goods dealer, and unable to meet his liabilities, compounded with his creditors at the rate of 7s. 6d. in the £, on giving notes, at certain dates to be indorsed by a responsible person, and which were accordingly indorsed by the plaintiff in consideration of five per cent. on the amount so indorsed for: and by way of securing the plaintiff against such indorsements *Ritchey* the elder conveyed to *Lee* certain real estate in trust. In reality plaintiff had agreed with *Ritchey* junior, in addition to

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the five per cent. for such indorsements, for payment of his own demand against him (*Ritchey* junior) in full.

Upon this being discovered by the defendant *Ritchey*, he refused to recognise the claim of the plaintiff, and thereupon the present suit was instituted.

Statement.

Evidence was taken before the court. One *James Brown*, the head clerk of the plaintiff, was examined as a witness; in the course of his examination he stated: "It was settled a few days before the 4th of June, that the plaintiff was to indorse. I do not know why the notes were dated 1st May; I think they were ante dated. The deed of 24th April was abandoned about the 5th of May, the day named in the deed. The deed of 24th April was executed by some Montreal creditors only; some Montreal creditor refused to sign it. *Ritchey* was in Montreal getting it signed; there was some conversation among the creditors while the deed of 24th April was in progress, as to who was to indorse; the name of *Wakefield, Coate & Co.*, was mentioned. *Ritchey* went round with me to most of the Toronto creditors when they signed. I got the signatures of the Montreal creditors myself, with the exception of two only, I think. None of the creditors whose signatures I obtained asked what the plaintiff was to get, and I made no representation upon the subject either in Montreal or in Toronto. I do not know of there being any desire to mislead or misinform the creditors or any of them. It was not stated, so far as I am aware, that the plaintiff was getting only 7s. 6d. in the £, as the creditors would hardly have believed it. It is generally understood in Montreal, upon composition with creditors, that the creditor who indorses for the debtor is to be paid in full; he is sometimes paid in full and gets a commission besides. The plaintiff agreed to give *Ritchey* goods to continue his business, and he did get goods for some time after the composition. It was part of the agreement that the plaintiff should be paid in full, and that he should furnish goods to *Ritchey* and assist him, and that *Ritchey* should remit money from time to time by draft through the City Bank. * * * I do not think that goods being furnished by the plaintiff to *Ritchey* would prevent other merchants from furnishing him with goods, but rather the contrary. I think they would not be deterred by knowing of the plaintiff being paid in full,

if the plaintiff furnished *Ritchey* with a quantity of goods; I believe he did get other goods in Montreal."

The other more important parts of the evidence appear sufficiently in the judgment.

Mr. *Fitzgerald*, for the plaintiff.

Mr. *Gwynne*, Q.C., and Mr. *R. P. Crooks*, for defendant *Ritchey*.

Lee v. *Jones* (*a*), *Railton* v. *Mathews* (*b*), *Blest* v. *Brown* (*c*), *Palk* v. *Clinton* (*d*), *Field* v. *Lord Donoughmore* (*e*), *North British Assurance Co.* v. *Lloyd* (*f*), *Boyd* v. *Hind* (*g*), *Duffin* v. *Orr* (*h*), were referred to.

Judgment.

SPRAGGE, V.C.—The questions presented for decision in this case arise out of certain indentures and an agreement to which *John Ritchey*, junr., a person carrying on business in Toronto, as a merchant, was a party, with a view to making a composition with his creditors.

The first deed bears date 11th March, 1862, and was made by *Ritchey* to one *Linton* and the defendant *Lee*, as trustees for the general benefit of all creditors *pro rata*; no security for payment is provided for; and the only compensation was five per cent. to the trustees, to remunerate them for their trouble. Nothing appears to have been done under this deed.

This was followed by an instrument called an agreement dated 24th April, 1862, between *Ritchey* of the one part and his creditors, who should come in before the 5th of May, of the other part: in case all should not come in before the 5th May, the instrument was to be void. The instrument provided that the creditors should receive 37½ cents in the $, less five per cent. Notes

(*a*) 11 Jur. N. S. 81.
(*b*) 10 Cl. & F. 934.
(*c*) 8 Jur. N. S. 602.
(*d*) 12 Ves. 56.
(*e*) 1 D. & War. 227.
(*f*) 10 Ex. 523.
(*g*) 3 Jur. N. S. 566.
(*h*) 1 Clk. & Fin. 253.

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were to be given to the creditors coming in, and to be indorsed by some responsible person or persons: the five per cent. was to be paid to the indorser: no indorser was named. Some only of the creditors came in under this instrument, and it was considered to have lapsed.

Another instrument, substantially the same in its terms, was afterwards contemplated by *Ritchey* and his creditors; and the plaintiff in this suit was given out as a probable indorser; and, in order to secure such indorser, a conveyance was made by *John Ritchey*, the principal defendant in this suit and the father of *Ritchey* the trader, to the defendant *Lee*, one of the trustees named in the indenture of March. This indenture bears date 15th May, 1862, and conveys to *Lee* several properties in the City of Toronto and one in the Township of York. It recites that the creditors of *Ritchey* the trader had agreed to accept composition notes, indorsed by a responsible person or persons, not naming the rate of composition, or the indorser. The principal trust is to apply the balance of rents and profits to be received by the trustee, after providing for the payment of certain expenses and charges, "to the payment of the said composition notes, to be given by the said *John Ritchey* the younger as aforesaid."

Judgment.

The last instrument in the case, is an indenture bearing date 4th June, 1862. The parties of the first part are the trustees named in the deed of March; *Ritchey* the trader is the party of the second part; and the parties of the third part are "the several persons creditors of the said *John Ritchey* the younger, who shall execute these presents." It recites the trust deed of March; that the parties of the third part had agreed each with the other, and with *Ritchey* the trader, to accept from him, in full payment and satisfaction, 37½ cents ("less five per cent. to be paid to the person or persons indorsing the notes, &c.,") in the dollar, payable by the promissory notes of *Ritchey* the trader, indorsed

by a responsible person or persons, at six, twelve, and eighteen months, from 1st May preceding; it then recites that *James P. Clarke*, the plaintiff, had agreed to indorse such notes; and that the creditors had agreed to accept them; and to authorize the trustees under deed of March to reassign to *Ritchey;* and the trust property is thereby reassigned.

It is to be observed, that neither in the indemnity deed of the 15th May, nor in the composition deed of 4th June, is any provision made for the security of *Clarke's* own debt against the trader. He is to secure the debt of other creditors and to be indemnified against them; but as to his own, no provision is made: and, further, he is no party upon the face of either of these deeds to any agreement to accept a composition of his debt. It is said that this is to be inferred, because, under the agreement of April, to which he became a party, he was to receive the same composition as other creditors. But his position was very different under the two deeds; the composition he was to receive under the first was to be secured to him. What he was to receive under the other, whatever it was, was not secured: and 7s. 6d. in the £ secured might be better than 20s. in the £ unsecured. I incline to think that the consideration for indorsing was five per cent.; not that percentage, and an agreement that his own debt should be paid in full besides; and that it would be properly so understood by the other creditors; because five per cent. was to be the compensation to the person indorsing, and such person might be a creditor or might not.

Judgment.

It was certainly material to the other creditors that *Clarke* should, like them, be paid a composition only, because they were entitled to the security of the trader himself, and of his estate; the latter would be diminished and himself less able to pay if any creditor were paid in full. Still, unless it is to be implied from the instruments, for it is not expressed, unless implied from their nature

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or their provisions, or from the position of the parties, there is nothing upon the face of the instruments to oblige *Clarke* to take a composition. It may of course be implied, and I have no doubt would be implied, if he stood upon the same footing as the other creditors; but he did not: his position was essentially different; and it is not without significance that, while the last deed recites what persons are to receive a composition, and though his name is introduced in the deed, he is not included among those who agree to accept it, either in the recital or in the operative part of the deed. It is true that he is not described as a creditor, but it is clear, from the evidence, that the creditors generally knew him to be one, and his name appeared as one in the instrument of April. From all that appears on the face of the instrument it might have been well understood that *Clarke* was to receive five per cent., by way of compensation for securing by his indorsement the debts of other creditors, and to receive, if he could get it, payment of his own debt in full, because it was unsecured. His own debt was about $1,250, the debts of the creditors about $25,000.

Judgment.

But in fact, as appears by evidence *aliunde*, it was not so understood, at any rate by some of the creditors. in a letter written by *Clarke* to *Ritchey* 8th April, 1862, he says "*George Stevenson* has been threatening a good deal, and saying that if they did not hear from you at the end of the week *Linton* would go up and wind up the estate." In a letter post-marked, 11th April, 1862, he says, "I have just heard that *Linton* goes up to-night about your affair." * * "*Linton* has just this moment looked in and I told him that I was inclined to indorse 7s. 6d. I did not wish to put it to him positively, and you will put it to him that I will accept the same myself; and that out of the 7s. 6d. they must pay my five per cent. for indorsing."

It would not be a very violent presumption to infer

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that *Ritchey* did act upon *Clarke's* suggestion and put it to *Linton* that, though he might indorse, he would still accept the same composition as the other creditors; and *Ritchey* is called as a witness, and states that he actually did so, and that on a subseqnent occasion he made the like representation to other creditors; he names only one, a Mr. *Fraser*. He says also, that from the first it was agreed between him and *Clarke* that *Clarke* was to be paid in full.

It is objected that *Ritchey* is not a competent witness. His interest no doubt is very strong, but still he does not fall within any of the classes whose incompetency is retained by the statute. The most that can be said is, that if *Ritchey* the elder is discharged from liability by reason of his son being discharged, the son also must be discharged, if the same grounds are made to appear; but the result of this suit, if in favor of the father, would have no direct effect in discharging the son; nor would the evidence of the son given in this suit be readable in favor of the son in another suit to which he might be a party.

Judgment

The authorities to which I have been referred, are cases falling within the well established rule, that creditors, parties to a composition with a debtor, and standing upon the same footing as other creditors, shall, if they make a by bargain with the debtor to receive a larger composition, forfeit not only the excess, but the composition itself. In one case of this class, *Knight* v. *Hunt* (*a*), Lord *Wynford* states the rule thus: "These agreements for composition with creditors, require the strictest good faith. If I see a man acquainted with the circumstances of the debtor, agreeing to sign a paper under which he is to be satisfied with 10s. in the £., I conclude he has exercised a judgment on the subject. Am I not cheated if he procures another to give

(*a*) 5 Bing. 432.

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him 10s. more?" In *Howden* v. *Haigh* (*a*), *Coleridge*, J., observed, "The principle of the case is that of entire good faith, which the creditors have a right to expect from each other and from the debtor." Similar language has been used by many English judges; what I have quoted seems particularly applicable to this case. *Clarke*, as I judge by his letters, was on a footing of intimacy with *Ritchey*; and appears to have made himself acquainted with the state of his affairs, for in his letter of the 8th of April, 1862, he says, "I have your last two letters. I am afraid nobody will take 6s. 9d., but I think you are quite able to pay 7s. 6d., at 6, 12, and 18, in the way you propose."

Judgment.

There was not that good faith between *Clarke* and the other creditors, which the law requires; he authorized a direct misrepresentation to be made to one; and it was made to that one, and at least to one other. In the last case to which I have referred, Lord *Denman* approved of *Knight* v. *Hunt*, and added, "If other creditors are deceived it is immaterial in what part of the transaction the deception is practised, the whole is avoided." It has been held that where a creditor having security on real estate, refrained from executing a composition deed until he had realized his security, for the expressed and avowed purpose of retaining his right to make his security available, for so much of the debt as should not be discharged by the composition, and he declared that he would not come into the composition unless he was allowed to make his security available for the residue of his debt; all which he had, as Lord *Langdale* held, a perfect right to do; and although, as the learned judge said, he appears to have understood that the stipulation was to be made known to all the creditors; and although when he signed the composition deed he stated to the person who asked him to sign,

(*a*) 11 A. & E. 1033.

that having realized his security he would sign; still as the fact of his intention to avail himself of his securities was not so stated as to guard other creditors from being misled, although he had acted with perfect good faith, he was decreed to account for the amount realized by the securities. *Cullingworth* v. *Loyd* (*a*)—This case is referred to by Mr. *Forsyth* in his treatise on the law relating to composition with creditors, as authority for the proposition (which it seems to sustain) that a stipulation for receiving anything beyond what other creditors receive must be made known to all the creditors; and it must follow, I apprehend, that any untrue representation by a creditor, made to any of the other creditors, whereby they may be induced to sign the composition deed, will vitiate any agreement contrary to such representation made between such creditor and the debtor, for the benefit of the creditor.

Judgment.

All this, however, goes no further than this, that what *Clarke* was to receive, if anything, under the composition deed, might be forfeited at the instance of other creditors, or of the trustees, and that his whole debt against the trader might be forfeited. And if *Ritchey*, the father, had guaranteed that debt, it would follow that he would be entitled to relief. What he has guaranteed is the payment of the composition to the other creditors. It is true that it is for the protection of *Clarke*, and if *Clarke* had misled him, he would have been entitled to relief. I have said that I see nothing in the instruments, or the position of the parties to confine *Clarke* to a composition. If there were, *Ritchey* the father would be entitled to the benefit of it. If the creditors are entitled to be relieved, it is because they may have been induced to come into the composition by the representations of *Clarke*, as to his own position.

(*a*) 2 Beav. 385.

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But here this question arises, not only are the creditors relieved, but the debtor, though *particeps fraudis*, is relieved to the extent, in the cases I have seen, of his own debt to the creditor he has preferred. If he is relieved to the extent of the new debt contracted, as between him and the preferred creditor in the new character of guarantor assumed by the latter, then it would follow that the guarantor over would be relieved also. This is a case of principal debtor, surety and surety over. It cannot be that the primary surety, who has by conduct discharged the principal debtor, can still look to be indemnified by the surety over.

Judgment.

And this brings me to what seems to me to be the turning point in the case. *Clarke* has forfeited the debt which he has sought to realize in full, contrary to his representations. As part of the same transaction, *Clarke* assumed a new character, creating a new liability from the trader to him. Putting the elder *Ritchey* for the moment out of the question, could *Clarke*, if compelled to pay the composition to the creditors, have his remedy as surety against *Ritchey* the trader; or, is that part of the transaction vitiated as well as the other? If the rule were simply that a creditor making a private bargain with his debtor, should make nothing of it, I should know where to stop; but it goes further, and upon the principle of public policy; and works a forfeiture of that, which, if he had acted correctly, he would have been entitled to. Why does he lose that, unless upon the principle that the whole transaction is tainted by the fraud. I find it difficult to stop short and say that the creditor cannot recover even the amount of composition common to all the creditors, out of his debtor or his debtor's estate, but he may recover against him the composition which he may have to pay to other creditors, and which his own representations may have induced them to accept. I might say certainly that I find none of the cases go that length; but if the principle upon which they proceed in its proper application carries me that length, I must apply it. The language of Lord *Wynford* in

continuation of that which I have already quoted is apposite "Perhaps there is no case exactly like this; but as no two cases are ever alike in all respects, the best way is to extract a principle from analogous decisions." This distinction might be suggested, that so far, what has been forfeited has been the whole of the debt, as to the payment of which representation has been made, but that distinction does not satisfy my mind as a sound one. It proceeds upon this, that such a forfeiture is punishment enough; but the principle is, that the whole transaction is vitiated. It appears to me that the whole is part of the one transaction. It is so put by *Clarke* himself. I will indorse, and yet I will receive a composition: say this to a creditor, to induce him to accede to the same composition. Now the right of any creditor upon this is to repudiate the composition deed if he thinks fit, *Pendlebury* v. *Walker* (*a*); it is vitiated by the vicious bargain between *Clarke* and the trader. The notes, the due payment of which is guaranteed by *Ritchey* the father, lose their character as binding composition notes, and may be enforced or repudiated at the option of the creditors. I do not see how I can arrive at any other conclusion than that the whole is one transaction, and that the same principle applies to all; therefore that *Clarke* could not recover against *Ritchey* the trader. I have already said that if so, he cannot in my opinion recover against *Ritchey* the guarantor.

Judgment.

I must necessarily place my decision upon the grounds that I have indicated; or I must have given a decree to the plaintiff. The case nearest in its circumstances is that of *Pendlebury* v. *Walker*; but in that case there was actual misrepresentation to the parties, who stood in the like position with *Ritchey* the defendant in this case; which was a clear ground for relieving the parties to whom

(*a*) 4 Y. & C. 440.

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the representation was made. Here there does not seem to have been any misrepresentation to *Ritchey*, nor does he by his answer say there was: he only says that he was not informed that *Clarke* was to receive more than the guaranteed creditors; and that if so informed he would not have executed the deed of 15th May. I have already said that I think he had no right to conclude that *Clarke* was to accept the same, or any composition.

I am not however so clear against *Ritchey* upon the point arising out of the ordinary law of principal and surety, that the surety must be put in possession of all the facts likely to affect the degree of his responsibility. It may be that the agreement between *Clarke* and *Ritchey* the trader, ought to have been disclosed to *Ritchey* the surety; but I do not rest upon this, because he had no reason to suppose but that such agreement did exist. In truth it needed no agreement; the inference I think would be that *Clarke* was not upon the same footing as to composition as the guaranteed creditors.

Judgment.

In the view that I take of the case and of the law bearing upon it, I must dismiss the plaintiff's bill and with costs.

The cause was afterwards re-heard before the full court, and the decree was affirmed, his lordship the *Chancellor* and *Mowat*, V.C., being of opinion that the deed of the 15th May, 1862, was by its express terms only available in case of a composition with all the creditors; and that, as the plaintiff was not to accept a composition for his debt, no liability under the deed had ever arisen, on the principle thus stated by Lord *Westbury* in *Blest* v. *Brown* (*a*): "It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond

(*a*) 8 Jur. N. S. 602.

the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound therefore merely according to the proper meaning and effect of the written engagement that he has entered into. If that written agreement is altered in a single line, no matter whether it be altered for his benefit—no matter whether the alteration be innocently made—he has a right to say 'the contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end.'"

1865.
Clarke v. Ritchey.
Judgment.

Decree affirmed with costs.

MITCHELL v. RITCHEY.

Voluntary deeds—Trusts.

A voluntary grantor of real estate is not chargeable, at the suit of the objects of the bounty, for rents of such estate subsequently received by him, or which but for his neglect might have been so received.

Real estate was conveyed to three trustees in trust for the settlor for life, with remainder for his children; two of the trustees died, and the settlor afterwards verbally arranged with the surviving trustee that he would release to the latter his equitable interest for life, in trust for the same children; that the trustee should thereupon appoint the settlor and his son co-trustees in the place of the two deceased trustees, and should leave the whole management during the settlor's life time to the son.

The release, which was without consideration, was accordingly executed, and the appointment of co-trustees made. The son, with the consent of other trustees, received the rents, but misappropriated them:

Held that the other trustees were not bound to make good the loss.

This cause was heard before His Honor *V. C. Mowat*, at Toronto, on the 5th June last.

The facts were these: On the 21st April, 1837, *John Ritchey*, senior, one of the defendants, and his wife *Agnes*, since deceased, conveyed the property in question

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to the defendant *William Augustus Baldwin*, and two others since deceased, their heirs and assigns, in trust to the use of the grantors respectively for life, and after their death in trust for *Isabella Ritchey* and *Jane Ritchey*, daughters of *John Ritchey*, senior, their heirs and assigns, as tenants in common; and in case either should die without issue, then in trust for the survivor and the defendant *John Ritchey* the younger, their heirs and assigns; and in case *Isabella* and *Jane* should both die without issue, then in trust for *John Ritchey* the younger and *James Ritchey*, their heirs and assigns.

The deed contained a provision whereby, for the better carrying on of the trusts therein declared, the said trustees, or the survivors or survivor of them, in case of the death of any one or more of them before the accomplishment of the said several trusts, were empowered and authorized to nominate and appoint one or more trustee or trustees to keep up the number of three trustees.

Statement.

Before the 30th of January, 1854, *Agnes Ritchey* and two of the trustees had died: *Isabella Ritchey* had married *Robert Wright*, both of whom were defendants; and *Jane Ritchey* had married *Robert Mitchell*, and died leaving the plaintiffs her only children. The plaintiffs were minors. *Mitchell*, died in 1863.

On the 30th January, 1854, *Ritchey* senior executed a voluntary deed, expressed to be made between himself of the one part and the defendant *Baldwin* of the other part, conveying to the latter *Ritchey's* equitable estate for life in the property, *in trust*, as to the yearly sum of £150 of the yearly rents, to invest the same in such manner and upon such security yielding interest as *Baldwin* might think advisable, for the purpose of forming a fund with which, at the end of twenty-one years (the period for which it was therein stated that *Baldwin* was about to lease the premises), the buildings

or improvements made, or to be made, thereon by the intended tenants, might be purchased by the said *Baldwin*, if he should think proper to do so; and as to the residue of the rents, after deducting the yearly sum of £150, and as to the yearly interest upon the said yearly sum of £150, to hold the same in trust for the said *Isabella Wright* and the plaintiffs; and in trust for the other and subsequent purposes in the deed of 1837 declared.

By another deed bearing date the following day, (31st January, 1854,) *Baldwin* appointed the defendant *Ritchey* senior, and his son *John Ritchey* junior, co-trustees under the deed of 1837. On the 31st March, 1854, the trustees executed leases of the trust property to various persons for twenty-one years at an aggregate rental of $1,400.

Statement.

These rents were from time to time received by *Ritchey* junior, with the consent of the other trustees. He made payments thereout to *Mitchell* on account of *Jane's* share, and to the defendants the *Wrights* on account of *Isabella Wright's* share, and retained in his own hands the £150 a year mentioned in the deed of 30th January, 1854. He afterwards became insolvent, and the money was lost. It did not appear that *Baldwin* had any notice that these moneys were so retained; or any notice of *Ritchey* junior's insolvency.

Mr. *Wilson* was the solicitor, under whose advice the transaction of 1854 was carried out; and in his evidence he gave the following account of the object of the transaction, and of the circumstances under which it took place:

"The first proposal, according to my recollection, as to the deed of January 30th, 1854, was, that the life estate should be conveyed absolutely to *John Ritchey* junior, and that the rents might accumulate in his hands to pay

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for the buildings at the end of the leases that were to be given. Ultimately, this course was not taken, but the intention at the time of the execution of the deed of January 30th, was that Mr. *Ritchey* junior should be trustee, and that he should have the management of the property during his father's life time, and that the rents should accumulate in his hands for the purpose I have mentioned, to the extent provided by the deed. When *John Ritchey* senior executed the deed of his life estate on the 30th January, 1854, it was intended that *J. Ritchey* junior and *J. Ritchey* senior should be appointed trustees. It was a condition of parting with his life estate. The intention was also to relieve Mr. *Baldwin* of any further trouble in connection with the estate by means of this arrangement."

Statement.

"I think Mr. *Baldwin* did not act after Mr. *Ritchey* junior's appointment; for whatever he did was through me. He did not in person attend to such matters. He did not reside in town; and it was not convenient for him to give such matters his personal attention. I have no doubt that all the parties interested knew of the appointment of the *Ritcheys* as new trustees at the time it took place. No objection was made to their appointment. The whole transaction was one that the other parties were only too glad of, as *John Ritchey* senior was giving up his life interest for nothing." * *

"I have no doubt that the reason I told Mr. *Baldwin* that he would have no further trouble with the estate was that Mr. *Ritchey* was thenceforward to be the acting trustee. Mr. *Baldwin* wished to be discharged altogether. I think Mr. *Ritchey* senior would not have given up his life estate, if his son was not to have the management of the estate. I think that was his inducement." * *

"I heard nothing against Mr. *Ritchey* junior's standing from 1854 to 1860, and I think I would have been

much more likely to hear of it than Mr. *Baldwin*. Indeed I think I did not hear of Mr. *Ritchey* junior's insolvency until to-day." * *

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"The whole arrangement of 1854, including the new leases then executed, was considered a very advantageous one for all parties."

It was contended on behalf of the plaintiffs that new trustees could not be appointed by a surviving trustee until after the death of *Ritchey* senior; and that *Baldwin* and *Ritchey* senior were bound to make good the loss which had occurred. These were the only questions argued at the hearing.

Mr. *Ferguson* appeared for the plaintiffs.

Mr. *R. Crooks*, for *Ritchey* senior.

Mr. *Hector*, Q.C., for *Baldwin*.

Mr. *Fitzgerald*, for the defendants *Wright*.

The bill was taken *pro confesso* against *Ritchey* junior.

Judgment

MOWAT, V. C.—I am of opinion that the deed of 1837 authorized a surviving trustee to appoint new trustees as occasion required, during the lifetime of the grantor, as well as after his death.

I think that *Ritchey* senior's conveyance of his life estate being voluntary, he is not chargeable with the rents afterwards received by his son. For, after executing that conveyance, he could still sell his life estate, and apply to his own use the purchase money without accounting for it to those interested under the voluntary deed; *Evelyn* v. *Templar* (*a*); *Pulvertoft* v. *Pulvertoft* (*b*); *Buckle* v. *Mitchell* (*c*); *Daking* v. *Whim-*

(*a*) 2 Beav. 148.
(*b*) 18 Ves. 84.
(*c*) 18 Ves. 100.
(*d*) 26 Beav. 568.

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per (*d*). So also he could, for his own benefit, raise money on the property by a mortgage, either legal or equitable; *Lister* v. *Turner* (*a*); *Buckle* v. *Mitchell* (*b*); or he might lease it; *Goodright* v. *Moses* (*c*). How, consistently with these authorities, could he have been charged with the rent in question if he had received it himself?

I asked the learned counsel for the plaintiffs, at the hearing, whether any case could be found in which a voluntary grantor, who could thus at any moment put an end to the whole interest of the parties to benefit by the voluntary deed, had been held accountable for past rents; and after the argument I was referred to *Ellison* v. *Ellison* (*d*), *Lanham* v. *Pirie* (*e*), *McDonell* v. *Hesilridge* (*f*), and *Fortescue* v. *Burnett* (*g*), as bearing on the point. But in not one of these cases was the grantor made accountable for past rents or income. In *Ellison* v. *Ellison*, *Lanham* v. *Pirie*, and *McDonell* v. *Hesilrige*, the settlor had reserved a life interest by the express terms of his deed: and no question as to his right to retain the income was, or could have been, raised. *Fortescue* v. *Barnett* was the case of a settlement of a policy on the life of the settlor. In *Lanham* v. *Pirie* and *McDonell* v. *Hesilrige*, also, the settlements were not of any interest in land, but of personality merely; and a settlement of personality, not being within the statute, 27 Eliz., ch. 4, a disposition of it by gift cannot be got rid of by a subsequent sale for value by the donor, *Jones* v. *Croucher* (*h*).

Judgment.

If, therefore, *Ritchey* senior is not bound to account for rents received by him, it seems to follow, *a fortiori*, that he is not chargeable for wilful neglect or default in

(*a*) 5 Hare, 281. (*b*) 18 Ves. 100.
(*c*) 2 W. Bl. 1019.
(*d*) 6 Ves. 656, 1 W. & T. Lead, Ca. 2nd ed. 209.
(*e*) 2 Jur. N.S. 753, 3 Jur. N.S. 704.
(*f*) 16 Beav. 346. (*g*) 3 M. & K. 36.
(*h*) 1 S. & S. 315.

respect of rents not received by him; and, assuming that it was proper, under the circumstances, for Mr. *Baldwin* to appoint the *Ritcheys* as co-trustees with him (which on Mr. *Wilson's* evidence is indisputable), no ground was suggested on which I could exempt Mr. *Ritchey* senior and yet hold Mr. *Baldwin* liable. 1865. Mitchell v. Ritchey.

Costs to all parties out of the estate.

LOSEE v. ARMSTRONG.

Dower.

In equity, as at law, a widow is not entitled to arrears of dower unless her husband died seised.

In such a case, she is not, as a general rule, entitled to costs in equity unless she has made a demand in writing, as required at law.

Statement.

This cause came on to be heard before His Honor *V. C. Mowat*, after the long vacation of 1865.

The bill (which was taken *pro confesso* against the defendant) was by a widow for her dower, and for an account of arrears since her husband's death. The bill alleged that the plaintiff's husband had sold the land after their marriage, and that the property had since become vested in the defendants.

Mr. *J. C. Hamilton*, for the plaintiff, cited, as to the plaintiff's right to arrears, *Craig* v. *Templeton* (*a*); *Gordon* v. *Gordon* (*b*); *Leach* v. *Shaw* (*c*).

MOWAT, V.C.—The plaintiff's husband not having died seised, the plaintiff is not entitled at law to

(*a*) 8 Gr. 483. (*b*) 10 Gr. 467.
(*c*) Ib. 496.

1865. damages for arrears, *Jones* v. *Jones* (*a*); *Hawkshaw* v. *Hodgins* (*b*); *Humphries* v. *Barnett* (*c*); and on this point equity appears to follow the law; *Delver* v. *Hunter* (*d*); *Park* on Dower, chap. 15, p. 332. The cases cited for the plaintiff do not bear on this point.

Losee v. Armstrong.

I think, also, there can be no costs. In this respect too equity follows the law; *Lucas* v. *Calcraft* (*e*); *Mundy* v. *Mundy* (*f*); *Worgan* v. *Ryder*, (*g*).

The bill alleges applications and refusals to assign dower; but does not say that any application was made in writing, nor does it state when the applications were made. For all that appears, they may not have been made until the day before the filing of the bill. I think that, generally speaking, as a matter of reasonable precaution, the same notice should be given in cases like this, with a view to entitling the widow to costs in equity, as is necessary at law (*vide* Consol. Stat. 22 Vic., ch. 28, s. 7); though where a defendant unsuccessfully resists in this court a plaintiff's claim for dower, she may be entitled to her costs without any such prior demand; *Fry* v. *Noble* (*h*); but in the present case the defendants have made no resistance here.

Judgment.

There will, therefore, be the usual decree for assigning the widow her dower, but no account of arrears, and no costs.

(*a*) 2 C. & J. 601.
(*b*) 11 U. C. Q. B. 71.
(*c*) 16 U. C. Q. B. 463.
(*d*) Bunb. 57.
(*e*) 1 B. C. C. 133.
(*f*) 2 Ves. Junr. 128.
(*g*) 1 V. & B. 20.
(*h*) 20 Beav. 606.

SMITH v. BELL. 1865.

Vendor and purchaser—Injunction.

The plaintiff sold woodland to the defendants on credit; and the agreement stipulated that any cordwood or timber removed from the premises by the defendants, should be paid for at specific rates, if the plaintiff should demand such payment, the sums so paid to be credited to the defendants on instalments due or to become due. The defendants cut a quantity of cordwood and were removing it, before making the stipulated payments:

Held, that the plaintiff, as vendor, had no lien on the cordwood, and was not entitled to restrain the removal of what had been cut.

This suit was commenced in the County Court of the United Counties of York and Peel, and afterwards removed into this court.

Statement.

An injunction had been granted *ex parte* by the County Court Judge restraining the defendants, their servants, etc., from removing the cordwood and timber in question, wherever the same might be; and from cutting, felling, or removing any other cordwood or timber growing, standing or being on the premises.

The plaintiff, who owned the land, had on the 18th of January, 1865, entered into a written agreement for the sale of it to the defendants for $13,000, payable by instalments, of which the first, $500, was to be paid on the 1st of July in the same year; and it was provided that if any or either of the instalments should remain unpaid for ten days after it became due ("time being considered as of the essence of this agreement,") the defendants agreed to pay interest at the rate of six per cent. on the sum remaining unpaid; such interest to be computed from the date when the last payment previously made fell due. It was further agreed that any cordwood or timber removed from the premises was to be paid for at the rate of $2 per cord, and the timber at the rate of $15 per thousand cubic feet, if the plaintiff should demand such payment; and

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any moneys so paid were to be credited to the defendants on account of instalments due or to become due.

The defendants cut down between 700 and 800 cords of wood; part of which was removed, and part was still on the premises. The plaintiff demanded payment; but the defendants had paid neither the instalment due on the 1st of July, nor the $2 a cord for the wood removed.

Under the statute (22 Vic., ch. 15, s. 35) the injunction granted by the County Court being in force for one month only, the plaintiff now moved to continue it.

Mr. *C. W. Cooper*, for the motion, referred to *Ferrier* v. *Kerr* (*a*), *Thompson* v. *Crocker* (*b*), *Lawrence* v. *Judge* (*c*).

Mr. *Bell*, Q.C., and Mr. *Taylor* contra, cited *Hamilton McDonald* (*d*), *McCarthy* v. *Oliver* (*e*).

Judgment.

MOWAT, V.C.—The cordwood in question was manufactured before the first instalment of the purchase money became due; and it was not contended that the defendants were bound to pay for it before cutting down the trees, or that cutting down the trees was a wrongful act. But the trees when cut down became chattels; and the lien in equity for unpaid purchase money in the case of chattels is not, as a general rule, more extensive than at law. Now it seems clear that, under the agreement, the plaintiff had no lien at law on the cordwood; the defendants having been in rightful possession of the land at the time they cut down the trees, and having been authorized to cut them down, and having ever since been in possession of them and

(*a*) 2 Gr. 668.
(*b*) 3 Gr. 653.
(*c*) Ib. 301.
(*d*) 5 U. C. Q. B. O. S. 720.
(*e*) 14 U. C. C. P. 290.

of the cordwood manufactured from them, I cannot distinguish the case from *McCarthy* v. *Oliver* (*a*), and *Smith* v. *Hudson* (*b*). 1865. Smith v. Bell.

I think, therefore, there can be no injunction to forbid the removal of what has been cut. But the defendants having been guilty of default in paying the instalment of the purchase money due 1st of July, and in paying for the cordwood removed, I think the plaintiff is entitled to an injunction to restrain the defendants from cutting any more. Judgment.

I express no opinion as to whether the defendants will, or will not, be entitled to dissolve this injunction on tendering the amount payable under the contract in respect of the cordwood and timber they have removed or cut.

RADENHURST v. REYNOLDS.

Practice—Correcting error in decree.

An application to correct a clerical error in a decree or order must, as a general rule, be made on notice.

This was an *ex parte* application by the plaintiffs, on a petition for the correction of an alleged error in an order directing two bonds, dated 16th March and 1st November, 1850, to be delivered up by the defendants to be cancelled. Statement.

The petition alleged that a bond dated 26th July, 1853, had been substituted for these bonds of 1850; that it was by mistake that the bonds of 1850 had been mentioned in the order; and that the bond of 1853

(*a*) 14 U. C. C. P. 290. (*b*) 2 Law Times, N.S. 253.

1865. was that of which the order intended to direct the delivery. The prayer was that the bond of 1853 should be inserted in the order, instead of the bonds of 1850.

Radenhurst v. Reynolds.

Mr. *Fizgerald* in support of the application, cited *Moffat* v. *Hyde* (*a*), as authorizing the application to be made *ex parte*.

MOWAT, V.C.—I think this petition must be served. On referring to the order made in the case cited I find that the defendant affected by the amendment was served with notice of the application, but did not appear thereon.

Judgment.

An application to correct a clerical error in a decree or an order appears to require notice (*b*). In *Wallis* v. *Thomas* (*c*) the necessity of notice was expressly stated by Lord *Eldon*; and I do not find that the 45th order of 1828 introduced any new practice (*d*). I have looked at the cases collected in *Morgan's* Orders, p. 476, 3rd ed., as well as at most of those collected under the proper title in *Chitty's* Equity Index, pages 2085 to 2089, 3rd ed., and I find that in the great majority of the cases it distinctly appears that the application was not made *ex parte*. On the other hand, while in a very few cases it is not expressly said that the counsel appeared or that notice was given, yet in not one that I have seen is it stated that the application was *ex parte*; and where nothing appears either way, it by no means follows that there was no notice. Thus the report of *Pickard* v. *Matheson* (*e*) immediately follows that of *Wallis* v. *Thomas*, and yet nothing is said in it as to counsel appearing for the opposite party, or as to notice having been given,

(*a*) 6 U. C. L. J. 94. (*b*) 2 Daniel's Practice, 1234. Perkins ed.
(*c*) 7 Vesey, 292. (*d*) 2 Smith's Practice, p. 15, 2nd ed.
(*e*) 7 Ves. 293.

though both motions were before the same judge, and in the preceding case *His Lordship* had held the notice to be indispensable. 1865. Radenhurst v. Reynolds.

In some of the cases in which the application distinctly appears to have been made on notice, the propriety of the order asked for was, to say the least of it, quite as obvious as it can be said to be in the present case: *Vide Wallis* v. *Thomas* (*a*); *Punderson* v. *Dixon* (*b*); *Whitehead* v. *North* (*c*); *Bird* v. *Heath* (*d*); *Trevelyan* v. *Charter* (*e*).

No order.

Gould v. Burritt.

Executor—Commission—Costs.

Where an executor had retained money in his hands unemployed, for which on passing his accounts he was charged by the Accountant with interest and rests:

Held, notwithstanding, that, having reference to the condition of the estate and the facts of the case, he should be allowed his commission and costs of the suit.

This cause came on to be heard on further directions in March, 1865, when His Honor *V. C. Mowat* sent the report back to the Master at Guelph, to be reviewed. *Vide ante* p. 234. The Master having afterwards resigned his office, the reference was transferred to the Accountant. The Accountant having made his report, the cause came on again upon an appeal from the report, and for further directions and costs. Statement.

The plaintiffs were the residuary devisees of the testator; and the original defendants were his executors, and devisees in trust of all his real estate with full powers of sale.

(*a*) 7 Ves. 292.
(*b*) 5 Madd, 121.
(*c*) Cr. & Ph. 78.
(*d*) 6 Hare, 236.
(*e*) 9 Beav. 140.

1865. Gould v. Burritt. A judgment creditor, one *Alanson Baker*, was also a defendant, but his claim had been settled since the case was last before the court.

Mr. *S. Blake*, for the defendants, cited *Smith* v. *Roe* (*a*), *McLennan* v. *Heward* (*b*), *Harrison* v. *Patterson* (*c*.)

Mr. *Roaf*, Q.C., for the defendants, the executors, cited *Morgan* and *Davey* on Costs, 120-121.

Mr. *D. McLennan*, for an infant defendant, made a party in the Master's office.

Mowat, V.C.—This case came on before me upon an appeal from the Accountant's report, and on further directions and costs. The plaintiffs have submitted to some of the grounds of appeal, and the only one argued before me was the disallowance by the Accountant of any commission to either executor.

Judgment.

As to the defendant *Buell*, it was admitted on the argument that, under the circumstances of the case, a decree charging him with the costs of the suit could not be objected to. It was argued, however, that he should have been allowed his commission, and that the misconduct of an executor was only to be punished by charging him with interest and costs. I do not concur in that view. I see nothing in the statute (*d*) rendering it necessary to hold that an executor who does not do his duty properly, has right to the same compensation as an executor whose conduct has been free from blame. As it was admitted that nothing more can be said for the defendant *Buell's* claim to commission, I think the Accountant was right in disallowing it.

(*a*) 11 Gr. 311. (*b*) 9 Gr. 279.
(*c*) Ib. 105. (*d*) U. C. Consol., 22 Vict., ch. 16, sec. 66.

1865.

Gould v. Burritt.

Dr. *Burritt*, the other executor, stands in a different position. The Accountant finds that he refused or declined to furnish an account of his executorship; but he did furnish an account of his receipts, payments and charges, which was the only account connected with his executorship that he was asked to furnish; and the accuracy of this account is not disputed.

The testator died on the 19th November, 1861. The balance in Dr. *Burritt's* hands on the 1st May following was $14.07 only. By the 1st November, 1862, which was about thirteen months before the filing of the bill, the amount had increased to $387.60. On the 1st May, 1863, he had $719.73; and on the 4th December, 1863, the day this suit was commenced, the amount had reached $1,018.01. The Accountant has charged him with interest, and has taken the account with rests, partly because the money was not deposited in any bank, and partly for other reasons. Dr. *Burritt* acquiesces in this charge. Mr. *Buell* had considerably more in his hands than Dr. *Burritt*, but there is no evidence as to how far the latter was aware of the amount received by his co-executor.

Judgment.

The estate was a large one: but the personal assets were not sufficient to pay the debts. The executors paid a considerable amount before the filing of the bill. There was then due of simple contract debts about $700; a balance of about $2,400 on a judgment obtained by the defendant *Baker* against the executors for a simple contract debt of the testator; and two mortgage debts, one of $2,400, bearing interest at eight per cent., and one of $1,600, bearing interest at ten per cent. The holders of these mortgages were not pressing for their principal, but required their interest to be regularly paid. The bill complains, among other things, of personal estate being applied to pay some simple contract debts, while these mortgages were outstanding. The defendant

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claims that it was in the exercise of his best discretion that he kept on hand the balances I have mentioned.

Such being the condition of the estate, and such the facts affecting the question now before me, I think it impossible for me to hold, upon the authorities, that Dr. *Burritt's* retaining on hand the sums named for the periods specified was such misconduct as to subject him to the loss of his commission and to the costs of the suit. I think the Accountant was wrong in disallowing his commission; I think him also entitled to the costs of the suit as between solicitor and client.

Judgment.

The defendant *Buell* will pay the plaintiffs' costs as between party and party. The difference between these and the plaintiffs' costs, as between solicitor and client, must be paid out of the estate.

On all other points I understand there is no difference between the parties as to the proper decree.

CLARKE v. HAWKE. 1865.

Mistake—Undue influence—Acquiescence.

A division of the residuary personal estate of a testator was made between his legatees, with their concurrence, appropriating to one of them, as part of her share, a mortgage for about £10,000, assumed to be good, but which, from defective title and other causes, was not worth one-fourth of that sum:

Held that, in consequence of the mistake as to the character and value of the mortgage, the appropriation was not binding on such legatee.

An unequal division of a residuary estate, agreed to by the parties interested, and sanctioned by the executors, was held not to be binding, where it appeared that the lady to whom the division was unjust, had agreed thereto without professional or other independent advice, with undue haste, and in ignorance of the real value of the largest item of the assets of the estate, the other party to the agreement being her brother-in-law, and being the only person, except the executors, who appeared to have had any of her confidence in matters of business.

An unequal and unjust division of a residuary estate was agreed to in 1858, under circumstances that rendered the transaction invalid. The division was acted on to a certain extent by both parties, though conveyances had not been executed. A bill being filed in 1864 to set aside the division, and the delay sufficiently accounted for, a decree was made as prayed, and it was referred to the Master to make a new division, not disturbing the old division more than should be necessary.

This cause was heard before His Honor *V. C. Mowat*, at the Toronto sittings, in the Spring of 1865.

The suit was by *Hannah Maria Clarke*, by her next friend, and *John Clarke* her husband, as plaintiff's, against *George M. Hawke* and *Charlotte* his wife, and their infant children, and the executors and trustees under the will of the late Dr. *Widmer*, defendants. Statement.

The plaintiff Mrs. *Clarke*, and the defendant Mrs. *Hawke*, were the only children of the late Dr. *Widmer* who were alive at the time of the making of his will and of his death. Both were unmarried at the date of the will; but a marriage was then in contemplation between the younger daughter and the defendant *Hawke*, and the same took place in the following month. The testator's only son had died shortly before the making of

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the will. The will was dated 11th August, 1857; and the testator, thereby, after providing for his widow, divided the bulk of his property, real and personal, between his two children, vesting the share of the elder of them, the plaintiff *Hannah*, in herself, she being then in her 27th year, and vesting the share of the younger, the defendant *Charlotte*, she being in her 17th year, in his executors, in trust (amongst other things) for her separate use for life, and on her death for her children; his real estate he divided specifically; of his personal estate he gave to *Hannah* certain specific bequests of considerable value and a legacy of £1900; and to his trustees for *Charlotte*, he gave £8000; the residue amounting to about £40,000, he divided between the two daughters equally.

Statement.

On the 3rd May, 1858, the testator died. Immediately after his death, his papers were examined and arranged by Mr. *Hawke* and *Miss Widmer;* and the particulars, with the exception of the testator's medical accounts, were entered by the former in a book. In this book three of the items are stated to be "marked doubtful," namely:

W. H. Boulton's bond for £298 7s. 6d.

Insurance Company stock, £1500, (£657 paid thereon,) and

Grand Trunk stock, £225.

On the 5th of July, 1858, a division of the estate was agreed upon, and a memorandum thereof in three parts was signed by all parties. By this memorandum the stocks so marked doubtful were divided between the legatees; and a mortgage made to the deceased by *Thomas Brunskill*, on which £9870 was due, was appropriated as part of Miss *Widmer's* share for the full amount due thereon. This mortgage was afterwards ascertained not to be worth one-fourth of that sum, from the title being defective and other causes.

The object of the present suit was to have the division

set aside, either altogether, or so far as related to the *Brunskill* mortgage. 1. Because the division was brought about by the fraudulent management of *Hawke*. 2. Because of its being a family arrangement, making it incumbent on *Hawke* to have acted with perfect good faith, and to have communicated to Miss *Widmer* several matters of which she was ignorant, and which are referred to in the judgment of the court. 3. Because there existed between *Hawke* and Miss *Widmer* either the relationship of solicitor and client, or that of steward and property owner, or agent and principal, or some analogous relationship involving confidence and not susceptible of any precise designation. 4. Because undue influence was, under the circumstances alleged in the bill, exercised by *Hawke* over Miss *Widmer*. 5. Because the division was grossly improvident, and did not carry out the intention of the parties, which was to make a fair, just, and equal division of the residue. And 6. Because the division, owing to breach of duty on the part of the trustees, wanted mutuality. Statement.

On the 23rd of June, Miss *Widmer* had sent Mr. *Wilson*, one of the executors, the following note:

"Dear Sir,—I should be much obliged to you, if you would settle, at your earliest convenience, any matters requisite to be done with reference to Papa's estate.

"My brother, sister, and myself, are anxious to take a trip to Europe as soon as everything can be settled, and we can obtain the funds necessary for the purpose. Will you also be kind enough (if you think right) to send Mr. *Hawke* a power of attorney, to act for the trust estate, as there are many bills to pay, and rents due, which if allowed to run on might create confusion? My brother will also act for me at present, but a verbal agreement will be enough for that. The interest on debentures, mortgages, etc., becoming due early in July, I should be very glad if you could without much trouble have the division made and the bank books ready by that period."

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Agreeably to the request contained in this letter, the executors, on the 25th June, gave Mr. *Hawke* a power of attorney, authorizing him to act in and manage the matters and things of the executors and trustees, in relation to the rents, interests and debts due to the executors and trustees on behalf of Mrs. *Hawke*, under the said will, and in relation to the insuring, care and management of the properties vested in the trustees, under the will, for and on behalf of Mrs. *Hawke*; and for that purpose empowering him in their name to ask, demand and sue for all moneys and effects whatsoever payable or belonging to them as such executors and trustees, or otherwise; to give receipts and discharges; to settle accounts and pay or receive balances; to distrain for rents; to insure against fire; and generally to do all acts in or about the estate, property and affairs of the trustees as thereinbefore mentioned and contained, as amply and effectually as the executors and trustees could themselves do.

Statement.

There was a great mass of evidence. The material portions of that given by Mr. *Wilson* were as follows:—

"I recognise the letter produced of the 23rd of June, 1858, as being in the handwriting of the plaintiff Mrs *Clarke*. I cannot recollect any conversation with Mrs. *Clarke* on the subject of a division before the date of this letter. I was the acting trustee under Mr. *Widmer's* will more than the other trustees. I have no recollection that I ever saw any draft or copy of the papers of division of July 5th, 1858, until the three copies were produced to me ready for signature. I cannot recollect where they were executed. I think Mr. *Baldwin* and Mr. *Dalton* [the other executors and trustees named in the will] were present at the time of the execution of them. Neither my co-trustees nor myself made the division. I think I had no previous conversation with any of the parties about the division before the papers were brought to me. I have no doubt I enquired whether it was the division which the parties had themselves agreed to. I don't remember making any observation to the parties about any particular in the division. The property comprised in the mortgage from Mr. *James McDonnell* was an ample security for the

amount due on it to the estate. There could not I think, be a better security. I had been for many years the solicitor of the late Mr. *Widmer*, and his intimate friend. * * I never heard of Mr. *Widmer* having any relatives in this country. After Mr. *Widmer's* death I saw Mrs. *Clarke* frequently and Mr. *Hawke* also, about the affairs of the estate. I think the produced power of attorney given by the trustees to Mr. *Hawke* was so given in consequence of Mrs. *Clarke's* letter, already referred to. The person alluded to in her letter as her brother was Mr. *Hawke*. I think that from the time of the doctor's death Mr. *Hawke* acted on behalf of Mrs. *Clarke*. She had an uncle on the mother's side, but I do not think he ever acted for her. I think Mr. *Hawke* acted for the estate generally after Mr. *Widmer's* death. His estate consisted of lands in the town and country. There were rents to receive and many mortgages. The estate was large and required to be attended to. There were moneys payable by persons to whom Dr. *Widmer* had sold lands. Since Mrs. *Hawke's* marriage, her husband has acted for her. Mr. *Hawke* is still acting under the power of attorney. He has been the general agent for managing his wife's property up to the present time. Generally speaking, the trustees have acted on his suggestions in reference to it. I think I saw Mrs. *Hawke* before the division paper was signed, but it was her husband who managed for her generally. From the nature of this instrument I think it must have been intended that there should be some formal documents prepared to carry it out, though I have no recollection of anything being said about this. I don't think it likely that Dr. *Widmer* was very communicative to Mrs. *Clarke* about his business affairs, so far as I know. She was not in the habit of interfering in the management of her father's affairs during her lifetime. * * * Mr. *Hawke*, the defendant, is a very good man of business. The memorandum at the foot of each page of D. 24 is in my hand-writing. * * * [This memorandum was as follows:—The above properties and securities are not specifically devised or bequeathed, but they are appropriated as above, with the consent of all parties subscribing to this memorandum. Toronto, 5th July, 1858.] The corresponding memorandum on the other two parts of the document, D 25 and D 26, was not written by me. I think all was done at the same time. I wrote the first memorandum on the occasion of the papers being signed, and it was immediately copied on the other parts, and the three

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documents signed. (The witness's answer, paragraphs 10 and 11 to the plaintiff's bill, were read to him.) I think I recollect now that there was a previous memorandum, as there stated, before the three copies were made to which I have referred in my evidence. I think I was several times at the house after Dr. *Widmer's* death, and saw all the parties there. * * * I don't think I scrutinized the proposed division. Seeing the parties had agreed to it I made no observation upon it. I have no doubt I read it, and I think that finding the parties had agreed to it, I suggested that three copies of it should be made. Mrs. *Clarke* and Mr. and Mrs. *Hawke* were on very friendly terms, and I thought they were arranging things to their mutual satisfaction. When I read the first draft which was in Mrs. *Clarke's* hand-writing, it did not strike me there was anything objectionable in it so far as I recollect. * * I had some general knowledge of the property. I did not know that Mr. *Brunskill* was insolvent at the time of the division. I did not know the property was an inadequate security at that time. I had before this heard of a supposed defect in the title of the property; I heard it from Mr. *Brunskill* himself at the time of his purchase from Dr. *Widmer*. * * I told Mr. *Brunskill* he must either take or reject the title, that Dr. *Widmer* would not guarantee the title. Mr. *Brunskill* completed the purchase notwithstanding. The object of the power of attorney was to authorize the rents to be collected and any other moneys that were overdue to be received. Mrs. *Clarke* is a person of an acute mind. I think she has a good knowledge of business. I have known her for many years. I think that if she had made up her mind she would not be easily moved. But if she had not made up her mind I think she was open to influence. I think whoever she placed confidence in she would be influenced by to some extent. I do not think she ever asked any advice about the division. I felt as much interest in one daughter as in the other. I do not remember of anything being done after Dr. *Widmer's* death and before the division except the collection of rents and overdue debts. I think I remember some bank stocks were transferred in accordance with the division. I do not recollect anything else being done. I think all the securities belonging to the estate remained at the doctor's house after his death. The executors did not take possession of them.

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"I considered the particulars which were the subject of the division as belonging thenceforward to the parties entitled to them by the division. I do not recollect any suggestion being made about any further documents being signed to carry out the division, I regarded the division as a concluded matter. * * I think Mr. *Hawke* received all moneys of the estate that were received. I do not recollect receiving any of the moneys myself. * * * I think everything was managed by him. I am quite sure that this was Mrs. *Clarke's* desire. She had confidence in him. He made the payments as well as received the money. I assented to the division chiefly because the parties beneficially entitled approved of it. I did not tell Mrs. *Clarke* the alleged defect in the title to the property sold *Brunskill*. The Doctor had no apprehension about the title; and I had none after the sale. I did not think the matter would ever come up again after Mr. *Brunskill* had completed his purchase. I think that in business transactions Mrs. *Clarke* was not equal to Mr. *Hawke*. It is very probable she could not cope with him. I dare say it is so. He is a remarkably shrewd man, and much more conversant with matters of business than Mrs. *Clarke*, though Mrs. *Clarke* is an intelligent, active woman. * * There were not many sums to be paid for the estate. The debts due by the estate were very trifling. * * At the time of the division I thought all the securities comprised in it were available, and what I looked to chiefly was the amounts to see how they balanced. Mrs. *Clarke* had the intervention of no adviser for herself specially in the matter of the division. The property comprised in the *McDonell* mortgage is very productive property. I think the income derived from it at the time of the division was at least £2000 a year."

Statement.

After the division Mr. *Baldwin* died, and Mr. *Beatty* was appointed a trustee of Mrs. *Hawke's* share in his place, in pursuance of a provision in the will for appointing new trustees.

All the defendants put in answers insisting on the validity of the division.

Mr. *Strong*, Q.C., Mr. *Crooks*, Q.C., Mr. *McLennan*, and Mr. *Huson Murray* for the plaintiffs.

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Mr. *Blake*, Q.C., Mr. *Roaf*, Q.C., and Mr. *Wells*, for the defendants Mr. and Mrs. *Hawke* and their children.

Mr. *J.C. Hamilton* for the Trustees.

The following cases were referred to and commented on by counsel:

Argument.

Smith v. *Kay* (*a*), *Reynell* v. *Sprye* (*b*), *Gibson* v. *D'Este* (*c*), *Beale* v. *Billing* (*d*), *Espey* v. *Lake* (*e*), *Morley* v. *Attenborough* (*f*), *Turner* v. *Harvey* (*g*), *Eicholtz* v. *Bannister* (*h*), *Irvine* v. *Kirkpatrick* (*i*), *Denton* v. *Donner* (*j*), *Smith* v. *Pincombe* (*k*), *Harvey* v. *Mount* (*l*), *Davies* v. *Davies* (*m*), *Nottage* v. *Prince* (*n*), *Cooke* v. *Lamotte* (*o*), *Hoghton* v. *Hoghton* (*p*), *Gresley* v. *Mousley* (*q*), *King* v. *Savery* (*r*), *Lloyd* v. *Atwood* (*s*), *Holman* v. *Joynes* (*t*), *Lowe* v. *Holmes* (*u*), *Prideaux* v. *Lonsdale* (*v*), *Anderson* v. *Elsworth* (*w*), *Evans* v. *Llewellyn* (*x*), *Baker* v. *Monk* (*y*), *Pickett* v. *Loggon* (*z*), *Longmate* v. *Ledger* (*aa*), *Sturge* v. *Sturge* (*bb*), *Thornber* v. *Sheard* (*cc*), *Sharp* v. *Leach* (*dd*) *Clarke* v. *Malpas* (*ee*), *Vyvyan* v. *Vyvyan* (*ff*), *Sandeman* v. *Mackenzie* (*gg*), *Allfrey* v. *Allfrey* (*hh*),

(*a*) 7 H. L. 750.
(*b*) 1 DeG. McN. & G. 660.
(*c*) 2 Y. & C. Ch. 542.
(*d*) 13 Irish Ch. 250.
(*e*) 10 Hare 264.
(*f*) 3 Exch. 500.
(*g*) Jacob, 169.
(*h*) 13 W. R. 96.
(*i*) 7 Bell's Scotch Appeals, 186,
(*j*) 23 Beav. 285.
(*k*) 3 McN. & G. 652.
(*l*) 8 Beav. 439.
(*m*) 9 Jur. N. S. 1004.
(*n*) 2 Giff, 246.
(*o*) 15 Beav. 234.
(*p*) 15 Beav. 278.
(*q*) 4 DeG. & J. 78.
(*r*) 1 Sma. & Giff. 71, S. C. 5 [H. L. 627.
(*s*) 3 DeG. & J. 614, 649.
(*t*) 4 DeG. McN. & G. 270.
(*u*) 8 Irish. Ch. 53.
(*v*) 9 Jur. N. S. 507
(*w*) 7 Jur. N. S. 1047.
(*x*) 1 Cox 333.
(*y*) 10 Jur, N. S. 624, 691.
(*z*) 14 Ves. 215.
(*aa*) 2 Giff. 157, 163.
(*bb*) 12 Beav. 229.
(*cc*) 12 Beav. 589.
(*dd*) 31 Beav. 491.
(*ee*) 31 Beav. 80.
(*ff*) 30 Beav. 65.
(*gg*) 1 Johns. & H. 613.
(*hh*) 10 Beav. 353.

Downes v. *Jennings* (*a*), *Salmon* v. *Cutts* (*b*), *Baker* v. *Bradley* (*c*), *Rawlings* v. *Lambert* (*d*), *Huguenin* v. *Baseley* (*e*), *Chesterfield* v. *Janssen* (*f*), *Wright* v. *Vanderplanck* (*g*), *Stapleton* v. *Stapleton* (*h*), *Groves* v. *Perkins* (*i*), *Pickering* v. *Pickering* (*j*), *Harvey* v. *Cooke* (*k*), *Gordon* v. *Gordon* (*l*), *Scott* v. *Scott* (*m*), *Cocking* v. *Pratt* (*n*), *McCarthy* v. *Decaix* (*o*), *Curzon* v. *Belworthy* (*p*), *Bridgman* v. *Green* (*q*), *Goddard* v. *Carlisle* (*r*), *Marker* v. *Marker* (*s*), *Burrowes* v. *Walls* (*t*), *Brunskill* v. *Clark* (*u*), *Archibald* v. *The Commissioners for Charitable Bequests for Ireland* (*v*), *Harrison* v. *Guest* (*w*), *Rhodes* v. *Bates* (*x*), *Berdoe* v. *Dawson* (*y*), *Segrave* v. *Kirwan* (*z*), *Farrant* v. *Blanchford* (*aa*), *Crabb* on Real Property, vol. ii, sec. 2321, p. 956.

MOWAT, V. C.—This case occupied the court for several days in examining witnesses and hearing counsel. It was argued ably and fully on both sides.

Judgment.

The object of the suit is to set aside a division which was made of the residuary personal estate of the late Dr. *Widmer*, between his two daughters, the residuary legatees under his will, about two months after his death. Dr. *Widmer* died on the 3rd of May, 1858, and the division was agreed to by all parties concerned on the 5th of July. The objection to it relates to a

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(*a*) 32 Beav. 290.
(*b*) 4 DeG. & Sm. 125.
(*c*) 7 DeG. McN. & G. 597.
(*d*) 1 John & H. 458.
(*e*) 14 Ves. 273.
(*f*) 2 Ves. 125.
(*g*) 2 K. & J. 1.
(*h*) 2 White & Tud. 684.
(*i*) 6 Sim. 576.
(*j*) 2 Beav. 31.
(*k*) 4 Russ. 34.
(*l*) 3 Swan. 400.
(*m*) 11 Ir. Eq. 74.
(*n*) 1 Ves. Sen. 400; S. C. Belt's [Supp. 179.
(*o*) 2 R. & M. 620.
(*p*) 3 H. L. 742.
(*q*) 2 Ves. 627.
(*r*) 9 Price 169.
(*s*) 9 Hare 13.
(*t*) 5 DeG. McN. & G. 253.
(*u*) 9 Gr. 430.
(*v*) 2 H. L. 440.
(*w*) 6 DeG. M. N. & G. 424.
(*x*) 13 W. R. 710.
(*y*) 11 Jur. N. S. 254.
(*z*) Beatt. 175.
(*aa*) 1 DeG. J. & Smith 107

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mortgage of *Thomas Brunskill*, on which the amount due was £9870. This mortgage was appropriated, as representing that sum, to the plaintiff Miss *Widmer*, now Mrs. *Clarke*, and constituted in amount about one-half of what was appropriated as her share of the residue. The property comprised in the mortgage was unproductive. It formed part of a tract of thirty-five acres, which the testator bought in 1844, for £1365, from the Upper Canada Bank. He sold the twenty-four acres, to *Brunskill*, for £12,500, in 1856, which was near the close of a period of extraordinary speculation and inflated prices, well known in Canada. The mortgage was for the unpaid balance of the purchase money. Before the division, property like this had become much less saleable, and brought inferior prices: whether the depression would be temporary or permanent, was matter of speculation and conjecture. Dr. *Widmer* was a director of the bank at the time of his purchase, and his purchase was therefore invalid (*vide Brunskill* v. *Clarke* (*a*), so that the mortgage was nearly worthless until the transaction was confirmed by the bank on the 17th of March, 1864; and then prices had fallen so much that the property was a doubtful security for £1000. The title was not looked into by any person on behalf of Miss *Widmer*; and it is clear that, at the time of the division, she had no suspicion of any defect, but considered the security as good as any other that was comprised in the division.

Judgment.

There was one other large mortgage belonging to the estate. This mortgage was by *James McDonnell*, for £8000, and was appropriated to the defendant, Mrs. *Hawke*, as part of her share of the residue. This security was confessedly of the highest character; the title to the property comprised in it was beyond question; the property was productive; a portion of it yielded an annual rental of £1200; the remainder had been

(*a*) 9 Gr. p. 430.

sold by the mortgagor subject to the mortgage, and the purchase money yielded him an income of £800 more: and the sufficiency of the property as a security for £8000 was wholly independent of the speculative prices of 1856. 1865. Clarke v. Hawke.

The plaintiffs, Mrs. *Clarke* and Capt. *Clarke* her husband, now complain of the division, in consequence of the small value of the *Brunskill* mortgage; and the question is, Can the division be maintained?

The circumstances and effect of the delay in filing the bill, I will speak of hereafter. Apart from the consideration of these, I apprehend there can be no doubt whatever that Miss *Widmer* cannot be held bound by the division. Relief against mistakes is an old head of equity; and I think that Miss *Widmer's* ignorance or mistake as to the character and value of the *Brunskill* mortgage, is a sufficient foundation for the relief prayed, whether the mistake is regarded as one of fact or of law, *Stone* v. *Godfrey* (*a*), *Broughton* v. *Hutt* (*b*), *Turner* v. *Turner* (*c*); and whether it is assumed to have been a mistake common to both parties, *Colyer* v. *Clay*, (*d*); or, *a fortiori*, if the mistake or ignorance was not shared equally by the opposite party. *Harvey* v. *Cooke* (*e*), *Burrowes* v. *Walls* (*f*), *Broughton* v. *Hutt* (*b*). Judgment.

In *McCarthy* v. *Decaix* (*g*) the question was whether a husband had effectually renounced his interest in some property of his wife's for the benefit of her family. The judgment of the court was, that he had not; and the following are some of the observations of the

(*a*) 5 DeG. McN. & N. 76.
(*b*) 3 DeG. & J. 501.
(*c*) 2 Rep. in. Ch. 81.
(*d*) 7 Beav. 188.
(*e*) 4 Russ. 34.
(*f*) 5 DeG. McN. & G. 253.
(*g*) 2 R. & M. 614.

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Lord Chancellor on the case: "It must, therefore, at least be admitted, that in giving this, which is called his renunciation, the husband labored under two capital errors, one of law [the validity of a Danish divorce of the parties,] the other of fact; the one not superinduced by any suppression of circumstances on the part of Mrs. *Delattre* [the wife's sister,] and her agent; whereas the other may be said to have arisen from their not disclosing facts, which there is every reason to believe they must have known; the latter an error which if they did not create, they had, at least, to a certain degree a share in maintaining." * * "If it be assumed that Mrs. *Delattre* knew no more of the real facts than Mr. *Tuite* [the husband,] *Willan* v. *Willan* (*a*) is an authority to shew that where both parties were in a state of equal ignorance, as to the facts respecting which they were dealing, the transaction will not be supported." * * "On the whole, it is sufficiently established that when Mr. *Tuite* agreed to give up any claim to his wife's fortune, he was acting under a misapprehension in two most material circumstances: in the first place, he believed that Mrs. *Tuite*, at the time of her death, had by law ceased to be his wife, an impression which seems to have been the mainspring of his liberality; and, secondly, he was wholly ignorant, or rather he was positively misinformed, with respect to the amount and value of her property, and his ignorance certainly was not shared, at least in an equal degree, by the parties with whom he was dealing."

Judgment.

Groves v. *Perkins* (*b*) occurred three years later, and went further than *McCarthy* v. *Decaix*. The case was argued for the defendants by Sir *Edward Sugden*, who had argued the preceding case for the plaintiffs. In *Groves* v. *Perkins* there was no fraud; but the plaintiff was without professional advice, and had for an inade-

(*a*) 16 Ves. 72.

(*b*) 3 Simons, 575.

quate consideration parted with his interest in the personal estate of an intestate sister-in-law, without knowing what the amount of his share was; and so much importance, on grounds of general policy, did the court attach to his not having been informed of the amount, that the transaction was set aside, though the plaintiff knew, generally, that the amount coming to him was considerable, and though, by the transaction in question, the balance of share was settled on his wife and children whom he had deserted. The Vice-Chancellor said, in giving judgment: "The consideration for which the plaintiff executed the deed is very small; and the question is whether, adverting to the nature of the transaction, there was that disclosure made to the plaintiff which he was entitled to have. The administrators do not allege, in their answer, that they stated to the plaintiff what was the amount of the intestate's property, or of his wife's share of it; nor is there any evidence to that effect. The deed, it is true, recites that Mrs. *Porteous* was, at her death, possessed of very considerable personal estate, but I do not think that was a sufficient disclosure. And, although there was not that fraud in the transaction which the plaintiff has charged, yet, as the administrators withheld from him the knowledge of the amount of his wife's share, there was that non-disclosure of a material fact which compels me to say that the deed cannot stand."

Judgment.

It is to be observed that, until the division, the executors, in the present case, were trustees of the estate for both legatees, though they had a special trust in respect of the share of Mrs. *Hawke*. *Wilson*, one of the executors, had for many years been the intimate friend and the solicitor of the testator, and so continued up to the testator's death. Unless Mr *Hawke* is excepted, Mr. *Wilson* and his partners were the only professional advisers of Miss *Widmer* until after her marriage. Mr. *Wilson* felt as much interest in the one daughter as in the other; and it is evident that Miss *Widmer* all

1865. Clarke v. Hawke. along reposed in him, as, from his high character, professional and personal, she justly might, the fullest confidence. It is sufficiently plain, I think, that it was on him she from the first relied for advice in all matters which appeared to her to involve any doubt, or any which Mr. *Hawke* did not remove. It so happened, however, that Mr. *Wilson* exercised no deliberate judgment in regard to the division. Not being asked his advice upon it, and being aware of the mutual confidence existing between the parties, it did not occur to him to make inquiry of Miss *Widmer* as to her views in the scheme of division which was submitted to the executors, or to consider carefully for himself and to communicate to Miss *Widmer* the character and comparative value of the various securities, including the *Brunskill* mortgage. He assumed that she knew all she wished to know, and all therefore that it was material for her to know; but the result was that she was left in ignorance of facts, which if she had known, it is not now disputed that she would not have consented to the division in question.

Judgment.

That these circumstances add great weight to this branch of the plaintiffs' case, is sufficiently illustrated by the case of *Pickering* v. *Pickering* (*a*). In that case (which was affirmed by the Lord Chancellor) the settlement was between a mother and her son, executor under the will to which the settlement referred; and the mother in agreeing to it, acted under the advice of an independent solicitor chosen by herself. The settlement, however, according to the construction which the court placed upon the will, did not do her justice; and the attention of the solicitor had not been called to the principal points which he should have considered, and perhaps taken counsel's opinion upon on her behalf. Her solicitor had assumed as correct an opinion which the court held to be erroneous, and which

(*a*) 2 Beav. 31.

had been obtained some time before on a case drawn by the defendant, and not quite accurate, or sufficiently full, in its statements, though the solicitor appears to have himself known all the facts in regard to which the case was defective; it was their significance only which had not occurred to him, and to which his attention had not been called. In the present case the good faith of the executors is beyond question; and in *Pickering* v. *Pickering* the court disclaimed all intention of imputing any fraudulent intention to the defendant. Here, the lady had no solicitor of her own, nor was the propriety of having one suggested to her; there she had a solicitor, and the executor had warned her not to rely on him for advice or assistance, and to employ a solicitor for herself. But the Master of the Rolls observed: "Mrs. *Andree* was disposed to rely, and did rely, on the defendant; and it is not enough in such a case for him to say, 'Don't trust me, go to Mr. *Grojan*, or somebody else, who will advise you:' he could not in that way divest himself of the duties of the situation in which he stood with regard to her at the time of this transaction; he could not divest her mind of the feeling of confidence she entertained, or of the natural influence which from his situation he must have had over her. * * There is nothing to show that the matters which were principally to be discussed between these parties, ever were in any way, called to the attention either of this lady or of *Grojan*, who was acting as her solicitor; but the matter, as far as I can judge of it from the evidence, was treated as a question of account, to be settled in accordance with the opinion given by Mr. *Bell*. It was most important that the opinion should have been submitted to the consideration of some other competent person, who might have the opportunity of considering the whole will; but it was assumed in this proceeding that the opinion had been correctly formed," etc. * * "I am of opinion that, under the circumstances, it was the duty of the defendant to see that the nature of the transaction was fully explained to his mother,

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and to see that she was placed in a situation to have the question properly considered on her behalf."

The bill does not proceed alone on the character of the division, or on the mistake under which Miss *Widmer* was allowed to agree to it, but in connection with these considerations, it principally relies on the part which the defendant *Hawke* had in bringing about the division, and the relation in which he stood at the time to Miss *Widmer*. These circumstances involve the consideration of principles so important that they constitute, as has often been remarked, one of the most valuable parts of the jurisdiction of courts of equity. *Maitland* v. *Backhouse* (*a*), *Billage* v. *Southee* (*b*).

Judgment.

It is to be observed that Mr. *Hawke*, at the time of the division, held a power of attorney from the trustees, and was acting in the matters of the estate as agent for the trustees, and for his wife, as well as in his own interest. Mr. *Wilson* stated in his evidence, that Mr. *Hawke* and Miss *Widmer* had agreed to the proposed division before it was submitted to the trustees, and that the trustees merely sanctioned and adopted what he understood these parties had already arranged. It is clear, therefore, that if *Hawke* occupied such a position towards Miss *Widmer* as to prevent his insisting on the division, so far as any interest of his own was concerned, neither could the trustees or the other persons they represent insist upon it, even though the transaction were open to no objection on the ground of anything done or omitted by themselves. *Grosvenor* v. *Sherratt* (*c*), *Coles* v. *Bates* (*d*), *Huguenin* v. *Baseley* (*e*), *Commercial Bank* v. *Cooke* (*f*), *Smith* v. *Kay* (*g*), *Berdoe* v. *Dawson* (*h*), *Espey* v. *Lake* (*i*).

The principle on which it was contended that, even in the absence of actual fraud, Mr. *Hawke's*

(*a*) 15 Sim. 63.
(*b*) 9 Hare 540.
(*c*) 28 Beav. 659.
(*d*) 13 Weekly Rep. 710.
(*e*) 14 Ves. 273.
(*f*) 9 Grant 524.
(*g*) 7 H. L. 760.
(*h*) 11 Jur. N. S. 264.
(*i*) 10 Hare, 264.

connection with the matter rendered the division invalid against the plaintiffs is, to a certain extent, applicable to the position of the trustees and executors as well as to the position of Mr. *Hawke*. I refer to the well settled doctrine that where one person occupies a position which naturally gives him the confidence of another, or a position which in any way gives him influence over the other, or which, for some other reason cognizable here, gives him an undue advantage over the other, transactions between them require something more to give them validity in a court of equity than is necessary in other cases.

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The rules which courts of equity have laid down for such transactions, are founded on a general public policy, and are designed in some degree as a protection to the parties against the effects of overweening confidence and self delusion, and the infirmities of hasty and precipitate judgment (*a*). With this view courts of equity do not demand evidence of the particular means, extent, and exertion of influence in the particular case, because these may be secret and inaccessible in judicial scrutiny. Where a confidential relation existed, much that led to an injurious or improvident transaction may have passed, and frequently has passed, in the private intercourse of the parties; and which it is, therefore, impossible to establish by any evidence. *Hatch* v. *Hatch* (*b*), *Huguenin* v. *Baseley* (*c*), *Dent* v. *Bennett* (*d*). In such a case there may be actual fraud, and the injured person be unable to shew it; advantage may be deliberately taken of the confidential relation that exists, to mislead the judgment of the confiding party, so that while the other is seeking his own advantage he may seem to be but consulting the interests of the principal, or client, or relative, who is trusting him. *Huguenin* v. *Baseley* (*c*). Or, the influence may

Judgment.

(*a*) 1 Story. Eq. Jur. § 307.
(*b*) 9 Ves. 202.
(*c*) 14 Ves. 273.
(*d*) 4 M. & C. 209.

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be used to the prejudice of the other without any deliberate design to mislead, but from the unconscious bias which self interest is apt to produce.

Having ascertained, therefore, that a relation of confidence existed which naturally, and perhaps insensibly, involved influence, the onus is cast on the party occupying such relation to establish the perfect fairness and equity of the transaction. Such a person must shew that the other entered into the transaction, not through the operation of any influence on the part of him who was in a position to exercise such influence, but after full and sufficient deliberation, and with all the information which it was material for him to have in order to guide his conduct; and that he had either indpendent and disinterested advice, or as ample protection as such advice could have given him.

Judgment.

Where the relation is that of a parent to his child, a guardian to his ward, a solicitor to his client, a spiritual instructor to his pupil, a physician or surgeon to his patient, an agent to his principal, or the like, as influence naturally flows from these relations, the parties are not regarded as on equal terms, and no further evidence is necessary, of the existence or probable existence of such influence. But it is open to the opposite party to rebut, if he can, the presumption which experience suggests, and which public policy consequently requires courts of equity in such a case to make, that the relation involved influence; and the rebutting evidence must, generally speaking, be of the clearest description. When the relation is one that may be and has been discontinued, its discontinuance is only material, if the influence has ceased with the relation. *Maitland* v. *Irving* (*a*), *Dawson* v. *Massey* (*b*), *Dent* v. *Bennett* (*c*), *Holman* v. *Loynes* (*d*)

(*a*) 15 Sim. 437.
(*b*) 1 B. & B. 219.
(*c*) 4 M. & C. 269.
(*d*) 4 DeG. McN. & G. 272.

So, a person in *loco parentis* is likely to have a similar influence, and is therefore treated in the same way as a parent. *Archer* v. *Hudson* (*a*). The rule extends to other relations, the parental not being the only relation that is apt to create confidence, and the influence which confidence and affection carry with them. Thus, in *Maitland* v. *Irving* (*b*) the learned *Vice-Chancellor* referred, generally, to its being the rule of the court "to view with great jealousy the exercise of any influence by persons standing in the situation of near relations, over persons just attaining their age of twenty-one years." The plaintiff in that case came of age a year and a half before the transaction which was in question took place. *Vide* also *Sturge* v. *Sturge* (*c*), *Grosvenor* v. *Sherratt* (*d*) and the cases referred to in *Mason* v. *Seney* (*e*). So, also, a person discharging, by delegation or otherwise, the duties of a guardian is under the same disability as a legal guardian. *Mulhallen* v. *Morum* (*f*), *Revett* v. *Harvey* (*g*).

Judgment.

In like manner the dealing of a solicitor, who has the confidence of the person with whom he deals, is treated in the same way as other dealings between solicitor and client, though the solicitor may have done no professional business; for the confidence and the influence do not necessarily depend on the professional character of the business actually transacted by him. The observations of the Lord Chief *Baron* in *Goddard* v. *Carlisle* (*h*) illustrate this: "The whole question in this case turns entirely, in my view of it, on the relative situation of the parties. Now it is clear, that *Sloper* [the solicitor] was most intimately connected with the plaintiff. There subsisted between them a very particular degree of private friendship and intimacy; and the

(*a*) 7 Beav. 551.
(*b*) 15 Sim. 444.
(*c*) 12 Beav. 229, 244, 245.
(*d*) 28 Beav. 659.
(*e*) 11 G. 447.
(*f*) 3 D. & War. 317.
(*g*) 1 S. & S. 502.
(*h*) 9 Price 180.

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plaintiff was constantly received at the house of *Sloper*, more as one of the family than as a guest, where he was always treated with great kindness and hospitality, and that until three years after the young man came of age." * * "But the most material feature in this is, that *Sloper*, during his connection with the plaintiff, was his solicitor; that is, the young man does not appear to have had any other professional adviser: and, *Sloper* being an attorney, and so connected in friendship and general association with the plaintiff, it must be taken, even if he could not be shewn to have acted professionally for him in any particular business, unless some other solicitor had been his legal adviser, that *Sloper* was the person to whom *Goddard* naturally looked for legal assistance." *Vide* also *Denton* v. *Donner* (*a*).

Judgment.

But it has often been remarked that such cases as I have mentioned are not the only ones in which this special protection is thrown around those who need it. "I will not narrow the rule," said Lord *Cottenham* in *Dent* v. *Bennett* (*b*), "or run the risk of in any degree fettering the exercise of the beneficial jurisdiction of this court, by any enumeration of the description of persons against whom it ought to be most freely exercised. The relief * * stands upon a general principle applying to all the varieties of relations in which dominion may be exercised by one person over another."

"No part of the jurisdiction of this court," said Lord Justice *Turner*, then V.C., in *Billage* v. *Southee* (*c*), "is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other; and, in my opinion, this part of the jurisdiction of the court cannot be too freely applied, either as to the persons between whom, or the circumstances in which, it is applied. The

(*a*) 23 Beav. 285. (*b*) 4 M. & C. 691.
(*c*) 9 Hare, 540.

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jurisdiction is founded on the principle of correcting abuses of confidence; and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustee and *cestui que trust*—guardian and ward—attorney and client—surgeon and patient—to be merely instances of the application of the principle." *Vide* also *Gibson* v. *Jeyes* (*a*).

Another class of cases in which courts of equity exact like protection and evidence as the condition of maintaining transactions, is where they have taken place with persons who have just come into possession of property as heirs or devisees. In a case of this kind, *Dawson* v. *Massey* (*b*), the *Lord Chancellor* of Ireland made the following significant observations: "Generally speaking, there are no transactions in a man's life that ought in this court to be more scrupulously, or with more jealousy, examined, than those which occur recently after he attains the age of twenty-one, affecting his real property. Antecedent to that period his infancy is his protection; his disabilities are his security; but, instantly after he attains the age of twenty-one, as if he had acquired all the prudence and experience necessary to the management or disposal of his property, with the possession are given the absolute control and dominion over his estates. At law all his acts are binding, all his deeds are valid, unless upon some distinct case of fraud they can be impeached; but it is not so in this court: those relations of guardian and ward, principal and agent, trustee and *cestui que trust*, which are little regarded in a court of law, are in this court decisive against the validity of a transaction, which between strangers could not be impeached."

Judgment.

(*a*) 6 Ves. 266.

(*b*) 1 B. & B. 219.

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But, in transactions with persons of even mature years in respect of rights which have recently accrued to them as devisees or legatees, heirs or next of kin, the rules referred to, so far as they apply, have long been acted upon. *Evans* v. *Lewellyn* (*a*), before Lord *Kenyon*, then Sir Lloyd *Kenyon*, Master of the Rolls, was a case of that kind. In that case there was no fraud or fiduciary relatian between the parties, and no ignorance of fact or law on the part of the plaintiffs. But there was inadequacy of consideration, and there was want of professional or other advice. The plaintiffs were poor men, and only knew of their rights when asked to dispose of them; and they accepted an inadequate consideration from the influence of certain equitable circumstances which were at the same time pressed upon their attention, and to which they yielded without taking sufficient time to consider. Still, conveyances had been executed in pursuance of agreements; and there was an interval of three days between each agreement and the conveyance executed to carry it out; and an interval of a month between the first agreement and the second. The Master of the Rolls was of opinion, however, that an undue advantage had been taken of their situation; and in the course of his judgment he observed; "I am called upon for principles upon which I decide this case; but where there are many members of a case, it is not always easy to lay down a principle upon which to rely. However, here I say the party was taken by surprise; he had not sufficient time to act with caution; and therefore though there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation. The cases of infants dealing with guardians, of sons with fathers, all proceed on the same general principle, and establish this, that if the party is in a situation, in which he is not a free agent, and is not equal to protecting

Judgment.

(*a*) 1 Cox. 333; 2 B. C. C. 150.

himself, this court will protect him. I do not know that the court has drawn any line in this case or said thus far will we go and no further; it is sufficient for me to see that the party had not the protection he ought to have had, and therefore the court will harrow up the agreement. I am of opinion, in this case, the party was not competent to protect himself, and therefore this court is bound to afford him such protection; and therefore these deeds ought to be set aside, as being improvidently obtained. I will not use any harsh terms, because in truth I do not think the case calls for it. *Vide* also *Pickering* v. *Pickering* (*a*), *McCarthy* v. *Decaix* (*b*), *Groves* v. *Perkins* (*c*).

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Lord *Cottenham* in *Curzon* v. *Belworthy* (*d*) recognized the authority of *Evans* v. *Llewellyn*; and in reference to the facts of the case before the House observed: "The estate was sold considerably under its value, not at such an undervalue as shocks the conscience (as has been said in times long past), so that the moment you hear it stated, it makes you start and say, 'This cannot have been a fair transaction;' but at such an undervalue, I admit, as might, with other circumstances, be sufficient to induce the court to set aside the contract, though there was no actual fraud proved. I should have thought that the true way of bringing this case forward originally would have been this: that the contract was entered into improvidently, and hastily carried into execution, according to the doctrine laid down by Lord *Kenyon*, when Master of the Rolls, in *Evans* v. *Llewellyn*; * * and, looking at all the circumstances of this case, I am not prepared to say, if it had been brought forward in the way I have stated, what might have been the result."

Judgment.

Again, in *Baker* v. *Monk* (*e*), where the purchaser

(*a*) 2 Beav. 31.
(*b*) 2 R. & M. 614.
(*c*) 6 Sim. 575.
(*d*) 3 H. L. 752.
(*e*) 10 Jur. N. S. 625.

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was a person of greatly superior position to that of the vendor, the purchase was set aside on the ground thus stated by the Master of the Rolls who pronounced the decree: "[Such] a man who comes to a lone and aged woman, in the lower rank of life, and buys from her her property, without her having any consultation or advice on the subject with any one else, except his own solicitor, can only support the transaction, if questioned in a court of equity within a reasonable time, by proof that he gave the full value of the property for it."

In the same case on appeal (*a*) Lord Justice *Knight Bruce* said: "The question is not, merely or alone, whether this lady was, or was not, acquainted with the value of the property. That circumstance, standing alone, as we all know, might amount to nothing or next to nothing. But the question is whether, to repeat an expression used in several cases, they were on equal terms." And Lord Justice *Turner* observed: "Here is a transaction between an old woman [and I will say no more than that], said to be a very shrewd old woman, but still an old woman, dealing with a person far superior to her in position, there being no advice given her, and no assistance rendered to her, in the course of the treaty for the purchase and agreement for the sale of the fee simple of the property, for an annuity of nine shillings a week, to last during the life of this old lady, who could know no more about what the pecuniary value of that annuity was than any person whom you might meet walking the streets at the time. I think there was that distinction between the parties which rendered it incumbent on the defendant to throw further protection around this lady, before he made the bargain with her. And I think, if the case depended on the evidence of valuers, the defendant's evidence has not satisfied my mind that the true value was given," etc. The decree was affirmed.

Judgment.

(*a*) 10 Jur. N.S. 691.

There are many other cases in which, though there is no confidential relation between the parties, yet the unequal terms on which they deal may constitute a ground on which, in equity, the protection I have mentioned is necessary.

In *Longmate* v. *Ledger* (*a*) the Vice-Chancellor begins his judgment by stating this: "By the settled doctrine of this court, in order to have a valid contract or conveyance of property, there must be a reasonable degree of equality between the contracting parties." The Vice-Chancellor adds: "In this case it is established by the evidence, that the property was sold for a price greatly below the value. This circumstance of itself might not be sufficient to invalidate the transaction; but when there is the additional fact, that the vendor was a man advanced in years, and known to be of a weak and eccentric disposition, and at the time of the sale was without the assistance of a disinterested legal adviser, there exists on the whole case such an inequality between the contracting parties, that it is to my mind impossible for the court to recognise the claim of the defendant to hold this property under the contract, except as a security for the payment of the moneys which have been actually advanced."

Judgment.

In *Clark* v. *Malpas* (*b*) the relative position of the parties was somewhat the same as in the last mentioned case, but there was also an attempt to shew the vendor's want of understanding. The Master of the Rolls, speaking of this evidence, said it was "not satisfactory, and that it would not alone have been sufficient to induce the court to say, that the transaction ought to be set aside, if there had been proper deliberation and time bestowed upon it, and he had had good advice." * * "However," the Master of the Rolls proceeded to say, "it is clear, from the description given of the

(*a*) 2 Giffard, 63.

(*b*) 31 Beav. 81.

1865.
Clarke v. Hawke.

whole course of the transaction, that it was essential, in that state of circumstances, that no person having any regard for the rules of this court, which require that a person in his situation of life should be fenced round with every protection which the law affords, ought to have got a bargain at that short notice, and in that speedy manner, and to which the expression 'snapped,' which was used by Lord *Campbell* in the House of Lords (*a*), seems to me exceedingly appropriate. It was a contract entered into after nine o'clock in the morning, and completed before six in the same evening, and appears to me to have been a bargain of that description."

VC. Malins

Judgment.

In *Grosvenor* v. *Sherratt* (*b*) the only relation, beyond that of great personal regard and confidence, which the party held through whose influence the impeached transaction was accomplished was, that he was executor of the plaintiff's father: and the property in question was not derived by the plaintiff from her father. The transaction was a lease to her brother-in-law and her uncle, her brother-in-law being the son of the person in whom she placed confidence. She had no other advice, and the Master of the Rolls in giving judgment observed: "I will, however, do them the justice to say, that I believe, and my belief is founded on a careful perusal of the evidence, that they intended to act fairly by her, and that being desirous to get the lease for themselves, they settled the terms of it at what they thought would be fair, as between herself and the lessees, and such as they supposed any person desirous to take the property would give. But this is not enough. She was entitled to have the utmost that could have been got, not what they thought, or what any indifferent person thought, would be fair between the parties. Accordingly the whole of the evidence of fourteen or sixteen gentlemen, stating that the terms are fair, and that these are usual

(*a*) 8 H. L. 492. (*b*) 28 Beav. 659.

terms, and such as property of that description would be let for in that neighbourhood, amounts, in my opinion, literally to nothing. Two persons are found who say they would have given more, but even if not, she was entitled to the most that could have been got for them." * * "In fact, in these cases, the persons who take the grant, whether it be a gift or a sale, or a lease of the property, put themselves in a position, which in a court of equity, makes it almost impossible for them to succeed. They must shew that the grantor had the fullest information on the subject, that he had separate, independent and disinterested advice, and that knowing all that he could know, and having the fullest information and this advice, he deliberately and intentionally made the grant."

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The learned judge speaks of gifts, sales and leases, as being all on the same footing. The cases to which I have referred have chiefly been cases of sales or leases, as these bear a more obvious analogy than gifts do, to the transaction which is impeached in the present suit. I had lately, in *Mason* v. *Seney*, (*a*), occasion to refer to some cases of gifts; and that the principle is the same, no matter what the nature of the transaction may be, has been laid down on several other occasions. Lord Justice *Turner* observed, in *Holman* v. *Loynes* (*b*): "I see no reason why the rule which applies to gifts should not equally in this respect apply to purchases. It is true that the rules of the court against gifts are absolute, and against purchases they are modified; but this is a question not upon the extent of the rules, but upon the circumstances under which they are to be brought into operation; and in that respect I see no difference between the case of gifts and purchases." In the case of sales and the like, the absence of influence is presumed, where the transactions are, in view of the real facts, fair and equal, and for adequate consideration. The case of gifts, of

Judgment.

(*a*) 21 Grant, 447.

(*b*) 4 DeG. McN. & G. 283.

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course, admits of no like modification of the rules referred to.

In applying to the present case the principle illustrated by all these decisions, it is proper to bear in mind, that a lady stands more in need of protection than a man, under like circumstances.

It does not appear that *Miss Widmer* had any practical knowledge of businss or property, until after the testator's death. The trifling offices which her father got her to perform for him in his business, during the last few months of his life, are, as bearing on this point, not worthy of observation. The evidence shews that *Miss Widmer* was naturally intelligent, and was anxious to understand her own affairs after her father's death, and to give them, as far as possible, her personal attention. But, having had no experience, she had everything to learn; while, on the other hand, her sex and station shut her out from advantages which would for this purpose have been available to a man. I have said that it was less than two months after Dr. *Widmer's* death when the division took place. What experience could she acquire in that short period? What she did learn, she appears to have learned through Mr. *Hawke*, or with his assistance. Necessarily confined to the house, we do not hear of her seeing a single individual there before the division, except Mr. and Mrs. *Hawke* and the members of her own family. I do not know whether Mr. *Wilson* saw her before the scheme of division was prepared and shewn to him; but if he did, his visits had certainly nothing to do with the division or with the *Brunskill* mortgage.

Judgment.

Viewing, therefore, the transaction as one between her and Mr. *Hawke*, acting for himself and others, apart from the confidential relations between them, the case is that of a remarkably acute man, a solicitor of

this court, with experience and knowledge of business and of business men (amongst whom he had spent his life), dealing with a young lady who had no independent advice, who had come into the property less than two months before, and whose experience was principally what she acquired by examining the papers of the estate with his assistance at her own house during that period. It is impossible not to see that two such persons did not deal with one another on equal terms. Even now, after Mrs. *Clarke* has had several years of experience in the management of her property, with all her intelligence and business aptitude, I do not find that any witness says that she is equal to Mr. *Hawke*. How could she cope with him before she had any experience whatever?

Judgment.

It is not alleged that Mr. *Hawke*, or Mr. *Wilson*, or any one, suggested to her the desirableness of delay, or of having independent advice or assistance in the matter; and, in her inexperience, nothing of the kind had, it is evident, occurred to herself. Unless she saw, or fancied she saw, some reason for applying in any particular matter to Mr. *Wilson*, it was, under all the circumstances, natural and inevitable that she should lean on Mr. *Hawke* for information, assistance and instruction, until she acquired the knowledge and experience which she needed. *Pickering* v. *Pickering*. (*a*). He was about her own age, or perhaps older. He was the son of an old and intimate friend of her father's. Her father had had such confidence in him that he entrusted to him the happiness of his younger daughter. Mr. *Hawke* had thus become the husband of Miss *Widmer's* only sister, and he was her own intimate friend. Relations and friends whose interests are more or less adverse do notwithstanding, I hope, usually deal fairly with one another, and possess justly each the confidence of the other. Here, in everything but the actual division

(*a*) 2 Beav. 31.

1865. Clarke v. Hawke.

of the property, Mr. *Hawke* and *Miss Widmer* had a common interest. In the division she wanted all that she was entitled to, but there was abundance for both; and what was hers then was, by the terms of the will, if she died without issue, to be added to her sister's share. She had thus every reason for giving her brother-in-law her confidence, in everything, or in every thing except the actual division between them of the property. He was a solicitor of this court, though not in practice, and was, by the testimony of all the witnesses, most competent to give her the assistance she needed. Her confidence, certainly, did not lead her to surrender her affairs wholly into his hands; I have already expressed my opinion that she endeavored to understand everything herself; but the protection which this court affords is not confined to cases in which the party had no mind or will of her own.

Judgment.

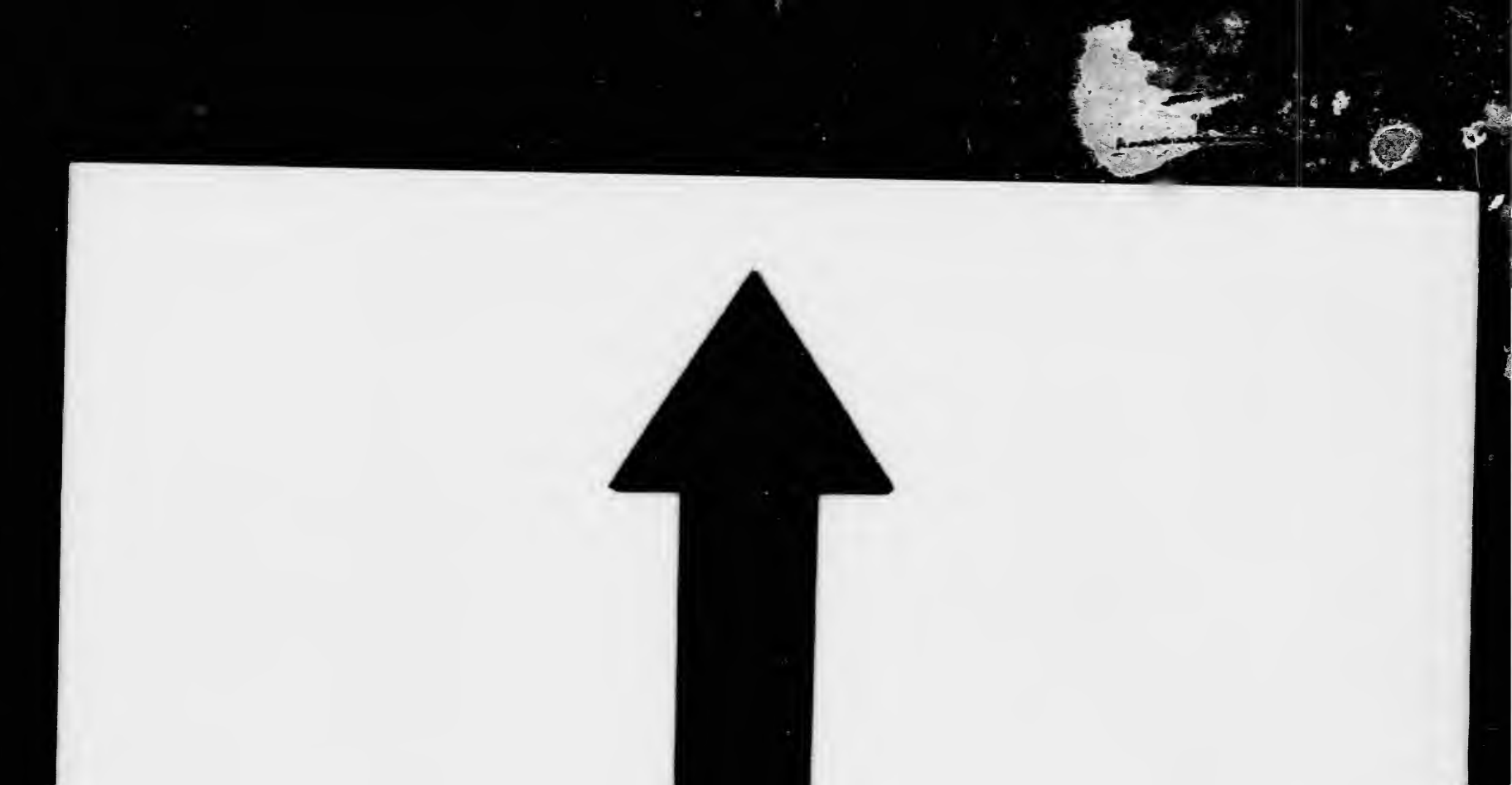
Miss *Widmer* had Mr. *Hawke's* active services from the time of her father's death. Her father's papers were not taken possession of by his executors, but Mr. *Hawke* and herself immediately applied themselves jointly to the task of arranging them and ascertaining the particulars of the estate. It was Mr. *Hawke* who made the list of these particulars; and the plaintiffs have produced the book in which he entered them. It bears date the 8th May, 1858 (five days after the testator's death), that I presume being the date at which the work was begun. The book is wholly in Mr. *Hawke's* handwriting; and, so far as appears, contains the only list of the testator's assets which was made. (In this book, I may observe in passing, that Mr. *Hawke* distinguished certain items as "marked doubtful," and did not designate the *Brunskill* mortgage as doubtful.) He instructed Miss *Widmer* as to the proper method of keeping her cash book, which she did not previously understand. He was with her almost daily, and for several hours of almost every day; and it is impossible not to presume that it was from him she received whatever other

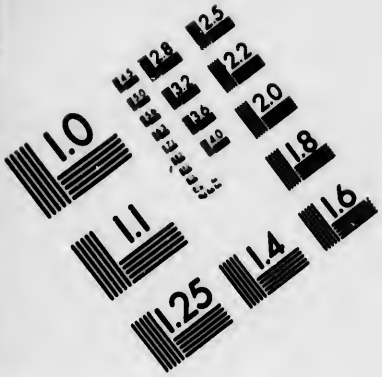
instruction she received from anybody. He also was the attorney specially appointed to accept for her the stocks which were transferred into her name; and he acted for her generally in whatever was done out of her own house, before the division as well as afterwards. Like assistance was given to her, and like offices were performed for her, by no one else.

Mr. *Hawke* had thus ample opportunities, before any question of division may have been referred to, of quietly producing upon the mind of his sister-in-law whatever impressions he chose in regard to the different securities belonging to the estate. There was no one at hand to contradict anything he chose to assert, or to tell anything he did not choose to communicate.

On the 23rd of June, Miss *Widmer* wrote to the executors a letter, bearing marks, I think, of having been written at the instance of Mr. *Hawke* himself. In this letter she speaks of him by the affectionate and confiding designation of her brother; asks that the executors should authorize him by power of attorney to act for the estate; and mentions that he is also to act for her. With this request the executors, with a confidence in Mr. *Hawke's* competency and character equal to her own, immediately complied. In fact, from the earliest date, as Mr. *Wilson* informs us, whatever business was done for either Miss *Widmer* or the executors, Mr. *Hawke* did. If his acts on behalf of either before the division were not numerous, this was evidently because in that short period there did not happen to be numerous acts requiring to be done. Mr. *Hawke* continued afterwards to act in the same capacity for both, and had much more afterwards to do which was capable of being proved by witnesses, and which has been so proved; but I see no difference in the character of his agency, or in the confidence which was reposed in him, during the two periods; and the relations of the parties after the division may properly be referred to, if necessary, as throwing light on the relations existing previously.

Judgment.





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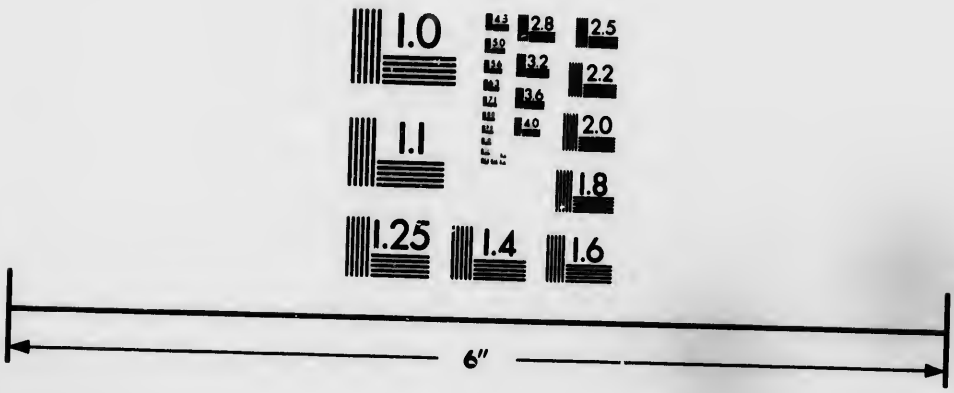

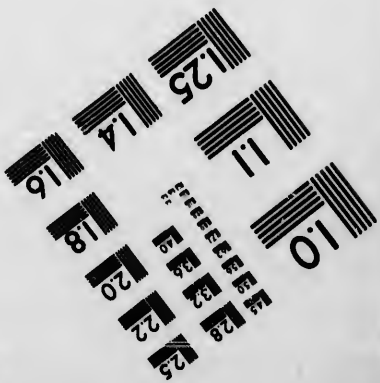

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1865.
Clarke v. Hawke.

There is much evidence of confidence in Mr. *Hawke* on the part of Miss *Widmer* from the earliest period, and no evidence whatever of distrust. However, the principal defendants, speaking of Miss *Widmer* in reference to the division, say in their answer, "that the turn of her mind is such, that if this defendant *Hawke* had recommended any particular security as good, she would have become suspicious of it, and have declined to take it." Assuming this to have been her disposition, it is obvious that a facile and confiding disposition would not have been more useful than this in enabling a shrewd man like Mr. *Hawke* to take advantage of her, if he wished to do so. In the view which I take of the case, it is not necessary that I should say whether Mr. *Hawke* had any such wish.

In brief, then, I think it is clear, not only that the transaction in question was entered into by Miss *Widmer* in consequence of ignorance and mistake in regard to the most important item of the assets of the estate; not only that the division was in consequence a most improvident one; not only that it was entered into by her without professional or other independent advice, and with undue haste; not only that in her position she ought to have received information and assistance from the executors, which, for reasons already mentioned, she did not receive; and not only that the two parties by whom the division was arranged were not on equal terms; but also, that there was a confidential relation between them, as the bill alleges; and that Mr. *Hawke* was in a position to influence the mind of his sister-in-law in reference to the particulars involved in the division; and I think I must add, that he in fact misled her in regard to them: whether he did so intentionally or not, I do not say.

Judgment.

These facts afford several distinct grounds on which the transaction must be held to have been utterly void, as against Miss *Widmer*. It would be most disastrous

that it should be supposed that an unequal and injurious settlement like this could be snapped by one party interested in an estate from another, and that other a female, reposing confidence in him as she did in no one else, except perhaps the executors themselves; having no professional or independent advice, and ignorant of the real condition of so large an item of the estate.

1865.
Clarke v. Hawke.

I think that the transaction would not have been maintainable though it had been perfected by conveyances; and the difficulty of getting rid of an agreement, acted upon but not executed, is not so great as where it has been completed by proper instruments.

The facts on which my judgment proceeds can hardly be said to be matter of serious dispute, on the evidence; and as these alone shew the transaction to have been invalid, I have refrained from observing on many other facts urged in the argument on behalf of the plaintiffs, as well as on the evidence, generally, relating to the case of actual fraud made by the bill. The learned counsel for the defendants contended, that the only case made by the bill was a case of actual fraud; but I think that contention unfounded. It is only as bearing on the case of actual fraud that it would be material to express an opinion as to whether, before the division, Mr. *Hawke* was aware of the difficulty in the title of the *Brunskill* property; or aware of *Brunskill's* failing circumstances; or of the change in the value and saleableness of the property comprised in his mortgage; or to express an opinion as to whether he designedly concealed these facts from Miss *Widmer;* or took means to prevent their coming to her knowledge, or receiving her attention; or as to whether the scheme of division originated with him or with Miss *Widmer;* or as to whether he took any active part in bringing about or hastening the division; or as to whether, if he did so, it was with any fraudulent object or not; or as to some other allegations much discussed at the bar; and upon all these matters, there-

Judgment.

1865.
Clarke v. Hawke.

fore, I abstain from saying anything. My judgment is already very long; but the large amount at stake, and the importance of the doctrines which the case involves, seemed to forbid a less full statement of the grounds on which my view of the case proceeds.

There is one point which remains to be considered. The defendants set up that the plaintiffs have adopted, and acted on, and acquiesced in the division under such circumstances, and to such an extent, and have been guilty of such laches in the premises, as to disentitle them to relief.

Now, there was certainly no deliberate intention of confirming the division with the knowledge of its invalidity; and I see nothing in the delay or in the acts of the plaintiffs to render relief against it now inequitable. Miss *Widmer* has always had the same solicitors as Mr. *Hawke* and the other defendants; and, except in the single matter of the *Brunskill* mortgage, the plaintiffs and defendants have the same solicitors still. I have already had occasion to observe that the relations which existed between the parties at the time of the division did not cease afterwards. In July, 1859, Miss *Widmer* went to Europe with Mr. and Mrs. *Hawke:* she travelled with them there: returned with them in June, 1860: and thenceforward lived with them as a member of the same family until a few weeks before her marriage, which took place on the 2nd March, 1861. As to the significance of these facts, I need only refer to *Hatch* v. *Hatch* (*a*). Again, on the 3rd June, 1861, the *Brunskill* matter was transferred by the plaintiffs to the office of Mr. *J. H. Cameron*, and the question of a redistribution in consequence of the condition of the *Brunskill* mortgage appears to have been the subject of conversation from that time, if not earlier. The suit of *Brunskill* v. *Clarke* was commenced on the 3rd September, 1861, and did not

Judgment.

(*a*) 9 Ves. 298.

come to a conclusion until the 2nd April, 1864. Negotiations were also going on through Mr. *Hawke* and the solicitors for all parties, from an early period until the 17th March, 1864, for a deed of release or confirmation from the Upper Canada Bank. The present suit was commenced on the 21st September, 1864.

Under all these circumstances, the defence of delay, or presumed acquiescence, or confirmation, is out of the question, upon the authorities that were cited.

It is proper, however, that the division should not be unnecessarily disturbed: some of the securities have been paid in whole or in part; others have been exchanged; and the difficulty which Mr. *Roaf* pointed out, of dealing with losses which may have taken place through improvident management of any of the securities since the division, deserves attention. The decree will declare the division of the residuary estate to be not binding on the plaintiffs, and will refer it to the Master or Accountant to make a new division of the residuary estate, but not disturbing the old division more than may be necessary, or than justice to the parties respectively may require; with power to direct a payment in money to meet any inequality in the amount of the securities appropriated to each party. All necessary accounts will also be taken. Judgment.

The decree must be with costs to the plaintiffs; without prejudice to the right of the defendants *Wilson*, *Dalton* and *Beatty*, as trustees of Mrs. *Hawke's* share, to charge what they may pay against their *cestuis que trust*.

1865.

HAGARTY v. HAGARTY.

Alimony.

The purpose of allotting alimony to a wife is to afford her the means of supporting herself whilst living apart from her husband; but as the law does not contemplate the parties living separately for life, but looks forward to a reconciliation between them, the court will not sanction the payment by the husband of a sum in gross, in lieu of an annual sum by way of such alimony.

This was a suit for alimony in which a decree had been made declaring the plaintiff entitled to an allowance by way of alimony, and referring it to the Master to settle what sum should be paid by the defendant to his wife (the plaintiff). In proceeding under the decree the Master, with the assent of both parties, found that a sum in gross should be paid by defendant to the plaintiff, and which was to be accepted by her in full of all future claims under the decree.

The cause afterwards came on to be heard for further directions.

Mr. *J. McLennan* for plaintiff.

Mr. *Bull* for defendant.

Judgment.

SPRAGGE, V. C.—In this case, the Master, with the assent of the parties, fixed the alimony to be allowed to his wife at a gross sum, instead of at so much per annum, to be paid monthly, or quarterly, as is usual: and counsel for both parties ask the sanction of the court to this allowance.

If the parties choose to make any arrangement out of court, the court has nothing to say to it, but, when the sanction of the court is asked, it is incumbent on the court to see that it sanctions nothing that is not in accordance with the law of the court.

1865.

Hagarty. v. Hagarty.

When the matter was before me on further directions I said, it struck me that the arrangments sanctioned by the Master was objectionable, as against public policy; and after further consideration that is my opinion still. In the books I find no instance of any such order; but I find alimony treated as due to the wife for her daily support. In Mr. *Pitchard's* book it is stated to be the ordinary rule of the court to decree it to be paid quarterly, and in *Wilson* v. *Wilson* (*a*) where the application was to enforce the payment of the same, for several years, the court said "Alimony is allotted for the maintenance of a wife from year to year."

In favor of the arrangement it is said that it makes the wife secure for so much money, whereas if payable from year to year the husband might evade payment: that is a reason of convenience; against which it may be said that if a sum be paid in gross to the wife she would be apt to live upon her capital; and at no very distant period probably be left destitute.

Judgment.

But the reasons against this arrangement, on grounds of public policy, appear to me to be very strong. The law does not contemplate that the husband and wife will live apart for life; but looks forward to their reconciliation; and so the sentence of divorce *a mensa et thoro* by the ecclesiastical courts was only "until they shall be reconciled to each other," and the sentence of judicial separation under the present law is doubtless in similar terms. The arrangement in question buys off the wife for life; it takes away one inducement on the part of the husband for reconciliation; its tendency is perpetual separation.

It is open to this further serious objection. The wife is entitled to her alimony only so long as she leads a chaste life. A wife separated from her husband is exposed to great temptations, every provision that tends

(*a*) Eccl. R. 329.

1865.

Hagarty. v. Hagarty.

to keep her from falling is valuable; this arrangement would remove one safeguard.

Under the imperial Divorce and Matrimonial Causes Act, the court when decreeing a *dissolution* of marriage, which can only be by reason of adultery, may order the husband to secure to the wife a gross sum of money or an annual sum; but in those clauses of the statute which relate to *judicial separation* there is no such provision; but the enactment is simply this, that the court may order the payment of alimony; which I understand to mean alimony according to the ordinary course of the ecclesiastical courts, and not a gross sum.

Judgment.

The distinction is marked—where the woman ceases to be a wife a gross sum may be paid to her; but where she remains a wife there is no authority for such a payment. I must add that the reasons against it appear to me so weighty, that in my judgment the court ought not to approve of the arrangement proposed. There must be a reference back to a Master to allow alimony in the usual way.

RUTHERFORD v. RUTHERFORD. 1865.

Vendor's lien for unpaid purchase money.

L. sold land to R. who paid £175 in cash, and assumed payment of two mortgages made by L. as one-third of the consideration agreed on; and a mortgage was executed by R. to secure another third of the purchase money. L's wife, refusing to bar her dower, a bond was executed by R. providing for payment of the remaining one-third at a certain period. It was arranged that in case of the death of L. or his wife before the time fixed, the money secured by the bond was to be paid within one year thereafter to the survivor.

Held, that under these circumstances, L. had not waived his vendor's lien for that portion of the purchase money secured by the bond.

The bill in this cause was filed by *William Rutherford* against *Thomas Rutherford* and *James Lang*; the plaintiff claiming as holder of two mortgages made upon premises in Albion by the defendant *Lang*, whilst owner thereof, and who, on the 12th of October, 1857, conveyed his equity of redemption to the other defendant.

Lang, in his answer alleged that he sold the premises in question to his co-defendant for £1450, including the amounts due on two mortgages previously executed by him, receiving from *Rutherford* £175 in cash, and a mortgage to secure £466 13s. 4d. There remained £483 8s. 4d. of the purchase money, which was secured by a bond executed by the defendant *Rutherford* in the penal sum of £600, whereby it was recited, as *Lang* alleged, that it had been agreed that one-third of the purchase money should remain unpaid in the hands of the defendant *Rutherford*, as the dower of his wife, until the 14th of October, 1862; and that in case *James Lang*, or his wife, should die before that time, then the survivor of them should receive the sum secured by the bond. He also alleged that the bond had been stolen from him, and prayed that it might be established, and the sum secured thereby declared a lien on the premises.

The bill was taken *pro-confesso* against *Rutherford*,

1865. and heard on motion for decree as against the other defendant.

Rutherford v. Rutherford.

Mr. *Huson Murray* for the plaintiff.

Mr. *George Murray* for defendant *Lang*.

SPRAGGE, V.C.—The defendant *Lang*, by his answer, claims an interest in the mortgaged premises, the equity of redemption in which is sought by the bill to be foreclosed, by virtue of his lien as vendor for unpaid purchase money. The question has been argued between *Lang* and the plaintiff, it being in truth a matter of no interest to the plaintiff whether *Lang* has such interest or not, as he is only a mortgagee, and the existence of the lien would only give *Lang* a right to redeem him. The bill has been taken *pro-confesso* against *Thomas Rutherford*, the owner of the equity of redemption, and I have felt some hesitation about disposing of the question in his absence, as the allowance of the lien would *pro tanto* onerate the estate beyond the mortgage moneys; but, upon consideration, I have thought it right to give my opinion upon the question of lien, as I think *Thomas Rutherford*, if he desired to be present, should have instructed counsel. *Lang* is made a defendant, "inasmuch," as the bill expresses it, "as he claims some interest in the said land." *Thomas Rutherford*, I apprehend, must have known what interest in the land was claimed by *Lang*. The question against the lien was fully argued by counsel for the plaintiff, as well as by counsel for *Lang*.

Judgment.

Lang having made the two mortgages in question, sold his equity of redemption to *Thomas Rutherford*, who paid in hand a portion of the purchase money, and gave a mortgage upon the land for another portion; and as *Lang's* wife did not bar her dower, one-third of the purchase money was by arrangement between the vendor and purchaser set apart to answer her dower; a bond for

the payment of this sum was executed by the purchaser, the substance of which was that it should be paid to the husband, or wife, according to which of them should survive the other; but as set out in the answer it was payable to the husband at any rate, if he lived to the 14th of October, 1862. It is in respect to this portion of the purchase money that the question of lien arises.

Against the lien, the old case of *Bond* v. *Kent* (*a*), is relied upon. That was a naked case of sale of land, mortgage for part of the purchase money, and a note given for the balance; and for that balance it was held that the vendor had no lien. The report contains no reasons for the judgment: but Lord *Redesdale* in *Hughes* v. *Kearney* (*b*), said, that in the case in *Vernon* it was manifestly the intention of the parties that the amount of the note should not be a lien upon the lands, else they would have had a mortgage for the whole; that the seller took the estate from his debtor for part of the purchase money, and was content with the note for the remaining part; and *Lord Eldon*, in commenting upon the same case in *Mackreth* v. *Symmons* (*c*), said, that there was strong negative evidence that the vendor was not intended to be a mortgagee, for the portion of purchase money for which the note was taken; and in the same case, after observing upon *Nairn* v. *Prowse* (*d*), he proceeds to say, "It does not however appear to me a violent conclusion, as between vendor and vendee, that, notwithstanding a mortgage, the lien should subsist. The principle has been carried this length, that the lien exists, unless an intention, and a manifest intention, that it shall not exist appears." Lord *St. Leonards* too does not seem to have thought the taking of a mortgage for part of the purchase money a very strong ground for displacing the lien; for, after enumerating cases in which it has been held not to exist, he adds, "so, even

Judgment.

(*a*) 2 Ver. 281.
(*b*) 1 S. & L. 135.
(*c*) 15 Ves. 340.
(*d*) 6 Ves. 752.

1865.

Rutherford v. Rutherford.

where the vendor takes a mortgage of the estate sold for only part of the purchase money," (*a*) and then adds, "and these appear to be well-founded general rules, although Lord *Eldon* thought they might be liable to some exceptions."

Judgment.

Primarily there is a lien; and the onus is upon the purchaser to shew that it was intended not to exist: the question depends, as was said by Lord *Eldon* (*b*), not upon the circumstance of taking a security, but upon the nature of the security, as amounting to evidence, or to plain declaration or manifest intention, of a purpose to rely, not upon the estate, but upon the personal credit of the individual. I think this case does not fall within the reason upon which, so far as we can gather, the case of *Bond* v. *Kent* was decided: we cannot say, as was said of that case by Lord *Redesdale*, it was manifestly the intention of the parties, that the portion of purchase money not secured by mortgage should not be a lien on the land; for we cannot conclude, as he did, that but for such intention the mortgage would have been taken for the whole. I think the proper conclusion in this case is rather, that but for the setting aside a portion of purchase money to answer dower, the whole would have been included in the mortgage; that it was separately provided for, not in order that the land should not be onerated with the amount, but because the provisions in regard to it, and the contingencies to be provided for, were of such a nature as, in the judgment of the parties, could not be well provided for in the mortgage.

In *Bond* v. *Kent* the conclusion was almost irresistible that it was the intention of the parties that the land should not be onerated with so much of the purchase money as was not covered by the mortgage; the transaction was not explicable upon any other hypothesis.

(*a*) V. & P. 14 ed. 675. (*b*) 15 Ves. 342.

1865.

Rutherford. v. Rutherford.

The same cannot be said of this transaction: it admits of another, and, as it appears to me, a very natural explanation. Therefore, looking at the law of lien for unpaid purchase money, as it is held in this court, I think the proper conclusion is, that in this case it was not waived.

As between the plaintiff and *Lang*, therefore, I think the right of the latter to redeem established; this being as between them a motion for decree, and the answer of *Lang* readable as an affidavit; but it remains to be established as against *Thomas Rutherford*, who has admitted nothing but what is alleged in the bill; and that is only, that *Lang* claims some interest in the mortgage premises. There must be an inquiry in the Master's office as to the arrangement set up by the answer, which will be proved by proof of the bond, or of its contents if lost, as alleged.

Judgment.

1865.

DeGear v. Smith.

Lien for unpaid purchase money—Specific performance.

On the sale of land the purchaser paid a certain sum in hand, gave a mortgage on other property owned by him for another portion of the price, and for the balance four promissory notes were to be given, made by the purchaser and such other person as would render them saleable without being indorsed by the vendor. One only of the notes was delivered.

Held, that the vendor retained no lien on the property sold for any portion of the purchase money.

Held, also, that the bill could not be sustained as a bill for specific performance; the agreement for the delivery of the notes being such as this court could not execute and the remedy being at law for breach of the contract.

Statement.

The bill in this cause was filed, first, to enforce the vendor's lien for unpaid purchase money, and failing that, that the defendant might be ordered specifically to perform the agreement for the delivery of certain promissory notes agreed to be given for a portion of the price of the land.

The defendant having made default in answering, the bill had been ordered to be taken *pro confesso* against him, and the cause was accordingly brought on to be heard.

Mr. *R. Martin*, for the plaintiff, asked that a decree in either alternative of the prayer might be drawn up, but,

Spragge, V.C.—The plaintiff's case is in substance this:—On the 20th of October, 1864, he sold an estate to the defendant for $2,000. Of the purchase money $200 was to be paid in hand, and I assume was paid, as is assumed though not expressly stated in the bill; a mortgage on other property was to be made for $1000 and for the balance, $800, four promissory notes were to be given payable at intervals of a year; the bill states them "as four promissory notes of the defendant, and

such other person or persons of such standing as to render the notes, without the indorsement of the plaintiff, capable of being sold and disposed of by the plaintiff without loss, to persons living in the neighbourhood of the plaintiff." The mortgage for $1000 of the purchase money was given by the defendant, and assigned by the plaintiff for value to a third person.

I am of opinion that, under the circumstances, the plaintiff retained no lien on the premises sold, for any portion of the purchase money. *Nairn* v. *Prowse* (*a*), *Bond* v. *Kent* (*b*), *Hughes* v. *Kearney* (*c*), *Mackreth* v. *Symmons* (*d*).

Further, I am of opinion that the bill cannot be sustained as a bill for specific performance of the agreement, for the giving of the notes for the balance of purchase money $800, or rather for $600, the first of the notes having been given in pursuance of the agreement; and that on two grounds, one, that the agreement is of a nature which this court cannot execute; the other, that this court can give no other remedy than can be given at law. All that the court could give would be a money compensation for the non-fulfilment of the contract; in other words, damages to be recovered as at law against the goods and lands of the defendant. Judgment.

(*a*) 6 Ves. 752.
(*b*) 2 Ver. 281.
(*c*) 1 S. & L. 132.
(*d*) 15 Ves. 341, 348, 349.

1865.

LEECH v. LEECH.

Devise upon condition—Voluntary conveyance.

L. devised lands to his widow, "provided she does not marry or misbehave," and to his son after his wife's death. *Held*, that the widow's estate was not absolutely determined by her again marrying; the party next entitled not having claimed the estate.

A. being the owner of land, entered into an agreement whereby he conveyed part of it to his son, "on account of natural love," the son to give to his father the one-half of the produce, if demanded. *Held*, that this was a valuable consideration. A. afterwards by deed conveyed to others these premises, and their assignee having commenced ejectment, L's widow obtained an injunction against the action. L's widow having meantime intermarried, the assignee moved to dissolve, urging that the widow's estate had determined, and that it was defeasible, and had been defeated by the testator's subsequent transfer for value under 27th Eliz., cap. 4; but the application was, under the circumstances refused.

Judgment.

The bill in this cause was filed by *Margaret Leech*, widow of the late *James Leech*, against *Luke Leech*, *Robert Leech*, *William Leech* the younger, and *William Henry Leech*, setting forth that the plaintiff's late husband was, at the time of his death, seized in fee of an undivided moiety in certain premises under an agreement which is sufficiently set forth in the judgment. *James Leech* soon after entered into possession of the premises, which he retained till his death, in 1862; since which time the plaintiff had retained possession. A dispute having arisen between the plaintiff and *William Leech*, after *James Leech's* death, the land was divided between them by the surveyor.

William Leech, on the 6th of January, 1863, conveyed to the defendants, *Robert* and *William Leech* the younger, all his estate and interest in the premises: the consideration expressed being £550.

These defendants afterwards conveyed to the defendant, *Luke Leech*, that portion of the premises claimed by the plaintiff for the consideration expressed in the deed of £250.

These defendants alledged that the agreement between *William* the elder and *James* was voluntary, and by the subsequent conveyance was defeated under 27th Eliz., cap. 4.

The plaintiff was the devisee of the premises under her husband's will, which devised it to her, "provided she does not marry or misbehave;" and then follows a devise to the defendant, *William Henry*, of the "aforesaid property after my wife's decease."

The defendant *Luke* commenced an action of ejectment against the plaintiff, in which *Luke* recovered, on the ground that he and the plaintiff were tenants in common, and that he was therefore entitled to a limited possession, but the court ordered judgment to be delayed for a time, that a partition might be effected between the parties if possible. The bill prayed for an injunction to restrain the action of ejectment, and that a partition might be effected, and that portion of the premises to which the plaintiff was entitled set off and conveyed to her in severalty. An injunction was granted soon after the filing of the bill, but the plaintiff had since intermarried. Statement.

An application was made on behalf of the defendant, *Luke Leech*, to dissolve the injunction.

Mr. *Blake*, Q.C., in support of the motion.

Mr. *J. Patterson*, contra.

Wheeler v. *Malins* (*a*), *Hill* v. *Hoare* (*b*), *Crabbe* on Real Property, sec. 2135; *Burton* on Real Property, page 7; and the action of ejectment reported in the 24th volume of the Upper Canada Queen's Bench Reports, where the facts are fully set forth, were referred to.

(*a*) 4 Madd. 171. (*b*) Cox Eq. Rep. 50.

1865.

Leech v. Leech.

SPRAGGE, V.C.—This is a motion to dissolve an injunction granted by my brother *Mowat*, restraining the defendant *Luke Leech* from issuing a writ of *Habere*, upon judgment obtained in ejectment.

The first point made is that the injunction was irregularly obtained. I think I must assume upon this application that the learned judge who granted the injunction was satisfied with the service that had been effected.

One groun ' made for dissolving the injunction is, that the interest of the plaintiff in the property in question has ceased. She claims as devisee under the will of her late husband. By the will the land is in the first place devised to her absolutely; this is followed by these words: "provided she does not marry or misbehave," then follows a devise to the testator's son, the infant defendant: "Secondly, I do leave and bequeath to my son *William Henry Leech*, the aforesaid property after my wife's decease." The plaintiff has married again, since the granting of the injunction. Her counsel contend, that inasmuch as the estate to the son is a devise over *after the death* of the wife, that provision overrides the condition making it determinable upon her marrying again. The inclination of my opinion is against this argument; but it does not follow, because the widow's estate was determinable upon her marrying again, that it was thereby *ipso facto* determined. The rule appears to be that, where an estate is granted or devised upon some condition subsequent, the payment of a sum of money, the taking of a journey, the remaining unmarried, or the like, the law permits it to continue beyond the time of the contingency happening, unless the estate be determined by the act of the party next entitled. This point, however, was not raised, and may be spoken to if parties desire it. If it is a point of reasonable doubt, the court would, of course, leave matters as they are until the hearing; for

Judgment.

the present I will treat the plaintiff as still entitled under her husband's will. 1865.

Leech v. Leech.

Then, as to the merits. The title of her husband rested upon an instrument dated the 14th of July, 1855, made between his father through whom *Luke* also claims, and himself. The material parts are, the commencement and conclusion. It commences thus: "I, *William Leech*, of the first part, on account of the natural love I bear to my son *James* of the second part, do give him my right, title, and interest, of one half of the east half of lot number 12," &c. It concludes thus: "*James Leech*, of the second part, is to till the said farm as usual, and to give to his father *William Leech*, of the first part, one-half of the produce, if demanded by the said *William Leech*, of the first part." The plaintiff contends that this instrument, which was under the hands and seals of the parties, operated as a conveyance to *James* of an undivided moiety of the east half of lot number 12, and it has received that construction at law. Judgment.

Luke, who claims to be a purchaser for value, contends that this instrument is voluntary; and so void as against his conveyance, under the statute of Elizabeth; that the only consideration expressed is natural love and affection, and that no other can be shewn; conceding, however, as the rule certainly is, that if any valuable consideration be expressed, a further valuable consideration may be proved *aliunde*. I think the instrument shews a valuable consideration upon its face. It is observable that the word consideration is not used in any part of it. It says, speaking in the name of the father, "on account of the natural love I bear," and a duty and labour, onerous to the son and valuable to the father, are part of the agreement. It is as though it had been expressed, that the inducement which led the father to enter into the agreement was the love he bore his son, and the agreement itself was that he should,

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on his part, convey a moiety of the farm to his son; and that the son, on his part, should cultivate it and render to the father one-half of the produce, if demanded.

This, I apprehend, is sufficient without shewing any other consideration, but it also admits evidence of further consideration; and further consideration, consisting of past services rendered by the son to the father, and an acting under the agreement to till and render produce to the father, are all in evidence. It is in evidence that the son continued to live upon and work the farm until his death, which occurred in December, 1862, more than seven years after the agreement, or until disabled by ill-health; and that his father and mother were chiefly supported out of his earnings and labour; such support being, it may be presumed, in lieu of the one-half of the produce which he was bound to pay over to his father, if demanded.

Statement.

In 1863, the father conveyed to his sons, *Robert* and *William*, the land which was the subject of the agreement with *James*; and in the same or the following year, I think in the following, from the terms in which the two conveyances are stated in the answer of *Luke*, and from the affidavit of *Conley*, *Robert* and *William*, the son, conveyed to *Luke*: and it is sworn that both these conveyances were for valuable consideration. It is not set up that *Robert* and *William* were purchasers without notice, and there is evidence of actual notice to *Robert*. *Luke* in his answer denies that he had notice. The conveyance to him was of one-half of the half lot, being that half which was claimed by the widow as having been apportioned to her husband by his father, to be held by him in severalty; and the ejectment was brought against the widow as in possession of that which she claimed as so apportioned. The partition was not proved; and she did not defend as tenant in common, and on that ground judgment was given for the plaintiff.

From this it appears that the widow was, at the time of the ejectment brought, in actual possession of the land conveyed to *Luke;* and for all that appears, was so when *Luke* purchased. The instrument of July, 1855, was registered certainly before the conveyance to *Luke* was registered, and, upon the evidence, before it was executed. *Luke*, therefore, purchased with a prior registered title in his way; and, as I may assume, for the purposes of this application, while the land purchased was not in possession of his vendors, but of another claimant: his vendors, too, being his brothers, and having notice of the plaintiff's claim of title. The jury, upon the trial in ejectment, found for the widow, and expressly negatived that the conveyance to *Robert* and *William* was for valuable consideration; and it was not shewn that *Luke* paid any valuable consideration for his conveyance. 1865. Leech v. Leech. Judgment.

If the instrument of conveyance to *James* had been voluntary, I should hesitate before making an order at this stage of the cause, which would have the effect of changing the possession. The whole transaction, on the part of these surviving brothers, has a suspicious appearance, both as to payment of consideration and as to notice. Being of opinion that the conveyance to *James* was for a valuable consideration, and being of opinion, moreover, that the merits, so far as they are yet disclosed, are with the party in possession, I think the proper course is to leave it as it is, until the hearing.

1865.

LUNDY v. MCKAMIS.

Mortgage on wrong lot.

Where a mortgage was, through error, created upon a wrong lot of land, the mortgagor owning only the land intended to be embraced in it, and having no title to that actually conveyed, and he subsequently sold the land to which he had title; the court, upon a bill filed for that purpose, ordered him to account for the proceeds of the sale, not exceeding the amount secured by the mortgage, with interest and costs of suit.

The bill in this case alleged that the defendant had created a mortgage in favour of the plaintiff, on certain land, and that through error a wrong lot had been inserted in the mortgage deed, the lot intended to be embraced in the mortgage, it was alleged, was the only land owned by the defendant at the time, and that the same was subsequently sold by the defendant to a purchaser for value, without notice of plaintiff's claim, for £200 paid to him. The prayer was that defendant might be ordered to discharge plaintiff's mortgage. The facts stated in the bill were not denied by defendant.

Statement.

Mr. *Crickmore*, for plaintiff.

Mr. *Moss*, for defendant, contended that the facts of this case did not warrant the court in making a personal order against the defendant, and no case can be found in which such order has been made: under the circumstances here appearing the court can only follow the land, not the person.

VANKOUGHNET, C.—It being admitted that if the defendant had retained the land the court could have fastened the plaintiff's mortgage upon it, as against him, I have no difficulty in holding that the defendant having thus become, though against his will, a trustee of the land in the eyes of this court, and having parted with the title for money received by him, he is also a trustee of that money and must account for it.

The decree will declare the defendant liable to pay what is due on his mortgage, not exceeding £200 and interest from the time he received the money, and also the costs of the suit. 1865. Lundy v. McKamis.

KELLY v. ARDELL.

Pleading—Parties—Costs of demurrer.

Where a testator devised his real and personal estate to A., subject to a charge of $200 in favour of B., and A., after the testator's death, mortgaged the real estate to B. to secure a further sum, a bill by B., for payment of the two sums, praying, in default, a foreclosure or sale, was held not to be multifarious.

In such a case the personal representative of the testator was held to be a necessary party, and an allegation that the defendant had been appointed executor by the will, was held insufficient in the absence of any allegation that he had proved the will or had acted as executor.

Where a demurrer for multifariousness was over-ruled, and a demurrer *ore tenus* for want of parties was allowed, the practice was held to be that the demurrer for multifariousness should be over-ruled with costs, and the demurrer *ore tenus* allowed without costs.

This was a demurrer for multifariousness under the circumstances stated in the head note and judgment.

Argument.

Mr. *Scott*, for the demurrer, referred to *Ward* v. *Northumberland* (*a*), *Campbell* v. *McKay* (*b*), *Crooks* v. *Smith* (*c*), *Story's* Equity Pleadings, s. 271.

Mr. *Moore*, contra, cited *Daniel's* Practice, pp. 232, 291, 3rd ed.

MOWAT, V.C.—The bill states in substance that the property belonged to *John Ardell* deceased; that he, by his last will, devised and bequeathed all his real and

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(*a*) 2 Anst, 469. (*b*) 1 M. & C. 608. Story's Eq Pl. s. 271.
(*c*) 1 Gr. 356.

1865. Kelly v. Ardell.

personal estate to the defendant, subject to a charge for $200 in favour of the plaintiff; that the testator appointed the defendant and one *George Forsyth* his executors; and that *George Forsyth* afterwards died, leaving the defendant sole executor; that after the testator's death the defendant executed a mortgage on the property to the plaintiff to secure $268.25 and interest.

The bill prays that the plaintiff may be paid the sums due to her in respect of the charge and mortgage respectively, and, in default, for a foreclosure or sale, and for general relief.

To this bill the defendant has filed a demurrer for multifariousness, and counsel for the defendant argued that a bill would not lie to enforce the payment of both the legacy and mortgage, but that a separate bill in respect of each was necessary. I do not concur in that connection. *Vide Pearce* v. *Watkins* (*a*), *Ely* v. *Norwood* (*b*), *Shuttleworth* v. *Laycock* (*c*), *Thomas* v. *Thomas* (*d*).

Judgment.

The defendant also demurred *ore tenus* for want of parties, contending that the personal representative of the testator is a necessary party; that the bill does not allege that the defendant proved the will or acted as executor; and that by reason of the omission the defendant cannot be regarded as representing the personal estate for the purpose of this suit. I think that this objection is well founded. *Vide Humphreys* v. *Ingledon* (*e*), *Creasor* v. *Robinson* (*f*).

The legacy is a charge on the whole estate, but the bill states that the interest of the defendant is as tenant

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(*a*) 5 DeG. & S. 315.
(*b*) 5 DeG. & S. 241.
(*c*) 1 Vern. 245.
(*d*) 22 Beav. 341.
(*e*) 1 P. W. 753.
(*f*) 14 Beav. 589.

for life only: and it was further contended *ore tenus* that in that case the heir of the testator is a necessary party. The bill is inconsistent in its statements as to the estate of the defendant under the will. If he were merely a tenant for life, the heir would be a necessary party to a bill for enforcing a charge against the real estate.

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The demurrer for multifariousness must be overruled with costs, and the demurrers *ore tenus*, for want of parties, allowed without costs. This appears to be the well settled rule as to costs in such cases, *Attorney-General* v. *Brown* (*a*), *Mortimer* v. *Fraser* (*b*), *McIntyre* v. *Connell* (*c*), *Lund* v. *Blanshard* (*d*).* The plaintiff may amend to remove the objections as to parties.

Judgment.

ATTORNEY-GENERAL v. MCNULTY.

The decree pronounced in this cause, as reported ante p. 21, was on re-hearing affirmed at the close of the argument. His Lordship *The Chancellor* observing: We are of opinion that parties making *ex parte* applications to the Crown Lands Department, or to the government, are bound to use the most perfect good faith; neither misstating nor suppressing any fact within their knowledge or belief which can be at all material for the government to know. We require such good faith on *ex parte* applications to this court, and it is at least as important that it should be observed towards the government as toward us. The Crown Lands Department particularly is much at the mercy, as to facts, of every applicant for land. How can the department know the position of every lot of land in this vast country, or the rights which parties may create among themselves,

(*a*) 1 Sw. 288.
(*b*) 2 M. & C. 173.
(*c*) 1 Sim. N. S. 257.
(*d*) 4 Hare, 23.
*See also Paine v. Chapman, ante, vol. vi, p. 338.

1865. unless informed of them? Here, after the award had
Atty.-Gen. been made giving to the defendant *McNulty's* brother
v. the land in dispute, *McNulty*, upon the simple repre-
McNulty. sentation that he had improved the land, procured an order in council giving him the right to purchase. He withheld all information of the award, and so deceived the Council, which had therefore no opportunity of considering the case of the adverse claimant. Was
Judgment. not a gross fraud thus practised upon the government, and did not the patent under such circumstances issue in error? We think it did, and should be cancelled.

Degree affirmed, except as to costs, and defendan *McNulty* ordered to pay plaintiff's costs.

AN INDEX

TO THE

PRINCIPAL MATTERS.

2. Executors finding it impossible to wind up the estate of the testator, so long as certain partnership accounts remained unsettled, became personally liable to the surviving partner for the payment of a sum supposed to be equal to his share in the estate, and he thereupon released to them all his interest in the partnership estate, which was by them wound up, and the proceeds applied in liquidation of the testator's debts. On a reference to the Master, this arrangement was found beneficial to the testator's estate, and the same was so declared by the court, and the executors were held to be entitled to a first charge on the proceeds of the estate for the moneys paid by them to the surviving partner, and for what they still owed him on their personal obligation; as also the amount of commission allowed them by the Judge of the Surrogate Court.—*Ib.*

3. The widow of an intestate, having obtained letters of administration, received and got in his personal estate, went into occupation of the real estate, received the rents and profits thereof, and spent a considerable sum in improving it. She also maintained the infant heirs of the intestate, to whom no guardian had been appointed. *Held*, that the personal estate, and the proceeds or profits of the real estate come to her hands must first be applied towards payment of debts, then to reimburse her for sums spent in the infants' maintenance. No allowance was made to the administratrix for her improvements to the realty, but she was not to be charged with any increase in rental caused by such improvements.

In re Brazill, Barry v. Brazill, 253.

4. A legatee filed a bill against executors and another person, between whom and the executors it was charged improper dealings had taken place with the estate. The charges so made were not sustained in evidence, and the plaintiff was therefore ordered to pay the costs of the defendants to the hearing, and allowed only costs of and subsequent to decree; and cross-charges of improper conduct having been brought against the plaintiff by other legatees made parties to the suit, and not substantiated, the costs incurred in resisting such charges were directed to be paid by the parties making them.

Miller v. McNaughton, 308.

5. Although the rule is, that executors or trustees will be charged with what they ought to have made, with what they actually did make, or with what they must be presumed to have made, out of the moneys of the testator, come to their hands; still, where such moneys had, before the repeal of the usury laws, been invested in first-class security at the rate of six per cent. per annum, the court, on appeal from the Master's report, considered the executors were not called upon, at the risk of

being charged with the extra amount of interest, to call in those moneys and re-invest the same at the rates, as the evidence shewed, moneys could have been loaned at. It also appearing that part of the money of the estate had been loaned by the executors to themselves, they were charged the higher rate of interest thereon.

Smith v. Roe, 311.

6. Where the report of the Master shewed that the conduct of the executors, in neglecting to prepare accounts or afford information reasonably called for by the legatees, had given rise to the suit, the court charged the executors with the general costs thereof, but set off against such general costs, certain costs occasioned by unfounded claims set up by the bill.—*Ib.*

7. A testator, a short time before his death in 1841, and during his last illness, signed a statement by which he acknowledged himself indebted to his father, one of his executors, in the sum of £73. 8d. 5d. His will contained direct authority to his executors to sell his real estate for the payment of his debts. In 1843 the executors obtained an administration order, and the father sought to have his claims against the estate, including the amount so acknowledged, paid by a sale of the land. These claims were resisted by the widow and the heir-at-law, the testator having been in a weak and dying state when he signed the acknowledgment. The father had, until about 1861, been in the occupation of the land, and a surcharge was put in against him, for the rents and profits. *Held*, that mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt; that the statute of limitations does not bar the claim of an executor against the estate of his testator: that an executor is not justified in keeping an estate open and unadministered in order to obtain interest upon a claim which he has against the estate: and that delay on the part of executors to sell lands, which by the will are saleable for payment of debts, will render the executors liable for rents and profits.

Emes v. Emes, 325.

8. S. took out letters of administration to the estate of an insolvent, at the request of a simple contract creditor, and was on the following day served by the latter with a summons for the debt. The administrator took no steps to ascertain, and made no inquiry, whether there were any other debts, but allowed judgment to go against him by default, and all the chattel property of the intestate to be sold under the execution. *Held*, at the suit of a specialty creditor, that the administrator's conduct did not entitle him to set up the defence of no notice of the specialty debt, and that the amount produced by the sale must be

applied in due course of administration.

Hutchinson v. Edmison, 477.

ALIMONY.

The purpose of allotting alimony to a wife is to afford her the means of supporting herself whilst living apart from her husband; but as the law does not contemplate the parties living separately for life, and looks forward to a reconciliation between them, the court will not sanction the payment by the husband of a sum in gross, in lieu of a sum by way of such alimony.

Hagarty v. Hagarty, 562.

AMENDMENT.

Amendments may be made at the hearing of causes, under the new practice, as at *Nisi Prius*.

Fraser v. Rodney, 426.

ANTE-NUPTIAL SETTLEMENT.

See "Married Woman," 1.

APPLICATION OF PAYMENTS.

See "Mortgage," 1.

ARBITRATION.

(REFERENCE TO—BY MARRIED WOMAN, HOW FAR BINDING, WHEN AFFECTING HER REAL ESTATE.)

See "Married Woman," 2.

ASSIGNEE OF MORTGAGE,

WITHOUT NOTICE—(RIGHT OF.)

1. Where a party executed a mortgage and had it registered, but did not, for some time, give it to the mortgagee, and this security was afterwards sold to a third party, who was not aware of the facts, it was held entitled to priority over another mortgage previously executed, but not registered till after the other security had been registered, although registered before the other had been delivered to the mortgagee.

Muir v. Dunnet, 85.

2. Mortgage held good in the hands of an assignee for value without notice, though the parties for whose benefit it was given were not named in it or shewn by any writing.—*Ib.*

(IN INSOLVENCY.)

See "Injunction," 1.

ASSIGNMENT.

See "Insolvency," 1.

BANKRUPT, &c.

See "Mortgage," &c., 3.
"Redemption," 1.

BRIEF.

See "Practice," 10.

BUILDING SOCIETIES.

A decree was obtained in a suit by a shareholder of a building society, suing on behalf of himself and all other shareholders, for the administration

of the assets of the society, and charging the directors with losses which had been sustained: *Held*, that persons who had ceased to be directors before the suit was commenced could not be made parties in the Master's office.

Rolph v. The Upper Canada Building Society, 275.

COMPENSATION.

See "Specific Performance," 10.

COMMISSION.

See "Executors," 4.

COMPOSITION WITH CREDITORS.

See "Principal and Surety," 4, 5.

CONDITIONAL DEVISE.

See "Devise upon Condition."

CONFIDENCE.

(CONFIDENTIAL RELATION.)

Where a son, who had the entire management of his father's business,—the father being old, and having for years been unable to attend to business,—obtained deeds of gift from his father and mother of their property, without the intervention of any adviser but the son himself, and failed to give evidence that the nature and effect of the deeds were fully and truly explained to the donor, that he perfectly understood them, that he was made alive, by explanation and advice, to the effect and consequences of executing it; and that the deed was a willing act on his part, and not obtained by the exercise of any of that influence which the confidential relationship of the donee put it in his power to employ; the deeds were set aside.

Mason v. Seney, 447.

CONSIDERATION.

(AGAINST PUBLIC POLICY.)

See "Conveyance," 1.

(NOTE GIVEN WITHOUT.)

See "Pleading," 1.

CONTRACT.

(FAIRNESS OF.)

See "Specific Performance," 1.

CONVEYANCE.

(FOR ILLEGAL PURPOSE.)

Upon rehearing the decree pronounced in this cause, declaring that a conveyance made for the purpose of enabling an irresponsible person to justify as special bail, was a transaction against good conscience and morality, was affirmed with costs.

Langlois v. Baby, 21.

(TO DEFEAT CREDITORS.)

See "Fraudulent Conveyance," 2.

COSTS.

See "Administration," 4, 6.
"County Court."
"Demurrer."
"Dower."
"Executors," 4.

"Practice," 2, 4, 5, 10, 15, 17, 18.
"Principal and Agent."
"Specific performance," 9.
"Trustee," &c., 3.
"University."
"Vendor and Purchaser."

COUNTY COURT.

Where a bill is filed to foreclose in respect of a demand not exceeding £50, the plaintiff will be entitled to his full costs if it appear that there is an incumbrance beyond that sum.

Hyman v. Roots, 202.

DEBTOR.

(RELEASE OF.)

See "Principal and Surety," 1.

DECREE.

(SPECIAL FORM OF IN FORECLOSURE SUIT—STATED.)

See "Mortgage," &c., 6.

(CORRECTING CLERICAL ERROR IN.)

See "Practice," 19.

DEED.

(DELIVERY AND REGISTRATION OF.)

See "Assignee of Mortgage," 1.

DEFICIENCY.

See "Specific Performance," 10.

DEMURRER.

Where a demurrer for multifariousness was overruled, and a demurrer *ore tenus* for want of parties was allowed, the practice was held to be that the demurrer for multifariousness should be overruled with costs, and the demurrer *ore tenus* allowed without costs.

Kelly v. Ardell, 579.

See also "Pleading," 1, 2.
"Specific Performance," 2.
"Suit Pending."

DEVISE.

(UPON CONDITION.)

L. devised lands to his widow, "provided she does not marry or misbehave," and to his son after his wife's death. *Held*, that the widow's estate was not absolutely determined by her again marrying; the party next entitled, not having claimed the estate.

Leech v. Leech, 572.

DILAPIDATIONS.

See "Specific Performance," 4, 5, 6.

DISCLAIMER.

See "Practice," 5.

DISPUTED TITLE.

Where the grantors were in possession of half the property conveyed, and had an undisputed life estate therein, but their title to the remainder in fee, subject to such life estate, was disputed: *Held*, that the rule laid down in *Prosser* v. *Edmonds*, did not apply to their grantee of such

half, and that the grantee might maintain a bill therefor. In such a case, an objection taken at the hearing to a bill by the grantors and grantees against the adverse claimant of the whole property was disallowed.

Mason v. Seney, 447.

DOWER.

In equity, as at law, a widow is not entitled to arrears of dower unless her husband died seised.

Losee v. Armstrong, 577.

In such a case, she is not, as a general rule, entitled to costs in equity, unless she has made a demand in writing, as required at law.—*Ib.*

EQUITY OF REDEMPTION.

(PURCHASE OF.)

See "Merger."

EQUITABLE ESTATE.

Where a writ of *fieri facias* or sequestration is placed in the sheriff's hands, it forms a lien on the defendant's equitable estate, from the date of such delivery, and not merely from the date of the plaintiff's filing a bill to enforce the same.

Moore v. Clarke, 497.

EQUITABLE EXECUTION.

W. had an interest in land as vendee, but had made default in paying the purchase money and otherwise. The plaintiff B. and one H. had executions in the sheriff's hands on judgments recovered at law against W., H.'s execution having priority. The plaintiff B. and D. (the latter having the control of H's execution), severally inquired of the vendor whether, if he purchased at sheriff's sale, the vendor would give him the benefit of the contract, and each had received a favorable answer. The defendant D. became the purchaser at sheriff's sale at a fair price. Meanwhile, the vendor had brought an action of ejectment to put an end to the original contract, and after the sheriff's sale executed a writ of *habere facias possessionem*, but subsequently accepted D. as the assignee of the contract, and received payment from him of the arrears without objection by B. Two years afterwards B., who had kept alive his execution against W's land, filed a bill against D., claiming that he, B., was entitled to a lien on the interest acquired by D. in the land under his agreement with the vendor. Bill dismissed with costs.

Burnham v. Dennistoun, 490.

EQUITABLE MORTGAGE.

(BY DEPOSIT OF TITLE DEEDS.)

Where a mortgage was created by the deposit of title deeds, and the borrower signed a memorandum stating the sum loaned and times for repayment; and agreeing to execute a writing to enable the lender to transfer or control certain mortgages so deposited: *Held*, that this memorandum did not require registration to secure its priority over a

subsequently registered incumbrance: such memorandam not being, in the language of the act, "a deed, conveyance or assurance affecting lands."

Harrison v. Armour, 303.

EXAMINATION OF CO-DEFENDANT.

See "Practice," 1.

EXECUTION CREDITOR.

Where the owner of land sells the timber upon it, after a writ against his lands is placed in the sheriff's hands, and the purchaser cuts down and removes the timber before an injunction is obtained, he is accountable to the execution creditor for the timber so cut and removed.

Brown v. Sage, 239.

EXECUTORS.

1. (THEIR RIGHT OF RETAINER AND TO BE RECOUPED.)

See "Administration," 2.

2. (THEIR RIGHT TO COMPROMISE A SUIT.)

See "Administration," 5, 6.

See also "Suit Pending."

3. (SALE BY, TO LEGATEES.)

See "Will," 1.

4. Where an executor had retained money in his hunds unemployed, for which on passing his accounts he was charged by the Accountant with interest and rests: *Held*, notwithstanding that, having reference to the condition of the estate and the facts of the case, he should be allowed his commission and costs of the suit.

Gould v. Burritt, 523.

EVIDENCE.

See "Set-off."

FATHER AND SON.

See "Fraudulent Judgment."

"Possession—Title by."

FIERI FACIAS.

See "Equitable Estate."

FIXTURES.

A creditor, having execution against lands, cannot claim fixtures which do not belong to his debtor.

Brown v. Sage, 239.

FORECLOSURE.

See "Practice," 12, 13.

(SPECIAL DECREE OF.)

See "Mortgage," etc., 6.

FRAUDULENT CONVEYANCE.

1. M. B, an unmarried woman, resided for some years with her sister and brother-in-law. He, having become involved in his circumstances, conveyed his real estate to M. B., for the alleged consideration of wages due her as a hired servant. Promissory notes were also made and given to M. B. by her brother-in-law, and on these notes be-

coming due, judgment was obtained, under which M. B. sold the farm stock and other personal property of her brother-in-law, becoming herself the purchaser. The evidence as to *bonâ fides* and good consideration for the transfer of the land and the giving of the notes was unsatisfactory, and the conveyance was set aside as fraudulent, at the instance of the creditors of the grantor.

Ball v. Ballantyne, 199.

2. Where a debtor executes a fraudulent conveyance, in respect of which relief in equity may have to be sought, the proper course for the creditor is, not to have the property sold by the sheriff at a great undervalue, and then to come into equity to have the sale confirmed; but to come into equity in the first instance to have the fraudulent conveyance set aside, and the property then sold.

Kerr v. Bain, 423.

See also "Sheriff's Sale," 3.

FRAUDULENT JUDGMENT

1. In a suit to set aside a judgment obtained by a son against his father, as being fraudulent against creditors, it was alleged by both that after the son had attained twenty-one years of age, he had remained working with his father, as his farmer and overseer, the father promising to pay him what was just and right, but no sum as wages was ever named. This alleged agreement continued for about eight years, the son in the meantime having married and brought his wife home to reside in his father's house, both of them being clothed and maintained by the father. The father having become embarrassed, by reason of his being liable as indorser on notes of his brother, on some of which actions had been commenced against him, came to a settlement of accounts with the son, he demanding, and the father agreeing to give $15 a month to the son and $5 a month to the son's wife, during her residence in the house, as wages. For the amount so agreed upon, the father gave his promissory note to the son, payable on demand, which note was immediately put in suit, and the action not being defended, judgment and execution therein were obtained before the plaintiff could recover judgment in her action which was defended. About the same time the father conveyed his farm to the son for $1,300, alleged to have been paid by the father of the son's wife, the property at the time being subject to several mortgages, one of them for $2,000 having been given by the father in payment of a small lot of land near Sarnia, but which neither the father nor son had ever seen. The court [*Spragge* V.C., dissenting,] under the circumstances, declared the judgment and execution fraudulent and void as against the plaintiff, and ordered the defendants to pay the costs of the suit.

Douglass v. Ward, 39.

2. A. being largely indebted to B. & Co., and the owner in fee of certain real estate, conveyed the same to his son, without consideration. B. & Co. recovered judgment against A., on which an execution against his lands was issued in May, 1864, but in February previous the son had conveyed the premises in question to D., taking as the consideration for the purchase thereof, his promissory notes not yet due, and still unpaid. Evidence establishing collusion between A., his son, and D., was adduced, and both the conveyances were declared fraudulent, and the lands held subject to the plaintiff's judgment debt.

Buchanan v. Dinsley, 132.

GRANT FROM THE CROWN.

1. A patent was issued to A., in consideration of improvements having been made on the land, but the benefit of these improvements had, on an arbitration between A. and B., been adjudged to B., and the adjudication was in no way impeached or discredited; and it was shewn to be the settled policy and practice of the Crown to issue patents in such cases to those entitled to the benefit of the improvements: *Held*, that though the award was known to the officers of the Government when the patent was issued, the patent should be set aside at the suit of the Attorney-General, as having been issued through fraud, and in error and improvidence.

The Att'y-General v. McNulty, 281.

[Affirmed on re-hearing, 581.]

2. A bill was filed, alleging that by an act of the legislature the Grand River Navigation Company were empowered to take such land as might be necessary for the purposes of the act, subject to payment; and in case of dispute arbitrators were named to determine the amount; and compensation was in the same manner to be made for any Indian lands required for the undertaking. The bill alleged that the company having claimed, as being necessary for the purposes of the work, a tract of land containing about ninety-one acres, and forming part of the village of Cayuga, which was then occupied and improved by several parties, an arbitration was had in respect thereof on the 30th day of October, 1847, when an award was made directing the payment of £159 5s., for the right of the Indians therein, but that no notice was given to the occupiers of the land, nor was anything further done in the matter until January, 1864, when the assignees of the company applied to the government for the absolute purchase of the land, untruly representing, as the bill alleged, that the company had gone into possession under the award, and were then in peaceable possession; that the only improvements made on the land, were so made by squatters with knowledge of the company's right; and the applicants

were thereupon allowed to purchase for the sum awarded, and interest, although in reality the land, by the improvements of the occupiers, was then worth ten times the amount. The bill prayed to set aside the patent as having been issued through fraud, error, improvidence and mistake: a demurrer by the patentees for want of equity was overruled.

Westbrook v. The Attorney-General, ...330.

3. Whether, although a person may have been entitled to a grant from the Crown, yet if, on his applying, therefor, he knowingly makes grossly false representations to the Government, the patent may not be set aside.—*Quære.*—*Ib.*

GUARDIAN AD LITEM.

(DUTY OF).

Where the guardian for infant defendants, being notified, did not appear at the hearing, and their interests, which were not fully ascertained, were not represented, the court refused to pronounce a decree in their absence, removed the guardian, appointed another in his stead, and directed the cause to be again brought on.

Sanborn v. Sanborn, 123.

HEIRSHIP.

(ADMISSION OF.)

See "Practice," 6.

ILLEGAL PURPOSE.

(CONVEYANCE FOR.)

See "Conveyance," 1.

IMPROVEMENTS OF REAL ESTATE.

(WHEN ALLOWED FOR, TO ADMINISTRATOR.)

See "Administration," 3.

INADEQUACY OF PRICE.

See "Sheriff's Sale."

INFANTS.

In cases where, if money belonged to an infant residing in Upper Canada, the court would invest it for the benefit of the infant, the court will, where the infant is resident in a foreign country, direct the moneys to be invested for his benefit in the securities of such foreign country.

Sanborn v. Sanborn, 359.

See also "Administration," 3.

"Practice," 12, 13.

"Specific Performance," 2.

INJUNCTION.

V. and D., traders, made an assignment to the plaintiffs on the 9th of January, 1865, as insolvents, and in pursuance of the provisions of the Act of 1864. A judgment at law having been obtained against V., his interest in the partnership assets was sold for a nominal consideration to C., who had notice of the insolvency proceedings. C. then entered into possession of, and

otherwise interfered with, the partnership goods, so as to hinder the plaintiffs from exercising the duties of their office; an injunction was thereupon granted on application of the assignees, to restrain the defendant from further interference.

Wilson v. Corby, 92.

2. An injunction granted to restrain trustees of a University founded by Royal Charter removing a Professor thereof.

Weir v. Mathieson, 383.

See also "Execution Creditor."

"Vendor and Purchaser," 3.

INSOLVENCY.

1. Two partners, before the passing of the Insolvency Act, assigned their joint estate and separate estates together, for the benefit of their joint and separate creditors, *paripassu*. An assignee under the Act having been afterwards appointed, he filed a bill to set aside the previous assignments, on the ground that, to put the separate creditors of each on an equality with the joint creditors in respect of the joint property, and of the separate property of the other partner, was a fraud on the joint creditors. But it appearing by evidence that the separate estates of both partners were solvent, and that the equality complained of was an advantage to the joint creditors, the bill was dismissed with costs.

McDonald v. McCallum, 469.

2. A bill was filed by assignees under the Insolvency Act to set aside a settlement executed by the insolvent, on the marriage of his daughter, with a secret trust in his own favour. The bill charged that the insolvent defendant was in the enjoyment of the property, and prayed costs against all the defendants. A demurrer by the insolvent, on the ground that he was not a proper party to such a bill, was allowed.

Wilson v. Chisholm, 471.

[Assignee in,—Entitled to aid of court against persons improperly interfering.]

See "Injunction," 1.

INSOLVENCY ACT.

A voluntary assignment for the benefit of creditors, not executed in pursuance of the provisions of the Insolvency Act, is void as against assignees appointed under the Act, where such assignment was the act of insolvency on which the attachment was issued.

Wilson v. Cramp, 444.

INSURANCE.

The agent of an insurance company, employed to receive applications, on application by the plaintiff, and receipt from him of the usual premium, gave to the plaintiff a receipt therefor, "subject to approval by the Board of Directors, money and note to be returned in case appli-

cation is rejected." It was alleged, that this was verbally understood between the agent and the assured to be a final agreement for the policy and an acceptance of the risk. The directors having refused to effect the proposed insurance, and returned the premium note given to the agent. *Held*, not liable to make good a loss.

Held, also, that the agent's authority did not extend to the making of final agreements for insurance or to the insuring temporarily of property, not of the classes specified in printed circulars of the company, or such as they were accustomed to insure.

Henry v. The Agricultural Mutual Assurance Co., 125.

INVESTMENT OF MONEYS.

(BY EXECUTORS.)

See "Administration," 5.

JUDGMENTS.

(ACT ABOLISHING REGISTRATION OF.)

See "Lis Pendens."

LANDS.

(BOUGHT FOR PURPOSES OF TRADE.)

See "Partnership Property."

LEAVE OF COURT.

(NOTICE OF MOTION BY.)

See "Practice," 3.

LIEN.

See "Equitable Execution."
"Vendor's Lien."

LIS PENDENS.

In September, 1855, one G. entered into a contract (which was never registered) with one M., for the sale to him of a lot of land; in October, 1857, the plaintiffs recovered and registered a judgment against G., and thereby acquired priority over M., on the lot sold by him, and in March, 1861, filed a bill against G., to enforce their judgment against the lot contracted to be sold to M., as well as against other lands of G., to which bill the plaintiffs (having no notice of the contract) did not make M. a party, a certificate *lis pendens* being however registered. In March, 1862, M. obtained from G., under the contract, a conveyance of the lot, which he registered in September, 1362, and the plaintiffs becoming aware thereof applied *ex parte* on the 10th June, 1864, under the order of 29th June, 1861, for, and obtained, an order to make M. a party in the Master's office. *Held*, on appeal to the full court, (*Vankoughnet* C., *dissentiente*) that the suit was not pending as against M. prior to the date of the order to make him a party: that therefore there was no suit pending against him on the 18th May, 1861, and in consequence, that the lien created by the registration of the plaintiff's judgment against the lot, the subject of the contract, was gone, and that M. was not a necessary or proper party to the suit, and that the order to make him a partner should be discharged.

Juson v. Gardiner, 23.

LOWER CANADA.

(LAW OF.)

See "Married Woman," 1.

LUNACY.

A special act, passed in Upper Canada in 1827, authorized a commission to issue to enquire into the lunacy of one P. V.; and, if he should be found a lunatic, the act directed a committee of his estate to be appointed, and authorized such committee to sell his goods and lands; and to invest the proceeds in bank stock or real securities; and enacted that whatever remained of such investments at the lunatic's death, should be distributed among his legal representatives according to law:

Held, that such residue was personal estate, and was to be distributed among the next of kin.

Clarke v. Ruttan, 416.

See also "Practice," 4.

MAINTENANCE.

(OF INFANTS WHEN ALLOWED FOR.)

See "Administration," 3.

MARRIED WOMAN.

1. By an ante-nuptial settlement made in Lower Canada, in 1833, according to the laws there in force, it was agreed between the parties to the proposed marriage that no communion of property between them should exist, but that each should hold and continue to enjoy what each then had or should thereafter acquire. In 1848, certain goods and chattels of the husband were sold at sheriff's sale, on executions against the husband, and, having been bought in by a third party, were, by a deed of donation, conveyed to the wife for her separate use. The parties having removed to Upper Canada, brought with them these goods, which were seized under executions, issued on judgments obtained against the husband.

Held, that the marriage settlement and deed of donation properly vested the goods therein mentioned in the wife, and that they were not liable to seizure for her husband's debts.

Ryland v. Alnutt, 135.

(REFERENCE TO ARBITRATION BY.)

2. A. having duly made his last will and testament, whereby he devised certain real estate, in separate parcels, to B. and C., afterwards incumbered these lands, which incumbrance was unremoved at the time of his death. B. was a *feme covert*, and questions having arisen between B. and C. as to the amount of the incumbrance to be borne by each, they by mutual bonds, in which B. and her husband joined, agreed to refer such questions to arbitration; and an award having been made between these parties, *Held*, that B. being a *feme covert* could not enter into such an agreement to refer, and that the provisions of the law, as to conveyances by married women of their real estates, did

not apply to agreements to refer, and that therefore such agreement and award were not binding on her.

Bagley v. Humphries, 118.

(MISREPRESENTATION BY.)

3. Where a married woman joined with her husband in making misrepresentations to the executor of a deceased person in order to obtain possession of a chattel belonging to the testator, the court, upon appeal from the Master, *held* her to be responsible for such misrepresentation equally with a person *sui juris*, and overruled an objection to the finding of the Master, charging her with the value of the chattel.

Blain v. Terryberry, 286.

MASTER'S REPORT.

(REFERRING BACK.)

See "Practice," 7.

MERGER.

1. Where a mortgagee of lands buys up the equity of redemption, taking a conveyance to himself, his charge will merge or not, according to what may appear to have been the bargain between the parties to the transaction at the time of his obtaining the transfer.

Finlayson v. Mills, 218.

2. Where a derivative mortgagee took a conveyance from the original mortgagors, and there was no express stipulation as to whether there should be a merger or not: but the conveyance taken from the mortgagors was therein declared to be made in consideration of the settlement of a suit of foreclosure between the parties to the deed, and in satisfaction of the grantee's lien, claim and interest on the property, and subject to the lien and interest of the original mortgagee: and the grantee gave to one of the mortgagors a bond of indemnity against any claim that the original mortgagees might have against him in respect of the original mortgage debt; *Held*, that the debt to the grantee (the derivative mortgagee) was at an end, and that the balance due the original mortgagee was the only charge on the property.—*Ib.*

3. Premises having been twice mortgaged were sold at sheriff's sale to S., who afterwards obtained an assignment to himself of the first mortgage. *Held*, that he might still claim the sum due on the first mortgage, no merger having taken place. *Semble*, that in this respect our law is more favourable to S.'s position than English law would be.

Elliott v. Jayne, 412.

MISJOINDER.

See "Pleading," 3.

MISREPRESENTATION.

(BY MARRIED WOMAN.)

See "Married Woman," 2.

MISTAKE.

A division of the residuary personal estate of a testator was made between his legatees, with their concurrence, appropriating to one of them, as part of her share, a mortgage for about £10,000, assumed to be good, but which, from defective title and other causes, was not worth one-fourth of that sum: *Held*, that, in consequence of the mistake as to the character and value of the mortgage, the appropriation was not binding on such legatee.

Clarke v. Hawke, 527.

MORTGAGE, MORTGAGOR, AND MORTGAGEE.

1. One partner of a firm gave as security for half of the partnership indebtedness a mortgage on his separate real estate, the other partner gave an indorsed note for the remaining portion of the debt; subsequently payments were made to the creditor on account of the joint debt, which he credited on the note, claiming to hold the mortgage for the entire balance. *Held*, that an assignee of the mortgagor was entitled to have one-half of all sums which had been paid out of the partnership assets on account of the debt credited on the mortgage security.

Moore v. Riddell, 69.

2. In a redemption suit by the second mortgagee against the first, it appeared that the equity of redemption had become vested in the first mortgagee, and that he had entered into possession of the premises, and had cut and removed timber therefrom, to a greater value than the amount due on his mortgage. *Held*, that the first mortgagee was only bound to account for the value of such timber and occupation rent, as was taken or received by him as mortgagee, and not for that taken or received in his other capacity, as owner of the equity of redemption; but that the second mortgagee might ask for a receiver.

Steinhoff v. Brown, 114.

3. Where a mortgagor becomes bankrupt the mortgagee is not compelled to go in under the act, but may proceed to sell the property under a power of sale in his mortgage.

Gordon v. Ross, 124.

4. A mortgagee of land, part of which was taken by a railway company, was offered £100 as compensation for the land so taken, which he refused; and the matter having been referred to arbitration, £30 only was awarded. On a bill filed to redeem: *Held*, that under the circumstances, he was chargeable with the sum awarded and no more.

Gunn v. McDonald, 140.

5. A., the equitable owner of property, had it conveyed to his son, a minor, in trust for A. himself. A. afterwards signed the son's name to a mortgage of the property to a creditor, and

added his own name as witness. *Held*, that the instrument, though void at law, created a valid charge in equity.

Dennistoun v. Fyfe, 372.

6. V. executed a mortgage on certain property to A., then sold part of the property to H., then mortgaged the residue with other property to P., who obtained an assignment from A. of his mortgage, and filed a bill of foreclosure against V. & H. The proper form of the decree in such case stated.

Perkins v. Vanderlip, 488.

7. Where a mortgage was, through error, created upon a wrong lot of land, the mortgagor owning only the land intended to be embraced in it, and having no title to that actually conveyed, and he subsequently sold the land to which he had title; the court, upon a bill filed for that purpose, ordered him to account for the proceeds of the sale not exceeding the amount secured by the mortgage, with interest and costs of the suit.

Lundy v. McKamis, 578.

See also "Merger."

MOTION.

(REFUSED.)

See "Practice," 2.

NOTICE OF MOTION.

(BY LEAVE OF COURT.)

See "Practice," 3.

OCCUPATION RENT.

(WHEN MORTGAGEE, BEING ALSO OWNER OF EQUITY OF REDEMPTION, CHARGEABLE WITH.)

See "Mortgage," &c., 2.

PARTIES.

See "Insolvency," 2.
"Pleading," 2, 4, 5.
"Practice," 13.

PARTITION.

See "Trusts, Trustee and *Cestui que* Trust," 1.

PARTNERS.

See "Insolvency," 1.

PARTNERSHIP DEBT.

See "Mortgage," &c., 1.

PARTNERSHIP PROPERTY.

Persons engaged in the "oil business" purchased land, on parts of which they sank wells, and leased or sold other portions thereof to various persons desirous of extracting oil from them. *Held*, that such lands were part of the partnership assets and to be treated as personal property.

Sanborn v. Sanborn, 359.

PAYMENTS.

(APPLICATION OF.)

See "Mortgage," &c., 1.

PLEADING.

1. Where the maker of a promissory note was sued thereon, and instead of raising the defence at law, that the note had been given without consideration in that, save as to part, no value had been received by the maker, pleaded that the plaintiff in the action was not the holder of the note, and a verdict was rendered against the defendant for the full amount thereof, for which execution against lands was sued out and placed in the sheriff's hands; whereupon the defendant in the action filed a bill to restrain proceedings at law. A demurrer for want of equity was allowed.

Leitch v. Leitch, 81.

2. A bill filed by A. & B., as executors of the deceased mortgagee to foreclose, did not allege that probate had issued to them. *Held*, defective on demurrer. *Held*, also that the heirs of the deceased mortgagee, or the person beneficially interested under his will, were not necessary parties to such suit.

Lawrence v. Humphries, 209.

3. Several persons being in possession of separate portions of crown land filed a bill, claiming to have, by the invariable usage of the Government, a pre-emptive right, each to the portion he was in possession of, alleging that a patent had been obtained for all the lands by a defendant through fraud, and praying that the patent might be rescinded. A demurrer to the bill for misjoinder was allowed.

Westbrooke v. The Att. Gen. 264.

4. To a bill by a mortgagee for a sale after the mortgagor's death, the personal representative of the mortgagor is a necessary party; but not to a bill for foreclosure.

White v. Haight, 420.

5. To a suit by a surety against the creditor for an assignment by him of a judgment recovered against the debtor, the debtor is a necessary party.

Cockburn v. Gillespie, 465.

6. Where a testator devised his real and personal estate to A., subject to a charge of $200 in favour of B.; and A., after the testator's death, mortgaged the real estate to B. to secure a further sum; a bill by B. for payment of the two sums, praying in default a foreclosure or sale, was held not to be multifarious.

Kelly v. Ardell, 579.

7. In such a case the personal representative of the testator was held to be a necessary party, and an allegation that the defendant had been appointed executor by the will, was held insufficient in the absence of any allegation that he had proved the will, or had acted as executor.—*Ib.*

See also "Insolvency," 2.

POSSESSION.

1. Possession is notice of the title of the party having possession, without proving notice

of such possession by the party charged with notice of such title. Attorney-General v. McNulty, 281.

[Affirmed on re-hearing, 581.]

2. The defendant's mother was in possession of a farm at the time of her second marriage, and the defendant, who was her son by a former marriage, and was a minor, lived with her. On the death of her second husband, the defendant, who had just come of age, continued with his mother on the farm and managed it. *Held*, that he could not claim the farm against a person to whom the mother subsequently mortgaged it.

White v. Haight, 420.

(TITLE BY.)

3. The defendant's father had for sixteen years been in possession of land, to which he had no title, legal or equitable, and the legal owner then conveyed it to the defendant, a youth about twelve years old, who was living on the lot with his father, and continued to do so for eleven years thereafter, when the property was sold on an execution against the father. *Held*, that the possession, after the execution of the deed, was the possession of the son; that the father acquired no title thereby against the son; and that the sheriff's deed was void against the son, and should be set aside as a cloud on his title.

McKinnon v. McDonald, 432.

POWER OF SALE.

See "Mortgage," &c., 3.

PRACTICE.

1. Where the plaintiff examines several defendants before answer, the examination of the one cannot be read against the other defendants at the hearing of the cause.

Douglass v. Ward, 39.

2. Where a motion stands over, and afterwards the party moving gives notice of abandoning the application, the costs which are given against him are not those of an abandoned motion, but of a motion refused.

Dennison v. Devlin, 84.

3. Where an injunction is granted to a particular day, which is not a motion day, and the writ is served together with a notice of motion for that day to extend the injunction, the notice is not irregular, though it omits to mention that such notice is given by leave of the court.

Johnson v. Cass, 117.

4. This court in a proper case, will, upon petition, quash a commission of lunacy, and the inquisition taken under it, without putting the party to the expense and delay of a traverse; but in such a case, where the alleged lunatic had so conducted himself as to afford grounds for the application being made against him, the court, while quashing the inquisition which had been

taken, refused to charge the party applying for the commission with costs.

Re Milne, 153.

5. A creditor filed a bill to set aside a deed as fraudulent against creditors, and the grantee by his answer disclaimed and alleged that the deed was executed without his knowledge or consent, and that when he became aware of it, he had repudiated it. *Held*, that the grantee, having been properly made a defendant, was not entitled to his costs.

Shuttleworth v. Brown, 237.

6. Where a bill was filed to obtain the opinion of the court as to the validity of certain bequests in a will, and the heirship of the defendant, who claimed to be heir and next of kin, was not admitted by the defendants, who claimed the bequests, a preliminary reference was directed to the Master, to inquire who was heir and next of kin; and further directions and costs were reserved.

Elmsley v. Madden, 232.

7. Where both parties had proceeded on the assumption that the evidence before the Master, on taking the accounts under the decree, would be before the court on further directions, and had in consequence allowed mutual claims of interest and commission to be submitted by the Master to the court, without his setting forth sufficient to enable the court to dispose of them; and the report was, besides, so expressed as to render the defendants chargeable with sums for which it did not appear to have been intended to make them liable, the court, on further directions, referred the case back to the Master to review his report.

Gould v. Burritt, 234.

8. A. having an interest in improvements for which, in a suit between B., his vendor, and C., B. obtained a decree, *Held*, that A. could not, by petition, make himself a party to such suit; and that his remedy was by bill.

Slater v. Young, 268.

9. On the dismissal of a bill, costs were taxed to the defendants, and execution issued against the plaintiff, which was returned "*nulla bona*." Two of the defendants, as administrators, held moneys, part of which would, on distribution, belong to the plaintiff, and which they now applied for leave to set-off against the taxed costs. Under the circumstances the motion was refused.

Black v. Black, 270.

10. The court being dissatisfied with the mode in which the argument was conducted, and the brief of the pleadings had been prepared, though it allowed a demurrer to the bill, liquidated the costs at $10 only.

McFadgen v. Stewart, 272.

11. Unless where the parties to be charged are too numerous to be made parties to the bill, or there is some other special reason, the 42nd of the General Orders of 3rd June, 1853, is confined to

cases where no direct relief is sought against the parties to be added; or where the object is to bind their interests by the proceedings in a manner similar to what is provided for by the 6th of the same Orders.

Rolph v. The Upper Canada Building Society, 275.

12. In a foreclosure suit a question was raised as to whether the equity of redemption in the principal portion of the mortgaged premises was in the defendants, against whom the bill had been taken *pro confesso*, and who did not appear at the hearing, or in the other defendants, some of whom were infants; the court refused to decide this question at the hearing, at the instance of the defendants who appeared.

Robinson v. Dobson, 357.

13. Where a mortgagor had conveyed his equity of redemption to the trustees of his marraige settlement in trust for his wife for life, remainder to his children; and a bill of foreclosure was filed after his death against the trustees and widow, to which bill the children, being infants, were not made parties: the court granted a decree containing the usual reference to inquire whether a sale or foreclosure would be more beneficial to the infants; and gave liberty to the Master to make the infants parties in his office if he should see fit.

Dickson v. Draper, 362.

14. Amendments may be made at the hearing of causes under the new practice, as at *Nisi Prius*.

Fraser v. Rodney, 426.

15. Where a bill prayed specific performance of an agreement, and for an injunction against waste, and an account of waste committed, and the court was of opinion that the plaintiff's remedy, except as to the injunction, was at law, the decree was made without costs: the objection to the jurisdiction appearing by the bill, and not being raised until the hearing of the cause.

Raven v. Lovelass, 435.

16. Where new plaintiffs are added by amendment, they have at the hearing the same rights, and the court has the same discretion in the case of a misjoinder, as if they had been plaintiffs originally; and the court may, under the General Orders, treat such new plaintiffs as the sole plaintiffs.

Mason v. Seney, 447.

17. Where a conveyance is set aside as void against creditors, a sale ordered, and costs up to the hearing given against the defendants; these costs should be paid by the defendants immediately, where it is manifest the property is not sufficient to pay the creditors in full.

Gill v. Tyrrell, 474.

18. A trustee who severed in his defence, because his co-trustee had refused to act in conjunction with him in the manage-

ment of the estate, was, under the circumstances, refused his costs.

Gibson v. Annis, 481.

19. An application to correct a clerical error in a decree or order must, as a general rule, be made on notice.

Radenhurst v. Reynolds, 521.

See also "Disputed Title,"

"Lis Pendens,"

"Trusts," &c.

PRAYER FOR FURTHER RELIEF.

See "Specific Performance," 2.

PRINCIPAL AND AGENT.

An agent had not answered for some months urgent letters received from his principal in England. The principal thereupon, being alarmed, employed solicitors here to see to his interests in the matter; but the agent, though repeatedly applied to by such solicitors during nearly three weeks, gave the solicitors no information, or even an interview, and they consequently filed a bill for an account and injunction. *Held*, that the defendant, by reason of his neglect must pay the costs up to the hearing, though the court was satisfied his neglect did not proceed from any dishonesty on his part, or any intention of withholding information from his principal.

Douglass v. Woodside, 375.

See also "Insurance."

"Vendor and Purchaser."

PRINCIPAL AND SURETY.

1. The payee of a promissory note, indorsed for the accommodation of the maker, having obtained judgment against the maker and indorser, executed a release to the maker, reserving all his rights against the indorser. *Held*, that he was entitled to do so, and might still proceed to enforce the judgment against the indorser.

Bell v. Manning, 142.

2. W. owed A. $400. To secure this debt S., as surety, joined with W. in a promissory note to the creditor (A.) for the amount, payable at a future date with interest. W., the principal, without notice to the surety (S.), agreed in writing to pay interest at 15 per cent. as a condition of the note being accepted, and of the time mentioned in the agreement being given: *Held*, that the surety was discharged from liability.

Shaver v. Allison, 356.

[Affirmed on re-hearing.]

3. Where a surety pays a debt, and claims an assignment of a judgment which the creditor had recovered against the debtor, and it is doubtful whether the payment is a satisfaction of the

judgment, the creditor may properly make the assignment, and leave the debtor to set up that defence if proceedings are taken on the judgment.

Cockburn v. Gillespie, 465.

4. A. guaranteed to B. (a creditor of C.) certain composition notes, which B. was to indorse for the other creditors of C. B. represented to one or more of the creditors, before the composition was agreed to, that he (B.) was to accept a like composition himself, but he had a secret bargain with C. that he should be paid in full. *Held*, on grounds of public policy, that this secret bargain vitiated the whole transaction, and that A. was not liable to B. on his guarantee.

Clarke v. Ritchey, 499.

5. Various proposals having been made for a composition by all the creditors of an insolvent person, A. executed a deed to a trustee, reciting that an agreement to that effect had been come to, and conveying certain property to the trustee to secure any person or persons who might indorse the composition note which the debtors were to receive. B., a creditor, indorsed the notes of the other creditors, but was to receive payment in full of his own demand. *Held*, that the trust deed was not a security for the notes he indorsed, the deed being available only if the composition was accepted by all the creditors.—*Ib.*

PRIVILEGED COMMUNICATIONS.

1. A defendant, one of the members of the firm of G. & C., when proving a claim in the Master's office, was called on to produce "all the letters to or from Mr. L. (his solicitor), in reference to the questions involved in the proceeding of proving the claim of G. & C., excepting such as passed in contemplation of G. &. C. proving their claim in the present suit." *Held*, that he was bound to do so.

McDonald v. Putman, 258.

2. The distinction between the protection afforded to solicitors and clients, respectively, with regard to communications made pending, or in anticipation of litigation, pointed out.—*Ib.*

PROBATE.

See "Pleading," 2.

PROSSER v. EDMONDS.

(THE RULE IN, CONSIDERED.)

Mason v. Seney, 447.

PUBLIC POLICY.

(CONSIDERATION AGAINST.)

See "Conveyance," 1.

PURCHASE FOR VALUE.

A plea of purchase for value, without notice, cannot be set up against the Crown.

The Attorney General v. McNulty, 281.

[Affirmed on re-hearing, 581.]

PURCHASE MONEY.

(PAYMENT OF, INTO COURT, PENDING REFERENCE AS TO TITLE.)

See "Specific Performance," 8.

REAL ESTATE.

(PARTNERSHIP ASSETS.)

A bill was filed by a surviving partner against the representatives of the deceased partner, praying an account of certain partnership dealings, to which a demurrer for want of equity was allowed, on the ground that the relief sought was barred by the lapse of more than six years between the death of the deceased partner and the filing of the bill; but leave was given to amend, with the view of shewing that certain lands held by the deceased partner, and which had descended to his heir at law, had been purchased with partnership assets, and that therefore there was a resulting trust in favor of the plaintiff.

McFadgen v. Stewart, 272.

RECEIVER.

See "Mortgage," &c., 2.

REDEMPTION.

In July, 1859, F., being a member of the firm of R. M. & Co., mortgaged certain lands, the property of the firm, to the defendant C. In September, 1860, by the "Act and Warrant," (under Imperial Act 19 & 20 Vic. ch. 79.) of the Sheriff Depute of Lanarkshire, in Scotland, all the real and personal estate of R. M. & Co. in Canada, as well as in Scotland, became vested in R., under the bankruptcy laws of that country, as trustee; and in August, 1861, the equity of redemption vested in R. & B. as trustees. In June, 1861, C., being ignorant of the proceedings in bankruptcy, filed his bill of foreclosure against F., who took the copy served on him to R.'s solicitor, but no notice was taken of it; and, in 1862, a final order of foreclosure was obtained and registered by C., who, in 1863, conveyed to defendant G. In 1864, R. & B. filed the present bill for redemption. *Held*, that the "Act and Warrant," though containing no attestation clause, without a witness to its execution, and specifying no lands in Upper Canada, was capable of registration. *Held*, further, that the transferee of real estate in general terms must, at his peril, register the instrument, under which he claims, in the city, town, township, or place in which the lands lie; and that the conduct of the plaintiffs, after service upon F. and notice to R.'s solicitor, disentitled them to redeem.

Robinson v. Carpenter, 293.

REFORMING DEEDS.

A., being in possession of the east half of a lot, claiming title thereto, executed a mortgage on the west half. On a bill against the heir of A. to reform the mortgage by substituting the

east half for the west half, it was shewn that A. had no claim to the west half, and that that portion of the lot was an improved farm, of which others had, for many years, been in possession. The defendant neither admitted nor denied the mistake. *Held*, that the mistake was sufficiently established to entitle the plaintiff to a decree for reforming the mortgage.

White v. Haight, 420.

REGISTRATION.

(OF JUDGMENTS.)

See "Lis Pendens."

Registration of a mortgage held not to be invalidated by the mortgagee signing it, and also the witness to the execution of the instrument subscribing his name to it after it had been registered.

Muir v. Dunnet, 85.

(WHAT IS CAPABLE OF REGISTRATION.)

See "Equitable Mortgage."
"Redemption."

RELEASE.

(OF DEBTOR.)

See "Principal and Surety."

SECURITY.

(IN FAVOUR OF PARTIES NOT NAMED.)

See "Assignee of Mortgage," 2.

SEPARATE SECURITY.

(BY ONE PARTNER.)

See "Mortgage," 1.

SETT OFF.

In the view of equity the setting off one demand against another between the same parties is extremely just; and where there is any technical difficulty in the way of its being done without an agreement, the court accepts slighter evidence of such an agreement than is usually required in order to establish disputed facts.

Lundy v. McCulla, 368.

(AFTER BILL DISMISSED.)

See "Practice," 9.

SHERIFF'S SALE OF LAND.

1. Where a sheriff offered for sale, under an execution against lands, the interest of the debtor in certain lands, whatever that interest might be, not stating what it was, although the means of ascertaining what the interest was were convenient, and the interest itself was actually known to the judgment creditor, and partially known to the sheriff, but not mentioned to the audience, the sale was set aside, because of the uncertainty of the interest or estate put up for sale; and the court also held that the sale could not be upheld, for the further reason, that the interest of the debtor was a life estate, which he had conveyed

away absolutely, though for the purpose of a security only, and therefore that the statute for the sale of equities of redemption did not apply, the right to redeem not appearing on the face of the conveyance.

Fitzgibbon v. Duggan, 188.

2. Where an execution creditor purchased property at sheriff's sale at one-sixth of its value, the court held that effect could only be given to such a transaction as a security for the debt and costs, and not as an absolute purchase.

Kerr v. Bain, 423.

3. The plaintiff had purchased at sheriff's sale for a small sum, the interest of his debtor in property which the debtor had previously mortgaged for a large sum, the validity of the mortgage or the amount due upon it being doubtful, the court declined to enforce the purchase as absolute; but, the plaintiff submitting to have his deed from the sheriff treated as a security for his debt, the court made a decree on that footing.

Malloch v. Plunkett, 439.

4. Where property worth £1,500 had been sold at sheriff's sale for £90 5s., in consequence of the title being disputed, the court refused to give effect to the sheriff's deed as an absolute purchase.

Chalmers v. Piggott, 475.

SOLICITOR AND CLIENT.

See "Privileged Communications."

SPECIFIC PERFORMANCE.

1. A contract to be specifically performed must be equal, fair, and certain in its terms, and founded on good consideration. Where, therefore, a woman, under the impression that she held a life interest in two acres of land, when in reality she was entitled to the fee thereof, and also an annual allowance of £10, partly in cash, and partly in produce, charged upon other lands, agreed to sell her interest in such two acres to the owner of the other lands, in consideration of his paying her the £10 all in cash, the court, under the circumstances, refused to enforce the specific performance of the agreement.

Earley v. McGill, 75.

2. The widow and infant heirs of C. were entitled to certain premises, subject to a mortgage to E. By agreement between the widow, E., and W., the premises were conveyed to W., upon a verbal understanding that he should retain a part of the premises, equal in value to the sum due on E.'s mortgage, which he was to assume, and that he should convey the remainder of the land to the widow, for the benefit of herself and children. The conveyance to W. having been made by E., the widow and infant heirs filed their bill, seeking a specific performance of the agreement to convey the portion agreed on to them. On demurrer for want of equity, *Held*, following Graham v. Chalmers, that the specific relief sought could

not be decreed, but that under the general prayer, and the case stated, the plaintiffs were entitled to some relief, and the demurrer was therefore overruled.

Clark v. Eby, 98.

3. A purchaser of land, at public auction, from the Trust and Loan Company, filed a bill for specific performance, injunction, and compensation, alleging misconduct of the company's agents at the sale and otherwise, and consequent damage to the plaintiff, which allegations were partly disproved by the evidence; however, as the delay which occurred in completing the title to the plaintiff was owing in a great measure to the defendants, the court, under the circumstances, made a decree for specific performance and injunction; but without costs or compensation.

Mossop. v. The Trust and Loan Company, 204.

4. A vendor who contracts for the sale of property of which he has not taken possession, is accountable to the purchaser for dilapidations by the parties in possession before the vendor takes the possession from them.

Fisken v. Wride, 245.

5. A vendor in possession is, generally speaking, responsible for dilapidations that take place, before he shews a good title, where the dilapidations are such as a prudent owner, or his tenants, might have prevented.—*Ib.*

6. Where buildings are torn down after a contract for sale, and before the purchaser takes, or was bound to take possession, the vender is *prima facie* accountable for the loss.—*Ib.*

7. Where a contract for sale of building lots provided for the immediate possession, and for the payment of the purchase money in eight annual instalments. *Held*, that the erection of two workshops on the lots by the vendees was no waiver of their right to examine the title; nor was the division of the property between them, when they dissolved their partnership, nor the acceptance of a conveyance at another time of another lot said to depend on the same title.

Darby v. Greenlees, 351.

8. In a suit against purchasers for specific performance the court refused, under the circumstances of the case, to order the purchase money into court, pending a reference as to title, though the defendants were in possession of the property.—*Ib.*

9. M. executed a mortgage in Y's favor for £50, over lot No. 11, he then holding a lease renewable in perpetuity of lot A. at a rental of £4 per annum. The rent being in arrear, judgment was obtained and execution issued by the lessor against M. therefor; Y. then agreed with M. to pay this execution, M. to assign to him the lease of lot A.; and further, it was agreed that if the lessors "will give to the

party of the first part (Y.) a deed in fee simple, or a lease perpetually renewable at the present rent, he, the party of the first part, will discharge and release a mortgage," etc., being that above mentioned. Y. afterwards obtained a conveyance from the lessors of lot A.; but it did not appear that such was made for the sum contemplated at the time of the agreement between Y. and M. Y. afterwards pressed for payment of the mortgage debt, when M. made excuses for delay, and did not rely on the agreement as a bar to Y's claim. Y. having commenced an action of ejectment on his mortgage, M's bill to stay it, and to have the agreement and subsequent purchase by Y. construed into a satisfaction of the mortgage debt, was dismissed with costs.

McKenzie v. Yielding, 406.

10. Where an answer improperly impugned the motives of the solicitor who filed the bill, the court, although it dismissed the bill with costs, directed the costs of the answer to be disallowed to the defendant.—*Ib.*

11. The plaintiff sold to the defendant a lot of land; the contract did not mention the number of acres it contained; the conveyance stated the quantity to be 200 acres more or less; the covenants did not warrant the quantity; part of the purchase money remained as a lien on the land, and many years afterwards, but before the purchase money was fully paid, the vendee discovered that there was a deficiency of 24 acres in the supposed contents of the lot: *Held*, that the vendee was not entitled to compensation from the plaintiff for deficiency as against the unpaid purchase money.

Follis v. Porter, 442.

See also "Vendor's Lien," 2.

SUIT PENDING.

(FOR SAME CAUSE OF ACTION.)

A., B. and G. were appointed executors. B., as acting executor, received a large sum belonging to his testator's estate, which he failing to account for, a suit was commenced to administer the estate. This suit was compromised by the plaintiff therein, who was a beneficiary under the testator's will, and the co-executors who took security for the sum found due from B. who agreed to cease all further interference with the estate, which was thenceforth to be managed by A.; B. continued to meddle with the estate; whereupon A. and G. filed a bill praying for an account; and for an injunction to restrain B. from all further interference with the estate. *Held*, on demurrer, that the proceedings in the former suit and its pendency were no bar to the relief sought.

Aikins v. Blain, 212.

TITLE.

(BY POSSESSION.)

See "Possession," 3.

(WAIVER OF.)

See "Specific Performance," 7.

TRADE.

(LANDS BOUGHT FOR PURPOSES OF.)

See "Partnership Property."

TRUSTS, TRUSTEE, AND CESTUI QUE TRUST.

1. The defendant, by answer, having submitted to account, as trustee, the court made a decree for an account and partition, although, without such submission in the answer, there was no evidence of the defendant holding the property in trust.

Cuthbert v. Cuthbert, 88.

2. Where a trustee deals with his *cestui que* trust for the conveyance to himself of any portion of the trust property, it rests with the trustee to shew that everything in connection with the transfer was fair and just.

Blain v. Terryberry, 286.

3. It is the duty of a trustee to use reasonable diligence to have the accounts of the trust ready, and to render them within a reasonable time after they have been asked for on behalf of the *cestuis que trustent;* and where a trustee wholly neglected this duty, though he offered his books for inspection by the parties interested, he was charged with the costs of suit up to the hearing.

Randall v. Burrowes, 364.

4. A deed purporting to convey land to M., was executed by the plaintiff under circumstances that disentitled the grantee to hold it as a valid deed entitling him to the beneficial interest in the property. The grantee, M., having afterwards sold and conveyed the lands to R., receiving part of the purchase money and a mortgage for the balance. *Held*, that on confirming the title of the purchaser (R.,) the plaintiff was entitled to the balance of the mortgage money from R., and to a decree against M. for what M. had received.

Fraser v. Rodney, 426.

5. One of several trustees filed a bill against his co-trustees and his *cestuis que* trust, to be relieved from the trust, on the grounds set forth in the bill. The other trustees, by answer, asked for the same relief on the same grounds which were applicable to all, and the *cestuis que* trust, most of whom were adults, submitted to the relief: the court granted a reference to the Master for the approval of new trustees in place of all the existing trustees.

Proudfoot v. Tiffany, 461.

6. In such a case the court, at the instance of the *cestuis que* trust, in granting the usual reference, added a direction that, if the Master, on taking the evidence, found sufficient reason for reducing the number of trustees, or for the appointment of one of the *cestuis que* trust as one of the trustees or as sole trustee, he should report the facts and reasons to the court.—*Ib.*

7. Real estate was conveyed to three trustees in trust for the settlor for life, with remainder for his children; two of the trustees died, and the settlor afterwards verbally arranged with the surviving trustee that he would release to the latter his equitable interest for life, in trust for the same children; that the trustee should thereupon appoint the settlor and his son co-trustees in the place of the two deceased trustees, and should leave the whole management during the settlor's lifetime to the son. The release, which was without consideration, was accordingly executed, and the appointment of co-trustees made. The son, with the consent of the other trustees, received the rents, but misappropriated them. *Held*, that the other trustees were not bound to make good the loss.

Mitchell v. Ritchey, 511.

See also "Mortgage," &c., 4.
"Practice," 18.

UNDERVALUE.

See "Sheriff's Sale," 2.

UNDUE INFLUENCE.

An unequal division of a residuary estate, agreed to by the parties interested, and sanctioned by the executors, was held not to be binding, where it appeared that the lady to whom the division was unjust, had agreed thereto without professional or other independent advice, with undue haste, and in ignorance of the real value of the largest item of the assets of the estate, the other party to the agreement being her brother-in-law, and being the only person, except the executors, who appeared to have had any of her confidence in matters of business.

Clarke v. Hawke, 527.

UNIVERSITY.

An injunction granted to restrain trustees of a university founded by Royal Charter removing a Professor thereof.

Weir v. Mathieson, 383.

By letters patent under the great seal, issued on the 16th of October, 1842, certain persons therein named were created a body corporate by the name of "Queen's College, at Kingston," with the style and privilege of a university, with power to appoint professors and other officers, and in case of complaint made to the trustees to institute inquiry, and in the event of any impropriety of conduct being duly proved, to admonish, reprove, suspend, or remove the person offending. *Held*, that the professorships in the institution were offices of freehold, and the trustees had not the power at their discretion without such inquiry of removing the professors, but that they held their appointments *ad vitam aut culpam;* that this court would by injunction prevent the trustees from improperly interfering with the professors in the discharge of their duties; and where

a professor had been improperly removed, the court, on decreeing him relief, and in order to do him complete justice, ordered him to be paid out of the trust funds of the institution his arrears of salary; and ordered such of the trustees as had acted in such improper removal to pay the costs of the suit.—*Ib.*

VENDOR AND PURCHASER.

1. The defendant was a trustee under the will of P. for the sale of the property in question. In 1834, a friendly suit was instituted in England (where the trustees and all the parties interested under the will resided,) for the execution of the trusts of the will, and a decree was made for the appointment of a receiver, and the sale by him of the testator's lands in Upper Canada. A receiver appointed in this suit having died, a considerable period elapsed before another was appointed. During this interval the Canadian solicitors for the estate continued to sell the lands, and manage the property as theretofore, under the authority of the trustee. While they were so acting, the plaintiff applied to them to purchase the land in question. A clerk of the solicitors, who attended to the business of the estate, had been authorized to buy a few lots for himself at the prices at which they were for sale to others; and, acting upon the strength of this general authority, he, without their knowledge, entered into a contract in his own name and behalf, with the plaintiff, for the sale of the lot at £250, and gave the plaintiff his own bond for a deed, and received from him the purchase money. The plaintiff supposed the clerk was acting for the defendant, and was authorized to act for him. The clerk sometime afterwards entered in the solicitors' book of sales, and subsequently in an account transmitted to the defendant, a sale of the lot to another person at £150, and charged the plaintiff with that amount as assignee of the pretended purchaser. A deed of conveyance to the plaintiff, reciting a sale to him at £150, was prepared by and under the directions of the clerk, and was transmitted by the solicitors with other deeds to the trustee for execution, and retained by the latter for some time, but was not executed. *Held*, that there was not any contract which this court could enforce against the trustee; but as a suit was to some extent necessary to ascertain the truth satisfactorily, and the same was rendered unnecessarily expensive by the unqualified denial of the defendant that the solicitors had any power to sell lands; the court, on dismissing the bill, refused the defendant his costs.

Ratz v. Tylee, 342.

2. Where vendors had not furnished an abstract of title notwithstanding repeated notices, and had at length brought an action at law on a note given by the purchaser for part of the purchase money, the purchaser

filed a bill alleging that, by reason of the delay, the contract was at an end, and praying an injunction to stay the suit at law. The vendors failing to justify their neglect, the court granted the injunction.

Walton v. Armstrong, 379.

3. The plaintiff sold woodland to the defendants on credit; and the agreement stipulated that any cordwood or timber removed from the premises by the defendants should be paid for at specific rates, if the plaintiff should demand such payment, the sums so paid to be credited to the defendants on instalments due or to become due. The defendants cut a quantity of cordwood and were removing it before making the stipulated payments. *Held*, that the plaintiff, as vendor, had no lien on the cordwood, and was not entitled to restrain the removal of what had been cut.

Smith v. Bell, 579.

See also "Equitable Execution."

VENDOR'S LIEN.

(FOR UNPAID PURCHASE MONEY.)

1. L. sold land to R. who paid £175 in cash, and assumed payment of two mortgages made by L. as one-third of the consideration agreed on; and a mortgage was executed by R. to secure another third of the purchase money. L's wife refusing to bar her dower, a bond was executed by R. providing for payment of the remaining one-third at a certain period. It was arranged that, in case of the death of L. or his wife before the time fixed, the money secured by the bond was to be paid within one year thereafter to the survivor. *Held*, that under these circumstances L. had not waived his vendor's lien for that portion of the purchase money secured by the bond.

Rutherford v. Rutherford, 565.

2. On the sale of land the purchaser paid a certain sum in hand, gave a mortgage on other property owned by him for another portion of the price, and for the balance four promissory notes were to be given, made by the purchaser and such other person as would render them salable without being indorsed by the vendor. One only of the notes was delivered. *Held*, that the vendor retained no lien on the property sold for any portion of the purchase money. *Held*, also, that the bill could not be sustained as a bill for specific performance; the agreement for the delivery of the notes being such as this court could not execute, and the remedy being at law for breach of the contract.

DeGear v. Smith, 570.

VOLUNTARY CONVEYANCE.

A., being the owner of land, entered into an agreement whereby he conveyed part of it to his son, "on account of natural love," the son to give to his father one-half of the produce, if demanded. *Held*, that this was a valuable consideration. A. afterwards by deed conveyed to

others these premises, and their assignee having commenced ejectment, L's widow obtained an injunction against the action. L's widow having meantime intermarried, the assignee moved to dissolve, urging that the widow's estate had determined, and that it was defeasible, and had been defeated by the testator's subsequent transfer for value under 27th Eliz. cap. 4; but the application was, under the circumstances, refused.

Leech v. Leech, 572.

VOLUNTARY DEEDS.

A deed having been executed by a husband and wife under such circumstances as to make the conveyance voluntary, the court held that the onus was on the grantee, of proving that the grantors understood the nature and effect of the deed; and, as it did not appear to have been explained before being executed, the deed was held invalid.

Fraser v. Rodney, 426.

2. To sustain a deed of gift to a person standing in a confidential relation to the donor, the donee must establish by clear evidence that the nature and effect of the deed were fully and truly explained to the donor; that he perfectly understood them; that he was made alive, by explanation and advice, to the effect and consequences of executing it, and that the deed was a willing act on his part, and not obtained by the exercise of any of that influence which the confidential relationship of the donee put it in his power to employ: otherwise such deed of gift will be set aside.

Mason v. Seney, 447.

3. A voluntary grantor of real estate is not chargeable, at the suit of the objects of his bounty, for rents of such estate subsequently received by him, or which but for his neglect might have been so received.

Mitchell v. Ritchey, 511.

WAIVER OF TITLE.

See "Specific Performance," 7.

WASTE.

Where an injunction to stay waste was continued at the hearing, and it appeared that the extent of the waste committed did not exceed $20, the court refused to direct any account, and left the amount of the waste to be dealt with in any action for mesne profits which the plaintiffs might be advised to bring.

Raven v. Lovelass, 435.

WILL.

(CONSTRUCTION OF.)

1. P. having an estate estimated at £60,000, by will provided that after payment of the debts and certain pecuniary legacies, a sum sufficient to secure an annuity of £500 per annum during her life should be invested for the use of the widow; that £5,000 should be invested for each of his four daughters, and that the residuary estate should be divided equally among the testator's three sons, J., P.

and W., when W., the youngest, should attain majority: And in case the value of the estate should not prove sufficient, after providing for the widow's annuity and the daughters' portions, to produce £7,000 for each of the sons, then a ratable reduction should be made from the share of each child. The testator also directed that after the decease of his wife the sum set apart for securing her annuity should be equally divided amongst his children. The testator by his will provided that in case his sons desired to continue his business, that his executors should afford them facilities for so doing, and should sell to them at a fair valuation the store and stock-in-trade. Stock was being taken at the time of the testator's death, and the goods in hand were, in accordance with his custom, valued, by adding 75 per cent. to their sterling price, at the sum of £13,990. The sons J. and P. having agreed to continue their father's business, were charged in the books of account with that sum. The estate proved to be of only half the value at which it was estimated at testator's death, so that there was insufficient without taking into account the value of the stock, to realize the widow's annuity and the portions for the daughters. The sum at which the stock had been valued was proved to be about twice its actual value, and evidence was adduced proving that no actual consent or agreement had been given by J. and P. to be charged with it at its estimated value. *Held*, that there had been no absolute sale of stock to them, and that they were only chargeable with it at its actual value: that the sum required to be set apart to raise the annuity for the widow was such a sum as, being invested at 6 per cent. per annum, the legal rate at the time of testator's death, would produce £500 per annum, and that the principal sum was, under the above provision, distributable, on the death of the widow, among all the testator's children.

Paterson v. McMaster, 337.

2. Where a testator, by his will, gave the residue of his real and personal property to his executors and trustees in trust, to sell the same, and, after satisfying certain charges, to expend and apply, for the maintenance and education of his minor children, such sums as they thought necessary for this purpose, and in subsequent parts of the will provided that such children were to draw, or be entitled to, equal shares of his estate, and that each should receive his or her share of the proceeds of the real estate, on marrying or arriving at maturity; and that, until then, the shares of such children should be invested and paid out as they required the same as aforesaid. *Held*, that their maintenance and education were a charge on their own shares only, and not on the whole residue.

Gibson v. Annis, 481.

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