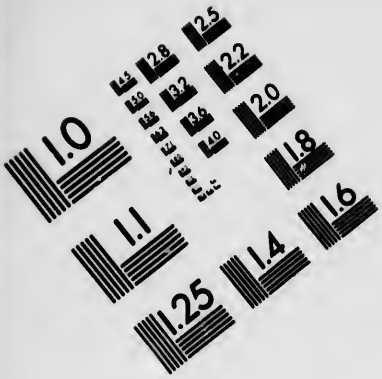


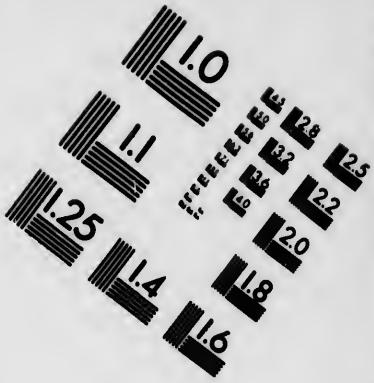


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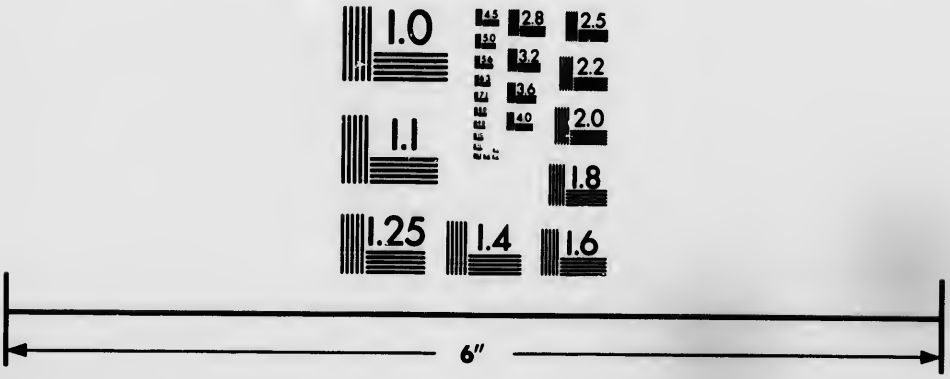



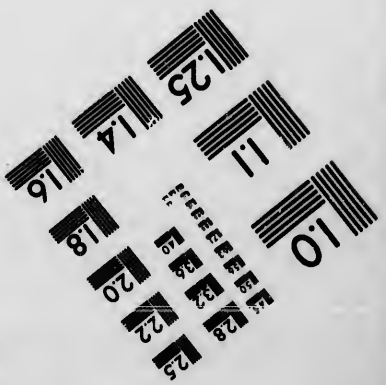


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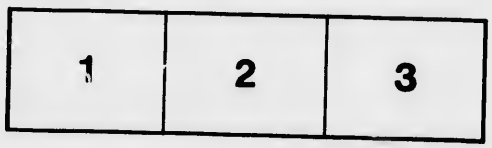


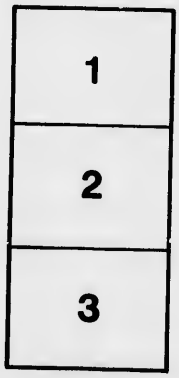


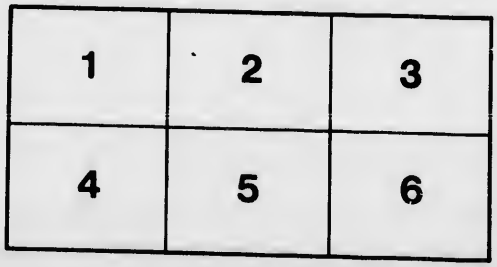


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# REPORTS OF CASES



ADJUDGED IN THE

# COURT OF CHANCERY

OF

# ONTARIO,

BY

ALEXANDER GRANT, BARRISTER,

REPORTER TO THE COURT.

## VOLUME XXII.

TORONTO:
ROWSELL & HUTCHISON,
KING STREET.

1876.

ROWSELL & HUTCHISON, LAW PRINTERS, TORONTO.

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

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

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

# A TABLE

OF

# CASES REPORTED IN THIS VOLUME.

*Versus* is always put after the plaintiff's name.

A.



B.

B.



C.

C.



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E.



F.

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P.

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S.



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V.



W.

W.

# A TABLE

OF THE

# NAMES OF CASES CITED IN THIS VOLUME.

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A.



B.

# REPORTS OF CASES

ADJUDGED IN THE

# COURT OF CHANCERY,

OF

# ONTARIO,

DURING PORTIONS OF THE YEARS 1875 AND 1876.

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## BOYD v. SHOULDICE.

*Specific performance—Valuable consideration—Supplemental answer—Consideration of marriage—Practice.*

The owner of land promised the father of the plaintiff that if he would marry his daughter he would give him 50 acres of land; and after the marriage he did execute a bond to him for a conveyance thereof reciting the payment of $300 as the consideration therefor The, bond also contained a recital that the obligor desired that the land should go to the male issue of his daughter and her husband. The obligee having died, a suit to compel the specific performance of the agreement was filed by his infant heiress, to which the obligor set up the defence of want of consideration; as also a denial of having executed the bond. At the hearing *Blake*, V.C., refused to allow a supplemental answer to be filed setting up a defence as to the estate agreed to be conveyed; and being of opinion that there was an adequate consideration, made a decree for specific performance of the agreement with costs; which, on rehearing, was affirmed with costs.

Statement.

The bill in this case was filed by *Catharine Boyd*, an infant, by her next friend, and *Richard Gordon* and *Mary Gordon*, his wife, for the specific performance of an agreement to convey 50 acres of land in the township of Elderslie, made by *James Shouldice* the elder, one of the defendants, with *Donald Boyd*, the father of the infant plaintiff.

The agreement was contained in a bond dated 6th August, 1863, which recited that *Donald Boyd* had con-

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tracted with *James Shouldice*, Sr., for the absolute purchase in fee simple free and clear from all incumbrances whatsoever, of the east half of lot 34, in the 1st concession of Elderslie, containing fifty acres. That the said *Donald Boyd* had agreed to pay therefor $300 in hand paid down at the time of the signing and sealing thereof. That *James Shouldice*, Sr. had agreed to execute a good and sufficient deed in fee simple of the said lands, within twelve months from the date of the instrument, to the said *Donald Boyd*; ("And whereas also the said above bounden desires that the said lands above mentioned shall, after the death of the said *Donald Boyd* and *Mary Boyd*, his wife, go to the male issue of the said *Donald Boyd* and *Mary Boyd*, in regular descent.") and was subject to a condition to be void if "the said *James Shouldice*, Sr., his heirs and assigns should by a good and sufficient warranted deed in fee simple convey and assure unto the said *Donald Boyd*, his heirs and assigns forever the said premises free and clear from all incumbrances whatever."

Statement.

The bill alleged that the twelve months were named to enable the obligor to discharge a mortgage then on the land; that *Donald Boyd* went into possession of the land, and made some improvements on it. That upon his death, in 1865, *James Shouldice*, Sr., wrongfully took possession of the cleared portion, and had retained it till he gave it to his son, *James Shouldice*, Jr., the other defendant, to whom he had conveyed the land; and charged *James Shouldice*, Jr., with notice both through the registration of the bond and full notice otherwise.

The defendant *James Shouldice*, Jr., alleged that *Donald Boyd* was permitted by *James Shouldice*, Sr. to live on the land, but he claimed no ownership, and that the said *James Shouldice*, Sr., made the improvements; that he believed the bond set out in the bill was never

executed by the obligor, and that *Donald Boyd* never paid the consideration money. 1875. Boyd v. Shouldice.

The answer of *James Shouldice*, Sr., stated that *Donald Boyd*, after his marriage, was afflicted with sickness, and the defendant, with *Donald Boyd's* assistance, put up the house on the land in question, which was taken possession of by *Donald Boyd* without the obligor's knowledge; and that, on account of his illness he was allowed to remain there; denied all knowledge or recollection of having executed any such bond, but sometime after its date he heard of its existence and procured a copy; that *Donald Boyd* never paid him any money on account of the land; that he never intended to give *Donald Boyd* the land, and did not recollect ever instructing any one to prepare such a bond.

The execution of the bond was proved by the solicitor, Mr. *McMillan*, who drew it, and who received his instructions from the obligor. In his evidence he stated that "He said he wanted to give his son-in-law fifty acres of land. He said he owed *Donald Boyd* a considerable sum of money, and on account of this and being his son-in-law he was going to give him this bond. * * About three months after he signed the bond he asked me to read it to him; I did so, and he said it was all right. * * I inserted $300 of my own notion; understood *Shouldice* was to give this partly on account of the wages he owed *Boyd*, and partly because *Boyd* was his son-in-law." Statement.

*Mary Gordon*, the mother of the infant plaintiff *Catharine Boyd*, and the widow of *Donald Boyd*, proved that she married *Boyd*, 11th May, 1863, after having had a child by him, and that she had two others by him after marriage, one of whom died. *Donald Boyd* came to work with *James Shouldice* 16th May, 1863, having

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previously assisted him occasionally: she stated, "Father promised to give the fifty acres to *Boyd*, and help him all he could, if he would marry me." This witness also proved improvements made by *Boyd*. "Father gave the land for the work *Boyd* did for father, and for my marriage; *Boyd* took the lot for this, and was satisfied. Father, before our marriage, promised this fifty acres to *Boyd*." She denied any knowledge of the agreement that after the death of herself and *Boyd* the lot was to go to her eldest son. There was no writing before her marriage between her father and *Boyd* about the lot.

*Sarah McLelland*, a sister of *Mary Gordon*, said, "I have heard my father say he would give *Donald Boyd* fifty acres for taking my sister as his wife. I heard him afterwards say he had done so."

Statement.

*James McLelland*, the husband of *Sarah*, testified that *Shouldice*, Jr., told him the deed to him was all nonsense, that he only wanted to get *Mary* off the place.

The cause was heard before *Blake*, V. C., at the sittings at Walkerton, in the autumn of 1874, who made a decree for specific performance, and directed a vesting order of the fee simple to be made.

The defendants thereupon reheard the cause.

Mr. *Bethune*, for the defendants, contended that the evidence shewed clearly that the bond which had been executed was voluntary, and without any good consideration therefor, and was not such an instrument as this Court would be active in enforcing; and if the Court should be of opinion that any valuable consideration was established, then the bond clearly shewed that an estate tail male was what the obligor had stipulated to convey.

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Mr. *Bain*, contra. In addition to the cases mentioned in the judgment, counsel referred to *Jeffreys* v. *Jeffreys* (*a*), *Dillon* v. *Cappon* (*b*), *Moore* v. *Crofton* (*c*), *Fletcher* v. *Fletcher* (*d*), *Pearson* v. *The Amicable Assurance Office* (*e*), *Townsend* v. *Toker* (*f*), *Skidmore* v. *Bradford* (*g*), *Farrell* v. *Davenport* (*h*), *Childers* v. *Eardley* (*i*), Re *Hugh Neal's* Trusts (*j*), *Hopkinson* v. *Lusk* (*k*), *Wilson* v. *Wilson* (*l*), *Woollam* v. *Hearn* (*m*), *Kerr* on Frauds, 348, *Dart's* Vendors, &c., vol. 2, p. 948.

BLAKE, V. C.—I have read the judgment of my brother *Proudfoot*, in whioh I concur. The facts of the case present plainer grounds for relief than appear in *Surcome* v. *Pinniger* (*n*); where relief was given to the plaintiff. I think the decree should be affirmed with costs.

PROUDFOOT, V.C.—[After stating the facts as above set forth.] The defendants rehear the cause, and on their behalf it was argued:—1st. That the bond was voluntary, and—2nd. If not, that the agreement was only to convey in fee tail male; and—3rdly. Leave is asked to file a supplemental answer raising the questions argued.

Judgment.

It is true that the consideration in the bond is $300; and it does not appear that this was a sum agreed upon by the parties as the solicitor says he fixed the sum himself. But it is clear that the true consideration may be shewn notwithstanding the erroneous statement in the bond. *Mulholland* v. *Williamson* (*o*), was a stronger case than this, for there a deed for the expressed consideration of

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(*a*) Cr. & Ph., at p. 141.
(*b*) 4 M. & C. 647.
(*c*) 3 I. & Lan. 438.
(*d*) 4 Pa. 67.
(*e*) 27 Beav. 229.
(*f*) 1 Ch., at 458.
(*g*) L. R. 8 Eq. 138.
(*h*) 1 Jur. N. S. 862.
(*i*) 28 Beav. 648.
(*j*) 4 Jur. N. S. 6.
(*k*) 10 Jur. N. S. 288.
(*l*) 5 H. L. Ca. 40.
(*m*) 2 W. & T. L. Ca., ot 489.
(*n*) 3 D. M. & G. 571.
(*o*) 12 Gr. 91, In app. 14 Gr. 291.

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£1000, was sustained against creditors, although the true consideration was not money at all, but a settlement on marriage; and I think that a sufficient consideration has been established here to sustain the instrument, so that it cannot be considered voluntary. The obligor told the solicitor that he owed the obligee a considerable sum of money and on that account and being his son-in-law, he was going to give him this bond. He understood the bond was given partly on account of wages to *Boyd*, and partly because *Boyd* was his son-in-law. It is proved by other witnesses that *Boyd* worked continuously from 16th May till 6th August for the obligor, and that wages were due to him for this work. No evidence was given of the value of the land nor of the amount due for work, nothing to shew that it was an excessive price for the work. There was indeed another reason for giving the bond,—marrying the daughter,—but there is no means of estimating how much was due to this cause. Now, whatever may be the rule as regards creditors, in the position of these parties, the adequacy of the consideration will not be nicely inquired into. *Crawford v. Meldrum* (*a*) *Carradice* v. *Currie* (*b*). Finding a good codsideration for the bond I have not thought it necessary to examine the cases cited in regard to the rule that voluntary agreements will not be enforced.

Judgment.

On the second point I think the true meaning and effect of the bond is, that the obligor was to convey a fee simple. The recitals, with an exception to be presently noticed, and the obligatory part of the bond, state an agreement for the purchase of the fee simple, and a proviso for its conveyance. The exception is the recital introduced within a parenthesis that the obligor desired that the lands after the death of *Boyd* and his wife should go to their male issue. It is not recited as an agreement to that effect,—the instructions were given

(*a*) 3 Er. & A. 101. (*b*) 19 Gr. 108.

by the obligor,—and it is not shewn that any stipulation of this kind was known to, or assented to, by *Boyd. Mary* the wife never heard of it. Taking the whole instrument together I think the agreement was for a conveyance in fee simple, and that the obligor expressed a wish merely as to its ultimate destination, which does not qualify or modify the agreement.

As to the application to be permitted to file a supplemental answer, the facts seem to be, that just before the hearing in October an application for that purpose was made to the Referee, and refused by him; and although such leave was asked at the hearing, it was not supported by any evidence, the affidavits not having been procured from Toronto, that had been used before the Referee; and although the defendants were in Court neither of them was examined, though certainly they were the best qualified to speak of a mistake, had any been made. The date when issue was joined does not appear on the brief, nor when the answers were filed, though they seem to have been sworn on the 28th March. No explanation is given of the delay in making the application,—it is contradictory to the case made by the answer, which rested on no bond having been executed,—it is for the purpose of proving a mistake after the death of the obligee, without any allegation that it can be established by any writing; and I think it would not be safe to permit it to be proved by the evidence of persons who have sworn so recklessly as these defendants have done. The defence throughout hitherto has been that no bond was executed, that it was voluntary; failing both these, it is now sought to set up a defence applicable to an instrument executed for a good consideration.

Judgment.

The affidavit of *Shouldice* the elder, used before the Referee, does not swear to any mistake having been made in the bond, does not say that the obligatory part of it was erroneous, and did not truly express the intention of the parties.

1875.

Boyd v. Shouldice.

Considering the great caution with which the Court reforms deeds on the ground of mistake (*a*). I do not think this a proper case in which to give the defendants an opportunity of raising this defence. The decree should be affirmed with costs.

*Per Curiam*—Decree affirmed with costs.

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## SCATCHERD v. KIELY.

*Mortgage—Trustee—Interest.*

A mortgage had been transferred to a trustee to secure certain notes of the mortgagee, one of which, after several years, was found in the hands of the assignee of the mortgage, and a suit having been instituted upon the mortgage by the trustee and the party interested in the note, it was *held*, that to the extent of the amount remaining due on the mortgage, including six years' interest, the party beneficially interested was entitled to recover the amount of the note and interest for the whole period the note had run.

Statement.

On drawing up the decree as pronounced *ante* vol. xxi., p. 30, a question arose as to the right of *McFie* to enforce payment of more than six years' arrears of interest, and which, not having discussed at the hearing, it was arranged should be spoken to by counsel before the learned Vice Chancellor who had heard the cause.

Mr. *Ferguson*, for the defendant, insisted that only six years' interest could be given, that being the invariable rule in foreclosure suits against the mortgagor.

Mr. *Meredith*, contra, distinguished this from the common case between mortgagor and mortgagee, where the general rule is as suggested; but here *Scatcherd*, was a bare trustee, and so far as he was entitled to recover from the mortgagor, to that extent *McFie* should be entitled to recover against the trustee.

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(*a*) Barrow v. Barrow, 18 Beav. 529.

1875.

Scatcherd v. Kiely.

BLAKE, V. C.—As between the mortgagor and mortgagee only the principal money and interest for six years can, without special circumstances, be recovered in a mortgage suit. Here, it being an ordinary case, but the six years could be recovered. When the mortgagee assigns the mortgage in trust, there the *cestui que trust* could charge as against the trustee the whole twenty years' arrears of interest, and the trustee, collecting from the mortgagor the principal money and six years' interest, should account to the *cestui que trust* for the principal money and twenty years' interest unless absolved by special circumstances.

Here the *cestui que trust* demands that his principal money and interest for the sixteen years it has run should be paid. It matters not whether this be given out of principal money or interest. But these arrears of interest cannot be demanded to the detriment of the mortgagor. The question, therefore, really to be solved is, taking the accounts between mortgagor and mortgagee, and allowing the interest properly payable between them, is there a sufficient amount left to give the claimant here his principal money and sixteen years' arrears of interest? If there is, it is to be allowed; if not, it cannot be recovered against the mortgagor. In other words, the liability incurred by the assignee of the mortgage in trust is not to be enlarged. If the mortgagor can prove that he has paid the whole of the mortgage, and left but the $194 unpaid then, I think, only $194 and six years' arrears of interest can be recovered. If, on the other hand, there is yet due from the mortgagor a larger amount than this, the plaintiffs can demand it to the extent sufficient to satisfy the debt, and sixteen years of interest. If the facts necessary to work out the above are not admitted so as to allow the Registrar to act upon them, then there will have to be a reference to the Master at London to take the accounts, and he can ascertain the facts and find the amount in pursuance of the above.

Judgment.

1875.

## KEAYS v. BROWN.

*Insolvency—Preferential Assignment—Pressure.*

Traders, who had been in business for about eight months, and were at the end of that time in insolvent circumstances, had sent an order for goods to their largest creditor, whose account against the firm had increased to double the amount it was originally agreed that it should be, which goods were packed up, but not sent for some days, when one of the firm waited on the creditor, taking with him a list of debts due the firm, intending, by arrangement with his partner, to offer to assign to the creditor such of these accounts as the creditor should select, and which he accordingly did offer on being asked if he could pay any money on account, and a transfer thereof was accepted by the creditor.

*Held*, that this was sufficient pressure on the part of the creditor to prevent the assignment being considered as a preferential one within the Act.

This was the rehearing of a decree dismissing the bill in this case with costs.

Statement.

The bill was by *William J. Keays* against *John Brown*, setting forth that *Dillman M. Kenzie* and *Joseph Matheson McIntyre* had been carrying on business in partnership; and having become hopelessly insolvent did, on the 9th October, 1873, make an assignment to the plaintiff, official assignee for the County of Lambton, under the Insolvent Act of 1869, for the benefit of their creditors. That prior to such assignment, namely, on or about the 30th August, 1873, *Kenzie* and *McIntyre* being then hopelessly insolvent, and indebted to several persons besides the defendant, and unable to meet their engagements, and with intent to defeat, delay, and hinder their other creditors, and in contemplation of insolvency, assigned and set over to the defendants, carrying on business under the style or firm of *John Brown & Co.*, to whom they were indebted, certain accounts, (setting them forth) due *Kenzie & McIntyre*, amounting in all to $2,109.30, and executed a memorandum in the following words: "We hereby transfer

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to Messrs. *John Brown & Co.*, in consideration of our indebtedness to them, and their consenting to renew our Paper, all the above accounts, and will immediately take from the respective parties their notes negotiable, and forward the same to them without delay." And that the same was executed without any pressure on the part of the defendant, and was the voluntary and spontaneous act of *Kenzie & McIntyre*, and was so made in contemplation of insolvency, with intent to defeat, delay, and hinder their creditors other than the defendant in recovering their claims; that these debts so assigned constituted the principal part of the assets of the said firm, and their remaining assets would not pay more than 13 per cent. to their other creditors; while, if the assignment of these debts was allowed to stand, the same would pay the defendant's claim in full: charged that there was not any treaty for any renewal of paper or further advance of goods, which the defendant alleged was the consideration for the said assignment, and that such assignment was not a transaction in the ordinary course of business; and prayed that the same might be declared fraudulent and void; and that the defandant might be ordered to account, and for further relief. Statement.

The defendant answered the bill, denying all fraudulent or improper intention in obtaining the assignment of the said debts, or that the same was voluntary on the part of *Kenzie & McIntyre*, but was in fact the result of pressure upon them by the defendant, he having refused to furnish further goods, or renew the over due paper of the firm had they refused to comply with his request.

The cause came on for hearing before *Strong*, V. C., at the sittings of the Court at Sarnia in the Spring of 1874, when *Dillman M. Kenzie* was examined as a witness, and swore that he and his partner commenced business in December, 1872, at Sarnia. "All the capital I put into the business was $70; my partner put into

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it $350. This was all the cash capital we had. Our sales in one year reached $22,000. I was married; my partner was single. We were not, from the outset of the business, able to meet our liabilities. In July, 1873, our notes began to be protested. Mr. *Brown* was our largest creditor at this time. I went down on or about the 30th August, 1873, for the purpose of assigning to Mr. *Brown* some notes and accounts, and paying other creditors some money. I took a list of the accounts with me; I had not seen Mr. *Brown* previous to this on the subject of assigning the notes and accounts to him. *Brown* had not asked me before I got to Hamilton to assign the notes and accounts. *Brown* had notified me when the paper became due, but had not brought any pressure to bear upon me. I went down voluntarily on the 30th August for the purpose of making this assignment. I felt that *Brown* was handling our account delicately, and that unless I did something I could not get any more goods from him. I mean that *Brown* seemed disinclined to advance any more goods to us. When I got down *Brown* told me that my account was larger than I had arranged it should be when I first purchased my stock He asked me whether I was prepared to pay him any cash. I told him I was not. I told him I had brought some accounts and some notes down, which I was willing to assign to him. Mr. *Brown* then prepared the assignment, and I signed it. This was all that was said affecting the assignment at this time. * * I think I also told *Brown* our paper had gone to protest. * * *Brown* seemed a little surprised when I told him we had let our paper go to protest; this was before the assignment was signed. * * Up to the time the assignment to defendant was signed there was no proposition for any further advance to me by Mr. *Brown*. * * Our debt to *Brown* was in the neighbourhood of $2,450. * * After the assignment I got some more goods from Mr. *Brown*, I think in the neighbourhood of $400. * * I told Mr. *Brown* at the time the transfer of debts was

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made to him that we hoped in future to be able to take up our notes, and not let them go to protest. * * * Before I went to Hamilton my partner and I had arranged that I was to assign the accounts to Mr. *Brown*, and to pay *Simpson, Stewart & Co.*, $100." 1875. Keays v. Brown.

The defendant was examined on his own behalf, and swore: "I dealt with *Kenzie & McIntyre* from the time they formed partnership. I supplied them with a considerable amount of goods. The arrangement at the opening of the account was that it should be limited to $1,200. In August, 1873, the account was probably $2,400. * * They had made me some payments from time to time. The account was a purely advance account. It was of the nature of what is called a supply account. * * *Kenzie* came down on the 30th of August, and I had an interview with him. Prior to this an order had been sent by *Kenzie & McIntyre* for goods; they had not been sent. I had given instructions that they were not to be sent until I had seen Mr. *Kenzie*. Prior to *Kenzie's* visit in August I had complained to Mr. *McIntyre* of the state of the account, and said it ought to be reduced. When *Kenzie* showed me the list of debts I suggested that more debts should be converted into notes. I asked *Kenzie* to assign these debts to me; there was paper in default on 30th August, when *Kenzie* came to me; I renewed that paper; at this time my impression as to the business prospects of *Kenzie & McIntyre* was favorable. I knew of nothing to lead me to believe they were likely to fail—nothing in the world. I sent them goods after I got the assignment. I sent them immediately. The goods had been ordered previously. If *Kenzie* had refused to assign the accounts I would not have sent the goods—not from any want of confidence, but because the account was too large. Subsequently to this, and about the middle of September, I supplied them with goods to the amount of $160; up to this time there was nothing to shake my confidence in Statement.

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them. I would have had not the slightest hesitation in supplying their orders up to the time of their failure * * If I had had any idea they were going into insolvency I would not have supplied the goods. I had no intention, in taking the assignment, of getting a preference over other creditors. * * Mr. *Kenzie* brought a statement of debts on the 30th August. Mr. *Kenzie* did not produce this statement till I asked for it. I am quite sure that I asked *Kenzie* for the assignment of debts before he offered to make it. He gave me the assignment with the utmost readiness. I had a great deal of confidence in *Kenzie*. * * I never notified the debtors of the transfer of their accounts to me. * * The only reason I did not notify the debtors was, that I expected *Kenzie & McIntyre* to get notes for the amounts, and send them to me."

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

Mr. *Moss* and Mr. *Walker* for the defendant.

The only question in the cause was, whether the transfer of the debts made by *Kenzie* to *Brown* was made voluntarily, or could in any sense be said to have resulted from pressure by the creditor *Brown*.

The authorities cited are mentioned in the judgments.

Judgment.

BLAKE, V. C.—The words of the English Act of 1869, sec. 92, are, "with a view of giving such creditor a preference over," &c., the words of the Canadian Act, sec. 89, are, "whereby such creditor obtains, or will obtain, an unjust preference over," &c. The latter strikes at the *result*, no matter what the *intent*. The former deals with the view or *intent* with which the preference was given; we may have the result without the view or intent. It is to be observed that in the Canadian Act we have the word "unjust;" in the

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section of the English Act this word is omitted. The spirit of the Acts is brought pretty well into agreement. But for the authorities, I should have thought there was a great deal in the argument, that looking at the general object of the Insolvent Act, namely, the having a ratable distribution of the funds of the debtor, any preference was "unjust" which frustrated this object. The construction of the Queensland Insolvent Act was brought into question in *The Bank of Australasia* v. *Harris* (*a*), and it was further considered in *Nurres* v. *Carter* (*b*). In the latter case Lord *Westbury* says: "The conditions of the avoidance of a transfer in that Act were, therefore, two: one, that it should be made within a certain period of time before the insolvency; the other, conjointly, that it should have the effect of giving a preference to one creditor over the others; and it was held, in the judicial interpretation of the Act, that the preference must be fraudulent,—a fraudulent preference is well known to the bankrupt law. It arises where the debtor, in contemplation of bankruptcy,—that is, knowing his circumstances to be such as that bankruptcy must be, or will be the probable result, though it may not be the inevitable result,—does, *ex mero motu*, make a payment of money or a delivery of property to a creditor, not in the ordinary course of business, and without any pressure or demand on the part of the creditor." In the present case, in the Court below it was found that there was pressure exercised in order to the obtaining of the assets assigned to the defendant. The evidence can be so read as to support this view, and the Appellate Court cannot, in such a state of facts, reverse the conclusion thus arrived at. Pressure being established, under the authorities, the plaintiff's case fails, and the decree made must be affirmed with costs.

Judgment.

PROUDFOOT, V. C.—*Kenzie & Co.*, when they assigned the debts to the defendant, did not do so in contempla-

(*a*) 15 Moo. P. C. 97. (*b*) L. R. 1 Pr. Co. 342.

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tion of insolvency; and their making the assignment was in consequence of pressure such as, under the authorities, justifies an assignment.

In August they did not doubt their ability to carry on the business as they had previously done: they made a payment to one creditor, and the assignment in question to another, and procured further supplies of goods from defendant, thinking they would be able to go on by means of the fresh goods. It does not seem to have been till October they began seriously to doubt their ability to carry on the business, and that caused by the harsh proceeding of one creditor. *Kenzie* says: "I told Mr. *Brown* at the time the transfer of debts was made to him, that we hoped in future to be able to take up our notes and not let them go to protest," &c. (*a*)

Judgment.

That there was *pressure* used by defendant in order to get the assignment, is, I think, deducible from the evidence. *Kenzie & Co.* had given an order on defendant for about $400 worth of goods, at a time when the limit of their account with the defendant had been doubled, and when they had allowed their notes to the defendant to be protested. This was so little like a business way of proceeding, that they entertained apprehensions the goods would not be forwarded. Thereupon *Kenzie* went to the defendant with a number of accounts ready to assign if required. He says he "Felt that defendant was handling our account delicately, and that unless I did something I could not get any more goods from him," &c. (p. 3.) The goods ordered had been packed, but directed by defendant not to be sent till he had seen *Kenzie*; and on seeing *Kenzie* he told him his account was larger than it was arranged it should be. He also asked *Kenzie* whether he was prepared to pay

(*a*) p. 5 Dep.

him any cash, and *Kenzie* told him he was not, but had brought some accounts and notes which he was willing to assign. I think it must satisfy every one that the impression on *Kenzie's* mind, that goods would not be furnished without a payment or reduction of account, was caused by the defendant's action in not forwarding the goods ordered, and demanding a payment of cash; and this, under the circumstances of these parties, I consider to constitute such a pressure as to relieve the assignment from the imputation of fraud.

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SPRAGGE, C.—I agree in the judgments of my brothers *Blake* and *Proudfoot*. I think, upon the evidence, we cannot disturb the finding of the learned Judge who heard the cause, that what was assigned in this case to the defendant *Brown* was not assigned voluntarily, but that the assignment was the result of pressure.

Judgment.

I could have wished, certainly, that the evidence had been before us in a more satisfactory shape. It is very meagre, and leaves matters to be inferred as to which one might expect something like positive evidence. Still, I cannot say that an erroneous conclusion was arrived at. That the evidence was not more definite, was the fault or misfortune of the plaintiff. He has not enabled us to see that he is entitled to relief against the opinion of the learned Judge before whom the evidence was taken and the cause heard.

*Per Curiam.*—Decree affirmed with costs.

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## LINDSAY PETROLEUM CO. v. PARDEE.

*Corporation—Lands reverting to grantors.*

Where a corporation, constituted under the statutes, ch. 63, C. S. C., and 29 Vic. ch. 21, had purchased lands, and, without having disposed thereof, allowed the period named in the declaration of the shareholders, for the continuance of the company, to expire, it was *held* that the corporators ceased to have any interest in the lands, and could not maintain any suit in respect thereof; and that the lands had reverted to the grantors.

This was a suit brought by the *Lindsay Petroleum Company* against *Timothy Blair Pardee*, *Frederick A. Read*, (since deceased) and *Abraham Farewell*, setting forth the several proceedings in the case of the same plaintiffs against the defendant *Farewell* and others, in which an order was finally made by Her Majesty in council for the repayment by the defendants in that suit to the plaintiffs of the sum of $13,750 and interest.

Statement. That by virtue of a writ against lands, issued on a judgment recovered in an action at law brought by one *Burley Smith* against the plaintiffs, the lands in question had been sold at sheriff's sale and bought by defendant *Pardee*, but that such purchase was in reality for the benefit of, and as trusteee for, the defendant *Farewell* who had obtained an assignment of the judgment from *Smith*.

The order of the Privy Council was made subject to the right of the defendants in that suit to have a reconveyance of the lands conveyed to the company, and the present suit was brought to obtain a reconveyance of the lands, so that the company might be in a position to reconvey the same; or that it might be declared that *Farewell* was already in possession thereof, and that he might be ordered to pay the sum above mentioned.

The material allegations of the bill were either admitted by the defendants, or proved in evidence. The

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defendants, however, set up that the plaintiffs were not in a position to obtain the relief asked; the term limited by their declaration of copartnership, under the statute, having expired in July, 1871, the declaration filed by them under that Act having limited the existence of the company to five years from the sixteenth July, 1866, "or until dissolution by resolution in writing of two-thirds of the trustees for the time being;" the bill in this cause having been filed on the 23rd November, 1871.

The cause came on to be heard before *Strong*, V. C., who upon this state of facts dismissed the bill with costs. The plaintiffs thereupon reheard.

Mr. *Hector Cameron*, Q. C., and Mr. *Bethune*, for the plaintiffs, asked, in the event of the Court thinking that the Company could not maintain the suit, permission to amend by making the individuals, composing the Company, plaintiffs.

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

Judgment.

SPRAGGE, C.—I have come to the conclusion, I confess very unwillingly, that the plaintiffs cannot succeed in this suit. My brother *Proudfoot* has prepared a judgment, which I have read, and I agree with him as to the construction to be placed upon the instrument of association, and the term of the Company's proposed existence thereby declared, and the expiry of that term.

I agree also with my learned brother that the amendment asked for cannot be granted. The case of *Clay* v. *Oxford* (*a*) is a very clear authority against it.

Upon the question whether a right of suit exists in the corporators, or in creditors or elsewhere, or whether the land has reverted to the granters, I desire to express no

(*a*) L. R. 2 Ex. 54.

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opinion. If the doctrine of reverter is the true one, it is an unfortunate state of the law, inasmuch as it will enable the perpetrators of, what has been pronounced in this country and in England, a gross fraud, to retain the fruits of that fraud without the law being able to reach them. It will be understood that I refer not to the defendant *Pardee*, but to the defendant *Farewell*..

BLAKE, V. C.—I am of opinion that the Company in question is defunct: that it was so at the time of filing the bill in this cause: that its property has gone into other hands, and, therefore, that the present bill cannot be sustained, as at the time of filing the bill there was no interest in the plaintiffs in the property in question. No amendment could or can be allowed in its favour. The decree made must be affirmed with costs.

PROUDFOOT, V. C.—I think that the declaration of the shareholders means that the Company shall last for five years, or any less time the shareholders may by resolution determine. The statute must have intended there should be a defined limit to the proposed existence of the corporation. It evidently was not intended that the shareholders should say, we propose to form a company for any time we may please short of fifty years.

Judgment.

The objection to the memorandum of association because it authorizes the sale of the lands, does not seem to me tenable. The Company was formed for the purchase of oil lands and working them. The declaration unnecessarily specified the lands, and then provided that the Company might sell or lease the lands in portions, or entirely, and either before testing or after, and for investing the proceeds in the purchase and working of other lands. The Statute, sec. 8, authorizes the Company to purchase and convey lands to enable it to carry on the operations mentioned, but not to mortgage. Taking the declaration as a whole, it amounts to nothing more than that the

Company is formed for searching for, pumping, and vending petroleum, and the purchase and sale of lands requisite for the purpose. But if one purpose be not within the Act, it will not prevent the others from being carried out.

Being of opinion that the corporation has ceased to exist, it becomes necessary to ascertain what becomes of its property. The common law on the subject is very well stated in *Angell & Ames* on Corporations, sec. 779, that in such cases the lands revert to the grantor and his heir. In the next, sec. 779 *a*, it is said, however, that this rule has become obsolete and useless, and that the corporation property is deemed to be a trust fund for the benefit of creditors and stockholders. The cases cited in support of this proposition are all American decisions administering laws in some respects differing from those of England on the subject. In *Curran* v. *Arkansas (a)* there was no dissolution, but the Court was reasoning on the power of the State, which was the sole stockholder of the bank, to dissolve it, and put an end to its liability to creditors, a power which the Court most justly held was not vested in the State Legislature, which might dissolve indeed, but could not discharge from debts; and Mr. Justice *Curtis* quotes from Chancellor Kent (*b*) that, "The received doctrine now is, as shewn by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations constitute a trust fund for the payment of creditors and stockholders," but no authority is cited, and it would rather seem that the learned Chancellor was stating the rule under Statutes providing for the event. In *Bacon* v. *Robertson* (*c*) the charter of a bank was forfeited, and the question what became of its assets was discussed at considerable length, and the law of England was referred to as unsatisfactory, that there had been instances of lands reverting

Judgment.

(*a*) 15 How. 304.
(*b*) 2 Com. 307, n.
(*c*) 18 How, 480.

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to the donors, but that what became of the personalty was still more misty, and refers to *Wallworth* v. *Holt* (*a*) and *Foss* v. *Harbottle*(*b*), as showing the disposition of the English Courts to adapt their mode of proceeding to the changing progress of society; and conceives that the tendency of the discussions and judgments of the Courts of Chancery in England is to concede the right of property in the individual corporators in the assets of the corporation, and this is supported by much cogent reasoning, but without the authority of an English decision in its favour. In truth, so far from the law having become obsolete in England, in the recent case of *Colchester* v. *Brooks* (*c*) it was affirmed, Lord *Denman* saying that, in case of a dissolution, the real property of a corporation does not escheat to the Crown, but reverts to the donor or his heirs. The alternative seems to be between escheat to the Crown and reverter to the donor. No right is recognized in the corporators.

Judgment.

Arriving at the conclusion that the corporation has ceased to exist, and that in such case the lands revert to the grantors, the corporators have no *locus standi*. But were my opinion otherwise I do not think the present bill could be amended by substituting the corporators for the corporation. This is not a mere matter of form : it is a distinct and substantive right entirely contradictory of the case made by the bill. The practice of the Court is no doubt much more liberal now in permitting amendments than it was formerly, and in most cases the question resolves itself into one of costs, but here there are no plaintiffs, no suit, no pending proceedings, they are all imaginary. Certainly *McGregor* v. *Boulton* (*d*), and the cases from the Common Law Courts afford no precedent for such an amendment, and *Clay* v. *Oxford* is decisive against it.

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(*a*) 4 M & C 435.
(*b*) 2 Hare 491.
(*c*) 7 B. R.
(*d*) 12 Gr. 288.

I think the decree should be affirmed and, if of any use to give costs, with costs. 1875.

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On the other points that were argued, I think there was a salable interest, and that we could not hold otherwise while *Parke* v. *Riley* (*a*), stands, but that the defendant could not be permitted to hold the purchase as against the plaintiffs.

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## MITCHELL v. MITCHELL.

*Appeal from ruling of Master—Master's Office—Practice—Vacation.*

In proceeding before the Master a warrant was issued during long vacation for the defendant to bring in accounts, which the Master having ruled was regular, an attachment thereupon was issued to compel the necessary production; and to escape the attachment the defendant did produce the required papers: *Held*, that it was too late for the defendant afterwards to appeal against the Master's ruling.

When a party desires to appeal from the ruling of the Master, it is incumbent on him to do so within fourteen days, the time given for appealing from a report, although no time is limited for appealing from a ruling of the Master; as, unless he does appeal within that time, unnecessary expense may be incurred in taking proceedings under such ruling.

A party is in contempt although no attachment may have actually issued; the contempt consisting in the disobedience to an order of the Court, and the fact of the disobedience having been made to appear to the satisfaction of the proper officer who has made an order for an attachment to issue.

A party though in contempt is always allowed to take any defensive proceding in the cause.

This was an appeal by the defendant from the Master at Brantford, and a motion by the plaintiff to strike the appeal out of the list of cases on the ground that the Statement.

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(*a*) 3 E. & A. 215.

1875. same was so set down while the defendant was in contempt for disobedience to an order issued by said Master.

Mitchell v. Mitchell.

Mr. *Cassels* for the plaintiff.

Mr. *Arnoldi*, for the defendant.

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

PROUDFOOT, V. C.—The defendant appeals from the ruling of the Master, at Brantford, made on the 11th of June last, by which he decided that the personal representative of *Janet Mitchell*, deceased, was not a necessary party to the cause, and that it was not necessary that the estate should be represented on the reference; and also from the ruling of the Master on the 29th of September last, that the warrant issued by him on the 13th of July last, requiring the defendant to bring in accounts, was regular and the defendant bound to obey it, because, as to this last ruling, the warrant was issued in vacation and was a nullity, and because it was issued when the representative of *Janet Mitchell* was not a party to the suit. The defendant had not brought in the accounts as directed by the Master, and an order for an attachment had issued before the notice of appeal had been given, but in order to escape the attachment they were brought in before the argument.

Judgment.

I declined to consider the propriety or regularity of the Master's direction to bring in the accounts since the defendant had chosen to comply with it, and I therefore dismissed the second ground of appeal with costs.

As to the first ground of appeal. The decree directed an account to be taken of the personal estate of *John Mitchell* come to the hands of *Janet Mitchell*, or *Hugh Mitchell*, or the defendant; *Janet Mitchell* being the

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widow and administratrix of *John Mitchell*, who died intestate; and on her death, intestate, *Hugh* became administrator of *John*, and on *Hugh's* death the defendant became his administrator. *Janet* was entitled to one-third of her husband's personalty, and in that respect it seems plain that she or her estate ought to be bound by these proceedings, so as to protect the defendant from another suit in regard to it. If the plaintiffs seek relief against her estate, it will be incumbent on them to have some person before the Court, representing, her to render these accounts; but, if they do not seek these accounts, all that the defendant can require is protection from any demand on behalf of her estate, and this will be sufficiently attained by serving her representative with a copy of the decree, without technically making him a party to the suit: *English* v. *English* (*a*).

Judgment.

I do not find that the Master has refused to require this to be done. The only evidence I have of his ruling is his certificate, and in that he states: "That the defendants took the objection that before proceedings can be taken under the decree, the personal representative of *Janet Mitchell* must be before the Court, which objection was over-ruled." So that the Master seems only to have refused to require the representatives to be before the Court *then*, and I think it was quite competent for the Master to proceed as he has done, assuming, of course, that before he makes his report he will see that all proper parties have been served; and, according to *English* v. *English*, if the account was waived against *Janet's* estate, it would have been improper for him to require the representative to be made a party.

On another ground I am inclined to think the appeal should be dismissed. The ruling was made on the 11th

(*a*) 12 Grant 441.

1875. Mitchell v. Mitchell. of June, and the notice of appeal is dated the 29th of September. In appealing from a report, it must be done within fourteen days; it is said there is no decision determining that the same limit applies to an appeal from a ruling. The reason of the limitation would apply with greater force to the appeal from the ruling than to the other, for although the same objection might be taken to the report, yet it seems to me reasonable that if a party means to question the propriety of a ruling, then, to save the expense of taking proceedings under it which may turn out to be nugatory, it should be incumbent on him to do so within fourteen days, or such other time as a Judge may think proper.

There was argued, at the same time with the foregoing, a motion by the plaintiffs to strike out the appeal of the defendant from the list of causes set down for hearing on this day, because the defendant was in contempt, under an order of the referee, made on the 1st of October, to commit her, and that an attachment do issue for that purpose, for not filing her accounts in the Master's office, pursuant to the direction of the Master.

Judgment.

I think the defendant is in contempt, although the attachment may not have actually issued. A contempt consists in a disobedience to an order of the Court. The fact of disobedience has been made to appear to the satisfaction of the proper officer, who has made an order for an attachment to issue. This could not have been done had there been no contempt; the attachment is only the mode of enforcing the punishment for the contempt. The cases to which reference was made: *East India Co.* v. *Henchman* (*a*), *Sowerby* v. *Warder* (*b*), were cases where the time for answering having expired, demurrers were put in, which were held to be regular, there being no process of contempt by which the defendants were affected.

(*a*) 3 Bro. C. C. 268. (*b*) 2 Cox. 268.

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In *Curzon* v. *De La Zouch* (*a*), the defendant had obtained time to plead answer or demur, not demurring alone, and after the time had expired was taken upon an attachment for not answering. He then filed a demurrer and answer, which were ordered to be taken off the file, but time was given to him to file an answer. These do not shew that an attachment is a necessary preliminary to contempt. Attachments in such cases required no proceeding save a *præcipe*. The Court expressed no opinion of contempt having been incurred. But though in contempt it is competent for the defendant to take the proceedings she is now taking.

Lord *Bacon's* 78th Order provided that, "They that are in contempt, specially, so far as proclamation of rebellion, are not to be heard, neither in that suit, nor any other, except the Court of special grace suspend the contempt."

Judgment.

In *Ricketts* v. *Mornington* (*b*), where, on a cause coming on to be heard, the defendant objected that the plaintiff was in contempt for disobedience to an order in the cause the Vice-Chancellor says: "Lord *Bacon's* Order, as administered in practice, is confined to cases where parties who are in contempt come forward voluntarily and ask for indulgences; but the rules of the Court make it imperative on the plaintiff to bring his cause to a hearing at a certain time, and therefore the cause must proceed."

So in *Wilson* v. *Bates* (*c*), it was held that a plaintiff may issue an attachment against a defendant for want of answer, although he himself is in contempt for non-payment of costs, which he has been ordered to pay to the defendant.

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(*a*) 1 Sw. 185.
(*b*) 7 Sim. 200.
(*c*) 9 S. W. 54, 3 M. & C. 197.

1875. Mitchell v. Mitchell.

And in *Bickford* v. *Skewes* (*a*) a plaintiff endeavoured to postpone a trial directed to be brought by him, on the ground that the defendant was in contempt for non-payment of costs, but he did not succeed.

In *Cattell* v. *Simons* (*b*) the plaintiff was in contempt for non-payment of costs, and there being costs which the defendant was ordered to pay to the plaintiff, the plaintiff moved to set off the costs, being an application for relief against the process of attachment. The defendant filed an affidavit, which was alleged to be scandalous and impertinent. It was held that pending the proper motion, the plaintiff, though in contempt, was entitled to an order referring the affidavit for scandal and impertinence.

In *Futvoye* v. *Kennard* (*c*) the plaintiff moved to discharge an order authorizing the defendant *Wesley* to rent a space in the Crystal Palace Bazaar, at a rent which he alleged was insufficient, and charging the receiver with acting in the interest of the other defendants, and he was permitted to do so although he was in contempt for non-payment of costs of a motion.

Judgment.

In *Haldane* v. *Eckfrid* (*d*) a defendant, in contempt for not having made an affidavit of documents, was held entitled to an order that plaintiff should make an affidavit of documents. The Vice-Chancellor held that though the contempts committed had been of the most flagrant kind, as these documents were required by the defendants for the purpose of defending themselves, he had no jurisdiction to refuse the order.

In *Fry* v. *Ernest* (*e*) Wood, V. C., says, "There can be no doubt that notwithstanding a defendant is in

(*a*) 10 Sim. 193.
(*b*) 5 Beav. 396.
(*c*) 2 Giff. 110.
(*d*) L. R. 7 Eq. 425.
(*e*) 9 Jur. N. S. 1151.

contempt, he may take any defensive measures." *Morrison* v. *Morrison* (*a*) is to the same effect. 1875. Mitchell v. Mitchell.

Dismiss plaintiff's motion without costs.

Dismiss defendant's first ground of appeal without costs.

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## Ross v. Scott.

*Principal and agent—Parol agreemant—Statute of Frauds.*

Where it was shewn by evidence that the defendant had agreed to attend and buy in a property, offered for sale by auction, as the agent of the plaintiff and for his benefit; *Held*, notwithstanding the Statute of Frauds had been set up as a defence and there was not any writing evidencing the agreement, that the plaintiff was entitled to a decree to carry out the agreement.

This was a re-hearing at the instance of the defendants, of the decree reported *ante* volume xxi., page 391. Statement.

Mr. *C. Moss*, for the defendants.

The agreement, promise, or engagement, proved to have been made or entered into here was a merely honorary one, and as such not capable of being specifically enforced by this Court. The same principle is involved here as where a man conveys to another on a secret trust without obtaining any writing to evidence the trust, the Court will not enforce it. In *Bartlett* v. *Pickersgill* (*b*) there was quite as much fraud in resisting the claim of the plaintiff, and yet the Court refused to interfere. It is said the statute will not be used as an instrument of fraud, but in *Heard* v. *Pilley* (*c*) no conveyance had been made and and all rested *in fieri*, and under those

(*a*) 4 Hare 590.
(*b*) L. R. 4 Ch. 548.
(*c*) 1 Eden 515.

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circumstances the Court saw its way to giving the plaintiff relief; while here the transactions has been wholly completed, the conveyance executed, and the defendant in answer to the claim of the plaintiff sets up the statute as a defence. He also referred to *Montacute* v. *Maxwell* (*a*).

Mr. *Boyd*, for the plaintiff. The only question here is that raised under the Statute of Frauds. Here there is a resulting trust, and plaintiff it is shewn changed his position on account of the agreement and promise of *Scott*. He contended that 1st on the ground of agency, and 2ndly by reason of the fraudulent conduct of the defendant the decree already pronounced should be affirmed. In addition to the cases cited on the original hearing he referred to and commented on *Taylor* v. *Salmon* (*b*), *Cowell* v. *Watts* (*c*), *Dale* v. *Hamilton* (*d*), *Davis* v. *Otty* (*e*), *Coles* v. *Pilkington* (*f*), *McCormick* v. *Grogan* (*g*).

Judgment.

BLAKE, V. C.—I retain the opinion expressed at the hearing of this cause, without holding that the Statute of Frauds does not apply where a clear case of fraud is proved against the defendant, although none of the cases to which I referred go that far. I think we are so far bound by the authorities as that we must come to the conclusion, that circumstances of apparently trifling weight will enable a plaintiff to succeed, notwithstanding the Statute of Frauds is raised as a defence. I think that which was relied upon by the plaintiff is sufficient for the purpose here. In addition to the cases cited to me in the Court below, there is the authority in the Privy Council of *McCormick* v. *Grogan*. There Lord *Hatherley* says, in regard to the admission of parol testimony, to prove a trust: "But this doctrine

(*a*) 1 P. W. 618.
(*b*) 4 M. & C. 134.
(*c*) 2 H. & Tw. 224.
(*d*) 5 Hare 391.
(*e*) 35 Beav. 208.
(*f*) 23 W. R. 41.
(*g*) 4 E. & I. App. 82.

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evidently requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the Legislature to pass the Statute of Frauds, and it is only in clear cases of fraud that this doctrine has been applied—cases in which the Court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary, in order to lead the testator to confide to him the duty which he so undertook to perform." The language of Lord *Westbury* in the same case seems to go much further: "The jurisdiction which is invoked here by the appellant is founded altogether on personal fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now, being a jurisdiction founded on personal fraud, it is incumbent on the Court to see that a fraud, a *malus animus*, is proved by the clearest and most indisputable evidence. Judgment. * * The Court of Equity has, from a very early period, decided that even an Act of Parliament should not be used as an instrument of fraud; and if, in the machinery of perpetrating a fraud, an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds; and in this manner, also, it deals with the Statute of Wills." I think this exposition of the law would warrant the decree made, on the ground of the arrangement entered into before the sale, being one which, notwithstanding the Statute of Frauds, can be proved, and being sustained in evidence, affords clear ground for relief. Here there was "a fraudulent inducement held out on the part of the defendant, in order to lead the plaintiff to confide to him the duty which he so under-

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took to perform." The defendant alleged that he would attend, and buy for the plaintiff. He thereby induced him to confide to him the duty of purchasing. The plaintiff was led by this fraudulent inducement into an arrangement, of which the defendant now wants to take an advantage to the detriment of the plaintiff. It is not for the Court to calculate with accuracy the hour that the defendant conceived, and when he consummated this fraudulent intent. It is enough that a fraudulent use is now being made of a position in which he was placed by a statement to which he is unwilling to give effect, and the abandonment whereof causes an injury to him to whom it was made. The act of fraud now complained of is the attempt to maintain the character of absolute owner of the premises in question, in place of that of trustee for the plaintiff; but it is only part of the general scheme, and the Court reckons this but as the second act in a play, the plot in which began when the defendant obtained a position on terms which he now refuses to make good.

Judgment.

I think the decree should be affirmed with costs.

PROUDFOOT, V. C.—The judgment of my brother *Blake*, I think, states correctly the result of the authorities in our Courts as to the cases in which parol evidence is admissible to convert an absolute deed into a mortgage. Whether we are so bound by these authorities as to be unable, though in accordance with the Court of Appeal in Chancery in England, or with the House of Lords, to decide contrary to them, until the Privy Council, the Court of Appeal from the Colonies, shall have sanctioned it, I do not at present mean to inquire. Some of the propositions stated in *Howland* v. *Stewart* (*a*), are clearly not law; as, for instance, where it is said that a deed cannot be corrected for mistake unless there be

(*a*) 2 Grant 71.

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something beyond the mere parol evidence. It is the practice of the Courts in England to admit such evidence (*a*), and there are not wanting decisions of Judges of great eminence, and Courts of the highest authority, to shew that the provisions of the Statute of Frauds shall not be invoked to cover a fraud;—to enable that to be perpetrated which it was their object to avoid: *Lincoln* v. *Wright* (*b*), *Mc Cormick* v. *Grogan* (*c*), *Heard* v. *Pilley* (*d*), *Haigh* v. *Kay* (*e*).

But the decree in this case may be supported, it seems to me, on two grounds, quite consistently with all that has been decided in our Courts: 1st. That an act of the defendant, viz., keeping an account of his expenditure on the property for the purpose of charging the plaintiff with the amount, has been satisfactorily proved; and 2nd. That, by the agreement of the defendant, the plaintiff was induced not to procure the attendance of another agent to act for him: was lulled into security by this agreement, and thereby prevented from securing himself against the loss, not of the bargain merely, but of a security he held upon the land.

Judgment.

That the defendant did keep such an account is established by the evidence of the defendant himself, who says he told the plaintiff before the sale, "I keep an account of all the place costs me." And in January, after the sale, when the plaintiff wanted to trade a horse to pay for getting chopping done on the land, the defendant told him he had hired a man to do the chopping, and said, "I keep a strict account of all it costs me." On the examination on his own behalf he assigns as a reason for this: "I heard that he (*Ross*) was saying that I purchased for him, and I wanted to get rid of him, and this is why I said I kept an account. I had

(*a*) Kerr on Fraud and Mistake, 352.
(*b*) 4 DeG. & J. 16.
(*c*) L. R. 4 Eng. and Ir. App. 82, 97.
(*d*) L. R. 4 Chy. 548.
(*e*) L. R. 7 Ch. 469.

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no other reason." This gives no satisfactory explanation of his keeping an account of the expense. If the land was bought for himself we would naturally expect to find him take the earliest opportunity of letting the plaintiff know it. If he meant the plaintiff to know he claimed it, to tell him he kept such an account was the surest way of leading him to an opposite conclusion. The only rational inference to be deduced from this statement is, that *Ross* was interested in his keeping this account, and he could have no interest unless he was entitled to the property or an interest in it. The other witnesses leave no doubt as to the defendant's object in keeping the account. *Rennie*, a friend of the defendant, and interested in the sale, says, "The defendant said he would keep an exact account of all his expenses to come against the plaintiff when I was paid." The plaintiff says that when the defendant promised to keep the account it was in answer to the plaintiff's proposal to get some clearing done, and for that purpose to trade a horse. It is inexplicable, if the defendant thought he held the property for himself, that he did not then assert his title, and let the plaintiff know that the clearing was none of his business.

Judgment.

The keeping of this account of the expense he was at in regard to the land I consider to be an act quite inconsistent with the notion of the defendant's beneficial ownership, and sufficient within the authorities in our Courts to admit parol evidence of what the real agreement was; and I quite agree in the statement of my brother *Blake* that the evidence establishes the agreement set out in the bill.

On the other ground it is important to remember that the plaintiff was a second mortgagee on the property, and I think it satisfactorily established that he refrained from getting an agent to bid for his protection upon the promise of the defendant to do so, and I think the evi-

dence would warrant its being placed on even a higher ground: that the plaintiff discharged an agent whom he had employed, relying upon the defendant's promise to purchase for him. The defendant says he asked the plaintiff "If he was going to have an agent to bid for him at the sale, and he said yes, he was going to have *Bruce*. *Bruce* was not at the sale," and the plaintiff says he told the defendant that he would get *Bruce* to bid in for him, and the defendant said, "We will bid in for you; we will find the money." He could have arranged with half-a-dozen other parties to do this business for him, if he had not arranged with the defendant.

And when, by conduct or representation, the defendant induced the plaintiff to abandon measures he had taken to protect himself, or to omit to take such measures, the position of the plaintiff is so changed as to render it inequitable to permit the defendant to go back from his promise; and I cannot make any intelligible distinction between a promise which induces a person to do some act changing his position, and one which induces him not to do an act, reliance on the promise in both cases resulting in damage.

Judgment.

In *Heard* v. *Pilley* (*a*), *Selwyn*, L. J., says:—"I cannot at all accede to the argument that when the agent goes to the principal and says, 'I will go and buy an estate for you,' it is not a fraudulent act on his part afterwards to buy the estate for himself and to deny the agency." And all the cases cited of circumstances sufficient for admission of parol evidence proceed upon a similar principle: that the position of one of the parties was changed in reliance on the promise of the other. The plaintiff had a present interest in the property, and it was of the utmost importance to him to prevent that interest from being sacrificed. It is not

(*a*) L. R. 4 Chy. 552.

1875. like the case of a person without an interest desiring to speculate in a purchase, when other considerations might interpose difficulties in the way of giving relief.

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I think the decree should be affirmed.

SPRAGGE, C., intimated that he concurred in the views expressed by the Vice Chancellors, and with them agreed that the decree should be affirmed with costs.

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FERGUSON v. GIBSON.

*Will, construction of—Mortmain acts.*

A bequest issuing out of realty to Queen's College for the founding of a Bursary, is a charitable bequest within the Mortmain Acts, and therefore void.

Motion for decree construing the will of the testator, and to declare the legacies to certain of the defendants, void.

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

Mr. *Maclennan*, Q.C., and Mr. *George M. McDonnell*, for the defendants, Queen's College.

Bill *pro confesso* against the other defendants.

Judgment. PROUDFOOT, V. C.—The legacies in the testator's will of $500 for a bursary in Queen's College, and the devise of the residue of the real and personal estate to, and to distribute the proceeds among certain schemes of the Church of Scotland, Education Scheme, Indian Scheme, Home Scheme, Colonial Scheme, and Jewish Scheme, share and share alike, are charities; and so far as the real estate is concerned, are void, unless Mr. *Maclennan's* argument be correct, that the Mortmain Act is not

in force in Canada, or that so far as the College is concerned, it has, by its charter, power to hold such a gift. 1875. Ferguson v. Gibson.

On the first point, it is no longer open for discussion here. It has been too frequently held in our Courts to be in force, for me to venture to consider the question as still arguable: Doe *Anderson* v. *Todd* (*a*), *Hallock* v. *Wilson* (*b*), *Mercer* v. *Hewston* (*c*), *Hambly* v. *Fuller* (*d*).

The last three cases have been decided since *Whicher* v. *Hume* (*e*), and after considering the effect of that case,

Queen's College was incorporated by Royal Charter in 1841, and, by the second clause of the charter, was authorized "to have, take, receive, purchase, acquire, hold, possess, enjoy, and maintain in law to and for the use of the said College any messuages, lands, tenements, and hereditaments of what kind, nature or quality soever so as that the same do not exceed in yearly value £15,000, sterling, and also that they and their successors shall have power to take, purchase, acquire, have, hold, enjoy, receive, possess, and retain all or any goods, chattels, moneys, stocks, charitable or other contributions, gifts, benefactions, or bequests, whatsoever." Judgment.

The first part of this clause refers to real estate, which is not to exceed a certain annual value, the last is evidently confined to personalty. There is no limit to the amount; and the language is peculiarly appropriate to that species of property. Then the first clause does not purport to dispense with the Mortmain prohibitions, and its language is fully satisfied by construing it as extending to lands that might be acquired without infringing that statute.

Construing the charter as I have done, it is not neces-

(*a*) 2 U. C. R. 82.
(*b*) 9 U. C. C. P. 28.
(*c*) 9 U. C. C. P. 349.
(*d*) 22 U. C. C. P. 141.
(*e*) 7 H. L. C. 124.

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sary to consider the constitutional question of the power of the Crown to grant a license in Mortmain in Canada.

The plaintiff's counsel sought no declaration as to the bequest to the "poor of Callendar."

There is no case for marshalling in favor of the charities. The rule is, that the Court will not marshal in such cases: *Mogg* v. *Hodges* (*a*): but the testator himself may: *Wills* v. *Brown* (*b*) *Miles* v. *Harrison* (*c*). Here the testator has not done so.

The bequests to the College and to the schemes of the Church of Scotland, will be declared void. A reference must be made to the Master to take the accounts of the estate, and ascertain the proportion of pure personalty to impure, and make an abatement accordingly.

Judgment.

As the suit was necessary for the administration of the estate, the costs of all parties must be paid out of it.

Any parties interested, not now before the Court, may be summoned in the Master's Office.

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(*a*) 2 Ves. 53. (*b*) L. R. 16 Eq. 487.
(*c*) L. R. 9 Eq. 316.

## WILSON v. WILSON. 1875.

*Will, setting aside—Mental capacity—Duty of solicitor on taking instructions for will.*

The Court, in adjudicating upon the question of the mental capacity of a testator, will give effect to the evidence thereof given by the medical attendants rather than to that of others, particularly those benefited by the will; where, therefore, a testator in January, 1871, while in full possession of his mental faculties, made a will whereby he directed all his property to be invested, and one-half of the proceeds thereof paid to his widow during widowhood, and the other half to his sister, and in the event of issue, then that the issue, widow and sister should share the same equally; and on the child, if a son, attaining twenty-five, or if a daughter, attaining twenty-one, or marrying, that then one-half of all the estate (real and personal) should go to such child absolutely: and afterwards, (on the 5th July, 1873), whilst the testator was on his death-bed, another will was signed by him, without any consultation with the wife and without her knowledge, whereby he gave one-third of his estate absolutely to his sister, and directed the residue to be invested, and out of the proceeds to pay his mother $1,600 a year as a first charge thereon, and to his widow $800 a year during life. The residue of his estate he gave to his child on attaining twenty-one; the reason stated by the parties benefited thereunder, and the solicitor who drew it, for the testator making such second will, being that his wife was likely soon to become a mother, and that he desired to make provision for the expected issue. The testator died on the 12th of July, and in the results which followed, the sixteen hundred dollars a year given to his mother would absorb nearly, if not quite, all the income of the estate not given to his sister. The testator and his wife were shewn to have lived on the most friendly and affectionate terms, and that there was not any intention, on his part, to deprive her of any benefits given by the former will. The widow, by this second will, was named as executrix, though not so under the prior one, and being guided by her husband's relatives, and informed by them that she was entitled to a third of the estate, and being without any independent advice, joined with the executors in proving the will; but, six months afterwards, becoming aware of her true position thereunder she filed a bill charging that the same had been obtained by undue influence exercised over the testator while he was incapable of properly understanding the effect of the dispositions he was making of his property. Some of the parties benefited by such will swore that at the time of signing it the testator was clear in his intellect and understood perfectly what he was about; whilst the medical attendants swore that at that date he was in an almost comatose state, and

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had been rapidly becoming so for some days previously, and that from the first to the fifth of July his mind was not in such a state as to be capable of any continuous action. The Court, under these circumances, refused to allow the paper to stand as his will: but considering that, owing to the fact of the widow having proved the will,—though not sufficient to preclude her from afterwards impeaching it—the parties claiming under it were justified in litigating the question, gave them, as well as the widow, their costs out of the estate.

Where a solicitor, when receiving instructions for the preparation of a party's will, is made aware of the object the testator has in view, but the language used will not effectuate that end, it is the duty of the solicitor to call the testator's attention to the fact, and to point out to him wherever the words used fail in carrying out the known intentions of the testator: it is erroneous to suppose that the solicitor properly discharges his duty by simply taking down the directions given by the testator without reference to their effect upon the provisions it was alleged the testator desired to make with regard to his family and estate.

1874. Nov. 19.

This was a bill filed by *Mary Ellen Wilson* against *Catherine Wilson* and others seeking to set aside the will of the late *Thomas Wilson*, of the 5th of July, 1873, as having been obtained by undue influence over the testator when he was incapable of properly understanding the effects of the will or of making a proper disposition of his estate.

Statement.

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

Mr. *Moss*, Q. C., and Mr. *W. Fitzgerald*, for the defendants.

The facts of the case, and the authorities cited, are fully stated in the judgment.

1875. March 3.

BLAKE, V.C.—The late *Thomas Wilson* was married in May, 1866, to the above-named plaintiff, and died on the 12th of July, 1873. In January, 1871, the deceased duly made a will, which the plaintiff claims to be his last will and testament. This paper is as follows:

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"This is the last Will and Testament of me *Thomas Wilson*, of the City of Toronto, merchant:

"I will, devise and bequeath all the real and personal estate which shall belong to me at my decease, unto and to the use of half-brothers *James Wilson*, of Youngstown, in the State of Ohio, one of the United States of America, stationer, and *Charles Beatty*, of the City of London, Canada, book-keeper, upon trust to dispose thereof according to the directions hereinafter contained, that is to say: I direct that my trustees shall, as soon as may be after my decease, have the accounts duly taken of the partnership business known and carried on under the name, style, and firm of *Frank Smith* & Co., of which partnership the said *Frank Smith* and myself are the co-partners, and my share in the said business ascertained: I direct my trustees to invest my said share, together with all other real and personal estate of which I may be seised or possessed at my decease, in such securities as they shall deem good and sufficient: I direct my said trustees, out of the produce or income from my estate, to pay to my wife *Mary Ellen Wilson*, one-half thereof during the time she shall remain my widow; and I direct my trustees to pay the other half thereof to my sister *Catherine Wilson*, for her own separate use absolutely; but in the event of there being issue of the marriage of myself and my said wife, then I direct my said trustees to cause the legacies to my said wife and sister so to be abated that such issue shall share equally with my said wife and sister in the produce or annual income of my estate until such issue shall have attained the age of twenty-one years or marriage, whichever shall first occur. And in case of the marriage again or death of my said wife, then, from and after such event, I direct that her share shall enure to the benefit of such issue.

Judgment.

"For, and notwithstanding anything hereinbefore contained, I will, devise and bequeath to such issue, if a

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male, on his attaining the age of twenty-five years, and if a female, on her attaining the age of twenty-one or marriage, one-half of all my estate, real and personal, of what nature soever, and wheresoever situated, absolutely. And in the event of there being no issue of the said marriage of myself and my said wife born, or if born, not living within one year from my decease, then I will, devise and bequeath one-half of my estate, real and personal, to my said sister *Catherine Wilson*, to and for her own separate use absolutely. And in the event of the death of my said wife, or of my said wife ceasing to be my widow, then I give, devise and bequeath the other half, that is all of my estate, real and personal, of what nature or kind soever, and wheresoever situated, to my said sister in manner aforesaid to her own separate use absolutely.

"I will, and direct for, and notwithstanding anything hereinbefore contained, that my said trustees, in the event of my said sister's death before or after the whole of my estate become vested in her as aforesaid, shall pay my mother *Margaret Beatty*, the annual income or produce thereof during her life; and in the event of my said mother's death, then I will, bequeath and devise all my estate, real and personal, share and share alike to *Charles*, *Margaret*, and *Arthur Beatty*, children of my said mother by her present husband *Thomas Beatty*, and in the event of the death of either of them, then all share and share alike to the survivors of them.

Judgment.

"I direct that my trustees shall have power at their discretion to settle any accounts, and wind up my affairs, and in so doing to make such arrangements relative to debts or demands due, or claimed to be due to or from my estate as they shall judge expedient, with liberty to accept compositions or securities from, and grant indulgences to debtors, and wholly to release property mortgaged or pledged on payment or part payment of the

money secured, and to admit the claims of creditors on evidence not strictly legal, and to pay demands; and also to submit questions and accounts to arbitration. 1875. Wilson v. Wilson.

"I direct that my trustees may employ attorneys, counsel, collectors, clerks, accountants, and servants, in collecting debts, and in the management of my trust property, and in making out and keeping the accounts thereof; with such salaries and allowances as they shall think reasonable. I direct that purchasers and others taking the receipt of my trustees on the payment or transfer to them of any money or effects shall be thereby exonerated from all liability in respect to the application thereof. I direct that any and every vacancy in the trusteeship of my will, occasioned by disclaimers, resignation, or death, whether in my life-time, or after my decease, shall be supplied as soon as may be by the appointment of a fit substitute, such appointment to be made by the continuing trustee and my wife during her widowhood; and after her death or marriage by my said sister *Catherine* or mother, or the survivor of them and the continuing trustee, if there be one: and if not, then by my said sister or mother, or survivor of them. Judgment.

"For, and notwithstanding anything herein contained, I will and bequeath to my wife *Mary Ellen Wilson*, all my household furniture and effects in and about my dwelling at my decease.

"I give and bequeath my own gold watch, chain, and personal jewellery to my brother, the said *James Wilson*, as a slight token of my affection. I direct that the trusts and powers hereinbefore confided to my trustees herein appointed may be executed by the trustees or trustee for the time being of my will, and in regard to trustees to be appointed as well before as after the vesting of the trust property.

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"I appoint my half-brothers, the said *James Wilson* and *Charles Beatty*, to be the trustees and executors of this my will.

"I hereby revoke all former wills by me made."

The defendants produce a paper dated the 5th of July, 1873, which they propound as the last will of the deceased. It is in these words:

"This is the last will and testament of me, *Thomas Wilson*, of the city of Toronto, merchant.

"I will, devise and bequeath all my estate, real and personal, to my executors, the survivors or survivor of them hereinafter named upon trust to get in my said estate as soon as may be after my decease, and after the payment of my debts, funeral and testamentary expenses, give one-third part thereof to my sister *Catherine Wilson*, for her own use absolutely.

Judgment.

"I will and direct my said executors, the survivors or survivor of them, to invest the residue of my estate on real estate securities.

"I direct and will that my said executors, the survivors or survivor of them, shall pay to my mother as a first charge upon my estate, not hereinbefore bequeathed, an annuity of one thousand six hundred dollars per annum during her natural life.

"I also will and direct that my said executors, the survivors or survivor of them, shall pay to my wife eight hundred dollars per annum during her natural life, and that the said annuities to my wife and mother shall be paid quarterly or semi-annually as the said annuitants shall respectively require.

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"I give and bequeath to my wife all my household furniture and effects, and I will and direct that my said executors shall pay to my said wife, during her widowhood, any excess of income there may be from my estate invested as aforesaid over and above the amount of the two annuities as aforesaid.

"In case there may be hereafter born any issue of the marriage of me with my said wife *Mary Ellen Wilson*, I will, devise and bequeath to such issue, on attaining the age of twenty-one years, the residue of my estate of what nature or kind soever and wheresoever situate, and in the event of the death of such issue before attaining the said age, then I will and bequeath such residuary estate to my sister *Catherine Wilson*, to vest in her immediately after the death of such issue.

"In case of the death of the said issue and of my said sister *Catherine Wilson* before the said issue attained the said age of twenty-one years I will and bequeath the said residuary estate to my said brothers and sisters of the half blood, *Charles Beatty*, *Margaret Beatty*, and *Arthur Beatty*, or the survivors or survivor of them, share and share alike. Judgment.

"I give my gold watch and chain to my said half brother, *Charles Beatty*.

"I appoint my wife *Mary Ellen Wilson*, my sister *Catherine Wilson*, and my half-brother *Charles Beatty*, the executors and trustees of this my last will and testament, and I hereby revoke all former wills by me made."

The deceased was unfortunately addicted to the too great use of intoxicating liquor, the indulgence in which vice either occasioned or accelerated the disease of which he died. Dr. *Philbrick*, the family physician, was in constant attendance on the deceased from the

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month of May up to the time of his death. The disease arrived at a crisis on the 14th of June, at five o'clock in the morning of which day Dr. *Philbrick* was summoned; and, later on in the same day, Dr. *Hodder* was called in to advise with the attendant physician. I propose to consider in detail the testimony given before me as to the state of the deceased from this latter date until the day of his death, and I do so at greater length than I otherwise would, as the case turns upon the evidence, which is voluminous, and I desire, to the best of my ability, to give in full my impressions in respect thereof, as the parties may desire to carry the question further; and, as in the prosecution of the case, the reasons at length for my finding may be of use to the litigants. As to some matters in the suit there can be no doubt. The plaintiff and her husband lived on affectionate terms up to the time of his death. Throughout his illness he looked for her attendance on him, and he received at her hands all the attention in her power. No indication of any intention to deprive her of any benefit given her by the will of 1871 is even hinted at by any witness. There is no doubt that blood-poisoning resulted from the sickness under which the husband was suffering; that this was apparent in the middle of June; that it more or less affected the brain; and that on the 8th of July the deceased lapsed into unconsciousness, from which he was never aroused. The question is how far had this progressed on the 5th of July, the day on which we find the name of the deceased appended to the paper which the defendants propound as his act.

Judgment.

The wife was not anxious on the subject of the will, as in the previous month of April her husband had informed her that he had made it, and that thereunder she had one half of his property. There was no child born of the marriage, but the plaintiff hoped to become a mother not long after the period at which her husband died, and I gather from her evidence, and that of Mr.

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*O'Donohoe*, that the principal matter in the mind of the deceased was to make some provision for the expected heir. This was doubtless to some extent in his mind, for Dr. *Philbrick* tells us, as evidence of the husband's affection and consideration for his wife, that he had arranged with him, that whatever his other engagements might be, they should not prevent his attending on his wife during her approaching confinement. The husband was the more solicitous as to the welfare of his wife, as she had suffered from several miscarriages.

The plaintiff, in her evidence, states that her husband was confined to the house from about the 1st of June; that Dr. *Philbrick* began to make frequent visits from the end of May; that he told her her husband's state was very critical; that on the 10th of June he had to be assisted by several persons, in order to get to her room, he having lost the use of his feet, and that on the 13th of June he finally took to his bed. She says: "He was in bed when I came downstairs, about eleven o'clock; I went to his room, and I found *Catherine Wilson* leaning on the bed; and *Charles Beatty* sat at the foot of the bed. He said: '*Charley*, go over to *O'Donohoe's*, and tell him to send over my papers.' I said: '*Tom*, you are very weak this morning; perhaps to-morrow morning you will be better.' He said: 'Oh, I must see to it to-day.' He said: '*Charley*, go over to *O'Donohoe's*, and tell him to send over my papers.' He said: 'Does *Tom* mean for me to bring the papers?' and *Catherine Wilson* said, 'Yes, he does.' He went away. I was under the impression that my husband's will was made, and that he wanted to add a codicil to his will for his child. He did not send for *O'Donohoe*; he sent for his papers. I did not ask anything about it after that. My husband vomited blood the morning of the 14th, about five o'clock. On the morning of the 14th, they sent for a person from the clergy, He went to confession with Father *Frechau*. He received the

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Communion on the 15th; it was Sunday. The doctor said there was no time to lose. Dr. *Hodder* was called in, on the 14th, about noon. He kept growing worse up to the 18th. The first indications of Mr. *Wilson's* illness were drowsiness. You would have to speak quite loud—would have to get close up to his ear and speak; ordinary conversation carried on would not be heard by him in the usual tone. About the 18th he rallied; he continued better about a week. About the 26th, Dr. *Hodder* resumed his visits; on the 28th, Dr. *Hodder* said if he had any business to attend to it had better be done at once, as the disease was rapidly going to his head. I thought it very strange my friends were not sent for. I said to Dr. *Hodder* that my husband's affairs were settled; but he had only dissolved partnership a short time with the Hon. *Frank Smith*, and his business was in a critical state. Dr. *Philbrick* returned, and I saw him; * * and he said I had better keep quiet, I was in a critical state of health, and he asked me if I had anything I wished him to convey to my husband. I said: 'No; Mr. *Wilson* had done all that was right to me.' * * On the 28th, he was despaired of by the doctors—given up; * * he was in a constant state of stupor. * * He was anointed on the 29th; * * they thought he was in a dying state. * * On the 28th, Bishop *Jamot* * * asked me if I was not glad to see my husband dying and he so well prepared. * * On the 1st 2nd, 3rd, and 4th of July, * * they thought he was dying every day. * * He was in a constant stupor; no noise would arouse him. I holloa'd in his ear once, and all the indication was he took hold of my hand. * * Dr. *Hodder* came on the 5th, in the morning. * * They said that Mr. *Wilson* was dying, and I proposed to get another doctor; Dr. *Philbrick* said to please me, that I might; that was his worst day * * I met Mr. *O'Donohoe* on this evening. * * It was after attending my husband, and I was going to my own room, and I met him at the door; he was on the outside, and I was on

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the inside, and he said, 'How is Mr. *Wilson?*' and I said, 'He is so ill you cannot see him; he is very bad, and I won't have him disturbed;' and he insisted upon going in; he said he would not talk only two or three minutes. *Catherine Wilson* was with him, and she stepped behind him when I objected to *O'Donohoe's* going into the room. * * *O'Donohoe* did not say what he wanted. * * I said he could come to-morrow and see him, and he said he could not, he would have to see Mr. *Wilson* to-day. He had nothing in his hand to make me suspect there was anything going on, and there was nothing in Mr. *Wilson's* room or anything to shew there was anything going on. * * This was about six o'clock. * * I could hear in my room most all the conversation addressed to my husband, on account of his being so deaf—on account of their being obliged to talk so loud. I did not hear any then. * * I think Mr. *O'Donohoe* was about five minutes in the room; I heard him leave the room. * * I then got up and went into my husband's room; he was going to sleep when I went in. Dr. *Philbrick* and Dr. *Richardson* came about eight o'clock in the evening, and my husband was then in a stupor. * * At this time I saw *Kate Wilson* in deep conversation at the foot of the stairs with Mr. *O'Donohoe*. I heard Mr. *O'Donohoe* was in the house after that; I did not see him. * * I asked Mrs. *Cumings* who went into Mr. *Wilson's* room; she said it was Mr. *O'Donohoe* and Mr. *Walls* * * they were there only a few minutes. My husband being in this stupor, I did not consider that anything would disturb him. * * There was nothing said to me about the will. After that my husband faded away until the 12th; on the 12th, about six o'clock, he died. I heard nothing about any will from the 13th; * * all I then heard was that he sent for his papers. * * My child was born about the 7th of September, and died about the 12th. *Catherine Wilson* told me I was entitled to one-third of the property, and the next time I spoke to her she said I shared equally with her and her mother.

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* * I did everything they told me. * * I heard after the funeral that I had half the estate when my child was born. * * I did not understand my real position until February following. * * It was after Dr. *Hodder* had spoken to me that the last rites were administered. * * Mr. *O'Donohoe* was not there for a week after Dr. *Hodder* had spoken to me. About the 28th a decided change for the worse came on my husband; * * I did not then think there was a necessity for sending for my friends. * * On the 29th my husband was growing worse. He was still worse on the 29th and on the 1st. * * All that week we thought he was dying day by day. * * I did not send for my friends; I did not wish them to know Mr. *Wilson's* state. I sent for my brother on the 5th; I then thought my husband was dying; up to that, I thought he was dropping off by degrees. * * The 5th was his worst day; * * that day he did not speak to any one that I know of. * * Father *Jamot* came frequently to see him. He never spoke to me about his worldly affairs; I did not know he was sent for about them. My husband had not spoken to me for all the week of the 5th; he did not speak to me for a fortnight before he died; I would say, 'Good morning, *Tom*,' in his ear, and he said nothing. My husband did not receive any of the rites of the church after Mr. *O'Donohoe* was there."

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The evidence of Dr. *Richardson*, the next witness, is not very material, except as shewing that about eight o'clock of the evening of the 5th, when he called upon the deceased, he was sleeping heavily; there was an unnatural heaviness; he made an effort, but not a determined one, to arouse him, and it failed, and after prescribing for the patient he left.

Dr. *Hodder* states:—"I first saw the deceased on the 14th of June. I found him in a very critical condition, labouring under an extensive enlargement of the liver,

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and, to a certain extent, blood-poisoning going on. On the 18th he appeared to rally, and I did not see him again until the 26th. I think his condition on the 26th was decidedly worse than when I saw him last. He shewed evident signs of blood-poisoning. I remember, about the 27th or 28th, he was in such a critical condition, and I saw the disease progressing so unfavourably, I asked if he had made his will, and I thought it was then fully time he should do so, if ever, for very shortly he might not be able to do so at all. I told some of the family that. On the 1st, 2nd, 3rd, 4th, and 5th of July he was getting worse—no improvement. On the 5th of July I think I saw him with Dr. *Philbrick*. He was almost in a comatose condition—he was not in a comatose condition for he could be aroused, but he was not capable of continuous thought, that is to say, if he were asked to hear a will read I do not think he was in a condition to hear it read—that was on the 5th of July when I saw him. I should say decidedly he was not in a condition to conduct a settlement of his affairs. You could arouse him, and he would answer a short question; but as to answering continuously, that, I think, was quite impossible. That condition commenced several days before, but it became more profound on the 5th. On the 5th it was so profound I thought it was utterly hopeless for him to attempt to make a will, if it had not already been done. * * I took it for granted that the will had been made because I spoke several days before. * * It was a constant deterioration from the 1st up to the 5th of July. I think I ceased my visits on the 5th. I then thought he was dying, and that he would scarcely live the night out. I do not believe at any time that I saw him in the month of July that he was in a fit state to make a will. He might have had a lucid interval or two, but I did not see him in that condition. * * I should say he was in such a state that if the will was not made before the 1st of July he was not in a fit state to make it. He may have answered a short

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question yes or no, or something of that kind, but for continuous action I do not think his mind was in a condition for it from the 1st to the 5th. I cannot fix the exact date I spoke about the will—it would be about the 28th or 29th. * * I ceased my attendance on the 5th, supposing he was then likely to die during the night. * * When I recommended the family about making his will he was, of course, in a fit state to make a will, but I saw the approach of the condition which afterwards followed. * * All medical men know the rapidity with which the system becomes poisoned, and when you first see the symptoms of it—of course there is danger in delay. * * The more poison taken into the blood the worse, and the brain may be in such a state as to refuse to act—may be comatose, as Mr. *Wilson's* was at last. * * We saw the deterioration, that the mind was not as clear as it was, and we thought it was our duty to recommend it while he was still in a condition to make it. There had been several days attendance before I gave this advice. During that time the progress of this blood-poisoning had been steady. It was rapid, although not so rapid as some cases. It had progressed steadily, and we looked upon his case every day more unfavourably. On the 5th of July he was not in a condition to make a will—scarcely a short will. He might have been asked the question: 'Whom do you wish your property left to?'—'Your wife?' 'Your mother?' or any one like that. He was not capable of constant thought—he wandered in a few seconds. When I actually did see him on the 5th he certainly was not in a position to perform a testamentary act. I was there about half an hour that day. It was impossible to talk with him; I spoke to him, and asked him a few questions and he would open his eyes and close them again. Sometimes he would answer a question rationally and at other times he wandered. People who are suffering in that comatose state from continuous blood-poisoning do not rally much. They may be a little better at one time than at another. I

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recollect we considered him in such a critical state that they ought to send for Father *Jamot* to induce him to settle his worldly affairs—that was in June, somewhere between the 27th and 30th." 1875. Wilson v. Wilson.

Dr. *Philbrick* says: "On the afternoon of the 13th of June the deceased was getting so rapidly worse that I told Miss *Wilson* that if he had any affairs to settle he had better settle them, and have his priest. Miss *Wilson* told me his affairs were all settled. She said he had got his will drawn, but she would send for his priest. I then went over for Father *Vincent*. His condition then was that of a dying man—he was muddled from blood poisoning. The crisis came on the 14th. He was then in a great state of prostration. He remained pretty much in the same state for three or four days, then rallied a little—and this rally lasted about a week, when he again broke down. During this period that he rallied Dr. *Hodder* was attending him too. He continued to visit until sometime about the end of June, when he said there was no use, as the deceased was dying. We had a serious conversation on the 28th. We discussed the propriety, if he had any worldly affairs to settle, to do so, for he would not be able to do it afterwards. After that I never observed that he could do more than arouse just, to a simple, short question. The blood poisoning was going on worse and worse. I never saw any rally after the 28th. Sometimes he was liable to chills, and when they were on you could hardly tell whether he was alive or not. I made efforts to converse with him, but I could never get him to complete a sentence. He was so bad on the 5th of July that I suggested to telegraph to Mrs. *Wilson's* brother in New York, and I did telegraph. I remember that on the 5th Dr. *Hodder* said the patient was so bad he would give up attendance. His condition was not so good on that day as on previous days. The disease was one that progressed with the bodily decay, involving a mental decay. The grad- Judgment.

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ual activity of the blood-poisoning was killing him—the poisoning was caused by the bile. I do not believe the deceased could understand three lines any time after the 28th. He was very much worse on the 5th of July. He was then utterly incapacitated as regards mental volition. I saw him every day between the 5th and 12th. I saw him on the 6th. He was always much worse towards the latter part of the day, but he would never completely rally during the early part of the day. I saw him two or three times during the day. Between the 27th and 28th of June, and the 5th of July I was often in and out; I was there sometimes five or six times a day. I was there several times on the 5th. I was there a good deal. I passed a good deal of the time in the house on the 5th. My visits were numerous. The first concern in the morning, and the last at night. There was danger of immediate death on the 14th."

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*Isabella Dechattelle* visited him every day, she believes, for a fortnight before his death. "He would sometimes say 'Yes,' and ask me how I was; the last week he did not. The week before his death he had a very severe chill. He seemed to me unconscious during this chill. I am positive this was the week before he died. After that, up to the time of his death, I considered he was dying. For nine or ten days before he died, if I would ask him, 'Are you better; how do you feel to-day?' he would not say, 'I am better,' but he would make a motion with his lips, and make a noise, 'ehr,' or something like that."

*Mary Clancy* went there at 7 o'clock on the morning of the Tuesday before he died, and remained there until the evening of the day following. She was nearly all the time in the bed-room of the deceased, and found him in a state of stupor, unconscious all the time—quite senseless. On cross-examination she expresses herself as not quite sure of the date.

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The Rev. *Charles Vincent* corroborates Dr. *Philbrick* as to his going for him on the 13th of June.

The Rev. *Francis Frechau* heard his confession on the 14th.

The *Telegraph Operator* proved the telegrams sent on the 5th of July to Dr. *O'Dea*, New York, by Dr. *Philbrick*, and one on the same day, sent to Mr. *McDonell*, by *Charles Beatty*.

*William Brydon*, the druggist, proves the receipt of a prescription from Dr. *Richardson*, which he made up on the 5th of July for the deceased.

This closed the evidence for the plaintiff, and upon it standing alone, I should have had no hesitation in coming to the conclusion, that the paper of the 5th July did not represent the mind of the deceased. The first will provided that half of the income of the deceased's estate should be paid to his wife during her widowhood. This is the first in order of the provisions made in the will—the other half was to be paid to his sister *Catherine Wilson*. In the event of issue of his marriage, then the legacies to the wife and sister were to abate, so that such issue should share the income of the estate equally with the wife and sister, until such issue attained 21 or marriage, and, after the marriage or death of his wife, her share was to go to the benefit of the issue. The will went on to provide that the child, if a male, at 25, or a female, at 21 or marriage, should take half of all the estate; and in case of their being no child living within a year from his decease, then half of the property was to go to the sister *Catherine Wilson*, and in case of the death or marriage of his wife, her half went also to his sister. In case of the death of this sister the income of the estate was to be paid to the mother for life, and on her death the property was to go to *Charles, Margaret*, and *Arthur Beatty*, children of his mother by her hus-

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band *Thomas*, and on the death of either of them, to the survivor. Certain powers were then given to the trustees to settle the estate as they thought best. All the household furniture and effects in and about the dwelling-house were given to his wife, his gold watch and chain to his brother *James*. His half-brothers *James Wilson* and *Charles Beatty* were named executors and trustees of the will. The will covered five pages of foolscap paper, and in the attestation clause the day of the date was left blank. In it we find a distinct provision made for the wife; she was thereby placed in the position which, except for the restriction as to widowhood, we would expect to see occupied by one whose claims to the bounty of another, were certainly second to no one else. A reasonable share in his property was by him assigned to her who had accepted his lot, whether for better or for worse. A provision also was made for issue, perhaps not so specific as otherwise it would have been, but

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that the testator was at this time without a child. A provision which, on reflection, and in prospect of a child being born to him, a husband and prospective father might reasonably have been dissatisfied with, as no guardian was appointed by the will, and no hand named to dispense during minority the allowance made to the child. It is of importance to consider these matters, for they are such as would, not unnaturally, be found in the mind of one whose attention, lying on a bed of sickness, would reasonably be called to the prospects of those he may be called upon soon to leave. It is also of importance, because the evidence shews us, that the probable birth of a child was a matter actually in his mind, and the only expression of dissatisfaction we find him giving utterance to, as to the contents of the will, is in respect of that portion of it which dealt with this subject. If the alterations made on the 5th of July corresponded with the expressed wishes of an earlier date, when there was no question as to the soundness of the mind, this should go very far to sustain the will: if, on the other hand,

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the paper prepared does not carry out these views, it must be received with a very considerable amount of suspicion. Now here, bearing in mind the expressed object of the testator in altering the will, what do we find? In the first place, how far has the main object been effected—the provision for the child? How does the paper of 1873 improve his position beyond that of 1871? By the later paper the child takes nothing during his minority, directly or indirectly. No allowance is made for his maintenance or education, and on attaining 21 he gets the residue of the estate, which amounts to nothing, until the death of the mother and wife. So that the child is left penniless until, by these deaths, the estate is released of charges subject to which the child takes a share of it. It would be hard to conceive a more unlikely provision for a father to make advisedly, or a clause less likely to carry out the views of one, anxious to provide for his child, and having the means of so doing.

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The wife shares not much better than the child. She is displaced from the position she occupied in January, 1871. The paper of 1873 begins with the gift of one-third of the property to the sister *Catherine Wilson*. Then an annuity of $1600 in favour of the mother is made a first charge on the balance of the estate. Thereafter an annuity of $800 for life is given to the wife. The household furniture and effects are given to her, and any excess of income, after payment of these annuities, is to go to the wife during her widowhood. In case of the death of the issue, and of *Catherine Wilson*, before the issue attain 21, the residuary estate is to go to *Charles Beatty*, *Margaret Beatty*, and *Arthur Beatty*. The gold watch is given to *Charles Beatty*: and the wife, *Catherine Wilson*, and *Charles Beatty* are appointed executors and trustees. Looking, then, at the state of the deceased, as described by the witnesses to whom I have referred, we find a strong corroboration

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of the truth of the conclusions at which they arrived, when we see that the paper produced by the defendants so completely fails to carry out the only object which we can ascertain the deceased desired to accomplish in altering the will executed.

On what then do the defendants rely, in support of the paper they propound as the last will and testament of *Thomas Wilson?* Their first witness was the defendant *Charles Beatty.* He was in London. Ont., on the 14th of June and then received a telegram which stated that the deceased was seriously ill. He arrived in Toronto on the evening of that day, and said he did not then consider the deceased very ill; that he was then as able to speak as ever he was in his life. "I recollect," he says, "the 29th of June, the Sunday week before his death. The Hon. *Frank Smith* remained for about an hour with him that day. They conversed all the time—they talked about politics. Mr. *Smith* told him of a commercial transaction and customs duty transaction. On Monday following he sent me down for a valise. On the 29th I washed him; he was talking to me all the time; he told me a couple of anecdotes. He was in good health on the 1st, that is, in the same condition that he had been in the day before. There was no particular change on the 2nd. On this day he and Dr. *Hodder* talked over the Barrie races, where the latter had been on the 1st. I talked with him every day. On the 2nd he sent me to *Furniss's* for some claret and gave directions about it. He was not so well on the 3rd. He said he was not satisfied with the way things were moving. He spoke to Dr. *Hodder*, who told him he was dangerously ill. He then said he had better settle his affairs. The doctor said, 'Yes, you had better settle them.' He sent over to *O'Donohoe's* for the will, and said he did not want to leave his affairs unsettled. I went and got the will, and gave it to *Wilson*, and expected he would ask me to read it. He told me to call my sister *Kate*, and I called her;

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and he told me to leave the room and shut the door, and I did so; and she remained in the room. I spoke to him on the 4th about going to the lawyer. He said he wanted to think it over. On the 5th he was not at all so well as he had been before. Dr. *Hodder* asked me if his will had been made yet; I said 'No.' He said it ought to be made at once, for by and by, he said, he will not be able. A few minutes after that Miss *Wilson* came to the door, and told me the doctor recommended that we should send for Father *Jamot* to ask him to make his will. I went over to the Palace, and saw Father *Jamot*, and told him to come over. I then went to *O'Donohoe's* office, and told him what we had done, and that we wanted him to come over to make the will. He came with me. * * My sister seemed glad to see me. We went up-stairs. I think we met Father *Jamot*. * * When we went into the room, *Wilson* said he wanted to be alone with *O'Donohoe*, and I went away, and closed the door, and remained outside until *O'Donohoe* was through. *O'Donohoe* was there twenty minutes or half an hour. We spoke about having another doctor, and I went for Dr. *Richardson*. I saw *Wilson* about half-past eight that evening. He was asleep. I did not wake him up. I went and got the fomentation, and brought it back to the house. I saw *O'Donohoe* at the house between seven and eight o'clock that evening. I was not present when the will was signed. I last saw *Wilson* that evening about the time Dr. *Richardson* was there. When I got back with the medicine *Wilson* was still asleep. I did not see him awake that night. I think I went to bed about ten. He did not seem any worse on the 6th. There was no material change on the 7th. I had nothing to do with the preparation of the will, nor did I know what disposition he was making of his property by it. He appeared a good deal worse on the morning of the 8th. On that day he recognized his brother from the States, and read two letters received from Ireland. The doctor gave him some

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medicine and he grew worse rapidly and never rallied after. The whole estate will realize a little over $40,000 —it may amount to $42,000 perhaps. I have stated that *Wilson* intended to put his wife, mother, and sister on an equality as regards income. A large part of the estate was in the shape of a debt due him by a man named *Dwan*, of Strathroy. I thought it was an imprudent thing for him to take this debt—it was taking an uncertainty before a certainty. There was only security for $16,000 of it. There will be more realized out of it. I never had any conversation with *Wilson* of any kind about the will, nor with my sister or mother."

This witness had been examined before the special examiner, previous to his giving his evidence in Court, and then he said Dr. *Richardson* did not prescribe that night, and that he did not think he was in *Wilson's* room that night; also that he came to Toronto on the 8th in place of the 14th of June. These and other matters in the depositions, when compared with the previous examination, shew that the memory of this witness cannot be relied on in dealing with dates.

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He proceeds: "I first saw Mr. *O'Donohoe* in the house on the 5th, between two and three o'clock. I saw him again somewhere about five or six o'clock: I don't recollect seeing him there after that. I think he was there in the evening. I have not a distinct recollection of seeing him. I think I saw him there about 9 o'clock. I think I remember him there waiting to see if *Wilson* would wake up. I know *Wilson* sent me for the will on Thursday; I asked him about it on Friday, and he made it on Saturday It was Miss *Wilson* who asked me to go and see Father *Jamot*, and get him to come. I did not speak to Mrs. *Wilson* on the subject of the will: she was not consulted about it at all. The thought never struck me of speaking to his wife about it. Nothing

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passed between me and Father *Jamot* about Mrs. *Wilson*. The rite of extreme unction was administered by Father *Jamot* on the 4th of July. Father *Jamot* was at the house on the 4th and 5th, and every day afterwards until *Wilson* died. On the 5th, Dr. *Hodder* gave up coming because he thought the case hopeless. Between the 1st and the 5th I did not notice *Wilson* asleep, drowsy, or lethargic. I did not notice him in that state during my fifteen visits stretching over those days; he might have been asleep, but he was not lethargic, comatose, or in a stupor. I do not remember his being in a fever during that time; he was in a chill on the 5th, but before that I never saw him in a chill or feverish. I telegraphed to the friends on the 5th in consequence of the doctors saying *Wilson* could not recover. On the 5th I believe he was asleep when I came up stairs, just about the time the doctor came in. I do not think it was stupor or anything approaching it. He remained awake all the time that the doctors were there, and he was awake when I went away for *O'Donohoe*, and I found him awake when I got back again. I think he was perfectly sensible up to the time he took the laudanum. I think there was no time but that he was sensible up to the time he got the laudanum. I am quite certain I was never in the room, up to that time, but that he had perfect command of his faculties. I think it was towards the night of the 7th I noticed he was not so well. I did not hear him converse with anybody, that I can recollect, on the 5th. He was deaf for about two weeks before he died; several times he intimated to me that he could not hear unless the voice were raised. I think it was the next morning I heard from the people that a fresh will had been made. I don't know whether Mrs. *Wilson* or who told me. I don't know who told me."

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*Catherine Wilson*, the co-defendant, says:—"On Thursday, the 3rd, Dr. *Hodder* said to her brother that

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he had better settle his affairs, that he was seriously ill, and it would not be well to hide it from him any longer. When the will was brought my brother asked me to read it over slowly and distinctly, and I did so. He said he was going to make some changes in the will—some little changes, I think he said. He remarked that the will was not dated. On the 4th my brother asked the deceased if he should go for Mr. *O'Donohoe*. On the 5th the doctor told me how drowsy my brother was. Dr. *Hodder* asked me if his affairs were settled. Mrs. *Wilson* was in the room, and she said she did not know. She left the room and Dr. *Hodder* followed her. The doctor came back and said the best person to send for was Father *Jamot*. I told Dr. *Hodder* that there was a will made, and I thought it was a very good one. He asked me if I thought there was a prospect of a child being born, and he said that might make a great difference. I saw my brother after *O'Donohoe* left. I cannot tell particularly how he was, only I never saw him in a state of stupor, or anything of that kind up to that time. His brother *James* came the Monday before he died, and he knew him on the Tuesday. He got out of bed that morning without any assistance. He read one letter at all events that day. I think the deceased and his wife were on affectionate terms. As her health permitted her she attended on him. He seemed to look for, and expect her attendance, and always asked for her. He never said anything about altering his testamentary disposition against her. He just said he wanted to make some changes, or some little changes. He did not say what these changes were. I read the will over once ; he did not ask me to pause in reading. When I read it, he said he wanted to make some little changes, and then he told me to put it up. He said nothing more about the changes, or making them. I asked him to let me send it over to Mr. *O'Donohoe*. He said, 'Put it by,' and I went upstairs with it. I was in the room when *Charles* asked him whether he should go for *O'Donohoe*. I had

some conversation with Father *Jamot*. He saw my brother, and came and said I might send for a lawyer. I then went to send for Mr. *O'Donohoe*, and met him in the hall, coming in. At this time I did not know my brother had gone for him. When Mr. *O'Donohoe* was in the room with my brother, I don't think I heard any conversation there. Generally when persons were talking there I could hear voices. Mr. *O'Donohoe* came three or four times between that and late at night. I went in to my brother with a drink as soon as Mr. *O'Donohoe* went out. I do not think he slept more than a man would in perfect health, only it was disturbed more at intervals through the twenty-four hours. I never saw him in a stupor until Tuesday. On the Tuesday the doctors gave him some laudanum, and he went into what they called a state of coma, and never aroused after that. I did not know it was anything but sleep. I think he was in a comatose state after Tuesday, simply because he never roused up. He always talked some until he went into the state of coma. He was always competent to take part in conversation. I was in his room a good deal. Mother was there a great deal; Mrs. *Wilson* was there, and my sister was there. I cannot mention anything about what we talked in the month of July, in which the deceased took part, except as to his illness and the will. I never thought his mind was weak at all. I never thought there was the slightest lowering of the mental powers until Tuesday, until he went into the state of coma, from which he never aroused. I think his intellect was as bright and clear as it ever was. I think his intellect was as perfect as it was before his sickness; his body was weak, but his mind was strong. He was able to move and sit up in bed until he fell into the state of coma. He was always able to move around and help himself. On the 3rd, at the request of Father *Proulx*, he consented to receive extreme unction."

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Mrs. *Beatty* was not, nor was any other member of

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the family, or Bishop *Jamot*, examined; so that this closes the evidence of those who were present continually or frequently at the bedside of the sick man; and it will be well to pause here and consider, so far, the effect of the testimony.

It is admitted by all that on the 8th of July the deceased sank into unconsciousness: the coma then became profound; and never after that did he become conscious. The medical testimony makes it clear that he rapidly and gradually reached this comatose state. The diseased state of the liver disordered the whole system. The beginning of this was apparent on the 14th of June; then the blood began to be visibly affected by the disease. This continued for three or four days, then a rally for about a week took place, when the dangerous symptoms again shewed themselves, and they continued without intermission until death ensued. The poisoning
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It was not the case of a man seized one day with a sudden paroxysm, and thus deprived of his intelligence for a period, and when recovered, again able to deal rationally with the affairs of life: but the medical gentlemen, well qualified to speak as to these matters, tell us, that in the present case, as it is generally in cases of this class, when the sickness ends in death, there is a

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gradual, steady progress of the disease—the lethargy or stupor becoming. from day to day more intense, until the beclouded intellect loses itself in midnight darkness. It is not to be looked for, that when the mind has reached a state such as that described as the condition of the deceased during the first days of July, the reasoning powers will again regain their sway.

There is no doubt as to the opinion of the plaintiff and *Isabella Dechattelle*, of the state of the deceased for the ten days preceding his death; but I think it better for the moment not to consider their evidence, and to contrast that of *Charles Beatty* and *Catherine Wilson* with the testimony of those who have no bias in the matter—the medical gentlemen.

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Dr. *Hodder* says, that on the 5th the deceased was almost comatose; that he was not in a condition to settle his affairs; that it utterly hopeless to try and make a will then; that from the 26th matters were gradually leading up to that state; that there was a constant deterioration; that the deceased was never in July fit to make a will; that people thus situated do not rally much; that he saw on the 28th or 29th that the mind was not so clear, and therefore then advised the making of the will; that what was happening to the mind was the natural and looked for result of the disease.

Dr. *Philbrick*, who was in attendance from three to six times each day, from the 14th of June until the death, and was at the house much of the 5th, corroborates entirely this statement of Dr. *Hodder* as to the condition of the deceased from the 29th up to and inclusive of the 5th. He says, that even on the 14th he was, as he termed it, "muddled;" and that after the 29th he never could do more than answer simple questions.

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Is it possible to reconcile this with the statement of *Charles Beatty*, who says that he was in the bedroom during this period three times a day for the space of half an hour at each visit, and yet that he did not on any of these occasions notice him asleep, drowsy, or lethargic; that he was perfectly sensible up to the time he took the laudanum, that is, until the 8th; that he was never in the room up to that date, but that he had perfect command of his faculties.

The statement of *Catherine Wilson* is, it possible, stronger. She says that the deceased did not sleep more than a man in perfect health; that until the 8th he was competent to take part in conversation; that she never thought his mind weak at all; that she never thought there was the slightest lowering of the mental faculties until Tuesday; that she thought his intellect was as bright and clear as it ever was; that his intellect was as perfect as it was before his sickness—his body was weak, but his mind was strong.

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This is the account of a constant attendant at the bedside—present when the medical men paid their visits, and who pledges her oath to the intellect of the deceased being as bright and clear as ever it was, at a time when the medical men say his faculties were so impaired that he could do no more than answer yes or no to simple questions.

It is impossible to reconcile these conflicting accounts, and I am bound to accept the statement made by the attending physicians, and to reject the untruthful and biased one given by these defendants.

It is, however, still necessary to consider the testimony of the Rev. Mr. *Shea*, Mr. *Smith*, The barber, and the two witnesses to the will, in order to ascertain whether what transpired in their presence should lead to the

conclusion that the deceased was capable of a testamentary act. 1875.

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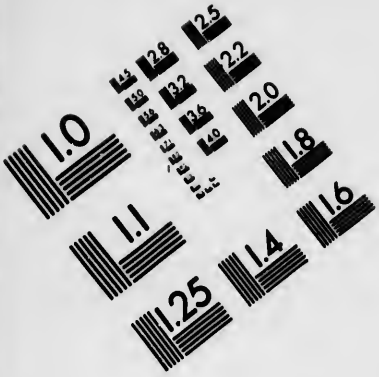
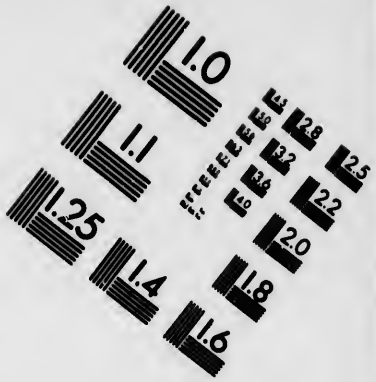
The evidence of Mr. *Smith* does not assist the defendants. Mr. *Beatty* and Miss [illegible]*n* stated that up to the 8th the deceased was a[illegible] to join in any conversation. Mr. *Smith's* visit was on the 29th, and as to that he says: "I did not talk on very general subjects. In our conversation he answered yes and no. He made two or three remarks during my conversation. I do not recollect exactly what they were. I think I spoke something about elections, and tried to get him into conversation, and he did so; he was very weak, but he would answer yes and no. I found I had to carry on the bulk of the conversation. To the best of my knowledge no answers he gave me were more than yes or no." Such a statement corroborates the opinion of the medical men as to the failing powers of the deceased, and the need of losing no time in arranging his worldly affairs. Judgment.

*Andrew Elder*, the barber, shaved the deceased on the 6th, and says that after the operation he said, "How do I look, Andrew?" He also shaved him on the 2nd.

The only material circumstance in the evidence of the Rev. *John Shea* is, that he visited the deceased when he was in a comatose state, which he thinks was about five days before his death.

Unfortunately the testimony of Mr. *Walls*, one of the witnesses to the will, throws but little light upon the condition of the deceased at the time of the signing of the paper. On his cross-examination he thus shortly states what took place at this time: "Immediately upon my entrance Mr. *O'Donohoe* produced the will, and immediately upon his producing it Mr. *Wilson* was assisted up in that way; and immediately upon his being assisted up, he had the pen, and observed the want of date, and

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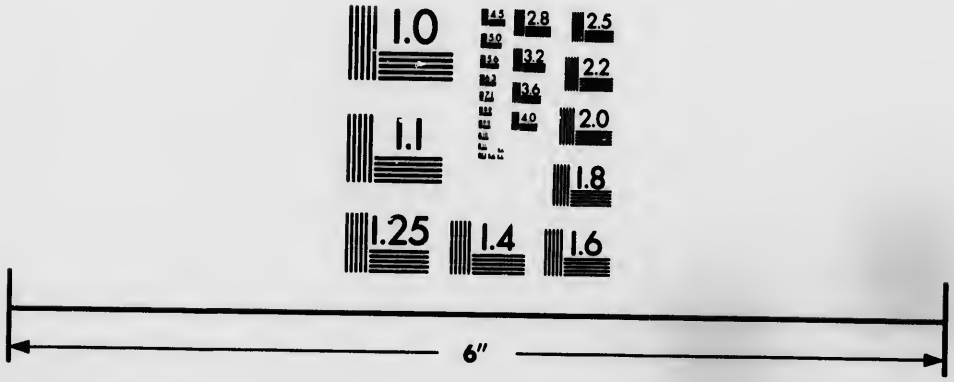


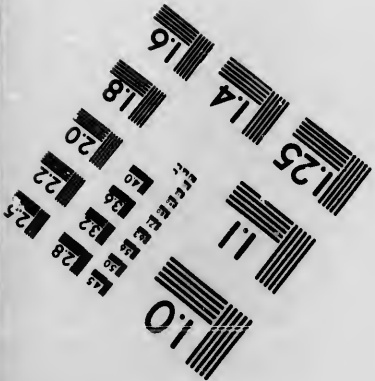


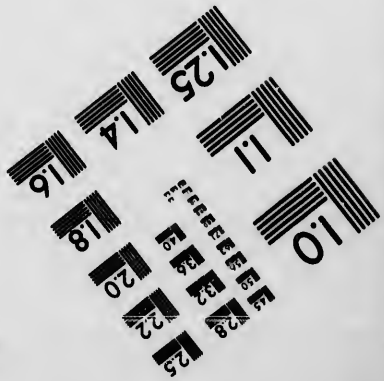


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immediately Mr. *O'Donohoe* filled up the date. I supported Mr. *Wilson* while this word was being put in, and Mr. *Wilson* completed his signature, and immediately I said, 'Good bye,' and that I hoped he would get better, or some such kindly words, and I went off." There was not the least discussion as to the tenor or effect of the will. It was not read over. Mr. *Walls's* attention was called to some discrepancies between his former examination and that given before the Court; not that I think he purposely said anything but what he considered to be the truth, but it shews that the little which took place, during the few minutes he was in the room, did not impress itself very firmly upon his mind. There was not anything, however, that took place in the shape of conversation or discussion which could assist in arriving at the conclusion as to the state of the deceased's mind at this time.

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The last witness, whose testimony I have to consider, is Mr. *O'Donohoe*, who prepared and witnessed the paper in question. I had hoped, up to the time he went into the witness-box, that I would have found, in the story told by him, an easy solution of the difficult question of fact which is presented to me. The material portion of his examination is the following:

"I had known the deceased for a number of years, intimately since he came to reside in Toronto. I acted as solicitor of the company of which he was a member, *Frank Smith & Co.* I prepared a will for him. I did so first on the eve of his going to Ireland. This will remained in my possession until shortly before drawing the other will. I delivered the first will to *Charles Beatty*. *Charles Beatty* called for me at my office, and I went with him to the telegraph office, and from there to the house. I then saw Mr. *Wilson*, and received instructions from him. No one was present but myself. I do not recollect whether any one was

present when I arrived there. The will which I had drawn formerly was placed in my hands on my entering the room, and after he had spoken to me about the purpose for which I had called, I asked if this would not answer every purpose, speaking of the former will, and if he desired any changes, that they might easily be made on this will, without troubling himself with making another, and he said he would rather have a new will made; that his circumstances had changed so much from the time that was made up to the present, that he thought it would be easier to make a new will than to alter that to suit him. After deciding upon drawing a new will, I sat close by his side, and noted down in short form his instructions; and after having done so, I went over to my own house. I lived across the road from him. This was very close to 3 o'clock. I do not think it could have been more than fifteen minutes either before or after. I went to my own house and made a draft from my notes, and went over with the draft, and went over it with him, and he caused the draft to be so greatly changed that I interlined the changes in the draft, and after that was done I went home and made another copy, and brought it back; that copy was changed but slightly. There were some changes. Some changes I did not think very important as to the dispositions, but at all events they were made, and after doing that I went home again, and made the will finally, and that is the will which is here. He caused me to go over with it very close to himself, and go over it very particularly. The will that I finally prepared is in accordance with his instructions. I did not receive a tittle of instructions from anybody else. When I had the will prepared finally it was very late at night. I said to him, it was all ready for execution, and that I would go down stairs and call a witness; and he said, 'You know old *Walls* and myself are pretty good friends, and I would like to have him as a witness.' The term 'old *Walls*' was the term he addressed him with occasionally. We

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were in each other's society a good deal; we lived near each other, *Walls*, *Wilson*, and myself, and I said I would go for him, and I did; and I left the will drawn as it was in the room, on the bureau, just open as I had finished it, ready for execution; and called for Mr. *Walls*, who accompanied me, and we both got there, and after some salutations and word of conversation between *Walls* and myself, the will was signed; a small table was drawn to the side of the bed, Mr. *Wilson* was assisted up in his bed, and he leaned out on that small table, and with his own hand signed that will. I destroyed the drafts of the will immediately after the execution of the will. I paid three or four visits to the house that day. I cannot say which. I paid, certainly, three. The will produced was not the second copy I made. It was the third copy, calling the notes I made one. I cannot say for certain, whether that is the third or fourth copy: I know I kept making copies until I satisfied him. When I talked to him first I had the old will in my hands. I observed some pencil-mar[illegible] on it within a day or two. These marks are in my [illegible]d-writing. Until this moment it slipped my memory that I had marked the will. I do not remember when I marked it; nor any of the circumstances about it. The only occasion I had a conversation about the will in question was the one I have mentioned. The pencil memorandum '*Chs.*, my wife, and Miss *Wilson*, Exrs,' stands for '*Charles*, my wife, and Miss *Wilson*, executors.' That was a taking down by me of the statement of the testator that he desired *Charles*, Miss *Wilson*, and his wife, to be the executors. I think the statement on the back of the will, 'My mother, £400 a-year during her life,' was taken from the testator; also the note, 'to my wife.' 'Also Kate all vt'.* These were not the rough notes of which I spoke. I had them on other pieces of paper. I do not know where they are. I cannot explain how it was that I took portions of the notes

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* These four words were run through in pencil.

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on the will, and portions on other paper. I do not think I had any discussion with Mr. *Wilson* on my first visit as to the character or extent of his estate. I do not think I had at any of my interviews that day; but I cannot speak at all in confidence from memory upon the fact: If I had, I do not recollect it. I think he mentioned something about the expectation of a child being born. I cannot tell what he said, but I am quite sure he mentioned something; and it was one of the causes, I think, that made him want to make another will; that is my impression of his talk. I do not remember his expressing any reason, why the expectation of issue, at this time, would necessitate a different provision. On my return I found that what I had written did not suit his view, or what his views were. I believe I brought back to him in writing the impression he gave me of his will. I either misunderstood his instructions, or he changed his mind. I do not know which it was. The document brought back was so interlined and changed that I had to make a second draft. I cannot recollect any of the changes. The first will was not read on the first visit in my presence, Its dispositions were not referred to further than by my asking generally if changes could not be made to make that will do. No particular disposition in the will was referred to. I had not read or seen, for a long time, the first will that I wrote, nor did it give me any concern what it contained. I cannot tell whether it was upon the first or second visit that I was instructed to make the preferential dispositions in favor of the wife or mother. I have no recollection as to when it was that these extraordinary dispositions were made as between the mother, his wife, and his sister. I did not point out that the consequence of placing the wife third in these dispositions might be that she would be left without anything at all. I only remember the provision made for issue by a recent reading of the will. I think the income of a third of

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the estate was to go to the mother and the infant during the minority. I think there is a further provision that the income of a third of the estate was to go to the widow. I do not mean to say that that was the instruction. It is my impression that that is in the will. I derived that impression from looking at the will recently. My general impression is, that the deceased thought that $60,000 was the value of his estate. I do not think I gave any attention to the fact that any deficiency in capital or interest would have to be borne by the wife and the issue; and I believe he had no anticipation of a reduction of the estate. I really cannot tell what was present to my mind at the time I drew the will. I cannot tell what was present to the testator's mind. I did not feel called upon to make any suggestion whatever as to the dispositions, and took no trouble to ascertain that he really apprehended the possible results of those dispositions, and I cannot say that he did apprehend them. I cannot say what struck my mind at the time—I have no recollection. I cannot tell whether my mind was struck by the idea that the wife was being placed in an extraordinary and disadvantageous position. My instructions were obtained by the process of sitting close by the deceased, and as he told me what he willed and wished I would put it upon paper. There was no process of questioning on my part. I do not remember that I interrogated him; I might have; I made no suggestion. I cannot give the slightest idea of the particulars where I found any change of mind or misapprehension of those instructions. I cannot give any idea whatever of the words or the substance of the words in which he conveyed to my mind that his sister should be provided for first and his mother next and his wife last, if at all, out of whatever there might be; nor did I make any remonstrance whatever as to the effect of this disposition. He gave me no reason whatever for such treatment of his expected child and his wife. There was very little change in the deceased from the time I

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commenced with him until I left him. Generally when I left him he slept, and I found him on my return asleep. I do not remember talking on any other subject but the will; I may have had a slight word with him. I used to say, 'Mr. *Wilson*, go on now with this matter—we will go on now with this matter.' That would arouse him. I think I was a good while taking these instructions: I think I must have been pretty well on to an hour. I do not speak as to the time with any degree of certainty at all. He was not in a condition to talk so rapidly as a man in his proper strength. I think there were pauses. After the statement of his wishes I noted it down and read it to him, and asked him if that was his view, and he either said it was or was not. This was the first time I visited him. After that there would be a slight pause, and then he would go on. I sat ready to take his words, and then I took them down and asked if they were right—that was the process the first time. When I came back the second time there were considerable changes. To a certain extent I went through the same process. I cannot say whether or not at this time he said his estate was worth $60,000, or that his wife, sister, and mother should each have about one-third. I will not say that he did not say so; for all that I remember he may have said so. If he did I should say this will disappoints his expectations. I took no trouble in any way to give direction to his will. I took all my instructions from him. I always consider it my duty to take the instructions from the testator, and not to suggest. He gave me the instructions perfectly clear. I had no apprehension whatever—indeed had so little doubt after, that my firm belief was, and I believe I said so, that the doctors were very strange in their statements to him, and it was my strong belief that he would recover. It did not occur to me that there was the slightest mental weakness about him at that time. I thought he could make as good a bargain then as ever. He was a man of remarkably clear intelligence. I have

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In weighing the evidence of the solicitor who prepared and witnessed the will, naturally these two matters present themselves to the mind: first, what opportunities were afforded to him for testing the capacity of the deceased; and, second, how far has his memory served him in remembering what took place at the time.

It is to be regretted that Mr. *ODonohoe* entertained the opinion to which he testified as to the position of a solicitor in taking instructions for a will. No doubt it is, as are many matters with which solicitors have to do, a subject frequently of much delicacy to suggest to a client an object of his bounty, and to explain the effect of particular dispositions, when it may lead to the necessity of imparting family secrets in order to the understanding of seemingly ill-advised distributions of the estate. But this affords no reason for the legal adviser not bringing before the notice of his client the effect of his will, and explaining to him where some peculiar provision is asked to be made, in what it differs from the ordinary arrangement made; and in what respect it may be unwise to insert it.

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The client comes to the solicitor as his adviser in this, as a matter in which peculiarly he stands in need of his assistance. A general statement of his views are given, and they are clothed in language considered appropriate for giving them effect. This careful supervision on the part of the solicitor is at all times proper, so that no matter usually embraced in a will be omitted—so that no desire of the testator fail by reason of its not being fully comprehended and aptly expressed. But, perhaps at no time does a man stand so much in need of the

friendly offices of his legal adviser as when, enfeebled with disease, he seeks his aid to assist him in making those final arrangements as to which, if there be a miscarriage, there is but slight prospect of remedying it. 1875. Wilson v. Wilson.

It was under these circumstances that Mr. *O'Donohoe* was summoned to the bedside of the deceased. Mr. *O'Donohoe* admits that he cannot recollect a single statement made to him by Mr. *Wilson*, but that he desired some provision to be made for his issue. There was no question asked; there was no suggestion made; there was no remonstrance as to the effect of the will. Mr. *O'Donohoe* cannot say that the deceased comprehended the will when it was made; that he knew its provisions; or, that the will carried out his intentions. The rough notes and draft of the will are destroyed, and the only memorandum we have preserved is the pencil noting on the first will, which affords no evidence of a provision for issue or of postponement of the wife. Mr. *O'Donohoe* says he saw nothing about the deceased to call his attention to the necessity of making any observation as to the will, its contents, or effect. But Mr. *O'Donohoe* knew the deceased was very deaf and very feeble. He knew that it took him about an hour to give him instructions about this simple will. He knew that the deceased had mentioned to him, as one of the reasons for desiring to make a will, that he wanted to provide for issue. He knew that the provision made was a mere farce, and which, if the grandmother and mother were long-lived, would give nothing to the child until it was thirty or forty. He knew that the allowance to the wife depended on the contingency of collecting in a large sum of money, the greater part of which was unsecured. He knew that the income of the wife was not only being lessened in amount, but that it was made to bear all the risk of failure in collecting the estate and of loss thereafter, arising from investments which turned out badly. He knew that the husband was Judgment.

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expressing renewed confidence in the wife by naming her executrix in this will, and with all this he allows the wife and expected child to be displaced from the position they held under the first will. He allows this to be done by a man who informs him that it is consideration for the issue that causes him to desire the alteration of the will, and yet he says there was nothing to lead him to make any inquiry in the matter. I think there was everything to arouse suspicion, and to call for the most thorough explanation, and the most searching inquiry, on the part of the solicitor, in order to satisfy himself as to the true state of the person desiring to make a disposition of his property, so opposed to his wishes, and differing so widely from the former testamentary paper. The only means of testing the state of mind of the deceased is the production of this paper, and this cannot satisfy me as to its soundness.

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It must be admitted that a man may be many days ill, and may lose his memory, or his mind may become unsound, and he may thereafter have a lucid interval, and be capable of making a valid settlement of his affairs.

But we must not lose sight of the fact, that here for four days prior to the 5th, the two medical attendants aver that the deceased was incapable of considering the same subject for more than a few seconds continuously; that on the 5th he was worse than on the preceding days; that the three doctors were there on this day, and during all their visits we find him in a semi-comatose state.

I think, looking at the evidence of these gentlemen and the contents of this paper, that I am justified in considering that, as Mr. *O'Donohoe* has forgotten almost all the incidents connected with the instructions for the will, so his memory has failed, as to the actual state of the mind of the deceased at the time it was signed.

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But it was argued that in considering the case I could not look at the inofficious character of the will, and that I was bound to exclude this from my consideration, in arriving at the conclusion as to soundness, or unsoundness, of mind. It is necessary, therefore, on this point to consider the authorities, as I conceive that the terms of the will form a most important element in the disposition of the matters in controversy.

Mr. *Redfield*, in his work on Wills (*a*), appears to have drawn a very correct conclusion from the decisions which bear on the legal question raised: "It seems," he says, "to have been a standing rule of the Ecclesiastical Courts of England, while they held the jurisdiction of the subject, to treat all wills as *primâ facie* invalid, which were absurd in themselves, or as it was expressed in the quaint language of some of the early writers, 'if there be but one word sounding to folly.' But this must be regarded as little more than a presumption of fact, since it is every day's experience that a sensible man in the fullest, most unquestionable possesssion of all his mental powers, sometimes will make the strangest, most unaccountable disposition of his property, without, and indeed contrary to, all supposed motive, to be deduced from any process of fairly conducted *a priori* reasoning. * * The English law does not admit the *querela inofficiosa* of the Roman law by which all wills which omitted altogether the mention of any of the testator's children, or which disinherited them without cause, were to be set aside upon the presumption that the testator was insane or otherwise incompetent to execute a will. Nor is it requisite that the testator should assign any reason for disinheriting the heir—2 Bl. Com. 502, 503, *voluntas stet pro ratione*," (note 2) Sec. 5. "The party must not only be able to answer simple questions by an affirmative or negative

Judgment.

(*a*) Vol. i. p. 121.

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intelligibly, but, as is said by Lord *Coke*, he must have a 'disposing memory' or a 'safe and perfect memory.' By this we understand one that is capable of presenting to the testator all his property, and all the persons who come reasonably within the range of his bounty. * * Sec. 9. "But the lowest amount of capacity requisite to the execution of a valid will is, that the testator was able to comprehend the transaction. It is said, 'if he be not totally deprived of reason, he is the lawful disposer of his property.' If one be able to transact the ordinary affairs of life he may, of course, execute a valid will. The testator must have something more than mere passive memory. He must retain sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted and to hold them in his mind a sufficient length of time to perceive, at least, their more obvious relations to each other, and be able to form some rational judgment in regard to them. The
Judgment.
elements of such a judgment should be the number of those who are the proper objects of his bounty, their deserts, with reference to conduct, capacity, and need, and what he had before done for them, and the amount and condition of his property. It will be obvious that even this amount of capacity may often be more or less clouded and obscured, and still the will be established, where it possesses no inherent incongruities or defects, and is in strict accordance with the testator's previously declared purposes and intentions."

A case similar, in several of its circumstances, to the present is *Brydges* v. *King* (*a*). There Sir *John Nicholl* thus refers to the evidence adduced: "*Witchell*, a witness, in point of character, unimpeached, says, that on entering the room *James King* asked the deceased whether what he had written was to her liking. She answered, perfectly so, or quite so. *James King* then

(*a*) 1 Hag. 256.

handed a pen to the deceased and she wrote her name, and, having signed it, said, 'that will do.' After that *James King* read over the clause of attestation. At this time Miss *King* asked the deceased whether it was not time to take her medicine, and the witness then left the room. The witness goes on to say that at this time the deceased was of sound and disposing mind, and talked, in what little he heard her say, rationally and sensibly."

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The Judge proceeds (*a*), "It comes then to the evidence of the brother and of the female friend of the person principally benefited, and, under all the circumstances already adverted to, it would be hardly safe to trust to the statement of such biased witnesses. * * The persons engaged and the time chosen are at least as consistent with fraud as with fairness; and the whole has a most suspicious appearance. * * Another circumstance with respect to time strikes me as pointing to fraud: the preparation and execution took place during the absence of *Baker*. * * The deed was done during the absence of the medical attendant. * * The time chosen, then, added to the other circumstances, tends considerably to increase the suspicion and to excite the doubts and jealousy of the Court."

Judgment.

Again the learned Judge proceeds (*b*): "The Court will see what improbabilities, what contradictions, what circumstances of suspicion there are, and whether, on the whole, it can venture to repose full confidence in their testimony." The following remarks appear to me most pertinent to the present case: "*James King* goes on making the deceased in the most perfect mind, not only full of intelligence but of activity and alacrity." Then follows a description by the witness of what took place between the deceased and him and which made her out of perfect mind, and as to it he remarks: "Now all this is very good, if it be true; but it makes the deceased of a

(*a*) P. 276.

(*b*) P. 280.

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very perfect and alert understanding at this time." *King*, the witness, said that the will was dictated, which dictation he alleged he followed, and when finished the deceased, as he alleged, desired him to make a fair copy of it, adding that it must be properly attested. As to the evidence of the condition of the deceased at this time, Sir *John Nicholl* says (*a*): "Now, in this representation, for this is the account of what passed on the night when the instructions were taken, there is as alert a testatrix as fancy can suppose; she enters into long conversations and explanations, and dictates every part of the paper. * * * She was not only mentally, but bodily alert; she is alive to everything that is going forward." The witness *Mary Cunningham* stated, "That in point of capacity there was no diminution of it from the time of her first acquaintance with the deceased." And, as to the time when the will was executed, the Judge says (*b*):

Judgment.

"The same observations will apply to this account as to that of the preceding night, respecting the great alertness and readiness of the deceased." In dealing with this class of evidence, coming from such a source, the Court says: "Unless the Court can believe the whole, it must not rely on any part." The same judgment proceeds: "The whole transaction is clandestine, which of itself affixes a strong indication of fraud and contrivance. Here is not a single declaration by the deceased of a wish, about this time, to do a testamentary act of any sort. * * * Looking, therefore, to the improbability of the disposition from its difference, in the character and amount of the legacies, from the former papers—looking at the condition of the deceased—considering who were the persons around her; that they are, most of them, closely connected together, and are materially benefited under this paper; considering, also, the necessary jealousy of the law in guarding the beds of dying persons against fraud and

(*a*) P. 286. (*b*) P. 291.

circumvention (*a*). * * * I pronounce against the codicil."

1875.

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In *Montifiore* v. *Montifiore* (*b*), Sir *John Nicholl* thus deals with the same subject: "The paper propounded going, in effect, to revoke an executed will, and to put an immense property in a course of distribution, which is very far from being an 'officious' one, the allegation, to be admissible, must make out a case of full and entire 'capacity' in the testator, at the time when the paper was framed; nor will it be sufficient, in order to do this, for the plea to make out that he was of capacity to answer a few (common) questions, or to make a few (casual) remarks, or even to conceive and express some (loose) wishes and ideas, as to altering his will, and so on; it must satisfy the Court that he was equal and alive to, and comprehended the full import of what he was doing at the time; seriously important as what he actually did, must be admitted to be. In short, as Lord *Coke* expresses it, that he was capable, at the time of the transaction, of making disposition of his 'estate' with judgment and understanding."

Judgment.

In *Ayery* v. *Hill* (*c*), and *Wrench* v. *Murray* (*d*), we find that the officious or inofficious character of the will is a circumstance to be taken into consideration in determining whether or not the paper propounded is to be taken as the will of the deceased.

Lord *Kenyon*, in *Greenwood* v. *Greenwood* (*e*), thus defines a sound mind for testamentary purposes: "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

(*a*) P. 310.
(*b*) 2 Add. 354-361.
(*c*) 2 Add. 207.
(*d*) 6 Cur. 328.
(*e*) 3 Cur. Ap. 2, 30.

1875.

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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 his will."

The rule was thus laid down in 1790, and eighty years afterwards was approved of in the now famous case of *Banks* v. *Goodfellow* (*a*). At page 570 of that case the Chief Justice says: "The presumption against a will made under such circumstances becomes additionally strong when the will is, to use the term of the civilians, an inofficious one; that is to say, one in which natural affection, and the claims of near relationship have been disregarded."

Judgment.

In *Boughton* v. *Knight* (*b*), Sir *James Hannen*, in referring to this case, says: "In an earlier passage the Lord Chief Justice lays down, with, I think I may say, singular accuracy, what is essential to the constitution of testamentary capacity. It is essential to the exercise of such a power (of making a will) that the testator shall understand the nature of the act, and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and with a view to the latter object, that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it; which, if the mind had been sound, would not have been made. Here then, we have the degree of mental power which should be insisted on."

In *Burdett* v. *Thompson* (*c*), the same Judge says:

(*a*) L. R. 5 Q. B. 549-557. (*b*) 3 P. & D. 64-74.
(*c*) P. 72, Boughton v. Knight.

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"Probably the mind of no person can be said to be perfectly sound, just as the body of no person can be said to be perfectly sound." And as to the soundness needed for the making of a will, he continues: "From the character of the act it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons, who, by nature, or through other circumstances, may be supposed to have claims on the testator's bounty, and the power of considering these several claims, and of determining in what proportions the property shall be divided amongst the claimants; and therefore whatever degrees there may be of soundness of mind, the highest degree must be required for making a will."

Judgment.

Mr. Justice *Hannen* was here stating the rule as accurately as he could, because he conceived that there had been a misapprehension as to his ruling in a former case. After all, it is but restating, in language perhaps more precise and exact, but to the same effect, the view taken by the Privy Council.

In *Harwood* v. *Baker* (*a*), the following language is most pertinent to the present case: "Their Lordships are of opinion that in order to constitute a sound, disposing mind, a testator must not only be able to understand that he is, by his will, giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property, and that the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the

(*a*) 3 Moo. P. C. at 290.

1875.

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invalid as to shut out all others that might require consideration; and therefore, the question which their Lordships propose to decide in this case, is not whether Mr. *Baker* knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question as to his capacity."

Judgment.

Again, the then Mr. Justice *Erskine* continues:— "Keeping, therefore, in mind the principle that in all cases the party propounding the will is bound to prove, to the satisfaction of the Court, that the paper in question does contain the last will and testament of the deceased, and that this obligation is more especially cast upon him when the evidence in the case shews that the mind of the testator was generally, about the time of its execution, incompetent to the exertion required for such a purpose, and further, keeping in mind that the disposition in question was not in accordance with any purpose deliberately formed before his mind became enfeebled by disease we come to the evidence of the witnesses," &c.

In *Baker* v. *Batt* (*a*) this statement of the Privy Council may, to some extent, assist in defining the position of a judge in disposing of cases such as the present: "And thus in a Court of Probate, where the *onus propandi* most undoubtedly lies upon the party propound-

(*a*) 2 Moo. P. C. 317, 319.

ing the will, if the conscience of the Judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied, that the paper in question does contain the last will and testament of the deceased, it is bound to pronounce its opinion that the instrument is not entitled to probate, and it may frequently happen that this may be the result of an inquiry in cases of doubtful competence in particular, without the imputation of wilful perjury on either side, or it may be, the Judge may not be satisfied on which side the perjury is committed, or whether it certainly exists."

The remarks of the Lord Chancellor in *Boyse* v. *Rossborough* (*a*), in the House of Lords, throw a little light on the subject, although that being a case which rested on undue influence, and the present, one depending mainly on unsoundness of mind, where the possibility of a lucid interval exists, too much stress cannot be laid upon it. "Where a jury sees that at or near the time when the will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the persons benefited by the will, that as to them he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised."

Judgment.

I have referred, amongst other cases, in addition to those above mentioned, to *Smith* v. *Tebbitt* (*b*), ; *McNaughton's* case (*c*), *Hall* v. *Hall* (*d*), *Rowarth* v. *Mariott* (*e*), *Ross* v. *Chester* (*f*), *Martin* v. *Walton* (*g*), *McDiarmid* v. *McDiarmid* (*h*).

(*a*) 6 H. of L. C. 51.
(*b*) L. R. 1 P. & D. 398.
(*c*) 10 Cl. & F. 200.
(*d*) 18 L. J. N. S. 153.
(*e*) 1 M. & K. 643.
(*f*) 1 Hagg. 227.
(*g*) 1 Lee's Eq. Rep.
(*h*) 3 Bligh N. S. 374.

1875.

Wilson v. Wilson.

The last authority that I quote from is a judgment of Sir *John Nicholl* (*a*), in which he says: "It is a great but not uncommon error to suppose, that because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise; the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case. In *Combe's* case the rule is laid down in these words: 'It was agreed by the judges, that sane memory, for the making of a will, is not at all times when the party can answer to anything with sense, but he ought to have judgment to discern, and to be of perfect memory, otherwise the will is void. It is not answering, that she had been round Clapham Common, or that her house was leasehold, or the like, even if the questions were answered correctly, and the husband had not been present, that would be sufficient in the present case. So again, in the *Marquis of Winchester's* case. By the law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his estate with understanding and reason."

Judgment.

At the close of the case I stated that I was not satisfied that the objects of the deceased were carried out by the paper in question, and that as Bishop *Jamot* was in Court, I would give the defendants the opportunity of examining him. This leave was refused by the defendants: neither was it accepted, although offered to the plaintiff. I desired to give the defendants this opportunity, as I was not at all satisfied with the secret manner in which they went about the procurement of the paper

(*a*) Marsh v. Tyrell, 2 Hagg 84-122.

1875.

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in question. It was, to my mind, a most unsatisfactory state of matters, that the wife should have been passed over, and kept in ignorance of, the intention to send for the solicitor, or the endeavor to have another will made. I desired to give those who obtain so large a benefit under this document, every opportunity of giving me evidence of the volition and capacity of the deceased, and if possible, of shewing the manner whereby the mind was influenced to alter the former will.

I am of opinion that it was on or about the 29th that Dr. *Hodder* advised the making of the will; that the deceased, from the 13th, expressed no desire about the matter; that the defendants, or some of them, without the knowledge of the wife, procured the attendance of the solicitor, and the preparation of the second paper; that on the 5th, owing to the nature and length of his illness, he was very infirm, both in mind and body; that in this matter the disinterested witnesses competent to form a correct judgment, are supported by the reasonable probabilities of the case; that I am justified in looking at the paper of the 5th of July, the former will, and the various expressions of intention used by the deceased, and to consider how far it carries these out; and in doing so, in the present instance, I find the case of the plaintiff thereby sustained. I do not find the evidence of the defendants sufficient to displace this state of facts presented to me by the plaintiff.

Judgment.

I am aware how unwilling the Court is to interfere with a testamentary disposition, yet with this fully in my mind, as I cannot come to the conclusion that the deceased had the power of summoning, and did successfully summon, his faculties to the consideration of the nature of his property, the various persons who were the fit objects of his regard, and their respective claims upon his bounty, I cannot allow the paper of the 5th of July to stand as his will.

1875.

Wilson v. Wilson.

It is true, the plaintiff proved this paper as executrix, but she did so under a misapprehension, and on statements so made to her by the defendants as that they cannot bind her by this step as an assent to an adoption of this paper as the last will of her husband. It, however, is, I think, one of the circumstances which, with others, brings the case, in regard to the question of costs, within *Boughton* v. *Knight*, and I think no costs should be given, or rather that they should be borne out of the estate. However, this point was not argued; and so, if the parties desire it, they may, within the next ten days, speak to it.

I am not aware whether the parties desire an administration of the estate, or in what shape they desire the decree: if there be any difficulty as to this, it can be spoken to at the same time.

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On a subsequent day counsel spoke to the question of costs, the plaintiff contending that if the defendants were not ordered to pay costs, they ought at least to be left to pay their own; and that the estate should not be burdened with them. The defendants insisted that they should have their costs, if not from the plaintiff, out of the estate; that the plaintiff, having adopted the will, and proved it, had afforded grounds for the defendants insisting that the will of July, 1873, should be established.

March 27.

Judgment

BLAKE, V. C.—In *Williams* v. *Heney* (*a*) the plaintiff succeeded in her contention, but the Court allowed the defendants their costs out of the estate, the learned Judge thinking that the defendants were led to litigate the will by the act of the plaintiff.

In *Nash* v. *Yelloly* (*b*) the plaintiff propounding the

(*a*) 3 Sw. & Tr. 463. (*b*) Sw. & Tr. 59.

will was condemned in costs, the Court finding that it was procured by the undue influence of the plaintiff and another.

1875.

Wilson v. Wilson.

In *Rennie* v. *Massie* (*a*), which is but shortly reported, a nude executor, propounding a will which was found against, was made to pay the costs of the litigation, the Judge saying: "I think there was no reasonable ground for litigation in this case."

In *Hall* v. *Hall* (*b*) the Court found the will was obtained through the undue influence of the plaintiff, and therefore condemned her in the costs of the litigation.

In *Rayson* v. *Parton* (*c*) the plaintiff, a next of kin of the deceased, succeeded in setting aside the will, on the ground that the deceased was not of sound mind; undue influence and fraud were negatived, but the executors, defendants, were made to pay the costs of the suit.

Judgment.

In *Keys* v. *McDonnell* (*d*) probate was refused the executors, because the deceased was not of sound mind; the costs of the litigation were given to the defendant, the heir, out of the estate, but none to the plaintiff.

In *Scowler* v. *Plowright* (*e*) the plaintiff was next of kin, and one of the executors a defendant,—there it was thought "that gross fraud had been committed in the case, and duress inflicted on the deceased," and therefore the defendant was condemned in costs.

In *Marsh* v. *Tyrrell* (*f*) it was found that the will "was obtained by undue influence and marital authority," and therefore the person standing on such a will was charged with the costs.

(*a*) L. R. 1 Pro. & Div. 118.
(*c*) 2 P. & Div. 38.
(*e*) 10 Moo. P. C. 440.
(*b*) L. R. 1 Pro. & Div. 481. R. 6 Eq. 614.
(*f*) 2 Hag. 84, 141.

1875.

Wilson v. Wilson.

In *Baker* v. *Batt* (*a*) the conduct of the husband propounding the will was thought to be such, and to savour so much of a contrivance to procure the will, as that he should be charged with the costs.

In *Boughton* v. *Knight* (*b*) the question of the mode of dealing with the costs of litigation, similar to the present, was considered, and some cases, in addition to those above referred to, were cited before Sir *James Hannen*. He says: "On the best consideration that I can give to the subject, it appears to me that an executor is *prima facie* justified in propounding a will. * * I think the question of the testator's capacity was a very grave one, and he could not be expected to take on himself the responsibility of leaving it undetermined. * * * The decision of the question of costs must depend on the infinitely varying circumstances of each case; and the conclusion I have arrived at brings this case within the principle of the decisions to which I have referred on former occasions—was the testator really and substantially the cause of the litigation that has occurred?" The Court there ordered, although finding against the executor, that the costs should he paid out of the estate.

Judgment.

In the case before me I am not satisfied with the position of the defendants, and my present impression is, that if this bill had been filed immediately after the death of the deceased I should have charged the defendants with the costs of these proceedings. But the plaintiff did not choose to adopt that course, in which case the defendants might have abandoned this paper for the will of 1871: she, with the defendants, proved the will, and accepted the office of executrix, and she thereby assented to this paper as being the last will of her husband; and although, under the circumstances, I do not think I am justified in concluding that this act pre-

(*a*) 1 Cur. 125, 171. (*b*) L. R. 3 P. & D. 64.

cludes her from impeaching the will, yet I am of opinion that it is one of those matters which should be taken into consideration in determining whether the defendants are to be charged with the costs of a suit in which they say, "We must put you to strict proof before we withdraw from a position which we obtained by your assent." Further reflection does not lead me to a feeling of satisfaction with what the defendants have done in connection with this will; but I cannot lose sight of the fact that the plaintiff, for over six months, made no objection to its standing as the will of her husband; and I think, weighing all the facts as presented to me, I must treat the present as part of the costs of litigation, to be dealt with as in *Boughton* v. *Knight*, and therefore, that all parties are to be entitled to them out of the estate. The costs of speaking to this question will follow as part of these costs.

1875.

Wilson v. Wilson.

Judgment.

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## Henderson v. Kerr.

*Foreclosure—Insolvency—Jurisdiction of assignee.*

Under the Insolvent Act of 1869, the jurisdiction of this Court to decree foreclosure upon a mortgage is not taken away, and a mortgagee must still proceed in this Court to obtain such relief against the official assignee of the mortgagor, there being no proper machinery in the Insolvent Court under which foreclosure can be obtained or for serving parties out of the jurisdiction, or for calling in parties to establish their claims upon the mortgage premises.

Sept. 20.

One *Kilfeder*, by conveyance dated 12th April, 1871, mortgaged the lands in question to the plaintiff, to secure certain moneys. On the 29th April, 1873, the mortgagor made an assignment in insolvency to the defendant, as official assignee under the Insolvent Act of 1869, default having previously been made in payment of the moneys secured by this mortgage.

1875.

Henderson v. Kerr.

The plaintiff, in February, 1874, filed the bill in this cause, praying foreclosure, and, on the 18th June following, the usual *præcipe* decree was issued; and payment not having been made as thereby directed, the plaintiff moved for the final order of foreclosure.

The defendant opposed the motion, contending that, under section 50 of the Insolvent Act of 1869, the jurisdiction of the Court of Chancery had been taken away. It was thereupon agreed between counsel that the question should be argued as if a demurrer had been put in to the bill, and as if no decree had in fact been issued.

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

Mr. *Bethune* for defendants.

Sept. 30.

Judgment.

BLAKE, V.C.—I am of opinion that a mortgagee of real estate has a right to come to this Court to obtain a foreclosure of the equity of redemption, which, subsequent to the making of the mortgage, has passed to the assignee in insolvency of the mortgagor. This mortgagee, default having taken place in payment, is the owner of the premises, subject to the rights of the mortgagor originally, now of the assignee, to avail himself of the equity which allows him to redeem. The mortgagee does not come as creditor and ask for payment out of the assets of the estate, but he asks that within a specified time the defendant shall avail himself of this equity, and that, in default, it shall be barred. The Insolvent Court has no machinery for calling in claimants; for service out of the jurisdiction; and for working out all the details of a foreclosure suit. I do not think it was intended by the Insolvent Act that this jurisdiction of the Court should be transferred to the Insolvent Court. In every case in which that Court can work out all the rights and remedies of persons

having claims against the estate, the Court "may," and therefore it is bound to work out complete justice between the parties; but, beyond this, the Insolvent Court cannot go, and cases not brought within this rule are outside the jurisdiction of such Court. The matter is not free from doubt; but I do not think I should lightly disturb a course of procedure which has been carried on in this Court for the past six years, and under which the title to so many properties depends. It would be better for the learned counsel to act upon the suggestion he made, and endeavour to procure a quieting of this doubt and a distinct statement of the effect intended to be wrought by the Act. There is a marked difference between the wording of the English Act, 32 & 33 Vic. ch. 71, secs. 72 & 12; and sec. 50 of the Canadian enactment. I have not come to the above conclusion without examining the following cases: *Archibald* v. *Haldane* (*a*), *Dumble* v. *White* (*b*), *Crombie Jackson* (*c*), *Burke* v. *McWhirter* (*d*), *Coulthurst* v. *Smith* (*e*), *Martin* v. *Powning* (*f*), *Stone* v. *Thomas* (*g*), *White* v. *Simmons* (*h*), *Re Edwards* (*i*), *Gordon* v. *Ross* (*j*). The opinion which I have formed does not interfere with the right of the assignee to proceed and sell an equity of redemption, which may have passed to him as assignee.

Judgment

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(*a*) 30 U. C. 30.
(*b*) 32 U. C. 601.
(*c*) 34 U. C. 572.
(*d*) 35 U. C. 1.
(*e*) 29 L. T. N. S. 714.
(*f*) 4 Ch. 356.
(*g*) 5 Ch. 219.
(*h*) 6 Ch. 555.
(*i*) 9 Ch. 673.
(*j*) 11 Gr. 124.

1875.

## KIRKPATRICK v. HOWELL.

*Practice—Præcipe decrees.*

Since the passing of the Order (435) of 20th December, 1865, the Registrar has the power of issuing any decree on præcipe in mortgage cases, that the Court would, previously to that order, have made upon a hearing *pro confesso*.

Sept. 26.

This was a suit by *John C. Kirkpatrick* against *Eliza Howell*, *Harvey Howell*, her husband and *Joseph Morris*, upon two several mortgages; one made by the defendant *Morris* to the plaintiff, to secure the payment of which the defendant *Harvey Howell* gave his bond as surety. The mortgagor (*Morris*) afterwards conveyed his equity of redemption to the defendant *Eliza Howell*, and she, together with her husband, joined in creating a second mortgage on the same property to the plaintiff.

Statement.

Both the mortgages having been allowed to run into arrear, the present bill was filed, praying that in default of payment of what might be found due to the plaintiff, the lands might be sold, and in the event of their not producing enough to pay the amount found due on the first mortgage, a personal order against *Morris* on his covenant, and against *Howell* on his bond, as such surety; and further, that in the event of any deficiency on the second mortgage, that a like order against defendants *Howell* and his wife might be made.

No answer or disputing note having been filed, application was made to the Registrar to issue the usual præcipe decree, but that officer declined doing so, as it was a question whether, under the special circumstances set forth in the bill, he had a right to do so upon the authority of *King* v. *Freeman* (*a*), and directed the question to be spoken to before the Court.

(*a*) 1 Ch. Cham. R. 350.)

1875.

Kirkpatrick v. Howell.

Mr. *Cassells*, for the plaintiff, thereupon moved that the Registrar might be directed to issue a decree in the terms of the prayer of the bill.

After taking time to look into authorities:—

Sept. 30.

BLAKE, V.C.—I think, under Order 435, where the defendant does not answer the bill, the plaintiff is entitled to such decree as would, previously to 20th December, 1865, have been granted by the Court on a hearing of the cause, on the order to take the bill *pro confesso*. When this order says the plaintiff is "to be entitled to such a decree as would, under the practice of the Court, have been made upon the hearing of the cause, *pro confesso*," it relates to the hearing of the cause referred to in the preceding orders of 1853, numbered 426, 427, 428, 429, 432, and 433. It is clear that between 1853 and 1865 the Court would have made the decree now asked, if the cause were set down in Court; and I think that, under Order 435, the Registrar of the Court has now the power to issue such decree on præcipe. The decree applied for in this case should therefore be issued as asked.

Judgment.

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A similar ruling was also come to by the same learned Judge in *Buell* v. *Towns*.

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## HOWEREN v. BRADBURN.

*Administration of Justice Act—Appeal from Master—Interest—Redemption suit.*

Since the passing of the Administration of Justice Act (36 Vic., ch. 8 (O.), and to avoid circuity of action, the Court will allow interest to a defendant, for more than six years, in a suit to redeem.

Where the answer of a defendant omitted to set up a claim to interest for a period exceeding eight years, the Court, on an appeal from the Master, offered, if it was necessary that such a claim should be set up, to allow the defendant then to do so, as all the facts were before the Court.

Sept. 16. This was an appeal from the Master, at Peterborough, by the plaintiff, who had filed his bill for redemption. The plaintiff had mortgaged the property on the 1st of April, 1862, to the defendant, and in the mortgage had covenanted to pay the amount secured and interest.

Statement. No interest had been paid up to 1871, when the defendant took possession and entered into the receipt of the rents and profits.

The decree made was the usual one for redemption, and, in proceeding thereunder, the Master had allowed interest to the defendant from the date of the incumbrance, 1st of April, 1862, setting off the rents received.

From this finding of the Master the plaintiff appealed, contending that there had been no appropriation of the rents by the defendant, and that if there was no appropriation, only six years' arrears of interest could now be recovered.

Mr. *Cattanach* contended that it was immaterial to the plaintiff whether there was an appropriation or not, if the Court was of opinion that more than six years' arrears could be recovered in a redemption suit; he,

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therefore, proposed to argue this point first. In *Airey* v. *Mitchell* (*a*), the Court, on re-hearing, had determined there was no distinction between a bill to foreclose and a bill to redeem. He relied on that case and the authorities there cited.

Mr. *Cassells*, contra, contended that *Airey* v. *Mitchell* did not decide the point. That case was altogether different, and it was a *dictum* only. The law in this country has been that a mortgagee is entitled to all arrears. The case of a bill by a mortgagee to foreclose or sell is different from that of a mortgagor to redeem. The former was a proceeding expressly coming within the Statutes of Limitations; the latter was not. In *Caldwell* v. *Hall* (*b*), the late Chancellor *VanKoughnet* pointed out the distinction, shewing that a bill to redeem was one for an account. *Edmunds* v. *Waugh* (*c*), the last English case, is the same way; and, in *Ford* v. *Allen* (*d*), on re-hearing, which was affirmed on appeal, that case was followed. The English cases shew that it is the same in principle whether the bill is for redemption by the mortgagee or to foreclose the surplus of land sold under a power of sale in the mortgage. In any event, the statement in *Airey* v. *Mitchell* is that "unless special circumstances occur." The special circumstance here is the fact that there is a covenant. In this case, even before the Administration of Justice Act, the mortgagee could tack as against the mortgagor the covenant debt to avoid circuity of action: *Du Vigier* v. *Lee* (*e*); *Brown* on Limitations, 394. Now the Administration of Justice Act makes it clear, and puts the matter in the same position against the mortgagor as against his heirs in the event of death.

Statement.

Mr. *Cattanach*, in reply. The Administration of Justice Act cannot help. The claim should be set up

(*a*) 21 Gr. 510.
(*b*) 9 Gr. 111.
(*c*) L. R. 1 Eq. 418.
(*d*) 15 Gr. 565.
(*e*) 2 Hare, 396.

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in the answer; if it were, a personal decree might be obtained in the same suit for the covenant debt, but you cannot charge the land. It has been held that you cannot, to avoid circuity, proceed against a man and against his heirs in one suit.

BLAKE, V. C.—I think that under the Administration of Justice Act, as no incumbrancer intervenes, the defendant is entitled to recover the thirteen years' interest. Apart from this act, the defendant could prove for the principal money and six years' arrears, and then go to a Court of law and recover on the covenant the seven years' arrears, and put his *fi. fa.* in the hands of the sheriff, and thus charge the lands with the thirteen years' arrears of interest. This being so, and looking at the scope of the Administration of Justice Act, more particularly sections one and thirty-two, I think I would not be carrying out the spirit of the enactment, if I granted the partial relief by giving six years' arrears, and left the defendant to his common law remedy for the balance.

Judgment.

It is said that the effect of this is to evade the Statute of Limitations. I do not think that this is so to any greater extent then was done in the cases of *Robertson* v. *Carroll* (*a*) and *Airey* v. *Mitchell*.

Here the specific charge is only allowed to the extent of six years, but then there is the general charge by virtue of the covenant which coalesces with the specific charge, and thereby the defendant is enabled to recover all the interest that is due.

It is true the defendant does not by his answer set up this claim, and it is urged by Mr. *Cattanach* that under section thirty-two of the same Act, the claim, if made at all, must be not later than at the hearing of the cause. It is admitted that all the evidence that would throw any

(*a*) 15 Gr. 173.

light on the question has been given; and no reason is urged for not granting such an amendment as would allow the defendant by the answer to raise the question. I think, that if it were necessary, I would be bound under sections forty-nine and fifty to allow any amendment that might be necessary to raise the point. I think the report should be allowed to stand, and the appeal dismissed with costs.

Judgment.

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## ADAMS v. LOOMIS.

*Husband and wife—Alimony suit—Voluntary deed—Valuable consideration—Settlement of suit—Married Women's Property Act,* 1872 (*O.*) *—Equitable estate.*

The compromise of an alimony suit is a sufficiently valuable consideration for a deed from the husband to the wife.

A wife's conveyance of her equitable estate is valid without the husband joining in the conveyance; and the husband having the legal title vested in him, the wife's vendee was held entitled to a decree against the husband for a conveyance.

*Semble*, that such portions of the Married Women's Property Act, 1872, as would deprive parties of their vested rights, if held to affect women married before its passing, should be so read as not to interfere with such rights; while the portions of the Act which have not this effect should go into operation as regards women married before, as well as after, the second of March, 1872.

This was a suit for specific performance by *Thomas Adams* against *Crowell H. Loomis* and *Margaret Loomis* his wife.

The defendants it appeared had been married in 1844. In December, 1872, the defendant *Margaret Loomis*, filed a bill against her husband, the defendant *Crowell H. Loomis*, claiming alimony against him, and alleging cruelty on his part as the reason for taking the proceedings. After service of the bill on the husband, he became anxious for a settlement of the suit, and negoti-

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ations were entered into which ended in the preparation of paper "H," which was as follows:—

"I hereby propose to give my wife, the plaintiff in this suit, a life lease during her life of two hundred acres, being lot number thirty-three in the eighth concession of the township of Brighton, and a life-lease during her life of all the personal property thereon—said conveyances to be executed in due form of law; and, in consideration that my wife, the plaintiff herein, will, on said conveyances being duly and fully completed and registered, discontinue said suit, and stipulate to pay me one hundred dollars per annum and furnish board and lodging to and for me on said premises, and also clothing suitable to my position in life and two rooms, being dining room and bedroom adjoining the same, in the dwelling house on said premises. The only reserve of personal property I make from the personal property on said premises are the young bay mare and colt. I will also permit what wood, for all necessary purposes and uses, on said premises to be cut and used thereon.

Statement.

"Dated this 24th day of December, 1872.

"C. H. LOOMIS."

and which was drawn up in the office of the solicitor of the wife, and was signed by the husband on the 24th of December. A more formal instrument to carry out the agreement then entered into, was to have been subsequently prepared; but, in the meantime, and after two days' negotiations, in which the plaintiff took part, it was arranged that, in place of the husband giving the wife a lease of the whole of the premises, she should receive an absolute conveyance of one hundred acres of the lot; and, thereupon, the husband prepared paper "A," which was in the words following:—

"We agree to divide the real and personal property, including lot number thirty-three in the eighth

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concession of the township of Brighton; the lot is to be divided north and south, and *Margaret Loomis* is to have the east half of the lot and *C. H. Loomis* is to have the west half of the lot, with the barn and little house, together with the two rooms in the house on the east hundred acres, that is to say, the dining-room and bed-room joining; the remainder of the house is to be *Margaret Loomis's* property. Each one is to pay the one half of the debts up to this date, the sum of one thousand and seventy-three dollars from one year from next May, then two hundred dollars a year till paid by given good security; all household property, namely, in the house, except in my room, namely, one bed and one bedstead, with change, six chairs, one table, one lounge, one sideboard, one desk, one box-stove, and carpet, and my entrance to my room by the hall door and first right hand door in the hall; now in consideration with the stock on the place, they are to remain on the place as they are at present, and they are to have the horse stable for one span of horses till fall; *C. H. Loomis* is to have the use of the road leading in from the main road in front of lot number thirty-three in the eighth concession, to have access in and out; to have a gate on the line north of the creek on the west hundred acres of said lot, to enter on said lot as near as practicable to the creek.

Statement.

"Here we sign our name to the aforesaid agreement.

"C. H. L."

"The said barn and shed, if on said east hundred acres, must be moved off by the first day of July next.

"C. H. LOOMIS."

her
"MARGARET X LOOMIS."
mark

"THOMAS ADAMS, witness."

and which, after much consideration and disputing, was signed by both parties in presence of the plaintiff. They had arranged to go to the solicitor

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for the plaintiff in the alimony suit on the 13th of January, to carry out agreement "H." On the day after agreement "A" was signed, they attended at his office and produced the substituted agreement, and requested him to prepare the necessary papers to give it effect, and they then remained in the office for some hours, and papers "B," "C," "K," "L," and "M," were drawn and signed. By paper "A," the parties, it will be seen, were to have a division of the real and personal property. *Margaret Loomis* was to take the east half of the lot, and her husband the west half, with the barns and two rooms—the dining room and bedroom in the house on the east half. Each was to pay half of the debts up to that date. As the half of the lot the wife took was the most valuable; and, as she got the greater part of the furniture, she was to pay the husband $1,073 in five annual payments. The husband was to have certain specified furniture in his rooms, and ingress to his lot through the wife's half. By a deed, dated the 21st of January, 1873 (Exhibit "B" before mentioned), *Loomis*, in consideration of 5s., "granted, released, and quitted claim" to *Hilton* and his heirs "all his estate," &c., in the said east half of lot thirty-three, in the eighth concession of the township of Brighton; and, on the same day and by a like instrument, (Exhibit "C"), *Hilton* conveyed the same land to *Margaret Loomis* and her heirs. On that day, *Loomis*, by a bill of sale (Exhibit "L"), in consideration of $1,400, sold and transferred to the plaintiff all the furniture, except what was transferred to *Loomis* under the agreement, and also half of the farming implements and stock on the lot; and, by a similar instrument bearing the same date (Exhibit "M"), *Adams* transferred this property to *Margaret Loomis*. At the same time *Margaret Loomis* signed and sealed another paper (Exhibit "K"), whereby she purported to lease to *Adams*, as trustee for *Loomis*, the two rooms and the right of ingress during the life of *Loomis*. By the terms

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of agreement "H," it was stipulated that the wife was to discontinue the suit for alimony she had commenced; and, on the conclusion of the agreement, ultimately carried out, the suit was accordingly discontinued, and the husband and wife returned to live on the premises. The husband leased, verbally, to the wife, for one year, his half of the lot, on the terms that he was to be boarded and clothed, &c.; and the whole of the two hundred acres were worked together by the family that year. Some of the children went to live in the State of Michigan, and the mother resolved to sell, and go and live with them there. She was advised against this course until she had ascertained how she would like the change; and so she went to Michigan, and, after remaining there a fortnight, returned, having determined to move to Michigan. Thereupon, she agreed to sell her half of the lot and the chattels to the plaintiff, and executed the paper "D," which was in the following words:—

Statement.

"Articles of agreement, made in duplicate, this second day of March, in the year of our Lord one thousand eight hundred and seventy-four, between *Margaret Loomis* of the township of Brighton, in the county of Northumberland, wife of *Crowell H. Loomis*, of the same place, yeoman, of the first part, and *Thomas Adams* of the same place, yeoman, of the second part. Whereas the said party of the first part has agreed to sell to the said party of the second part, and the party of the second part has agreed to purchase of and from the said party of the first part all and singular that certain parcel or tract of land and premises, situate lying and being in the township of Brighton, in the county of Northumberland, being composed of the east half of lot number thirty-three in the eighth concession of the said township of Brighton, containing by admeasurement one hundred acres, be the same more or less, together with all the privileges and appurtenances thereto belonging, at or for the price or

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sum of five thousand dollars of lawful money of Canada, payable on the twentieth day of March in the year of our Lord one thousand eight hundred and seventy-four. In consideration whereof, and on payment of the said sum of money, the said party of the first part doth for herself, her heirs, executors, administrators and assigns, covenant, promise, and agree, to and with the said party of the second part, his heirs, executors, administrators, or assigns, to convey and assure, or cause to be conveyed and assured, to the said party of the second part, his heirs or assigns, by a good and sufficient deed in fee simple, with the usual covenants of warranty, of the said piece or parcel of land with the appurtenances, freed and discharged from all dower and other incumbrances, and subject to the conditions and reservations expressed in the original grant from the Crown.

Statement.

"In witness whereof the said parties have hereto set their hands and seals the day and year first above written.

her
"MARGARET X LOOMIS."
mark

"THOMAS ADAMS."

"Signed, sealed, and delivered
in presence of

"ROBERT LOUGHEAD."

Also the exhibit "E," which was as follows:—

"This agreement made and entered into this eleventh day of March, in the year of our Lord one thousand eight hundred and seventy-four, between *Margaret Loomis*, of the township of Brighton, in the county of Northumberland, wife of *Crowell H. Loomis*, of the first part, and *Thomas Adams*, of the same place, yeoman, of the second part, in consideration of the sum of five hundred dollars of lawful money of Canada.

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"Now this agreement sheweth that the said party of the first part sells to the said party of the second part, and the said party of the second part buys all the household furniture, together with the stoves, cooking utensils, bedsteads, beds and bedding, except what is in the dining room and bedroom adjoining; also all the grain, hay, and straw that is in the barn, shed, and barn yard, together with a fanning mill, gang plough, and grindstone, together with the contents of the cellar under the house; also two piles of lumber containing about fourteen thousand feet—all of which property is situate on the east half of lot number thirty-three, in the eighth concession of the township of Brighton, in the county of Northumberland, except a part of said lumber and a quantity of corn, which are on the west half of said lot, together with any hay in the shed on said lot."

her
"MARGARET X LOOMIS."
mark

Statement.

"THOMAS ADAMS."

"Signed in presence of

"THOMAS LOUGHEED."

was entered into; and ultimately, and on the 25th of the same month, a short form of conveyance was executed by *Margaret Loomis* in favour of the plaintiff, for the expressed consideration of $5,000 then paid to her. The patent from the Crown did not issue until the 4th of February, 1873, on which day the defendant *Loomis* caused it to be issued to himself.

The cause came on to be heard at the sittings of the Court at Cobourg, on the 26th of April, 1875.

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

Mr. *Armour*, Q.C., and Mr. *Moss*, Q.C., for the defendant, *Crowell H. Loomis*.

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The defendant *Crowell H. Loomis* was examined at considerable length. The following are extracts from his examination: "There was no marriage settlement at the time of our marriage. I had but little property at the time. We went on the lot in question the year after our marriage. I remember when agreement "A" was made: I drew it. It was made through the course of Monday, after a good deal of wrangling with *Adams*. He wanted to get all he could for the wife; I agreed to it for peace. * * * Mr. *Francis* had agreement "A" to work upon, and the instruments were prepared to carry out the arrangement grounded on this agreement. * * After that, Mrs. *Loomis* and I continued to live together as man and wife, in all respects as we always did, using the same bed, and eating at the same table. About the time Mrs. *Loomis* sold, I heard she had sold or was about selling, and that *Adams* was about buying. When I heard this I made mention of the $1,073 to *Adams*. This was after she had gone to Michigan, and returned. It was after this I heard her bargaining with *Adams*. The conversation took place in my dining-room. *Adams* came in, in the forenoon of Friday, and we commenced talking about his buying. I thought this hard, with the promises Mrs. *Loomis* had made me. I reproached *Adams* with this—with buying my home, which I had made. *Adams* said the $1,073 was a matter between me and my wife—that he had nothing to do with it. He said he did not intend to secure me if he bought—that it was a matter between me and my wife, with which he had nothing to do. * * * I don't think I was present when the money was tendered. I was there and saw the money. * * I first heard of "E" a short time before she gave the deed. * * * I recollect a bill in Chancery being served on me by my wife; she claimed alimony against me. She accused me of acts which would have entitled her to alimony. I talked of settling it, and went to Mr. *Francis's* office for that purpose, and signed "A."

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I won't say she was to have a life-lease of the 200 acres; this was beyond my expectation or recollection. I mean this writing is. I quite forgot all about this writing. There are two or three writings here as to which I had forgotten everything. * * * I don't remember the conditions about the chattel property at all; my memory is gone from me about this. I can't remember what I was to get; I have no memory of that. * * * I heard "H" read to-day, but I did not remember it; I would have denied it if the paper had not been produced. * * * I have no doubt the agreement was prepared to carry out what was stipulated. * * * I had forgotten both these two letters until Mr. *Francis* spoke of them in the box here to-day;(†) except for this I would have denied all about it. * * * There is a great deal of what then passed which has gone from me. I would not say whether he advised me not to lease the whole of my property, and said that it would be better to deed a part of it. I have no doubt this passed, although I cannot remember it. * * * There might have been bickering between my wife and me that day about the property. Perhaps we could not have agreed without the intervention of somebody. * * * I wanted a reconciliation; we hoped the next morning to come to a conclusion. * * * After I had written it (the agreement), I read it over aloud. I read it to *Adams*, my wife, and a neighbour who was then present. * * * This agreement was all right at the time; we expected to enter into this and carry it out. There was no mistake in it: it was just as it should be. That is, the agreement then made between me and my wife. It did not comprise the whole bargain: there were some verbal conditions besides. I can't say why they were not put in there. I thought it was just as good not to have the conditions in writing. I wrote this paper as an agreement, to be got up and carried out. I wrote to have it carried out as far as it

Statement.

(†) Two letters written by Loomis.

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went, and something further. I wrote this to express the bargain. I can't tell why I did not put the rest of my bargain into writing. I did not do so because I had not room enough on the paper to put them down. I don't know that I exactly remember what these other conditions were. * * * The day after I wrote the agreement, I went down to Mr. *Francis*. *Hilton* was there. He was called in. We were some hours in the office. * * * My health has been delicate for the past ten or twelve years, and I am as likely to forget as to remember; of late years I can't trust my own memory. * * * The deeds were to have been quit-claim deeds, as I had not then got my patent. I applied for the patent pretty soon. I thought this would cut out any quit claim. * * * I expected the patent would cover these deeds and be first. * * * My wife was to have half of the chattel property, besides certain furniture which was specified. * * * I rented the west half after this to my wife. There was no writing about this. This arrangement to rent the west half was made immediately after the deeds were signed. * * I was to have my board, washing, making and mending as a consideration for the west half which I rented them. * * * I had nothing to do with the farm after this until my wife went and sold. * * * I used to ask for the notes. I never named an indorser to her, because I never got her willing to give the notes. * * The first time I saw *Adams* after his agreement I asked him whether he was going to make me secure in the $1,073; he said he had nothing to do with it. I said to him, if he bought that property and did not pay me, I would have no means of collecting the $1,073, as she was my wife, and that it was likely she was going away to Michigan. I wanted *Adams* to work for me and to get the $1,073, and to give it to me. I expected that *Adams* would buy, and that my wife could sell, and therefore I wanted *Adams* to make good to me this $1,073 out of the purchase money. * * * The

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notes were given up on condition that I should be made secure for the $1,073. It was an arrangement whereby Mr. *Clarke* was to be surety to me for the notes, and Mrs. *Loomis* was to secure *Clarke* by mortgage. This was in the summer preceding the sale to *Adams*. * * I think procrastination prevented the matter being carried out. Neither party refused to carry the matter out; both were willing to carry it out. Our bargain was then in force and has continued ever since, and is so still. Property on my premises was seized. * * This debt has been paid and satisfied; I satisfied him. I decline to tell how. I had the property seized, and expected to have it sold. * * * Mr. *Eyre* sued as a friend. I did nothing else to break up the bargain. It is a matter of our own how I settled with Mr. *Eyre*. I don't think there was much talk between Mrs. *Loomis* and me, after the conversation about *Clarke* securing me, until after she had made her bargain with *Adams*. Up to that time I had rested on the understanding that *Clarke* would secure me. I thought this was all right. I thought the thing would be carried out; procrastination alone prevented this. * * * I sold the stock after she had sold to *Adams*, and left me. * * * I sold the young span to my son for $10. I did not get the value of them; I suppose they were worth $100. I made a present of them to my son by his giving me $10. * * * I rented to the *Austins* the year after the sale to *Adams*. * * * They used the stuff there as property belonging to the premises. I expected they would. It was understood they should use this property. They used the hay, grain, and straw. I got some of it. * * * The tenants use some of the furniture."

Statement.

Counsel for the plaintiff contended that he was clearly entitled to the decree asked for, the defendant *Margaret Loomis* having the right under the provisions of the Married Women's Act of entering into a binding con-

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tract in respect of her estate; and *Loomis* himself had never disputed her absolute right to the land and to deal with it, until he became aware of the arrangement she had entered into with plaintiff; and even then there was no assertion that she was not entitled to sell, but simply a request to have the claim he asserted for the $1073 made good. He had no lien; however, such a claim being inconsistent with his own version of the transaction. (1.) Because it is shewn that negotiable paper was what was bargained for, *Loomis* refusing security on the land. (2.) The notes were to be given for the chattel property assigned to the wife as well as for the land conveyed, and there was therefore a mixed consideration, and in such a case *Wilson* v. *Daniels* (*a*) shew no lien exists. (3.) No lien was asserted by *Loomis* when plaintiff was dealing with the property, but he requested more as a favor, at the hands of the plaintiff, than as a right he could insist upon, that he should be protected. (4.) By the Registry Act of 1868 equitable liens cannot exist; and besides, if the Court should even be of opinion that he was entitled to be paid this claim, he must give credit for the value of the chattel property which he had agreed to give his wife, but which he had used himself, and also for the rents and profits, since the time plaintiff acquired his title.

Argument.

On behalf of the defendant it was insisted, that the agreement entered into by Mrs. *Loomis* with plaintiff was void, the Married Women's Act only applying where the marriage took place after the passing of the Act; that here Mrs. *Loomis* had really no estate to convey, the patent from the Crown having been completed after the execution of the releases or deeds of quit claim between the parties; that the title to the land was in *Loomis*, and the wife acquired no estate under the releases. In such a case, the deeds could not operate by way of estoppel, nothing having passed under them;

(*a*) 9 Gr. 491.

besides the agreement itself could not be made without the husband's consent. *Maguire* v. *Maguire* (*a*), shews this to be the law. 1875. Adams v. Loomis.

They also contended that the agreement between the husband and wife was not such as the Court would enforce; so far as he was concerned, it was merely voluntary. No consideration whatever passed from the wife—she is not bound even to release her dower in the half lot retained by him; and the plaintiff was fully aware of all the circumstances attending the alleged agreement between *Loomis* and his wife, and this being so, he can occupy no better position than the wife herself would, if she were now suing.

The authorities cited are mentioned in the judgment.

May 19. Judgment.

BLAKE, V. C. [after stating the facts to the effect above set forth]—The evidence shews that *Loomis*, on his wife taking proceedings against him for alimony, became desirous of making some satisfactory arrangement with her; that at first it was proposed to lease the whole of the premises to the wife for life, retaining to the husband certain provisions in his favour; that afterwards it was proposed and arranged that the property, real and personal, should be evenly divided between the two; that thereupon the suit was stayed; the parties lived together for more than a year, and then the wife disposed of what she thought was given to her, under this division, and went to the States to join her children who seem to have settled there. As the wife got the more valuable of the two halves of the property, she was to pay $1073 which has not yet been satisfied, owing, as the husband says, to their procrastination. There was, however, but the one arrangement, and it must be taken as a whole, and part of the consideration being this sum of $1073, in order

(*a*) 23 U. C. C. P. 123.

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to enforce its performance, the wife must herself complete the agreement of which she asks specific performance. Now, in the first place, can it be said that such an arrangement is a voluntary one? that where a bill has been filed against a husband for alimony, and under such pressure an arrangement is made, such a settlement is without consideration? In *Mason* v. *Scott* (*a*) a settlement made under such circumstances was considered sufficient to sustain a transaction, when impeached by the assignee in insolvency of the husband, thereafter an insolvent debtor.

Judgment.

In *Wilson* v. *Wilson* (*b*) the Court enforced performance of an agreement for the separation and living apart of husband and wife. It was there contended also that there was no consideration for the deed, but the Lord Chancellor observes "One part of the consideration is the provision as to the suit in the Ecclesiastical Court. The stopping of those proceedings appears to have been an important object to Mr. *Wilson*—of the reason for which he was the best judge—and that alone was a sufficient consideration * * why is not the compromise of such a suit to afford consideration for an agreement. * * The Court is only exercising its ordinary jurisdiction in giving effect to the arrangement of property agreed upon." It is also to be observed that in that case the defendant stoutly contended that the plaintiff could not succeed against him in her suit in the Ecclesiastical Court, and that he had been surprised into entering into the agreement on which the bill was based. See also *Hamilton* v. *Hector* (*c*), *Rowley* v. *Rowley* (*d*), *Gibbs* v. *Harding* (*e*).

In the last case the Vice-Chancellor says, in regard to the agreement in question, which was one to live separate: "The authorities are clear as to the jurisdiction, and it is too late to urge any argument as to policy."

(*a*) 20 Gr. 84. (*b*) 1 H. of L. 538, and 5 H. of L. 58.
(*c*) 6 Ch. 701. (*d*) L. R. 1 H. L. Sc. Ap, 63. (*e*) L. R. 8 Eq. 490.

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There is no doubt of the strictness of the old rule as to arrangements between husband and wife, and that a provision for a future separation is not even now supported: *Westmeath* v. *Westmeath* (*a*). But here the agreement was one not likely to prevent reconciliation; no doubt the difficulties between husband and wife arose to a certain extent from the wife's uneasiness as to the property, the accumulation of which was due to a great extent to her exertions. By making a division of the property this vexed question would be solved. For a year after this they did live together. It does not seem to me that, under the authorities, the agreement made between the parties is open to objection, and it is not, thus tested, voluntary, but one for which good consideration was given. It seems to me impossible, after the husband has had all the advantage that he sought by the abandonment of the suit, that he can now turn round and repudiate his part of the agreement. It is, however, further urged that this was an agreement for separation — that the separation did not take place—that the parties, thereafter, cohabited together, and that thus the whole arrangement terminated. I do not think the agreement was one for separation, or that the course of conduct of the parties, subsequent to entering into it, has ended their rights under it. Rather than allow the suit to be prosecuted against him, the husba... leemed it advisable to settle half of his property on his wife, and she was nothing loth to accept this, and abandon the claim she was thereby making. It was not made a term of the bargain either that they should live together or separate, and the remaining with or abandoning the husband in no way altered the rights of the parties, in respect of the property the subject of this agreement. It is true that *Loomis* speaks of some other matters, as being part of the bargain made between himself and his wife, but then his story is entirely without corroboration—at best

Judgment.

(*a*) 1 D. & Cl. 519.

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he is a most unsatisfactory witness—His memory is not to be relied on, and the papers produced, the principal one prepared after much negotiation and disputing with the wife, contradict *in toto* the statements to which he deposed. The solicitor to whom instructions were given heard nothing of the matters which *Loomis* now sets up, and in fact we hear nothing about them until after the sale to *Adams*, when *Loomis*, annoyed at not getting his $1073, and at the sale and the filing of this bill for a specific performance of the agreement, brings forward these matters of which, so far as the evidence goes, no person ever heard before.

Judgment.

No doubt, under the agreement, the right of the husband to a tenancy by the curtesy in the lot taken by the wife was to be extinguished, and the wife's right to dower in the lot retained by the husband was to be abandoned. In executing the conveyance to *Hilton*, the husband parted with this right; and probably the solicitor considered that the effect of the arrangement would be to jointure the wife; and that she would have thereby lost her right to dower, without any further instrument being executed, by her shewing specifically this part of the agreement.

In *Randle* v. *Gould* (*a*) there was an agreement for separation, and after that cohabitation, and in an action on the covenant for the payment of an allowance, Lord *Campbell* says, "But, if there had been no express proviso for avoiding the deed in a certain manner, we are of opinion that, looking to the whole scope of this deed, the covenant to pay the weekly allowance would not have been avoided by the reconciliation and cohabitation of the husband and wife. * * It is therefore a *post nuptial* settlement upon her, by her husband, holding out no temptation to her to separate from him, and is as

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

little liable to exception as a covenant to pay pin money, in a regular marriage settlement." This case was approved of by the Court of Appeal in Chancery in *Crouch* v. *Waller* (*a*) in the following terms by Lord *Chelmsford* "I may say with the Court in *Randle* v. *Gould*, it is not merely an allowance to her while she lives separate from her husband; it was absolutely to be paid to her by way of a provision during the term of her natural life, not being suspended or reviving as she should live with him or leave him." In *Ruffles* v. *Alston* (*b*) *Malins* Vice-Chancellor said, "Although this deed was *primâ facie* a separation deed, he did not think that it was put an end to by the husband and wife returning to cohabitation * * He was of opinion, taking the whole deed together, that it went beyond a mere separation deed, and converted the brother into a trustee."

Judgment.

I am of opinion that the husband and wife entered into an agreement for good consideration, and which is valid, and should be enforced at the suit of the wife. But whatever might have been the position of the husband if shortly after January, 1873, he had asked to be relieved from the agreement into which he had entered, in view of what has transpired subsequent to that period it would be impossible to relieve him from its effect. In the meantime the plaintiff has purchased the premises, and paid $5,400 therefor, in cash, and has received from the wife a conveyance of the same. The husband knew of the agreement between the plaintiff and his wife before it was carried out. He asked the plaintiff to befriend him and so to arrange matters as that he should receive the $1073. All that he pressed for was the receipt of this sum. This could not be accomplished by the plaintiff without the sale of the premises to him. At this time *Loomis*, so far from discouraging the sale, only asks that it shall be so carried out as that he may receive the balance due him. It is true that on one or two

(*a*) 4 D. J. & S. 301, 313.

(*b*) 30 W. R. 465.

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occasions he regrets that the plaintiff is buying the lot, but he never pretended to him but that his wife had full power to sell. He never pretended that the arrangement of January, 1873, was ended. He never complained that the wife had improperly obtained the deeds and was attempting to do anything illegal when she was selling to the plaintiff. I think the case is brought within the authorities referred to in *Re Shaver*, (*a*) and that *Loomis* cannot now be heard to say that his wife could not sell the premises, as the agreement entered into between them was ended. His own evidence on that point would seem to be fatal to any such contention, for he swears he thought the agreement between himself and his wife was never ended, and that it was only through procrastination that it was not carried out in all its terms.

Judgment.

In the property the wife was to get, the husband was to have no interest. She took as absolutely the part of the property that fell to her lot as did the husband the portion of it which fell to his. This is a material circumstance in dealing with the position of the wife under the Married Women's Acts, as there would be less objection to consider those Acts retrospective where vested rights were not interfered with, than where they were, and if the husband had no rights to be interfered with in the wife's half lot, then there appears but little reason for holding that these acts do not apply to the present case. In a case of *Townly* v. *Morton* in November, 1873, I had to consider the effect of the "Married Women's Property Act, 1872," and a reconsideration of the question has not caused me to change my opinion. I then thought, and still think, that it was the intention of the Act "to extend the rights of property" of those occupying the position of "married women" at the time the Act was passed. Because this was the effect of the Act it was thought proper to enact the clause that "this Act shall not affect any pending suit or proceeding." I

(*a*) 3 Ch. Cham. R. 379.

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think that the Legislature shewed by section ten that the only rights they desired to preserve were those in litigation when the Act was passed. When the rights of third parties might be affected, then the Legislature admitted the impropriety of allowing it to have a retrospective effect, and so, in clause eight, in unmistakable language, the liability of the husband is removed only in case "of any marriage which shall take place after this Act has come into operation." The words used in sections two, three, four, and five, are, as in section one, "a married woman" or "any married woman." I do not think it could be contended that the Act does not come into force so far as these later sections are concerned, so as to affect women married before its date, because, on such a construction, in an enactment intended to benefit married women, we would have a postponement of the extension of the rights of those intended to be aided, without any reason for such a construction. I think it was not intended to place women married before the second of March, 1872, in that position. *Merrick* v. *Sherwood* (*a*) and *McFarlane* v. *Murphy* (*b*) shew that the Act, in some respects, is retrospective, whereas *Dingman* v. *Austin* (*c*) shews that it is not in all its parts retroactive. It may perhaps be reasonable to say that such portions of the Act as would deprive parties of their vested rights, if held to affect women married before its passing, should be so read as not to interfere with such rights; while the portions of the Act which have not this effect should go into operation as regards women married before, as well as after, the second of March, 1872. I think the part of the enactment which is here in question, the latter paragraph of section one, should be read in this latter way. Whether you read "after the passing of this Act * * any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*" as one sentence; or. "and any married woman shall be liable on any contract made by her respecting her

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(*a*) 22 U. C. C. P. 467. (*b*) 21 Gr. 80. (*c*) 33 U. C. R. 190.

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real estate, as if she were a *feme sole*," as a distinct paragraph, I think I should treat this and the other portions of the Act, not interfering with vested rights, as affecting all married women, and not as confined to those married after the Act. As to the portions of the Act referring to rights enjoyed at the time of its passage, I am bound to follow *Dingman* v. *Austin*, and hold that it has the limited effect there laid down; although the defenders of women's rights may have argued that, as the claim to dower had been very seriously affected by recent enactments, it would be only fair, as a kind of compensation, to take away the husband's right to his tenancy, and, therefore, the enactment had the wider scope which can certainly be given to it without doing any violence to its language. This Act is taken, to a great extent, from the Imperial Statute 33 & 34 Vict. ch. 93. The first provision of sec. 8 of the Canadian Act is taken verbatim from section 12 of the English enact-

Judgment.

ment. It was thought proper to limit the effect of this section, and, therefore, the words in the English Act, "by reason of any marriage which shall take place after this Act has come into operation," are inserted in our statute. There are several clauses in the English enactment similar to the Canadian, giving rights to "any married woman," and these are taken to apply to women, whether married before or after the 9th of August, 1870, when the enactment came into force. Where, as in sections 7 & 8, Parliament desired to restrict the persons to whom the Act applied, then the words, "women married after the passing of this Act," are inserted. Our Legislature did not choose to adopt this restriction, and so omitted the words which would have had this effect. I think Mrs. *Loomis* had the power to contract as to her real estate, notwithstanding that she was married before the 9th of March, 1872, and that the part of section 1, subsequent to the semicolon, is in force, so far as "as any married woman" is concerned. I do not think *Maguire* v. *Maguire* applies. The

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personalty here is not merely property declared by the Act to be separate property. The intention was, that the husband should abandon his marital rights in respect of it. It was for the sole use of the wife, and, therefore, comes within section 9 of the Act. It is not material to consider whether the Judge's certificate on the deed can be impeached or not. I think it probable, looking at *Northwood* v. *Keating* (*a*), and *Romanes* v. *Fraser* (*b*), that the circumstances under which it was granted can be investigated. I do not think they were as fully or truly laid before the Judge as they should have been. *Re Haigh* (*c*), *Ex parte Graham and Andrews* (*d*), *Ex parte Gilmore* (*e*), *Ex parte Robinson* (*f*), *Re Rogers* (*g*), *Re Murphy* (*h*), *Re Price* (*i*), *Re Williams* (*j*), *Ex parte Bruce* (*k*), shew the care exercised in England before granting certificates allowing married women to part with their property, under the similar clause in the Act in force there. It is not material either whether or not the deed to Mrs. *Loomis* operated by estoppel, so as to pass to her the title acquired by her husband when the patents issued. The instruments in *Todd* v. *Cain* (*l*), and *McGill* v. *Shea* (*m*), did not operate by estoppel, as the parties executing them did not pretend thereby, at the time of their execution, to convey any estate in the land. See *Irvine* v. *Webster* (*n*), and *Bigelow* on Estoppel, pp. 334, 340, 355, 357.

Judgment.

The difficulty in the plaintiff's way here is, that the grantor conveys all his "estate" in the land. At the time of its execution, the land was in the Crown. There is no covenant, and it appears to me that the

(*a*) 18 Gr. 643.
(*b*) 17 Gr. 267.
(*c*) 2 C. B. N. S. 198.
(*d*) 19 C. B. N. S. 370.
(*e*) 3 C. B. 967.
(*f*) L. R. 4 C. P. 205.
(*g*) 11 Jur. N. S. 1038.
(*h*) 5 Scott N. S. 166.
(*i*) 13 C. B. N. S. 286.
(*j*) 2 Scott N. R. 120.
(*k*) 3 Scott N. R. 592.
(*l*) 16 U. C. R. 516.
(*m*) 2 U. C. R. 483.
(*n*) 2 U. C. R. 224.

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only ground on which an argument in favor of the plaintiff can be based is the doubtful one of the use of the word "expectancy," as descriptive of the interest which is to pass. There was, however, a good assignment in equity, and that answers all the purposes of the plaintiff. The pleadings may not answer exactly either the case or the defence made, but the evidence tendered was given without exception, and it was not pretended that the parties would be in any better position in presenting their case to the Court did the pleadings answer more accurately the case as proved. I do not think there is any need for directing an amendment which, under the law as it now stands, would be allowed as a matter of course under the circumstances.

Judgment.

I think that the plaintiff is entitled to a decree for a specific performance; that he must pay the balance due *Loomis*; that *Loomis* must account for the chattels which he agreed to give the wife, and which have been dealt with by him personally or through his tenants; that *Loomis* must be indemnified against the half of the debts due in January, 1873; that he must account for the rents and profits of the estate since the sale to the plaintiff; that Mrs. *Loomis* must release her dower in the half lot retained by *Loomis*; that *Loomis* must have the rooms and right of way contracted for. There must be a declaration that this provision for the wife is in lieu of alimony or other claims against the husband, and an undertaking of the wife to indemnify the husband against her debts for the future. These provisions can be inserted in the decree, or, if the parties desire it, a formal instrument can be settled by the Master embodying them. I reserve the costs until the Master at Cobourg has taken the accounts necessary to complete the matter. Report in three months, and further directions reserved.

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THE IMPERIAL LOAN AND INVESTMENT CO. v. BOULTON.

*Administration of Justice Act—Mortgage—Sale—Injunction—Interpleader.*

Where a bill is filed to enforce a sale of mortgage premises, the Court, under the Administration of Justice Act, will, in addition to the relief formerly given, grant an order for immediate payment, on which a writ of *fieri facias* may at once issue; and will also order possession to be given to the mortgagee, charging him with an occupation rent. And where a mortgagee was suing at law on the covenant, and in ejectment, and was also proceeding on a power of sale in the mortgage, the Court refused to interfere, as complete justice could be done in the Court of law. And, in like manner, where an action had been brought by a second mortgagee to recover a surplus of purchase money, after payment of the first mortgagee, the Court refused to restrain such action at the instance of the mortgagor, although it was sworn that the second mortgage had been obtained by fraud and undue influence.

The plaintiffs were assignees of a mortgage made by the defendants *Boulton* and wife, and filed a bill praying for an order for immediate payment, upon which a *fieri facias* might issue; and for an order for delivery of possession under the provisions of the Administration of Justice Act of 1873, (O.), and also for an order for sale of the land in default of payment.

The bill was taken *pro confesso*.

Mr. *Fitzgerald*, Q.C., for the plaintiffs, now moved for a decree in the terms of the prayer of the bill.

PROUDFOOT, V. C. [after stating the facts as above].—The plaintiffs ask the relief prayed under the 32nd section of the Administration of Justice Act, 1873, contending that they are entitled to the same remedies in this Court as in a Court of law, in addition to those formerly administered in this Court; that, as at law, they might have sued upon the covenant and brought an action of ejectment to recover the possession, so, when they apply to this Court, they should have the same

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relief; that the object of the Act was to enable either Court to grant complete remedies without being under the necessity of resorting to the other, so that all the rights and equities of the parties may be adjudicated on in one suit. I think the plaintiffs entitled to what they ask for the reasons assigned. The decree will order immediate payment by the defendants of the amount due, to be ascertained by the Registrar. In taking the account, the Registrar will charge the plaintiffs with an occupation rent, as they desire to take possession; and there will be an order for delivery of possession and if the amount is not realized or paid before six months, order a sale.

I have had occasion recently to consider the extent of the powers conferred on the Common Law Courts by the 8th section of the Act, and have held, in *Fenn* v. *Crosbie* (*a*), that where a mortgagee was suing at law on the covenant and in an action of ejectment, and was also proceeding on a power of sale in the mortgage, complete justice might be done in those Courts, and that there was no equity to sustain a motion for an injunction. And, in another case, *McKinnon* v. *Boulton* (*b*), where a first mortgagee, having sold under a power of sale, had a surplus in his hands which was claimed by a second mortgagee, who had sued at law for it, and also by the mortgagor, alleging that the second mortgage was fraudulent and obtained by undue influence, that there was no equity to sustain a motion for an injunction against those proceedings, as in either of the suits complete relief could be given, and an order to interplead made without filing a separate bill for that purpose.

Judgment.

I think the 32nd section was intended to confer equally extensive powers on this Court, in any case in which it was first applied to.

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(*a*) 8th Oct., 1875. (*b*) 12th Oct., 1875.

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## GILLIES v. COLTON.

*Patent of invention—Partnership—Practice.*

The holder of patents for improvements in certain agricultural implements agreed to assign to the defendant the exclusive right to sell these implements, but not to manufacture them; and in certain contingencies he also agreed to assign the patents themselves. In fact the patents were invalid, for want of novelty, and the defendant having reassigned any interest he had in the patents, claimed the right to manufacture the implements for his own benefit.

*Held*, that owing to the agreement between the parties, and their dealings with each other thereunder, the defendant was estopped from questioning the validity of the patents.

*Held* also, that the effect of such agreement was not to constitute the defendant a partner, but to give him an interest in the patents, and that he was not a mere licensee of the patentee.

Where the evidence at the hearing was the same as that given on a motion for injunction, and the Judge before whom it was made granted the injunction, the Court, at the hearing, made the injunction perpetual, although doubting whether the facts, as shewn in the cause, were not sufficient to entitle the defendant to an entire rescission of the agreement, on proper proceedings being taken for that purpose.

Statement.

This was a motion for an injunction to restrain the defendant from infringing certain patents, of the plaintiff *Collard*, for an improved harrow and an improved cultivator. The defendant insisted that the patents were not valid, as the invention was not new in several particulars, and that he had only manufactured implements without the new features in the patents. The plaintiff admitted this, but claimed that, under the agreements and deeds between him and the defendant, the latter was estopped from questioning the validity of the patents.

The material facts were, that on 27th of May, 1871, *Collard* and *Colton* made an agreement by which, in consideration of certain privileges, thereinafter granted, *Colton* agreed to furnish *Collard* with the premises he

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(*Colton*) then occupied in Gananoque, with the water-wheel, gearing, &c., with power to drive as theretofore, and to make an addition to the building, the whole to be rent free, and to furnish him with stock at net cost, and advance means to pay wages, and needful machinery, not charging any commission on advances; the machinery, tools, &c., to be *Collard's* property, and to be paid for by him. And *Colton* agreed to make all needful exertion to sell and introduce *Collard's* implements both in the United States and Canada, and to take at least two thousand harrows, one thousand cultivators, and five hundred horse hoes at specified rates. *Collard* agreed to assign to *Colton* the exclusive right to sell these implements both in Canada and the United States, and to sell county or township rights; to sell and use, but not to manufacture, which *Collard* reserved to himself; but he granted to *Colton* full right to sell, use, and enjoy all those implements, and, if the right could be registered at Ottawa, so as to make it legal, such an assignment was to be given to *Colton*. In case it could not be so assigned legally, then *Collard* was to assign the patent to *Colton*, and the same in the United States, if it could be legally given; such an instrument was to be prepared and executed by *Collard* whenever he obtained patents in the United States, and, in case this could not be done with prudence to all parties, then the patents were to issue direct to *Colton*; but, in the meantime, to avoid delay, *Collard* was to execute a power of attorney to one *Waggoner;* and *Collard* was to be the contracting party in selling township rights, *Colton* receiving the proceeds.

Statement.

It appeared that *Collard* agreed to furnish *Colton* at least three thousand harrows, three thousand cultivators, and one thousand horse hoes per annum, at the specified prices, if required. If it were found necessary to assign the patents to *Colton*, then *Colton* was to assign to *Collard* the exclusive right to manufacture to supply *Colton* with implements, but for no other purpose.

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Subsequently, differences having arisen between *Colton* and *Collard*, *Colton*, by indenture of the 1st April, 1874, reassigned his interest in the patents to *Collard*, and he, by an instrument dated in May, 1874, assigned to the plaintiff *Gillies* the exclusive right to manufacture and sell the patented articles within the Dominion of Canada.

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

The question really for decision, on the present application, is, whether the defendant, by reason of his dealings with *Collard*, is now precluded from asserting the invalidity of the patents. The defendant now sets up that there is such a want of novelty in the improvements as to render the patents invalid. The patents were issued in *Collard's* name, but *Colton*, under the agreement between the parties, was entitled to the exclusive right of selling. Township rights were sold by *Colton*, but were given in the name of *Collard*. In certain contingencies the patents themselves were to be assigned to *Colton*, but in consequence of disagreements between them, this was not carried out, and *Colton* reassigned all his rights under the patents to *Collard;* and having thus dealt with them he cannot be heard to impeach their validity; all the transactions between the parties were carried out on the assumption that the patents were valid. *Chambers* v. *Crichley* (*a*), *Whiting* v. *Tuttle* (*b*), and *Crossley* v. *Dixon* (*c*), shew that a grantor cannot dispute the validity of a patent he has assigned. There was nothing obnoxious to the law in the parties making an agreement of this kind.

Argument.

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

This bill is one alleging valid patents, and that the plaintiffs were entitled by reason of the dealings therewith.

(*a*) 33 Beav. 374. (*b*) 17 Gr. 454. (*c*) 10 H. L. 293.

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The question is whether, on the proper construction of the agreement, the defendant was prevented from manufacturing;—there is no covenant that he will not do so. Such a covenant would be in restraint of trade, and therefore void;—this would be the effect without raising the question of estoppel. The holders of township rights had no exclusive rights; they merely had a right to have so many implements furnished to them at a particular price. The agreement between the parties was one determinable at will, as there was no fixed time for it to continue. Both the parties, it is contended, knew that the patents were invalid before the agreement was made, and the defendant will not now be prevented from destroying the monopoly the plaintiff claims. There is no ownership by *Colton* of the patent; he is a mere licensee, and this distinguishes this case from the cases cited. *Colton* is only a licensee at will, and he merely gave up to *Collard* the right he had of vending, and

Argument.

therefore restore to him the full rights of patentee. The doctrine of estoppel is now sought to be extended in this case, but there is no precedent for it. There is no estoppel in this case; there is no transfer to a third party—it is a mere restoration by *Colton* to *Collard* of what he got from him, thus leaving both parties as they were before. The doctrine of estoppel not being applicable to this case, the defendant is not prevented from contesting the validity of the patents. The cases cited by the plaintiffs go to the very verge of the law. The parties were not dealing with this as a valid patent—*Colton* was not, certainly. The evidence shews that before the agreement of April, 1874, he was aware that the patent was not valid. *Pidding* v. *Franks* (*a*); *Lawes* v. *Purser* (*b*). The fact of *Colton* releasing his interest does not amount to a grant, and therefore the question of estoppel cannot arise. A licensee can repudiate his license, and then he can dispute the validity of the patent.

(*a*) 1 McN. & G. 56. (*b*) 6 E. & B. 930.

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Mr. *Moss*, Q. C., in reply.—There was no assignment of a legal interest in *Chambers* v. *Crichley*, and it cannot therefore be distinguised from this case. The distinction drawn by counsel on the other side is on an erroneous assumption of the facts. It cannot be said that *Colton* had no interest in the patents. *Colton* could have restrained *Collard* from making sale of a single implement, and he had quite as much interest in these patents as the defendant had in *Chambers* v. *Crichley*. In addition to erecting the building *Colton* was to make advances, and his security for this was his interest in the patents. He was also to establish agencies throughout the province. *Colton* had the right under the agreement to have the patent assigned to him, and could have come to this Court for that purpose. The whole of the arrangement shews that *Colton* dealt with *Collard* on the assumption that the patent was valid; and if *Colton* supposed or knew at the date of the agreement that the patent was invalid, he was acting a most dishonest part; but the evidence in reality contradicts such a supposition. As a matter of fact, *Colton* is now sending over implements for sale to the United States pursuant to the agreement.

Judgment.

Proudfoot, V. C.—[After stating the facts as above set forth].—The first question to be determined is, what interest *Colton* took under this agreement. I do not think the agreement constituted a partnership. But *Colton* was not in the position of a mere licensee; he was not to manufacture, but *Collard* was to manufacture only for him. The scale on which the works were to be carried on was an extensive one; the implements that *Collard* covenanted to furnish annually at the rates specified in the agreement amounted to nearly $53,000; and *Colton* furnished the premises rent free, provided stock at net cost, and advanced money for wages and machinery, without commission; the machinery and tools were to

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become *Collard's* property, and be paid for. It seems to me plain that this was not an arrangement that might be terminated at *Collard's* will or caprice.

It was contemplated to last for more than one year, at any rate, as *Collard* agrees to furnish the $53,000 for machines annually; *Colton* agreed to take a certain number, and receives the exclusive right to sell the township licenses. These all, I think, indicate the object of the agreement, that it should continue while the patents lasted. In certain contingencies, *Colton* was to have the patents themselves assigned to him, and to grant to *Collard* the exclusive right to manufacture for him. It is impossible to suppose that all this was to be undertaken by *Colton*, with the risk of being deprived of all the advantages at a moment's notice; the profits to be made on the sale of the implements and county rights being the only benefit he was to derive for his expenditure. I think, therefore, that *Colton* had an interest in the patents.

Judgment.

Afterwards, by an agreement of 1st of April, 1874, between *Colton* and *Collard*, reciting that differences had arisen in relation to their past business transactions, it was witnessed that *Collard* agreed to leave and surrender the premises in Gananoque belonging to *Colton*, and he assigned to *Colton* tools, machinery, plant, &c., and agreed to assign his right to take out patents in the United States for the implements for which he had received patents in Canada. And *Colton* agreed to release *Collard* from all claims due to him in connection with the business, and to save *Collard* harmless from all claims in connection with the business; and *Colton* assigned to *Collard* all interest or right which he had in the patents, or in the sale of the implements in Canada.

I think this instrument does assign to *Collard* the

interest *Colton* had in the patents, and it recognizes that he had an interest to assign.

It is argued that if the effect of this instrument is to preclude *Colton* from manufacturing these implements throughout the Dominion, it is void as being in restraint of trade. I do not think so. The Legislature has imposed a general restraint of trade in these articles in the whole Dominion, in favour of the patentee, and I see no violation of any legal principle in permitting the defendant to restore himself to the condition of the rest of the population, from which he had been relieved, for a time, by his arrangement with the patentee.

Having determined that *Colton* had an interest in the patent, and that he has, by a deed granted this to *Collard*, the question of whether he is estopped from derogating from his grant seems covered by authority. *Chambers* v. *Crichley* (*a*), and *Whiting* v. *Tuttle* (*b*) are in point. Judgment.

*Pidding* v. *Franks* (*c*), which was cited for the defendant, seems to rest on the ground that the defendants were mere equitable assignees of a license, and who disclaimed the use of the patent, and were allowed therefore to dispute its validity. The most recent case quoted was *Axman* v. *Lund* (*d*), and has an appearance of supporting the defendant's position, which I think vanishes on a closer inspection. In that case there were two patents, one of 1864 the other of 1868; the former was worked by the plaintiff and defendant in partnership, but belonged exclusively to the defendant. The latter was a joint patent, and they were also jointly entitled to a third unpatented process. They dissolved partnership in 1873, and the plaintiff assigned to the defendant "all that one undivided moiety of the plaintiff

(*a*) 33 Beav. 374.
(*b*) 17 Grant, 454.
(*c*) 1 McN. & G. 56.
(*d*) L. R. 18 Eq. 330.

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of and in the said stock in trade, credit, and effects, and also all sums of money belonging to the partnership, and all the plaintiff's estate and interest therein." Afterwards, to terminate doubts as to the rights of the parties to the patent of 1868, it was agreed that it should be considered the property of both in equal shares, and each should work it for his own benefit; so that each had a right to use the patent of 1868 and the unpatented process, but the defendant alone the right to the patent of 1864. The plaintiff carried on the manufacturing under all three processes, and it was held that he was not precluded from shewing that the patent of 1864 was invalid. Of that patent he had only been a licensee, and the deed executed by him on the dissolution had assigned no interest in it; and it is expressly on this ground, of his having been a licensee, and the license having expired, that the case was decided, and leaves the principle of *Chambers* v. *Crichley* untouched.

Judgment.

Injunction granted.

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The cause was afterwards brought to a hearing at the sittings at Kingston, in April, 1875.

Mr. *George Kirkpatrick*, for plaintiffs.

Mr. *Boyd*, for defendant.

The authorities cited were the same as on the motion for injunction.

May 10.

BLAKE, V. C.—At the conclusion of the examination of witnesses in this case, the counsel for the defendant could not point out any particular in which the evidence then given differed from that adduced before the Court on the motion for injunction. On that motion, the case was considered by my brother *Proudfoot*, and he thought

the plaintiffs entitled to the relief they asked, and granted an injunction. That order having been made on material the same in substance as that which is before me, I am concluded by it, and am bound to follow the decision arrived at by the Vice-Chancellor, after due consideration.

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I admit that the case is one not free from doubt, but I think when *Collard* and *Colton*, at the time of the dissolution of their arrangement, chose to consider the patents as valid, and, upon the basis of their validity, made a settlement of their differences and agreed that certain rights under the patents were to be enjoyed by the one, and certain other rights under the same patents by the other, neither of them can turn round and treat as invalid that the validity of which they have admitted, and which has proved a principal item in the consideration of the terms of their dissolution. If there had been a simple termination of the arrangement, and the question of the patents was one left entirely at large, the rights of the parties would, to my mind, assume a different aspect, and the defendant might then very reasonably claim that he stood as any outsider in regard to these patents; but this was not the course pursued: they did not choose to prosecute the question whether the patents were valid or not—they chose to assume them to be valid, and a division of the assets is made upon this understanding, and, after that, I do not think the defendant can deny the title of the plaintiff to that which he has allowed him to take as part of what is coming to him on the winding up of their business.

Judgment.

It is said the defendant was deceived in entering into this arrangement, in this, that he could not use the patents in the States, and that while he thought he could, the plaintiff *Collard* knew that the matter had been there rejected. If this be so, then I

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think it may perhaps form a ground for the entire rescission of the agreement entered into between *Colton* and *Collard*; but, so long as that is allowed to stand, I think it must be carried out, notwithstanding the defendant's right, on proper proceedings being taken, to set aside the whole transaction. I doubt the validity of the patents in question, but I do not think I have any more to do with the consideration of that point than had the Master of the Rolls, in *Chambers* v. *Crichley* (*a*), with the decision of the fact whether the patent relied on there was good or bad. I have perused the following authorities in arriving at the above conclusion: *Crossley* v. *Dixon* (*b*), *Axman* v. *Lund* (*c*), *Whiting* v. *Tuttle* (*d*), *Pidding* v. *Franks* (*e*), *Walton* v. *Lovater* (*f*), *Naton* v. *Brooks* (*g*).

Judgment.

I think the plaintiffs entitled to a decree for injunction and an account, with costs. If any difficulty arises as to the form of the decree, I will, if the parties desire it, settle it.

The defendants asked, if my view accorded with that of the Vice-Chancellor who granted the injunction, that I should give leave to appeal. I think it a proper case, if the defendants desire further litigation, in which to grant the leave required by the statute, to enable a party to go direct to the Court of Appeal; and, therefore, I give the required leave.

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(*a*) 33 Beav. 374.
(*b*) 10 H. of L. 293.
(*c*) L. R. 18 Eq. 330.
(*d*) 17 Gr. 454.
(*e*) 1 M. N. G. 56.
(*f*) 29 L. J. C. P. 275.
(*g*) 7 H. & N. 499.

## HART v. M.[illegible]UESTEN, [IN APPEAL].*

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*Mortgage—Release of equity of redemption—Merger.*

Under the statute 14 & 15 Vic., ch. 45, (Con. S. U. C., ch. 87), a mortgagee has a right to get in the equity of redemption in any way without thereby merging his security, and thus enabling a puisne incumbrancer to compel him to pay off such puisne incumbrancer's claim; therefore, where a first mortgagee took from the mortgagor a release of the equity of redemption, the consideration therefor being expressed to be the amount due on the mortgage for principal and interest, "and in satisfaction thereof," to the intent that the mortgagee "may hereafter hold and enjoy the said land and premises * * freed from the proviso of redemption;" and the mortgagor covenanted for further assurance, and that he had done no act to incumber:

*Held*, Per Curiam—[reversing the decree of the Court below, as reported ante volume xxi, page 242]—that the security of the first mortgagee was not thereby merged, and that the only relief a subsequent incumbrancer was entitled to, was that of redeeming the first mortgagee.—[STRONG, J., dissenting.]

The facts of this case are fully stated in the report thereof ante vol. xxi, p. 242. From the decree there pronounced the plaintiffs appealed. June 15th, 1875.

Mr. *Moss*, Q. C., and Mr. *Arnoldi* for the appellants.

Mr. Attorney-General *Blake*, contra.

For the appellants it was urged, that under chapter 87 of the Consolidated Statutes of Upper Canada it is competent to a mortgagee to accept a release of the equity of redemption without thereby merging his mortgage interest; and that under the conveyance executed by *Logan* to *Watt* no merger was effected: that in order that a merger shall take place it is necessary that upon the conveyance thereof an express intention must appear, or it must be clearly implied from the dealings of Statement.

Present—DRAPER, C. J., STRONG, BURTON, and PATTERSON, JJ.

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the parties that a merger should take place; but where, as in this case, the interest of the mortgagee, to whom the release was made, clearly requires that his mortgage security shall be retained, there no merger will arise; but the mortgage will be kept on foot as against *puisne* incumbrancers on the property embraced in his security.

For the respondents it was contended that the incumbrancer here having acquired the equity of redemption, by contract, the *onus* of shewing that a merger did not take place rests on the party denying the merger. There is no reason, certainly in the transaction itself, for presuming an intention of the assignee of the equity of redemption to preserve his charge; such an intention must be shewn by the acts of the parties to the contract. The provincial statute under which the appellants claim to be entitled seems to place the law in this country on much the same footing as the case of *Watts* v. *Symes* (*a*), referred to in the Court below, had put it in England: that case did not over-rule *Toulmin* v. *Steere* (*b*), but qualified it, by deciding that the incumbrancer might take a release or conveyance of the equity of redemption without working a merger, the question, whether he in fact does so, being to be determined according to the circumstances of each case as it arises. In *Watts* v. *Symes* clear evidence was adduced shewing that the intention of the mortgagee, there, was to preserve the charge; and on that alone the case was decided; and in *Elliott* v. *Jayne* (*c*), in our own Court, the Court held that there was evidence of intention to retain the charge.

Argument.

The result of all the cases, it was contended, was, that a mortgagee, getting in the equity of redemption, may contract to retain the charge unmerged; but intention, much less contract, to retain the charge will not be presumed, simply from the fact that it is for the interest of

(*a*) 1 D. M. & G. 240. (*b*) 3 Mer. 210. (*c*) 11 Gr. 412.

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the party that it should be retained;—that here *Watt*, who had notice of the puisne incumbrance, took a conveyance of the equity of redemption "*in satisfaction of the debt*;" accepted the covenant of the releasor against incumbrances, and thereupon went into possession and improved as owner; that the plain construction of this deed of assignment or release shows that the debt was satisfied, and the mortgage thereby merged, the purchaser relying on the contract alone for security; and that therefore the intention by the purchaser to merge his security was established conclusively; that evidence to rebut this intention would in fact be evidence to contradict the deed, and make a new contract between the parties, and as such would be inadmissible; but no such evidence was offered, and now the Court is asked to presume an intention, the reverse of that evidenced by the deed.

In addition to the cases cited in the Court below *Brown* v. *Stead* (*a*), *Parry* v. *Wright* (*b*), *Anderson* v. *Pignet* (*c*), *Phillips* v. *Gutteridge* (*d*), *Swinfen* v. *Swinfen* (*e*), were referred to.

Sept. 25th.

DRAPER, C. J.—The leading question in this case may be thus stated:—One *Logan* being seized in fee, on 3rd January, 1856, mortgaged in fee to *Watt*, and he, afterwards, (in September, 1858,) executed a second mortgage to *McQuesten & Co.* Afterwards *Logan* took the benefit of the Insolvent Acts, and *McQuesten & Co.* proved their mortgage debt, alleging that the lands mortgaged were insufficient to pay it. They retained the mortgage and *Logan* got his discharge.

Judgment.

In October, 1860, *Logan* executed a deed poll (indorsed on his mortgage to *Watt*) reciting that he had

(*a*) 5 Sim. 535.
(*b*) 1 S. & S. 369.
(*c*) L. R. 3 Ch. 180.
(*d*) 4 D. & J. 581.
(*e*) 29 Beav. 199.

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agreed with *Watt* for the absolute sale of the inheritance of the lands mortgaged to secure the payment of £338 10*s*., and in consideration of $1500 then due to *Watt* for principal and interest on the mortgage, and in satisfaction thereof, granted and released the proviso for redemption contained in the mortgage, and all the estate, right, title, and interest, which he had or might claim in the said lands, to the intent that *Watt* might have, hold, and enjoy, the said lands unto him, his heirs and assigns for ever, freed from the proviso for redemption.

Judgment.

I have read and considered the English cases on this subject. I take it to be clear that in England the merger of a security might always be prevented by an expressed or implied intention to the contrary (*a*). The case of *Toulmin* v. *Steere* (*b*), seems to be the one which carries the doctrine to the greatest length, but in reference to that case I notice that in *Watts* v. *Symes* (*c*), Lord Justice *Knight Bruce* expressed a doubt whether the cases on which Sir *W. Grant* relied in *Toulmin* v. *Steere* sustained his decision, and Sir *J. Romilly*, Master of the Rolls, in *Hayden* v. *Kirkpatrick* (*d*), remarks: "*Toulmin* v. *Steere* was a very strong case, and would have been appealed but that a compromise was entered into. But this would be much stronger, if when an estate was subjected to two mortgages, and the first mortgagee got in the equity of redemption, he not only released his own mortgage but let in the second mortgagee to a better position. *Toulmin* v. *Steere* clearly was not intended to go to that length." This language appears to me almost descriptive of the case before us, leading to a conclusion in support of the appeal. It may be observed that in the report of *Watts* v. *Symes* in 16 Jur. 114, the above cited passage is not to be found. It should also be noticed that Mr. *Fisher* has, in his 2nd

(*a*) Fisher on Mortgages, 2nd Ed., ss. 1410–1451.
(*b*) 3 Mer. 210. (*c*) 1 De G. M. & G. 240.
(*d*) 11 Jur. N. S. 836.

edition, qualified the passage cited in *Finlayson* v. *Mills* (*a*). And *Forbes* v. *Moffat* (*b*) shews that merger will depend on the actual or presumed intention of the person in whom the interests are united.

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The case of *Gordon* v. *Lothian* (*c*), also appears to me to favour the plaintiffs' contention; but the case of *Street*, appellant, v. *The Commercial Bank*, respondent, (*d*) which was decided in 1844, by the then Court of Appeal of this Province, seems to me so applicable that I do not see very well how, without overruling it, I could dismiss this appeal. The facts are not altogether similar, but the principle bears directly on the present question, and the language in parts of the very elaborate Judgment of the late Sir *John B. Robinson*, C. J., sustains the opinion I have formed. Referring to the case of *Forbes* v. *Moffat*, his Lordship says: "The principle settled by this judgment is, that where one having a charge acquires the legal estate, his charge sinks or not, according as it appears to be for his interest or otherwise that it should subsist. If he manifests an intention that it should sink it does sink, if not, and he is indifferent, then it also sinks; if no intention is shewn, and it may be in his favour to prevent a prior mortgagee" (that is, as I understand, prior to the acquisition of the legal estate) "from coming in, it will not be treated as being sunk." In the present case the legal estate was conveyed to *Watt* in the first instance, and he never parted with it. *Logan* had a right on the performance of a condition, or rather on his fully complying with the terms of the proviso, to get it back; and this right is what he surrendered in consideration of being discharged from personal liability to pay the debt. And the language of the learned Chief Justice directly meets the present case "He" (the mortgagee) "could not have imagined

Judgment.

(*a*) 11 Grant at p. 230.
(*b*) 18 Ves. 384.
(*c*) 2 Gr. 293.
(*d*) 1 Gr. 169.

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that by taking a conveyance of the equity of redemption while all his debt was unpaid, he would be in a worse situation than when he held the defeasible estate."

But if we are not bound by this decision, as one made by this tribunal, being, though differently constituted, the court of ultimate appeal in this province, and if the reasons given in that case, as well as the effect of the other authorities referred to, will not establish the appellants' case, there remains the statute 14 & 15 Vic. ch. 45, entitled "An Act for the relief of Mortgagees."

The first section enacts "that it shall and *may be lawful*" for any mortgagee of real or personal property to take and receive from the mortgagor a release of the equity of redemption in such property, or to purchase the same under any power of sale in his mortgage, without thereby merging the mortgage debt as against any subsequent mortgagee.

Judgment.

The second section enacts that when a prior mortgagee takes a release of the equity of redemption, or purchases the same under a power of sale in his mortgage, no subsequent mortgagee shall be entitled to foreclose or sell such property, without redeeming or selling subject to such prior mortgagee, (Qu. mortgage) in the same manner as if such prior mortgagee had not taken, received, or purchased, such equity of redemption of the mortgagor.

The force of the first section is in the latter words "without thereby merging the mortgage debt," for, I apprehend, there was nothing *unlawful* in a mortgagee's acquiring a release of the equity of redemption from his mortgagor; but then if the release was unaccompanied by any act or declaration establishing a contrary intention the mortgage was extinguished, and a second mortgagee would be let in; under this section,

as against him, the mortgage debt would still continue by force of the law. Then the second section makes the relief of the first mortgagee complete by taking away the power assumed to exist in the subsequent mortgagee to foreclose or sell.

Then apply these sections to the facts of this case.

*Watt* was the first mortgagee of certain freehold property.

The mortgagor had paid neither interest nor principal, and the amount due equalled the fair value of the mortgaged premises.

It was then agreed between *Watt* and the mortgagor "that in consideration of the sum of $1500 now due, and owing to the said *John Watt* for the absolute sale of the inheritance of the lands" mortgaged, *Logan* should, and it was witnessed that he did grant and release to *Watt* and his heirs the proviso for redemption, and all his estate, &c., at law and in equity of and in the lands, to the intent that *Watt* and his heirs may have, hold, and enjoy, the said lands freed for ever from the proviso for redemption. Judgment.

He was therefore possessed of the legal estate by the mortgage, and he took and received from his mortgagor a release of the equity of redemption for a valuable consideration, *i.e.*, a release to the mortgagor of all personal liability for the mortgage debt. Is not this precisely what the first section of the statute declares it shall be lawful for him to do, without thereby merging the mortgage debt as against any subsequent mortgagee?

But this is not all, for the second section contains provisions which deprive the subsequent mortgagee of the right to take certain proceedings upon his own

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mortgage, without redeeming the prior mortgagee, or selling subject to his claim, in the same manner as if such prior mortgagee "had not taken, received, or purchased, such equity of redemption of the mortgagor."

This Act expressly enables the first mortgagee to unite to the legal estate already vested in him the equitable estate also, without merging his mortgage debt—notwithstanding that the personal liability of the mortgagor to pay that debt is at an end—while the second section recognizes the right of the subsequent mortgagee to redeem the first, or to sell, if there be a power of sale in his mortgage, but subject to the payment and satisfaction of the prior mortgagee. As between him and the mortgagor, the debt is satisfied and the transaction is finally closed: as between the two mortgagees, the former has, as I construe the act, a right to call on the latter to pay him off or to submit to foreclosure, and the latter has a right to treat the former as still no more than a mortgagee as against him.

Judgment.

But the respondents contend that *Watt's* debt is paid, and the burden being thus taken off *Logan's* estate, their mortgage has become the first charge upon it, and that *Watt* having removed his charge, takes the estate subject to the incumbrance created upon it by *Logan* in their favour, and they rely on the language of *Logan's* deed poll as conclusive in *their* favour as to the intentions of *Watt* in taking it. If every thing but what that deed poll expresses be excluded from consideration, they might possibly succeed. I am, however, not called upon to decide that question, but it sufficiently appears that the object of the parties was that the existing debt should be considered as the purchase money of *Logan's* right of redemption, and that he should be released from his personal liability for that debt.

I think that is enough to justify me in holding that

under the statute the debt was not merged: that the facts establish a purchase by *Watt* of the equity of redemption, and that the only way for the respondents to obtain the priority they claim is to redeem the appellants. As against the respondents there was no merger, and therefore the appellants are entitled to a decree in the usual form to foreclose the respondents.

STRONG, J., was of opinion that the case of *Toulmin* v. *Steere* shewed the decreee of the Court below to be correct, and said that he concurred fully in the views expressed by the learned Vice Chancellor who had heard the case, and therefore thought the decree should be affirmed, and the appeal dismissed with costs.

BURTON, J.—This is a case of the owner of an incumbrance acquiring the estate, not by devise or descent, but by contract.

Judgment.

Most of the cases, to be found in the books, are of questions arising between the real and personal representatives of the person entitled both to the estate and the charge, cases in which the deceased, being entitled to the whole property, had a right to deal with it as he chose; as to whom, during his life-time, it may have been of no consequence to have a charge on his own estate; and therefore, as to whom this charge would sink without some declaration or act on his part to keep it on foot.

No question would arise in these cases until after the death of the party entitled.

The party becoming entitled to the estate and the charge might clearly, at his election, take the estate, and keep up the charge, and in most instances, it being, with reference to the party himself, of no sort of use to have a charge on his own estate, in the absence of

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any intention, actual or presumed, on his part, it would be held to sink; but, as observed by Sir *William Grant* in the case of *Forbes* v. *Moffatt*, in all cases where a charge had been held to merge, it was perfectly indifferent to the party in whom the interests had united, whether the charge should or should not subsist.

Upon looking into all the cases at the time of that decision, that very learned Judge had been unable to find any case in which any different rule had prevailed, and I think it will be found that the decisions, from that day to the present, are in accordance with that view.

But in the case of a party acquiring the estate by contract, different considerations arise. It was at one time erroneously supposed that a party purchasing from the mortgagor could not keep alive the first incumbrance as against subsequent incumbrances of which he had notice, and that the same principle prevailed where the purchaser of the equity of redemption was the first mortgagee.

Judgment.

In this uncertain state of the law our statute 14th and 15th Vic., ch. 45, was passed, and it appears to me that it would be a very forced, and a very narrow construction of that Act, to hold that it was passed simply for the purpose of declaring that a mortgagee might (if he used proper language to indicate his intention) take a release of the equity of redemption without merging his prior claim as against subsequent incumbrancers.

The preamble to the statute recites, that it is expedient that relief should be afforded to mortgagees of freehold and leasehold property in certain cases in which they are not sufficiently protected by law; and then enacts—

1st. That it shall be lawful for any mortgagee to take

and receive from the mortgagor a release of the equity of redemption in such property, or to purchase the same under any power of sale in his mortgage, or any judgment or decree, *without thereby merging his mortgage debt as against any subsequent mortgagee* of the same property.

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If there were any question as to this being merely declaratory of the law, leaving it, however, still incumbent upon the parties to protect themselves by declaration or otherwise, such question is removed by the 2nd section, which declares that, whenever any prior mortgagee shall take a release of the equity of redemption, or shall purchase the same under any power of sale in his mortgage, or any judgment or decree, no subsequent mortgagee shall be entitled to foreclose or sell such property without redeeming or selling subject to such prior mortgage.

Judgment.

The evil to be guarded against at the time of the passing of the statute was, that a mortgagee acquiring the equity of redemption should, by a technical rule of equity, and contrary to his intention, let in the subsequent incumbrancer, who was no party to the contract, and who was in no way prejudiced by it. Why then place upon it a construction which would still leave parties exposed to the risk of having their securities defeated, contrary to their intention, in preference to one which the words, in their natural sense, clearly bear? As remarked by *Mowat*, V. C., in *Finlayson* v. *Mills*, the object of the Legislature was to prevent a 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 when a merger is necessary to give effect to the intention of the parties. It is still in the power of parties to make any arrangement they may think proper, but I apprehend that the effect of the statute is to shift the onus of proof, and to

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throw upon a subsequent incumbrancer, desirous of availing himself of a merger, the necessity of proving it.

In the present case, it appears that on the 3rd January, 1856, one *Patrick Logan* mortgaged the premises in question to *John Watt*, now deceased, whose estate is represented by the plaintiffs, his executors and devisees.

Some months subsequently he executed a second mortgage to the defendants *McQuesten* and others, and afterwards, on the 23rd October, 1860, by deed poll indorsed on the first mortgage, released his equity of redemption to the plaintiffs, the deed being in the following words :—

"To all to whom these presents shall come, *Patrick Logan*, in the annexed indenture of mortgage named, sends greeting :—Whereas the said *Patrick Logan* hath agreed with the said *John Watt*, in the annexed indenture also named, for the absolute sale of the inheritance of the lands in the said indenture mentioned, to be granted and released to him for securing the sum of £338 10s. Now these presents witness, that in pursuance of this agreement, and in consideration of the sum of $1500, now due and owing to the said *John Watt*, for purchase money and interest, on the within security, and in satisfaction thereof, and also in consideration of $1, &c., he hath granted and released unto the said *John Watt* and his heirs, *the proviso or agreement in the within indenture mentioned*, and all the estate, right, title, and interest which the said *Patrick Logan* now hath or may claim at law, or in equity, of or in the said lands or premises, to the intent that the said *John Watt* may have, hold, and enjoy the said lands and premises unto him, his heirs and assigns for ever, freed from the proviso for redemption as aforesaid. And the said *Patrick Logan* covenants with the said *John Watt* that he hath done no act to incumber the said premises."

Judgment.

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The learned Vice Chancellor, who delivered the judgment in the Court below, appears to have proceeded upon the ground that the language of this instrument expressly negatived any intention to keep the debt alive, and to have been influenced by the consideration that the plaintiffs had thereby put it out of their power to place the second incumbrancer in the position which, in the event of redemption, he was *entitled to hold*. With great deference to the opinion of that learned Judge, and consequently not without considerable hesitation, I have come to a different conclusion upon both points. I think that the language used conveys nothing more than the law would imply as between the parties to the arrangement, if no such words had been used; and the covenant entered into by *Logan* against incumbrances, certainly cannot be regarded as indicating that, as between them, the purchaser was to assume the second mortgage.

Judgment.

In *Phillips* v. *Gutteridge* (*a*) a deed was executed by a legal mortgagee of leasehold, the executor of the mortgagor, and a new mortgagee, whereby, in consideration of the payment by the new mortgagee, of the old mortgage debt, the discharge of which the old mortgagee thereby acknowledged, and in consideration of a further advance to the executor of the mortgagor by the new mortgagee the old mortgagee and the executor conveyed the mortgaged premises to the new mortgagee with a new covenant for payment of the aggregate sum, and a new proviso for redemption. It was held that the old mortgage was not extinguished, as far as regarded priority over a subsequent incumbrancer. Lord Justice *Knight Bruce*, in delivering judgment, says: "This deed is so constructed as to render it possible that the payment to the original mortgagee operated as an extinguishant of the original mortgage debts *as debts;* but the

(*a*) 4 DeG. & S. 531.

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existence of them independently as debts was not essential to the continuance of the security. The mortgagee had a right to hold the property till the debts were paid, and the debts were secured by a legal estate which could not be recovered by the mortgagor or his representative without payment of the debt. This right was transferred to the plaintiff's testatrix. The conveyancing may not have been perfect, but there can be no doubt as to the intention of all parties to preserve the priority of the charges."

If the subsequent incumbrancer were entitled upon redemption to an assignment of the covenant, and a right to the personal remedy upon it against the mortgagor, as the Vice Chancellor seems to assume, the case might be different, but I do not so understand the law. The plaintiffs might, if they had chosen, have taken a charge upon the land only, dispensing with any personal covenant; or they might at any time subsequently discharge the covenant without releasing the charge, unless the circumstance of a second mortgage being given abridges their right in this respect; and I should be much surprised to find any authority to that effect. I have been unable to find any, and the invariable form of the decree is, that upon payment, the mortgagee shall reconvey or reassign the mortgaged premises. In *Dunstan* v. *Patterson* (*a*) the decree had been drawn up with a direction, in addition, to assign the debt; and the Lord Chancellor, on appeal, intimated that he had asked in vain for any authority to show that a mortgagor has a right to require the mortgagee, to assign the debt when he is paid off. That it was a departure from the contract was beyond all doubt, and not justified by the law or practice of the Court, and that the decree in that respect was erroneous. In *Smith* v. *Green* (*b*), it seems to be admitted that the party redeeming had no strict right to an

Judgment.

(*a*) 2 Phill. 341. (*b*) 1 Coll. 555.

assignment of the debt, but merely to a conveyance of the mortgaged estate.

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None of the decisions in our own Courts militate against the judgment we are now pronouncing. The Chancellor in *Barker* v. *Eccles* (*a*) very clearly defines his view of the law in such cases: "There is no equity," he remarks, "in a subsequent incumbrancer, to have his mortgage preferred. It is no wrong to him to be left just where he was. Our statute and the more recent English decisions place the matter, in my opinion, on a just and intelligible footing. There is no reason that I can see why a prior mortgagee, purchasing the equity of redemption, should lose the priority of his mortgage, or why the position of a subsequent mortgagee should be bettered."

Mr. Justice *Gwynne*, though dissenting from the majority of the Court in that case, intimates that in a case like the one before us, where a mortgagee takes a release of the equity of redemption *in satisfaction of the mortgage debt*, he would be protected by the statute. I do not quite follow the reasoning of that learned Judge, when he speaks of the transaction in that case being a *fraud upon the subsequent incumbrancer*. I can quite understand that, as between the owner of the equity of redemption and the purchaser, the latter might be bound to discharge the mortgage, or to indemnify the former against it, and that he might be estopped by his contract with him from setting up the first mortgage; but I am at a loss to see how he can be under any obligation to the party referred to by the learned Judge as the "defrauded subsequent incumbrancer."

Judgment.

I have come, therefore, to the conclusion that there was no merger of the debt here against the subsequent incumbrancer; that the appeal should be allowed, and

(*a*) 17 Gr. at page 635.

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that there should be the usual decree for foreclosure, as prayed for in the plaintiffs' bill.

PATTERSON, J.—The facts before us are the following: *Logan*, in 1856, mortgaged certain freehold lands to *Watt*, to secure £338 10s. and interest. In 1858 *Logan* made a second mortgage of the same lands to *McQuesten* and others. In 1860 *Logan* executed a deed poll which was indorsed on the mortgage of 1856. This deed is set out in the bill of complaint, and, as printed in the appeal book, it begins by reciting that *Logan* has agreed with *Watt* "for the absolute sale of the inheritance of the lands and premises in the said indenture mentioned, to be granted and released to him for securing the sum of £338 10s.;" and then in consideration of $1500 due to *Watt* "for principal money and interest upon the within security and in satisfaction thereof," and in consideration of $1, *Logan* grants and releases to *Watt* "the proviso or agreement in the within indenture mentioned, and all the estate, right, title, and interest" which *Logan* has or may claim at law or in equity in the lands and premises, to the intent that *Watt* may have, hold, and enjoy the lands and premises "freed from the proviso for redemption as aforesaid." *Logan* covenants that he has done no act to incumber the premises, and for further assurance.

Judgment.

The plaintiffs now represent *Watt's* estate, and they ask for payment of the mortgage of 1856 or foreclosure. The defendants contend that the effect of the deed of 1860 is to extinguish the mortgage of 1856, and to give priority to that of 1858, and the decree from which the plaintiffs now appeal is in favour of that contention.

In my opinion the plaintiffs are entitled to the decree prayed for in their bill.

I understand the judgment of the learned Vice-Chan-

celler to proceed upon the ground, that as the deed poll clearly shews that, as between *Logan* and *Watt*, the mortgage debt was satisfied, therefore an intention appears to merge the mortgage and to let in the subsequent incumbrance—holding, in effect, that to prevent a merger taking place, it is necessary that the mortgage debt should continue to exist as money due by the mortgagor, and which might be recovered against him in an action upon the covenant in his mortgage.

I do not understand that even under the English decisions, and without any reference to our Statute (*a*) this doctrine could be supported. If there is such a doctrine, it must rest on the ground that the puisne mortgagee has a right, upon redeeming the prior mortgage, to have assigned to him the mortgage debt, as a debt still capable of being enforced by action.

We were not referred to any authority for this proposition and I have failed to find any. In *Coote* on Mortgages (*b*) the author says "It seems that *stricto jure* a mortgagee cannot be compelled to assign the mortgage debt on redemption either by the mortgagor or by a stranger, though he is bound to convey the estate." The authorities cited for this are *Smith* v. *Green* (*c*) and *Dunstan* v. *Patterson* (*d*). The reference in *Smith* v. *Green* is evidently to that part of the judgment of Sir *L. Shadwell*, where the Vice-Chancellor says, "It must be remembered also what species of conveyance or assignment Mr. *Smith* will, if redeemed by Mr. *Mullings* in this suit, be under the necessity of executing. If the plaintiff had objected to assign his debt, so as, keeping it alive, to authorize his name to be used afterwards in an action, the objection, of however precise and rigid a kind, would very possibly have been sustained." In *Dunstan* v. *Patterson* it was held that the mortgagor on

Judgment.

(*a*) C. S. U. C. cap. 87.
(*b*) 3 Ed. p. 347.
(*c*) 1 Coll. 555.
(*d*) 2 Ph. 341.

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redeeming was not entitled to keep the debt alive by having it assigned to a trustee.

*Ramsbottom* v. *Wallis*, reported in 5 L. J. N. S. Ch. 92, and in the appendix to *Coote* on Mortgages at p. 576, was a suit by a second mortgagee against the first mortgagee and the mortgagor for redemption of the first mortgage. It was held that by reason of a covenant in the second mortgage, the plaintiff was precluded from proceeding against the mortgagor; and that the suit for redemption could not proceed against the first mortgagee in the absence of the mortgagor. The rights of the second mortgagee are thus stated in the head note, "The only relief which a second mortgagee is entitled to is a decree for the redemption of the first mortgagee and for the foreclosure or redemption of the mortgagor. He has no right to compel the first mortgagee to transfer to him his first mortgage on payment of what is due, or to call on the mortgagor to join in such transfer."

Judgment.

In *Cooper* v. *Cartwright* (*a*) it was held that when a mortgagor contracts to sell the fee simple of the mortgaged estate free from incumbrances, the purchaser, with the concurrence of the mortgagee, is entitled, on procuring a discharge of the vendor from all liability in respect of the mortgage debt, and bearing any extra expense occasioned by his demand, to require a conveyance of the equity of redemption so as to keep the mortgage on foot. Lord *Hatherley*, then Vice-Chancellor *Wood*, said, "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."

In *Phillips* v. *Gutteridge* (*b*) the Lord Justice Sir *J. L. Knight Bruce* giving a judgment in which Sir *G. Turner* concurred, said, "This deed is so constructed as

(*a*) Johns. 686. (*b*) 4 DeG. & J. 531.

to render it possible that the payment to the original mortgagees operated as an extinguishment of the original mortgage debts, *as debts*. But tho existence of them independently as debts was not essential to the continuance of the security. The mortgagees had a right to hold the property till the debts were paid, and the debts were secured by a legal estate which could not be recovered by the mortgagor or his representative without payment of the debts. This right was transferred to the plaintiff's testatrix. The conveyancing may not have been perfect, but there can be no doubt of the intention of all parties to preserve the priority of the charges of £300 and £400." Referring to this case Mr. *Dart*, in his book on Vendors and Purchasers, says, at p. 840, "The Court considered it clear that there was an intention to preserve the priority of the first charge, but the decision was mainly rested on the ground that the maintenance of the original debt, as a debt, was not essential to the continuance of the security."

Judgment.

But, whatever may be the English doctrine, I consider that our own statute leaves no room to question the position that the mortgage debt may be absolutely satisfied, as between mortgagor and mortgagee, without merging the charge so as to let in a subsequent incumbrance. By the first section, any mortgagee of freehold or leasehold property may take and receive from the mortgagor a release of the equity of redemption in such property, or may purchase the same under any power of sale in his mortgage, or any judgment or decree, without thereby *merging the mortgage debt as against any subsequent mortgagee*. Now if a mortgagee purchase, under a power of sale in his mortgage, the equity of redemption, for a sum equal to the mortgage debt, the debt is paid. If he purchases it under a *fi. fa.* in which he is plaintiff, he is obliged, by sec. 259 of the Common Law Procedure Act, to give a release of the mortgage debt. In either case the debt is extinguished as against the mortgagor;

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but, by the Statute, it is not merged as against the subsequent mortgagee. The second section of the Statute, chapter 87, makes it, if possible, still more plain, by providing that if a prior mortgagee takes a release of the equity of redemption or purchases it, as allowed by the first section, no subsequent mortgagee shall be allowed to foreclose without redeeming, or selling subject to the rights of the prior mortgagee, in the same manner as if the prior mortgagee had not acquired the equity of redemption.

I believe the view which I express is that which has been taken in all the reported cases in our own Courts in which the construction of this Statute has been in question.

Judgment.

In *Buckley* v. *Wilson* (*a*) the plaintiff, a judgment creditor of one mortgagee, claimed that he had acquired priority over a mortgage from *Montague* to one *Foley*. The defendant *Wilson*, who held under a conveyance from *Foley*, stated in his answer that it was agreed between *Montague* and *Foley* that *Foley* should purchase the lands, and give, besides and in addition to the mortgage, the further sum of £100; that instead of treating the mortgage as part of the conveyance *Foley* took an ordinary conveyance from *Montague* and released the mortgage, thereby apparently making the plaintiff's judgment the first incumbrance on the lands, whereas in fact it was an incumbrance subsequent to the mortgage. The transaction so stated was clearly an extinguishment at law as well as in equity of the mortgage debt by satisfaction, and apart from the operation of the release.

The case was heard on motion for decree before the present Chancellor, then Vice-Chancellor. After stating the contention of the defendant *Wilson* that in substance the transaction was a purchase of *Montague's*

(*a*) 8 Grant 566.

equity of redemption, and the conveyance to *Foley* a release of it, and the release by *Foley* of the mortgage a mere mistake in the conveyance by which their dealings were carried out; he proceeds to say, "This is assuming that *Foley* intended to keep his mortgage on foot as against subsequent incumbrancers, and I apprehend that in the absence of any act manifesting an intention that the mortgage should not be kept on foot, the mortgagee acquiring the equity of redemption would be entitled, under the statute, to priority in respect of his mortgage over puisne incumbrancers." The decision was against *Wilson's* contention, on the ground that the release was strong evidence of intention not to keep the charge on foot, which intention was not negatived by any evidence, or even allegation in pleading, and because by releasing the mortgage, the mortgagee had put it out of his power to assign it to the plaintiff, who would therefore be deprived of the rights against the mortgagor, to which, on redeeming, he would be entitled. What rights the learned Vice-Chancellor had in his mind he does not explain in his judgment. They would, of course, include the benefit of the covenants for title, which the mortgagee would not be permitted to deal with, to the prejudice of the person entitled to redeem (*a*), but they could not in this case have included any right to the debt as an existing liability, because it had been satisfied by the conveyance of the land, which would have afforded a complete answer to any action on the covenant for payment.

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Judgment.

In *Elliott* v. *Jayne* (*b*), in which case the same learned Judge decided that a purchaser of the equity of redemption, who after his purchase obtained an assignment to himself of the first mortgage, did not thereby merge that mortgage as against the second mortgagee, the point I am now discussing did not arise, as no payment of the first mortgage had been made.

(*a*) Thornton *v.* Court, 3 DeG. M. & G. 293. (*b*) 11 Gr. 412.

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In *Finlayson* v. *Mills* (*a*), Vice-Chancellor *Spragge* and the Chancellor held that the case did not come within the statute. Vice-Chancellor *Mowat* seems to have thought that the statute did apply, and comments on the statute to shew that it did not prevent the application to that case of the rule upon which it was decided, viz., that a merger will take place when the parties intend that it shall take place. In deciding that the intention in that case was to merge, some stress was laid by Vice-Chancellor *Mowat* and also by the Chancellor on the circumstance that the debt which formed the first charge was satisfied, as one of the facts which afforded evidence of the intention, but I do not gather from the judgments any suggestion that the continuance of the debt, as a personal liability, was regarded as essential to the maintenance of the charge.

Judgment.

*Barker* v. *Eccles* is reported in 17 Grant at p. 631, when it was before Chancellor *Spragge* on appeal from the Master's Report, and again in the Court of Appeal, in 18 Grant pp. 440 and 523. In that case there was no question of satisfaction of the mortgage debt, and therefore no decision as to how far such a question would affect the application of the statute. Chancellor *Spragge* held that there was no merger under the facts in the case, and the majority of the Court of Appeal agreed with that view. *Mowat*, Vice-Chancellor, doubted, and *Gwynne*, J., dissented, the latter holding that the statute did not apply when, as in that case, the equity of redemption had been acquired before the assignment of the mortgage. Referring to the statute, *Spragge*, Chancellor, says (*b*), "There is no equity in a subsequent incumbrancer to have his mortgage preferred. It is no wrong to him to be left just where he was. Our statute and the more recent English decisions place the matter in my opinion upon a just and intelligible footing. There is no reason that I can see why a

(*a*) 11 Grant 218. (*b*) 17 Gr. 635.

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prior mortgagee, purchasing the equity of redemption, should lose priority of his mortgage, or why the position of a subsequent mortgagee should be bettered." This is in my opinion a correct statement of the position of the subsequent mortgagee. If the dealing, between the mortgagor and the first mortgagee, has the effect of merging the mortgage debt and giving priority to the second mortgage, the second mortgagee gains an advantage which, as far as he is concerned, is accidental. If he does not gain priority but is left in his original position, I do not understand any ground on which he can be said to be defrauded, as Mr. Justice *Gwynne*, from his judgment, seems to have thought would be the case. Apart from this view, in which I do not agree with that learned Judge, I think he correctly expresses the effect of the statute in the passage in vol. xviii., p. 526, commencing with these words "Its object, as it seems to me, is to protect a mortgagee who *takes a mere release* of the equity of redemption *in satisfaction* of the mortgage debt, or who *purchases* at a sale under a power in his mortgage; or at a sale under an execution issued upon a judgment or decree."

Judgment.

If then the law is, as I apprehend it is, that satisfaction or extinguishment of the mortgage debt, as a personal liability, may take place without destroying the charge upon the land, what is there in the present case to cause us to hold that the charge is merged?

Whatever may have been supposed to be the law after the decision of *Toulmin v. Steere* (*a*) in 1817, there seems to be no doubt that, under the decisions of the last twenty or thirty years, it is settled that in England a mortgagee, when taking a release of the equity of redemption, may preserve the charge by taking the proper means to do so. *Primâ facie* the presumption there is, as it always was, that the charge merges in the inheritance, but this pre-

(*a*) 3 Mer. 210.

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sumption may be rebutted, or the effect avoided, if such is the intention of the parties to the transaction.

This doctrine of merger is stated in *Forbes* v. *Moffatt* (*a*) and in other cases, to be a doctrine of the Courts of Equity, in which they are not guided by the rules of Courts of Law.

Judgment.

Our statute places the law with us on a different ground. In place of a presumption of merger, to be rebutted by evidence of an intention to preserve the charge, the provision of the statute is, that a mortgagee may acquire the equity of redemption in any of the modes mentioned in the statute without merging the mortgage debt as against a subsequent incumbrancer. These modes are all cases of contract. The recital in the original act 14 & 15 Vic. ch. 45 shews that the Act was passed to afford relief to mortgagees, in cases in which they were not sufficiently protected by law. When the interests were united in the same person by devise or descent, the law already afforded sufficient protection, by the application of the rule as to intention which is stated in many cases from *Forbes* v. *Moffatt*, in 1811, down to *Tyrwhitt* v. *Tyrwhitt* (*b*), in 1863. Of the three tests given by Sir *John Romilly* in the last named case, from which the intention to preserve the charge may be found or presumed, viz., 1st, the expression of such intention; 2nd, acts consistent only with such intention, and 3rd, the interest of the owner requiring the preservation of the charge, the third and perhaps also the second appear only to have been applied in cases of devise or descent, and in contests between the real and personal representatives of the owner. I believe that is the case, but I make the statement with diffidence, because I observe that in *Elliott* v. *Jayne* (*c*), which was a case of contract, the present learned Chancellor states the rule without making any such distinction. The distinction,

(*a*) 18 Ves. 384. (*b*) 32 Beav. 144. (*c*) 11 Gr. 416.

however, is very clearly stated by *Mowat*, Vice-Chancellor in his judgment, in *Finlayson* v. *Mills*, reported in the same volume.

I do not understand the statute as, in any way, altering the law with regard to cases of devise or descent. In those cases the charge will merge in the inheritance or not, on the same principle which always prevailed. But when the mortgagee acquires the equity of redemption by contract, whether it be conveyed to him in satisfaction of the mortgage debt or for any other consideration, or whether it be purchased under the judgment of the mortgagee or of a stranger, or in whatever way within the terms of the statute it may be acquired, the transaction has no longer the effect of merging the mortgage debt, as against the subsequent incumbrancer; or giving priority to a subsequent incumbrance. The debt will remain a charge upon the land. The puisne mortgagee may redeem, as he might always have done, and his position will then be as expressed by Sir *William Grant*, in *Jones* v. *Gibbons* (*a*), "The estate being absolute at law the debtor has no means of redeeming it but by paying the money. Therefore he who has the estate has in effect the debt, as the estate can never be taken from him except by payment of the debt." Judgment.

If it should happen that the land is worth more than the amount of the first incumbrance, the subsequent incumbrancer gets the benefit of that by redeeming. If it is worth more than both incumbrances, he may expect to be redeemed in his turn. His position is not affected by the dealings with the equity of redemption.

The mortgagor may, however, desire to protect himself against his personal liability, by providing for the purchaser of the equity of redemption paying the debt or indemnifying him from it. There is nothing to prevent

(*a*) 9 Ves. 411.

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his contracting with the purchaser that the latter shall pay off the subsequent charge, or indemnify him in respect of it, or that it shall have priority and stand as a first charge on the land. If there is such an agreement, it may appear by express stipulation in the deed by which the equity of redemption is released, or in any way by which, under the rules of evidence, a contract may be proved; and I apprehend that the question of intention is now only material, in cases coming within the statute, when the intention, however proved, amounts to an agreement by the purchaser of the equity of redemption to assume or give priority to the puisne incumbrance.

In the case before us, the deed purports to convey or release to *Watt* the equity of redemption in the land, in consideration of the $1500 due on the mortgage to him, and the further nominal consideration of $1. In other words, *Logan* and *Watt* agree that *Watt* shall have the land for $1500. The contention of the defendants now is that *Watt* was not to have the land unless he also paid off the second mortgage, amounting to, say, $900, making the price of the land $2400. It was undoubtedly competent for *Logan* and *Watt* to have made such an agreement, but I cannot see that they have done so, and they are the only parties to the contract. The defendants are no parties to it. It does not bind them. They can still make *Watt* or his representatives pay the $2400 as the price for keeping the land, if it is worth so much; and, on the other hand, they cannot by right claim that their position shall be bettered by the contract. If it benefits them, it is by what must be, as to them, its accidental effect.

Judgment.

There is no evidence on the subject of the contract or intention in the case beyond what the deed contains, and there is nothing in the deed to refer to, in support of the alleged contract or intention, except the statement that

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the conveyance is in satisfaction of the mortgage debt. I have already attempted to shew that the debt may be satisfied without the charge being merged in the inheritance. The *statement* that the debt is satisfied can have no greater effect than the fact stated would have had. The presumption under the statute being that there is no merger, the defendants have to establish, as a matter of fact, that *Logan* and *Watt* agreed that *Watt*, besides releasing *Logan* from the $1500 debt, was also to give priority to the second mortgage. I see no evidence of any such agreement, or of any understanding to that effect. On the contrary, if it had still been necessary for the plaintiffs to shew an intention to keep the charge on foot, the recital that *Logan* had agreed with *Watt* for the absolute sale of the inheritance in the lands, to be granted and released to him, for securing the sum of £338 10s., though not a very perspicuous statement, would be quite capable of being read as an expression of intention that the charge should remain, notwithstanding the release of the equity of redemption. Judgment.

*Per Curiam.*—Appeal allowed with costs [STRONG, J., dissenting].

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That the said petition and appeal be allowed.

Order.

Declare that the instrument in the pleadings set forth, bearing date the twenty-third day of October, one thousand eight hundred and sixty, executed by *Patrick Logan* to *John Watt*, was not intended to have and had not the effect of merging the mortgage security of the appellants in the pleadings mentioned, and that the said mortgage security of the appellants is a subsisting charge upon the lands therein comprised, and that the same is entitled to priority over the mortgage security held by the respondents, *Calvin McQuesten*, *John Fisher*, and *Julia Ann Dickerman*, in the said pleadings also mentioned, for the amount of principal and interest due thereon; and that

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Hart v. McQuesten. Order.

the appellants are entitled to a decree of foreclosure in default of payment of the same and to be paid the costs of the said suit in the said Court of Chancery. And with the foregoing declaration this cause is remitted to the said Court of Chancery to make such order and decree herein as shall be necessary and proper to carry out the same.

That the respondents pay to the appellants the costs incurred in the said appeal.

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## WILSON v. DALTON.

*Will, construction of—Annuities—Legacies—Interest—Abatement—Liability of estate in respect of charges on land settled on volunteers.*

Where the income of an estate, which was made applicable to the payment of annuities, had, for some years, been insufficient to satisfy them, the Court *held* that the annuities did not bear interest, and that they were not payable out of the corpus of the estate.

Lands were conveyed to the son of the testatrix, and he, as to part thereof, stated in writing that he held it in trust for his mother for her life, and after her death, for her daughters, *H. and M.*, in fee. The son created a mortgage upon the whole property, and by the writing acknowledging the trusts—to which the testatrix was a party—it was agreed that £600, part of the mortgage money, should be charged on that part of the mortgage premises settled on the daughters. *Held*, that this sum was payable as a debt out of the estate.

By a codicil to her will the testatrix stated that "It is my intention to build upon the two acres * * and in case of my death before the completion of the house, I desire that it may be completed and furnished according to my present plans and intentions, which are known to my family. * * My son *William* I wish to have five hundred pounds, to be paid to him by my executors. What is here is to stand prior to everything in my said will." By the same codicil the testatrix gave annuities to two daughters:

*Held*, that the payment of the amount needed for the furnishing of the house, the annuities to the daughters, and the legacy of five hundred pounds to the son, were first charges on the estate, after payment of debts; and that the parties entitled to these several charges would, in the event of the estate ultimately proving deficient, be bound to abate ratably.

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Wilson v. Dalton.

April 29, and June 9.

The bill in this case was filed by the Hon. *Adam Wilson* and *Robert G. Dalton*, executors of the late *Sophia Dalton*, who died on the 14th June, 1869, for the purpose of obtaining a construction of the will and codicil of the testatrix.

The defendants were the *cestuis que trustent* under those instruments.

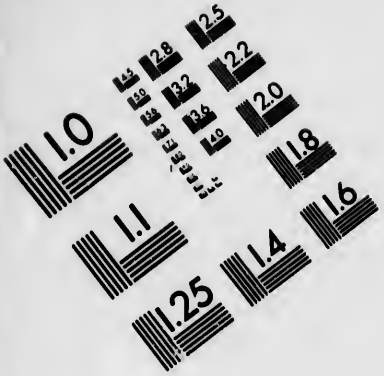
By this will various sums were bequeathed as legacies to the defendants.

The testatrix, in April, 1866, made a codicil to her will as follows:—

"CODICIL.—As to my will, I wish the same to be altered as far as the following alters it:

"It is my intention to build upon the two acres held in trust by *Robert*, for myself for life, and for my daughters *Harriet* and *Mary* in fee after my death, and in case of my death before the completion of the house, I desire that it may be completed and furnished according to my present plans and intentions, which are known to my family. And I wish that after my death, my executors shall invest enough of my property for *Harriet* and *Mary* to make an income of one hundred pounds a year to each of them during their lives. Should either of them die without issue before the other, the survivor is then to have the whole income of two hundred pounds a year. In the case of the death of either of them leaving issue, they are to have the power of leaving by will, whether their husbands be alive or not; upon their death without issue or without a will, if they have issue, the property, out of which the income is derived, shall go to their brothers and sisters or their issue. This is meant instead of all that is in my said daughters' favor in my will, and is a revocation thereof. My son *William* I wish to have five hundred pounds to be paid to him by

Statement.





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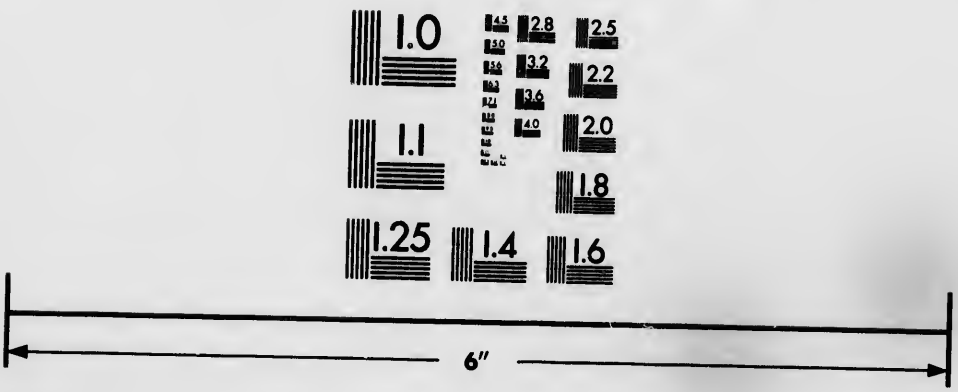


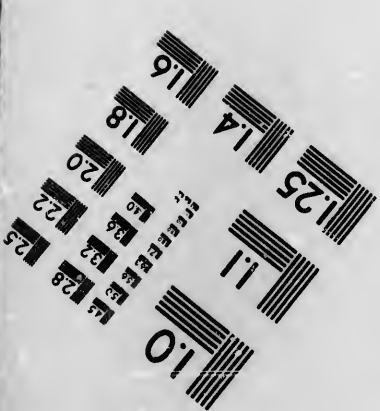


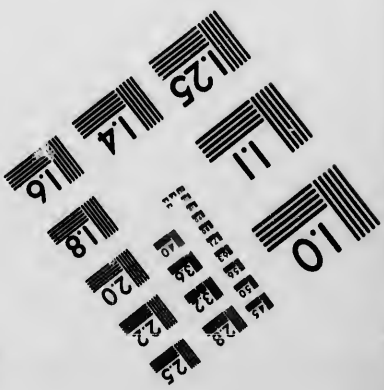


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my executors. What is here is to stand prior to everything in my said will.

SOPHIA DALTON.

"Toronto, April, 1866."

The testatrix and her son *Robert G. Dalton* had purchased lands jointly, two acres of which were those referred to in the codicil. A sum of £1,100, part of the purchase money of the lands—four acres in all—was secured by mortgage made, however, by *Dalton* alone, as the lands were, by arrangement between the testatrix, himself, and the vendors, vested in him. The intention of the parties as to the payment of the purchase money, amounting, at the decease of Mrs. *Dalton* to £600, was evidenced by a memorandum as follows:—

Statement.

"The four acres bought from the *Wells'* estate are held by *Robert G. Dalton* in fee as follows:—As to the southerly two acres thereof, fronting on the concession line, in trust for Mrs. *Dalton* for her life, and for her daughters *Harriet* and *Mary* in fee simple, after her death, and the other two acres are for *Robert G. Dalton* himself. Of the price, £1,300, *Robert* is to pay £600, and Mrs. *Dalton* is to pay £700, and in that proportion as to all interest, expenses, &c."

(Signed) "SOPHIA DALTON, [L.S.]
"ROBERT G. DALTON [L.S.]

"Witness: ANDREW WILSON.
"Dated April, 1856."

At the decease of Mrs. *Dalton* the balance due by her amounted to £600, which sum the plaintiff *Dalton*, as executor, had paid, and claimed to have it allowed out of the estate. Those interested in the estate, other than the daughters *Harriet* and *Mary*, objected to this on the ground that the daughters, being volunteers, took the two acres subject to this as a charge.

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Wilson v. Dalton.

The bill set out that when the will and codicil were made, the estate was considered ample to meet all demands, and satisfy the legacies and annuities bequeathed by the testatrix; but most of the estate, being vacant lands in Toronto, had, owing to the decline in the demand for such lands, soon become almost unsalable and so continued till 1873, so that the daughters *Harriet* and *Mary* had together received but $2,600 on account of their annuities, and the legatee, *William Dalton*, named in the codicil, only half of the sum bequeathed to him. From May, 1873, the lands had become salable, and a considerable sum had been realized therefrom by the estate. The annuitants claimed to be entitled to interest on their annuities, and that the arrears with such interest should be paid to them out of the corpus of the estate.

Statement.

It was also stated that the testatrix, in her lifetime, completed the building of the house for her daughters named in the codicil, but that it had not been furnished for them; and they claimed that this should be done, and the expenditure therefor made good out of the corpus of the estate.

The cause was heard on motion for decree. Evidence was adduced proving the documents referred to, and the facts stated as to the purchase of the lands, the mortgage made by the plaintiff *Dalton*, and the amount required to furnish the house; as to which a sum was agreed on by the parties interested.

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

Mr. *Bethune* and Mr. *Hoyles*, for the defendants, *Harriet* and *Mary Dalton*.

Mr. *Cassels*, for other defendants.

The cases cited are all mentioned in the judgment.

1875.

Wilson v. Dalton.

BLAKE, V. C.—I have perused the various authorities cited to me in this case, and am thereby more convinced than ever of the truth of the statement of Lord *Chelmsford* in *Baker* v. *Baker* (*a*), "That in cases of the construction of wills very little aid is to be derived from authorities. Each case must depend, in a great degree, upon its own circumstances and language."

June 16th.

No doubt a general principle may be deduced from the decisions, which may be thus expressed. If by the will an annual payment is to be made out of the estate of the testator, there that payment must be made, even although in making it the whole of the corpus of the estate be exhausted; but this, which is the *prima facie* or general result of such a charge, may be modified or limited by the language of the will shewing that the bequest is confined to the income of the estate, or to some specific fund designated by the testator. The difficulty here is to ascertain whether the testatrix has so far controlled the bequests of £100 a year in favour of her daughters, as that clearly they are to be payable out of the income of the estate, or whether they are entitled to come upon the corpus of the estate for the satisfaction of their legacies. With much hesitation I have arrived at the conclusion: (1st.) That the payment of the amount needed for the furnishing of the house, the charge of £200 a year in favour of the daughters *Harriet* and *Mary*, and the £500 to be paid to the son *William* are the first charges, after payment of debts, on the estate. (2nd.) That the sums payable to the daughters are not to be realized out of the corpus of the estate, but that they are entitled to receive the income of the estate until their legacies of £100 a year each are paid in full. (3rd.) That the three charges on the property to which I have referred, must abate ratably in case of an ultimate deficiency. I do not know whether the daughters would object, in the meantime, to

Judgment.

(*a*) 6 H. L. 624.

their brother, receiving the balance due of the £500, but if they do, the proportion to which he is now, and may from time to time, be entitled, can be settled in the decree, or by the Master. 1875. Wilson v. Dalton.

The reasons from which I conclude that this testamentary disposition comes within the class of cases represented by *Baker* v. *Baker*, rather than that of which *Wright* v. *Callender* is the leading one, are that here (a) a portion of the property of the testatrix is to be set apart; (b) this property is to be invested; (c) the object of the investment is to make an income; (d) this property out of which the income is derived is, on certain contingencies, by the will bequeathed to others, and is, in its integrity, to go to them, and not after payment of the annuity, but after death; (e) this construction of the codicil makes it accord with the seeming intention of the testatrix in her will, which it partially revokes. (f) Giving this meaning to the codicil will probably effectuate entirely the intention of the testatrix by giving the daughters the £100 a year, and leaving for the other beneficiaries a property sufficient to pay them almost, if not altogether, their bequests. Judgment.

The reason that I think these two daughters must be paid in full, before those persons not mentioned in the codicil receive any portion of the estate is, that the testatrix, in the codicil, shews, as in her will, an intention to give them a priority; and the words, "What is here is to stand prior to everything in my said will," would not receive their due effect were any of the bequests in the will satisfied until the £200 a year is fully paid out of the income. See *Booth* v. *Coulton* (*a*).

I do not see how it is possible for me, in the face of *Booth* v. *Coulton* (*b*), and *Torre* v. *Brown* (*c*), to allow interest on the bequests to the daughters.

(*a*) L. R. 5 Ch. 686. (*b*) 2 Giff. 514. (*c*) 5 House of Lords 555.

1875.

Wilson v. Dalton.

There is no doubt from the paper of April, 1866, that Mr. *Dalton* held the two acres in question "in trust for Mrs. *Dalton* for her life, and for her daughters *Harriet* and *Mary* in fee simple after her death." It is equally clear that Mrs. *Dalton* was to pay the purchase money of the land. At this time the conveyance had issued from the vendors to Mr. *Dalton* of this lot and the adjoining two acres; which last mentioned property Mr. *Dalton* was to retain as his own, paying his share of the purchase money which was settled by the memorandum of 1856. A mortgage also had been given by him in 1855 to secure the unpaid purchase money on the whole four acres, a portion of which had been paid in the lifetime of Mrs. *Dalton*, and the balance after her death. Mr. *Dalton* was appointed executor of the will of Mrs. *Dalton*, and he paid himself out of the proceeds of her personal estate the amount which, as trustee, he was owed by her under the agreement of April, 1856. The will of Mrs. *Dalton* does not exhibit any intention of charging the devisees of this land with any sum of money in respect thereof.

Judgment.

Mrs. *Dalton* was liable to Mr. *Dalton* for the payment of this purchase money, and could have been compelled by him to make it good, and I think where, under these circumstances, a payment is made, that it should enure to the benefit of those who claim the premises, even although they be volunteers. The mortgage here was not a direct liability of Mrs. *Dalton*, she had created no charge on the premises. The son alone had covenanted for the payment of the purchase money, and he had accepted an undertaking of the mother that she would make good her share of it. The son thereafter procures funds of the mother which he applies in liquidation of this claim, any indirect liability under which the premises may theretofore have been then ceased to exist, and I think the daughters are entitled to hold the land free from a claim, which I doubt ever

affected it in the manner argued for by the counsel for those interested adversely to these daughters. 1875.

Wilson v. Dalton.

Lord *St. Leonards* (*a*) says: "If a father purchase in the name of a child, although a female or illegitimate, who is without a provision, or in the joint names of such a child and of another person, it will not be deemed a resulting trust for the father, but a gift or advancement for the child; and if the father die without having paid all the purchase money, his personal estate must pay it for the benefit of his child." He cited with approval the case of *Redington* v. *Redington* (*b*), at page 201, of which report there is the following statement: "One objection had nearly escaped my memory, and that is, that by this decree the executor of old *Thomas Redington* is directed to make good, out of his personal estate, any balance which may appear upon the account to remain unpaid of the original purchase of *Ryhill*. The ground upon which I made that a part of the decree simply was, that by the agreement of old *Thomas* to make this purchase for his son *Michael*, this balance unpaid is in equity as much a debt of his as any other debt of the same nature, and I conceive his personal estate must be subject to it, more particularly as he has devised it to the appellant *Thomas* the younger, expressly subject to his debts." Judgment.

In *Drew* v. *Martin* (*c*), on an administration of the estate of *Thomas Martin*, deceased, it was contended that the widow took certain premises subject to the payment of the instalments of purchase money unpaid at the time of the death of her husband, the purchase having been made in the joint names of husband and wife. It was argued on behalf of the heir at law that the distinction between that case and those cited was that there the purchase money had not been fully paid;

(*a*) Sugden's V. & P. 14th ed., p. 703 (*b*) 3 Ridg. P. C. 106.
(*c*) 2 H. & M. 130.

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and further, that if there were any intention to benefit the wife, she was a volunteer, and could not have the agreement specifically performed. Sir. *W. Page Wood* says: "Some part of the purchase money remains unpaid, and the matter thus resting in contract, the question is, what ought to be done? * * But here the contract is not completed, which raises questions with reference to the payment of the purchase money. * * The other point raised in the argument, as to how far the wife, as a volunteer, would be entitled to have the contract completed and the money paid out of the husband's personal estate, did not appear to me to involve any difficulty. Although the wife, being a mere volunteer, could not compel specific performance, still the vendors could enforce payment from the husband's estate, and when they had done so, the conveyance would have to be made to the wife surviving. The case has some analogy to *Gregory* v. *Williams* (*a*), *Davenport* v. *Bishop* (*b*), and that class of authorities, wherein the benefit of a covenant when enforced by others has been held to enure for a volunteer." The Vice-Chancellor refers to *Redington* v. *Redington*, and approving of it, says: "It is clear that the decree does not rest merely on the paternal relation, but on the principle that, as the vendor could insist on payment, it was not a case of enforcing a contract for a volunteer, but merely a question who was to have the estate. * * The principle of that decision seems to me quite sound. It is not the volunteer enforcing the contract, but the vendor entitled to enforce, and the volunteer thus taking the benefit of the estate."

Judgment

See also *Skidmore* v. *Bradford* (*c*), *Nicholson* v. *Mulligan* (*d*), and the cases collected in *Lewin* on Trustees (*e*), p. 158, and *Watson's* Compendium of Equity, vol. 2, p. 872. If the case rested merely on the presumption

(*a*) 3 Mer. 582.
(*b*) 2 Y. & C. C. 541, and in Ap. 1 Ph. 193.
(*c*) L. R. 8 Eq. 134.
(*d*) L. R. 3 Eq. 308.
(*e*) Ed. 1875.

1875.

Wilson v. Dalton.

of advancement, under the authority of *Sayre* v. *Hughes* (*a*), these daughters would seem entitled to the premises absolutely.

It is said, however, that *Jenkinson* v. *Harcourt* (*b*), a decision of Lord *Hatherley*, earlier than *Drew* v. *Martin*, plainly shews that these premises cannot be held by these ladies absolved from this debt. I do not think that is so. In *Jenkinson* v. *Harcourt* the Earl of *Liverpool* made a voluntary settlement to such uses as he should appoint, and subject thereto to himself for life with remainders over. Thereupon, any volunteer under the Earl would take the premises subject to whatever uses he had appointed. The persons, the objects of the Earl's bounty, would take, as if the uses, defined after the execution of the settlement, had been clauses, conditions, or charges subject to the provisions or payment of which the premises had come to them. So when the Earl thereafter exercised his power of appointment, by mortgaging the lands, the subject of the settlement, for £15,000, this mortgage became as it were a part of the settlement—the mortgage is, as it were, substituted for the power reserved—the right in the settlor has been defined by this charge, and the settled estates go to the taker thereof, charged in his hands with the payment of that, subject to which, according to the power reserved, they are expressly transmitted. To my mind, therefore, the parties in this case stood in the same position as if a testator devised the premises, (before the recent Wills Act), stating in so many words that the devise was subject to an incumbrance existing thereon. In either case the party taking the premises would be charged with the payment of the incumbrance, subject to which he had accepted the estate.

Judgment.

It is true in the case which I am discussing there are to be found some general observations in favour of the

(*a*) L. R. 5 Eq. 376.

(*b*) Kay 688.

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liability of a volunteer for payment of a charge on premises granted to him, but the following passage furnishes the ground on which the then Vice-Chancellor disposed of the case, (p. 700:) "The appointor had made himself first tenant for life by the settlement, subject to the power, with remainder to other persons. Therefore, if his personal estate had paid off the charge, he would have been in the position of a tenant for life paying off a mortgage. Judging, accordingly, by the true rule of the interest of the party himself in the matter, I find that the appointor had limited over the estate to himself subject to his power, and that he did not by the appointment declare any intention of liberating the estate from the charge, and that he had left himself the first tenant for life of the estate; and that, therefore, by the exercise of this power he was charging an estate of which it is true that he might have made himself the owner in fee, but did not; and in this state of circumstances the inference, I think, must be, that he intended that property, which was not absolutely his own, to pay this debt in preference to his own property. This is the conclusion at which the Courts arrive in considering the case of a person having a limited interest in an estate, and paying off a charge." The principle on which this case is decided does not attack that on which *Drew* v. *Martin* was disposed of, and I am bound to decide that the two acres are held by the two daughters discharged from the debt in question, which must be borne out of the personalty. I understand it is admitted that $1,200 is the sum to be allowed for the furnishing the house, and that there is no other matter in question under the will.

Judgment.

If desired let the estate be administered in the usual manner.

As the question up to the hearing has been one of the construction of the will, the costs will be allowed out of the estate to all parties.

1875.

## LAIDLAW v. JACKES.

*Will, construction of—Option to pay for shares of devisees, time for exercise of.*

A testator, in 1840, devised all the income of his estate to his widow until his eldest son attained twenty-one, for the support of herself; and the maintenance, education, and support of all his children during their minority; and as each attained twenty-one he or she was to be allowed a proportion of the annual income, after making ample provision for the support of his wife during her widowhood; and after the youngest child attained twenty-one, and the death or marriage of the widow, he gave all his estate, real and personal, amongst all his children in equal proportions; and should any child die without issue and under age, such child's share to be divided amongst the others. The testator further directed that, should a majority of his sons think proper to pay to each of his daughters the sum of five hundred pounds currency in lieu of their share of the estate, the payment thereof should be taken by them in full of their respective shares of the property devised to them. After the death of the testator, one of his daughters died intestate, and without issue, after having attained the age of twenty-one. Subsequently to the making of this will the testator acquired real estate of considerable extent and value.

*Held*, that, in the absence of any act whereby the right was lost, the time for the majority of the sons to exercise the option of paying the daughters the five hundred pounds each, was the period of distribution of the *corpus* or principal; and that in the meantime the daughters were entitled to their shares of the actual income of the estate, and that this option on the part of the sons applied to the share of the deceased daughter as well as to the shares of the other daughters. *Held*, also, that the after-acquired realty was not affected by the provisions of the will, and that the same was to be partitioned amongst the several parties interested therein.

The bill in this cause was filed by *Catherine Agnes* 12th Nov.
*Laidlaw* against *William Jackes* and *Catherine Jackes*, executor and executrix of *Franklin Jackes*, and the several parties interested in the estate of the testator, and the husband of the plaintiff, who was joined as a nominal party.

The will of the testator was in the following terms:—

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"This is the last will and testament of me *Franklin Jackes*, of the Township of York, in the Home District, gentleman. First, I desire my executors hereinafter named to pay all my just debts and funeral and testamentary expenses as soon as possible after my death. And as to all the real and personal estate wherewith a kind and merciful Providence hath blessed me, I dispose thereof in the following manner, that is to say: I give and bequeath unto my dear wife *Catherine* all my household furniture, linen, and wearing apparel, to and for her own absolute use, benefit, and disposal. I give and bequeath unto my said dear wife the annual income arising from my real and personal estate during her widowhood, and until my eldest surviving son shall attain the age of twenty-one years, for the support of herself and the maintenance, education, and support of all my children during their minority. And as each one of my said children attains the full age of twenty-

Statement.

one years, it is my will and pleasure, and I hereby order and direct my executors hereinafter named to pay to him, her, or them their proportion of the annual income and profits arising out of my real and personal estate, after making ample provision for the support of my said wife during her widowhood And from and immediately after my said youngest surviving child shall attain the said age of twenty-one years, and after the death or marriage of my said wife, then I give and bequeath the whole of my said real and personal estate unto, between, and amongst all my said children in equal proportion, as tenants in common, and not as joint tenants, and to their heirs and assigns for ever. Should any of my said children depart this life without leaving any lawful issue and under age, then I direct that the share or shares of such child or children so dying to be equally divided amongst my surviving children, but in case any of my said children shall depart this life before my youngest surviving child attains the said age of twenty-one years leaving lawful issue, such issue to take the share or

1875.

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shares of the parent or parents so dying equally amongst them if more than one, and if but one then to such one, and to his or their heirs and assigns for ever. Should a majority of my sons think proper to pay each of my daughters the sum of five hundred pounds currency in lieu of their share or proportion of my estate so devised to them, it is my will and pleasure, and I hereby order and direct that the payment of the before mentioned sum of five hundred pounds to each of my said daughters shall be by them taken in full for their respective shares of the property hereby devised to them. And I give, devise, and bequeath all their share, right and estate of and in my said real and personal estates unto my said sons equally, share and share alike, as tenants in common, and lastly I do hereby nominate, constitute, and appoint, my said dear wife *Catherine*, and my eldest son executrix and executor of this my last will and testament.

"In witness whereof I have hereunto set my hand and seal this seventeenth day of November in the year of our Lord one thousand eight hundred and forty. Statement.

"FRANKLIN JACKES." (L.S.)

"Signed, sealed, published, and declared by the testator, *Franklin Jackes*, as and for his last will and testament, in the presence of us, who in his presence, and at his request, have hereunto set their names as witnesses.

"J. H. PRICE.
"THOMAS EWART.
"AMBROSE GORHAM."

The bill alleged that after the making of the will the testator had purchased and acquired title in large and valuable quantities of lands, and claimed that the same were not within the provisions of or controlled by the said will, and were in the same condition as if such last will had not been made, and claimed a partition thereof. One of the children of the testator, *Margaret Amelia Jackes*, had died after him unmarried, and without issue.

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The bill prayed that the true meaning and intent of the said last will might be declared, and the rights of the various parties determined by decree of this Court; that the estate might be administered, the lands not devised partitioned, and for further relief.

Mr. *Ferguson* and Mr. *Bain*, for plaintiff and her husband.

Mr. *Attorney-General Blake* and Mr. *George Murray*, for the personal representatives.

Mr. *Attorney-General Mowat*, Mr. *J. C. Hamilton* and Mr. *Moss*, for other defendants.

13th Nov.

Judgment.

BLAKE, V. C.—Under this will the testator gives to his wife, during widowhood and until the eldest surviving son attains twenty-one, the annual income arising from his real and personal estate for the support of herself, and the maintenance, education, and support of his children during their minority. As each child attained the age of twenty-one, their proportion of the annual income thus derived was to be paid to him or her after making ample provision for the support of his wife during her widowhood; and after the death or marriage of the widow and the attaining the age of twenty-one by the youngest surviving child, then the whole of the real and personal estate was given amongst the children in equal proportions, and should any of the children die without leaving lawful issue and under age, then "the share or shares of such child or children so dying was to be equally divided" amongst the surviving children; but, in case any of the children died before the youngest surviving child attained twenty-one, leaving lawful issue, such issue is to take "the share or shares" of the parent or parents so dying equally amongst them.

The testator has thus given his children, on the happening of certain events, a proportion of the annual

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income of the estate, and on the happening of certain other events a share or proportion of the estates themselves.. After the latter disposition, there is added this clause: "Should a majority of my sons think proper to pay to each of my daughters the sum of five hundred pounds currency in lieu of their share or proportion of my estate so devised to them, it is my will and pleasure and I hereby order and direct that payment of the before mentioned sum of five hundred pounds to each of my said daughters shall be by them taken in full for their respective shares of the property hereby devised to them. And I give, devise and bequeath all their share, right, and estate of and in my said real and personal estates unto my said sons equally, share and share alike, as tenants in common."

I think, looking at the wording of this clause and its position in the will, that the testator intended that the majority of the sons should, when the period for the enjoyment of their proportion of the estates, and not merely of the income derived from them, arrived, be at liberty to purchase and enjoy as tenants in common the shares that would, but for this purchase, have gone to the daughters. My opinion, therefore, is, that the daughters are entitled to enjoy their proportion of the income until this period of distribution arrives. The decree will contain a declaration: that on the true construction of the will the real estate acquired after it was made, did not pass under it; that the daughters are entitled to enjoy their shares of the income of the estate until the period of distribution, the death or marriage of the widow, when, the majority of the sons agreeing, they are entitled, on payment of the five hundred pounds, to claim the interest in the *corpus* of the estate, which would otherwise have gone to the daughters.

Judgment.

Let the Master inquire whether this right of the sons has been in any manner lost: let there be the usual directions in an administration suit, with a declaration

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that on the submission of the defendants, *Franklin Jackes*, *Joseph Jackes*, *James A. Jackes*, *Charles Bagot Jackes*, *Albert Gideon Jackes*, *Baldwin Jackes*, *Price Jackes*, *Mary Jane Brown*, and *James Brown*, her husband, the management of the estate and the accounts of the executors cannot be by them questioned: declare also, that as against the representatives of *Margaret Amelia Jackes* the sons are entitled to exercise the option on payment of the five hundred pounds to her representatives: let the Master add all necessary parties in his office: ascertain whether the widow is entitled to dower, and, if so, settle its amount; and partition or sell the undevised estate.

Judgment.

Reserve further directions and costs.

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## PARR v. MONTGOMERY.

*Practice—Formâ pauperis—Costs.*

The rule is that where a plaintiff sues *in forma pauperis* he will not be ordered to pay costs of any indulgence granted him during the progress of the cause. Where, therefore, such a plaintiff brought his suit to a hearing, which was defective for want of parties, the Court ordered it to stand over to add them, and directed that the question of costs of this indulgence should stand over and be disposed of on the hearing of the cause.

June 10, 1874.

The plaintiff in this suit had been allowed to sue *in formâ pauperis*, and on the cause being brought to a hearing it appeared that it was defective for want of parties; whereupon it was postponed to a later day of the same sittings, and subsequently, the plaintiff having been unable to make the necessary amendment, it was directed to stand over till the following sittings for the purpose of adding the necessary parties. As a general rule this would only have been allowed on payment of costs by the plaintiff, but proceedings having been taken *in formâ pauperis*, the question as to the payment of costs was reserved, in order that counsel might furnish authorities.

1875.

Parr v. Montgomery

Feb. 17.

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

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

SPRAGGE, C.—The question as to the payment of costs was reserved, and counsel were to furnish authorities; none have been furnished, and it is said there are not any on the point; but I find there are several bearing on the question.

It is said to be doubtful whether after the dismissal of a bill, sued *in formâ pauperis*, the pauper may again sue the same parties for the same cause of suit except upon payment of the costs of the former suit (*a*). The opinion of Lord *Eldon* was, that he could do so unless his conduct had been vexatious: it would appear that the test is, was the conduct of the party vexatious. This is so both at law and in equity. In the case of a bill being dismissed as against some of the defendants with costs, it is said that in such case the costs must be paid; one obvious reason for this being that such defendants are out of the case, and the Court, in the further progress of the cause, cannot deal with the costs as to them as it can do as to those who remain parties.

Judgment.

The case shewing this to be the rule is *Wilkinson* v. *Belsher* (*b*). There, after a bill had been filed, the plaintiff had been admitted to sue *in formâ pauperis* and a motion was made to amend by leaving out some of the defendants.

Mr. *Scott*, for the defendants, objected to the order, on the ground, it would seem, that by the amendment these defendants would be out of Court, and could not at the hearing apply for their costs; and the Lord Chancellor refused to make the order except upon the terms of payment of costs. The matter is thus treated of and explained in *Daniel's* Practice, page 47.

(*a*) Dan. Pr., 5th Ed., pp. 40, 43. (*b*) 2 B. C. C. 272.

1875.

Parr v. Montgomery

Where costs are ordered to be paid on a contempt, the contempt is not treated as a bar to further proceedings, but the costs are paid out of the suitor's fee fund; and that fund is reimbursed should the party afterwards become entitled to any fund in Court. The future disposition of costs is always in the discretion of the Court. Here, to grant the indulgence only on payment of costs, would be equivalent to a refusal of the indulgence; and would be a bar to the further progress of the suit: it would in fact be dispauperising the plaintiff, and that in the absence of vexatious conduct.

The suggestion made by Mr. *Blake* that, in the event of plaintiff being admitted to redeem, these costs should be added to the mortgage debt, seems reasonable; or the Court may deal with them otherwise at the hearing of the cause; as, for example, if any costs be ordered to be paid to the plaintiff at the hearing, the costs now properly payable might be deducted.

Judgment.

The order may be drawn up directing that the cause should stand over for the purpose of adding parties defendants; and, inasmuch as this order would be made only upon payment of costs, if the plaintiff had not been admitted to sue *in formâ pauperis*, order that the disposition of such costs do stand until the hearing of the cause.

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## PENMAN v. SOMERVILLE.

*Injunction—Chattels.*

**Where the Court has possession of a matter in which real estate is concerned, it will, if chattel property form part of the subject matter in dispute, deal with that also by injunction for the purpose of preserving the same *in medio*, without reference to the rule as to the Court not interfering with chattels unless they are of special value, or form the subject of a trust.**

This bill was filed to set aside the agreement set out in the pleadings, on the ground that the same was obtained

by undue influence; that in fact the party who signed the agreement was in such a state of mind as to be incapable of managing his own affairs. It alleged that since the signing of the agr ement the defendant had been stripping the land of firewood and standing timber. 1875. Penman v. Somerville.

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

Mr. *C. Moss*, contra. The defendant's contention is, that he was living in the United States, and he came over here at the request of the plaintiff, after being entreated to do so, to look after the plaintiff's affairs; and, as a consideration for his so doing, he was to get the land in question: *Flint* v. *Corby* (*a*). The Court will not interfere after the cordwood has been removed from the premises The motion seeks to restrain the defendant from disposing of last year's crop grown upon the premises. This cannot be granted. It is clearly shewn that these crops were the produce of the defendant's own labour, and under such circumstances the Court will not interfere; no case of irremediable loss to plaintiff is made out by allowing defendant to deal with the chattels and the crops; besides, it is shewn that this property is the only means of livelihood of defendant. Defendant submits to an injunction restraining the cutting of timber for any purpose other than what is required for the usual husbandry purposes. Argument.

Mr. *Crooks*, Q. C. Supposing the Court set aside this agreement, it has then the power to deal with everything which was the subject of that agreement, including all the chattel property. If the chattel property be disposed of the plaintiff could not have his rights restored: *Wood* v. *Rowcliffe* (*b*).

SPRAGGE, C.—On this argument it is to be assumed that the plaintiff may succeed in setting aside the entire contract and conveyance that are impeached by the bill. 17th Feb. Judgment.

(*a*) 4 Gr. 45.

(*b*) 3 Hare 304.

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Supposo him to succeed, the Court would certainly decree restitution of any chattel property then in defendant's possession as well as a reconveyance of land, and if it could be the subject of a decree, it is the subject of an injunction, in order to its being preserved *in medio* in the meanwhile.

Judgment.

The contract and conveyance are of both realty and personalty. The realty gives the Court jurisdiction at any rate; and having jurisdiction it will, as is its well established function, deal with the whole subject matter.

The law, as to interfering in case of chattels only where they are of special value or the subject of a trust, is therefore out of the case.

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## Watson v. Mason.

*Composition—Revivor of debt on default—Insolvency—Penalty.*

Two traders, *E. & R.*, having become insolvent, an agreement was entered into between them and their creditors, whereby it was stipulated that *R.* should retire from the partnership and that *E. & G.* should form a new co-partnership, and that the creditors of *E. & R.* should accept the notes of the new firm for fifteen shillings in the pound of their claims. By the deed of composition it was expressly agreed that in the event of *E. & G.* becoming insolvent before the notes securing the fifteen shillings in the pound were paid their original debts should revive against *E.*, *G.*, and *R.*, and that the creditors should be entitled to rank on the estate of *E. & G.* for the full amount of their respective claims against the firm of *E. & R.*, less any sum which might have been paid them by *E. & G.* on account of said debts. Before the notes were all satisfied *E. & G.* were compelled to make an assignment in insolvency.

*Held*, on rehearing [reversing the order of V. C. Strong], that the creditors were entitled to prove against the estate of *E. & G.* for the full amount of their original claims against *E. & R.*, giving credit for such sums as had been paid to them by *E. & G.* in respect of the composition notes; and that the agreement for the revivor of the original demands was not in the nature of a penalty.

This was a special case stated for the opinion of the

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Court, under the Statute 28th Vic. ch. 17, in a cause wherein *Charles Stanhope Watson* and *Samuel Waddell* were plaintiffs, and *John James Mason*, Assignee in Insolvency of the estate of *Edward Magill* and *George Magill*, and *Ralph H. Kilby* and thirty-eight others, creditors of said *Edward* and *George Magill*, were defendants, which set forth that *Robert Magill* and *Edward Magill* were, on and previous to the 22nd of December, 1868, trading together in co-partnership as hardware merchants, in the City of Hamilton, under the style or firm of *Magill & Brother*; and, in the course of such co-partnership business, became largely indebted to the defendants, other than *Mason*, as well as to others: that *Robert Magill* and *Edward Magill*, on and previous to that date, were unable to meet their engagements, and were insolvent within the meaning of the then Insolvent Acts, and were, under and by virtue of such Insolvent Acts, duly required by some of their creditors to make an assignment of their estate, pursuant to the said Insolvent Acts; that a meeting of the creditors of the said *Robert Magill* and *Edward Magill* was thereupon held on that day, and at such meeting the following agreement was entered into and signed by the defendants, other than *Mason*, and also by the said *Robert Magill* and *Edward Magill*, and by *George Magill* therein mentioned:—

Statement.

"It is agreed that the liabilities of *Magill & Brother* shall be made up as cash at this date, such rebate of interest being allowed on liabilities not yet due as to make them equivalent to cash at this date; that *Robert Magill* shall retire from the firm of *Magill & Brother* without taking any assets therefrom, and that *George Magill* shall form a co-partnership with *Edward Magill*, and that the said firm of *Edward* and *George Magill* shall give their notes for fifteen shillings in the pound on the amount of liabilities of the firm of *Magill & Brother*, made up as above mentioned, such notes to

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be payable in three, six, nine, twelve, and fifteen months respectively, with interest, as a composition on the debts of said firm of *Magill & Brother*; and that each one shall forthwith convey to *Charles Stanhope Watson*, of the City of Montreal, merchant, and *Samuel Waddell*, of the City of Montreal, merchant, as trustees for the creditors of the said *Edward* and *George Magill*, all their real estate; that the said *Edward* and *George Magill* shall insure their stock-in-trade, and assign the policy of insurance thereon to the said trustees upon the same trusts, and also assign and keep up at their expense the policies on the real estate; said security to remain till the full composition is paid.

"And the undersigned creditors of the said *Magill & Brother* hereby agree to accept the notes of *Edward* and *George Magill* for the amounts and at the dates aforesaid, with the security above mentioned, in satisfaction of their respective claims against the firm of *Magill & Brother*.

Statement.

"And it is further agreed, that until such notes are given, *John Macdonald*, of the City of Montreal, accountant, shall be allowed, on behalf of the creditors of the said firm of *Magill & Brother*, and at their expense, to take charge of the cash, bills, notes, and books of account of the said firm of *Magill & Brother*, the same to be handed over to the said *Edward* and *George Magill*, upon the carrying out of the foregoing arrangements on their part. And it is further agreed, that in the meantime, and until the above mentioned arrangement shall have been carried out, no proceeding in insolvency shall be taken against said *Magill & Brother*, the proceedings now pending to be merely suspended and not abandoned, so that if this arrangement falls through, or the said *Magill* sued at law, the said insolvency may be proceeded with.

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"Mr. *Macdonald* to pay moneys received by him into the bank daily to a special account in the names of the said trustees, paying thereout merely the current expenses. Proper deeds to be executed to carry this out, with provision for the payment to the trustee for the expenses to be incurred in management of the trust, including insurance, &c. Dated 22nd Dec., 1868."

Afterwards, on the 24th day of the month of December, an indenture concerning the premises was executed between the parties to the agreement aforesaid, which was in the words following:—

"This indenture, made the 24th of December, 1868, between *Charles Stanhope Watson*, of the City of Montreal, in the Province of Quebec, merchant, and *Samuel Waddell*, of the same place, merchant, of the first part, and *Edward Magill*, of the City of Hamilton, in the County of Wentworth, merchant, and *George Magill*, of the same place, merchant, of the second part, *Robert Magill*, of the same place, merchant, of the third part, and all the creditors of *Magill & Brother* who shall come in and assent to these presents, of the fourth part. Statement.

"Whereas, the said *Edward Magill* and *Robert Magill* have lately carried on business at said city of Hamilton in co-partnership, under the name, style, and firm of *Magill & Brother*.

"And whereas, the said *Edward Magill* and *Robert Magill* became embarrassed in their circumstances, and were unable to meet their engagements as they became due.

"And whereas, the said *Robert Magill* has agreed to retire from the said firm without withdrawing any of the assets thereof, and the said *George Magill* has agreed to enter into partnership with the said *Edward Magill*

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under the name and firm of *E. & G. Magill*; and the said *Edward* and *George Magill* have agreed to pay seventy-five cents on every one dollar of the indebtedness of said firm of *Magill & Brother*, except the debt due said *George Magill*, which debt is to be treated as a private debt between said *Edward* and *George Magill*, and give their promissory notes therefor for equal amounts, payable in three, six, nine, twelve, and fifteen months from the date hereof, and the majority in number and value of the creditors of said *Magill & Brother* have agreed to accept the said compromise, to be made payable as aforesaid.

"And whereas, the said *Edward Magill* and *George Magill* have, by two conveyances bearing even date herewith, respectively conveyed to said parties of the first part hereto absolutely certain lands and premises in the City of Hamilton and in the Township of Barton.

Statement.

"And whereas, the said conveyances are absolute on the face thereof, but the same are only made for the purpose of further securing the payment of said promissory notes and insurance premiums and expenses hereinafter mentioned; and the said parties of the first part have agreed to execute these presents for the purpose of declaring the trusts on which they hold the said land and premises so conveyed to them as aforesaid.

"Now know all men by these presents, that we, the said *Charles Stanhope Watson* and *Samuel Waddell*, do hereby declare that we hold the said lands and premises conveyed to us by said *Edward Magill* and *George Magill* upon the trusts following, that is to say: Firstly, in case default shall be made in payment of said promissory notes, or any or either of them, or in any part of either of them, or of the insurance premiums hereinafter mentioned, or any thereof, to sell and dispose of the said lands and premises or any part thereof

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for the best price the said parties of the first part can reasonably obtain for the same, either at public auction or private sale, and for cash or on credit as to said parties of the first part may seem best, and to pay and reimburse themselves all costs, charges, and expenses at any such sale or sales, and all sum or sums of money they may pay for insurance as aforesaid, or may be put to in and about the said trusts, the proceeds arising from such sale or sales, after such deductions as aforesaid, to divide amongst the creditors of said *Edward* and *George Magill*, according to said conveyance, *pro ratâ* according to their respective claims against said *Edward* and *George Magill* as partners and not as individuals, and on payment and satisfaction of all said promissory notes and all such sum or sums of money as the said parties of the first part hereto may pay for insurance, then to reconvey the said lands and premises to said *George Magill* and *Edward Magill* or as they may direct and appoint.

Statement.

"And this indenture further witnesseth, that the said *Edward Magill* and *George Magill* do hereby covenant and agree to and with the said *Charles Stanlope Watson* and *Samuel Waddell* that they will forthwith insure, unless already insured, and during the time said promissory notes, or any or either of them, or any part of any or either of them, are unpaid, or any sum of money is due to the said parties of the first part, or either of them, under any provision of this indenture, insure and keep insured, against loss or damage by fire, the messuages and buildings erected on said lands hereby conveyed or mentioned, or intended so to be, and also their stock of hardware goods and merchandise to the full insurable value thereof, in some insurance office or offices, to be approved by the said parties of the first part, their heirs or assigns, and pay all premiums and sums of money necessary for such purposes as the same shall become due, and will assign, transfer, and deliver

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unto the said parties of the first part, their heirs, executors, administrators, or assigns, the policy or policies of assurance, receipt and receipts thereto appertaining; and if the said parties of the first part, their heirs or assigns, shall pay any premiums or sums of money for insurance of said premises, or any part thereof, or the said stock of hardware and merchandise, or any part thereof, the amount of such payment shall be a charge on said lands and premises, and shall bear interest at the rate of seven per cent. from the time of such payment by said parties of the first part until paid.

"And the said parties of the second part for themselves, their executors and administrators, further covenant, to and with the said parties of the first part, their heirs, executors, administrators, and assigns, that they, the said parties of the second part, shall and will, during all the time any sum or sums of money remain due on any Statement. of the promissory notes hereinbefore mentioned, or for any sum paid for insurance on said premises, or any other expenses incurred by said parties of the first part in and about said trusts, pay or cause to be paid all taxes, rates, water-rates, and impositions which may be assessed against or imposed on said lands and tenements during the time aforesaid, and if the same, or any part thereof, is paid by said parties of the first part the same shall be a charge on said lands and bear interest at the rate of seven per cent.

"It is hereby expressly declared and agreed, by and between the parties hereto, that each of the said parties of the first part shall not be responsible for more money than shall actually come to his hands under the trusts aforesaid, they shall not be liable for the acts or omissions of any clerks, servants, or agents, employed by them, or either of them, nor for any loss or damage, act or omission, or default of his own which may happen in the execution of these presents, unless the same occur

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or happen by his or their own gross, wilful, and positive misconduct.

"It is further agreed by and between the parties hereto, that in case the said parties hereto of the second part shall become insolvent before all said promissory notes have been paid, then the original debt of all said parties who may now accept such composition against said *Edward Magill*, and *George Magill*, and *Robert Magill* [shall revive *], and they shall be entitled to rank on the said estate of said *Edward* and *George Magill* for the full amount of their respective claims against the said firm of *Magill & Brother*, less any sum which may have been paid them by said *Edward* and *George Magill* on account of said debt.

"And the said *Robert Magill* joins in these presents for the express purpose of assenting to, and confirming every act, matter, and thing, herein contained.

Statement.

"And the said parties of the fourth part join in these presents for the purpose of assenting hereto and accepting the said composition on the terms aforesaid. In witness." &c.

The defendants, other than *Mason*, were, by and in consideration of the agreement and indenture aforesaid by the said *Edward Magill*, *Robert Magill*, *George Magill*, and the plaintiffs, induced and procured to, and in fact did then and thenceforth refrain from putting the said *Edward Magill* and *Robert Magill* and their estate into compulsory liquidation.

Upon the execution of such indenture by the parties thereto, the said *Robert Magill* in fact did wholly retire

* It was admitted that the words "shall revive," or their equivalent, should be here, but had been omitted from the original instrument.

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from the said co-partnership firm of *Magill & Brother* and the business thereof, and ceased to have any interest therein, and the said *George Magill* in fact did thenceforth become a partner of said *Edward Magill*, and they accordingly did thenceforth continue and carry on business as co-partners under and by the name and style of *E. & G. Magill* as contemplated by said indenture, and said *Edward Magill* and *George Magill* did thereupon give their promissory notes to the defendants, other than *John James Mason*, for seventy-five cents of every dollar of the indebtedness of said firm of *Magill & Brother* to said last named defendants. * *

The said *George Magill* had not been, and was not before or at the time of the said execution by him of such above mentioned indenture, a partner in, or in any manner liable for any of the debts or liabilities of the said dissolved firm of *Magill & Brother*.

Statement.

The said *Edward* and *George Magill*, after the making of said trust deed, carried on business in partnership as *E.* and *G. Magill*, using therein the stock in trade and assets of the late firm of *Magill & Brother*, and they also incurred debts to a large amount for other goods supplied to them in the course of their trade, said *Edward* and *George Magill* paid some of the said composition notes in full, and made partial payments on others, and failed to pay others of such notes, and also failed to pay their liabilities for goods bought by them as aforesaid; and in June, 1869, their stock was destroyed by fire, and they then stopped payment, and in September, 1869, became insolvent, and made an assignment to the defendant *John James Mason*, as interim assignee under the Insolvent Act of 1869, for the benefit of their creditors, and under this assignment the said *John James Mason* was subsequently duly confirmed as assignee of said *Edward* and *George Magill*.

The stock-in-trade insured as aforesaid by the said

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*Edward Magill* and *George Magill* and covered by the policies assigned by them to the plaintiffs, as above mentioned, was destroyed by fire previous to said assignment of said *Edward Magill* and *George Magill* to the defendant *John James Mason*—the stock-in-trade so destroyed and covered by said policies, consisting in part of the residue of the stock formerly belonging to the firm of *Magill & Brother*, and partly of stock subsequently purchased by the firm of *Edward* and *George Magill*.

Statement.

The plaintiffs, as such trustees as aforesaid, proceeded to realize and did realize the securities assigned to them as aforesaid by collecting the moneys secured by said policies of insurance and other moneys, and by selling the lands conveyed and assigned to them as aforesaid, and realized a sufficient sum of money over and above all costs and expenses to pay off the whole amount of said composition notes and interest thereon from maturity after deducting all sums paid by said *Edward* and *George Magill* on account thereof, and also a further sum sufficient to pay off the residue of twenty-five cents on the dollar of the original debts due by the said firm of *Magill & Brother* to the creditors who became parties to the indenture aforesaid, together with interest on such original debt, but the defendant *John James Mason* claims that upon the true construction of the said trust deed all the moneys remaining after paying the amount of said composition notes and interest thereon are payable to him as the assignee of said *Edward* and *George Magill*, and that if not correct in this contention then that only the balance of twenty-five per cent. of the original debt due to the said respective creditors of *Magill & Brother*, but without any interest thereon, is payable to the said creditors, and that even if the said twenty-five per cent. and the interest thereon, or either of such sums, is a claim against the estate of *Edward* and *George Magill*, the payment thereof is not charged upon or payable out of the said trust funds, and the

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defendants, other than the said *John James Mason*, who are all the creditors of said *Magill & Brother* entitled to the benefits of the said trust deed, contend for, and demand from the plaintiffs payment to them of the said residue or sum of twenty-five per cent. of the original claims against *Magill & Brother*, and interest thereon from the 24th December, 1868, being the date to which interest was computed thereon for the purpose of such composition which they claim to be payable to them on the true construction of said trust deed; and the plaintiffs submit to pay over the trust funds aforesaid in such manner as the Court may direct.

The plaintiffs and defendants respectively agree to conform to and perform the order or decree of the Court upon the questions submitted by this special case, and that the costs of all parties hereto shall be paid out of the said trust funds.

Statement.

The questions submitted for the opinion of the Court were:—

(1.) Whether on the true construction of the said trust deed the defendants, other than said *John James Mason*, are entitled to be paid in full out of the said trust funds the residue or sum of twenty-five per cent. of their respective original claims against *Magill & Brother* not included in the said composition notes given by *Edward* and *George Magill*.

(2.) Whether if said defendants, other than *John James Mason*, are entitled to be paid twenty-five per cent. of their original claims, they are entitled to interest thereon from 24th December, 1868, or what other date.

(3.) Whether the defendants, other than *John James Mason*, if they are not respectively entitled to be paid in full the said twenty-five per cent. or the interest

thereon, or either of such sums, are respectively entitled to rank as creditors for said amounts, or either of them, on the insolvent estate of *Edward* and *George Magill*.

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The case came originally before Vice Chancellor *Strong* for argument, who determined "that, upon the facts stated in the said special case, the defendants, other than the defendant *John James Mason*, were not entitled to be paid out of the Trust Funds in the said special case mentioned, the residue or sum of twenty-five per cent. of their respective original claims against *Magill & Brother* in said special case named, not included in the composition notes given by *E. & G. Magill* in said special case mentioned, nor were the said defendants, other than the defendant *John James Mason*, entitled to rank as creditors on the insolvent estate of the said *E. & G. Magill* for the said residue or sum of twenty-five per cent. of the respective original claims against said *Magill & Brother*, not included in the composition notes given by *E. & G. Magill* in said special case mentioned."

Statement.

Thereupon the creditors reheard the cause, which came on to be argued before the two Vice-Chancellors.

Mr. *Moss*, Q.C., and Mr. *R. Martin* for the creditors. The stipulation here is, that fifteen shillings in the pound will be paid; but if default is made, and the notes for this amount are not paid, then, in such case, the full sum is to be charged; the clause in the indenture of the 24th December, 1868, is express as to this being the arrangement between the parties.

There is a difference where there is a debt certain as here; and when the debtors, by the settlement, are to procure a benefit, and where there is no certain debt. *Collins* v. *Burton* (*a*) shews a subsequent creditor cannot dispute this debt.

(*a*) 4 DeG. & J. 612.

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In *Exp. McKay* (*a*), and other cases, there was a preference. In the present case there is no preference—all are placed on the same footing. The creditors here were secured to a certain amount, that is, to the extent of fifteen shillings in the pound. After this lapse of time the transaction here will not be impeached: the only question to be discussed is, the effect of the deed. The question of the insolveney of the debtors or the effect of the Insolvent Act cannot now be raised.

Mr. *Mackelcan* for the defendant *Mason*. The attempt here is to charge others than the original debtors; not to revive the debts as against the original debtors, but against others.

The creditors here cannot rank against the estate of the partnership, for the debt, if revived, is revived against the three brothers: so far as *George Magill* is concerned, this is in the nature of a penalty. *Wilson* v. *Greenwood* (*b*), *Lester* v. *Gardland* (*c*), *Thompson* v. *Hudson* (*d*).

Argument.

The liability here was only to the extent of fifteen shillings in the pound as regards the defendants *E. & G. Magill;* it is not as if a debt of a larger amount had been previously ascertained between them and the creditors, who were the creditors of *Magill & Brother* only. *Knapp* v. *Cameron* (*e*), *Hill* v. *Rutherford* (*f*).

In any event, if these creditors are allowed to prove against this estate for the full amount, they must pay to the assignee of the estate all the moneys received by them in respect of the composition notes.

Mr. *E. Martin* for the trustees, submitted to act as the Court should direct.

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(*a*) L. R. 8 Ch. 643.
(*b*) 1 Swan at 480.
(*c*) 5 Sim. 205.
(*d*) L. R. 2 Ch. 255; L. R. 4. H. L. 1.
(*e*) 6 Gr. 559.
(*f*) 9 Gr. 207.

Mr. *R. Martin*, in reply:—

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*Ex p. Vere* (*a*), *Re McRae* (*b*), *Ex p. Peel* (*c*), *Phipps* v. *Ennismore* (*d*), were also referred to.

The judgment of the Court was delivered by—

BLAKE, V. C.—The agreements in question are set out in the special case. I think the effect of them is, that a certain sum of money will be accepted by the creditors if it be paid at the times specified, and, if not, that the full amount of the debt will become payable by the estate of *Edward* and *George Magill* and by *Robert Magill*; that, if the reduced sum be not paid at the times specified, credit must be given for the amounts received up to the time of the insolvency of *Edward* and *George Magill*, and for the balance remaining due of the original indebtedness and interest, these creditors are entitled to rank with the other creditors of *Edward* and *George Magill* on their estate. Dec 16, 1874. Judgment.

It is argued, in respect of these agreements, first, that their effect is, to make a larger sum payable on default, and, therefore, that it is the case of a penalty which cannot be enforced; and, second, that if otherwise it could be recovered, the transaction is a fraud on the insolvent laws, and for this reason, that nothing can be claimed beyond the composition.

In looking at the position of the parties, we must consider what was the substance of the transaction impeached.

*Robert* and *Edward Magill* being in partnership under the name of *Magill & Brother*, became indebted to the defendants, other than *John James Mason*; and,

(*a*) 19 Ves. 93.
(*b*) 15 Gr. 408.
(*c*) 1 Rose 435.
(*d*) 4 Russ. 131.

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on the 22nd of December, 1868, having become insolvent, they were required to make an assignment in insolvency, whereupon the first of the two agreements was entered into. It was then arranged that *Robert Magill* was to retire from the firm, withdrawing no assets therefrom, and that *George* was to take his place and enter the partnership with *Edward*, and that *Edward* and *George Magill* were to give their notes for fifteen shillings in the pound on the amount of the liabilities of the firm of *Magill & Brother*, payable in three, six, nine, twelve, and fifteen months. Certain real estate was at once to be conveyed to Messrs. *Watson & Waddell*, as trustees for the creditors. *Edward* and *George Magill* were to insure the stock, and assign the policies as security for the indebtedness. The creditors were to accept the notes in satisfaction of their respective claims. Until these notes were given, Mr. *Macdonald*, of Montreal, was to take charge of the cash, bills, notes,

Judgment.

books, &c., of *Magill & Brother*; and, on carrying out the arrangement, these were to be given up to the new firm. In the meantime, no further proceedings in insolvency were to be had, and those pending were to be suspended. On the 24th of December, 1868, the second agreement was entered into; this was made between *Watson* and *Waddell* of the first part, *Edward* and *George Magill* of the second part, *Robert Magill* of the third part, and the creditors of *Magill & Brother* of the fourth part, and recites the above agreement; and that *Edward* and *George Magill* have agreed to pay seventy-five cents in the dollar of the indebtedness of the firm of *Magill & Brother*, except the debt due to *George Magill*, which was treated as a private debt. It was also declared that the lands conveyed were held upon trust for sale, in case of default in payment of the notes, or any of them; and, after reimbursing themselves, the trustees were to divide the balance amongst the creditors of *Edward* and *George Magill*. Then followed this clause:—

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"It is further agreed by and between the parties hereto, that, in case the said parties hereto of the second part shall become insolvent before all said promissory notes have been paid, then the original debt of all said parties who may now accept such composition against *Edward Magill*, *George Magill*, and *Robert Magill*; [*sic*] * * * and they shall be entitled to rank on the said estate of said *Edward* and *George Magill* for the full amount of their respective claims against the said firm of *Magill Brothers*, less any sum which may have been paid them by said *Edward* and *George Magill* on account of said debt; * * * and the said parties of the fourth part join in these presents, for the purpose of assenting hereto, and accepting the said composition on the terms aforesaid."

Thereupon the proceedings in insolvency terminated —*Robert McGill* retired from the firm—the notes were given—*Edward* and *George Magill* carried on business as partners, incurred other debts; some of the composition notes were paid: they failed to pay others. In June, 1869, the firm became insolvent, and made an assignment, under the Insolvent Acts, to the defendant *Mason*.

Judgment.

So that here we had an actual indebtedness of twenty shillings in the pound against a firm; the retirement of one partner without withdrawing any of the partnership assets, the introduction of another partner, and an agreement whereby this indebtedness was to be reduced to fifteen shillings in the pound, if paid at certain dates; and if not then paid the whole debt was to revive.

There was not here a mere voluntary agreement on the part of the incoming partner, but the position he attains in the firm is by the assumption of these debts; he procures an interest in the assets, charged with this indebtedness, and in respect of its payment he makes,

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doubtless, the best arrangement in his power. Nor can any stress be laid on the fact that the first and least formal agreement does not contain a clause similar to that above set forth and found in the second or more formal agreement. Without its insertion, on failure of payment in any of the composition notes, the debt would seemingly have revived. Some question may have arisen as to this contingency when the agreement was being finally carried out, and rather than leave the matter in doubt, they then most reasonably put it beyond question, by inserting the clause that if the agreement, on which the smaller sum was accepted, was not carried out, the advantage to be gained as to reduction in amount should be lost.

Judgment.

Here these creditors had the right to say, "We can continue these insolvency proceedings, but we will not exercise our right; we will reserve it on certain conditions; fulfil them, and we forbear to put in motion this right; fail to comply, and we fall back on our original position. If certain things are done, the right is not to be enforced: if they are not done, the right revives." There is no room here for the consideration of the question as one of forfeiture. There was no penalty attached to the non-performance of any condition. When this transaction took place, the creditors had a claim of twenty shillings in the pound. The new firm accept the position of the old firm. They accept their assets and their indebtedness. The creditors arrange that if the new firm pays them fifteen shillings in the pound, the debt will be discharged; if this advantage is not accepted the full amount of the debt will be chargeable against the firm, and the retiring partner. This is not the attaching of a penalty, but the granting of an advantage on a condition. Such a case as the present must be distinguished from those cases in which, there being an actual debt due, a clause is added increasing this actual and defined liability merely for the purpose of endeavouring to enforce punc-

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tuality in payment, it being immaterial whether such addition to the burden to be borne by the debtor be in respect of principal money or interest. In those cases a pre-existent right did not exist. Here the amount due was defined and ascertained. Twenty shillings in the pound was due these creditors, they did not ask any addition to this sum, but they make an arrangement whereby this amount is to be paid in full by three persons unless in the meantime a smaller sum be punctually paid. It is an alternative arrangement which amounts to this, "Give me a certain sum on a day named, and I give you a release, but if you do not do this, then the amount which would but for this arrangement be payable, shall be due between us." It is the reservation of a just demand which the creditors are willing to waive, to a certain extent, if the debtors will perform something else, and which not being done, the original right revives.

Judgment.

In *Ex parte Bennett* Lord *Hardwicke* uses this language, "For where a creditor agrees to take less than his debt, so that it be paid precisely at the day, and the debtor fails of payment, he cannot be relieved," and his opinion was, that on bankruptcy the whole debt could be proved. *Davis* v. *Thomas* (*a*) and *Ford* v. *Chesterfield* (*b*) are to the same effect as the recent case of *Thompson* v. *Hudson* (*c*). There Lord *Westbury* says, p. 27, "In answer to the questions which they were required to answer in the chamber of the Master of the Rolls, they thought that it was very rational and right for a creditor to say to his debtor, 'Provided you pay me one-half of the debt or two-thirds of the debt on an appointed day, I will release you from the rest, and will accept the money so paid in discharge of the whole debt; but if you do not make payment of it on that day, then the whole debt shall remain due to me, and I shall be at liberty to recover it.' If you were to put that proposition to any plain man walking the

(*a*) 1 R. & M. 506. (*b*) 19 Beav. 428.
(*c*) L. R. 4 H. L. 1.

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streets of London, there could be no doubt at all that he would say that it is reasonable and accordant with common sense. But if he was told that it would be requisite to go to three tribunals before you could get that plain principle and conclusion of common sense accepted as law, he would undoubtedly hold up his hands with astonishment at the state of the law. The Master of the Rolls appears to have thought that the residue of the debt, in the case I have put, would be converted into a penalty, and that the penalty could not be enforced. It is impossible to hold that money due by contract can be converted into a penalty—a penalty is a punishment, an infliction for not doing, or for doing something; but if a man submits to receive at a future time, and on the default of his debtor, that which he is now entitled to receive, it is impossible to understand how that can be regarded as a penalty." I think, applying the law thus laid down to the facts of this case, that the first question argued must be found in favor of the creditors. We have further to consider whether the transaction is a fraud on the insolvent laws, and, on this ground, one which the Court will not sanction.

Judgment.

The rule to be drawn from the cases on this subject is, as I understand them, as follows: an arrangement cannot be made between a creditor and debtor whereby, on the contingency of bankruptcy happening, a specified property is to be withdrawn from the assets of the insolvent for the exclusive benefit of this creditor. The Court will not sanction an agreement whereby the insolvent provides that in the event of his insolveney his property is to be distributed otherwise than in the manner provided by law.

The doctrine was gradually extended, beginning with *Higinbotham* v. *Holme* (*a*) and ending with *Re McKay* (*b*) until it seems to have become thus defined. *Higin-*

(*a*) 19 Ves. 88. (*b*) 8 Ch. App. 643.

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*botham* v. *Holme* was a very plain case. There the husband settled certain property to himself for life unless he became bankrupt, in which case it was to go to his wife. By the limitation the property in question was to remain with the settlor so long as creditors did not want it, and the moment they required it it was abstracted from them. It was there held there was a fraud on the bankrupt laws and the transaction was set aside. In *Wilson* v. *Greenwood* (*a*) Lord *Eldon's* opinion was that an arrangement whereby on the bankruptcy of a partner his share should be taken by the solvent partners at a sum to be fixed by valuation, was void. He says, "The property must be divided as in the ordinary event of dissolution without special provision." To this case there is the following note (*b*): "The general distinction seems to be, that the owner of property may, on alienation, qualify the interest of his alienee by a condition to take effect on bankruptcy, but cannot, by contract or otherwise, qualify his own interest by a like condition, determining it or controlling it, in the event of his own bankruptcy, to the disappointment or delay of his creditors, the *jus disponendi*, which for the first purpose is absolute, being in the latter instance subject to the disposition previously prescribed by law."

Judgment.

This rule is again extended in the case of *Whitmore* v. *Mason* (*c*). There, in case of the insolvency of one partner, his share, with certain exceptions, was to be valued, and, at the valuation, was to go over to the other partners. The then Vice-Chancellor there says: "Now, I apprehend the law is too clearly settled to admit of a shadow of doubt; that no person possessed of property can reserve that property to himself until he shall become bankrupt, and then provide, that, in the event of his becoming bankrupt, it shall pass to another, and not to his creditors."

(*a*) 1 Swa. 471. (*b*) p. 481. (*c*) 2 John. & Hem. 204.

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In *Ex parte McKay*, relied on so strongly by the learned counsel for the assignee, that which was attacked was the arrangement whereby the creditor was to have, in case of the bankruptcy of his debtor, a security over the other moiety of certain property, one half of which only was to be covered so long as the debtor remained solvent. Thus, the interest of the debtor was to be controlled and qualified in case of his bankruptcy, to the detriment of his creditors, and the case was brought within the authorities to which I have referred. The language of the Lords Justices shews this clearly. Sir *William James* says, p. 647: "If it were to be permitted that one creditor should obtain a preference in this way, by some particular security, I confess I do not see why it might not be done in every case. * * * In my opinion, a man is not allowed, by stipulation with a creditor, to provide for a different distribution of his effects, in the event of bankruptcy, from that which the law provides. It appears to me that this is a clear attempt to evade the operation of the bankruptcy laws." Sir *George Mellish* says, p. 648: "As I understand it, a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws." This case, decided in 1873, does not extend the rule further than to make it a fraud on the insolvent laws for a debtor to make an arrangement with his creditor, whereby, in case of his insolvency, his property is to be withdrawn from the effect of these acts, and to be dealt with in such a manner as that this creditor obtains some benefit therefrom or from a part of it, peculiar to himself. But the present is not a case falling within that class. Here there is no provision whereby, on insolvency, the property of the debtor is to go otherwise than is provided by law, but simply an arrangement that if the debtor becomes insolvent the full amount of the debt shall be paid out of the estate in place of the composition. To

Judgment.

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avoid the loss, delay, and expense of bankruptcy proceedings, the creditors thought fit to make an arrangement supposed to be beneficial to all. That which was avoided temporarily recurred, and I do not see why the creditors should have, in addition to the unfortunate event against which they vainly attempted to provide, a serious reduction in the amount of their claims, representing the sum they were willing to throw off if that which happened subsequently had been prevented for good —the insolvency of the debtor. The difference between *Re Vere* and *Re Peel* is shewn in *Re McRae* (*a*).

The clause set out provides that, on the insolvency happening, the creditors shall be entitled to rank for the full amount of their respective claims, less any sum which may have been paid them on account. No provision is there made for the retention of the securities held by the creditors. The rule seems to be that in such cases the creditors have the right to claim the composition and the benefit of that which is held to secure its payment, or, repudiating such an arrangement, then to rank on the estate for the balance due, but electing to rank, that the securities held must be given up. In *Robson* on Bankruptcy, the law is laid down as follows: "But, in making such proof, the creditor must give credit for any sums paid to him on account of the composition, and also deliver up any security held by him for the payment thereof;" and this statement is sustained by *Re Ellis* (*b*). I do not say that this decision is entirely satisfactory to my mind, but I have been unable to find any other case on this question, and am therefore bound by it, which is quoted with approval by the text writers on the subject.

Judgment.

The creditors must give credit for all sums of money paid them on account up to the time of the bankruptcy,

(*a*) 15 Grant 408.

(*b*) 2 M. & A. 370.

1875. and are entitled to prove against the estate of the insolvents for the balance due them, with interest.

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I think it reasonable, under the circumstances, and looking at the nature and difficulty of the questions raised, that the costs of all parties to this litigation should be borne out of the estate.*

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## BERRY v. BERRY.

*Infants—Next friend.*

It is important that the next friend of an infant should be a disinterested person in proceedings taken to sell an estate in which the infant has an interest. Where, therefore, the mother, who had a claim against the estate, filed a bill as next friend asking for a sale of the property, the Court refused to make the decree: but retained the bill in order that other parties to the cause, if so advised, might apply to make themselves plaintiffs and the infant a defendant.

This was a bill for sale of the estate in which the plaintiff, an infant, was interested with the defendants. The mother of the infant filed the bill as her next friend.

Mr. *Gibson*, for the plaintiff.

Mr. *Cassels*, for the defendants, consented to the decree as asked.

After taking time to look into the authorities,

Judgment. BLAKE, V. C.—It is for the interest of the mother, who is the next friend of the infant plaintiff, that the premises should be sold, in order that she may realise her claim out of the estate. She is not therefore a proper person to name as her next friend—she has the control of the proceedings, and by allowing, under such

* The Court of Appeal, on the 14th January, 1876, reversed the order made on this re-hearing; thus affirming the decree pronounced on the original hearing of the case.

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Berry v. Berry.

circumstances, this suit to proceed I should be opening the door to that which was condemned twenty-five years ago in this Court. See *Re McDonald* and *Re Taylor* (*a*). The child is but two years of age. This makes it the more important that some disinterested person should be named to represent one unable to give any expression to her views. See *Re Kennedy* and *Re McDonald* (*b*), and *Re Boddy* (*c*).

I do not think it is brought within the cases which explain sec. 50 of ch. 12 of the C. S. U. C., and therefore it is not one which should be sanctioned by the Court, and the relief asked should be refused. The other parties to the proceeding may desire to use this suit for their own benefit; if so they can make such application as they may be advised to make themselves plaintiffs, and the infant a defendant, on such terms as the Court may think proper.

Judgment.

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## The Corporation of the Town of Whitby v. Liscombe.

*Charitable bequest—Mortmain—Residue.*

October 10.

*M. W.* by her will directed all her real estate, except one house, to be converted into money, and out of the proceeds to pay sundry legacies and bequests. And to the town of Whitby she gave and bequeathed, *solely out of her personal estate*, two sums of $4,000 and $200 "for the purpose of establishing and maintaining in the said town of Whitby a Public Library and Mechanics' Institute, to be dedicated to and be under the control of the said Corporation of the said town of Whitby." The testatrix left very little, if any, chattel property, and the bequests could be paid only out of the proceeds of the sale of the realty or from moneys secured upon mortgage:

*Held* (1) that the sums so bequeathed were charitable bequests, and as such were void under the Statutes of Mortmain; and (2) that the amount thereof fell into the residue, which was disposed of by the will, and was not distributable amongst the next of kin of the testatrix.

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(*a*) 1 Gr. 90. (*b*) 1 Cham. Rep. 97. (*c*) 4 Gr. 144.

1875.

Corporation of Town of Whitby v. Liscombe.

The Bill in this case was filed by *The Corporation of the Town of Whitby* and *Thomas Huston*, Treasurer of the Corporation, against *Isabella Liscombe*, executrix of *Margaret Watson*, deceased, and others; being some of the next of kin and residuary devisees and legatees named in the will of the said *Margaret Watson*, which, so far as the same was material to the question in issue, was as follows:—

"Third. I desire my executors, so soon after my death as may be by them deemed best for the interest of my estate, to convert all my real estate, of whatever kind and wheresoever situate, into money, except the house and lot in Port Hope belonging to me, which will be sold as hereinafter mentioned, and out of the proceeds of my estate to pay the several legacies and bequests hereinafter mentioned, that is to say:— * * *

Statement.

"Seventh. For the purpose of encouraging the spread of useful knowledge, and promoting the growth of intelligence, and to commemorate my own and my husband's name in the said town of Whitby, I hereby give and bequeath, solely out of my personal estate, to the Corporation of the town of Whitby, in the County of Ontario and Province of Ontario, the sum of $4,000, to be paid to the Treasurer of the said town, for the purpose of establishing and maintaining in the said town of Whitby a Public Library and Mechanics' Institute, to be dedicated to, and belong to, and be under the control of the said corporation of the said Town of Whitby, acting through the Mayor and Common Council thereof, or other governing body thereof for the time being, who shall be the trustees of the said bequest and shall carry out the same, and who shall be bound to keep the same open at all times to come as a Public Library and Mechanics' Institute, and for carrying on therein and in and about the same the various exercises, duties, operations, works, rights, and privileges of such an In-

stitution in the said town of Whitby, and shall not dispose of or convert the same to any use or uses whatsoever, except to vary in such minor matters as, in the judgment of the said Mayor and Council or other governing body, may best contribute to carry out the intentions of this bequest, and make it most useful and beneficial to the said town of Whitby." * * *

"Lastly, my executors may, if they think fit, give the sum of $200 more to the trustees of the bequest hereinbefore made by me to establish and maintain a Public Library and Mechanics' Institute in the said town of Whitby, in order the more completely to carry out the objects of the said bequest.

"Ninth. I hereby will and devise and bequeath to my said executors hereinafter named all my real and personal estate of whatever nature and kind and wheresoever situate, with full power and absolute authority in trust to sell, convey, and otherwise dispose of the same as aforesaid, and invest the proceeds thereof in bank stock or good real estate, or other security, as they may think best, and to vary the same from time to time and pay off the legacies and bequests hereinbefore specified to the parties entitled thereto, and otherwise carry out my intention as required by this my will. Statement.

"Tenth. And as to the rest, residue, and remainder of my real and personal estate, not otherwise hereinbefore disposed of, I give, devise, and bequeath the same unto *Hannah Wood*, *Isabella Liscombe*, *William Henry Liscombe*, *Mary Ann Summersett* (aforesaid), *Susan Pake*, and *Thomas Hunter*, their and each of their heirs, executors, administrators, and assigns, forever."

The executrix having declined payment of these two bequests of $4000 and $200 on the grounds that the testatrix left very little if any personal estate, and

1875. these legacies would therefore be payable out of the realty, and would, by reason of the operation of the Statutes of Mortmain, be void; the bill, therefore, asked a construction of the will, and payment of the bequests.

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Mr. *Fitzgerald*, Q.C., and Mr. *A. Hoskin*, for the plaintiffs. In the present state of the authorities it cannot be urged in this Court that the statutes of Mortmain are not in force in this country; but, even admitting that they are, the bequests here are good, as they can be expended on land, which the evidence shews the town of Whitby held at the time of the death of the testatrix, suitable for a Mechanics' Institute and Free Library, and that they did not possess land of the annual value of $2,000. No lands were devised by the testatrix to the purpose, but only the proceeds of certain mortgages and other personalty; and besides, she directed that, in any event, her lands should be taken and regarded as personalty; and therefore there was a conversion, even if she had devised the lands themselves to the purposes in question.

Argument.

The ground upon which it has been held that moneys arising from the sale of lands come within the purview of the Mortmain Acts is, that by election the legatee might take the bequest in the shape of land, but in this case the reason could not apply as there is no land so devised, and the property is directed to be sold and the proceeds distributed amongst a large number of legatees: here it would have been impossible for the plaintiffs to have taken any lands by election, and *cessante ratione cessat etiam lex: Lucas* v. *Jones* (*a*), *Shadbolt* v. *Thornton* (*b*).

The bequest here is not to a charitable use, inasmuch as the inhabitants of the town of Whitby alone, not the

(*a*) L. R. 4 Eq. 73. (*b*) 17 Sim. 49.

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public generally, are to be benefited by it; and in any event the Statutes of Mortmain do not apply, as the application of the moneys bequeathed is in the discretion of the trustees named in the will: *Cocks* v. *Manners* (*a*), *Wilkinson* v. *Barber* (*b*).

Mr. *Cassels* and Mr. *McMillan*, for the executrix and the parties interested in the residue. *The Attorney-General* v. *Heelis* (*c*), and *The British Museum* v. *White* (*d*), establish clearly that this is a charitable bequest; and if the grounds urged by the plaintiffs, of the testatrix having directed her real estate to be converted into personalty, and that the estate consisted chiefly of mortgages, were held to take the case out of the provisions of the statute, then in every case a testator could defeat the object of the statute by simply directing a conversion of his estate from realty to personalty. *The Attorney-General* v. *Weymouth* (*e*) shews clearly that this is not the law.

Mr. *J. K. Gordon*, for the heirs-at-law and next of kin, contended that in the event of the bequests being held void they were entitled to have them distributed amongst them, and that these sums did not fall into and form part of the residuary estate.

October 20.

Judgment.

BLAKE, V. C.—There is no pure personalty out of which the bequest to the plaintiffs can be satisfied, and the first question for consideration is, can the proceeds of land or of the personalty savouring of realty be applied in its payment?

The preamble to the Act which, it is said, renders invalid the bequest in question, 9 Geo. II. ch. 36, contains the following language:—"Whereas gifts or alienations of lands, tenements, or hereditaments in mortmain,

(*a*) L. R. 12 Eq. 574.
(*b*) L. R. 14 Eq. 96.
(*c*) 2 S. & S. 67.
(*d*) 2 S. & S. 595.
(*e*) Amb. 20.

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are prohibited or restrained by *magna charta* and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons to uses called charitable uses, to take place after their deaths to the disherison of their lawful heirs." And the first section proceeds to enact: "That from and after the 24th of June, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or encumbered by any person or persons whatsoever, in trust for the benefit of any charitable uses whatsoever, unless," &c. By section 3 it is enacted: "That all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or encumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate or security for money, to be laid out or disposed of in the purchase of any lands, tenements or hereditaments, or of any estate or interest therein, or of any charge or encumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time from and after the said 24th day of June, 1736, be made in any other manner or form than by this Act is directed and appointed, shall be absolutely and to all intents and purposes null and void."

Judgment.

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It was argued that, as by the will the realty, out of which the legacy in question, amongst other legacies, is to be paid, is to be sold, the land is turned into money, and this notional conversion enables the plaintiffs to claim the bequest out of that which is thus transformed into money; and that the case differs from those in which the "charity" is given the proceeds of a particular piece of property, as there the "charity" could elect to take the land in place of the proceeds, and thus the Act would be defeated. My opinion is, that the testatrix gave her lands to those named in her will as executors, charged, amongst other legacies, with that in question: that the bequest is thus brought expressly within the language of the Act and is void; and that it makes no matter whether the legatees are entitled solely to the proceeds of the land, or are entitled with others.

Judgment.

The notional conversion which takes place, prior to an actual, sale where there is an unconditional direction for sale of lands in a will, cannot defeat the express language of the Act, which says, in section 1, "No * * lands * * shall be given * * or any ways charged or encumbered * * for the benefit of any charitable uses whatsoever;" and in section 2: "All gifts * * of any lands * * or of any charge or encumbrance affecting or to affect any lands * * in trust for any charitable uses * * shall be absolutely, and to all intents and purposes null and void." The effect of this statute came up before Lord *Hardwicke* shortly after it was passed in *The Attorney-General* v. Lord *Weymouth* (*a*). There the Lord Chancellor says: "The Legislature blended the two inconveniences together—the acts of languishing and dying persons, and the disherison of heirs. * * These words (quoting the language of the Act) import: 1st. That it shall not be in the power of any person to convey the lands

(*a*) Amb. 20.

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themselves. 2nd. That it shall not be in their power to charge or encumber them, and therefore it must be agreed that no man can charge £1,000, £500, or even £100 on any lands, of ever so great value, to any charitable use whatsoever; and the present case is stronger, as it gives the whole residue (after payment of particular legacies) to a charitable use; not only the gifts of lands themselves is made void by the Act, but even any charge out of them. Then consider the second question—what is done by this will?—and I am of opinion that it is both a devise of the land itself, and a gift of the money (arising by the sale of the land, after payment of particular charges), contrary to the prohibition of the Act. * * I am of opinion, whether this surplus is to be taken as money or land, it is just the same thing. * * If Sir *John James*, instead of devising the surplus, had said, I charge my real estate with the payment of £1,000 to a charity, it would certainly have been void by the express words of this Act; and will it not then be extremely absurd to say, he shall be able to give his whole real estate to be turned into money for the benefit of a charity?"

Judgment

See also *Durour* v. *Motteux* (*a*), *Anderson* v. *Dougall* (*b*), *Anderson* v. *Kilborn* (*c*), *Anderson* v. *Paine* (*d*), *Robinson* v. *Robinson* (*e*), *Waite* v. *Webb* (*f*).

In *Leigh & Dalzell*, on Conversion, at page 79, the law is thus stated: "It might be proper here to remark, that the Statute of Mortmain * * cannot be defeated by a conversion of property by which an interest in land is brought into charitable purposes, or by which money can be laid out in any such interest, unless under the restrictions of the Act; for the words of the statute,

(*a*) 1 Ves. Sen. 320.
(*b*) 13 Grant 164.
(*c*) 13 Grant 219.
(*d*) 14 Grant 110.
(*e*) 19 Beav. 494.
(*f*) 6 Mad. 71.

which go far beyond the title, are very express." And at page 80: "Therefore, between the first and third clauses of the Act, not only is the conversion of money into land by will for charitable purposes restrained, but likewise the conversion of real estate into personal."

In *Page* v. *Leapingwell* (*a*), lands were to be sold and charitable and other legacies to be paid out of the proceeds, and it was there held that the charitable legacies were void under the statute. See also *Thornber* v. *Wilson* (*b*).

It is true that Mr. *Tudor*, in his work on Charitable Trusts, says, page 68: "Money to arise from the sale of real estate, or a legacy from a fund to be produced by such a sale, is within the Act; not because it comes within its express words, but because it comes within its meaning, inasmuch as if such a bequest was allowed, the charity to whom the bequest was made might elect to take the land." Mr. *Jarman* arrives at the same conclusion, although he does not express his opinion so strongly (1 Jar. p. 207): "Though the statute does not in terms apply to the proceeds of land directed to be sold, yet it is settled by construction, that a fund of this nature is within its spirit and meaning, on the ground, it should seem, that the legatee might have elected to take it as land; and a legacy payable out of such a fund, of course, shares the same fate."

Judgment.

But there are cases in which the matter is put upon a broader ground, as *The Attorney-General* v. *Harley* (*c*), where Sir *John Leach* says: "That money to arise from a sale of land is an interest in land admits of no doubt; and it is plain, therefore, that Mr. *Newton* could not by his will have devoted these sums to charitable purposes." See also *Mogg* v. *Hodges* (*d*); *Shelford's* Laws of Mortmain, 164.

(*a*) 18 Ves. 463.
(*b*) 4 Drew 350.
(*c*) 3 Mad. 321.
(*d*) 2 Ves. Sen. 52.

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Mr. Justice *Williams*, in his work on Executors, says, p. 989: "Although this statute contains no restriction upon any one from leaving a sum of money, or any other estate purely personal, to charitable uses, yet, in the construction of it, it has been adjudged, that not only devises of land, copyhold as well as freehold, and bequests of money to be invested in land, are void, but also such bequests as in any manner affect or relate to interests in real property. Thus, bequests to charities of money charged on real estate, or of money to arise from the sale of real estate * * are within the statute and void."

Some light is thrown upon the point by the cases of *Lucas* v. *Jones* (*a*), and *Brook* v. *Badley* (*b*). There are other cases bearing more or less on the question collected in *Watson's* Compendium, page 50, Vol. 1.

Judgment.

There was no doubt a great difference of opinion in the Court below and in the House of Lords in the case of *Jeffries* v. *Alexander* (*c*), as to whether the bond debt there sought to be enforced could be collected out of the real assets; but as to whether a case such as the present was within the effect of the statute, or not, there seemed to be but one opinion. Mr. Justice *Blackburn* approves of the statement of Sir *John Leach* in *Attorney-General* v. *Harley*: "that money to arise from the sale of land is an interest in land admits of no doubt;" and proceeds, "There are several other decisions that the gift of any interest in land whatever is void. In all of them I think it will be found that an interest, sometimes a very slight one, but always an actual interest in or charge on some real estate, was given, and on this the decisions proceeded; and I think they were rightly decided. * * The devise of the land to be sold, or the bequest of the mortgage money, does actually give the objects of the

(*a*) L. R. 4 Eq. 73. (*b*) L. R. 3 Ch. 672.
(*c*) 8 H. of Lords 594.

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bounty of the testator an equitable interest in the land which is to be sold, or in the mortgaged estate, and therefore is within the very words of the statute; a gift of an interest in land." "Is it not," says Lord *Campbell*, p. 647, "the expressed intention of the Legislature by this Statute, that, without conforming to the requisitions specified in the 1st section, a man shall not in his life-time, by any gift or settlement, appropriate his chattels real, to be applied at his death for charitable uses, he remaining in the possession of the chattels real, and having complete control over them till he dies? Is not the statute violated by a person doing what certainly and inevitably leads to such appropriation at his death, after such possession and control during his life?"

Lord *Cranworth* approves of *The Attorney-General* v. Lord *Weymouth*, (page 650.) Lord *St. Leonards* speaks of the declarations of the Act being express and explicit, and asks, (page 655): "What is there which can be conceived to operate upon property which does not fall within some of these prohibitions? It appears to me to admit of no doubt."

Judgment.

Lord *Wensleydale* says, page 672: "In this respect there is an important difference between this case and those cases where lands are devised to be sold, and the proceeds paid to a charity. In those cases before the lands are sold, the charity has an equitable interest in them. The bequest constitutes a charge, and that charge by the third section of the Statute is void." Lord *Kingsdown's* judgment contains this general statement of the law on the point (*a*): "It is no doubt the professed objects of the statute to prevent either land, or the produce of or any interest in land, from being devoted to charity, except in a particular form; and to prevent money devoted to charity from being invested in lands; and it might be contended, if it was *res integra*, that

(*a*) Page 677.

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where a testator bequeathes a general legacy of money to a charity, he neither gives land, nor any interest in land, to the charity, nor directs a charitable legacy to be invested in land, or on security of land, though a part of his assets may consist of chattels real; but, inasmuch as a legacy given generally is to be paid out of the general assets, and if the general assets consist in part of chattels real, those portions are equally applicable with the other personal assets to discharge the gift, it is settled that, to make such application of them is to give an interest in land within the meaning of the statute, and is therefore a violation of its provisions. * * (*a*) The common case of a pecuniary legacy, given without the least reference to the state of the assets, fails to the extent in which the assets consist of chattels real, not because the devise to the charity operates directly on the chattels real, but because, in the ordinary legal administration of the assets, chattels real would be applied to the payment of the legacy."

Judgment.

I think there can be no doubt the effect of the Act here is truly expounded, and that I must find this point against the plaintiffs.

It was admitted that the plaintiffs could not take land by devise, and that, finding as I do, the devise in their favour failed.

It was contended by the next of kin and heirs-at-law that the amount intended by the testatrix to go to the plaintiffs devolved upon them, and by the residuary devisees and legatees that it passed to them under the residuary clause of the will. The words on which those claiming under the will rely, are, "and as to the rest, residue, and remainder of my real and personal estate not otherwise hereinbefore disposed of, I give, devise, and bequeath the same, &c."

(*a*) Page 680.

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The making of the will and the death took place in August, 1873, so that the case comes within 32 Vic., ch. 8, and not the later Wills' Act, 36 Vic., ch. 20.

I do not think I can say that this property has been disposed of by this Will. The testatrix made an ineffectual attempt to give it to the charity in question. This attempted disposition has failed, and the property remains as a portion of the estate to go with the residue remaining after all the effectual dispositions have been made good. I do not think there are any authorities which interfere with this which appears to me a reasonable conclusion at which to arrive. I say reasonable conclusion, as I think it more proper that those designated as objects of the testatrix's bounty should take the residue, whether large or small, rather than that which goes to swell this residue should pass to persons not named in the Will.

Judgment.

Sir *William Grant*, in *Cambridge* v. *Rous* (*a*), says: "It has been long settled that a residuary bequest of personal estate carries not only everything not disposed of, but everything that in the event turns out not to be disposed of, * * a presumption arises for the residuary legatee against every one except the particular legatee. The testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee. And in *Leake* v. *Robinson* (*b*), the same learned Judge uses the following language in regard to a residuary clause whereby the testator gave "all the residue and remainder of his real and personal estate and effects not before disposed of." "A question has been made whether the particular bequests there declared do or do not fall into the residue. I have always understood that, with regard to personal estate, everything which is ill given by the will does fall into the residue; and it must be a very peculiar case in... d, in which there can

(*a*) 8 Ves. 12.

(*b*) 2 Mer. 363, 367, 392.

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be at once a residuary clause and a partial intestacy, unless some part of the residue itself be ill given. It is immaterial how it happens that any part of the property is undisposed of, whether by the death of a legatee or by the remoteness and consequent illegality of the bequest. Either way it is residue, *i.e.*, something upon which no other disposition of the will effectually operates. It may in words have been before given, but if not effectually given, it is, legally speaking, undisposed of, and consequently included in the denomination of residue. * * * I am of opinion that, in so far as any of the particular bequests are ill disposed of they fall into the residue." See also on this point *Easum* v. *Appleford* (*a*), *Roberts* v. *Cooke* (*b*), *Bernard* v. *Minshull* (*c*), *Reynolds* v. *Kortwright* (*d*), *Markham* v. *Ivatt* (*e*), *Bland* v. *Lamb* (*f*), *Cunningham* v. *Murray* (*g*), *Lewis* v. *Patterson* (*h*), *Cogswell* v. *Armstrong* (*i*), *Green* v. *Dunn* (*j*), Doe *dem. Stewart* v. *Sheffield* (*k*), *Garner* v. *Hannyngton* (*l*), *Jones* v. *Mitchell* (*m*), *Gibbs* v. *Rumsey* (*n*), 2 *Williams* on Executors, 1350-1351; *Hawkins* on Wills, page 44.

Judgment.

It is true that a devise of land in a residuary clause is specific, notwithstanding the recent enactment, *Hensman* v. *Fryer* (*o*); but I still think I am warranted in the conclusion that where a bequest or devise is void *ab initio*, the property in respect of which the bequest or devise has failed passes as part of the residue under such a clause as that in question. But even if this doctrine could not be sustained so far as a specific piece of land is concerned, I think that the manner in which

(*a*) 5 M. & C. 56.
(*b*) 16 Ves. 451.
(*c*) 1 Johns 276.
(*d*) 18 Bea. 427.
(*e*) 20 Bea. 579.
(*f*) 2 J. & W. 399.
(*g*) 1 DeG. & S. 366, & 12 Jur. 547.
(*h*) 13 Grant 223.
(*i*) 2 K. & J. 227.
(*j*) 20 Bea. 6.
(*k*) 13 East 526.
(*l*) 22 Bea. 627.
(*m*) 1 S. & S. 293.
(*n*) 2 V. & B. 294.
(*o*) L. R. 3, Ch. 420.

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the property is here to be dealt with clearly brings this bequest within the class of cases in which the person entitled to the residue can claim that which the testator has not effectually disposed of by his will. This question cannot, however, be of much practical importance, as almost all the property in question consists of mortgages, which, although chattels real, would not go to the heir-at-law, in case of intestacy. I think all parties are entitled to their costs out of the estate, the plaintiffs only to the costs of one hearing.

There will be a declaration that the bequest in favour of the plaintiffs is void, and that it passes under the residuary clause to the legatees therein named.

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[NOTE.—This case has since been carried to the Court of Error and Appeal, and stands for judgment.] Judgment.

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## DAVIDSON v. MCINNES.

*Insolvent Act—Preferential assignment—Pressure.*

A trader, who was indebted to the amount of $8000 and claimed to have assets, consisting of stock-in-trade, book and other debts due to him, to the amount of about $8,500, agreed with one of his creditors to sell off his entire stock-in-trade, procure notes therefor, and hand the same over to the creditor in discharge of his claim, which was accordingly done by the debtor to an amount of about $6,000; leaving only the book debts, which, it was shewn, would pay not more than 25 per cent. on the claims of the remaining creditors. At this time about one half of the claim of the creditor so paid off was not due:

*Held*, that under the circumstances this was a preferential assignment within the meaning of the Insolvent Act, and as such fraudulent and void against the general body of creditors; and that it could not be supported as having been procured by pressure.

The case came on for hearing at the Autumn Sittings of 1875 at Hamilton.

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The facts appear sufficiently in the judgment.

Mr. *Boyd* and Mr. *Crerar*, for the plaintiffs, contended that there were two questions to be considered in the present case. 1st. Was the debtor *Miller* really insolvent at the time he transferred the notes and securities to the defendants? 2nd. Did the defendants know of it? To come to a correct conclusion on these it is necessary to consider the circumstances under which the transfer was made. Here the doctrine of pressure cannot apply, as there really never was any pressure brought to bear upon the debtor; the proposition to sell off his goods and procure notes or money therefor having in fact originated with himself, not with the defendants, his creditors.

Mr. *Bethune* and Mr. *Bruce*, for the defendants The arrangement which was here effected on the 10th of March was so carried out in pursuance of the agreement shewn to have been come to on the 9th of the preceding month. At that time, the insolvent now swears, he thought he could carry on and pay his debts. The case is not therefore within the 87th section of the Act as having been in contemplation of insolvency: nor can it be said to have been voluntary, as it is shewn that the defendants had for some time been urging *Miller* to reduce his account. This was clearly pressure sufficient within the cases to sustain the transaction.

October 27.

Judgment.

BLAKE, V. C.—At the close of the case I found that the transaction impeached was carried out at a time that the debtor was, to the knowledge of himself and the defendants, insolvent. On the 9th February, 1875, the debtor and the defendants arranged that he should return home, sell out the whole of his stock to an intending purchaser, obtain indorsed notes for the purchase money, transfer these securities to them, and thus discharge his indebtedness to them. He completed this arrangement,

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returned on the 10th of March, handed over cash and indorsed notes to the extent of about $6000, and his own note for about $600, and obtained a discharge of the debt due the defendants. At the time of this settlement about one half of the indebtedness then satisfied had matured, the balance was not due for some weeks. The handing over these assets to the defendants left the insolvent with book debts due him amounting to the nominal value of $4500, which distributed amongst his other creditors will realise for them about twenty-five cents in the dollar.

It is argued that the defendants can sustain the position they have obtained as it was procured, it is said, by pressure exercised upon the debtor. The effect of pressure has been of late dealt with in many of the cases, in none has it been put more plainly than in *Ex parte Topham re Walker* (*a*), which was followed in this Court in *Keays* v. *Brown* on rehearing (*b*). In several of the cases cited to me the transactions impeached could clearly be supported: as in *Ex parte Butcher* (*c*), where there was no notice to the payee of the insolvency, and that which was complained of was done in the ordinary course of business—in *Ex parte Keevin* (*d*) where the payment was made and received *bonâ fide*, and was not intended to prefer the one creditor above the others. In *Ex parte Foxly* (*e*) the arrangement complained of was said to be of the very kind which was struck at by the Act as tending to defeat or delay creditors as "by it the debtor conveyed substantially all his property to one of his creditors without any money or other equivalent advantage which would enable him to carry on his business or pay his other creditors."

Judgment.

In the present case it is not as if the debtor, on pay-

(*a*) L. R. 8 Ch. 614.
(*b*) Ante page 10.
(*c*) L R. 9 Ch. 598.
(*d*) L. R. 9 Ch. 752.
(*e*) L. R. 3 Ch. 515.

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ment being demanded, had handed over to his creditors notes to the value of $6000; but the debtor comes down and consults with these creditors, informs them of his position, and he then agrees to sweep away all that he possesses in the world in the way of a stock-in-trade, the only means of carrying on his business, and to hand over to these creditors the whole of the proceeds of this transaction. In these matters the Court looks at the value and nature of the property handed over to the creditor; the object intended by making the transfer, and does not allow the debtor, under pretence of paying one creditor, although he is pressing him, to arrange with a creditor to assist him in committing an act of bankruptcy by virtually handing over to him the whole of his stock, not to be ratably distributed amongst the creditors, but to be taken for his own personal benefit. In the present case we find united almost all those circumstances which are reprobated in the decisions bearing on such questions.

Judgment.

We have the insolvency at the time of the transaction—the knowledge of this fact by both creditors and debtor—a transaction not in the ordinary course of business—no equivalent given for the transfer, a sale of the whole stock-in-trade, the debtor thus deprived of the means of carrying on his business, and its stoppage thus necessitated. It withdrew from the creditors the larger part of the assets of the debtor. The very act, which was to satisfy these creditors, was, at the same time, known to them and the debtor as being an act which was to drive the debtor into the Insolvent Court.

Under the authorities, the payment or satisfaction of a debt, the result of pressure on the part of the creditors, where it is made in the ordinary course of business can stand, although at the time the debtor be insolvent. It is to be regretted that this is the result deduced from the Act in question, as it opens so wide the door to the accomplishment of that which I think this statute was intended to prevent. While following these decisions to

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the full extent that they have gone, I do not feel that I am bound to extend them so as to include extraordinary transactions such as the present. I am of opinion that the transaction in question is one which clearly contravenes the Insolvent Acts in force in this Province, and as there is no case which goes the length of supporting it, that I am at liberty to set it aside. I therefore declare the transaction one fraudulent within the Acts in question, and order the defendants to pay over to the plaintiff the amount of the cash and notes received, in one month from this date, with interest and the costs of the suit: *Re Wood* (*a*), *Ex parte Hawker, Re Keely* (*b*), *Ex parte Bolland Re Cherry* (*c*), *Ex parte Tempest* (*d*), *Ex parte Blackburn* (*e*), *Ex parte Halliday, Re Liebert* (*f*), *Gottwalls* v *Mulholland* (*g*), *Payne* v. *Hendry* (*h*), *McFarlane* v. *McDonald* (*i*), *Hartshorn* v. *Slodden* (*j*), *Strachan* v. *Barton* (*k*), *Allan* v. *Clarkson* (*l*), *McWhirter* v. *Bank* (*m*), *Campbell* v. *Barrie* (*n*), *Nunes* v. *Carter* (*o*).

Judgment.

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[NOTE.—The case has since been reheard at the instance of the defendants, and now stands for judgment.]

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(*a*) L. R. 7 Ch. 302. (*b*) L. R. 7 Ch. 214. (*c*) 7 L. R. Ch. 24.
(*d*) 6 Ch. 70. (*e*) L. R. 12 Eq. 358. (*f*) 8 Ch. 283.
(*g*) 3 E. & A. 194. (*h*) 209. (*i*) 21 Gr. 319.
(*j*) L.R. 2 B. & P. 582. (*k*) 11 Ex. 647. (*l*) 17 Grant. 570.
(*m*) 17 Grant 480. (*n*) 31 U. C. R. 279. (*o*) L. R. 1 P. C. 342.

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## BOUSTEAD v. WHITMORE AND WIFE.

*The Married Women's Property Act—Demurrer—Parties—Husband and wife.*

In a proceeding against a married woman to obtain a conveyance of property vested in her, it is not necessary to join her husband as a party. Where, therefore, a trader in contemplation of insolvency had purchased lands, the conveyance of which he took in his wife's name, with the fraudulent design of withdrawing part of his estate from his creditors, and thereupon a bill was filed by the official assignee for the purpose of obtaining a conveyance or sale of the property, to which bill the husband was made a party defendant, the Court allowed a demurrer thereto by the husband, on the ground that he was not a necessary party.

Statement.

This bill was filed by *James B. Boustead* against *John A. Whitmore* and his wife, setting forth that the plaintiff was the assignee in insolvency of the defendant, *John A. Whitmore*, and alleging that the insolvent, in contemplation of insolvency, and with the fraudulent design of withdrawing a portion of his estate from his creditors, invested certain money in the purchase of some town lots in Dunnville, and caused the conveyance to be made to the other defendant, his wife; and to raise money to pay the remainder of the purchase money, the husband and wife joined in executing a mortgage for $1,000, and the husband gave two notes of $200 each, one of which he had since paid. The plaintiff prayed for a conveyance to him of the property, or for a sale, subject to the mortgage.

The husband demurred on the ground that he was not a necessary party to the suit.

Mr. *C. Moss*, for the demurrer. There is really no difference between this case and the ordinary one where an insolvent is made a party defendant. The bill here proceeds on the ground that certain property now apparently vested in the wife is in reality the property

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of the husband; and if this be so then every interest which the husband ever had passed to the assignee under the insolvency; and in fact the bill does not pray any relief against the husband. It was therefore quite unnecessary making him a party to the suit. If the Acts relating to the estates of married women (*a*) do not give to the wife an absolute estate, the object of the Legislature in passing these statutes must have proved a failure. *McFarlane* v. *Murphy* (*b*), *Warren* v. *Cotterell* (*c*), and *Walkem's* Married Women's Property Act, p. 37, shew that the wife is enabled to convey without her husband joining.

Mr. *Lash*, contra. It is necessary to have the husband as a party before the Court for the purpose of obtaining a conveyance, or for the perfect operation of a vesting order. Here the conveyance was made by a third party to the wife, and the husband is not a party to it. The particular effect of the 35 Vic. does not apply to the case, as the plaintiff, in effect, is here following money. *Mitchell* v. *Weir* (*d*), *McGuire* v. *McGuire* (*e*), *Merrick* v. *Sherwood* (*f*), *Dingman* v. *Austin* (*g*).

Judgment.

PROUDFOOT, V. C.—This demurrer raises the question whether, under the law as it at present stands, a conveyance by a wife of her real estate is effectual unless the husband join in it, and she is examined under the statutes relating to conveyances by married women; for if not valid without these formalities, then the husband is a proper party to the suit.

By the Ontario Statute, 35 Vic. ch. 16, sec. 1, the real estate of any married woman shall be held and

(*a*) 35 Vic. ch. 16, and 36 Vic. ch. 18, O.
(*b*) 21 Gr. 80.
(*c*) 1 Prac. Rep. N. S. 11.
(*d*) 19 Gr. 568.
(*e*) 23 U. C. C. P. 123.
(*f*) 22 U. C. C. P. 489.
(*g*) 33 U. C. R. 190.

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enjoyed by her for her separate use free from any estate or claim of her husband during her lifetime, or as tenant by the curtesy. And any married woman shall be liable on any contract made by her respecting her real estate as if she were a *feme sole;* and section 9 provides that any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried.

The Con. Stat. U. C. ch, 73, had enacted, that a married woman might hold and enjoy her real estate free from the debts and obligations of her husband, and from his control and disposition, without her consent, in as full and ample a manner as if she continued *sole* and unmarried.

Judgment.

A series of decisions, beginning with *Kraemer* v. *Glass* (*a*), has determined that the estate of the married woman, under this Act, in her real and personal property, is entirely *sui generis:* that while relieving her to some extent from the disabilities under which she laboured at Common Law, it did not invest her with the powers she had over separate estate as recognized in Courts of Equity. The canon of construction applied to the Act by *Draper*, C. J., in *Kraemer* v. *Glass*, and adopted by subsequent judges, being that every provision for the purposes of the Act is a departure from the common law. And so far as is necessary to give these provisions full effect, we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give."

In *The Royal Canadian Bank* v. *Mitchell* (*b*) it was

(*a*) 10 U. C. C. P. 470. (*b*) 14 Grant 412.

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decided that this statute, while it gave to the ordinary equitable estate of a *feme covert* certain qualities for its better protection, which it did not possess before, such qualities being incident to a separate estate, and sufficient, probably, if found in a private instrument to constitute a separate estate; yet that, upon a proper construction of the whole Act, certain qualities incident to a separate estate are withheld; and, what is all important among them, that quality upon which the decisions making the separate property liable for the married woman's contracts is founded, viz., the right of alienation.

In arriving at this conclusion the learned Judge, the present Chancellor, was influenced by the fact that another Act, (Con. Stat. U. C. ch. 85), passed the same day, required the husband to be a party to any conveyance of real estate made by his wife; and that the Act, ch. 73, retained the estate of the husband as tenant by curtesy, (and perhaps a joint estate conferred by the marriage under sec. 13: *Emrich* v. *Sullivan* (*a*), per *Draper*, C. J.); both of these being inconsistent with the notion of separate estate as recognized in the Courts, it being of the essence of such estate that the husband should have no interest, and that the wife should have the power of aliening or charging without his consent. It has also been held that ch. 73 did not alter the power of a married woman to make contracts; she was not enabled to bind herself while a *feme covert* more than she could before it was passed. *Kraemer* v. *Glass*, supra, *Wright* v. *Garden* (*b*).

Judgment.

If the 35 Vic., ch. 16, (O.) has made the wife's estate a separate estate; if it has enabled her to make contracts; and if it has deprived the husband of any interest in her estate, then, the reasons for these decisions failing, these cases will be no authority in support of this bill.

(*a*) 25 U. C. R. 105, 107.

(*b*) 28 U. C. R. 609.

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This statute seems to me to strike at all these reasons. For while the former Act only declared that she should hold and enjoy her real estate free from the debts and obligations of the husband as if she continued sole and unmarried, this Act declares that she shall hold and enjoy it for her *separate use;* and she is to hold it free from any estate of the husband during her lifetime, or as tenant by the curtesy, thus depriving him of any interest in her estate; and it expressly clothes her with the power of making contracts respecting her real estate as if she were a *feme sole.*

Judgment.

The Act was passed, as its title states, to extend the rights of property of married women, and must be taken to have conferred an extended estate beyond what the construction of the Con. Stat. ch. 73 gave them. The Con. Stat. ch. 85 was applicable only to such estates as married women then had, and required their husbands to be a party to the conveyance. But it cannot be considered as applying, and indeed it was not intended to apply, to the estate created by the 35 Vic. ch. 16, (O.) if that estate be different from what they previously had.

This last statute, depriving the husband of any estate in the wife's lands, enabling her to hold it to her separate use, and empowering her to make contracts regarding it, appears to me to bring her estate clearly within the cases cited by the Chancellor (*a*), establishing what is to be considered separate estate. And there is no restraint on her power of alienation.

After some fluctuation of opinion it has been finally decided that a married woman, when not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation of that estate by instrument *inter vivos* or will (*b*);

(*a*) 14 Gr. 416. (*b*) Taylor v. Meads, 4 DeG. J. & S. 597.

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and for a conveyance *inter vivos* it is not necessary that the instrument should be executed in the manner required by the Act for the abolition of Fines and Recoveries in England, to which our Married Woman's Real Estate Act (*a*) is equivalent. The qualified power of devise given by ch. 73, sec. 16, applied to the peculiar and limited estate given by that Act, but did not restrict her power to devise separate estate,—as the 34 & 35 Henry VIII. ch. 5, sec. 14, declaring wills of married women of any lands to be void, was held not to apply to separate estate, which was a creature of equity and unknown at the time of passing the Act. But the clause (*b*) has been since repealed (*c*).

In the case of *Taylor* v. *Meads* the legal estate was in trustees, and the disposition of the estate was of an equitable estate. But the same principles apply whether the legal or equitable estate be vested in the wife. The interposition of trustees is not necessary for the creation of separate estate (*d*).

Judgment.

But it was contended that the 36 Vic. ch. 18 (O.), in regard to the conveyance of real estate by married women, has the same effect upon the 35 Vic., ch. 16 (O.) as the Con. Stat. ch. 85 had upon the Con. Stat. ch. 73, and that her estate can only be alienated by a deed executed with the solemnities required by it. The second section, interpreting the term *real estate* as including any estate, right, title, or interest, whether legal or equitable, would seem wide enough to comprehend a separate estate of either kind. But by the 11th section the powers of conveying given by that Act should not impair or affect any powers which, independently of that Act, might (either by statute, contract, or settlement,) be vested in or limited or reserved to her,

(*a*) Con. Stat. ch. 85.
(*b*) Ch. 73, sec. 16.
(*c*) 36 Vict. ch. 20, (O.)
(*d*) *Peachey* on Settlements, 260.

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so as to prevent her from executing such powers in any case, except so far as by any conveyance made under that Act she may be prevented from so doing in consequence of such powers having been suspended or extinguished by such conveyance. The original of this clause is probably the 78th section of the 3 & 4 Wm. IV., ch. 74, the Act for the abolition of Fines and Recoveries, but which does not contain the words within brackets, shewing that the draughtsman of the 36 Vic. ch. 20 had, in his view, not only the ordinary case of powers created by contract or settlement, but also those created by the 35 Vic. ch. 16. The effect of this clause appears to be to exempt from the operation of the Act all estates of married women over which powers had been given to them by the 35 Vic. ch. 16.

Judgment.

It was said, if this were the true construction, the Act would be nugatory if the estates given by the former Act were to have the quality of separate estate. But it is to be recollected that the former Act, sec. 1, so far as this question at least is concerned, applies only to marriages which take place after the Act was passed—*Dingman* v. *Austin* (*a*)—thus leaving a large field for the operation of the 36 Vic. ch. 20. I think this clause means to leave the married woman's power of alienation unfettered by requiring the consent of the husband. This intention is expressed by the first part of sec. 11; but, as a woman might choose to convey her estate with the consent of her husband and with the formalities required by the Act, the latter part was added that, if she did so, she should not have power to convey it alone independently of that Act.

The power given to the married woman to make contracts in regard to her real estate affords a strong argument in favour of this construction. She may, without

(*a*) 33 U. C. R. 190.

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the sanction of her husband, and it may be against his will, agree to sell her real estate; she may determine the price, and agree upon the terms of payment, and for these the most material points in which, if any protection were required, it would have been given; and if the Legislature deemed her capable of going so far in the disposition of her property, it is not too much to assume that, for the merely ministerial act of making a conveyance, they did not mean to incumber her with requiring a needless assent, an inane formality. The examination of a married woman was to protect her from the coercion or fear of coercion of the husband, and according to the construction contended for, this would only apply to the formal execution of the deed, not to the vital and essential thing, the agreement to convey. I am inclined to go further and to think that if it were necessary the husband should join, the statute having given her the power to contract, she could apply to the Court to compel him to execute the deed.

Judgment.

It was then contended that the 7th section of 35 Vic. ch. 16, providing that the Act should not apply to money deposited or investments by a married woman of her husband's money made in fraud of his creditors, but that the money so deposited or invested may be followed as if the Act had not been passed, took the case out of the operation of the Act, and that it had to be recovered by a suit against the husband and wife. The 5th and 6th sections had empowered the wife to become a stockholder or member of any bank, &c., as effectually as if she were a *feme sole*, and to make deposits of money in her own name in any bank; and the 7th section was intended to prevent her making these powers an instrument of fraud. It might fairly be limited to the kind of investments specified in the 5th and 6th sections, viz., investments in stock and deposits in banks. But I do not think it necessary to decide this, as the 7th section applies in terms only to

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investments made by the wife, while the bill in this case alleges the investment to have been made by the husband: that *he* formed the fraudulent design, and that *he* carried it into effect.

The 9th sec. of 35 Vic. ch. 16 permits a married woman to be sued alone in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried; and this has been held to sanction a suit against her to set aside a fraudulent conveyance made by the husband to her. *McFarlane* v. *Murphy* (*a*). This case is perhaps only an authority where no conveyance is required from the wife. Here a declaration that the deed is void would re-vest the estate, not in the husband, but in the vendor, so that a conveyance is required from the wife. The charge in the bill is, that after the conveyance was made to the wife she joined with her husband in a mortgage of it, so that she must be taken to have accepted the estate. But there is no charge that she was a party to the fraud or cognizant of it. I do not think this a sufficient allegation of a wrongful act to constitute a tort for which she might be sued alone.

Judgment.

*McFarlane* v. *Murphy* decides, however, that "conformity" is no longer a reason for joining the husband and wife in a suit.

I was then asked to assume that the defendants were married before the passing of the Act 35 Vic. ch. 15, when, according to *Dingman* v. *Austin*, they would not be subject to its provisions. It is not so alleged in the bill, and as it is a material fact, I do not think I can import it into the bill.

*Per Curiam:* Allow demurrer with costs, but if desired plaintiff to have leave to amend.

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(*a*) 21 Gr. 80.

## HOWLAND v. MCLAREN. 1875.

*Mortgage—Trustee and cestui que trust.*

A mortgage was created by *D*, in favour of two brothers, who executed an agreement apportioning the amount secured between them, and afterwards joined in an assignment of the security to *M.* in trust, as to the first instalment, to pay the same equally to the mortgagees, one of whom, *J.*, subsequently conveyed his interest in the mortgage to *H.* (the plaintiff), for the benefit of creditors. The other mortgagee subsequently acquired the equity of redemption, went into possession of the premises, and succeeded in satisfying the amount of the mortgage money other than the first instalment thereof. *M.* executed a discharge of the mortgage under the statute, declaring that *D.* had paid all moneys secured by the mortgage. In fact *D.* never paid any portion of the money, and the first instalment never was paid by any one, and *J.* was indebted to his co-mortgagee to a greater amount than his share of the first instalment would come to. *M.* died, and a bill was filed against his personal representatives by *H.* calling upon them to pay the share of the first instalment coming to *J.* Under these circumstances the Court *held* that the estate of *M.* was bound to make good the amount to which *J.* was proved to have been entitled, although no want of *bona fides* could be imputed to *M.*

April 10.

Statement.

*John* and *Jacob Cummer* being owners of a certain mill property in the Township of York, sold to one *Dixon*, and took from him a mortgage on the same property, bearing date the 11th day of October, 1856, securing £3,250, part of the purchase money, payable as follows: "The whole sum of £3,250, in seven annual instalments. The first six annual instalments, of £500 each, and the remaining instalment of £250, with interest at 6 per cent. per annum on the said sum of £3,250, to be paid with each instalment on or before the first day of September in each and every year, until the whole sum remaining due, with interest as aforesaid, is fully paid."

By agreement, under seal, dated March 17th, 1857, after reciting the said mortgage, and the mode of payment of the moneys thereby secured, *John* and *Jacob Cummer* agreed between themselves "that the said

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*Jacob Cummer*, out of the said sum of £3,250, shall be entitled to receive the sum of £1,889 1*s.* 3*d.*, and interest, as mentioned in the said mortgage to be paid thereon, and the remaining £1,360 18*s.* 9*d.*, and interest as aforesaid on the said sum, shall be the amount the said *John Cummer* shall be entitled to claim in the said mortgage." And it was thereby further agreed between the same parties "that each and every payment, and interest, as it falls due, and paid, shall be divided between the parties in proportion to the claims of each party aforesaid, or to their heirs, executors, administrators, or assigns, respectively."

Statement.

Subsequently the late *William P. McLaren*, deceased, agreed to purchase the mortgage from *John* and *Jacob Cummer*, as agent and trustee for one *Samuel Marshall*, and special terms of purchase were agreed on; and by assignment, dated June 19th, 1857, made by *John* and *Jacob Cummer*, of the first part, and the said *McLaren*, of the second part, after reciting the mortgage, and the proviso therein for redemption, *John* and *Jacob Cummer* assigned the said mortgage to *McLaren*, in consideration of £3,250 upon the following trusts: "Upon trust to call in, receive, and take the said principal sum of money and interest as the same, and the several instalments thereof mature and become due; and upon receipt of the sum of £500, and the interest due upon the said indenture of mortage on the 18th day of September ensuing the date hereof, to pay the same to the said parties of the first part, their executors, or adminstrators, to their own use, and upon receipt of each and every the remaining instalments and interest due and to mature upon the said indenture of mortgage, to pay the same to * * the said *Samuel Marshall*, his executors and administrators or assigns, or to such person or persons as he or they shall, in writing, direct or appoint; and upon the further trust, after the payment of the said principal money and interest to sign and exe-

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cute all and every necessary release or other discharges of the said indenture of mortgage." And the said *John* and *Jacob Cummer*, by the same instrument, covenanted with *McLaren*, "that in case the *five last instalments* and interest, secured by the said mortgage, or any part thereof, shall not be duly paid at the times in the said indenture of mortgage appointed for payment thereof, then, and in every case of such default in payment thereof, the parties of the first part, or one of them, or one of their heirs, executors, or administrators, shall and will, on demand, well and truly pay the said instalments and interest to the said party of the second part, his executors, administrators, or assigns."

By an instrument, dated 2nd March, 1858, *Jacob Cummer* assigned to the plaintiff, for the benefit of creditors, *inter alia*, whatever might be payable to him under the said mortgage and assignment, and by virtue of this assignment the plaintiff instituted these proceedings. Statement.

On the 29th October, 1863, *McLaren* executed a certificate of discharge of the said mortgage in the usual form, which was duly registered shortly after this date, in which he certified that *Dixon*, the mortgagor, had paid the mortgage money to him in full. It appeared in evidence that this was erroneous, that in fact *Dixon* had not paid anything upon the mortgage, but that *John Cummer*, having acquired, shortly after the date of the mortgage, the equity of redemption of *Dixon*, went into possession, and whatever was in fact paid upon the mortgage appeared to have been paid by *John Cummer*.

It appeared also in evidence that in September, 1858, after the assignment from *Jacob Cummer*, the plaintiff wrote to *McLaren*, giving him notice of his claim as assignee of *Jacob Cummer* to a portion of the moneys payable on the mortgage, and also called upon him, and verbally demanded payment of the amount, to which

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communications *McLaren*, by letter first, and subsequently verbally, stated to the plaintiff that he had received nothing on the mortgage up to that time.

*McLaren* departed this life in 1866, having made a will appointing the defendants *Jane McLaren* and *Richard Juson* his executors.—*Richard Juson* died pending this suit.

*John Cummer* died in 1868, before the institution of this suit, having made a will, by which he appointed the defendants *William Cummer* and *Arthur L. Willson* his executors, and this suit was brought by the plaintiff as assignee of *Jacob Cummer* against the surviving executrix of *McLaren* and the executors of *John Cummer*.

The remaining facts appear fully in the judgment.

Mr. *Fitzgerald*, Q. C., and Mr. *Arnoldi*, for the plaintiff.

Mr. *Blake*, Q.C., for the defendant *McLaren*.

Mr. *C. Moss*, for the executors of *Cummer*.

The points relied on appear in the judgment of

April 21. Judgment.

SPRAGGE, C.—*John* and *Jacob Cummer* were vendors, to one *Dixon*, of certain mill property in the township of York. A mortgage from the purchaser to the two vendors was made to secure payment of £3250 purchase money, which was payable by instalments. The first instalment, which was for £500, was payable, with interest on the whole purchase money, on the 1st of September, 1857. On the 17th of March, 1857, *John* and *Jacob Cummer*, by agreement reciting the mortgage, apportioned between themselves the mortgage money which each was to receive; and it was thereby agreed that

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*Jacob* should receive £1889 1s. 3d., and *John* the balance, being £1360 18s. 9d., each with interest in proportion.

By indenture of 19th June, 1857, the *Cummers* assigned their mortgage to *William P. McLaren*, the consideration expressed being the whole mortgage debt; and with this trust as to the first instalment and interest viz., to pay the same to the *Cummers;* and it is in regard to *Jacob's* share of this first instalment that the question in this suit arises.

By instrument of 2nd March, 1858, *Jacob Cummer* assigned to the plaintiff in this suit, for the benefit of creditors, *inter alia*, what might be payable to him under the mortgage from *Dixon*.

Judgment.

On the 29th October, 1863, *McLaren* gave a statutory discharge of the mortgage, stating it to have been paid by *Dixon*, the mortgagor. This was erroneous, the mortgage not having been paid by *Dixon;* and I think the proper conclusion from the evidence is, that the first instalment—that payable to the *Cummers*—was not paid at all. Mr. *Fitzgerald's* contention is, that whether paid or not, *McLaren* was, and his estate is liable for the amount; that it was the duty of *McLaren*, as trustee, to enforce payment; and that by discharging the *Dixon* mortgage he destroyed the security. And *primâ facie* this would appear to be correct.

The answer made to this is, that nothing is in fact really payable to *Jacob*, and would not be, if he had made no assignment; and that the plaintiff can only be entitled to what *Jacob* would have been entitled to. By the assignment from the *Cummers* to *McLaren*, they guaranteed payment to him of the whole mortgage debt, payable by *Dixon*, (with the exception of the first two instalments, the first of which was to be paid to them-

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selves). The defendant's case is, that the first instalment was never paid at all; and that the subsequent instalments and interest were paid by *John Cummer* to *McLaren;* and as some proof of this, a number of papers are produced by the executors of *John Cummer*, purporting to be receipts by *McLaren*, for moneys paid by *John Cummer*, on account of the *Dixon* mortgage, one of them being for $2169, dated 19th March, 1863, and stated to be in full of the mortgage debt and interest.

The facts appear to be, that *Dixon* did not succeed in his business; that he kept the mill for awhile,—a year or less; and that *John Cummer* then went into possession. A conveyance of the same property is put in, purporting to be from *John Cummer* and wife to *Franklin D. Cummer*, son of the grantors, the consideration being natural love and affection. It is dated 21st September, 1863; and so if the receipt of *McLaren* of the same year be correct, after full payment by *John* of the mortgage debt. A conveyance from *Franklin D. Cummer* to *James Cooper*, dated 9th April, 1868, of the same property, is also put in, the expressed consideration being $7000. It is alleged that *Dixon*, having failed in business, threw up his purchase and made a conveyance of the property to *John Cummer;* but such conveyance is not put in or proved, nor is its absence accounted for. It should be, if it exists, among the title deeds produced by *Cooper*, who is the present owner of the land. The contention on behalf of the defendant is, that the property was of less value than the mortgage debt,—and there is some evidence that it was so; that *John Cummer* made all the payments that were made to *McLaren;* and that he did so in virtue of his guarantee with *Jacob*, for payment of the mortgage debt to *McLaren*, (the guarantee being of the last five instalments, the instalments payable in 1857 and 1858 not being guaranteed); that under these circumstances the estate of *John* has claims upon *Jacob*, such claims being for the proportion

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of the guaranteed debt payable by *Jacob*, but actually paid by *John*, subject to be reduced by the value of the property obtained by *John*.

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As to the defendant's contention. *John* paid, it is said, under his guaranty. He was or assumed to be owner of the equity of redemption; did he pay in that character, or if he did, does it make any difference as between himself and *Jacob?* They two received from *McLaren* the whole mortgage debt, less the first instalment, *i. e.*, they received £2750, or, as *L. A. Cummer* says, £2500, and guaranteed £2250. That was the principal sum paid by *John* to *McLaren* in virtue of his guaranty,—of that, the larger proportion was payable by *Jacob*, say in round numbers, £1500,—so that apart from *John's* possession and other considerations, this latter sum would be a debt from *Jacob* to *John* for money paid on his account, arising out of their joint liability, which sum should have been provided by *Jacob*. Suppose nothing had ever been obtained by *John* out of the mill property; suppose, *e. g.*, eviction by a better title, and *John* to have paid £1500, which was payable by *Jacob*, there would be that debt as between *John* and *Jacob*, would that affect the trust as between *Jacob* and *McLaren*, taking it that he did not receive it, as probably he did not, but is liable, having destroyed the security? *McLaren's* answer, in the case I have supposed, would be, Nothing is coming to *Jacob*. Why? Because he owes a larger debt to *John*, and *John's* estate makes no claim upon him. Can it be put in this way? *McLaren's* default, if any, is in not enforcing payment of this first instalment from *Dixon* or from *John*. Assume that *Dixon* did not pay, having failed in business, and that *John* did not pay because he was not mortgagor, and partly because as to part he was to receive, it was no reason by itself why he should not pay the balance, if otherwise liable to pay it. Take it that *John* took the property, he took it subject to the mortgage, so, was to

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pay what he was to receive, he was bound to pay the difference, which difference was to go into the hands of *Jacob;* and *McLaren* did not fulfil his trust in not exacting from *John* that difference. For what purpose? To pay over to *Jacob.* Suppose *Jacob* had then promptly called upon *McLaren* to demand this payment before any counter claim for money paid under the guaranty pay the mortgage debt. Assume that he was not bound had arisen, he would have been in the right. The trust as to that instalment, as well as to the others, was to call it in. There was no personal liability on the part of *John* in respect of it, though as between himself and *Dixon* he may have been the party to pay. *McLaren* could, therefore, have enforced payment (*Dixon* having failed) only indirectly by foreclosure. But it does not seem that he called upon *John Cummer* to pay at all, but contented himself with receiving from *John* the instalments payable to *Marshall.* The correspond-

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ence between plaintiff and *McLaren* on 1st and 2nd September, 1858, is material. *McLaren* then said that nothing had been paid on the mortgage—this, in answer to plaintiff's inquiry as to the instalments in question; and says that *John Cummer* had recently called and requested delay. At that date the first instalment, payable to *Marshall*, had just fallen due, 1st September; and it was not guaranteed. Is not the inference that *John* called, because he had acquired the mill, and was the party to pay. This was, however, no answer to plaintiff's application, unless the delay asked was for time to pay the first instalment—that due a year before. The parties were probably at cross purposes; but the plaintiff could not know that. He would properly infer the payment was to be on the account he inquired about. Nine days after *McLaren's* letter he received $660 from *John Cummer* (receipt 10th September, 1858.) This must be taken to be the first payment made (unless there was a previous payment by *Dixon*, in which case it would be on the first instalment, and applicable to pay the *Cummers.*) The

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receipt is general, "being on account of *Wm. Dickson's* mortgage assigned to me in trust." It is not indorsed on the mortgage, which we have. There is no evidence of any application by payer or payee, and the law would apply the payment to the elder debt; and assume that it was so applied by *McLaren*, it being his duty, as trustee to *Jacob* and *Jacob's* assignee, the plaintiff, so to apply it, was there not then, at that date, $660 received by the trustee, *McLaren*, which the law must appropriate as a payment on account of the first instalment. Must it not be assumed, also, that it was paid on account of what was owing to *Jacob*, as *John* would not pay that which he was entitled to retain? *McLaren*, ten days before, had notice that plaintiff was assignee of *Jacob's* interest in that instalment, and was then trustee for plaintiff to pay to him that amount. His plain duty was to have at once paid over that sum to the plaintiff. I do not see how the subsequent dealings of the parties can affect the right of the plaintiff to receive that sum. The next payment is different; it is of $100, date 1st March, 1859, and expressed to be interest at 10 per cent. "on instalment of £500 on mortgage guaranteed by him due 1st September, 1858," and is signed by *McLaren*, "in trust for *S. Marshall.*" In truth that instalment was not guaranteed by *John Cummer*. The interest reserved on the mortgage was 6 per cent.; the sum paid was probably six months interest, which the parties agreed should be at 10 per cent. on the instalment due six months before. The payment is in terms appropriated.

Judgment.

The next receipt produced is dated 23rd May, 1859, and is for $2498.20, being for instalment and interest payable 1st September, 1859, with a rebate of interest "on prepayment." It is expressed to be on instalment guaranteed by him; and in fact the instalment falling due the following September was guaranteed by *John Cummer*. It must have been about the date of this payment, according to the evidence of the plaintiff, that

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he saw *McLaren* in Hamilton on the subject of the claim of which he was assignee, when *McLaren* was, as he said, very reticent, and plaintiff could get little or nothing from him, and *McLaren* referred him to his solicitor. The plaintiff fixes the date of this at early in 1859. There is no receipt produced for the instalment payable 1st September, 1858; but the inference from the other receipts produced is, that it was paid, and by *John Cummer*.

Another payment was made in anticipation, as appears by a receipt for $1300, dated 26th March, 1860, which is expressed to be on account of instalment due 1st September following.

It is unnecessary to follow the remaining payments. *McLaren* appears to have accepted them, from time to time, in various amounts, and the mortgage was finally paid off some six months before it fell due; or at least it is so expressed in *McLaren's* receipt of 19th March, 1863.

Judgment.

I have noticed some of the earlier payments more particularly, because they appear to me to indicate neglect, on the part of *McLaren*, to call for payment of the first instalment after notice of plaintiff's claim. The trust is, "to call in, receive, and take," the instalments. There is no suggestion that *John Cummer* was not able to pay, but every indication that he was. *McLaren* was trustee for two debts. He seems to have ignored the older debt, though notified of it as well in writing as verbally; and to have received a number of payments, some of them in advance, on account of the later debt, without any effort, so far as is shown, to perform his trust as to the older debt, and at last he destroys the security. I think the proper conclusion, from the evidence, documentary and oral, put in, is, that with due diligence he could, after being notified of the assign-

ment to the plaintiff of the claim of *Jacob Cummer*, have obtained payment of it from *John;* and that he cannot set up, against that claim in the hands of the plaintiff, the equities which he now says exist between *Jacob* and the estate of *John*. I doubt, indeed, if the payments made by *John* were in respect of his guarantee. Out of the ten receipts produced by his executor, only three are expressed to be so,—one, as I have pointed out, erroneously. I take it that it was by accident that any were so expressed, and that in fact the payments were made by him by reason of his ownership of the equity of redemption, though it is probable that he may have taken the place off the hands of *Dixon* because he had guaranteed payment of a large portion of *Dixon's* mortgage; and so it may be said that the existence of the guarantee was indirectly the occasion and reason of the payments.

His reasoning would be, "I was forced into the position of acquiring the property by the existence of the guaranty; a loss was the consequence; it could not be avoided; a proportion of the loss should fall upon *Jacob*." Suppose there had been default, the holder of the mortgage might have filed his bill against *Dixon* for sale, and the *Cummers* as sureties; and obtained an order against them for payment of deficiency; and if *John* had paid more than his proportion, he could look to *Jacob* to make it good. But for the assignment to the plaintiff, this would appear reasonable as between *John* and *Jacob Cummer;* but *John* has made no such demand. He may have chosen to forego it. *John* also makes no demand upon the estate of *McLaren*. I do not see that he has any to make; and if he has any, and chooses to forego it, it cannot better *McLaren's* position as between him and his *cestui que trust*. It may be said that it would have been unreasonable for *McLaren* to call upon *John Cummer*, when the first instalment fell due, to pay it; and that if *John* had been so called

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upon at that time, he might reasonably have refused to pay it, and would probably have done so. To the extent of *John's* own share in the first instalment and interest, this may be granted; but as to the share of *Jacob*, how is it an answer? It was *McLaren's* plain duty to call for that payment from *John Cummer*, if then owner of the equity of redemption. *John* could excuse himself as to his share, as the hand to receive as well as to pay; but as to *Jacob's* share, the only excuse offered on behalf of the trustee is a speculation as to some objection that *John* might have made if called upon. It is by no means certain that he would have made any objection. The property had been sold but recently before for the whole sum that he was called upon to pay; and there was no plain manifest loss; and he took the property itself, and used it as his own without testing or ascertaining in any way at the time whether there was or would be a loss; and now at this day, it is only a matter of opinion whether *John* did not obtain value for all that was to be paid to *McLaren*. *McLaren* could only say now that *John might* have objected to pay; he might or he might not; and if he had, it is by no means certain that his objection would have been a valid one. He certainly ought to have called upon *John* to pay that which, as a trustee, he was to receive. And it was especially his duty to do this, when he was called upon for this very money by the plaintiff; and if for any reason *John* had refused to pay, he should have at once communicated the refusal and the reason of it to the plaintiff, so that the plaintiff might thereupon have taken such steps as he might be advised for obtaining payment. *McLaren's* conduct under the circumstances was strange and unbusinesslike. It is difficult to account for it, unless under the idea that his mind was so absorbed in other matters as to give but a loose and inaccurate attention to the business of this trust. I acquit him of any intentional breach of duty; but the evidence shews that, from which breach of duty must be inferred. If his defence

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is, that his breach of duty did not result in loss to his *cesti que trust*, he should shew that clearly and unequivocally. *Primâ facie* in this case the money might have been got in. He has not shown that it could not, or that it ought not. He has set up a sort of *jus tertii* in the estate of *John;* but I am of opinion that what he has shewn does not relieve him from his *primâ facie* breach of trust. Nor do I think that an inquiry, assuming that it would result in shewing that *John* took the mill property at a loss—that is, that its value was in fact less than what he had to pay for it,—should have the effect of relieving him from his breach of trust.

In my opinion the plaintiff is entitled to a decree with costs.

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## CURRIER v. FRIEDRICK.

*Mechanics' Lien Act, 36 Vic. ch. 27, O—Registration of claim—Practice —Marking exhibit.*

A mechanic having erected two separate buildings under two distinct contracts for the owner of the land on which they were built, cannot register a claim for one gross sum in respect of the two; at all events he cannot do so unless it appears on the face of the instrument how much was claimed in respect of each contract.

In registering a claim under the Mechanics' Lien Act the claimant made an affidavit verifying it, and referred thereto as marked "A," but no such mark was upon it: *Held*, that this did not invalidate the registry.

A mechanic, having a claim for the erection of buildings under a contract, assigned his claim to the plaintiff to secure money due to him, who, for the purpose of enabling the mechanic to register under the act, reassigned to him: *Held*, that such reassignment enabled the mechanic to make the claim for registry, notwithstanding the equitable right of the plaintiff.

Statement.

The bill in this case was filed for the recovery of money under two building contracts and for extras, and to have

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it declared that the plaintiff was entitled to a lien under "The Mechanics' Lien Act of 1873."

At the hearing, in Ottawa, before *Proudfoot*, V. C., a decree was made to take an account of what was due to the plaintiff, reserving the question whether under the circumstances the plaintiff was entitled to a lien.

There were two contracts made between the defendant and one *McElroy*, a builder: one was in writing, dated 12th December, 1873, for the erection of one building of five tenements, with sheds, kitchens, &c., on a certain piece of land situate on Nicholas street, in Ottawa; the other, for the erection of a cottage on the rear of the same land.

*McElroy* had assigned the money coming to him from the defendant, under the first contract, to the plaintiff, and there being some doubt whether an assignee could register a lien under the Act, the plaintiff assigned back to *McElroy*, who executed the papers for registry, and then re-assigned to the plaintiff.

Statement.

The statement of claim prepared by *McElroy* for registry under the Act, claimed a lien, in respect of the work done in erecting the row of five tenement houses, and the cottage building and kitchen in the rear, and furnishing material, for one sum of $2,988.05. The land to be charged was stated to be lots numbers 11 and 12, on the east side of Nicholas street, in Ottawa.

*McElroy* also made an affidavit, which was annexed to the claim, and which referred to the claim as marked "A.", but no such mark was found on the claim. *McElroy* proved, however, that they were the papers prepared for registry.

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

Mr. *Ward*, for the defendant.

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January 19.

PROUDFOOT, V. C.—I think the claim is sufficiently identified; the affidavit refers to it as annexed; it is sworn to have been the paper prepared for registry, and in this condition annexed to the affidavit; it was registered; the omission to mark it with the letter "A." is not under the circumstances such a defect as should invalidate the registry.

Nor was there anything connected with the assignment to the plaintiff, and the assignment back to *McElroy*, that should affect the lien. It was at most but an equitable right to receive the money that passed to the plaintiff as a security for money due to him by *McElroy*, the legal right to recover it being in *McElroy*, and possibly no necessity existed for the temporary re-assignment to *McElroy*; but it having been so reassigned I think *McElroy* was quite competent to make the claim for registry notwithstanding the equitable right of the plaintiff, for in that case *McElroy* was a trustee for the plaintiff to the extent of the sum to be secured, and I see nothing in the Act to prevent a mortgagor from making the claim; he is still *the person entitled to the claim.*

Judgment.

It was, however, objected that separate statements of the several liens should have been made and the lands severally affected specified; and I think this objection must prevail.

It is impossible to tell from this claim how much is due in respect of the houses and how much for the cottage. There will be no declaration as to the plaintiff's lien; or if the defendant desire it there may be a declaration that the plaintiff has no lien on the land by virtue of the instrument in the pleadings mentioned registered under the Mechanics' Lien Act.

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The 36 Vic., ch. 27, (Ont.,) introduced a great change in the law in favour of mechanics and workmen working upon, or furnishing material to be used in the construction, alteration, or repair of, buildings at the instance of the owner, by giving them a lien, in the absence of a contrary agreement, for the price or value of the work or materials upon the building and the land occupied thereby and usually enjoyed therewith, if the claim were registered as provided by the Act. But there is nothing in the Act to shew that it was intended to give a lien upon one piece of property for work performed upon another. If there be several contracts for the erection of buildings, I apprehend there must be a distinct registration as to each, or at all events there must appear in the instrument registered data from which it it may be ascertained how much of the lien is applicable to each. Suppose an agreement to repair an existing house to the value of $100, and an agreement between the same parties for the erection of a new building of the value of $1,000, can it be contended that by registering one claim for $1,100, the workman might resort to either or both for its satisfaction?

Judgment.

I find nothing in the Act to justify any such contention. Nor does the fact of the buildings being upon the same lot offer any reason for it. The buildings are distinct, the land occupied by them is distinct, and that usually enjoyed with them must, for this purpose, also be considered as distinct.

With every disposition to construe this Act favourably for the workman, to construe it in the manner contended for would be to extend it far beyond the intention of the Legislature, and would lead to the perpetration of great injustice.

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## CRONE v. STRUTHERS.

*Mechanics' Lien Act.*

The lien given to mechanics under "The Mechanics' Lien Act" of 1873, 36 Vic., Ch. 27, (O.), has not the effect of giving a lien to parties who furnish materials to the mechanic for the purpose of executing the contract entered into by him with the owner of the land.

May 26.

This bill was filed under the Mechanics' Lien Act of 1873. The defendants were the proprietors of land upon which one *Walker* contracted with them to build for them two houses, *Walker* finding the materials. The plaintiffs furnished certain building materials to *Walker* for the purpose of their being used in the erection of these buildings—these materials were furnished upon the credit of *Walker*. The contract between *Walker* and the defendants contained this provision: "Payments will be made to account of the contracts as the works proceed, on certificate from the architects that the same is due, but such payments shall not at any time exceed eighty-five (85) per cent. of the contract value of the work executed and materials deposited on the ground, and the balance of fifteen (15) per cent. within one month after the works shall have been completed and taken off the contractor's hands, by certificate from the architects to that effect."

Statement.

A motion was made by Mr. *Fleming* for an injunction to restrain the defendants from making use of the materials so furnished by the plaintiffs and from intermeddling therewith; referring to Exp. *Conning In re Steele* (*a*); *Krehl* v. *The Great Central Gas Co.* (*b*); *Brown* v. *Bateman* (*c*); *Re Mackay In re Jeavons* (*d*.)

Mr. *Mortimer Clark*, contra, contended there was no

(*a*) L. R. 16 Eq. 414.
(*b*) L. R. 5 Ex. 289.
(*c*) L. R. 2 C. P. 272.
(*d*) L. R. 8 Ch. 643.

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privity between the parties, and that the Act relied on did not afford the plaintiffs any ground for coming to the Court.

June 2.

SPRAGGE, C. [after stating the facts as above]—It is conceded by counsel for the plaintiffs that payments were made by the defendants to *Walker* in accordance with this provision; and that at the time of the filing of the bill nothing was payable by the defendants to *Walker* upon the contract.

I expressed my opinion at the argument that upon these circumstances the plaintiffs' case failed; and I added that if, as Mr. *Fleming* pressed upon me, the Act gave a lien to the plaintiffs for the materials furnished by them to *Walker* it would operate most unjustly upon the defendants. Mr. *Fleming* referred me to some cases which I have examined, and I remain of the same opinion.

Judgment.

The question is not whether the contract between *Walker* and the defendants operated to pass a legal interest, or an equitable interest, or any interest in the materials in question to the defendants. Mr. *Fleming* admits that by the plaintiffs' sale and delivery to *Walker* he acquired a legal title to them; but denies that any interest passed to the defendants, and claims that the plaintiffs have a lien upon them by reason of their not having been paid for by *Walker*.

The question is not between an execution creditor or an assignee in insolvency, and the owner of the land and building; but the lien of the plaintiffs is the creature of the statute, and must be limited by its provisions Now, the third section seems to me to dispose of the whole question. It provides that the lien shall attach upon the estate, and interest legal or equitable of the owner of the building, &c.; it then limits the claim, in the case of a sub-contractor, and concludes: "And

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shall not in any case attach upon such estate and interest so as to make the same or the owner thereof liable to the payment of any greater sum than the sum payable by such owner to the contractor." The clause is not very well punctuated, but I take the part of it that I have quoted to apply to and to qualify all cases of lien created by the Act. Indeed, without any express qualification, the Courts, I apprehend, would imply one, rather than give a construction that would compel the owner of a building to pay twice over for the same thing; once to the contractor, and then to the person who has furnished materials to the contractor.

I must refuse the application, and it is a case in which, following the Extincteur fire case (*a*), I may properly refuse it with costs.

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## SUNTER v. JOHNSON.

*Will, construction of—Per capita or per stirpes.*

A testator, in 1856, devised certain land to *M.*, and in case of her death without issue, then to the heirs of *C.* & *E.*, "to be equally divided between them." *C.* died, after the testator, leaving five children. *M.* died after *C.*, without issue. *E.* survived at the date of the hearing, having one child living.

*Held*, that the period of distribution was upon the death of the first taker *M.*, so that those were entitled who were then the heirs of *C.* & *E.*, and that they took *per capita* and not *per stirpes*.

March 10.

Statement.

The testator, *Edward Bowland*, by his will, dated 25th of March, 1856, devised two parcels of land—the land in question—to *Maria Bowland*, in terms that would carry the fee. Then followed these words: "But should the said *Maria Bowland* die without lawful

(*a*) 20 Gr. 625.

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issue, then and in that case I give and devise the above mentioned property to the heirs of *Caroline Bowland*, wife of *Charles Sunter*, and the heirs of *Eliza Bowland*, wife of *James Johnson*, to be equally divided between them."

The testator died in April, 1856; *Caroline* died in August, 1859, leaving issue five children, who were still living; *Maria* died in July, 1873, without issue; *Eliza* was still living, and at the death of *Maria* had and still had issue, one child, the defendant, *Bartholomew Johnson*; and the principal question was, whether the children of *Caroline* and *Eliza* took *per capita* or *per stirpes*.

Mr. *S. J. VanKoughnet*, for the plaintiff.

Mr. *Hoskin*, Q.C., for defendant, *Thomas B. Sunter*, in the same interest as the plaintiff.

Mr. *Attorney-General Mowat* and Mr. *Fleming* for the other defendants.

The cases cited are mentioned in the judgment of

March 27.

Judgment.

SPRAGGE, C. [after stating the facts as above set forth]—The general rule, that where the gift is to the children of several persons the children take *per capita* and not *per stirpes*, is well established by a series of authorities, and the cases which are exceptions to the rule have been cases where the gift, or the income of the gift, has been given to the parents and then over to the children, or where, from the terms of the will, it is apparent that the testator intended that the children should take by representation, and not in their own right. I think it clear that in this case the children take in their own right, and that their being described as heirs of *Caroline* and heirs of *Eliza* is merely the

testator's mode of designating what persons should be objects of his bounty. 1875. Sunter v. Johnson.

The terms of the will in *Barnes* v. *Patch* (*a*), are almost identical with the terms of this will. The testator, in an event which happened, left the residue of his estate "to be equally divided between brother *Lancelot's* and sister *Esther's* families," and it was held that they took *per capita*.

In *Blackler* v. *Webb* (*b*), the gift was to a son named, and the children of another son named.

In *Dowding* v. *Smith* (*c*), it was, "To my niece, Miss *Mary Stockdale*, of Piccadilly, and to the children of Mr. *John Stockdale*, to be equally divided." In both cases it was held that the person first named and the children of the person secondly named, took *per capita*. The word "to" before the words "the children of Mr. *John Stockdale*" created at first a difficulty in the mind of Lord *Langdale*, but which, upon consideration, he overcame. Judgment.

The latest case reported is that of *Payne* v. *Webb* (*d*), heard in November last. The testator, after giving pecuniary legacies to sons and daughters, devised and bequeathed the residue in these words: "Unto my said sons and daughters (naming them), and to the children born of the body of *Eliza Hulbert*, deceased, and the children born of the body of *Lucy Hampton*, deceased, to be divided amongst them in equal shares and proportions." The testator left surviving him two sons and three daughters, and children of his deceased daughters, five of one and two of the other. Sir *Richard Malins* thought it was probably the intention of the testator to

(*a*) 8 Ves. 604.
(*b*) 2 P. Wms. 393.
(*c*) 3 Beav. 541.
(*d*) L. R. 19 Eq. 26.

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give to each of his surviving children one-seventh, and to the children of each deceased daughter one-seventh; but he felt bound by the authorities to hold that the five children and the seven grandchildren should take *per capita*, one-twelfth share each. That case and *Blackler* v. *Webb*, and *Dowding* v. *Smith* are much stronger cases than the one before me for holding that the devisees or legatees should take *per stirpes*.

*Booth* v. *Vicars* (*a*), before Sir *J. L. Knight Bruce*, is cited by the Attorney-General: "There was a bequest of a residue to two persons named after the death of the testator's wife, to be equally divided between them share and share alike, if then living; but if dead to go and be equally divided to and amongst the respective next legal representatives of the said *Nicholas Vicars* and *Mary Brown*, share and share alike." The learned Vice-Chancellor held that, *Nicholas Vicars* and *Mary Brown* having died in the lifetime of the testator's wife, their representatives took *per stirpes;* observing: "The word 'representatives' itself almost forces that interpretation; and when you consider that, if one of the two persons mentioned in the will had survived the tenant for life, only a moiety could have gone under the clause of substitution,—that construction seems to be rendered absolutely necessary."

Judgment.

I am also referred to *Alker* v. *Barton* (*b*). There was a bequest of a sum of money to trustees, to pay the interest to the testator's daughter for life, and after her death the bequest was of the same sum to be equally divided among her children and their representatives, share and share alike, and there was a provision for the sum falling into the residue in the event of the daughter dying "without issue or the representatives of such issue." The question was between a child of the daughter and children

(*a*) 1 Coll. 6. (*b*) 12 L. J. N. S. Ch. 16.

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of a deceased child. Lord *Langdale* held that the word representatives meant such children of the issue as could take by representation, and that they took *per stirpes*. The language and provisions of the will in that case were so different from the will before me that it cannot govern this case. I do not find any report of *Alker* v. *Barton*, in *Beavan's* Reports.

As to the period of distribution, I think there can be no question that it was upon the death of the first taker, *Maria Bowland;* consequently that those are entitled who, at the date of her death, filled the character of heirs of *Caroline* and *Eliza*. This is quite clear from several of the cases, and it disposes of the question raised by Mr. *Fleming* (which, however, he did not press), whether the child of *Eliza*—*Eliza* being still living—can take anything. The decree will declare the children of *Caroline*, who were living at the date of the death of *Maria Bowland*, and the child of *Eliza*, living at the same date, entitled each to one-sixth of the property in question.

Judgment.

Nothing has been said about the costs.

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## DELISLE v. MCCAW.

*Trustee and cestui que trust—Practice—Amendments at the hearing.*

Where the whole of the testator's property, real and personal, and the whole control of it, were vested in trustees subject to the trusts declared by the will, it was *held* not necessary to make any of the *cestuis que trust* parties to a suit for the purpose of enforcing a contract of purchase which the testator had entered into during his lifetime.

Where in such a suit the bill did not distinctly set forth the terms and conditions of the sale to the testator, but, there was no doubt what they were intended to be, the Court allowed the bill to be amended at the hearing, and made the decree as asked.

Where at the hearing of a suit to enforce a purchase made by a testator against the trustees under his will, it was made to appear that there were not funds of the estate wherewith to pay the amount of purchase money due, and the widow of the testator offered to purchase, in her own name, the property at a price which was considered beneficial for the estate, a direction to that effect was inserted in the decree, in order to avoid the necessity of a petition being presented to the Court for that purpose, after the usual decree should have been made.

March 10. Motion for decree to enforce specific performance of a contract for the purchase of certain lands entered into by the testator, against the trustees under his will.

The facts sufficiently appear in the head-note and judgment.

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

Mr. *Evans*, for the defendant.

The Chancellor entertaining a doubt at the hearing whether the parties beneficially interested ought not to be made parties, took time to look into the authorities.

Judgment. March 27. SPRAGGE, C.—The doubt that occurred to me at the hearing was, whether it was sufficient to make the trus-

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tees under the will of the purchaser in this case, and not any of the *cestuis que trust* parties defendants. Upon reading the will I find that the whole of the property of the testator, real and personal, and the whole control of it, are vested in the trustees, subject to the trusts declared by the will; and where that is the case, it seems to be the practice not to require any of the *cestuis que trust* to be made parties, the trustees being in that case in a position analogous to that of an executor. *Hanman* v. *Riley* (*a*); *Sale* v. *Kitson* (*b*); and see, also, the language of Sir *Geo. Turner*, then Vice-Chancellor, in *Goldsmid* v. *Stonehewer* (*c*).

The pleadings, however, leave it in doubt whether the plaintiff is not premature in filing his bill. It is filed for default in payment of half the purchase money, and which was to be paid in cash, "so soon" (as the contract expresses it) "as the deed is ready," the balance to be secured by mortgage. This I find from the contract put in. The bill says that the half was to be paid on the purchaser receiving a deed: and is silent as to a mortgage to be given, and it does not allege that any deed was given or executed; but only generally that the plaintiff did, and caused to be done, all things incumbent upon, and required to be by him done, in respect of the contract; but that the testator and the defendants failed "to execute the said mortgage," and to pay the moneys overdue.

Judgment.

I sent for original of bill, and found it to be the same.

The answer of *McCaw* sets up that the conveyance to the testator was never delivered. As to this, there is an affidavit from Mr. *Schreiber*, the plaintiff's agent, that he caused a deed of conveyance, in proper form,

(*a*) 9 Hare App. 40. (*b*) 3 D. M. & G. 119.
(*c*) 9 Hare App. 38.

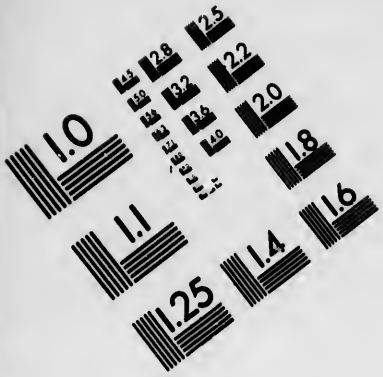



**IMAGE EVALUATION**
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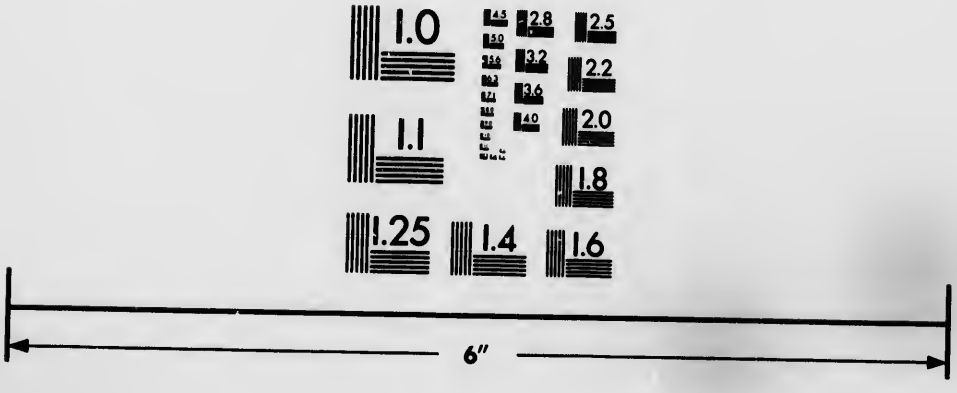



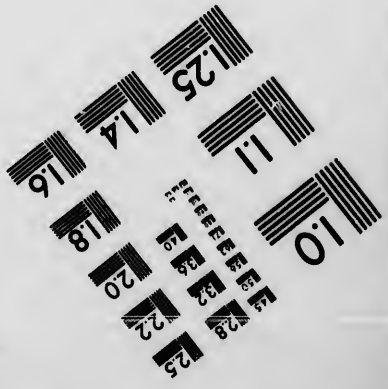


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from the plaintiff to the testator, to be executed, and which was approved by the purchaser's solicitor, and was in his (Mr. *Schreiber's*) hands ready for delivery on payment of half of the purchase money; but the testator failing to perform his contract, paying half the purchase money and giving a mortgage for the balance, the conveyance was not delivered. No doubt they were intended to be contemporaneous, and upon the bill being amended and put in proper shape a decree may be made.

It appears that the testator paid in his life time $420, on account of purchase money, the whole purchase money being $1500.

The present proposition by the widow, is to purchase for $1600; paying off the plaintiff, and paying the balance to the estate of the testator; and from the affidavits of Mr. *Schreiber* and of defendant *McCaw*, who has not funds to pay the purchase money, this would appear to be for the interest of the estate. If a decree were made for the payment of the purchase money, and a petition then presented, embodying such a proposition, it might properly be approved of by the Court; and, this being the case, it may properly be embodied in the decree.

Judgment.

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## HENRY AND HILL v. PINDAR.

*Vendor and purchaser—Misrepresentation—Conflict of evidence—Costs.*

The plaintiffs sought to set aside their purchase of a grist mill from the defendant, on the ground of false representations knowingly made to them by the defendant, and relied upon by them, as to the state of repair in which the mill was, and as to the water supply and the capacity of the mill for grinding. The evidence affirming and denying these representations was equally positive and explicit on either side. It appeared, however, that the purchase was not a hasty one: that the plaintiffs were and professed to be competent judges of the subject matter, one being a miller and the other an engineer: that they examined for themselves and made inquiries: that they were more eager to buy than the defendant was to sell; and that the conduct of the plaintiffs—which under the conflict of evidence was assumed to be the safest guide—was inconsistent with their assertion of a warranty, for they did not at first set it up, but asked to be relieved as a favour, and at one time it was agreed that they should pay $1,000 to be let off the bargain. Under all the facts, which are more fully set out in the judgment, the Court refused to set aside the contract; but, as the evidence tended to shew a want of candour on the defendant's part, and a disingenuous exaggeration of the condition and capacity of the property, the bill was dismissed without costs.

Examination of witnesses at Stratford.

The facts of the case are fully stated in the judgment. January 29.

Mr. *Moss*, Q.C., Mr. *Idington*, and Mr. *McIntosh*, for the plaintiffs.

Mr. *Blake*, Q.C., Mr. *Boyd*, and Mr. *Fisher*, for the defendant.

*Clark* v. *McKay* (*a*), *Dobell* v. *Stevens* (*b*), *Hutchinson* v. *Morley* (*c*), *Leyland* v. *Illingworth* (*d*), *Kerr* on Frauds, p. 35, *et seq.*, were referred to.

(*a*) 33 U. C. R. 583.
(*b*) 3 B. & C. 623.
(*c*) 7 Scott 341.
(*d*) 2 D. F. & J. 248.

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April 21.

SPRAGGE, C.—In the month of June, 1873, the plaintiffs contracted with the defendant for the purchase from him of a mill property in the township of Ellice. The price agreed upon was $5,000 (a considerable abatement from the sum first asked), $1,000 to be paid in hand and the balance on time. On the 24th of the same month an agreement was executed, the $1000 to be paid in hand was so paid, and the plaintiffs were put into possession of the premises. This bill is filed to set aside the whole transaction, on the ground that it was entered into by the plaintiffs upon the faith of representations made by the defendant in regard to the property, the subject of the purchase, which were untrue in fact; and were so to the knowledge of the defendant.

The points upon which it is alleged that untrue representations were made are numerous. They may be divided generally into two classes: one as to the state of repair of the mill which the purchasers either did or might have examined for themselves; the other as to matters of experience; of the latter are the water supply and the length of time that the mill could be driven by water, and the quantity of grist per hour that the mill was capable of grinding.

Judgment

As to the first class, although the truth or falsehood of the representations made were capable of being ascertained by examination; still, if they were made and trusted in, and the purchase made upon the faith of them, and they turn out to be untrue, then, as to them, as well as to representations in relation to matters which were not capable of verification at the time, the vendor cannot hold the purchasers to their bargain. But then the representation must be of a character, and as to matters, which it was intended and expected that the purchasers should receive as actually true, and should act upon,—something beyond mere language of commendation; and there is no doubt that language and

conduct are imputed to the defendant in the evidence of the plaintiffs and of some of their witnesses, which go the whole length that the law requires in order to vitiate a contract. 1875. Henry v. Pindar.

A great mass of evidence has been taken in the case. I do not propose, in disposing of the case, to analyse it: to do so would occupy more time than at present I have at my disposal; and I think it more to the interest of both parties to make an early disposition of the case, especially at this season of the year.

The plaintiff's case is, in relation to the state of repair of the mill, that the defendant prevented such examination of it as they desired; that their proposal for an examination by experts was met by an express warranty as to its soundness. This is sworn to explicitly on the part of the plaintiffs, and as explicitly denied by the defendant.

Judgment.

There are two or three matters, material in the case, which admit of no dispute. It was known to the plaintiffs as well as to most, if not all, of the witnesses that the mill was an old one; had been built a number of years; its exterior, as well as a good deal of the interior, indicated this. Another fact is, that the purchase was not a sudden or hasty transaction. Inquiries with a view to purchase were made on the 9th of the month,—June; they were continued on the 14th,—many inquiries and some examinations took place on the 19th, and the terms of purchase were settled on that day, provisionally upon the result of the working of the mill by steam power on the following Monday. On that day the trial was had, and on the following day the contract was signed. During this interval of fifteen days the plaintiffs and Mr. *Bowes*, the father-in-law of one of them, and who took the greatest interest in the purchase, made inquiries of neighbours and of others acquainted

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with the working of the mill respecting it; the spring indicated by the defendant as supplying a portion of the water power was examined; and the purchasers, to a certain extent at all events, used their own judgment, and availed themselves of the opinion and experience of others in regard to the mill and its working. Another fact is, that the purchasers were not ignorant, unskilled men, in relation to that which was the subject of their purchase. One of them, *Hill*, was a miller; was introduced as such to the defendant; and certainly did not undervalue his own capacity. The other, *Henry*, was an engineer, and was also a carpenter and framer; and this also was make known to the defendant. *Bowes* was a pump-maker, and professed to understand water-springs and woodwork connected with his business; and this was known to the defendant. The purchasers, therefore, were under no disadvantage in their negotiations for purchase; they were competent judges of what they purchased; and did not affect to be otherwise.

Judgment.

It is not inconsistent with all this that they purchased upon the faith of representations made by the defendant, which were untrue in fact; but the circumstances that I have detailed are very material in forming a judgment upon the disputed fact whether they did so purchase. Upon that disputed fact there is great conflict of evidence, and there is a great deal of evidence bearing upon it incidentally.

I will first notice what appeared to me, at the time that evidence was given of it, to be a very material circumstance. It is deposed to by *Bowes* and his wife, and is in substance this—that at an early interview between them and him, *Bowes* mentioned that they had some thought of purchasing a mill near Goderich, but that it was out of repair and would take some time to put it in working order; and that upon this the defendant observed that his mill was in good repair, so that a purchaser

could at once commence work, and make money. The defendant does not wholly deny the conversation referred to, but confines it to the stones, *Bowes* saying that those in the Goderich mill were out of order, and the defendant that those in his mill were in good order; and he added that the machinery in his mill was extra good and extra heavy. 1875. Henry v. Pindar.

The plaintiffs claim that there was an express warranty. It is a circumstance, though not a decisive one upon that point, that the eagerness to purchase appeared to be much greater on the part of the plaintiffs than the eagerness to sell on the part of the defendant. The evidence upon this question of warranty is very conflicting. The safest guide I take to be the conduct of the parties themselves. After testing the running of the mill by steam power on Monday the 23rd, and after the execution of the agreement on the following day, they continued to run the mill on that day; on the next day, Wednesday, they continued running it; and in the morning they were running it at such speed—at what the defendant called in his evidence a terrific rate—that the defendant went to the mill and remonstrated with them. They continued to run it through the following day, Thursday; and it was on the evening of that day that they first expressed a desire to give up the mill. The occasion on which this occurred was, a letter being brought to *Hill* respecting his liability on some notes that he had indorsed. Whether this was the true reason or not, may be a question. It is suggested for the plaintiffs that that the liability of *Hill* on the notes [illegible]rsed was so small that it could not have been the real [illegible]on. It was certainly the reason given,—other reasons were added afterwards, and the plaintiffs again and again pressed upon the defendant their desire and request to give up their purchase; but not for a long time making any complaint against the defendant; on the contrary, saying repeatedly and emphatically that they had no Judgment.

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complaint to make. I will here notice what is said in evidence by *Hill* and by *Steppler* as to what occurred on the Wednesday morning. They represent the defendant to have admitted on that occasion that he had made false representations to them, and to have exulted in having taken them in. It is inconceivable that the plaintiffs should have taken the line of conduct that they did, if this had occurred. The request to be released made first on the evening of the 26th was renewed on the following day, and their tone and manner were the same; they were discouraged and down hearted; *Hill* was in tears; they complained of the "backing out" of some who had promised to assist them with money, but made no complaint that they had been deceived by the defendant. On the following Monday, the 30th, *Hill* was again at the house of the defendant, *Hill's* wife being with him, their plea still being that they could not raise the money to carry on the mill, but still making no complaint against the defendant. Again, about a week afterwards both the plaintiffs were at the house of the defendant; and they were there again on the 12th of July. At these later interviews the terms upon which the plaintiffs should be released from their bargain were discussed, and at last, $1000, the whole of the sum paid by the plaintiffs, being the down payment on their purchase, was agreed upon as the price for the rescission of their contract. The parties do not agree as to how this settlement came to be broken off. The plaintiffs say it was the act of the defendant. If so, they continued willing that $1000 should be the price of the rescission of the contract.

Judgment.

The evidence leads me to think that several reasons induced the plaintiffs to be anxious for a rescission of the contract. They made their purchase with the idea of carrying on business on a much larger scale than it had been carried on by the defendant. He had been described to them as a man of no enterprise, as not at

all "a pushing man;" and they declared their intention to be to carry on business very differently, and not only to grind the grist brought to them, but to purchase wheat, and to use steam more than the defendant had done. To do this, money was necessary, and they had not means at their command, and had difficulty, or said they had, in procuring them. Further, each appears to have supposed the other to be possessed of more capital than he was possessed of. They found, also, that the cost of wood was greater than they had expected, and were told that grist was scarce; and it may be that the actual working of the mill was somewhat of a disappointment to them, though this is not clear, for they seem after two days' working to have expressed satisfaction with it. Be this as it may, they became very anxious to give up the mill, and very urgent with the defendant to take it off their hands, even at a great loss to themselves. The more anxious they were to effect this, the more would they naturally avail themselves of every reason that they could urge upon the defendant for a rescission of the bargain. They say now that the defendant warranted and reiterated his warranty that the mill was sound. The word alleged to be used, "warrant," is a word in familiar use with the class to which these parties belong, and its meaning well understood. It seems to me unaccountable, if a warranty were really given, that these parties, intensely anxious as they were to be rid of their bargain, should not have used the plain argument, that what they had agreed to purchase did not turn out what it was warranted to be, and that they were not bound to keep it; or, supposing that the defects now alleged to be so numerous and so serious were then only imperfectly discovered, it is strange that it should not have occurred to them to examine whether the mill really was what it had been represented to be. They knew the mill was old, and that it had been repaired,—patched up, in fact, in some parts; and it might well be supposed, that upon examination other defects would be made

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Judgment.

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apparent, to which a warranty, if there were a warranty, would apply. Yet these men, instead of asserting a right, instead of charging the defendant with having deceived them, or making an examination to shew that he had deceived them, throw themselves upon his mercy, and attribute their desire to be relieved from their agreement not to any misrepresentation, or any fault on the part of the defendant, but to circumstances with which he had nothing to do.

I cannot help thinking that all this is conduct, on the part of the plaintiffs, so much at variance with the conduct which would almost certainly be the conduct of men who were in the position which they assert was really their position, that, in the conflict of evidence which exists, ought to outweigh their evidence. If the defendant had made the representations they allege, and they had made their purchase upon the faith of them, it is scarcely possible that they could have acted as it is certain from the evidence that they did act. The proper conclusion in my judgment is, that there were not, in the proper legal signification of the term, representations made by the defendant in regard to the state of repair of the mill, upon the faith of which the plaintiffs made their purchase.

Judgment.

There remain to be considered the representations of the defendant as to the water supply and as to the capacity of the mill for grinding. Upon these points, also, there is a conflict of evidence; and as to one of them, the water supply, sufficient time and opportunity for testing it had not occurred. As to the other, the number of bushels per hour which the mill was capable of grinding could have been ascertained; and there is evidence of the plaintiffs having tested it, with a result satisfactory to themselves. There remains, therefore, the one point of the water supply.

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As to the water supply also, there is a conflict of evidence, both as to what representations were made, and as to what the water supply really was; and in connection with the latter was the reference made by the defendant to his insurance of the mill. With respect to that insurance, there would of course be a charge as for an increased risk during the time that the mill was driven by steam power; and the object of the mill owner would be to have it insured for as short a time as possible at the higher rate, consistently with safety, and for as long a time as possible at the lower rate; and such an unenterprising man as *Pindar* appears to have been, would naturally keep his insurance at the lower rate for as large a portion of the year as possible. *Pindar's* own account of what he said, when asked how long the mill would run by water, was, that he could not tell—that he had kept no account—that he had insured it as so running for nine months in the year, as he had to name some time; but that he told them not to depend upon that. And he says in his evidence now, that he thinks that the mill has, upon an average, run by water nine months in the year; denying, at the same time, that he made any representation to that effect. He says he thinks the shortest time that the mill ran in any year was eight months; he says he spoke of an average of nine months as a rough calculation, that the plaintiffs were not to depend upon. The evidence of defendant's wife is confirmatory of that of her husband, as to what passed between him and the plaintiffs, as to the time of the running of the mill.

Judgment.

On the other hand, the evidence is strong on behalf of the plaintiffs, that the defendant did represent the average running of the mill by water to be nine months in the year. That nine months was spoken of as the average running time is clear; but whether it was spoken of in the guarded terms represented by the defendant, or so spoken of as to amount to a representation, is the

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question. It is also a question, how far it was relied upon by the plaintiffs. They judged for themselves, to some extent, from what they saw of the main permanent source of supply, and what others said of it. Still, they desired to have *Pindar's* own account of it, and, as his wife says, pressed him upon the subject.

If the true average running of the mill was so very much less than nine months in the year, that *Pindar* must have known that he was misleading the plaintiffs by what he said—if, for instance, the average running time was in truth only six months in the year, or even seven—I should hold it to be a fraudulent representation; but upon this, as upon almost every question in this case, there is great conflict of evidence. I have felt it to be emphatically *the* doubtful point in the case. If, in truth, *Pindar's* answers to the inquiries upon this point were guarded as *Pindar* and his wife represent they were; and if, in truth, the average running of the mill by water (I mean with one run of stones, for that was what I have no doubt the parties understood.) was eight months in the year, or about that time, it would be going too far to say that it was a fraudulent representation. I cannot say that the evidence satisfies my mind upon either of these points against the defendant.

Judgment.

At the same time the evidence leads me to think that there was a want of honest candor on his part, amounting to disingenuous exaggeration of the property, its condition and capacity. While, therefore, it is not established to my satisfaction that there was fraudulent representation on the part of the defendant, so as to entitle the plaintiffs to set aside the contract, I think his conduct throughout the transaction was not marked with that fairness of dealing that should entitle him to his costs.

The bill is therefore dismissed, without costs.

## CROMBIE v. COOPER. 1875.

*Will, construction of—Residue—After-acquired property.*

Although a will speaks from the death of the testator, and so would carry after-acquired lands, yet where a testator devised all the remainder of his real estate to his wife, and then proceeded to enumerate the lands comprised in such remainder, it was *held* that after-acquired lands did not pass as part of the residue.

This was a bill filed by *Mary Crombie*, widow of the late *John Crombie*, for specific performance by the defendant *James George Cooper* of an agreement in writing signed by the plaintiff and defendant for the purchase and sale of certain freehold property situate in the County of Peel, conditioned for payment of consideration money upon a good title to the property being shown.

Statement.

The bill also set out that the plaintiff's title to the land was derived under the will of *John Crombie*, the husband of the plaintiff, who died on or about the 2nd day of September, 1875.

The will was in the words following: "I, *John Crombie*, * * * my will, is first: that my funeral expenses and just debts be paid by my executors hereinafter named. The residue of my property and estate I give, devise, and bequeath as follows, that is to say: I give, bequeath, and devise to my adopted daughter *Mary Crombie*, the house and half-acre lot on the opposite my dwelling house, in the village of Streetsville, at present occupied by *Charles Dingwall*, and also the house and half-acre lot on the opposite of the store and dwelling house lately occupied by *Richard Cuthbertson*, Maria street, known as the Bennet House, to her and and her heirs forever, and assigns, executors; and also the sum of four thousand dollars, to be paid to her within one year after my death by my executors; said four thousand

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dollars to be paid in good and recoverable notes of hand or in mortgages.

"I give to my brother *James Crombie* the house and village lot I bought from *James Anderson*, in said village, to him and to his heirs and assigns, and also the annual sum of fifty dollars so long as he shall live.

"I leave, devise, and bequeath all and singular the remainder of my real estate to my beloved wife *Mary Crombie*, to herself, to her heirs and assigns forever, namely: the house and twenty acres of land, more or less, I occupy as my homestead, and the houses, out-house, woods, ways, and waters thereon, and all the other appurtenances thereunto belonging; and also the north half of lot number seven, in the second concession of the Township of St. Vincent, in the County of Grey, and the houses and lot seven I own in Streetsville, occupied by *John Trimble;* and all the money, goods, and chattels, and the notes of hand, book accounts, and chattels, property, and all the mortgages I may be possessed of at the time of my death, after paying *Mary Crombie* her four thousand dollars and just debts.

Statement.

"Should my wife die before me, and I make no other will, I leave to my adopted daughter all the property, real and personal, that in this will I leave to my said beloved wife, and to her heirs and assigns forever, except the sum of fifty pounds to *Mary* and *Abigail Biney*."

The testator left him surviving the plaintiff, his widow, his adopted daughter *Mary Crombie*, and also his brother *James Crombie*.

At the time the testator made his will he was possessed of upwards of $4,000 in recoverable notes of hand and mortgages, but subsequently he collected a considerable

portion thereof, and therewith purchased in fee simple and obtained a conveyance of the parcel of land in question in this cause, and his personal estate at the time of his death amounted only to the sum of $1,600 or thereabout. 1875. Crombie v. Cooper.

The bill submitted that the plaintiff's title to the land was good, and that the agreement should be specifically performed. The answer of the defendant admitted all the facts set up in the bill, but insisted that this land having been acquired by the testator after the making of his will, the same did not pass thereby to the plaintiff, and that even if it did so pass the estate was charged in the hands of the plaintiff with the amount of the annuity bequeathed to *James Crombie*, and the legacy given to the testator's adopted daughter, so far as the personal estate was insufficient for that purpose, and it was admitted that the personalty was insufficient.

Statement.

The cause came on to be heard on Bill and Answer, before BLAKE, V.C., on Wednesday, 8th day of September, 1875.

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

Mr. *G. H. Watson*, for defendant.

The argument was confined to the question whether or not the lands in the bill mentioned passed to the plaintiff under the residuary clause in the will. Mr. *Maclennan* contending that it did pass, the clause referred to being clearly intended to pass all the rest and residue of testator's estate, so that there could not be an intestacy, and that although it was acquired after the will was made, the Ont. Stat. 32 Vic., ch. 8, being made directly to apply to such a case as this. See also Wills Act of 1873, sec. 21, and referred to cases collected in *Walkem* on Wills, pp. 263-77. Mr. *Watson*, that the clause, in

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the will referred to, was not a residuary clause, insomuch that it was expressly limited by the description of the property that was intended to be passed under it; the words to wit, and the particular mention of the property, made it a specific devise. And further, that there could have been no intention to pass other property than was therein mentioned, and certainly no after-acquired property. He also referred to the cases cited by plaintiff's counsel to disprove the intention to make this clause residuary.

Sep. 15.

BLAKE, V. C.—The testator made his will on the 24th of February, 1865, and died on the 2nd of September, 1874. Between these two dates he acquired the premises in question.

Judgment.

The following are the material portions of the will: "The residue of my property and estate I give, bequeath, and devise, as follows, that is to say: I give, devise, and bequeath to my adopted daughter *Mary Crombie*, the house and half-acre lot opposite my dwelling house * * * , and also the house and half-acre lot * * occupied by *Richard Cuthbertson*, to her and to her heirs forever. * * * I leave, devise, and bequeath all and singular the remainder of my real estate to my beloved wife *Mary Crombie*, to herself, to her heirs and assigns forever, namely: the house and twenty acres of land, more or less, that I occupy as my homestead; also the north half of lot No. 7, in the 2nd concession of the Township of St. Vincent, in the County of Grey; and the house and lot I own in Streetsville, occupied by *John Trimble*."

The language of sec. 1 of 32 Vic., ch. 8, is the same as that of sec. 21 of 36 Vic., ch. 20, and is as follows: "Every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been

executed immediately before the death of the testator, unless a contrary intention appears by the will."

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The intention which appears by this will is, to dispose in favour of the wife of the "remainder" of the property of the deceased, that which comprised such remainder being specified in the will. This appears to have been all the land the testator owned at the time of the making of the will, except certain premises which were otherwise specifically devised by the same instrument. The clear intention of this will, at the date it was made, was, to pass the property therein specified in the manner thereby indicated. There was no other property on which the will could then operate. By its express terms the property covered was limited to the lands set forth. Under these circumstances the testator acquired other property, which would pass by this will, although after-acquired, if there were any words in the will which could operate thereon. The will defines all that is to pass under it, and I do not see how I can extend this restricted language, to cover property, which the will on the face of it, shews was never intended to be touched by it. If there were general words used which would carry all that the testator owned when he made the will, this language being wide enough to embrace all lands would pass that which was after-acquired; but these general unrestricted words are wanting here. It is true that when the bequest or devise is capable of being augmented, and some general term is used, then, all that can be comprehended under such term, possessed at the time of the death, although not owned when the will was made, passes; or there may be an arbitrary designation, which may have acquired a certain meaning in the mind of the testator, which will cover all the premises, no matter when obtained, embraced within such appellation.

Judgment.

It was upon such a principle as this that Sir *Richard*

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*Malins* decided *Castle* v. *Fox* (*a*). There an estate, called "Cleeve Court," was devised. Subsequently additions were made to this estate. Evidence was allowed to be given which shewed that the testator considered these after-acquired properties as additions to Cleeve Court, and that the whole of such property was designated by this name. The Cleeve Court estates were in the mind of the testator a certain defined property when he made his will. The Cleeve Court estates still continued as such, but, at the time of the decease, contained, by certain additions to the property, a greater number of acres than when the will was made. It was shewn that the property, with this increased acreage, was still known by the testator as Cleeve Court, and it was therefore held, that all that thus constituted the Cleeve Court estates at the time of the death, passed to the devisee of this estate. That case does not, therefore, assist in the consideration of the present, which more resembles *Emuss* v. *Smith* (*b*).

Judgment.

I cannot compel the defendant to accept the title offered by the plaintiff under this will, and therefore must dismiss the bill with costs.

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(*a*) L. R. 11 Eq. 542. (*b*) 2 DeG. & Sm. 722.

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## HELM v. THE CORPORATION OF THE TOWN OF PORT HOPE ET AL.

*Municipal Institutions Act—Illegal by-law—Injunction.*

This Court has jurisdiction to restrain a Municipal Corporation from obtaining the vote of the ratepayers in favour of a by-law, which, if passed, would be illegal without Legislative sanction, and which sanction such vote was intended to aid, in obtaining in an informal and unauthorized manner.

Where, therefore, the corporation of the Town of Port Hope were about submitting, to the vote of the ratepayers, a by-law authorizing the Harbour Commissioners of that town to issue debentures to the amount of $75,000 to aid in completing a railway, but which debentures the corporation had not legally the power of directing to be issued, the Court restrained the corporation from proceeding to take such vote.

Statement.

The bill herein was filed by *John Helm*, the younger, *Cornelius Quinlan*, *James Guest Williams*, *William Barrett*, *Donald J. McLennan*, and *Harvey Milton Rose*, suing as well on their own behalf as on behalf of all others the ratepayers and inhabitants of the Municipality of the Town of Port Hope, except the defendants, against *The Corporation of the Town of Port Hope*, *John Wright*, Mayor, and *Rea Dickson*, *Thomas Hayden*, *Joseph Carveth Charles*, *Edwy Smith*, and *Peter R. Randall*, members of the corporation, setting forth that the Municipal Council of the Town of Port Hope had recently read a first and second time a by-law having for its object the issue of debentures by the Commissioners of the Port Hope Harbour to the amount of $75,000, payable in twenty years, with interest at six per cent., to aid in the construction of the Midland Railway, and had published such by-law, and caused notice to be given according to the Municipal Institutions Act, that the same would be voted on by all the ratepayers entitled to vote at a municipal election for councillors.

The bill charged that *The Corporation of the Town of Port Hope* had by law no power to cause or procure

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debentures to be issued by the said commissioners, and had no power to incur a debt for the purpose of aiding the said Railway Company, nor had the commissioners power to issue debentures for that purpose either at the instance of the said corporation or otherwise; nor had the corporation power to expend any money of the corporation in paying costs or expenses connected with the preparing or passing the said by-law; or for causing or procuring debentures to be issued; or for procuring legislation to legalize any such by-law, or for taking the vote of the ratepayers and electors on any such by-law.

The bill further alleged that the Harbour Commissioners were already overburthened with debt, and that the Town of Port Hope was already indebted to the full extent authorized by law; and prayed an injunction to restrain the taking of such vote or otherwise taking any proceedings to pass the said by-law.

Argument.

Mr. *Maclennan*, Q.C., for the plaintiffs, moved, on notice, for an injunction in terms of the prayer of the bill. The by-law here in terms authorizes person to vote who are not entitled to do so, that is, all leaseholders; whereas by section 233 of the Municipal Act it is not every leaseholder who has a right to vote. The proposed by-law should have recited the amount of the last assessment and other particulars, which the by-law here proposed omits to do. In reality no authority exists for submitting this by-law to a popular vote, and besides, owing to the financial position of the town and the harbour, it is an illegal proceeding on the part of the corporation to attempt to pass this by-law, and as such will be restrained by this Court.

Mr. *Boyd*, contra. The question as to the financial position of the corporation and the harbour commissioners is one properly to be discussed at the hearing, not upon an interlocutory proceeding like the present; and

as the by-law, even if affirmed by the voters, cannot be operative till sanctioned by the Legislature, no damage can result to any one by allowing the action of the Council to proceed.

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Here the bill would clearly have been demurrable but for the allegation that the corporation were expending improperly corporation funds in procuring the passage of the by-law; and at all events it is not such a pressing case as to call for the extraordinary aid of the Court by injunction, as the mischief (if any) to be apprehended is not irreparable.

*Carroll* v. *Perth* (*a*), *Whitney* v. *The Mayor of New York* (*b*), In re *London, Chatham and Dover Railway* (*c*), *Kerr* on Injunction, p. 561, *Hilliard* on Injunction, 372, The Municipal Act, (1873), secs. 4, 71, 79, 232, 235 and 258, were referred to.

June 6.

Judgment.

SPRAGGE, C.—The plaintiffs are ratepayers of the town of Port Hope and ask for an injunction to restrain the municipality from submitting to the vote of the ratepayers a provisional by-law, to become operative upon legislative sanction being hereafter obtained for it; and which, upon being so sanctioned, will have the effect of imposing an additional burthen upon the ratepayers.

It is admitted that the proposed proceeding is not one authorized by the Municipal Act or any other Act of the Legislature. The Municipal Act does make provision for submitting to a certain class of ratepayers a particular class of by-laws where there already exists legislative authority for that being done with the sanction of ratepayers, which the proposed by-law is intended provisionally to enact. It is the machinery which the Legislature has provided for ascertaining the will of that

(*a*) 10 Gr. 64. (*b*) 28 Barb. 210. (*c*) L. R. 5 Ch. 671.

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class of ratepayers which is authorized to vote upon such by-law. The municipality is setting this piece of machinery in motion for a purpose substantially differing from that for which its use is authorized by the Legislature.

One objection to it is, that it is *ultra vires*. One answer made to this objection is, that it is only a mode of ascertaining the opinion of the voters of the municipality with a view, in the event of a favourable response, of asking legislative sanction for what the by-law proposes to enact, and it is said that it is not to be supposed that the Legislature would be misled thereby.

It may be, that if this piece of machinery were not provided by the Legislature to be used for certain purposes defined by the Legislature, a municipality might lawfully use it as a mode of ascertaining the opinion of the ratepayers; might invent it, or adopt it as a convenient mode of taking the sense of the ratepayers. Upon that it is not necessary that I should express an opinion.

Judgment.

Being provided by the Legislature as it is, and its use appropriated to particular purposes and occasions defined by the Act, it is, I incline to think, *ultra vires* of the municipality to apply it to any other purpose. But assuming it to be not strictly *ultra vires*, still, unless it is manifestly an innocuous proceeding, it is, in my opinion, an abuse of the machinery provided by the Legislature to use it for the purpose contemplated by the municipality.

It is open to grave objections. It is evidently intended by its promoters to inform the Legislature of the desire of the ratepayers that a certain authority should be conferred by legislation. It is certainly calculated to have that effect; and I think it would be idle to deny that that is the result aimed at; and, if so, it is a disingenuous proceeding. It in effect invites all municipal voters to

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record their votes, although a certain class of voters are ineligible to vote upon the question. Whether that class be small or large, does not affect the principle. In cities it would probably be a large proportion. It is, at any rate, a class which the Legislature holds to be a class not having such an interest in the pecuniary burthens of the municipality, as to give to it a voice on the question of increasing the burthen in the mode proposed.

Then in the application of the machinery. Where it is within the authority of the Act, tests are applicable in order that only those entitled may be admitted to vote, and oaths may be administered. It would be extra judicial to administer an oath in this proposed proceeding; and many entitled to vote in a proper proceeding within the Act might, with good reason, abstain from voting in a proceeding so anomalous as this. It is not too much to say that the voting would almost certainly not represent the sense of those entitled to vote in a regular proceeding within the Act.

Judgment.

It is said that, at all events, it would be innocuous, because it would be open to those who are opposed to the proposed legislation to give explanations upon all these points to the Legislature by which, I suppose, is meant the Legislative Assembly; but that reasoning amounts to this: "There is no harm in our being allowed to create a prejudice by misrepresentation, because it is in your power to counteract it by explanation." But the Legislative body is composed of units, some of whom might be reached by misrepresentation, who might not be reached by explanation.

There is danger of the proposed vote being put forward as the expressed will of the ratepayers entitled to vote upon the question involved. I think it a proper inference from all that is before me, that it will be so put forward if allowed to be taken. The use of the

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machinery provided by the Act I regard as only part of a scheme to effect that object, and it is no breach of charity so to regard it. It is only acting upon the principle that parties will be taken to intend that which is the natural consequence of their acts.

It is argued that this application is premature. I do not think so. The mischief to be prevented is, the apparent, but really only colourable, expression of the will of the ratepayers, and the mischief is done as soon as this is obtained, and in this it differs from the case of *Whitney* v. *The Mayor of New York* (*a*).

In *The London, Chatham, and Dover Railway Arrangement Act* (*b*), it is conceded that the Court has the power to act *in personam*, even to restrain an improper application to Parliament, though it is difficult to conceive or define what are the cases in which it would be proper for the Court to exercise that power. Still it was conceded that the thing to be considered is, whether it is proper for the Court to exercise that power.

Judgment.

The Court is not asked to exercise that power in this case, and I agree that it is only in an extreme case that it should be exercised. What is asked in this case is much less. I am asked to prevent a proceeding unconscientious in itself, and calculated to prejudice those who make this application. The case is, as far as I know, a case of first impression; if I grant the injunction I do the defendants no mischief. I restrain only what, in the most indulgent view that can be taken of the proposed proceeding, is one of most questionable legality and propriety; while, on the other hand, if I allow the proceeding to go on, it may operate to the very serious prejudice of the ratepayers.

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(*a*) 28 Barbour at 233. (*b*) 5 Chy. Appeal. 671.

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I have not touched upon the question of the misapplication of municipal funds; but it is by no means clear that the plaintiffs' case on that head is met. The voting, and the machinery for it, would necessarily cause an expenditure of public funds; and there still exists liability for expenditure already incurred.

Upon one point, what I have said may possibly be open to misconception. I do not mean that a piece of machinery provided by the Legislature for one purpose *may* not properly be applied to another purpose, if done *bonâ fide;* but the fault in this proceeding is, that it is done in such a way as to give a character and effect to it calculated to operate to the prejudice of the plaintiffs.

I think the plaintiffs are entitled to the injunction prayed. Judgment

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## MUNSEN v. HAUSS.

*Mortgagor—Foreclosure—Suing for mortgage money.*

Although the fact of a mortgagee having obtained a final order of foreclosure, does not preclude him from suing for the mortgage money, still it would seem that the mortgagor is not entirely helpless, as he may offer to pay the mortgage, and if the mortgagee declines receiving the money the Court would restrain him from afterwards suing for the mortgage debt.

If after a mortgagee has obtained a final order of foreclosure he has mortgaged the estate, that fact alone will not deprive him of the right to sue for the mortgage money, if, at the time of bringing the action, he has paid off the mortage created by himself, and is in a position to reconvey the estate; neither does the fact of his having allowed the premises to fall into decay prevent him from so suing. *Gowland* v. *Garbutt*, ante vol. xiii., page 583, observed upon.

This was a suit to restrain the defendant from suing at law for the amount due upon a mortgage created by the plaintiff held by the defendant, on the ground that

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the defendant had previously obtained an order for final foreclosure; and had since obtaining such final order mortgaged the premises, and had allowed the buildings thereon, which were the chief value of the property, to fall into decay.

The cause came on for the examination of witnesses at Cobourg, in May, 1874.

The facts appear more fully in the judgment.

Mr. *Sidney Smith*, Q.C., and Mr. *Blake*, Q.C., for the plaintiff. A mortgagee cannot after final foreclosure sue for the mortgage debt unless he has at all times been in a position to reconvey upon payment of the debt and interest. Here it is shewn the defendant has used the buildings upon the property in such a manner as to have materially lessened the value of the estate; they were the chief value of the premises, and are now literally gone, having been destroyed and allowed to fall into decay; besides, defendant has during the period he had possession under the foreclosure created mortgages on the property: *Burnham* v. *Galt* (*a*), *Gowland* v. *Garbutt* (*b*). Under any circumstances the defendant should not be allowed to pursue his remedy at law except upon the terms of accounting for the value of the buildings which have been destroyed.

Argument.

Mr. *Attorney General Mowat* and Mr. *Benson*, for the defendants. Nothing is shewn to disentitle the defendant to proceed in his action at law. A mortgagee can only be disabled from suing when he sells the mortgage property or a part of it; he is not by any dealing of his with the buildings, neither is he by having created mortgages on the property. It is clear he can do so before obtaining his final order, and, this being so, it is difficult to understand upon what principle he

(*a*) 16 Gr. 417. (*b*) 13 Gr. 578.

should not be allowed to do so after final order. The action at law will not be stayed except upon the terms of paying the money into Court, as it is the undoubted right of a mortgagee to proceed at law to recover the amount under the covenant, and at the same time to proceed with his foreclosure on the mortgage: *Palmer* v. *Hendrie* (*a*), *Perry* v. *Barker* (*b*).

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Mr. *Blake*, Q.C., in reply. What has been done or is to be done by defendant in his action cannot affect the question raised in this suit: *Lockhart* v. *Hardy* (*c*). The effect of a mortgage created by a mortgagee before or after final foreclosure is entirely different—just as the effect of a sale is different. The language of the Court in *Gowland* v. *Garbutt* is, we contend, perfectly accurate. In like manner a mortgagee might disable himself from suing by entering into a contract with a third person.

Judgment.

SPRAGGE, C.—It is settled law that a mortgagee may obtain a final order of foreclosure, and afterwards sue at law for his mortgage debt, the legal obligation to pay not being extinguished by such order; and the mortgage property still being only, in equity, a pledge for the payment of the debt, and equity only interposes where the mortgagee has so dealt with the pledge that he cannot restore it. This has been affirmed in a number of cases, and the doctrine and the grounds of it are very clearly stated in the comparatively late case of *Palmer* v. *Hendrie* (*d*), before Lord *Romilly*.

In all the cases that I have seen, there has been such an alienation of the property that the mortgagee has placed it out of his power to restore it. The case before me differs from those cases in this, that, putting certain mortgages out of the question for the present, the mortgagee still has the property to restore, and has always

(*a*) 27 Beav. 349.
(*b*) 13 Ves. 205.
(*c*) 9 Beav. 349.
(*d*) 27 Bea. at 351.

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kept it. It is true that it is in a very dilapidated condition, and is a property of a very different character from that which came into his possession. The land is there still, but the brick building is absolutely gone, and the other very much out of repair.

The defendant entered into possession before obtaining his final order. If that order had never been obtained, I do not suppose that what has been done or neglected to be done by him, or both, would debar him from calling for payment of his mortgage debt. He would certainly have to account as mortgagee in possession, but it could not be contended, I apprehend, that his dealings with the property had so altered its character that he could not in any proper sense restore the pledge, and as a consequence could not call for his mortgage money. Then does the obtaining of the final order vary his rights?

Judgment.

Most certainly the position of the mortgagor is essentially changed by that order. Its effect is that he can do nothing, at least as a matter of right. His rights, so far as he can actively assert them, are entirely extinguished, both at law and in equity. It is in the power of the mortgagee, who has become absolute owner, to use the premises as he thinks fit, and the mortgagor cannot interfere. The mortgagee has become absolute owner and master. At the same time, his legal right not being extinguished, he can still sue upon his covenant; but, exercising that right, and its effect being to open the foreclosure, the inclination of my opinion at the hearing was, he must not only have retained the premises, but have retained them in such a state that the mortgagor ought to receive them back; that he must be in a condition to return the pledge, and to restore it in substantially the same condition as it was when it came to his hands; in as good a condition, taking all things into account, as would be reasonable and just between the parties. I say *taking all things into account*, because

it is very possible that from stagnation, or even retrogression in a branch of business, or in a locality, certain classes of premises will, in spite of care and attention bestowed upon them, fall into decay. 1875. Munsen v. Hauss.

I thought this a reasonable rule, looking at the position of the parties: the one in a position to exercise his legal right, whenever in his judgment it is for his interest to do so; the other without any right of active interference; and if a long time elapsed after final order obtained, and still more if the mortgagee put the mortgaged premises to a purpose which would injure them and lessen their value, I thought the mortgagor might well conclude that the mortgagee had exercised his election of keeping the premises absolutely as his own; and if the point had been *res integra*, I think I should have so held; and I still think that it is not a violent presumption, when a man so deals with property, that he has so elected; nor a violent course to hold him bound by it. Judgment.

On the other hand there is this, that there has been default on the part of the mortgagor, and that there is a legal liability which the law says continues to subsist, notwithstanding the final order. Indeed the right of the mortgagee is treated as being the same after final order as before, with the single exception that, having the power to alienate, if he exercise the power he cannot recover his debt; and even that is a modification of his right established in favour of the mortgagor by the later cases. This right of the mortgagee to call for payment of his debt, after final order, must be presumed to be known to the mortgagor. I incline to think that the mortgagor is not entirely helpless. I should think that if prepared to pay off the mortgage debt after final order, he might notify the mortgagee of the fact, and desire to be informed whether it would be received, and that thereby the mortgagee would be put to his election. If he consented to receive it, there would be redemption.

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If he refused, a Court of Equity, I should say, would feel no difficulty in restraining him from afterwards suing for the mortgage debt. If I am right in this, it would always be in the power of a mortgagor to relieve himself from the false position in which the law, as now administered, places him.

The case of *Lockhart* v. *Hardy* (*a*), before Lord *Langdale*, was the first case that settled the relative positions of mortgagor and mortgagee after final order of foreclosure, the previous cases of *Tooke* v. *Hartley* (*b*), and *Perry* v. *Barker* (*c*), having, as was said by the Master of the Rolls, left the matter in great obscurity. The language of Lord *Langdale* is precise. He says at page 355, "I apprehend that so long as the mortgagee holds the estate, and is able to give effect to the mortgagor's right to redeem, he may proceed on the bond." Again at page 356, "On the other hand, if he obtains foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is not absolutely precluded from suing on the bond or covenant. But it is held that by doing so he gives to the mortgagor a renewed right to redeem, or, in other words, opens the foreclosure; and consequently, upon the commencement of an action against him on the bond after foreclosure, the mortgagor may file a bill for redemption; and upon payment of the whole debt secured by the bond, he is entitled to have the estate back again, and the securities given up; and I conceive that after foreclosure, the Court will not restrain the mortgagee from suing on the bond, provided he retains the mortgaged estate in his own power, ready to be redeemed, in case the mortgagor should think fit to avail himself of the opening of the foreclosure." And again, at page 357, "The mortgagee had, by his securities, a right to foreclose the mortgage, and if he thought the estate insufficient, a further right

Judgment.

(*a*) 9 Bea. 349. (*b*) 2 B. C. C. 125. (*c*) 13 Ves. 198.

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to proceed on his personal securities, thereby giving to the mortgagor a renewed right to redeem; but when he has so dealt with the estate that the mortgagor cannot redeem, it appears to me that he is not entitled to proceed." All this language points to the one thing, the mortgagee having it in his power to give the estate back again, and it points to nothing more; not to his restoring it in as good order as he received it, or having damaged it, or dealt with it as if it were his own,—all of which an ordinary mortgagee in possession might do,—but simply having it to restore.

I think, therefore, that if I held the mortgagee debarred of his legal right by what he has done or left undone in regard to these premises, I should be establishing a principle not warranted by, but rather conflicting with, authority, though in my humble judgment not without some reason in its favor.

Judgment.

It remains to consider the effect of the defendant having given certain mortgages upon the property in question; the point made upon this being, that by the giving of these mortgages the defendant at one time had it not in his power to give back the property upon redemption.

All the cases that I have seen are cases where there had been an absolute alienation of the whole or part of the mortgaged property. Still I am not prepared to say that the rule would not apply in any case of mortgage made by the mortgagee. I think that it would apply in any case where the mortgage would disable the original mortgagee from restoring the property. That, I think, is the test. In *Gowland* v. *Garbutt* (*a*), the late V. C. *Mowat* threw out a suggestion to the contrary, but it was not necessary to the decision of the case. The party

(*a*) 13 Gr. 583.

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seeking for payment of the mortgage debt in that case was not in a condition to reconvey; all that was before the Court was a statement by counsel that he was authorized by a purchaser from the mortgagee to say, that on payment of the mortgage money he would reconvey. It was upon this that the learned Judge made the observation, that, "Assuming this to be so, mortgaged property cannot be redeemable and irredeemable from time to time, and the mortgage debt discharged and revived at the mere pleasure of the mortgagee and those claiming under him." The doctrine enunciated amounts to this, that if there has been a time after the mortgage has fallen due in which the mortgagee has in any way disabled himself, however temporarily, from reconveying, he cannot at any time afterwards enforce payment of his mortgage debt. There must, I apprehend, have been many cases in which, after default by the mortgagor, the mortgagee has made a derivative mortgage. It may be conceded that before the derivative mortgage is payable he is not in a position to file a bill against the mortgagor, or to sue upon his covenant; but here the mortgages given by the mortgagee appear to have been actually paid off before the mortgagee sued upon his covenant; and that being the case, I see no good reason for debarring him from his rights, whatever they may be, arising upon the default of the mortgagor.

Judgment.

My conclusion is, that the plaintiff fails in that which is the leading object of his bill, and that he must pay the costs up to and inclusive of the hearing. I think, however, that he may properly have an inquiry as to what, if anything, is due upon the mortgage given by him. That inquiry, under our general orders, will embrace all the dealings of the defendant with the mortgaged premises, as well as the note transactions referred to by amendment in the bill; and the evidence given at the hearing will be available upon that inquiry. The report of the Master to be procured by the plaintiff within one

month, and the proceedings at law to be stayed in the meantime. Subsequent costs and further directions to be reserved. 1875. Munsen v. Hauss.

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## POLLARD v. HODGSON.

*Will, construction of—Time of Distribution—Vested interest.*

A testator devised all his estate ("lands and chattels") to his mother for life, and after her death to his sister, *P. H.*, absolutely, charged with legacies to several persons. One of the legatees died after the testator, but before his mother, the tenant for life.

*Held*, that the legacy did not lapse, but was a vested interest in the legatee, and as such went to his personal representative.

This was a bill by *Mary Pollard* against *Thomas Hodgson* and *Henry Pollard*, setting forth that the defendant *Hodgson* had purchased from *George Hodgson* and *Priscilla Hodgson*, his wife, the lands in question, and which had been devised to her under the will of her brother *John Walton*, deceased, set forth in the judgment, and praying for payment to the plaintiff as administratrix of *George Walton*, deceased, of the sum of $300 and interest since the 15th October, 1861. Nov. 23. Statement.

The facts were admitted by the answer, the only question in dispute being whether the bequest to *George Walton* had not lapsed—he having died during the lifetime of the tenant for life,—and the lands thereby become relieved from the charge.

Mr. *Hodgins*, Q. C., for the plaintiff. The testator, by his will, devised the lands to his mother for her life, then to *Priscilla Hodgson*, on condition of paying *George* the legacy in question. *George* died in 1855, and the tenant for life in 1861. The plaintiff contends that under the will the lands vested in *Priscilla*, on the death of the testator, and the question is, what was the object of the testator in postponing the charge in favour

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of *George*. It does not appear to have been for some personal quality in the legatee, such as his attaining twenty-one, nor for contingencies under which the legacy would lapse; it would appear from the will to have been merely for the convenience of the life estate, and if so, then the legacy is still a charge in favour of the estate represented by the plaintiff. He cited *Leeming* v. *Sherratt* (*a*), *Re Bennett's Trust* (*b*), *Adams* v. *Robarts* (*c*), *Martin* v. *Keys* (*d*), *Wight* v. *Church*, (*e*), *Murphy* v. *Murphy* (*f*).

Mr. *Howell* for the defendant *Pollard*.

January 26.

SPRAGGE, C.—The will of the testator is very short. It is in these words:

"ONEIDA, April 18, 1852.

Judgment.

"*John Walton's* will. I leave my mother, as long as she lives, all that I possess, both lands and chattels; then, at her death, my sister *Priscilla Hodgson* is to have the land, with paying my brother *George* three hundred dollars, and my sister *Margaret Perl* one hundred dollars, likewise my sister's children, *Isabella*, that is dead, one hundred dollars; and the waggon is to be left to my brother *George*.

"Witness my hand and seal.

"JOHN WALTON." [L.S.]

"JOHN ANDERSON,
"EZEKIEL YOUNG."

The plaintiff is the administratrix of *George Walton:* the defendant, a purchaser from *Priscilla Hodgson* and her husband. *George Walton* died after the testator, but before the tenant for life, the mother of the testator; and the contention is, that the legacy became lapsed—in other words, that although the land was vested in the sister, as it certainly was before the death of the tenant

(*a*) 2 Hare 14. (*b*) 3 K. & J. 280. (*c*) 25 Beav. 558.
(*d*) 15 Gr. 14. (*e*) 15 Gr. 416, 16 Gr. 192. (*f*) 20 Gr. 416.

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for life, the legacy charged upon it in favour of *George Walton* was not so vested, and that upon the death of the mother she took it discharged of the legacy. There is really no room for this contention. *Adams* v. *Robarts*, before Lord *Romilly*, the case of *Bennett's Trust*, before Lord *Hatherby*, then Vice Chancellor, and *Leeming* v. *Sherratt*, before Sir *James Wigram*, are clear upon the point. There is nothing in the will to make the payment of the legacy contingent upon the legatee surviving the tenant for life. The period of enjoyment by the sister is postponed till after the death of the tenant for life, and upon the happening of that event the will says she "is to have the land with paying" this and other legacies.

Judgment.

The decree will be for the plaintiff with costs. The plaintiff is entitled to interest from the date of the death of the tenant for life. The bill admits payment of $100 on account, and the answer admits that no more has been paid. The decree will direct payment of the balance, with interest as above, in one month, with costs.

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## JOHNSON, ASSIGNEE IN INSOLVENCY, AND OTHERS v. THE MONTREAL AND CITY OF OTTAWA JUNCTION RAILWAY COMPANY.

*Pleading—Demurrer—Contract to construct a railway—Parties.*

A Railway Company entered into a contract for the construction of their road, which was to be completed and in perfect running order by the 1st of January, 1875; and to be paid for partly in cash and Municipal bonds, partly in bonds or debentures of the Company, and partly in guaranteed shares or stock of the Company; and the contractors entered upon the construction of the work, but owing to financial difficulties, they were obliged to suspend in 1873, and in August, 1874, they made a deed of composition with their creditors, and *J.* was appointed the official assignee. After the time appointed for the completion of the work, the assignee and the contractors filed a bill in their joint names against the Railway Company, asking that the contract might be performed by the Company, offering on their own part to perform it, and seeking to restrain the Company from entering into any new contract for the work with any other person, and from making, signing, or issuing any stock or bonds of the Company, until the stock or bonds to which the plaintiffs were entitled, were issued to the assignee. A demurrer for want of equity and for misjoinder of plaintiffs was allowed; the rule of the Court being that it will not decree the specific performance of works which the Court is unable to superintend; and that an insolvent or bankrupt cannot be joined as a co-plaintiff with his assignee.

Dec. 22, 1874.

Statement.

DEMURRER. The bill in this case was filed by the assignee in insolvency of *Catlin* and others, contractors, with the defendants, *The Railway Company* and the contractors themselves, against *The Railway Company* and its President. The demurrer, which was by *The Railway Company*, was for misjoinder of plaintiffs, and as to a portion of the bill for want of equity.

It is not considered necessary to enter minutely into the terms of the contract. It is sufficient to state that the contract was for the building of a railway from the city of Ottawa to some point at or near the village of Alexandria, in the county of Glengarry, and thence to some

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point at or near the Coteau Landing, in the county of Soulanges, the distance being approximately estimated at eighty-one miles. The contractors were bound to commence the work by 1st September, 1872, the road to be constructed, and in every way completed and delivered to the Railway Company in perfect running order, by the 1st of January, 1875.

The contractors were to be paid $25,000 per mile; expected to amount (without extra work, which was to be paid for in addition) to two millions and twenty-five thousand dollars; and they were to be paid partly in cash and municipal bonds, partly in bonds or debentures of the Railway Company: partly in guaranteed shares or stock of the Company; and these payments were to be made from time to time as progress should be made in the work.

Statement.

The bill stated that the contractors proceeded with the work, but that the same was slackened and was eventually suspended in 1873, from pecuniary reasons, which the bill attributed to defaults on the part of the railway company. In August, 1874, a deed of composition with creditors was entered into by the contractors, the plaintiff, *Johnson*, being appointed official assignee. The bill prayed that the contract might be performed by the Railway Company, the plaintiffs being ready and willing, and offering to perform the same on their part. It prayed also, among other things, that the defendants might be enjoined "from entering into a new contract for the said work with other parties, and from making, signing, or issuing any stock or bonds of the said Railway Company until the said stock or bonds to which your complainants are entitled or may be entitled are issued to the said *Eder Philo Johnson* as such assignee."

Mr. *Blake*, Q. C., and Mr. *Boyd*, in support of the demurrer. As to the misjoinder of parties, the bill ad-

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mits that the composition entered into between the parties and the discharge to be granted on the completion thereof, have not yet taken effect. The rights of the plaintiffs, the contractors, have, by reason of the assignment, been transferred to the assignee, and therefore the contractors themselves must be unnecessary, and as such, improper parties to this bill.

Here, there cannot be said to be any interest in common between the contractors and the assignee; *Burges* v. *Wickham*, (*a*).

On the second ground of demurrer, the want of equity, counsel contended that the rule of the Court was very clear that in a case like the present, the Court would not burthen itself with the specific execution of a contract for a work like that here contracted for, and therefore the Railway Company could never have maintained a bill against the contractors to compel a specific performance of the agreement, and the rights of parties must be mutual; *Dickson* v. *Covert* (*b*), *Gartshore* v. *The Gore Bank* (*c*), *Makepiece* v. *Haythorne* (*d*), *Cuff* v. *Platell* (*e*), *Spragg* v *Binkes*, (*f*).

Argument.

Mr. *Moss*, Q. C., and Mr. *J. C. Hamilton*, contra.

Although the bill does not allege that the property has revested in the insolvents, it does allege that proceedings are being taken for the purpose of having that done; and alleges also that the wrong doings of the Company have brought about the insolvent state of circumstances in which the contractors have been placed. The contractors are properly made parties for the purpose of giving their consent to the completion of the contract;

(*a*) 10 L. J N. S. 96.
(*b*) 17 Gr. 321.
(*c*) 13 Gr. 187.
(*d*) 4 Russ 244.
(*e*) 4 Russ 242.
(*f*) 5 Ves. 590.

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and also for the purpose of applying their skill and labour in carrying on she works to completion; *Beckham* v. *Drake* (*a*), *Crofton* v. *Poole* (*b*), *Elliott* v. *Clayton* (*c*).

Here, the contract has been partially performed, and there is nothing in the contract itself restricting the contractors from sub-letting portions of the work. The contractors here may be said to be in the position of *cestuis que trust: Stevens* v. *Benning* (*d*), *Staffordshire Banking Company* v. *Emmott* (*e*).

As to the want of equity, it was contended that there was nothing to prevent a specific performance being directed, it being only a question as to what terms it should be granted upon. Here, the plaintiffs are ready and willing to complete the work, and all the aid they ask from the Court is, a protection of their rights so as to enable them safely to carry out their undertaking to completion. *Middleton* v. *Grimwood* (*f*), *Price* v. *Penzance* (*g*), were also referred to.

Mr. *Blake*, Q.C., in reply. Any argument to be founded on the relation of trustee and *cestui que trust*, cannot apply here, as there is no allegation that there will be any surplus coming to the parties: *Re Edwards Ex p. Chalmers* (*h*).

Feb. 17.

Judgment.

SPRAGGE, C.—[After stating the facts at length as above set forth.] The demurrer for want of equity is "to so much of the said bill as relates to the specific performance of the said contract, and as seeks to restrain the said Company from entering into a new contract for the said work." The bill asks for an account for work

(*a*) 2 H. L. 579.
(*b*) 1 B. & Ad. 568.
(*c*) 16 Q. B. 581.
(*d*) 6 D. M. & G. 223.
(*e*) L. R. 2 Ex. at 211.
(*f*) 2 DeG. J. & S. 142
(*g*) 4 Hare 506.
(*h*) L. P. 8 Ch. 289.

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done, and for other relief; but the demurrer is confined to the relief sought by way of specific performance, and to prevent the Railway Company from entering into a contract with others for the doing of the work.

In the majority of the cases, the suits have been by individuals against companies or companies against contractors for the performance of works; but some have been by contractors against companies; and it has been held that the same principles as to the interference of this Court to compel specific performance, apply to the latter class as apply to the former. *Ranger* v. *The Great Western R. W. Co.* (*a*) was such a case. There were three contracts between the plaintiff and the railway company for railway construction. The bill prayed that under the contract, and the circumstances set forth, the company should elect to permit the plaintiff to finish the work, or that the contract should be considered at an end. I refer to the case principally for the language of the Judges affirming the principle I have stated; and further, that works of the kind which were the subjects of the contracts in that case and in the case before me, are not cases for specific performance by this Court. The Vice-Chancellor said, "This Court will not execute such contracts as those stated in the bill, and the Court is therefore disabled from giving a reciprocal equity to the defendants, which they would be entitled to in case the plaintiff has the equity which he seeks." So far, the Lord Chancellor agreed with the Vice-Chancellor; but in what follows, he did not agree with him: "If this Court cannot relieve the plaintiff, because it could not relieve the defendants, it does not appear to me that there is any portion of the case on which the bill can be sustained." The points upon which the Chancellor differed from this, are not material to the demurrer before me. The points upon which he agreed are

Judgment.

(*a*) 1 Ry. Ca. 89.

material: he agreed that the case was not one for specific performance. His Lordship said "The first part of the injunction is applicable to the case of the contracts, supposing them to be carried on, and the plaintiff to be reinstated in the works. If, however, the contract is to proceed, it is obviously of a nature over which this Court cannot have jurisdiction by way of directing a specific performance; and not having that jurisdiction over the entire contract, the Court will not assume it over a particular part of the contract, or interfere with the view of enabling the plaintiff to proceed with his works. * * * But, as I have said, if the contract is to continue, the Court has no jurisdiction in the case; and if the contract is determined, the Court cannot restrain the defendants from proceeding with the execution of their own works." The demurrer in that case was to the whole bill. It sought among other things an account, the amount due upon which the Chancellor said would involve an investigation, "which, it is obvious, can only take place under the superintendence of a Court of Equity, and impossible to be obtained in a Court of Law." And His Lordship, therefore, proceeding upon the principle that upon the demurrer, the only question is, whether any part of the case stated would entitle the plaintiff to a decree, overruled the demurrer. It is quite clear that if the demurrer had been to only so much of the bill, as it is in this case, it would have been allowed.

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Judgment.

It appears to me to be obvious, even from the very general outline of the contract between the Railway Company and the contractors, that I have given, that it is one which the Court could not execute on behalf of the contractors; apart from the question of mutuality, that it is one which the Court could not execute as against the contractors, if the Railway Company were the plaintiffs.

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*Ranger* v. *The Great Western R. W. Co.* was followed by *Peto* v. *Brighton, Uckfield, and Tunbridge Wells R. W. Co.* (*a*). The marginal note of the case sufficiently indicates the point in question and the decision; it is as follows: "This Court has not jurisdiction to decree the specific performance of a contract, for which the consideration on the part of the plaintiff is the execution of certain works which the Court is unable to superintend. Therefore, where the bill stated an agreement to employ the plaintiffs as contractors for making a railway, and to pay for the works in debentures and shares of the company, a motion for an injunction to restrain the Company from dealing with the debentures, and transferring the shares in question to others, in derogation of the plaintiffs' rights, was refused."

Judgment.

The question arose on an application for injunction, and Lord *Hatherley*, then Vice-Chancellor, after stating it, observed: "Now, on this the difficulty at once arises, that if I restrain the transfer of these shares I can only do so on an undertaking on the part of the plaintiffs that they will perform their part of the agreement; a submission to do so is a necessary ingredient in the bill, and it is essential that that offer should be one over which this Court should have complete control; if that were not so, the result would be to restrain the Company from dealing with these shares without securing to them the benefit of the plaintiffs' undertaking."

The learned Vice-Chancellor, while thinking that the conduct of the Railway Company appeared to involve a breach of faith, felt that he could not, consistently with the rule which the Court adopts in such cases, grant relief to the plaintiffs, and he decided that the only proper course for the Court to take was to leave both parties to their remedies at law. In that case it does not appear

(*a*) 1 H. & M. 468.

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that any work had been done under the contract; but the decision did not proceed upon that ground. In *Ranger* v. *The Great Western R. W. Co.*, as in the case before me, the contractors had done work under their contract. I would refer also to the recent case of *The Merchants' Trading Co.* v. *Banner* (*a*), before Lord *Romilly*, affirming the same principle as the cases to which I have before referred: "There is a class of cases in which the Court will decree the specific performance of works, *i. e.*, where the works to be performed are incidents of, or subsidiary to, some other contract. This case does not fall within that class; and if it did, I more than doubt whether the Court would not decline, as impracticable, the task that would be involved in superintending the specific performance of such a contract as this."

It appears to me that the demurrer for misjoinder of parties must also be allowed. There is nothing to take the case out of the general rule that a bankrupt or insolvent cannot be joined as co-plaintiff with his assignee, unless it be that in case of specific performance being decreed, and the skill of the contractors being required in the further execution of the contract, they would be proper parties for that purpose; but that ground fails when specific performance is not decreed. The contractors are not proper parties in respect of any surplus that may remain after payment of their debts. *Spragg* v. *Binkes* (*b*).

Judgment.

The demurrer is allowed on both grounds with costs.

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(*a*) L. R. 12 Eq. 18.

(*b*) 5 Ves. 583.

1875.

## THE ATTORNEY-GENERAL, EX RELATIONE JARVIS v. THE INTERNATIONAL BRIDGE COMPANY.

*Injunction—Railway Company—Bridge Company—Demurrer.*

The rule of this Court is never to interfere by injunction except where it can do so usefully and effectively.

A Company was incorporated to construct a bridge across the Niagara River, which bridge was to be "as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railway trains;" and the Company completed such bridge so far as to permit of the running of railway trains across it. The time limited for the completion of the structure for the passage of ordinary carriages, had not elapsed, when the Bridge Company leased such bridge to a railway company, who were daily running trains across it; but no commencement was made with that portion of the bridge intended for the purpose of ordinary traffic, &c. An information was filed seeking to restrain the lessees, from using the structure for railway traffic, until it was put in a condition to be used for ordinary passenger traffic, but a demurrer thereto for want of equity was allowed.

*Quære*, if even the time allowed for the completion of the bridge for ordinary traffic had elapsed, whether the Court would have interfered by injunction, the work which had been done, having been done by authority of law, and the relief prayed being such as would, in the event of the order of the Court being disobeyed, have necessitated the destruction of that portion of the works already completed

January 27.

Statement.

This was an information by the *Attorney General of Ontario*, at the relation of *Stephen Maule Jarvis*, against *The International Bridge Company* and *The Grand Trunk Railway Company of Canada*, setting forth that, under and by virtue of an Act of the late Province of Canada, passed in the twentieth year of Her Majesty's reign, entitled, "An Act to incorporate "*The International Bridge Company*," which recited that the construction of a bridge across the Niagara River at or near the village of Waterloo, in the township of Bertie, would be of great advantage to the public, certain persons therein named were incorporated under the name of *The International Bridge Company*, for constructing, maintaining, working, and managing a bridge across the

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Niagara River from some point at or near the village of Waterloo, known as Fort Erie, in the township of Bertie, to the city of Buffalo, according to the rules, orders, and directions of the said Act; and were thereby authorized to acquire the necessary real estate to the extent of ten acres for the purposes of the said bridge; that it was further enacted, that the said bridge should be as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railway trains; and such railway companies as were therein mentioned or referred to, should have and be entitled to the same, and equal rights and privileges in the passage of the said bridge, and in the use of the machinery and fixtures thereof, and of all the approaches thereto; that by a certain other Act, passed in the twenty-second year of Her Majesty's reign, entitled, "An Act to amend the Act to incorporate *The International Bridge Company*," it was further enacted, that whenever the bridge, authorized by the said last-mentioned Act, should be completed for the passage of ordinary trains and carriages, the said company might erect toll-gates, fix and collect rates of toll, but no greater tolls than those therein enumerated should be charged for entering upon or passing over the said bridge.

Statement.

The information further stated, that by a certain Act of the Dominion of Canada, passed in the thirty-third year of Her Majesty's reign, entitled, "An Act respecting *The International Bridge Company*," it was enacted, that the time for the completion of the said bridge should be extended to the first day of October, 1876, and authority was, by the Act, also given to the company to unite with any other company incorporated by the laws of the State of New York for a similar purpose, and also to amalgamate and consolidate its stock, property, and franchises, with such other company so incorporated in the State of New York, and that upon the

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making and perfecting of the agreement of consolidation according to the terms of the said Act the said two corporations should be deemed and taken to be one corporation, and should possess all the powers, and be subject to all the duties of each of the said companies so consolidated.

The information further stated, that in November, 1870, the Bridge Company commenced the construction of a stone, iron, and wooden bridge, and in 1873 the same was completed so far as to allow of the passage of railway trains, but without any means for the passage of foot-passengers or carriages: and under a lease of the bridge to *The Grand Trunk Railway Co.*, for 999 years, the last-named company were using the same for the passage of their railway trains containing passengers and other traffic; but that neither of the defendants had constructed a carriage or foot-way across the bridge, and they refused to construct any such way, and refused to allow carriages or foot-passengers to cross the bridge; and further, that they had abandoned all intention of constructing such bridge, and they intended to maintain the said bridge as they had already constructed it, so as to be available for railway trains only.

Statement.

The information alleged that this was not only a source of great pecuniary loss to the relator, but was a great loss and inconvenience to the public, and submitted that the defendants, or one of them, should be compelled to construct and maintain a proper carriage way and foot-way in accordance with the Acts of the Legislature, and that in default therof the defendants should be restrained from keeping or maintaining the said bridge, unless, and until constructed as well for the passage of persons on foot and in carriages as for the passage of railway trains; and that the defendants ought to be ordered to construct and maintain said bridge in such state as to allow the passage of persons

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on foot and in ordinary carriages upon payment of the proper and lawful tolls and rates therefor: and further, that until so constructed and completed, the defendants ought to be restrained from making use of the same for railway purposes, or collecting tolls or rates in respect of passengers or traffic carried by railway trains across said bridge, and prayed relief in accordance with these allegations.

The defendants demurred for want of equity.

Mr. *Blake*, Q. C., and Mr. *Moss*, Q. C., in support of the demurrer. The information is clearly premature, as the time limited by the Act of the Legislature for the completion of the structure has not yet expired, and will not until October, 1876: in fact the short point of contention here is, that the *Bridge Company* have finished that portion of the work which insures the passage of railway trains, and have not, at the same time, completed the portion of it intended for the purposes of general traffic; and therefore the Relator insists that the defendants should be restrained from using the railway passage until the other is finished. The Court is not to assume that the passage for the conveyance of ordinary traffic may or will not be completed before the expiration of the time named in the Act of Parliament.

Argument.

*The Grand Trunk Railway Company* are not parties to the agreement requiring the construction of these passages: they have a lease of the bridge for 999 years at a certain rental, and therefore, as against them, there cannot be any equity to restrain their use of it.

In *The Attorney General* v. *The Birmingham and Oxford Junction Railway* (*a*), the Court thought that the remedy, if any, was by mandamus. Here the

(*a*) 4 DeG. & S. 490.

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Court has no jurisdiction to enforce the completion of the structure in the face of the Act of Parliament.

Assuming that the Court will not grant the mandatory injunction sought by this information, the question is, will it grant the prohibitory order asked? *The South Wales Railway Co.* v. *Wilde* (*a*), shews this will also be refused under the circumstances of this case. Here the defendants have ample time still within which to complete the works as contemplated by the charter.

Another objection to this suit is, that *The Attorney General of Ontario* is not the proper officer to institute these proceedings: the information should have been filed by the Attorney General of the Dominion, the charter of the Company by the amendment and extension thereof being from the Dominion (*b*). It is not pretended, and it cannot be alleged that the people of this Province in particular are suffering any inconvenience or damage by the action of the defendants; for if any such damage is really sustained it is by the inhabitants of the whole Dominion: *The Attorney General* v. *The Niagara Falls Bridge Co.* (*c*).

Argument.

Mr. *Crooks*, Q. C., and Mr. *McLennan*, Q. C., contra. The objections raised here as to who is the proper officer to file the information are all disposed of by *Strong*, V.C., in *The Niagara Falls Bridge* case referred to by the other side. October, 1876, is the time within which this bridge *must* be finished; that is merely a time limited, as there must be in every charter. A contract may be sued on, although the time for the completion has not yet expired, when the party refuses to complete it, and makes that refusal known to outsiders: *Frost* v. *Knight* (*d*).

(*a*) 5 D. M. & G. 880.
(*b*) 32 & 33 Vic. ch. 65.
(*c*) 20 Gr. 111.
(*d*) L. R. 7 Ex.

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The bridge cannot be divisible in its use; the charter is for a bridge of a particular character, and until its whole character is complete, it is imperfect. The charter says, it is to be a railway bridge, as well as a carriage and foot passenger bridge.

The Acts of Parliament in reality constitute the contract between the company and the public.

In *The Attorney General* v. *The Mid-Kent Railway Co.* (*a*), an injunction was granted, restraining the defendants from proceeding with the construction of a bridge, which it was alleged was not of the character, in some respects, allowed by the charter to be erected. At law the defendants have no right to place an obstruction in this river, which is navigable, unless authorized to do so under their charter; and unless the structure which the defendants have erected is such as their charter warrants, they, in fact, illegally obstruct the river, and by so doing are guilty of a nuisance, and being so *The Attorney General* has a perfect right to select the forum in which he will proceed to asseft the rights of the public; at all events the 35th Section of the Administration of Justice Act obviates any objection on this ground. Indeed it may almost be said to have been framed to meet this very objection.

Argument.

It is not necessary in a case like the present to allege any damage in order to induce the Court to Act. The defendants, *The Grand Trunk Railway Co.*, are most interested, being the assignees for such a lengthened term, as it is stated they are; and in this view they are certainly necessary and proper parties.

As to any arguments founded on the fact that the information has been filed prematurely, it is only neces-

(*a*) L. R. 3 Ch. 100.

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sary to say that the allegations of the information obviate it; and when the cause is brought to a hearing, there is no doubt it will be plainly shewn that the defendants intend abandoning, or rather, that they have already abandoned the erection of a foot-passenger and carriage way provided for by the charter; and this being so shewn, the Court will not hesitate to act, treating the question of time as of no importance. The relator does not ask the Court to compel the defendants to commence and complete the construction of the bridge as provided for by the charter; but seeks simply the aid of the Court in compelling them, after they have commenced the structure, to finish it in the form provided for in the charter: *The Attorney General* v. *The Tewkesbury and Malvern Railway Co.* (*a*).

Argument.

Here the defendants treat this as being of comparatively trifling consequence so far as it can be looked at as a public inconvenience. Yet the city of Buffalo, with its large population, and the town of Fort Erie, are very much inconvenienced by the failure of the defendants to carry out the contract in good faith. In this respect the relator invokes the prohibitory, not the mandatory jurisdiction of the Court.

Mr. *Blake*, Q. C., in reply. The only thing the relator can complain of is, not that the public are injured by the non-completion of the bridge, but that they do not receive benefits to the same extent now as if it were fully finished; that is, the contract fully carried out as contemplated by the charter; but here the Relator is not satisfied with asking for this injury to be avoided, but asks the Court to deprive the public of the very large benefit they do obtain from the existence of the bridge in its present condition, in order to give them the small additional benefit of a carriage-way and foot-way; in

(*a*) 4 Giff. 333.

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other words, the relator in this way seeks to shorten the period within which the bridge is bound to be finished from that allowed by the Legislature. The Act of Parliament authorizes the opening of the bridge for railway traffic at any time it is prepared for that purpose, without waiting for the completion of the other portions of the structure; and these need not be completed before October, 1876. The defendants are not under any contract or agreement with any one to complete the work in a shorter time than the Legislature has enacted.

February 17.

SPRAGGE, C.—The Act of incorporation of the Bridge Company (20 Vic., c. 227) is sufficiently explicit as to the kind of bridge thereby authorized to be constructed.

Judgment.

After reciting that the construction of a bridge across the Niagara River, from a point indicated, would be of great advantage to the public, it proceeds to incorporate a company for its construction, maintenance, and so forth; and, at section 19, enacts, that "the said bridge shall be as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railway trains."

My attention is directed to section 16 of the same Act, and to section 2 of an Act amending the Act of Incorporation, 22 Vic., Ch. 124, as shewing that the Legislature contemplated that the bridge might be completed so as to admit of the passage of railway trains at one period; and be completed for the passage of ordinary carriages at another period; and the sections referred to do shew this. This is to negative any presumption that might be supposed to arise from the description in the earlier Act, of the *kind* of bridge that was to be constructed, that it was to be completed for all purposes at the same time.

The informant alleges that the bridge was commenced

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in November, 1870; and in the year 1873 completed across the river, but only so far as to allow of the passage of railway trains, and without any way, means, or conveniences for the passage of foot passengers or carriages; that thereupon the Grand Trunk R. W. Co., under the agreement and lease referred to in the information, entered into possession of the bridge, "and is now using the same for the passage of railway trains containing passengers, and other traffic;" and it alleges that neither of the defendants have as yet constructed a carriage or foot way, and that they refuse to construct the same; that they have abandoned all intention of so doing; and that it is their intention to maintain the bridge as constructed for the use of railway trains only.

Judgment.

The first alternative of the prayer is, that the defendants may be decreed to construct and maintain "a carriage way and foot way over the said bridge;" or that they be restrained from keeping or maintaining the bridge that is constructed, "unless and until constructed as well for the passage of persons on foot and in carriages and otherwise, as for the passage of railway trains." The other alternative of the prayer is, that in the meantime the defendants may be enjoined from imposing, receiving, or collecting tolls in respect of any passenger or traffic carried by railway trains over the bridge.

The last alternative prayer is open to this objection, in addition to the objections to which it may be open in common with the more direct relief sought by the first alternative, that the party to construct the bridge is the bridge company, the party to receive tolls on railway traffic is the railway company; the default in the matter of bridge construction, if any, is in the bridge company. The statute authorized the construction of the bridge for railway purposes and its lease to the railway company, without making it a condition that it should be completed for ordinary passenger traffic at the same time. And

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indeed, the information makes no complaint of what has been done in this respect by the bridge company and the railway company. All that has been so done appears to have been lawful. To enjoin the railway company from receiving tolls on its traffic would be punishing that company for an alleged default in the bridge company, a default for which the railway company is not answerable, and which it has not the power to repair, if it would. This position of the two companies, and what has been done by them under the authority of the Acts referred to, is a reason which may well be urged by the railway company against *any* interference with the bridge which will affect its use for railway purposes. The construction of the bridge, so far as it has been constructed, was a lawful act; the lease to the railway company was also lawful; and the user of the bridge by that company, alleged in the information, was and is also lawful. The first alternative of the prayer cannot be granted, therefore, without prejudicing the rights of the railway company acquired under the authority of the Legislature, and that, in the absence of any default on the part of the railway company.

Judgment.

I mean the first alternative of the prayer, as interpreted by counsel for the informant; for they concede that neither mandatory injunction nor mandamus will lie, to enforce *directly* the construction of the ordinary passenger bridge. Counsel explain that what they seek is a prohibitory injunction, *i. e.*, an injunction enjoining the defendants from keeping or maintaining the bridge actually constructed, unless or until constructed for ordinary traffic as well as for railway traffic. Such an injunction, in whatever way it might be enforced, would necessarily interfere with the user of the bridge by the railway company.

These are considerations applying particularly to this case; but there are also the general grounds upon

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which the Court proceeded in *The Attorney General* v. *The Birmingham and Oxford Junction R. W. Co.* (*a*). The company was authorized by Parliament to construct a main line, and also a branch line, and had nearly completed the main line without commencing the branch line; and the information charged that the Company intended to abandon the construction of the branch line altogether. It was contended, in accordance with the law as then interpreted, that the Act of Incorporation was a contract by the company to make the line, and also to make the branch; that it was competent to the company to make all the lines; but that it could not elect to make one only of its lines. Sir *James L. Knight Bruce*, then Vice-Chancellor, held, that the remedy (if any) was by mandamus: that at any rate it was not a case for the interference of a Court of Equity, upon the short ground that it was the *Attorney-General*, on behalf of the public, that asked the Court to interfere; and that the interests of the public would not be served by such interference. He said, "I am unable to see how the interests of the country, or the interests of Her Majesty's subjects at large, are concerned in preventing the opening or the construction of one part of the railway until another shall have been commenced or proceeded with, or until certain notices shall have been given. As I have already said, I can conceive that there may be private interests entitled to be heard on such a question; but how the public interest can be the better (I will not say, or the worse,) by restraining the opening, or proceeding with one part of the railway until the other shall have been proceeded with, or certain notices shall have been given relating to the other, I am unable to see. Being unable here to find any ground for saying, that the public or general interest will be advanced by such an injunction, I cannot conceive that the injunction asked will support the information."

Judgment.

(*a*) 4 Deg. & S. 490.

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The case was appealed; when the judgment of the Vice-Chancellor was affirmed by Lord *Truro* (*a*), who designated what was sought by the information as "in effect to compel a specific performance of an Act of Parliament."

The principles upon which that case proceeded apply to this. It is impossible that I can see that the public interest would be promoted by preventing the use of this bridge for railway purposes, until it be constructed also for ordinary passenger traffic. It is true that the public interest would be *further* promoted by the building also of the latter structure; but that is not the point; the same was the case, also, in the case referred to. The point is, whether the public interest would be served by closing the bridge against railway traffic; and upon that there can be no doubt.

Judgment.

It is attempted to distinguish this case from the case cited, upon the ground that the bridge built is not the bridge authorized by the statute to be built; and that the Legislature authorized an interference with public (and private rights) only upon condition that such a bridge should be built. Mr. *Maclennan* styles the bridge that is built a different work. I cannot agree in this contention; at least not to the extent urged. The information does not complain of the bridge so far as it has been built; it assumes that so far it is a proper bridge, for it says, that "the defendants, or one of them, should be compelled to construct and maintain a proper carriage way and foot way over the said bridge." It is thus treated as only an incomplete structure; constructed properly so far as it goes, but only completed for a portion, not for all, of the purposes contemplated by the Act.

The two cases principally relied upon to sustain the

(*a*) 3 McN. & G. 453.

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information, are *The Attorney-General* v. *The Tewkesbury and Malvern R. W. Co.* (*a*), and *The Attorney General* v. *The Mid-Kent and South Eastern R. W. Cos.* (*b*). The first of these two cases turned upon the meaning of the word "accordingly" used in the 13th section of the Railway Clauses Acts—whether it meant according to plans and sections deposited, or, in pursuance of the power conferred. It was not contended that either the railway company or the public would be prejudiced whichever construction was put upon the word.

The other case cited comes nearer to the case that is now before me, though there are still essential points of difference. The application of the railway company for a charter was opposed by the Croydon Board of Health, "which (as the report of the case says,) only withdrew its opposition" upon a clause being inserted in the Act providing that every bridge erected in the Parish of Croydon should have, among other things, an ascent thereto not to exceed 1 in 30, the general clauses Railway Act prescribing only 1 in 20. The company proceeded to make their road in the parish, but found that they could not make the ascent to one of the bridges of the prescribed grade, by reason of the embankment necessary for that purpose encroaching upon a strip of land of a Mr. *Teevan*, who obtained an injunction restraining them from interfering with it. Upon this the company shortened the embankment, which necessitated an increase of inclination which made the slope as much as 1 in 20. The strip of land encroached upon, as it turned out, (so says the report,) was not delineated in the plans or described in the book of reference of the company. The change of grade was not acquiesced in by the parish authorities, and some correspondence ensued,—as to which Lord Justice *Rolt* said, "repeated letters were written, asking the company to do what it

Judgment.

(*a*) 4 Giff. 333; 1 D. J. & S. 423. (*b*) L. R. 3 Chy. 100.

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was their duty to do. They take no notice of them for months; and when at last they send a reply, they treat their obligations as depending upon the question whether they can come to an arrangement with Mr. *Teevan*, as if the dispute were only between him and them." From this and other language of the Lords Justices, it is evident that they considered that the railway company treated their obligation too lightly; that they had not done all they could do to overcome the difficulty that existed, a difficulty created by their own inadvertence. The Court treated the approach to the bridge that had been made, as not within the powers of the railway company. As to Mr. *Teevan* and the injunction obtained by him, Lord *Cairns* said, "The company may come to terms with him if they can; but if they cannot, and are unable to comply with the Act without closing their railway, much as such a result may be to be regretted, they must close it."

Judgment.

This is certainly a strong case, stronger than the case which preceded it of *Raphael* v. *The Thames Valley R. W. Co.* (*a*). I observe that the case in *DeGex* and *Smale* was not referred to; and it is apparent that the Court did not apprehend that the closing of the railway would be the consequence of an injunction. What they did was to reverse the order of Vice-Chancellor *Stuart* dismissing the information; and to grant a mandatory injunction. The terms of the mandatory injunction are not given; but I apprehend they would be to enjoin the railway company from continuing the approach to the bridge at an ascent greater than 1 in 30. This is a very different thing from what was sought in the case in *DeGex* and *Smale*, and in this case: involving in that case probably only difficulty and expense, and at most a break in the continuity of their railway.

The great distinction, however, between that case and

(*a*) L. R. 2 Chy. 147.

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the one before me, is this, that in that case, what was done by the Railway company was not within the powers conferred by the Act; while in this case, what has been done has been done under the authority of the Act, and in accordance with the powers conferred by it; in that case a positive wrong, a nuisance unless authorized by the Act; in this case, as put by Mr. *Blake*, a diminution only of a contemplated public benefit. I have already explained why, in my judgment, all that has been done by the two sets of defendants has been lawfully done.

At the argument of the demurrer, I referred to what I may call a maxim of the Court to interpose by injunction only where it can do so usefully and effectually. The Court is asked to enjoin the defendants from keeping or maintaining "the said bridge," that is, the bridge now constructed, unless and until constructed also for ordinary traffic. The Court cannot help seeing, as it is bound to see, what would be the consequence of such an injunction. To carry it out, a time would have to be named within which the additional structure should be completed; and if not completed, the alternative prayed for and ordered, would be,—rendered in plain English,—the demolition of the bridge already constructed, *i. e.*, that the defendants should demolish the bridge, or be punished for a contempt of Court in omitting to do so; and unless the Court means its order to be a mere *brutum fulmen*, it must do this. The Court, it is conceded, cannot directly order the making of this structure. So the contempt would not consist in not making it; but,—having omitted to make it within the time prescribed—in not demolishing, at the expiration of that time, the bridge already constructed. I am very unwilling to place the Court in so false a position as would to my mind be involved in making such an order.

Judgment.

If the question were, whether the bridge company, having obtained from the Legislature authority to make

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a bridge to serve two purposes, and having made it so far only as to serve one, would be justifiable or excusable in abstaining permanently from so constructing it as to serve both, I should feel no difficulty in coming to a conclusion; assuming, that is, that all that is necessary to come to a right conclusion is stated in this bill. But the case admits of the many other considerations to which I have adverted.

I have thought it best, with a view to the avoidance (so far as it can lie with me), of future litigation, to discuss the title to relief in this Court made by the information, rather than to place my judgment upon any of the other grounds taken in argument. Upon those other grounds it is not necessary for me to express any opinion; but assuming this suit not to be premature by reason of the time for construction not having elapsed, and that the Attorney-General of Ontario is the proper officer to file this information, my opinion is, that this information cannot be sustained.

Judgment.

The demurrer must be allowed with costs.

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The order, made on this demurrer, was reheard at the rehearing term in December, 1875, when the same was affirmed with costs.

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## ARNOLDI v. GOUIN.

*Architect—Mechanics' Lien Act* 1874, (*O.*)

*Held*, on demurrer, that an architect is entitled to register a claim under The Mechanics' Lien Act of 1874, O., for moneys due him for making plans and specifications for, as also superintending the erection of, buildings for the owner.

Jan. 19, and Feb. 9, 1876.

This was a bill by an architect to have the amount due to him for his services in that capacity ($1,700), in and about certain buildings of the defendants, made a lien upon them under The Mechanics' Lien Act of 1874.

Statement.

The bill alleged that it was agreed between the plaintiff and the defendants that the plaintiff was to act as architect and superintendent for the defendants in the erection and construction of the buildings, and to do and perform whatever work and things were necessary to be done in that capacity; and that the plaintiff in pursuance of that agreement acted as architect and superintendent accordingly, and performed all work and things necessary to be done in that capacity.

The defendants demurred for want of equity.

Mr. *Hoyles*, in support of the demurrer. The short point for the decision of the Court is, whether an architect is entitled to file a bill to enforce a claim registered by him under the Mechanics' Lien Act, for services rendered by him for the proprietor of property in the drawing of plans, preparing specifications, and superintending the erection of houses thereon. The authorities, however, would seem to establish the contrary thereof: *Phillips* on Lien, pp. 59, 60, 75. If an architect can sustain a bill such as this, so also must it be held that an overseer, timekeeper, or other persons, can do so. The words, "any other person" in the Act must be taken to embrace only persons *ejusdem generis*. They must be persons of the same class.

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Mr. *Fitzgerald*, Q. C., contra. The passages of *Phillips* referred in support of this demurrer are very restrictive in their application. In the Act of 1874 the word contractor is defined. Section 1 of the Act of 1873, and section 2 of that of 1874 define who the persons are that are entitled to claim such liens. The term "architect" includes "builder." The lexicons shew that he is a "master builder." The derivation of the word also shews it, and the Greek word has the same signification: *Phillips*, page 51; *Sodine* v. *Winter* (*a*); *Mrartine* v. *Nelson* (*b*).

Mr. *Hoyles*, in reply. An architect's work is not such as can come under the provisions of either Act. His work is brain work, and is not such as is contemplated by the Act. For instance, a mere explorer is not a miner—"a miner" being really the person who works in the mine itself.

Judgment.

PROUDFOOT, V. C.—[After stating the facts as above.] The question is, is an architect entitled to the benefit of the Act?

The 2nd section of the Act enacts that every mechanic, machinist, builder, miner, labourer, or other person doing work upon or furnishing materials to be used in the construction of any building, shall have a lien or charge for the price of the work.

It was contended that the Act only contemplated persons who applied manual labour on, or furnished materials to be used in, a building in course of construction,—that an architect did neither,—and that the phrase *other person* must be construed, person of the same character as those mentioned specifically in the section.

The duties of an architect in preparing elevations, working plans, specifications, superintending the con-

(*a*) 32 Maryl. 130.

(*b*) 51 Ill. 422.

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struction of the building according to the plans, and seeing that proper material is used, &c., are essential things to be done in the construction of the work; and the architect seems to me, if not comprehended under the designation of "builder," to come under that of *other person*. There is nothing to shew that the person to be protected must have actually carried the stone or brick, or hewn the wood used in the building. The man who designs the building and superintends its erection as actually does work upon it as if he had carried a hod.

Judgment.

*Webster* (Dict.) defines a *builder* as "one who builds, —one whose occupation is to build,—an architect, a shipwright, a mason," &c. In common use the signification is, I think, somewhat more restricted, and perhaps would not embrace the duties of an architect in designing the building. But he certainly is a person performing work upon the building.

It is satisfactory to find that this construction of the Act brings our law into harmony with the civil law (*a*), with the French law (*b*), and with the Lower Canadian law (*c*), all of which give a lien to the architect as well as to the contractor and to the workman.

The demurrer is overruled, with costs.

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(*a*) Domat Loix Civ. Livre III., tit. 1, s. 5, ss. 9. (*b*) Code Nap., Art. 2103, c. 4. (*c*) Code, s. 2013.

## CLOSE v. BELMONT.

1875.

*Lessor and lessee—Verbal agreement to build—Removal of building—Equities.*

A lessee, after he had taken possession under his lease, agreed verbally with the lessor to erect at his own expense a rough-cast addition to a brick tenement then on the premises, with the privilege of selling or removing such addition. The lessee accordingly built such addition, and afterwards transferred his interest to the defendant. The lessor subsequently sold and conveyed the fee to the plaintiff subject to this lease, and by the lessee "assigned to *B.*" (the defendant, who was then in possession.) The defendant being about to sell and remove such addition, the plaintiff took proceedings to restrain him from so doing, claiming the same as part of his freehold, but:

*Held*, that the plaintiff was bound not only by the terms of the lease, but took subject to any other rights or equities existing between the original lessor and lessee, including such verbal agreement to permit the removal of the addition.

Nov. 23.

Statement.

The bill in this case was filed by *Patrick G. Close* against *Bell Belmont*, setting forth that on the 23rd November, 1871, one *Smith* being owner in fee of the premises in question, made a lease thereof to one *Evans* for a term of five years, from 10th November, 1870, who subsequently assigned and transferred all his interest in the said lease and term to the defendant, who went into and remained in possession of the premises. Subsequently, and on the 22nd September, 1873, *Smith* sold and conveyed the premises to the plaintiff in fee, "*subject to the said indenture of lease*," at which time there was on the premises an hotel, which was occupied by the defendant as such.

The bill further stated that the defendant had advertised for sale a rough-cast building annexed to, and forming part of the freehold, and also certain fixtures consisting of urinal, washstands, &c., and prayed an injunction to restrain such sale.

Affidavits were filed shewing the character of the building and the manner in which it was said to be

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attached to the main building, there being strips of tin on the roofs nailed to both, so as to turn the rain: that there was not any eastern wall to the addition, the western wall of the original one serving as such. The affidavit, and cross-examination thereon, of the original lessee, (*Evans*) however, proved distinctly that, after he had been in possession of the property for some time, he found he required more accommodation than the original building afforded, and applied to his landlord (*Smith*), and offered to be at one half the expense of putting up a brick addition if he (*Smith*) would have one put up; this, however, *Smith* refused to acquiesce in, but told *Evans* that he might build a rough-cast building to the west of the hotel, and that such building would be his own, and that he could remove the same on the expiration of the lease or sell it.

Statement.

Mr. *H. O'Brien*, for the plaintiff, moved to restrain the sale or removal of the building, and also of the fixtures, referring to *Amos & Ferard* on Fixtures, pp. 44, 46, 48, 81, 131, 161, and 237. He submitted the Court would not permit the removal of the rough-cast addition, it being shewn that by so doing the main building would be materially damaged, and for the present rendered nearly useless and untenantable, as openings made by *Evans* when putting up the new addition would be left entirely exposed: *West* v. *Blakeway* (*a*); *Woodfall's* L. & T., page 517. The *onus* lies on the defendant of shewing that no injury or damage will accrue to the plaintiff by the removal of the building: *McDonald* v. *Weeks* (*b*).

Mr. *Bain*, contra. The urinal and washstands are clearly tenant's fixtures, and as such removable by the defendant. The plaintiff is shewn to have had notice that the defendant claimed the build-

(*a*) 2 McN. & G. 729. (*b*) 8 Gr. 299.

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ing; and in any event he cannot stand in any better position than *Smith*, from whom he purchased, would have been: *Wigle* v. *Settrington* (*a*). *Evans*, in his depositions, states that his intention was, and his instructions to the builder were, to erect a building not affixed to the freehold. Plaintiff swears he gave special instructions to his solicitor in preparing the conveyance from *Smith* to have the new building inserted in it; but why should he do this if he had not reason to doubt that the building did go with the freehold. He gave no special instructions in regard to the other parts of the property. There is no evidence to shew that the old building is injured by the openings made in it; but, however this may be, they were so made with the sanction and consent of the then owner (*Smith*), and the plaintiff is bound to accept the property in the same plight and condition that *Smith* would be.

January 26.

Judgment.

SPRAGGE, C.—The application is, to restrain the defendant from removing a rough-cast building, which is a sort of appendage to a brick building on the corner of Yonge and Elm streets, in the City of Toronto. The brick building, with a yard, was let as the "White Hart Hotel," for a term of years from 10th November, 1870, by the then owner, *Frederick D. Smith*, to one *Evans*.

In the early part of the tenancy, *Evans* finding the accommodation of the brick building insufficient, proposed to *Smith* that a brick building should be put up in the rear, and that he would bear half the expense. This was declined by *Smith*, and it was then agreed that *Evans* might put up a rough-cast addition at his own expense, not attaching it to the brick building, and that it should be his own property. Access from the old building to the new was made on the lower floor by a doorway made through the brick wall, with the consent of *Smith*, and on the upper floor by the enlargement of

(*a*) 19 Gr. 512.

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a window. To this also *Smith* was an assenting party by conduct, if not in express terms; but I should say in terms also. *Evans* appears to have been careful not to attach the new building to the old one, unless a constructive attaching be involved in the apertures for doorways on the two floors, and for that he had *Smith's* consent. It is obvious, therefore, that as between *Smith* and *Evans*, *Evans* had the right to remove the building in question.

The plaintiff is a purchaser from *Smith*, and the defendant a purchaser from *Evans* of the residue of the term, and of, *inter alia*, the rough-cast building. The purchase by the defendant from *Evans* was the earlier of the two. During the treaty for purchase, a question was raised by Mr. *George Hawke*, who was acting for the defendant, as to whether *Evans* was entitled to the rough-cast building, and Mr. *Hawke* and *Evans* saw *Smith* on the subject, when *Smith* admitted *Evans's* right to it, and to do with it whatever he pleased; and shortly after the purchase by the defendant, reiterated the same thing in substance to him.

Judgment.

It is clear, then, that neither as against *Evans* nor against *Belmont*, the present defendant, could *Smith* be entitled to an injunction to restrain the removal of the building. The question remains whether the plaintiff stands on a different footing from *Smith*. He purchased from *Smith* in September, 1873, in terms subject to the lease to *Evans*, "and by him assigned to one *Bell Belmont*." *Belmont* was then in possession. It is clear that the vendee purchased subject to any equities existing between his vendor and the tenant in possession. This is established in several cases, and the equities need not be such only, as appear upon the face of his lease. In *Daniels* v. *Davison* (*a*), the equity was even in another character, that of a contract for purchase. In

(*a*) 16 Ves. 249.

that case, as in *Allen* v. *Anthony* (*a*), the equity arose, as it did in this case, after the granting of the lease. A number of cases are collected in Lord *St. Leonard's* Book on V. & P. (*b*).

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I think it quite clear that the plaintiff was affected with notice of the equity in the tenant, under the circumstances in which the building was put up, to remove it. I have called it an equity, that being sufficient, though it may have been more; but that it is not necessary to discuss, and I have placed the question of notice to the plaintiff upon his being affected with notice. There is, however, besides, some evidence of actual notice, and the plaintiff does not in his bill, nor in any affidavit, deny notice.

The case made by the bill is fully answered. The injunction must, therefore, be refused, and with costs.

Judgment.

In the view that I take of the case I have not thought it necessary to discuss the question principally argued before me—whether the rough-cast building was removable by the tenant as coming within the rule as to trade fixtures?

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(*a*) 1 Mer. 282.

(*b*) 14th Ed. 762.

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## CAMPBELL v. CAMPBELL.

*Alimony—Defence of adultery—Weight of evidence.*

To a bill for alimony, the husband alleged, as a ground of defence, that the plaintiff had been guilty of adultery. The evidence of the actual commission of the crime was distinct and positive by the brother and brother-in-law of the husband, who had watched on the outside of the house where the plaintiff resided with her husband, on the night that the alleged act of adultery was said to have been committed. These two witnesses also proved that the language used by the parties was of an obscene and offensive character; and there was the fact that letters of an objectionable nature had been discovered as passing between the plaintiff and a young man against whom the husband had warned his wife, and had forbidden her to associate with. The Court, under the circumstances, gave credence to the statements of these two witnesses, although without their evidence the case would not have been more than one of the very gravest suspicion; and this although the plaintiff and the partner in her guilt swore positively that no such act had ever been committed.

The nature of the evidence to be accepted in such cases, and the rules to be observed in the consideration of it, discussed.

Statement. This was an alimony suit, and the evidence had been taken before Vice Chancellor *Blake*, at the sittings of the Court at Whitby, the hearing of the cause being reserved to come on before the same Judge at Toronto. The effect of the evidence given is fully set forth in the judgment. The marriage of the parties being admitted.

May 14th. Mr. *Moss*, Q. C., for the defendant.—It is difficult to obtain the evidence of an eye-witness as to the guilt of the parties in such a case, and the Court does not require such proof. It is sufficient if the parties have been together alone when an opportunity would be had for criminal intercourse.

The conduct of the parties is inexplicable on any other supposition than that they were guilty. The correspondence between the plaintiff and *Park* shews that

she was a very fit subject for any seducer. The correspondence shews that the plaintiff had not kept her purity of mind unstained—shews great levity and impropriety. She had to admit that this correspondence arose from previous arrangement. As to what took place on the night of the 26th of August. It is shewn that *Gordon* walked home with plaintiff at her invitation, and went into the house at her invitation. The servant girl says there was no music that night, except the running of fingers over the keys of the piano: this contradicts the story of the plaintiff and of *Gordon*, who swears that there were two songs sung; after the songs that there was some reading by plaintiff, and then there was looking at stereoscopic views, after which they played drafts, and it is to be noticed that the board was placed on their knees, although there was a table in the room. It can hardly be credited that the plaintiff told *Gordon* that *Campbell* was on the watch. Why should *Gordon* have stayed so late, if he was aware that they were watched? *Campbell* and *Anderson*, who were outside, did not at first hear what was said by the parties in the room. This may be accounted for in this way, that plaintiff and *Gordon* spoke low while the servant girl was down stairs, and after she had retired they spoke louder, and so that they could be heard outside. Or it may be that the stillness of the later hours of night enabled the watchers to hear with more distinctness, although the conversation continued to be carried on in the same tone. No motive can be imputed to *Campbell* and *Anderson* for seeking to destroy the character of the plaintiff. Nothing could be said against these men in the witness box. Plaintiff sought to establish that there was music that evening, but the weight of evidence is against that being the fact. Plaintiff says that *Gordon* left at 1:30, and *Gordon* says at 1:30, but that his watch was fifteen minutes fast. *Gordon*, however, in his affidavit, filed, on the application to obtain a new trial, says that on getting up to leave he was surprised to

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learn that it was a quarter to two. No importance can be attached to the evidence of *Davidson* and *Allan*, as to the time. Mr. *Gross's* story is an extraordinary one. He had two clocks, and he noticed that they were both at 1:30 when he went down to get water to bathe his foot. He had been roused, he says, by what he thought was a cry of fire; he got up, looked out at the window, and saw about half-a-dozen people on the other side of the street. While *Adams's* testimony corroborates the testimony of *Campbell* and *Anderson* as to what *Campbell* said to *Gordon* on the street.

Argument.

Mr. *M. C. Cameron*, Q.C., for plaintiff.—The circumstances must be such as would lead to the conclusion of improper conduct. The plaintiff and *Gordon* had been acquainted from childhood, and he was intimate with her husband and had often been at his house. If *Gordon* was guilty of impropriety or imprudence by seeing a married woman home, and accepting her invitation to go into the house, then people of the utmost respectability are committing such improprieties every day. The weight of evidence is in favour of the view that there was music that night. Mr. and Mrs. *Gibson* could not be mistaken as to the fact. The servant girl was too much taken up with her lover to be able to say. *Adams's* evidence shews what took place between *Campbell*, *Anderson*, and *Gordon* on the street.

*Alexander* v. *Alexander* (*a*) is a case similar to this, in which a divorce was refused, and *Williams* v. *Williams* (*b*), and *Loveden* v. *Loveden* (*c*) are also in favour of the plaintiff's right-

Mr. *Moss*, in reply.—There is no ground upon which to charge defendant with setting his brother and brother-in-law on to get up evidence of the plaintiff's guilt.

(*a*) 2 Sw. & T. 385. (*b*) 2 Sw. & Fri. 299. (*c*) 2 Hag. Con. 1.

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The intimany of *Gordon* while *Campbell* was at home was by no means the same as after *Campbell* had gone away.

*Frank* v. *Carson* (*a*) shews that the evidence adduced here is sufficient to establish the fact of criminal intercourse.

The following cases were also referred to:

*Dillon* v. *Dillon* (*b*), *Croft* v. *Croft* (*c*), *Soilleux* v. *Soilleux* (*d*), *Best* v. *Best* (*e*), *Elwes* v. *Elwes* (*f*), *Evans* v. *Evans* (*g*), *Lockwood* v. *Lockwood* (*h*), *Turton* v. *Turton* (*i*), *Hay* v. *Gordon* (*j*), *Caton* v. *Caton* (*k*), *Bramwell* v. *Bramwell* (*l*), *Tucker* v. *Tucker* (*m*), *Burgess* v. *Burgess* (*n*), *Grant* v. *Grant* (*o*), *Chambers* v *Chambers* (*p*), *Rix* v. *Rix* (*q*), *Cadogan* v. *Cadogan* (*r*), *Simmons* v. *Simmons* (*s*), *Dysart* v. *Dysart* (*t*), *Hunt* v. *Hunt* (*u*), *Croice* v. *Croice* (*v*), *Davidson* v. *Davidson* (*w*), *Dally* v. *Dally* (*x*), *Moorsom* v. *Moorsom* (*y*).

Sep. 15th.

Judgment.

BLAKE, V.C.—The plaintiff and defendant were married on the 6th April, 1863, and lived together as man and wife until the latter part of the month of August, 1873, when the defendant refused any longer to recognize the plaintiff as his wife. There have been four children born of the marriage. The present bill is one

(*a*) 15 U.C.C.P. 135.
(*b*) 3 Cur. Ec. 86.
(*c*) 3 Hag. Ec. 310.
(*d*) 1 Hag. Con. 373.
(*e*) 1 Add. 411.
(*f*) 1 Hag. Con. 269.
(*g*) 1 Hag. 36.
(*h*) 2 Cur. Ec. 281.
(*i*) 3 Hag. Ec. 338.
(*j*) L. R. 4 P. C. 337.
(*k*) 13 Jur. 431.
(*l*) 3 Hag. Ec. 618.
(*m*) 11 Jur. 893.
(*n*) 2 Hag. Con. 223, 226.
(*o*) 2 Cur. Ec. 16.
(*p*) 1 Hag. Con. 413.
(*q*) 3 Hag. Ec. 75.
(*r*) 2 Hag. Con. 6.
(*s*) 11 Jur. 830.
(*t*) 1 Rob. 106, 141.
(*u*) Deane & Swa. 121.
(*v*) 1 Spinks 121.
(*w*) Deane & Swa. 132-5.
(*x*) 2 Sw. & T. 228.
(*y*) 3 Hag. Ec., at 94.

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If the testimony adduced on behalf of the defendant be believed, then there can be no doubt but that the plaintiff has been unfaithful to her husband, and that the partner in her guilt was *George Gordon*. It has been very strenuously urged before me that the evidence of *James Campbell*, the brother, and of *John Anderson*, the other witness, who give direct testimony as to the matter in issue, cannot be accepted as worthy of credit, and therefore that the case is not proved against the wife. It may be well, before proceeding to discuss the evidence, to glance at the rules which guide in the consideration of the question now before me.

Judgment.

The principles on which the Ecclesiastical Courts acted, are thus laid down in *Ayliffe* (*a*): "Adultery being an act of darkness and of great secrecy, can hardly be proved by any direct means; therefore in relation to the proof of adultery, by reason of such difficulty, it happens that presumptive evidence alone is sufficient proof; and this presumptive proof is collected and inferred *ex actibus propinquis*, that is to say, from the proximity and nearness of the acts; and thus adultery may be proved by such inferences as are received and approved of either by law or nature."

(*a*) pp. 44, 45, quoted in Shelford 405.

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The rule is thus stated by Lord *Stowell* in *Williams* v. *Williams* (*a*): "It is undoubtedly true that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable; but I take the rule to be, that there must be such proximate circumstances proved, as by former decisions, or in their own nature and tendency satisfy the legal conviction of the Court, that the criminal act has been committed. The Court will look with great satisfaction to the authority of established precedents, but where these fail, it must find its way, as well as it can, by its own reasoning on the particular circumstances of the case." At page 303, the same report proceeds: "The question then comes to this,—does the visit of a married woman to a single man's lodging or house, in itself, prove the act of adultery? There is no authority mentioned for such an inference, but the case of *Eliot* v. *Eliot*, which is open to the distinction, arising from the character of the house in that case, which is too obvious to be overlooked. It would be almost impossible that a woman could go to such a place but for a criminal purpose; but in the case of a private house, I am yet to learn that the law has affixed the same imputation on such a fact. In a late case of *Rickets* v. *Rickets*, in the King's Bench, the visit of the wife to a single man's house, combined with other circumstances, was held sufficient. In that case the windows were shut, and there were letters which could not be otherwise explained. That case, therefore, is no authority in this enquiry; and though the Court might be induced to think that such visits were highly improper, it must recollect that more is necessary, and that the Court must be convinced, in its legal judgment, that the woman has transgressed not only the bounds of delicacy, but also of duty."

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There are several passages in the leading case of *Loveden* v. *Loveden* (*b*), which may be usefully referred to.

(*a*) 1 Hag. Con. 299.

(*b*) 2 Hag. Con. 1.

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At page 2: "It is a fundamental rule that it is not necessary to prove the direct fact of adultery; because if it were otherwise, there is not one case in a hundred in which that proof would be obtainable. It is very rarely, indeed, that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally, though many of them, of a more obvious nature and of more frequent occurrence, are to be found in the ancient books; at the same time it is impossible to indicate them universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down on the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and Courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtleties, and remote and artificial reasonings upon such subjects. Upon such subjects the rational and legal interpretation must be the same. It is the consequence of this rule that it is not necessary to prove a fact of adultery in

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time and place. Circumstances need not be so specially proved as to produce the conclusion that the fact of adultery was committed at the particular hour or in that particular room; general cohabitation has been deemed enough." Again, at page 21: "The correspondence of a young married woman with a young man, unknown to her husband, is what I presume hardly comes within the known latitude of modern manners; but connected with the general footing on which these parties, by all the evidence to which I have alluded, were proved to have stood, it speaks a more decisive language with respect to its nature." And at page 26: "It is said, cannot people go into decent rooms in a decent house without being suspected? Yes, certainly, if they are decent persons; but if such an intercourse is proved between them as is established by the fact of this correspondence, and by the other facts to which I have alluded, I say the fact of such parties being close together for such a length of time, and unobserved, warrants the conclusion that they have committed the criminal act."

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Some observations made by the Court in the case of *Cadogan* v. *Cadogan*, and appended as a note at p. 40 of this case, are material. Amongst them is the following: "It may be possible that persons of peculiar and eccentric dispositions and habits, may live together in such a manner without actual criminal connexion, and it is physically possible that persons may be in the same bed together without criminal intercourse. Courts of Justice, however, cannot proceed on such ground; finding persons in such a situation as presumes guilt generally, they must presume it in all cases attended with these circumstances. They cannot adopt the extravagant professions of platonism for the principles of their decisions—such would be the decision of the Court on this point alone; but the Court is not at liberty to put out of its recollection all the antecedent facts of the case on which it has before observed."

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In the case of *Burgess* v. *Burgess* (*a*), the same high authority deals with the question of probability: "Such gross indecorums, and improper familiarities, with opportunities of privacy, advance to the footing of proximate acts; and if the privacy is shewn to be frequent, the Court will infer the commission of crime. * * * Circumstances, such as these, connected with the proof of previous intimacy, must be considered as laying a strong ground of probability that they met, at such times, in private interviews. * * * Here is an act of a married woman being seen to come out of the bedroom of a young unmarried man, a circumstance which, generally speaking, might only be considered in the light of a very high indecorum; but it is, in the present case, to be taken in conjunction with the whole conduct of these parties, and the Court is then to consider what would be the probable consequence of such an opportunity of privacy between them."

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The last citation which I shall make on this branch of the case is the following passage from *Chambers* v. *Chambers* (*b*): "That a young woman, estranged from her husband, and young officer, should be living together for months, and at different places, though under the flimsy disguise of separate beds, and that Courts of Justice should not put upon such intimacy the construction which everybody else would put upon it, would be monstrous."

Our attention is, however, called to the fact, by Mr. *Paynter*, in his work on Marriage and Divorce (p. 187), that the same presumption or probability is not in every case to be drawn from the same facts. He says: "Equal presumptions do not always follow similar facts: for the weight of presumption varies with circumstances, and with none more than with the rank and condition, the situations and habits, of the parties. For it must be

(*a*) 2 Hag. Con. 229 & 232. (*b*) 1 Hag. Con. 445.

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kept in mind that, in different ranks of life, and in different countries, different modes of education, and different notions and manners prevail; for instance, there are many freedoms which, in the unreserved contact of humble life, continually take place without imputation; whilst an equal license in classes of a higher order, and of a more refined education, would naturally lead to a very different conclusion * * * ; so where the parties are near of kin, or sustain the relation of physician and patient, a carnal intercourse will be less readily inferred; and according to the old canonists, if a clergyman is found embracing a woman in some secret place, this does not, as in the case of other people, prove adultery, for "he is not presumed to do it on the account of adultery, but rather on the score of giving his benediction or exhorting her to penance" (*a*). I may remark in passing that this extremely convenient rule which the ecclesiastics propounded when framing their canon law, does not seem to be allowed at the present time *requiescere in pace*; but it appears of late to be thought by some as much applicable to the light of the 19th century, as it was to the darkness of the age that gave it birth.

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It is obvious, then, from the authorities, and indeed without them, seeking to arrive at a just conclusion in the matter, it is equally plain, that one main ground of inquiry must be the terms on which the husband and wife were living prior to and at the time that it is alleged that the act was committed; and as to all those surroundings which throw light on the question, whether or not the wife had an affection for her husband and he for her; and whether or not the married life was one in which the parties rested satisfied with, and enjoyed the company of each other, or sought, beyond their own immediate circle, for pleasure which they did not find there.

(*a*) Bishop M. & D. 631, Ayliffe Parer. 51.

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Our experience teaches that men very much resemble each other, not only in their good qualities, but their bad. It is from this to a great extent that we draw our conclusions from probabilities, or "the likeliness to be true," and arrive at the determination that a narrative is probable, because it contains circumstances which are usually found in a story that is true.

In the present case the lady, the daughter of a clergyman, seems to have received a good education, and to have been not without accomplishments. She is described as a good musician, and very fond of both playing and singing. The husband appears to have been a man of good business habits, who by care and industry had acquired what, in this country, is looked upon as a considerable fortune. It appears, however, that he took but little, if any, interest in that which pleased his wife. The marriage was not, in this respect, a well assorted one; neither party sought to accommodate these differences. The husband, I should infer, sought the more to obtain pleasure from his chief source of enjoyment, the business which had absorbed so much of his time and attention, and he gave himself up to that to the exclusion, no doubt, to some extent, of the attention which his wife might have reasonably asked of him; and she looked for and obtained, in the society of others, the enjoyment and admiration which she vainly sought at the hands of her husband. Gradually that which amounted almost to estrangement grew up between them, and these feelings, unchecked, resulted in the miserable state of matters thus deposed to by the defendant:—

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"I was married to plaintiff in 1862 or 1863; lived with her on fair terms up to a year ago last fall—I might say till about January, 1873. I found at this time that her affections were estranged from me; that she was neglecting her children, and neglecting her house. She had told me several times in the spring of

1873 that she wished the children were dead, and that if they were dead she would leave me. She asked me if she left me, how much I would give her? I told her I would give her nothing? I told her: 'Lizzie, if you wish to leave me, do it honourably, and don't disgrace me first.' I don't know how the conversation as to the children commenced, or what I said that led to it * * * Before I left I cautioned my wife as to her conduct with *Park*. I told her it was not right for her to walk on the street with a young man she knew nothing of, and that if I found him in the house, I would shew him the door. I also warned her against intimacy with *Gordon*. I did not know plaintiff was in correspondence with *Park* until my return, on 18th August last. * * * *Park* had applied by letter to us for the situation of book-keeper. This was in February, 1873. Plaintiff asked me, had I answered his application. * * * I had found fault with plaintiff for being too familiar with one *Pugsden* on board ship. I spoke to her after leaving it I did not speak about it while on the ship, because I did not want a scene."

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The plaintiff did not, in her examination before me, deny the statement thus made by the defendant, and I must therefore take it as describing accurately the position of affairs to which it has reference. With matters in this state the husband, on the 26th June, leaves on a journey to England, whence, after an absence of over seven weeks, he returns on the 18th of August. On the morning of the following day he finds a letter in his office directed to his wife, which he opens. It reads as follows:—

"CONCORD, Aug. 14th, 1873.

DEAR MARIE,—I wrote to you from here three or four weeks since, but have never had an answer. I was thinking of coming about the first or second week in next month, should I be in time to escape the G—d—n. I asked in my last for some envelopes; will you write by return, and send me a few? I have been very busy all

1875. day, and have hardly a minute to spare, and have to walk to the post with this, as I cannot allow anyone to see the address. Be sure and write by return.

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In haste.—Believe me to remain,

My dear Marie,

Yours in sincerity,

G. H.

I think if you have written to me, your letter must have gone to the States, as there is a place of the same name there. Please address to me at Concord post office, County of Vaughan, Ontario.

Tell me where you think the suspicion is."

The following extracts from the evidence of the husband shew what transpired on the perusal of a letter justly calculated to arouse suspicion :—

"This was the first intimation I had of any correspondence with the writer. My wife's name is *Eliza Maria*. I understood the allusion to the envelopes. I thought she had given *Park* envelopes addressed in her own hand, and that he had run out of them. I afterwards, on search in my wife's drawer in my house, found papers "C," "D," and "E," all in my wife's handwriting. I found these letters on the Wednesday after I returned. I first got the information about *Gordon's* visits at the time these letters were got. I took the children to Saugeen on Monday. I had decided plaintiff was not a fit guardian for my children. I felt some explanation was necessary, and I did not wish my children to see the trouble. * * * I did not take the children away in order to get her to leave me. After what occurred, I decided that a separation must take place. I had determined after getting the letters and hearing about *Gordon* to separate and take the children, notwithstanding any explanation. I kissed her when I parted with her on taking away the children. * * * What I heard about *Gordon* was, that he was in the habit of going often to my house and staying late at night. I heard so from my brother and his wife, and that they

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had heard so from Mrs. *Jamieson*. I did not go to Mrs. *Jamieson* for an explanation. I made up my mind without inquiring from Mrs. *Jamieson* to get rid of my wife. I told my brother so. I did not make up my mind to part with her without an explanation. I wanted one. I refused to see her. She asked to explain. She wrote letters to me. I have them with me; the first is dated 28th August, 1873, marked "F." I received these letters. I did not answer them. I told her father that if she would come to my brother's house I would see her there. I was smoking when my wife's brother came to talk to me on the matter. Plaintiff's father, the Rev. Mr. *Byrne*, came to me to ask me to see my wife. I told him she could see me at my brother's house. When I went to Saugeen, I knew *Park* was in Concord, and I and *James Campbell* watched to see who walked home with plaintiff from the church soiree. Before taking away the children I slept one night with my wife. * * I made no inquiries from Miss *Newsome*, nor from her sister. I asked my brother to do so. I never intimated any suspicion of her fidelity until after my return from Saugeen. * * * I understood from *Gordon* on the Saturday night that he denied his guilt. I heard so either from *Anderson* or *James Campbell*. I did not tell *Gross* that *Gordon* had admitted it on the night of the 26th. I say that I always told the *Byrnes* that *Gordon* admitted it on that night. *James Campbell* read the admission from a statement prepared by him. *Anderson's* paper was written on Sunday. Either my brother or I asked him to do so. My brother was acting with me. I am sure I asked *Anderson* to draw the statement. I don't recollect the time and place. He gave it to me Sunday or Monday. I read what was struck out in the statement of *Anderson*."

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The following are the papers referred to in the defendant's evidence:—

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Ex. "C."

"I have been very remiss in not answering yours ere this, but I have been out so often in the evenings that really I've not had time. *I hope it has not seriously affected you though.* "*Incognito*" came safely, and was delivered into my own hands at the office. I thank you for the interesting letter. I have just come in from a "ramble" with two or three *other girls*. I think if you ever *honor* this fair town with your presence again you might find *some one* to take a ramble with you *as of yore*. A great deal may have been thought, but I have never had a word hinted to me of the past. How happy I should have been to have complied with your request in coming to give you a drive and then having you drive me home again. That dream is too sweet to indulge in. I haven't the slightest idea when I shall come up to Toronto. The "Guardian" was up for two days last week, but I suppose you had not the extreme felicity of *beholding* him. I am not certain if the *Guardian* will take that journey you spoke of or not, but if it is taken it will be some time in June or the beginning of July. I am glad you enjoy attending Holy Trinity. You say it is what you like, a little "High." I would much prefer attending something a shade or two lower in the same denomination. There are too many Ritualistic performances there to suit my liberal views. I should go with you, though, if I came up. You suggest the probability of some one giving me a walk after service. I assure you, on my honor, nothing of the kind has occurred. I do not so easily forget those I *like* as to run with another the moment they are out of sight. You seem to have had some trouble in your mind as to whether you should write.

Judgment.

* * *

BOOKKEEPER."

Ex. "D."

"I hope you will not forget our last fond meeting, so reft with bliss. Oh! that it could be renewed; what rapture fills my mind to think no pleasure on earth so exquisite. Think me not flighty, it is only the outpouring of a deep passionate love which I bear for you; a love which so few comparatively feel for one another. Adieu! cherished one. Come when thou wilt, I've a welcome for thee. Song.

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"If you should ever come over there, would you come to see us? I should be most happy to see you, so understand that if you please. Your reception would be princely; do you understand. Do not keep me in such fearful suspense, but send me a *line* expressive of your feelings."

Ex. "E."

"Here I am vacillating between two opinions—whether shall I stay here or stray afar off? Duty says stay.

"You were so enchantingly persuasive that I could not help but yield—I might say I was prompted by an irresistible impulse to come to you. My world is in a corner of my brain, and when I have finished my day's work, I wander in dream through the enchanted city.

"I believe there are certain men who can be happy when they have learned where their ideal lies. We never can be perfectly happy, although a great deal of our happiness consists in being contented. We must be sorrowful sometimes in order to compare the difference of happiness or misery. I have no wish to marry, and it is not likely that I shall ever sacrifice my independence to any woman. So much the worse for you! You will never know what love is, for we love only virtuous women, my dear, and never loved except by them. Now, the virtuous women demand marriage, and it is their due. Every reasonable man in marrying should choose a woman who, he thinks, is worthy of his confidence, and who will prove to him a companion; not a slave, but a helpmeet."

Judgment.

This is the certificate referred to by the defendant, and prepared by *Anderson*; and as to that paper and the evidence of *Anderson* and *James Campbell*, I might well have desired to be spared the pain of referring to them at large, were it not for the fact that the counsel for the plaintiff relied strongly upon the character of this testimony, as furnishing a reason for concluding that what is narrated by these witnesses could never have taken place. Any feelings of delicacy must, therefore, give way to what is required in order to the fullest consideration of the details of the story on which the case to so great an extent turns:—

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Ex. "A."

"Overheard conversation between *G. Gordon* and Mrs. *R. Campbell*, that took place on the evening of 26th August and morning of 27th, 1873 :—

On the evening of the 26th August, *James Campbell* came into my house and asked me to go with him to be prepared to act as a witness in case there was any criminal intercourse between *G. Gordon*, who was at that time in his brother's house. This was between the hours of 9 and 10 p.m. I went with him, and went into Mr. *Campbell's* yard, took off our white hats and boots, and then went up to the house, and went to the window. *J. Campbell* asked me, Can you recognize any particular person's voice? I told him, I could; *Robert's* wife; but could not tell who the man was. In a short time, I fully recognized the voice of *G. Gordon*, but could not for some time recognize enough of the conversation to make sense of it : after ½ past 12.

Judgment.

Heard *G. Gordon* remark, you are getting stout. She answered, young men should not take notice of these things; he replied, I always do. Heard Mrs. *C.* tell *G. Gordon* that she was going to California, but would not go unless he would go with her. Heard *G. Gordon* ask, what is this?—that is my navel.

Heard Mrs. *C.* tell *G. Gordon* that he might put it in half way. He asked, why? she said, it hurt her.

*G. Gordon* asked Mrs. *C.* to put her arms round him and let him stretch her out. Heard no objections, a short interval without any conversation, and then laughter.

Heard Mrs. *C.* crying. *G. Gordon* asked, what is the matter, what are you crying for? you hurt me, and then immediate laughter.

On 3 different occasions heard *Gordon* say he would go away; and he got up to leave, but she called him back. Heard Mrs. *C.* ask him to kiss her.

This was after ½ past one on Wednesday morning. Heard *Gordon* frequently after this time ask her to let

him do it, but she said, no, no; he asked, why? she replied, I don't want to; heard *Gordon* call Mrs. *C.* his dear love. 1875. Campbell v. Campbell.

At 3 a.m. put on my hat and boots, and in company with *J. Campbell* went out of the yard, and walked down to go to his place of business. On getting to *Mason's* corner heard a step on sidewalk—looked in direction; saw a man coming towards us, & stood still till he came up. *James Campbell* walked up to him, put his hand on his shoulder, and said, *George Gordon*, you are a Black-hearted scoundrel—a dyed villain! He asked, what is the matter, what do you mean? *J. Campbell* told him, YOU HAVE BEEN IN MY BROTHER'S HOUSE SINCE BETWEEN 9 and 10 LAST NIGHT and have ATTEMPTED TO SEDUCE HER, IF YOU HAVE NOT DONE SO ALREADY. GORDON STILL SAID, I DON'T KNOW WHAT YOU MEAN.* *J. Campbell* told him, you have had criminal intercourse with that woman this night. *Gordon* replied, it was not my fault; I could not help it.

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*James Campbell* was at this time unlocking his shop door; as he went in, *Gordon* called him a ——— ———; went into Mr. *Campbell's* shop; remained a few minutes; went up to *Robert Campbell's* House. *James Campbell* called to Mrs. *C.* to come to the window, as he wanted to speak to her (she was at this time in her room upstairs); after calling repeatedly, and receiving no answer, he placed the ladder against the verandah, and went up to her window; she put out the light; after calling repeatedly, and receiving no answer, he told her there was no use of Foxing, as he had watched her from ½ past 9 last night till 3 this morning, and would attend to her case in the morning. Heard *Gordon* ask repeatedly to let him do it; and tell Mrs. *Campbell* that he was crazy for it. *James Campbell* insisted on breaking in the window, but I persuaded him not to do so, as it would alarm the neighbours.

JOHN ANDERSON."

* The words here printed in capitals were struck out, but could be distinctly read.

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*Robert Campbell*, as he states, employed his brother, *James Campbell*, to discover what he could as to the suspicions connected with the plaintiff, and he obtained the assistance of the defendant's brother-in-law, *John Anderson*, who was first examined at the hearing; the portions of his evidence material to the case I refer to at length:

"Remember *James Campbell* asking me to accompany him to my brother-in-law's house, on the evening of the 26th of August last. It was between nine and ten p.m. We went to watch the house, and see if anything improper occurred. We went to the house and went to the west window; took off our hats and boots. * * * We both went to the west window together; stayed together for some little time, about half an hour, more or less. Heard voices; could not distinguish them. Heard Mrs. *Campbell* at once; did not recog-

Judgment.

nize the other for a little time, and then knew it was *Gordon*. The first remark I heard made was by plaintiff, she said she was going to California, but would not go unless he went with her. Heard no reply. The next I heard was *Gordon* say, you are getting stout. She said, young men should not notice such things. He said, he always did. Could see very slightly through the blind into the room. Could not tell if the blind was drawn. Heard *Gordon* say, what is this? She replied, it was her navel. I heard her say, you may put it in half way. He asked, why. She said, it hurt her. *Gordon* asked Mrs. *C.* to put her arms round him, and let him stretch her out. There was no objections. There was a short interval of silence, and then laughter. *Campbell* was at the south window, on the verandah. *Gordon* got up to leave on three occasions. Plaintiff asked him to come back. I heard him repeatedly ask her to let him do it. I heard her ask him to kiss her. I heard him call her his 'dear love.' We remained until three o'clock. *Campbell* remained with me. He and I

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were together at the west window more than once. *Campbell* wanted to break in the window with a stick. I persuaded him not to break the window, saying it would do no good, and alarm the neighborhood. When *Gordon* asked her to let him do it, plaintiff invariably replied no. This was about half an hour after the conversation in which he asked her to put her arms round him. I could not see or tell what was going on. I heard crying; this was before. He asked what was she crying for; she said he had hurt her, and then there was immediate laughter. *Campbell* and I went away together at three 3 a.m. * * * *Campbell* and I went to the shop; we only remained a few minutes. Went back to defendant's house. *Campbell* called repeatedly to Mrs. *Campbell* to come to the window. There was a light upstairs. I assisted Mr. *Campbell* to put a ladder from the verandah up to plaintiff's window. As he was stepping on the verandah the light went out. I understood, from what I heard, that there was criminal intercourse twice that night between plaintiff and *Gordon*. After the light was put out *Campbell* went up the ladder and repeatedly rapped on the window and called out, and received no reply."

Judgment.

On cross-examination this witness says: "Before 26th August I knew defendant had removed his children in consequence of a letter or letters from one *Park* he had found a few days before. I had not previously heard any suspicions of *Gordon*. I was not at defendant's house during his absence in England. * * * On 26th August, *Campbell* told me *Gordon* was at the house. We arranged no plan. We both went to the west window at first. *Campbell* thought he could hear better at the south window, and went there for that reason. We remained at the west window about half an hour. Heard nothing that was said so as to make sense; am not at all hard of hearing. * * * Up to half-past twelve heard nothing. Heard something about ten

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minutes after. Have talked with *Campbell* about what he heard, and about our recollections. Have talked with him about the time. Can't tell how long intervened between the remark about California and that about getting stout. Conversation was going on all the time, but could not always distinguish what was said. The remark about the navel was no louder than any other part of the conversation. Can't say what was the first conversation with *Gordon* after hearing this. I can't say how long after this that *Campbell* wanted to break in. It was less than an hour and a half. * * * He stood at corner of verandah with a stick. He whispered he had got the stick. I persuaded him not to use it. He laid the stick down. I think he then returned to the verandah. * * * Heard nothing particular after half past one, except *Gordon* asking plaintiff to let him do it. * * * About half past twelve *Gordon* wanted to leave. *Gordon* told me so on evening of the 29th August; I then told

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*Gordon* he got up to leave four times; he said, 'no, only three.' I supposed he was going to leave; because I saw him pass between the light and the window. There was an interval of about half an hour between his first and second attempts to leave. On the fourth time I saw a light taken out of the room. I did not see who took it. *Gordon* has since told me plaintiff took it away to get some matches. Three attempts to leave occurred between half-past twelve and half-past one. The fourth time was at the taking away of the light. * * * I wrote a statement of what occurred that night. I wrote it at *James* and *Robert Campbell's* request the Sunday following. I wrote it at my own house. I showed it to the *Campbells*. I made an alteration in my statement in regard as to what *Campbell* said to *Gordon*. I can't say whether the statement "A" is the first one I made. I wrote another one after the trial. It is not a copy. I have burned it. I can't say why I did so except to get it out of my children's way. The statement is in my handwriting. The words struck out of it were struck

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out by me. I struck out the first words, because I afterwards recollected the correct words used. I can't say whether the words struck out were used. I don't think they were. * * * I was not ashamed of what I was doing. I was simply there as a witness. There was no singing or playing in the defendant's house after I went there; quite certain there was none at about half-past eleven. If there had I would have heard it. * * * Neither of the *Campbells* was present when I wrote "A." I struck out the words struck out before the *Campbells* saw it. It was written all at one time. * * * When *Campbell* went up on the verandah, after calling to Mrs. *Campbell* repeatedly, he said it was no use foxing, that he had been watching the house since half-past nine, and it was now past three."

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*James Campbell* was examined after *Anderson*. He says: "I was on the grounds of my brother's house on the evening of the 26th of August. I went alone at first. *George Gordon* and the plaintiff were there then. I knew this because I could hear their voices. They were in the parlour. I remained there a few minutes, and then went for *John Anderson*, who lived a couple of blocks off. I found him in, and at once returned with him. We took off our hats and boots as we came into the gate. It was between nine and ten—near ten when we came back. We went to the west window. I remained there for a short time, and asked *Anderson* if he could recognize the voices, and he said he could Mrs. *Campbell's*; and a few minutes afterwards he said he could identify *Gordon's*. We could not make any sense then of what they were saying. Then I went on the verandah, and remained on the verandah until three a.m. I was moving about. I went round the front of the house once. About midnight I could distinguish first what was being said. The girl at this time had gone upstairs. I knew this by seeing the light in her room after twelve. I heard Mrs. *Campbell* saying to *Gordon*,

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'*Robert* might suspect this,' *Gordon* asked her if *Robert* had any connection with her since his return. Mrs. *Campbell* replied, 'Only the first night.' 'All right,' says *Gordon*, 'then he can't suspect.' I went to get a piece of stick to knock in the window, and *Anderson* begged of me not to do so, as it would alarm the neighbours, and do no good. I heard Mrs. *Campbell* say she was going to California to leave *Robert*; she and *Robert* had not lived happily together for over two years, and she was bound to leave him. She asked *Gordon* to go with her to California. She said she had no pleasure in life but in taking a walk down town; that a man made a woman unhappy. Mrs. *Campbell* asked *Gordon* if he had a wife, and she entertained a young man, as she was doing that night, what he would say,—and he said, 'All married women will do it.' I heard him call her 'his dear love;' they were then, I suppose, on the sofa. This sofa was nine or ten feet from the window, in an angle of the room. I heard *Gordon* say that the floor was as good as a bed. I could hear rustling on the floor. I heard *Gordon* tell her that if he gave her all that it would hurt her. He said he would only put it in half way. In a minute or so, or less, she was crying or wheezing, and in a minute or two after she was laughing. I heard her asking him which way he preferred it. I am quite satisfied they had criminal connection once. There was other improper and indecent conversation between them. I heard *Gordon* asking her what that was, and she said it was her navel. I heard her, while on the sofa, I think, say would he come half way if she came the other half, and *Gordon* said, 'Yes.' I remained there until three o'clock * * * At three we went away * * * After this we went to *Robert Campbell's* house, and went with *Anderson* below Mrs. *Campbell's* bedroom window, where there was a light. I called out to her half a dozen times, but received no answer. I then got a ladder, got up to the window, and called her, without receiving an answer.

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I said, '*Eliza*, there is no use in foxing.' The light was put cut when I was half way up the ladder. I said, 'There is no use in foxing; I have been at the house since nine o'clock, and it is now past three, and I have heard all your criminal actions and conversations, and I'll report you to my brother in the morning.' I then came down the ladder and I went home, and *Anderson* went to his house." On cross-examination, this witness continues, "There was an arrangement between my brother *Robert* and myself that I should watch the night. This was before the children were taken away. This was the Thursday or Friday before the children were taken away. I watched on Monday and Tuesday nights. While my brother was in England, the day before he returned, or at least the morning of the day he returned, a letter came to Mrs. *Campbell* from one *Park*. This letter was lying on the desk. My brother returned by the midnight train on Monday night. I don't know why this letter was not sent to Mrs. *Campbell*. It was lying on my brother's desk when my brother returned. We had some conversation relative to that letter, about two hours after it was received. He asked me to go to Toronto and get the letter copied, and give it to a detective and send him to Concord, and have it mailed there. On the following Wednesday I went to Toronto in consequence. We first talked of removing the children towards the end of the week, and he then told me what he would do. On my return from Toronto I saw my brother, and told him what I had done. My brother told me he had received some copies of letters Mrs. *Campbell* had sent to *Park*. On the Wednesday night nothing was determined upon. He then spoke to me. The next day he told me he would take the children away. I heard the defendant, at Toronto, in his evidence, say he would part with Mrs. *Campbell* when he got these letters. I understood that he wanted an explanation from his wife, but he did not get this explanation. I knew he lived with his wife after getting

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the letters. He told me that these letters were sufficient for him. He did not tell me by what excuse he got the children away. * * * I watched until about twelve amongst the bushes on Monday night. * * * The lights were not out when I left. I saw no person going into the house that night. I watched with my brother one evening the week before; it was the night of the soiree. We wanted to see who was in the habit of going to the house. I presumed Mrs. *Campbell* was at the soiree. I saw her coming home. I was behind a spruce tree. My brother, before that, had gone home to my house; he was tired, and lay down. * * * So far as the letters are concerned, *Campbell* had all the information about *Park* then that he has now. * * * I got information from my wife as to what Mrs. *Jamieson* had told her. She was told that *Gordon* went there early and came away late. I was suspicious, but I did not want anything wrong to take place. At this time my brother had determined on separation or explanation. I did not understand that my brother ever said he intended to separate after finding these letters. I don't think I could have prevented what I saw taking place when I went there, for I thought Mrs. *Campbell* and *Gordon* were so intimate that it would be useless to do so. I did not want to get evidence as to my brother's wife's criminal actions. I could not go in without ringing the bell. I could have gone in by the kitchen. I wanted to satisfy my mind as to the position of my brother's wife. * * * I wanted to satisfy myself by going to the window and listening. *Anderson* took up his position at the one window and I at the other. We both remained there until *Anderson* satisfied himself that *Gordon* was there. I could hear better, and therefore I remained at the south-west window—more distinctly than at the west window, besides it was warmer and more comfortable on the verandah. * * * I remained until after twelve before we could hear plainly. There were dogs barking, and the 'busses

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running, and other noise, and so we could not hear so well. They spoke in a louder tone after twelve o'clock; they were not so guarded. I could make out words before twelve, but not sentences—nothing that I could make sense of. * * * I wanted to break the window in on two different occasions; there was a considerable time between the two occasions. I had the stick there all the time after I got it. I laid it down on the verandah just by me. *Anderson* stopped me the second time just as he did the first time. I cannot describe the way he did. This was after one o'clock. I just then heard *Gordon* say the floor was as good as a bed. I heard her say to *Gordon*, just at that time, if he gave her all that it would hurt her. I then determined to knock the window in. * * * I wanted to see *Gordon* in order to charge him. We wanted to satisfy ourselves that *Gordon* and Mrs. *Campbell* had committed adultery. I was satisfied of this before that. I wanted to catch *Gordon*, and to let him know that I knew it. Between half-past one and three, *Anderson* and I had very little conversation. *Anderson* and I may have said, 'Now they are at it.' That was after one o'clock. We then must have been at the corner of the house, where we met. I cannot say which said that. That was not the only remark which was made. *Anderson* and I again spoke when *Gordon* asked Mrs. *Campbell* what that was and she said her navel. I have no doubt of that. * * * There was music for two or three minutes in the room when I went there. When I went there first there was not any playing. I first recognized the voices. I heard no piano. There were a few notes from the voice. Between eleven and twelve of that night there was no music or singing in the parlour. * * * I went to bed about four and got up at six. I talked to my wife about the matter on my return. I told her some of the principal matters that took place. I told her that they had intercourse, and that I had charged *Gordon* with it. I could not sleep, and so I

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soon got up. I wrote a portion of the statement before I left my house. * * * I wrote a part at the shop and part in the house. I don't know when I copied it." On re-examination, this same witness says: "*Anderson* does not drink once in six months. We had not anything to drink that night before going to my brother's house. I wrote my first statement on rough tea paper, and afterwards made a fuller statement for Mr. *Harrison*."

*Martha Newsome* says: "I know Mr. and Mrs. *R. Campbell*, and was living in their house as servant for one year and eight months. * * * I know *George Gordon*. I have seen him at defendant's house frequently. He was frequently at defendant's house during defendant's absence in England. He was always alone except once, when he came with Mrs. *John Mitchell*. He used to come in the evening. I have known him to stay as late as twelve o'clock. No one on these occasions was in the house except plaintiff, *Gordon*, and myself. Plaintiff and *Gordon* remained in the parlour. They sat there alone. I have gone to bed leaving them in the parlour. This did not often happen. On 2nd August last, clock was striking twelve as I went to bed. *Gordon* was still down stairs. I did not hear him go away. I did not even hear their conversation. In the morning I have noticed the curtain pinned in such a way as to obscure the light from the outside, and also a footstool put on it to keep it there. I had not done this. On 9th August went to bed a little before twelve. *Gordon* was still there. Did not hear him go away that night. Did not on 2nd or 9th hear Mrs. *Campbell* come to bed. I found on two occasions her boots in the parlour. Don't think it was on 2nd or 9th August, but do not recollect." On cross-examination she says: "After the first trial I returned to the service of the defendant. * * * There is a blind to the window, and a green rep curtain on one side, a lace on the other. The rep was pinned partly

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across the window * * * *Gordon* was five or six times to a very late hour during defendant's absence, and often besides. I can't tell when I first saw *Gordon* there, but think it was in June. * * * If I wished to listen, I could hear better what was going on from my bedroom than from the kitchen. My bedroom is at the head of the hall stairs. I never saw the parlour door cl[illegible] Re-examined—"On one occasion I saw *Gordo*[illegible]en the hall door himself and walk in. * * * *Gordon's* coming struck me as strange. I formed the conclusion at the time that this was not proper. The same curtains were always there."

*Jane Newsome*, a sister of the last witness, who succeeded her as servant, and was at the defendant's house during the night in question, says: "I know *George Gordon*. Saw him at defendant's on 26th August last. Heard his voice on even[illegible] of 15th, but did not see him. He was in the parlour with plaintiff. The time was about half-past nine. He had not left at twelve o'clock. I had gone to my room before that. I remained up until after twelve. *Gordon* had not gone then. On the evening of the 26th the plaintiff was out. She and *Gordon* came home between half-past nine and ten. I let them in. They went into the parlour. I went into the kitchen. Did not go to bed till after eleven. I saw plaintiff in the meantime. She came out into the dining room. She spoke to me from there. She asked for a pitcher of water. I went into the dining room. I asked her if her beau had left her. She said no. I had a friend with me. Did not see her again before I went to bed. *Gordon* had not gone when I went to bed. I heard the words three o'clock used. Don't know who used them. I was awakened out of my sleep by hearing these words. I came down in the morning a few minutes after six. Saw plaintiff as I was going down stairs. She was on the balcony. She was dressed. Never saw her up so early except once or twice. I have lived in the house before.

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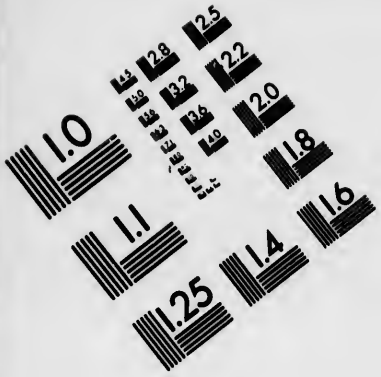


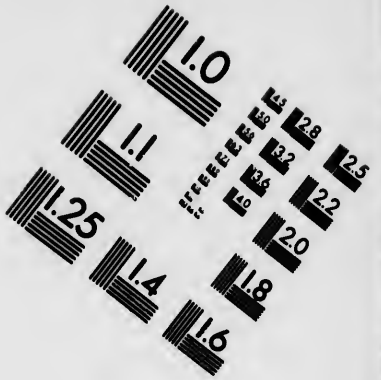


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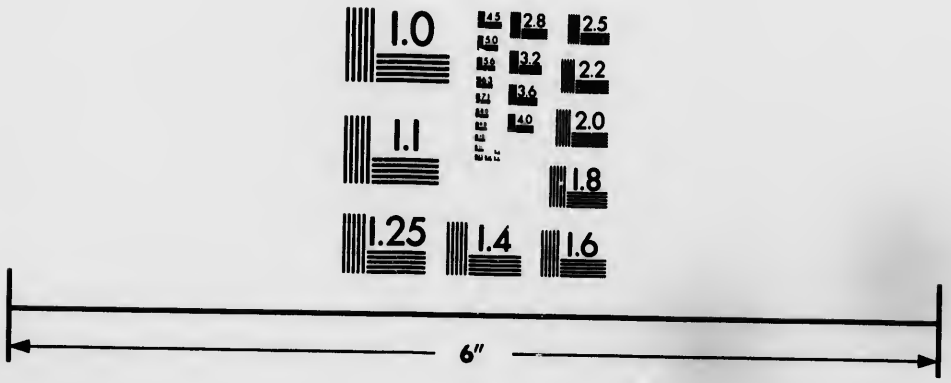



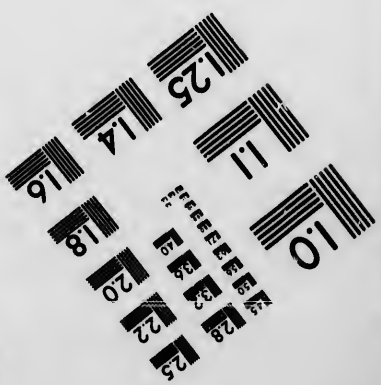


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Her usual hour is eight a.m. I said to her on this occasion 'you must be getting smart.' I don't remember that she replied. I noticed that the clock was stopped. I started it myself at seven. It was stopped at between twenty and fifteen minutes to two. Had conversation with plaintiff on 28th August last. Told me there was a difficulty between her and defendant, and that she did not think they would ever live together again. Did not see *Gordon* on evening of 26th after he came. On 28th Mrs. *Campbell* said they could prove nothing against her. Heard nothing of what was said in the parlour on the 26th. No tune was played on the piano. Some one ran fingers over piano." On cross-examination the witness says: "I did not think my question impertinent, because Mrs. *Campbell* had been very free in asking me questions. I preceded and followed my sister in service at the defendant's. Lived about one and a half years before my sister came. Defendant took away his children on 25th August; I understood to Saugeen. He then seemed perfectly friendly with plaintiff. He returned 28th August. He did not come to the house. It was in consequence of his not coming that Mrs. *Campbell* made the observation as to the difference between her and her husband. * * * The front door has a spring lock and key; if once shut, cannot be opened from outside without a key."

Judgment.

We have then established, beyond doubt, that the affections of the wife were alienated from the husband, and that she was in correspondence with a young man whom the husband had desired her not to associate with. The letters produced shew, not only the fact of the correspondence, but from their language it is plain that feelings were entertained by the wife for the young man with whom she corresponded, which no wife could have, under the circumstances, unless her moral nature were more or less depraved. Not only do the expressions therein contained evidence an undue regard for the

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person to whom they are addressed, but the matters referred to shew that her mind had been very considerably warped prior to the month of August. We find, a weekly visitor at the house, another person against whom the husband had warned the wife. We find these visits generally paid alone, lasting up to eleven or twelve at night, and at all events on two occasions to a later hour; and on the evening in question, certainly not earlier than half-past one. We find them seated side by side on the sofa for hours. We find them playing backgammon with their knees for their table. We find the blinds drawn so that outsiders could not see what was going on in the room, and sometimes the extra precaution was taken of pinning the window curtain, and so placing a footstool as to retain it across the window. We find, amongst other topics of conversation on the night of the 26th, that California and the pleasure of a trip there, and the subject of an "elopement," or eloping, formed part of that which engaged their time. No reason or excuse is given for this young man, for these four hours, invading the house of the defendant. Am I to conclude that they met there, according to the old saying, to repeat their pater-noster? or would it not be more in accordance with every day experience, to find that during these hours spent in such close proximity advantage had been taken of the opportunity afforded to give free course to their passions? It is said in these cases that if there be found in the mind of both parties the disposition to commit this crime, and an opportunity is presented for its commission, that the act will also there be found. The plaintiff and *Gordon*, on their examination, admit that they, on looking back, felt the impropriety of what they had done. They knew they were placed in a position of peril and suspicion, and yet, is it to be believed that all this was done purposelessly, and that no inclination, which such circumstances ordinarily produce, was gratified? The wife must have known, that she, five months gone in the family-way, sitting for

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hours alone at night side by side with a young man, in regard to whom she had been warned by the defendant, was outraging her husband's feelings, and giving up all claim to anything in the shape of delicacy and decorum. Surely there must have been some object to be gained by such a course of conduct. No legitimate one was assigned even in argument. It does not appear that the plaintiff and *Gordon* had such lawful sympathies and tastes as would warrant these constant and lengthened nightly meetings; and I fail to perceive what could be their cause unless it was the gratification of her animal passions, or surrendering up her body to her paramour, in order by her compliance with his wishes thus to retain him as her friend. It does not seem to me, therefore, that the mind of any one should be startled, if made aware of the fact, by some person who had secretly become aware of what had transpired in the room in question, that the wife had then and there been guilty of adultery.

Judgment.

But I do not think, without the direct evidence of *James Campbell* and *Anderson*, that case would be removed beyond one of the very gravest suspicion, and it is therefore necessary to consider the testimony of these witnesses in order to see whether it is brought beyond the region of suspicion into that of legal proof. It is urged that, looking at the animus of *James Campbell*, the means that he and his companion took to obtain the proof, the very nature of the testimony itself, and the discrepancies in the accounts given, the whole of their story must be entirely rejected. I agree with the counsel for the plaintiff, that the evidence of *James Campbell* should be narrowly scanned. Before the evening in question he had his suspicions about the plaintiff. He dwelt upon these suspicions, which, as Lord *Bacon* tells us, "dispose kings to tyranny, husbands to jealousy, and wise men to irresolution," and which, in respect of a bracelet or handkerchief, may

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destroy an Imogen or a Desdemona. He was not long in shewing "what a ready tongue suspicion hath," for at once he made certain statements to the defendant as to the conduct of his wife, which led him to believe that she was unfaithful to him. He was not on friendly terms with her. For weeks he had suspected that she was too intimate with *Gordon*, but we find no word of remonstrance, no attempt to procure some friend to warn the plaintiff as to the probable or possible result of the course she was pursuing. It is not by any means improbable that, if the same trouble had been taken by this witness to prevent the improper conduct with *Gordon*, as has been taken to discover proof of the plaintiff's guilt, the wife would not now be seeking to defend herself from the present charge. His attendance at the house that night was to obtain evidence which would enable him to convince his brother of his wife's infidelity. His mind had been fed by the tales and whisperings of others, and he desired that his brother's mind should be imbued with the like ideas. *Anderson* was also aware of what had taken place, and these men were willing to play the spy and evesdropper, with the expectation of being able to catch a wife, and she a connection of theirs, by marriage, in the act of adultery. But then, it is one thing to accept in a most guarded manner evidence that may be adduced, and quite another to reject it in toto. When the evidence was being given it did not strike me that these two men had manufactured their story. If they had sunk so low as to conspire to ruin an unfortunate woman, and to bring misery upon the husband, and reproach upon the children, it would have been easy for them to have agreed upon a statement, in which nothing would have appeared as to the difficulty of their hearing what passed—in which each would have heard, at the same time, some distinct remarks preceding and following the commission of the act—in which each would have deposed with certainty to the fact that the sofa or floor was chosen, and that certain defined sounds which reached their ears from the

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room, demonstrated that *Gordon* had carnal intercourse with the plaintiff. But, in place of that, we find both parties admitting that until after twelve nothing could be made of what passed between the occupants of the room. *James Campbell*, who was at the window where, it is said, what passed could be better heard, gives a fuller account of matters than *Anderson*. But both agree in the main fact, that the act of adultery had been committed, *Anderson* being of opinion that it took place twice. I think the case affords a fair example of that class of evidence which receives strength from the fact, that while there is agreement in the main matters deposed to, in the details there is a disagreement, which, while it shews the testimony has not been manufactured, is here readily accounted for by the circumstances to which I have alluded. Then can I say that these witnesses are to be discredited, on account of the improbability of any such conversation, as that which they relate, having taken place between plaintiff and *Gordon*? It must be borne in mind that these witnesses are shrewd enough to have known that the mind would naturally conclude that some matters by them referred to could scarcely have taken place, and when we find them, notwithstanding such obvious conclusion, giving us these improbabilities as that which actually passed, it is a matter, not unworthy of remark, in determining the weight to be attached to their testimony. If one was to sit down and determine calmly beforehand the conversation which would be most likely to lead to the conclusion which the adulterer desired, then no doubt we should have a very different dialogue from that which is presented to us. But we must remember that in these cases, judgment gives place to the passions—a word or remark, without much consideration as to its effect, uttered merely, it may be, to prevent reflection on the part of the other, or in order to say something, whatever it may be, is spoken. It would not unnaturally be thought very improbable, when the wife was about to prove herself

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false to her husband, that she would have brought up his name; nor would it be thought probable that the question would be put to the wife as to when she had connection with her husband; nor is it likely that there would be an investigation of the probability of discovery from any result flowing immediately from the act of adultery, when the woman was already five months gone with child; nor indeed did it strike me as natural that the gross language deposed to could have been used, or that the plaintiff should so soon have forsaken "the guile of her youth," as to have tolerated what is described, when placed before her in so gross a form. *Nemo repente fuit turpissimus* is as true as it is trite, and I must only conclude, if this evidence be received, that the process of rendering the mind impure had been going on for a longer time than might otherwise have been thought. It is more reasonable to conclude this to be the case, than that we have one of those instances in which, unaccountably, honour is exchanged for infamy. If the plaintiff has been an admirer and student of the works of the writer of the volume which was handed to me, in order to shew that the exhibits before referred to were merely extracts from this book, I can understand how speedily her mind would be contaminated. I do not mean to say that the novel produced, "Monsieur Sylvestre," contains much that is objectionable; I refer to the earlier works of Madame *Dudevant*, which, written in her fascinating and beautiful style, make all the more dangerous the infidel and highly immoral views which she so ·ly propounded without apology, except such as ma, found in the fact that she sought to spare her sex the odium of circulating such teachings, by attributing their authorship to *George Sand*. A more unsafe guide for any woman to follow it is hardly possible to conceive, and it may be that the loss of purity of mind, and the tainting of the principles of the plaintiff may be traced to the perusal of this and the like literature. That these men

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could hear, at all events something of what passed in the room that night, is clear, for the plaintiff and *Gordon* admit that "California" and an "elopement" or "eloping" were spoken of by them, and this is part of the conversation to which these witnesses depose.

On two points there is much difference of opinion. * * * Whether there was or was not music that night, and the hour to which they watched.

*James Campbell*, *Anderson*, *Jane Newsome*, *David Smith*, and *Mary Fraser*, swear that there was no music that night. *Yeoman Gibson* and his wife aver there was. I think the latter are mistaken. They speak of the music on an evening when two persons were seen by them about the outside of the house, one of whom wore a white hat. The white hat spoken of was, I think, that worn the following evening, when *Jane Newsome* and *David Smith* were walking about the grounds. On the preceding evening the hats had been removed from the watchers, and their heads would have appeared black in the nightlight. There is much more difficulty in determining the hour that *Campbell* and *Anderson* left the house —whether it was half-past one or three. *Gordon*, in an affidavit made in a former case, says the hour he left was forty-five minutes past one. I am unable to reconcile the statement of the witnesses whose testimony is under consideration, and that of the tavern-keeper *Bandell*, on the one side, and that of *Adams*, *Davidson*, *Gross*, and Mrs. *Allen*, on the other. The statement of *Jane Newsome*, the servant, to a certain extent, negatives the earlier hour; she says she was awakened by the words "three o'clock," uttered by some person. But I do not think I could discredit *James Campbell* and *Anderson*, even if I came to the conclusion that they erred as to the hour they left the house. It was by half-past one, according to their account, that the adultery had been committed. I do not know that the case is made much

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stronger against the plaintiff by putting the hour of *Gordon's* leaving at half-past one in place of three. I cannot find any reason for their stating the later hour, unless they, in good faith, thought that was the time when they left the house. I am unable to conclude that I am justified in disbelieving the story told by *James Campbell* and *Anderson*, and this being so, I am obliged to find that the case of strong suspicion presented by all the circumstances to which I have previously alluded, receives, in the testimony of these witnesses, the confirmation necessary to enable me to say that the fact is proved against the wife.

But it may be urged such a conclusion should be displaced when the persons implicated solemnly pledge their oaths to its falsity. I have had much doubt upon the effect to be given to such testimony, but the best opinion I can form on the subject is, that where the case apart from such testimony, is proved, the Court cannot allow it to alter the finding which, without it, has been arrived at. A wife who has been accused of unfaithfulness to her husband, will, I fear, go almost any length to negative such a charge. The crime is one which at all times the parties are too apt to deny; it has been so, at all events, from the days of Solomon: "Such is the way of an adulterous woman; she eateth and wipeth her mouth, and saith, I have done no wickedness."* The heinousness of the crime, the breach which it is almost sure to cause between the husband and wife, the injury to the children, the disgrace cast upon relatives and friends, the loss of social standing, combine to lead one, placed in this terrible position, to make any statement which may have the effect of freeing her from the impending calamity. The accusation made is so disgraceful in its character, and so dire in its results, that one feels justified in adding almost any other sin to it,

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* Prov. xxx. v. 20.

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in order to free one's self from the punishment so much dreaded, and to escape detection.

Then, as to the position of the partner in the guilt. He, by falsehood and a system of duplicity, utterly irreconcilable with the conduct of an honest man, steals enjoyment regardless of the laws alike of God and man. What law is it then which will restrain such an one, when in the witness-box he is asked as to these matters? Besides, we find amongst people of this loose class, as we do amongst thieves, what they are pleased to name by a pleasing euphemism, "a code of honour," and this seems to call for the protection, of the female, even to the extent of perjury, if they are thus far called upon. The greater sin being committed, that which appears so much lighter, and which the conscience almost justifies as the good deed of preserving one, whom, having sacrificed herself for you, you are peculiarly called upon to protect, will easily follow.

Judgment.

The view of Mr. *Denman*, expressed on the trial of Queen *Caroline*, although stated before the alteration in the Evidence Act, appears to me to be that which must still be held in weighing such testimony:—

"We have been told," said he, "that *Bergami* might be produced as a witness in our exculpation, but we know this to be a fiction of lawyers, which common sense and natural feeling would reject. The very call is one of the unparalleled circumstances of this extraordinary case. From the beginning of the world no instance is to be found of a man accused of adultery being called as a witness to disprove it. * * * How shameful an inquisition would the contrary practice engender! Great as is the obligation to veracity, the circumstances might raise a doubt in the most conscientious mind whether it ought to prevail. Mere casuits might dispute with plausible arguments on either side, but the natural feelings of mankind would be likely to triumph over their moral

doctrines. Supposing the existence of guilt, perjury itself would be thought venial in comparison with the exposure of a confiding woman. It follows that no such question ought in any case to be administered, nor such temptation given to tamper with the sanctity of oaths." (*a*)

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The evidence of parties so situated may, in some cases, give such a clear and convincing explanation of matters, as to clear up what was doubtful, and remove the suspicion that rested upon them; but I do not feel that I would be safe in doing more than thus acting on testimony derived from such a source.

The plaintiff kept *Gordon* apprised of the defendant's movements. On the 23rd, he knew of the proposed visit to Saugeen; and I have no doubt that then, or on the Sunday following, they made the assignation for the 26th. *Gordon* admits that, in speaking of California, the plaintiff said: "Would it not be nice to go there together?" to which he replied, "It would." They both admit the talk about an elopement, but say it referred to an old joke they made before the defendant. It did not strike me that he was a man much given to joking, and I doubt that, even were he so inclined, this would be a subject on which he would allow any such liberty to his wife and *Gordon*. In his examination the defendant denies that any such matter was ever mooted in his presence. *Gordon* does not seem to have been at the house of the defendant between April and June, but, when the defendant's back is turned, his visits there are frequent. I doubt that it would be possible to put this innocent interpretation, which the plaintiff desires, on the conversation about eloping. Another matter, to my mind more thinly disguised, is the introduction by these two, in their account, of the evening of a conversation about the army and "navy." It is to be inferred that the word "navel" was not used, but the word "navy" was by *Campbell*

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(*a*) *Taylor* on Evidence, sec. 1220 B., note 3.

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and *Anderson* misunderstood for it. I fear that the evidence of the plaintiff and *Gordon* bears marks of having been discussed between them, after they were aware of the statements of *Campbell* and *Anderson*, and that they then agreed to make up the story, which was to contain these explanations of what they felt damaging to them. The wife admits a number of letters passed between *Park* and herself. None of these were produced but those procured in the manner before described. As to two of these papers, she states that they were not copies of letters, but some memoranda which she had commenced making about three years before for a romance which she proposed to write. They bear all the appearance of extracts made to be used in the composition of letters similar to that which is found. We have the fact of letters of this kind being written, but we have no sign of the romance. Whether for letters or a romance, they shew the groove in which, unfortunately, the mind was running. I think I must conclude that these notes were made to furnish material for letters which the plaintiff was writing. The style of the letter produced, intended to be a copy of one sent to *Park*, leads my mind strongly to this conclusion.

Judgment.

I do not think any stress can be laid on the fact that the parlour door was not closed, during the time spent together in the drawing-room. It was not until after the servant, the only other person in the house, had gone to bed, that the adultery was committed. They might reasonably have thought it better to leave the door open, so that they could watch the servant, and when they found that she had gone to bed, and was apparently asleep, they could proceed with what they desired. It was, perhaps, quietly to make these investigations that the plaintiff took off her boots. There would be danger in shutting the door, as, if this were done, a person might surprise them in the act, which could not so easily take place if they were watchful and left the door ajar, so

that the first movement made outside the room in the house would attract them.

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I place no reliance on the evidence of *Fagin* and *Cameron*; it is highly improbable, exaggerated, and, to my mind, obviously unreliable. I do not think *Gordon* made any admission of his guilt on the morning of the 27th, when he was confronted by *Anderson* and *Campbell*.

I think it is a circumstance of suspicion that the plaintiff was dressed at six o'clock on the morning of the 27th; and that on the 28th, she should have admitted to the servant that she did not think she and her husband would again live together.

On the whole case presented, I am of opinion that the defendant has succeeded in the defence, which he has set up as an answer to the claim of the plaintiff, and that the evidence establishes an adulterous intercourse to have taken place between the plaintiff and *Gordon*.

Judgment.

It is almost needless to add the very great pain the consideration of this much to be lamented case has caused me. It is deplorable to witness the ruin which has been brought upon a household where existed, at one time, all that could have been thought necessary to render its members reasonably happy, if only self-control had been exercised. I deeply sympathize with both the parties to the unfortunate proceedings. The failure of the attempted settlement made during the progress of the cause, shews how useless it is now to look for any display of the spirit of forgiveness. The finding at which I have arrived, looking at the view taken of the offence in question by the cold charity of the world, removes any hope that may ever have existed of a reconciliation taking place. I desire not in any way to make light of, or to palliate, the grievous crime of adultery, but I know

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not why it should be looked upon as "the unpardonable sin," and why, when an unfortunate woman once becomes thus a sinner, she should, no matter how repentant, be by her fellow sinners condemned forever, and thenceforth be shunned by all earth's dainty clay. I know not why husband and wife should not, when suing from their common Father, for that mercy in which alone, tempering justice, must be found all their hope in the great Hereafter, be led towards each other "to render the deeds of mercy," and thus seek that double blessing which flows from the exercise of this God-like attribute.

It is not, however, within my province to enter into the discussion of these questions; my duty ends with the dismissal of the bill.

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## McMillan v. McDonald.

*Practice—Costs of postponing hearing.*

Although, as a general rule, where a party has made diligent efforts to obtain the attendance of a witness within the jurisdiction, and has been unable to do so, the costs of postponing the hearing will be costs in the cause, still where the plaintiff ascertained on Sunday that a witness, who was his mother, was confined to her bed and unable to attend at the sittings which began on the Tuesday following, but failed to give notice of this fact to the defendant, a motion made by the plaintiff to postpone the hearing was granted only on the terms of his paying the costs.

Sittings at Cornwall.

Argument.

Mr. *Fitzgerald*, Q. C., for the plaintiff, moved to postpone the hearing on the ground of the absence of a material witness, the mother of the plaintiff, who was confined to her bed by illness and unable to attend at the then sittings, and asked that the costs of the postponement should be made costs in the cause, referring to *Pattison* v. *McNabb* (*a*).

(*a*) 12 Grant 483.

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Mr. *Maclennan*, Q. C., contra, submitted that the postponement should only be on the terms of the plaintiff paying the costs. In the case cited, the plaintiff was not aware that his witness could not attend until he came to Court; here the plaintiff has been aware of the fact for two days, and yet took no steps to prevent the defendant incurring the expense of retaining counsel and subpœnaing his witnesses, which he could easily have done, and thus have avoided this unnecessary outlay to the defendant.

PROUDFOOT, V. C.—An application was made to me at Cornwall on behalf of the plaintiff to postpone the hearing on the ground of the absence of a material witness. The case was postponed on payment of the costs of the day; but the plaintiff's counsel insisting that the uniform rule in Chancery in such cases, differing from that at law, was to make the costs costs in the cause, so as to depend on the ultimate result of the suit, I promised to look at the cases, and if the rule was as he stated the costs would be reserved. Judgment.

The case *Pattison* v. *McNabb*, states the rule that where a party has made dilligent efforts to secure the attendance of a witness within the jurisdiction of the Court, and fails to secure it from a cause which he could not control, then the costs of such an application will be costs in the cause.

In this case the witness was the mother of the plaintiff, and resided within nine miles of Cornwall. The plaintiff, himself residing in Guelph, trusting that his mother would attend, did not subpœna her; and on Sunday, the hearing being fixed for the following Thursday, ascertained that his mother was confined to bed, and was too ill to attend as a witness. There was nothing to prevent her evidence being taken by the Master, or on commission; but this was not done; and no notice was given to the

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defendant so as to have enabled him to notify his witnesses not to attend. Under these circumstances the plaintiff will pay the costs of the application.

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## FERGUSON v. STEWART.

*Will, construction of—Vested interests—Conversion—Period of division—Bequest to a class.*

A testator gave to his wife the house which he possessed, with all the appurtenances thereof, and the house and town lot in, &c., "*and sixteen cords of good sound firewood yearly during her life time*"; such houses and lot to go to his only brother after the decease of his wife. He also bequeathed to his wife the interest of all the money and securities for money that he might be possessed of at the time of his death, after payment of debts and funeral expenses; and the value of one-third of his personal property, being composed of * * and all other implements and utensils of husbandry; and after his wife's death directed his money to be divided among his cousins, viz., the family of his uncle *J.F.*, the family of *J.S.*, &c.

He then devised certain lands to his brother, being the only wooded lands he was possessed of; and by a codicil left $200 to his wife in addition to the legacy given by the will. On a bill filed to obtain a construction of the will,

*Held*, that the annual supply of firewood did not form a charge upon any of the lands of the testator, but was to be provided for the widow out of the personalty: that the widow took absolutely one-third share of all the personal property other than money and securities for money, and not one-third of the enumerated articles only: and that the income of the other two-thirds up to the period of division belonged to those who were or might become entitled to the property.

*Held* also, that the gift of his money was to the cousins as a class, and that those living at his death took vested interests liable to be divested to the extent required to let in other cousins, of the families named, coming into existence before the death of the widow, the period of distribution; and that as the testator directed his wife to have one-third of the value of his personal property, which could only be ascertained by a sale, it was the duty of the executors to make such conversion; and as the gift was not to take effect till the death of the wife, the money the testator thereby meant to dispose of was not merely the money he possessed at the time of his death, but the money belonging to his estate at the time of his wife's death, when all the personal estate would be, or ought to be, in the shape of money.

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Ferguson v. Stewart.

This was a bill by *Isabella Ferguson*, the widow of *James Ferguson*, to obtain a construction of his will dated 23rd December, 1872, whereby he appointed *Peter McLagan*, *Robert Stewart*, and *John Ferguson*, the trustees and executors of his will, and gave to his wife the house which he presently possessed, with all the furniture and appurtenances thereof, and the house and town lot 46, in the 2nd concession of Ancaster, *and sixteen cords of good sound firewood yearly during her life time*; the said houses and lot to revert to his brother *John*, his heirs and assigns, after her decease.

The will then proceeded, "I also bequeath to my wife the interest of all the money and securities for money that I may be possessed of at the time of my death, after paying my funeral expenses and other lawful debts, and the value of one-third of my personal property, being composed of horses, cattle, sheep, waggons, buggy, cutter, sleighs, reaper, cultivator, horse-harness, and all other implements and utensils of husbandry. And I direct that after her decease my money to be equally divided among my cousins, viz., the family of my uncle *James Ferguson*, the family of *John Stewart*, the family of *Alexander McKillop*, and the daughter of my aunt *Helen Seaton*."

Statement.

He then devised to his brother *John* fifty acres on the south-east corner of lot 33, lot 28, and his share of lot 29, in the 6th concession of Ancaster; and bequeathed to *Eliza McLagan* $80, to be paid at his decease; and by a codicil, made two days later, bequeathed to his wife $200, to be paid at his decease, in addition to the legacy given to her by the will.

The only wooded lands the testator owned were those devised to his brother *John* for an immediate estate. The testator had no children, and left the plaintiff his widow, and his brother *John* his sole next of kin.

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Ferguson v. Stewart.

The cause came on by way of motion for decree.

Mr. *Robertson*, Q.C., for the plaintiff: Under the will the plaintiff is to have sixteen cords of wood yearly, in addition to all other benefits under the will; but it is not said where such wood is to be procured, whether it is to be purchased out of the funds of the estate or is intended to form a charge upon and be taken from any of the lands of the testator; and if from any of his lands, from which of his l. nds.

There has also been a question raised in administering the estate whether or not there has been an intestacy as to two-thirds of the articles bequeathed.

Mr. *Hoskin*, Q. C., for the executors other than the defendant *John Ferguson*, submitted that the bequest to the widow must be held to consist of one-third of the articles specifically mentioned in the will, referring to *Williams* on Executors, pp. 1188-9, and cases there cited.

Mr. *Watson* for *John Ferguson*, contended that under the devise to this defendant the cordwood could not be considered a charge on the lands given to him, and that there was an intestacy as to the two-thirds of the chattels mentioned in the will. He cited and commented on *Perry* v. *Walker* (*a*), *Jones* v. *Jones* (*b*), *Davidson* v. *Boomer* (*c*), *McKidd* v. *Brown* (*d*).

Judgment.

PROUDFOOT, V.C. [After stating the facts as above]—This bill is filed suggesting that it is doubtful whether the plaintiff, the widow, is entitled to one-third of the personal estate absolutely; or only to one-third of the articles specifically mentioned and to the interest of the money and securities for money in the will referred to,—

(*a*) 12 Gr. 370. (*b*) 15 Gr. 40. (*c*) 5 Gr. 633. (*d*) 17 Gr. 509.

and whether the sixteen cords of wood are to be purchased out of the personal estate, or if they form a charge upon any, and what, lands of the testator. 1875. Ferguson v. Stewart.

A further question was argued, viz., whether there was not an intestacy as to two-thirds of the personal property other than money.

I think the bequest to the widow of one-third of the personal property gave to her absolutely not only one-third of the enumerated articles, but of the whole personal property other than money and securities for money. The mention of the articles of which the personal property consisted is an imperfect and inaccurate description of the particulars of the gift. As to personal estate, it has always been presumed to have been the intention of the testator to pass whatever he might be possessed of, at the time of his death. If the testator had intended only to give her one-third of the value of the stock and implements mentioned, there would have been no use of specifying that he gave one-third of his personal property: *Dean* v. *Gibson* (*a*). There is strong reason for supposing he meant it to include all, as he was limiting the interest the wife would have taken in case of intestacy, in which event she would have been entitled to half, and his brother *John* to the other half. The testator makes liberal provision for the wife, gives her a house and a farm during her life, with a supply of fuel, a pecuniary legacy of $200, to be paid at his decease, and the interest of his money and securities for her life. I do not think he intended her to have one-third of the personal property enumerated, and to have one-half of the other personal property in addition. My conviction, derived from the language of the will, is, that he meant to dispose in favour of his wife of one-third of all his personal property. Judgment.

(*a*) L. R. 3 Eq. 713.

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Ferguson v. Stewart.

As to the cordwood, I find nothing making it a charge upon any portion of the real estate. He devised to his brother the only wooded land he had, but he makes no exception out of the devise of this wood in favouro f th e wife, and makes no request to his brother to provide it. I think it a general legacy to be provided for out of the personalty.

Judgment.

The last question, whether there was an intestacy as to part presents some peculiar features. There is no doubt that in the bequests to the wife the testator makes a distinction between money, securities for money, and other personal property, while in the paragraph bequeathing to his cousins he specifies only money. That the term money covers securities for money has been decided in *Shelmer's Case* (*a*), and in some instances it has been held to extend to a general residue: 1 *Jarman* on Wills 732; *Rogers* v. *Thomas* (*b*), *Dowson* v. *Gaskoin* (*c*), *Stocks* v. *Barrè* (*d*), *Grosvenor* v. *Durston* (*e*). The circumstances relied on in these cases for giving this enlarged meaning to the word were the use of phrases such as "all which might remain of money after the payment of debts and legacies," which were construed to mean that all which was liable to debts and legacies was intended to pass. Here there is no use of the word remainder, and the debts would seem charged on the money and securities for money in their limited sense. But the circumstances that the testator contemplated a conversion of his personal property into money, as he directs his wife to have one-third of the value, which could only properly be ascertained by a sale; that it was besides the duty of the executors to make such a conversion; and that the bequest is not immediate, but to take effect at the death of the wife; seem to me to indicate that he meant to dispose in this

(*a*) Gilb. Eq. R. 200, 1 Jarman Wills. 730 *n*.
(*b*) 2 Keen 8.
(*c*) 2 Keen 14.
(*d*) John. 54.
(*e*) 25 Beav. 97.

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clause not of the money he possessed at the time of his death, but the money belonging to his estate at the time of the wife's death, when all the personal estate would be, or ought to be, in the shape of money; and therefore, that the word money covers the whole personal property not before absolutely disposed of.

Nothing is said as to the income of the two-thirds of the personalty before the time of division, but I apprehend that in this case it will belong to those who are, or may become, entitled to the property: *Genery* v. *Fitzgerald* (*a*).

I think the gift is to the cousins as a class, and those living at the testator's death take vested interests liable to be divested to the extent required to let in other cousins, of the families named, coming into existence before the period of distribution: *Baldwin* v. *Rogers* (*b*), *Re Stanhope's Trusts* (*c*), *Drakeford* v. *Drakeford* (*d*), *Porter* v. *Fox* (*e*), *Clark* v. *Phillips* (*f*). Judgment.

There will be a declaration accordingly.

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(*a*) Jac. 468.
(*b*) 3 D. M. G. 649.
(*c*) 27 Beav. 201.
(*d*) 33 Beav. 43.
(*e*) 6 Sim. 485.
(*f*) 17 Jur. 886.

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## HERON v. MOFFATT.

*Trustee and cestui que trust—Purchase by trustee—Insurance—Mortgagee.*

The rule in Equity is, that the trustee buying the trust estate will be compelled to complete the purchase if considered for the advantage of those beneficially interested; but a trustee who had procured the estate to be bid in at auction, so as to prevent its being, as he considered, sacrificed, was *held* not bound to perfect the purchase; as it is the duty of a trustee to take steps to prevent the estate being sold at an undervalue: and this, although he erred in his judgment as to the value of the property offered for sale, as also as to the means adopted to protect it.

A trustee, unlike a mortgagee, is entitled to insure the trust property, and charge the premiums paid against it, without any express stipulation to that effect in the instrument creating the trust.

Feb. 9th.

Statement.

This was a motion to continue an injunction restraining the defendant *Moffatt* from selling certain village lots in the village of Angus, specified in the third paragraph of the bill.

The plaintiffs were *Andrew Heron* and *Charles Heron*, the defendants *Lewis Moffatt* and *Jonas Tar Bush*.

A suit of *Proudfoot* v. *Bush* was, in 1867, pending in this Court, to which *Moffatt* and his partner *Murray* had been made parties as incumbrancers, and on the 24th January, 1867, an agreement was come to between the plaintiff *Proudfoot* and the defendants *Bush*, and *Moffatt & Murray*, whereby, after reciting that the accounts between *Proudfoot* and *Bush* were complicated, and that the interests of *Bush* and his creditors would be prejudiced by delay, it was agreed that the sum due to *Proudfoot* should be fixed and agreed upon in the Master's office as $3,000, and that sum was paid by *Moffatt & Murray* as parties redeeming *Proudfoot*, and was to be added to the amount due to them. Certain premises on which were erected a grist mill and saw-mill were to be conveyed by *Charles Heron* and *Bush* to

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*Moffatt*, and the lands described in the mortgages, in the pleadings in that suit mentioned, were to be conveyed by *Proudfoot* and *Bush* to *Moffatt*.

The several parcels of land, which, by deed, or decree in that suit, might become vested in *Moffatt*, or in him and *Murray*, were to be held on the following trusts, viz., that *Moffatt* might, in his sole and independent discretion sell any of the said lands at public auction or private contract at fair and reasonable prices, and might resell any of them without being responsible for any loss, and that *Moffatt* might lease any part thereof at his discretion, and hold the proceeds of the sales or rents upon trust, 1st to pay or retain expenses, outgoings, repairs, and taxes; 2nd, to pay the amount paid by *Moffatt & Murray* to redeem *Proudfoot* and certain costs, and the amount due to *Moffatt & Murray* as incumbrancers. 3d. The amount, if any, due to any other incumbrancers, who had proved or might prove their claims in the Master's office, and to retain a commission of five per cent. on all sums received from leases or sales; and 4th. After payment as aforesaid, *Moffatt* to reconvey the grist mill and saw-mill lot to *Charles Heron*, and the other properties that might remain unsold to the defendant *Bush*, or to whom he might appoint. The grist and saw mills not to be sold till after 1st January, 1870.

Statement.

In pursuance of this agreement *Charles Heron* conveyed to *Moffatt* the mill properties, and the other lands were, by a decree of this Court in the suit of *Proudfoot* and *Bush*, dated 7th January, 1868, vested in *Moffatt*, these other lands comprising the village lots mentioned in the injunction.

In August, 1869, *Bush* became insolvent, and his estate and interest in the lands, other than the mill properties, were duly sold to the plaintiff *Andrew Heron*, and he and *Charles Heron* were entitled to the lands

1875. after payment of what was due to *Moffatt*, as before mentioned.

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The bill charged that *Moffatt* had received large sums from the proceeds of sales and rents, and had charged about $3,000 for insurance premiums, expended without authority; and that on the 8th January, 1875, *Moffatt* exposed the mill properties for sale at auction pursuant to an advertisement, declaring the sale to be without reserve, and that the same were duly sold to one *Peter Barclay* for $12,520, who became the purchaser thereof, not for himself, but for *Moffatt*, and that he held the same in trust for *Moffatt*; and that *Moffatt* had since advertised the village lots and the mill properties for sale. The plaintiffs submitted that they were entitled to credit in account for any sum the mill properties might realize over and above $12,520; and that in any event the plaintiff *Andrew Heron* was entitled to credit for that sum. which would pay off all that *Moffatt* was entitled to claim, and prayed that he might be restrained from selling the village lots.

Statement.

The circumstances connected with the sale at auction, and the purchase by *Barclay*, were fully detailed in the affidavits filed. *Moffatt* swore that having advertised the sale as without reserve, he employed *Barclay* on the morning of the sale to attend and bid, in order to prevent the property being sold at a sacrifice, and that he was not to let it go under $15,000, which was assumed to be its fair value. On meeting his solicitor at the auction room he was advised he could not employ any person to bid, and thereupon he put an upset price of $12,500 on the lots. *Barclay* was informed of the upset price, but was not told he was not to bid, and he did bid $20 in advance of the upset price, when it was knocked down to him. That *Barclay* had no intention of buying the property for himself or for *Moffatt*, the sole object of his attendance and bidding being to protect the estate.

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*Andrew Heron* and *Bush* were present at the sale. There were no other bids on the property. *Barclay's* affidavit was to the same effect. The Court considered these facts satisfactorily established.

A large portion of the affidavits and evidence on the part of the defendant *Moffatt* was directed to establish that *Bush* was the beneficial owner of the lands, and that the bidding in by *Barclay* was with his knowledge and consent. The plaintiffs and *Bush*, on the contrary, alleged that the plaintiffs alone were beneficially interested in the property, and that *Bush* acted as their agent, and denied that *Bush* was aware of the arrangement with *Barclay*.

Mr. *Boyd*, for the motion.

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

The cases cited are mentioned in the judgment.

Feb. 23rd. Judgment.

PROUDFOOT, V. C.—[After stating the facts as above.] —I do not think that the evidence would warrant me in coming to any other conclusion than that the plaintiffs are the real owners. Nor do I think there is such clear and conclusive proof of *Bush's* knowledge as to enable me to treat it as established. And were it established, I do not think the knowledge in this case to the agent ought to be imputed to the plaintiffs: *Cameron* v. *Hutchinson* (*a*). For it seems that *Bush* intended, on the occasion of the sale, to forget his character of agent, and endeavour to purchase for himself at as low a price as possible, and therefore to the prejudice of the plaintiffs' interest.

The question then is, how the bidding should be regarded under the circumstances stated above, which I

(*a*) 16 Grant 526.

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take to be proven, that *Barclay* attended at the sale for the purpose of protecting the property, and with no intention of buying either for himself or for *Moffatt*.

The cases establish that if a trustee for sale buy in the property, intending to become the purchaser, the *cestui que trust* has the option of holding him to his bargain: *Campbell* v. *Walker* (*a*).

And it seems also that assignees in bankruptcy cannot buy in the property for the benefit of the estate, unless having an authority from the creditors,—and if they do so, they may be held to their purchases: *Ex parte Lewis* (*b*), *Ex parte Gover* (*c*).

In the class of cases, however, represented by *Campbell* v. *Walker*, the trustee bid with the intention of purchasing for himself. In the bankruptcy cases it has to be noticed that the assignee had no discretion, and no authority to interfere with the sale; his duty was to carry out the instructions of the creditors.

Judgment.

In this case, however, the trustee was authorized, *in his sole and independent discretion*, to sell either at public auction or private contract, for cash or on credit, at fair reasonable prices, and to re-sell. So that *Moffatt* was the person who was to exercise the discretion that in bankruptcy is vested in the creditors. It is the duty of a trustee for sale to take reasonable precaution to protect the property, to prevent its being disposed of at an undervalue.

In *Re Peyton's* Settlement (*d*) there was a power in a settlement to dispose of and convey, by way of absolute sale, the lands and the inheritance thereof in fee simple

(*a*) 5 Ves. 678.
(*b*) 1 G. & J. 69.
(*c*) 1 DeG. 349.
(*d*) 30 Beav. 252.

for such prices as to the trustees should seem reasonable. The trustees applied to the Master of the Rolls, in consequence of doubts among conveyancers, whether they had, under such a power, authority to fix a reserved bid, and buy in the property. The Master of the Rolls said, "I think the power of sale must be considered to include all such acts as are usual and requisite for accomplishing the purpose of the power, and I have no doubt that it includes an authority to fix a reserved bidding," &c. Lord *St. Leonards* says, that trustees, acting providently, may buy in the estate (*a*).

An upset price and a reserved bidding are practically the same thing—a sum specified, below which the property is not to be sold.

Independently of the Ontario statute, then, of 1868, I do not doubt that a trustee might, under a power of sale, without special authority, buy in for the benefit of the estate. Whether the arrangement as to buying in was, in this instance, prudently managed, and whether the trustee may not be liable for a loss on a re-sale, are questions that do not arise here at present.

Judgment.

The Ontario statute, 31 Vic., ch. 28, was passed for the purpose of putting an end to the conflict between the Courts of Law and Equity, as to the validity of sales where a puffer was employed,—and for enabling sales to be enforced against unwilling purchasers.

It defines a puffer to mean a person appointed to bid on the part of the *seller*, in this respect differing from the Imperial statute on the same subject, which defines it to be a person appointed to bid on the part of the *owner;* and enacts that the sale shall be taken to be *without reserve*, unless otherwise stated in the conditions

(*a*) V. & P. 13 ed., 50-51; 14 ed., 62, 216.

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or particulars of sale, and upon any sale without reserve it shall not be lawful for the seller or for a puffer to bid.

These provisions seem to me all to indicate the intention of the Act to be to regulate sales by auction as between sellers and buyers, but not to affect the relation between *cestuis que trust* and trustees. The employment of puffers was an injury to purchasers, but if it procured a higher price would be beneficial to the *cestuis que trust*. And it was to protect purchasers against such arrangements that the Act was passed.

A puffer is defined, in *Shimmin* v. *Bellew* (*a*), as a person who, though the property be knocked down to him, is not liable to complete. Here *Barclay* never could have been compelled to complete his purchase. He went at the request of *Moffatt* to buy in for the estate, not to buy for himself; and *Moffatt* never could have obtained specific performance of the contract against him. The employment was illegal, and any *bonâ fide* purchaser might have taken advantage of it. But I cannot see that this taint of illegality between vendor and purchaser, rendering the contract void as between them, is to have the effect of making the trustee liable to complete. And it seems to me equally plain on another ground that *Heron* could not have had a specific performance against *Moffatt*, viz., that he bought under a mistake as to his rights, his duties, and his liability.

Judgment.

The right of *Moffatt* to charge the premiums for insurance was discussed, though I do not see that it is necessary at present to give any positive opinion. The question depends on whether *Moffatt* was a trustee or only a mortgagee; and considering the duties imposed on him by the agreement, I have no difficulty in determining

(*a*) Irish Rep. 1 Eq. 280.

him to be a trustee. And a trustee is entitled to insure, and charge the premiums against the estate. 1875.

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I refuse the injunction with costs.

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## In Re The Commissioners of the Cobourg Town Trust.

*Trustees of a town—Commission.*

Trustees of a municipalty are entitled, under the general provisions of the Act of 1874 (37 Vic.,ch. 9, Ont.), to a commission on moneys passing through their hands as compensation for their care and trouble in the management of the trust.

This was a petition by the Commissioners of The Cobourg Town Trust, praying for compensation for care, pains, and trouble, and time expended in the management of the trust estate, under the Act of 1874 (*a*). Feb. 3rd.

Mr. *Boyd* for the petitioners. The Act of 1874,ch. 9, provides for compensating all trustees without distinction, whether created by deed or will. The plaintiffs are trustees to all intents as regards their duties and liabilities: they have to look after the affairs of the Corporation; and they are liable to make good any loss caused by their neglect or inattention. The change in the law as to the payment of executors and others is fully discussed in *Deedes* v. *Graham* (*b*). The general principle in the United States is, to allow compensation to all parties occupying any fiduciary position. He referred to and commented on *Grant* v. *Campell* (*c*). Argument.

Mr. *Moss*, Q.C., contra. The case of *Mason* v. *Rosevelt* (*d*) shews that where a person is in an honorary position he cannot afterwards come and claim compensation

(*a*) 37 Vic., c. 9, Ont.
(*b*) 20 Gr. 258.
(*c*) 5 Ex. 294.
(*d*) 5 Johns, Ch. 534.

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for his services. In the present instance, as far back as fifteen years, this trust was created; and these gentlemen accepted this honorary appointment of trustees, and took upon themselves all the duties and responsibilities of the office, never dreaming of any allowance, or expecting any remuneration for their services; but now that an Act has been passed allowing compensation in certain cases, they come and claim an allowance in their favour out of the fund.

This cannot, properly speaking, be called a trust estate; clearly this Court could not administer it, and therefore, under the Act, they would not be entitled to compensation. It is true the Court might hold them responsible for any breach or neglect of duty; and a Court of law would have co-ordinate jurisdiction, no doubt, to punish them.

Section 4 of the Act would seem to indicate that persons of this kind are not contemplated by the statute: *Pearson* v. *Hull Local Board of Health* (*a*), *Hardy* v. *Tingey* (*b*), *Attorney General* v. *Dublin* (*c*).

Feb. 23rd.

Judgment.

PROUDFOOT, V. C.—Two of the trustees, Mr. *Hargraft*, M. P. P., and Mr. *Stevenson*, have disclaimed any desire for compensation: but this can have no effect on the rights of the remaining trustees if they shall be found entitled to it.

The Ontario Statute of 1874 defines *trustees* as including any trustee under a deed, settlement, or will, and executors and administrators, and any guardian appointed by any Court, and a testamentary guardian, or any other trustee, howsoever the trust is created; and enacts that they shall be entitled to such fair and reasonable allowance for the care, pains, and trouble, and their time expended in and about the trust estate, as may be allowed by the Court of Chancery, or a Judge or Master

(*a*) 3 H. & C. 921. (*b*) 5 Ex. 294. (*c*) Bligh. N. S. 312.

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thereof, to whom the same may be referred; and that a Judge of the Court of Chancery may settle the amount although the trust estate is not before the Court in any suit; and the Act should include any trust heretofore or hereafter to be created; but nothing in the Act shall apply to any case where the rate of allowance is fixed by the instrument creating the trust.

The Statutes creating the trust and appointing the trustees are the 22 Vic., c. 72 (1859), and 26 Vic., c. 48, (1863). The first of these was passed to consolidate the debt of the Town of Cobourg, and to vest the town property consisting of The Town Hall, The Market Block The Harbour, Wharves, &c., and the Port Hope and Rice Lake Gravel Road, in fee simple, in trustees. The property was to be held by the trustees out of the rents, dues, revenues, and profits to pay all reasonable expenses of the trust, to keep the property in repair and good order, to insure the buildings, and then to pay the interest on the debentures authorized to be issued by the Act. The Statute then authorized the issue of debentures by the Town Council to the amount of £50,000 stg., upon which the Commissioners were to raise money by loan. By the latter statute, the former was amended, and the Commissioners were authorized to submit annually to the Corporation a statement shewing how much the revenue from the trust estate was deficient to pay interest and the sinking fund, and the deficiency was to be supplied by the levying of a special rate upon all the taxable property in the town, to be paid by the Corporation to the Commissioners, to be by them applied in the manner specified in the Act. And the Commissioners were to account annually to the Town Council for the moneys received and expended, and to shew debentures issued during the year, and those outstanding.

Judgment.

The enumeration of these duties suffices to shew that the labours of the Commissioners were of a very onerous

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kind,—involving very considerable responsibility, and the exercise of skill and care, and the expenditure of time and trouble, and incurring large responsibility and disabilities.

It cannot be considered an *honorary trust* in the usual acceptation of the term; *i. e.*, one in which the trustees are bound in *honour* only to decide on the most proper and prudential course · such as trustees to preserve contingent remainders after the eldest son has attained twenty-one (*a*), for the Commissioners are bound to fulfil the trust in the terms of the statute, and to account to the Town Council annually for their dealings with the trust estate. This, of course, implies a liability for mismanagement, or negligent dealing, for which they would, no doubt, be liable to as great an extent as if appointed by a deed *inter partes*. In the case of *The Mersea Docks Trustees* v. *Gibbs*, (*b*) it was argued that the trustees being a public body, performing a public duty, under the authority of the Legislature, receiving no profit or emolument for the discharge of their duties, were not liable to an action for injuries arising to individuals from acts done by persons acting under them, but were only liable to an indictment. But the House of Lords held otherwise, and that where such a body was constituted by statute, whether collecting tolls for their own profit or public purposes, its liability was undoubted.

Judgment.

Their position as trustees also imposed on them disabilities to which no others were subject. They could not take a lease of a wharf, or storehouse, or a stall in the Market,—they could not purchase the debentures of the town,—could not contract to repair,—and were, in fact, excluded from any chance of investing or dealing in the property of the town.

(*a*) Biscoe v. Perkins, 1 V. & B. 492. (*b*) L. R. 1 E. & I. App. 93.

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Nor could the trust be considered an honorary one in the sense that it was undertaken without expectation of remuneration,—or, if so, that the trustees are on that account prevented from asking compensation. The statute itself affords an answer to this argument, as it enacts that it should include any trust heretofore or hereafter to be created. And if the statute was introducing a new law, as contended, in no case where the trust was created prior to its passing could the trustees have expected to be in a position to demand compensation, or have any hope of receiving any. The former Act giving compensation to executors was applied to the management of estates prior to its becoming law, without any express provision to that effect. But in this case no question arises as to compensation prior to the Act, as all that is sought is compensation from the time the Act was passed.

Judgment.

Under the statute I think I have power to fix the remuneration, or refer it to the Master to do so. From the accounts proved it seems that during the year 1874 the money collected by the Commissioners for rents, received from special rates upon their requisition, and raised upon the sale of debentures seems to have been about $90,000, which was applied by them in pursuance of the trust. There are six trustees, and the amount asked is $100 per annum for each, with $50 extra for the chairman, in all $650, for the year, or less than three-fourths of one per cent. on the receipts. I think this a very moderate and reasonable allowance, and authorize them to retain it out of the estate. If any of these gentlemen decline to receive it, it will be so much better for the trust. As the compensation ought to depend on the amount of labor performed it cannot be fixed till the work is done, and I will make no order as to future allowance,—application may be made for it yearly; and I think the costs of this application should be allowed to the Commissioners.

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I have not attempted to define the nature and character of the trusts to which the recent Act is applicable, I only decide that this trust is, in my opinion, within it. It may, perhaps, be necessary to limit, to some extent, the general language of the Act, though I am by no means certain that the Legislature did not mean to include all trustees who have the care and management of trust property, unless excluded by contract, either by agreeing to charge nothing, or only a specified sum.

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## WESTMACOTT v. HANLEY.

*Mortgage—Insurance.*

The owner of land mortgaged the same, and, in pursuance of a covenant in the deed, insured the buildings on the land. The policy provided that the loss, if any, should be paid to the mortgagees. The buildings were shortly afterwards destroyed by fire, and the insurance moneys paid to the mortgagees, who assigned the mortgage to trustees of the Insurance Company, and they thereupon proceeded to foreclose.

*Held*, on appeal, by a puisine incumbrancer, from the report of the Master, that the plaintiffs were not bound to give credit for the amount paid to the mortgagees.

Statement.

On the 7th of May, 1873, the defendant *Hanley* mortgaged the premises in the bill mentioned to the "Southern Counties Permanent Building and Savings Society," to secure the sum of $2,155.04, and covenanted to insure the buildings on the lands to an amount of not less than $2,000.

On the 18th of November, 1873, *Hanley* mortgaged the same property to *Marwood A. Gilbert*, to secure $387.32, and as no objection was made to the policy on the ground of this second mortgage, the Court assumed that the insurance company was notified of it, and assented to it. (*a*).

(*a*) See 36 Vic., c. 44. s 39, O.

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*Hanley* on the 14th of May, 1874, applied to the Commercial Union Assurance Company for insurance on the buildings for $2,000, and requested the loss, if any, to be paid to the building society, and on the 8th June, 1874, a policy was issued to him insuring that sum from the 14th May, 1874, to the 14th May, 1875, and containing a clause that the "loss, if any, payable to the Southern Counties Permanent Building Society."

The premises insured were burnt on the 11th November, 1874, by *Hanley* or at his instance.

The insurance company paid the building society the amount covered by the policy, and the mortgage was assigned by the building society to the plaintiffs, as trustees of the insurance company, on the 25th November, 1874.

Statement.

The plaintiffs filed their bill for the foreclosure of the mortgage against *Hanley*. *Gilbert* was made a party as an incumbrancer in the Master's office, and claimed that the plaintiffs should give credit for the amount of the insurance money received by the building society. The Master rejected this claim, and found the plaintiffs entitled to the whole amount of the mortgage, and reported *Gilbert* as a second incumbrancer.

From this finding of the Master, *Gilbert* appealed.

Sep. 2nd.

Mr. *Moss*, Q. C., for the appeal. The plaintiffs here representing the insurance company can stand in no better position than the building society. The insurance company having paid the mortgage money, and taken an assignment of the security, and the security must be reduced by the amount paid: *The Provincial Insurance Co.* v. *Reesor(a)*, *Austin* v. *Storey (b)*, *Burton* v. *The Gore Mutual Insurance Co. (c)*, *Phillips* on Insurance.

(a) 21 Gr. 296. (b) 10 Gr. 306. (c) 12 Gr. 156.

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*Gilbert*, who is a second mortgagee, cannot be deprived of his right to have the insurance money paid to the building society, credited on the first mortgage. It is admitted, for the purposes of this appeal, that the fire was the act of *Hanley*.

Mr. *Miller*, contra. The second mortgagee cannot stand in any better position than the mortgagor. The contract was between *Hanley* and the insurance company, and the fire having been caused by *Hanley*, neither he nor any one else can recover the amount of the loss. Here the insurance company simply bought up the mortgage paying, over to the society the amount of insurance money as the sum that would be called for under the policy.

Mr. *Moss*, in reply. The insurance company might have set up the defence that the fire was caused by *Hanley*,

Judgment.

and thus have defeated any attempt to enforce payment; they did not choose to adopt this course, but paid the claim, and took an assignment of the security; and they cannot now raise the objection to the injury of a *bona fide* second incumbrancer.

Sept. 3rd.

PROUDFOOT, V.C.—[After stating the facts as above.] —During the course of the argument a number of cases were referred to, but one which concludes me, at all events, was not referred to, viz., *Livingstone* v. *The Western Assurance Company* (*a*).

The case of *Burton* v. *The Gore District Mutual Insurance Company* (*b*), was one which received great consideration. It was first heard before the late Chancellor *Vankoughnet*; reheard before the full Court, and an appeal to the Court of Appeal was dismissed; and but for the decision in *Livingstone* v. *The Western Assurance Company*, I would have thought the circumstances undis-

(*a*) 14 Gr 461, and on appeal, 16 Gr. 9. (*b*) 12 Gr. 156.

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tinguishable from the present. In *Burton's* case the policy was assigned with the assent of the insurance company, while in *Livingstone's* the assurance was, as in this case, made for the benefit of *Livingstone*; in both, the companies recognized an interest other than that of the insured, but in the latter it was held that the person for whose benefit the insurance was made was only entitled to what the insured could have recovered, and he having violated one of the conditions which avoided the policy, the person for whose benefit it was effected was held not entitled to anything.

I am unable to distinguish *Livingstone's* case from the present, and in accordance with it feel bound to dismiss the appeal, with costs. But as it was not cited on argument, I will give the appellant an opportunity, if he desire it, of speaking to it again.

Judgment.

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## Anderson v. Kilborn.

*Will, construction of—Indefiniteness—Marshalling assets.*

A testator directed the residue of his estate to "be distributed at the discretion of his executors to the support of Christianity throughout the world, such as Bible, tract, missionary societies, and institutions of learning of the Baptist denomination:

*Held* a valid bequest, and one which could not be objected to on the ground of indefiniteness.

The testator having been interested in having a place of worship, of which he was a deacon, completed, told the building committee to collect all they could from the other members, and that he would see the building paid for; and the committee, relying on this assurance, completed the edifice, and incurred liability for the expense, and were out of pocket a considerable amount.

*Held*, that the executors were at liberty to discharge this sum out of their testator's estate.

The Court will not direct the assets to be marshalled in favour of a charity, unless the will says this is to be done.

Hearing on further directions.

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The case at the hearing is reported *ante* vol. xii, p. 219. By an order of 28th July, 1872, the report of the Master at Hamilton was referred to the Referee to reconsider, except as to certain matters, and under this order, and two subsequent orders, the Referee made his report, dated the 28th September, 1874, in which he reported on the matters now discussed, as follows:—

"12. The said executors made sundry payments for charity purposes of the character referred to in the 7th clause of the testator's will, amou' ting in all to $4918.17, but in taking the said accounts I have not allowed the said payments as proper payments, but have charged the said executors therewith, the devise for charitable purposes in the said 7th clause of the testator's will being general, uncertain, and indefinite."

Statement.

"13. At the request of the solicitor for the said executors, I certify, specially, that of the sum of $4918.17, expended by the said executors, as mentioned in the 12th paragraph hereof, for charity purposes, the sum of $2411.82 was so expended subsequent to the filing of the bill in this cause, and the sum of $2,506.35 was so expended before the filing of said bill, *bona fide*, before the right of the said executors to do so was challenged, and under an innocent misapprehension and mistake as to their rights and duties under the said will.

"14. I further certify that, although the said executors did not take legal advice as to the propriety of any of the particular payments which they made for charity, yet before entering upon the administration of the trusts of the testator's will they applied for and obtained the advice of counsel, who told them the will was "rightly constructed," and they had a right to go on, and who advised them to go on and carry out the will. I also certify that in their administration of the testator's estate

the said executors acted throughout honestly, without any corrupt purpose, and they derived no personal benefit or advantage from any of the payments made by them as aforesaid, except in the manner hereinafter mentioned. 1875. Anderson v. Kilborn.

"15. I further certify specially that of the money so expended as aforesaid for charity purposes, the sum of $3486.55 was paid in connection with the erection of a Baptist chapel at the village of Beamsville, $1106.66 before the filing of the bill in this cause, and $2379.89 since the filing of the said bill, under the following circumstances: The testator was a leading member and deacon in the Baptist congregation at Beamsville, and some time before his death the congregation determined to erect a new chapel. The testator was a member of the building committee, and subscribed towards the erection one-fourth of the expense of the body of the chapel, and one-third of the tower. After the building had proceeded some length the work was stopped for want of funds, and a meeting of the building committee was held, for the purpose of considering what should be done. At that meeting the testator, who was present, said, "The house must be built," and he told the building committee to collect all they could from the other members of the Church, and "he would see the meeting-house paid for." On subsequent occasions he expressed his intention to see the debt paid before he died; but he wished the other members of the Church to pay their proportion, and he would make up the deficiency. After the meeting aforesaid the building committee (the said executors being three of the members of said committee), relying on the support promised by the testator, proceeded with the work; and when the testator died, a few months afterwards, the chapel was nearly completed, the seats and pulpit had still to be put in, but the material of these was ready; and the painting had to be done. After payment of the testator's original subscription, and of the amounts subscribed by, and collected from, Statement.

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the other members of the congregation, there still remained a deficiency of $2854.56, which was paid by the executors out of the testator's estate. At that time the executors had no money of the estate in hand, but being personally liable as members, and of the building committee, gave their own notes, which, with interest thereon, at 8 per cent., they afterwards paid out of the testator's estate."

The case now came on to be heard on further directions, and as to the question of costs.

Dec. 9, 1874.

Mr. *Moss*, Q. C., and Mr. *C. Moss* for the plaintiffs, asked that the decree now made should direct the payment into Court of the amount found to be in the hands of the executors; the sale of the lands of the testator; inquiry as to who were entitled to the proceeds, and a distribution thereof after payment of costs.

Argument.

Mr. *Boyd* and Mr. *Cassels* for the defendants, the executors, contended that the several bequests of pure personalty were valid, and binding on all parties claiming under the testator, and the judgment of the Chancellor when the case was before him, as reported in 13 Grant, shews that that learned Judge entertained the same view.

The finding of the report as to the residue is wrong, and also that as to the executors not being entitled to payments made by them under the residuary clauses of the will: *Clifford* v. *Francis* (*a*).

The executors are clearly entitled to the amounts paid by them, and also to compensation under the statute in respect thereof: *Tudor's* Law of Charitable Trusts, pp. 210, 212, 229, 234, *The Attorney General* v. *London* (*b*), *Townsend* v. *Carus* (*c*).

(*a*) 1 Freem 330. (*b*) 1 Ves. Jun. 243. (*c*) 3 Hare 257.

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Here it is also shewn that part of the expenditure by these executors, in respect of these bequests, was before the bill was filed; and in any view the account should not go back further than that date, and this fact is specially reported on; as also the amount expended in building the chapel. These facts only become important, however, in case the Court should find against the validity of the bequests: *Bryant* v. *Goodnow* (*a*), *Barnes* v. *Perine* (*b*), *Home* v. *Dana* (*c*), *University of Vermont* v. *Reynolds* (*d*). The executors in this case are entitled to be paid their costs of suit, which should include all charges and expenses. The Court will favour charities to the extent of directing the debts to be paid out of the pure personalty as well as of personalty savouring of realty.

Argument.

The report, it was contended, was wrong in finding the bequests invalid. The original decree found the devises and bequests, other than that to Mrs. *Beam*, were void, in so far as they were payable out of realty or impure personalty.

*Howse* v. *Chapman* (*e*), *Roper*, p. 985, *Redfield*, vol. 2, p. 788, were also referred to.

Mr. *Moss*, Q. C., in reply. It is conceded that the bequests here, so far as they are payable out of realty, are void. The Chancellor only decided the question as to the personalty, that being really the only one before him. The bequest for the support of Christianity throughout the world was too wide to allow the executors to exercise a discretion: *Morice* v. *The Bishop of Durham* (*f*). And no scheme can be framed by the Court, as the object is too wide and indefinite. As to the Church: it may be, that had there been a bequest of money with which to erect a church, it might have

(*a*) 5 Pickering 228. (*b*) 9 Barb. 202. (*c*) 12 Mass. 190.
(*d*) 3 Verm. 542. (*e*) 4 Ves. 542. (*f*) 10 Ves. 522.

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been legal. But here was simply a personal undertaking to pay any deficiency; and there was no agreement binding on the testator to pay the building committee even; and no consideration for any promise or agreement that was made. Under such circumstances the executors were not justified in making the payments they did in aid of the church.

If the contention of the executors' view is correct, the result would be, that in their accounts there would be about $3000 allowed as expended on this church.

Jan. 19.

PROUDFOOT, V. C.—On behalf of the executors it is contended that the 7th clause of the will is not void for uncertainty and indefiniteness, and should it be held otherwise, that as to $3486.55, the executors should be allowed them as being, in reality a debt of the testator. The 7th clause of the will is as follows: "I will all the remainder and residue of my estate, after paying the above-named legacies, and all good and lawful claims against my estate, shall be distributed at the discretion of my executors to the support of Christianity throughout the world, such as Bible, tract, missionary societies, and institutions of learning of the Baptist denomination."

Judgment.

The decree made at the original hearing, and dated 19th July, 1867, declared that the devises and bequests contained in the will of *Jacob Beam*, other than the devise in favour of his wife, are void so far as they are payable out of the realty, or out of the personal estate savoring of the realty, as being contrary to the statute passed in the ninth year of George the Second, entitled "An Act to restrain the disposition of lands whereby the same become inalienable."

The bill had claimed (paragraph 6) that these devises and bequests were *void for uncertainty*, as also as being

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contrary to the statute of mortmain, and more specifically as to the residuary bequest had insisted it was *too vague and uncertain, and the objects of it could not be ascertained definitely, or with reasonable certainty.*

I apprehend that under these circumstances the question is no longer open for discussion; as matters in issue at the first hearing, which are neither decided, put into a train of investigation, nor reserved, must, on further directions, be regarded either as abandoned or as points on which the plaintiff was entitled to no order: *Passingham* v. *Sherborn* (*a*). Further than this, however, it seems to me that the Chancellor meant to affirm the validity of these bequests, so far as they were impeached for uncertainty, and that the declaration in the decree was designedly confined to the infringement of the Mortmain Act, as the only ground on which the bequests were assailable.

If the matter be still open, then I think the bequest of the residue is a valid bequest to charity. It would savor of pedantry to quote all the reported cases on this subject. I shall refer to a few that were cited, which seem to govern this case.

Judgment.

*Mills* v. *Farmer* (*b*) was decided by Lord *Eldon*, after great consideration, reversing a decree of the Master of the Rolls, Sir *W. Grant*. The testator there bequeathed "The rest and residue of all my effects I direct may be divided for promoting the Gospel in foreign parts and in England; for bringing up ministers in different seminaries, and other charitable purposes as I do intend to name hereafter, after all my worldly property is disposed of to the best advantage." He afterwards made a codicil, but named no charitable purposes. It was held to be a disposition of the residue in favour of charity to be carried into execution by the Court. Lord *Eldon* (*c*) lays down the principle that the same words in a will,

(*a*) 9 Beav. 424. (*b*) 1 Mer. 55. (*c*) P. 94.

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when applied to the case of individuals, may require a very different rule of construction from that which would govern them if applied to the case of a charity. "A third principle, which it is now too late to call in question, is, that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this Court, which will then supply the mode which alone was deficient."

Judgment.

And in *Moggridge* v. *Thackwell* (*a*),—where the testatrix gave the residue of her personal estate to *James Vaston*, desiring him to dispose of the same in such charities as he should think fit, recommending poor clergymen who have large families, and good characters —Lord *Thurlow* first, and afterwards Lord *Eldon*, supported this as a good devise to charity, regard being had to poor clergymen with good characters and large families, although *James Vaston* died in the testatrix's lifetime. "The general intention of this testatrix, who seems to have been saturated and satiated with the idea of charity, and yet not to have had mind enough herself to determine upon the particular objects, was to devote her property to charity, and according to these precedents (cases cited) *Vaston* was only the means and instrument by which that general intention was to be executed; and therefore this Court will carry that general intention into effect."

Dispositions *in pios usus* are looked upon in the same light as ordinary gifts to charity, of which, in fact, they are considered a branch: *Clifford* v. *Francis* (*b*).

Hence bequests to societies for propagating the Gospel either at home or abroad, are charitable donations

(*a*) 7 Ves. 36. (*b*) 1 Freem. 330.

within the statute: *Society for Propagating the Gospel, &c.*, v. *Attorney General* (*a*).

I shall now refer to the cases cited by the plaintiffs. The first is, *Vezey* v. *Jamson* (*b*). There, in the event of no appointment of the residuary estate by the testator, he gave it to trustees to dispose of it at their will and pleasure, either for charitable purposes, or public purposes, or to any person or persons in such shares and proportions, sort, manner and form as they in their discretion should think fit, and the laws of the land should not prohibit. It was optional with the trustees whether any portion should be given to charity; and it was expressly decided on this ground: "The testator has not fixed upon any part of the property a trust for a charitable use."

In *Williams* v. *Kershaw* (*c*), the testator directed his trustees "from time to time to apply the residue of the said dividends, interest, &c., to aid for such benevolent, charitable, and religious purposes as they in their discrerion should think most beneficial." It was decided upon the same ground that there was no trust for a *charitable* use fixed on the property. The Master of the Rolls said: "It was argued, in order to prove the gift to be good, that the terms must be taken conjointly; if so, every application must be to a religious purpose, which would, no doubt, be benevolent, and in a legal sense charitable." The testator did not so intend. "He intended to restrain the discretion of the trustees only within the limits of what was benevolent or charitable, or religious."

Judgment.

*Aston* v. *Wood* (*d*) is a case of the same kind. The testator gave to the trustees of Mount Zion Chapel, where he attended, £3500, and appointed as trustees to the same, *Aston* and *Green*, and directed that their receipts

(*a*) 3 Russ. 142. (*b*) 1 S. & S. 69.
(*c*) 5 Cl. & Fin 111. (*d*) L. R. 6 Eq. 419.

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should be a discharge to his executors, and the money to be appropriated according to the statement appended. No statement was appended, and *Giffard*, V. C., says: "As there is no statement appended, I cannot possibly tell or infer that the purpose thus intended to be referred to was charitable; and, if it was not charitable, then the object of the bequest is clearly so indefinite that the gift must fail."

Judgment.

In *Morice* v. *Bishop of Durham* (*a*) the bequest which was in trust for such objects of benevolence and liberality as the trustee, in his own discretion, shall most approve, was held not supportable as a charitable bequest—per Lord *Eldon*: "I say, with the Master of the Rolls, that a case has not been yet decided in which the Court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general." The true question is, whether if upon the one hand he might have devoted the whole to purposes in this sense charitable, he might not equally, according to the intention, have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes as this Court construes those words, and if it was competent for him to do so, the Court would not have charged him with mal-administration had he applied the whole to such benevolent purposes. The Court thought he had that power, and therefore it was indefinite. There was no devotion to charity in the bequest.

Lord *Eldon* then refers to a case in the same volume, *Attorney General* v. *Stepney* (*b*), in which a bequest for the use of the Welch Circulating Charity Schools as long as they should continue, and the increase and improvement of Christian knowledge, and promoting reli-

(*a*) 10 Ves. 522. (*b*) 10 Ves. 22.

gion, and to purchase Bibles and other religious books, pamphlets, and tracts, as the trustees should think fit, was sustained as a good charitable bequest.

In no one of the cases cited for the plaintiff do I find there was any unequivocal determination devoting the bequests to such purposes as this Court deems charitable. The bequest is clearly of such a kind as comes within the definition of charity, as recognized in this Court. I must therefore dissent from the conclusion of the Referee on that point.

I think I must dissent, however, from the other finding of the Referee, that the executors expended the $4918.17 for charity purposes of the character referred to in the seventh paragraph of the will, as he finds that of this sum $3486.55 were paid in connection with the erection of a Baptist chapel at Beamsville. The observations of the Chancellor, at the hearing (*a*) are opposed to the notion of such application being in accordance with the bequest.—"The testator's object was the application of the fund throughout the world; and I cannot cut down and defeat it by localizing the fund." The modes of applying the fund, indicated by the testator, "such as Bible, tract, missionary societies, and institutions of learning of the Baptist denomination," will not include an expenditure in building a Baptist chapel.

Judgment.

Then, can the payment of this $3486.55 be sustained as in discharge of a debt owing by the testator. The facts connected with it are set out in the fifteenth paragraph of the Referee's report. It seems the testator was a member of the building committee of the chapel, and had subscribed liberally towards its erection; but the work was stopped for want of funds; and at a meeting of the committee he said, "The house must be built," and told them to collect all they could from the other

(*a*) 13 Grant 222.

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members of the church, and "he would see the meeting-house paid for." The committee, relying on the support so promised, proceeded with the erection of the building; and after payment of the amounts subscribed by, and collected from the other members of the congregation, there remained a sum of $2854.56, which was paid by the executors, who were members of the committee, giving their own notes, which they afterwards discharged out of the testator's estate, with interest at 8 per cent., which, I suppose, makes up the sum of $3486.55.

Judgment.

A consideration to support a promise to pay may consist either in a benefit to the promisor, or a detriment to the promisee; and if the promisee do or perform any work at the instance of the promisor, though the latter may derive no benefit from it, he will be liable. The delivery of a letter which the promisee had a right to keep, was a good consideration for a promise to pay £1000, though the promisor derived no benefit from it: *Wilkinson* v. *Oliviera* (*a*). And the surrender of the possession of a paper, on which a guarantee was written, was a sufficient consideration for a promise, without reference to its contents: *Haigh* v. *Brooks* (*b*). And any service, benefit, or advantage, rendered to a third person, at the request of the promisor, is a sufficient consideration. Thus, if one person should say to another, "heal such a poor man of his disease," or "make an highway," and I will give thee so much, and he doeth it, an action lieth at the Common Law (*c*).

In the case before me, the testator was interested in having the chapel completed, and tells the committee to collect all they can from the other members of the church, and he would see the meeting-house paid for. The committee, accordingly, relying on this promise,

(*a*) 1 Bing. N.C. 490. (*b*) 10 A. & E. 309,334.
(*c*) 1 Rolle. Abr. Act. sur case.

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complete the building, incur liability for the expense, collect all they can from the other members of the church, and are out of pocket a large sum. It seems to me to bring the case within the principle contained in the cases cited, and entitled the executors to discharge the debt out of the estate.

It was also contended that the assets should be marshalled in favour of the charity. I think the cases, however, establish that the Court will not do so, unless the testator has desired it to be done: *Wills* v. *Bourne* (*a*); *Miles* v. *Harrison* (*b*).

The commission of the executors was not calculated on the sum of $4918.17, which the Referee disallowed. If I am correct in treating this as a proper payment, it ought to be considered in assessing compensation.

Judgment.

The decree will direct the Master to review the report on these subjects, and the lands to be sold; an inquiry as to who are entitled to the proceeds of realty and personalty savoring of realty, and payment to those found entitled by the Master. The costs of all parties will be borne ratably by the pure personalty and the impure personalty: *Wigg* v. *Nicholl* (*c*), *Wills* v. *Bourne* (*d*).

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(*a*) L. R. 16 Eq. 487.
(*b*) L. R. 9 Chy. 316.
(*c*) L.R. 14 Eq. 92.
(*d*) *Supra.*

1875.

## CRAWFORD v. BOYD.

*Will—Witness—Evidence Act* 1852.

A devise by a testatrix, who died in 1860, to a married woman, whose husband was one of the two witnesses to the execution to the will. *held* void, notwithstanding the provisions of the Evidence Act of 1852 (16 Vic., ch. 19).

This was a bill for partition, brought by one of the heirs-at-law of *Mary Boyd*, against the other heirs, under the following circumstances:—

*Mary Boyd*, by will, made 23rd January, 1857, devised the land in question to *Margaret Cunagh* in fee, subject to a provision in favour of *Nancy Boyd*, and to a charge of £50 in favour of *Joseph Crawford*. The will was attested by two witnesses, one of whom was *Robert Cunagh*, the husband of the devisee. The plaintiff was also assignee of the legacy to *Joseph Crawford*, and sought for partition of the land, either in her capacity of heir or assignee of the charge.

Hearing at Kingston.

Mr. *Machar*, for the plaintiff.

Mr. *Maclennan*, Q.C., and Mr. *McDonnell*, for defendants.

Jan. 19th. Judgment.

PROUDFOOT, V. C.—The case of *Hatfield* v. *Thorpe* (*a*), is an express authority for the proposition that a devise of an estate in fee, upon the determination of a life estate, to the wife of an attesting witness is void under the 25 Geo. II., ch. 6. In *Ryan* v. *Devereux* (*b*), this case is referred to by *Draper*, C. J., as a direct authority that the statute does not apply where the witness took an interest consequentially and not directly under the will.

(*a*) 5 B. & Ald. 589. (*b*) 26 U. C. R. 100.

1875.

Crawford v. Boyd.

This, I think, is a misapprehension, for the words of the certificate are expressly confined to saying that the will of the testator was not duly executed so as to pass any real estate in the messuage, &c., to *Elizabeth Hatfield*, the wife, but decide nothing as to the validity of the rest of the will. *Ryan* v. *Devereux* is itself no authority on the question now before me, for there the gift to the wife was held to be a pecuniary legacy, and that the statute of George did not apply, but that the statute of Charles did.

It was contended by the defendants that the evidence Act of 1852 (16 Vic., ch. 19) having removed the incapacity of witnesses from interest, had rendered the husband a credible witness to a will. Whatever might have been the effect of a general clause of that kind, its application to this case is excluded by the proviso that the Act did not render competent the husband or wife of any party named on the record. This Act was in force in 1860, when the testatrix died, and if at that time the devise was void, by reason of such incompetency, subsequent legislation could not affect it, if that legislation applies to similar cases.

Judgment.

I think the plaintiff is also entitled, as assignee of *Joseph Crawford's* legacy, to the amount of it. And all parties concurring, and the nature of the property being such as cannot be advantageously partitioned, the decree will be for a sale, the Master to ascertain the parties entitled, and their interest. An account of the legacy to *Joseph Crawford*, assigned to the plaintiff, will also be directed.

Further directions and costs reserved.

1875.

## GRUMMET v. GRUMMET.

*Will, construction of—Power of executors to sell—Maintenance.*

A testator devised his lands, charged with payment of debts, to his wife for life, and in the event of her death or marriage, to his children, "to be held for them until they come of age by the executors hereinafter named, to be applied for their use and benefit in the way and manner as the said executors shall see best; and when the above children shall come of age the residue of the above property shall be given to the children in equal shares." The executors were not expressly authorized to sell, but the testator had directed that his wife should not have power to dispose of any part of the property without the consent of his executors.

*Held* (1), that the necessary implication from these words was, that she had power to sell with their assent: and the executors and executrix,—the widow,—having sold the real estate and applied a large portion of the proceeds in support and maintenance of the children:

*Held* (2), that the sale was valid, and that the executors were entitled to be allowed the amount so expended for maintenance, which was moderate, in passing their accounts in the Master's office: and *semble*, that the fact of the debts having been charged on the lands implied a power in the executors to sell.

Sep. 22nd. Hearing on further directions—the original hearing is reported, *ante* volume xiv., p. 648, where and in the judgment on the present hearing the facts fully appear. The parties there pointed out by the Court as being necessary parties to a decision of the question as to the right of the executors to sell the real estate had been made parties.

Mr. *Duff*, for the plaintiffs, asked that the decree now made should direct the allowance in favour of the plaintiffs of the sum expended in the support and maintenance of the infant defendants.

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

The cases cited are all mentioned in the judgment.

1875.

Grummett v. Grummett.

Sep. 29th.

PROUDFOOT, V. C.—The only question discussed was, the right of the plaintiff *John Grummet* to be allowed the sum of $679.86, paid by him for and towards the maintenance of the infant children of the testator.

The guardian of the infants thinks the amount claimed reasonable, if it can be allowed at all; but he insists that to allow it would be an evasion of the statute 12 Vic. ch. 72, and the cases decided on it in regard to past maintenance.

The will of the testator is partly set out in the report of the case at the original hearing (*a*), and the learned Vice Chancellor *Mowat*, who gave judgment, while declining to give a definite construction in the then state of the record, expressed his opinion that the weight of authority in equity seems to be that the charge of lands with debts gives to the executors an implied power of sale.

Judgment.

But in addition to the part of the will found in that report, there are other clauses that have an important bearing on this question. The testator had given the wife an estate in all his lands during life or widowhood, and had given her all his personal estate, except some trifling legacies, for a like term; and "provided that his wife should not have any power to sell or otherwise dispose of the above, or any part of the aforesaid parcels of land hereinbefore described, houses, buildings, &c., thereunto belonging, neither shall she have power to sell or otherwise dispose of any of my other property herein bequeathed to her without the consent of the executors hereinafter named. * * * Provided also, that in the event of the decease of my wife *Susan Grummet*, or in case she marries again, I give and devise the above parcels and tracts of land hereinbefore described, together with all the houses, &c., to the

(*a*) 14 Grant 648.

1875. Grummett v. Grummett.

children by her my said wife *Susan Grummet*, viz., *Wesley*, *Jane*, *Thomas*, *Eliza*, *Samuel*, *Josiah*, *Isaiah*, and *Lavinia*, to be held for them until they come of age, by the executors hereinafter named, to be applied for their use and benefit in the way and manner as the said executors shall see best; and when the above children shall come of age the residue of the above property shall be given to the said children in equal shares. * * * Provided also, that my other personal property, hereinbefore mentioned, in the event of the decease or marriage of my said wife *Susan Grummet*, shall be given to the children above-named, and applied for their benefit in the same manner as the above-mentioned landed property." And he appointed *John Grummet*, *David Penguin*, and his wife, his executors and executrix.

Judgment.

All the parties whose absence prevented a construction of the will at the hearing have now been added, and there is nothing to prevent the effect of it being ascertained and declared.

I concur with Vice Chancellor *Mowat* in thinking that the weight of authority is in favour of implying a power of sale in the executors from the charge of debts. But in addition to that, it seems to me that such a power is given to the wife, with the consent of the other executors, in the clause providing that she should not sell without their consent. The necessary implication being that she might sell with such assent.

The executors and executrix united in selling a portion of the property, which realized $1785, and formed the principal portion of the estate that came to their hands. They have properly applied it all except $139 84, now in *John Grummet's* hands, unless an exception is to be made in regard to the sum spent for maintenance.

That a sale was intended or contemplated in the administration by the executors appears also from the provision, that only the residue is to be divided among the children.

The powers of the executors, however, are not confined to a sale for payment of debts, but they are authorized to hold the lands and chattels during the minority of the children, to be applied *for their use and benefit in the way and manner as the said executors shall see best*, and on their attaining their majority to give them *the residue*. It might be plausibly argued, that under such language the lands were vested in the executors either in fee or during the minority of the children, with a power to appoint in fee.

They are given to the children to be held for them till they come of age by the executors, to be applied for their use and benefit, &c. Now, it is a well known rule, that wherever a trust is created a legal estate sufficient for the execution of the trust shall, if possible, be implied (*a*). There is a plain trust here for the children; the executors are to hold the land to be applied for their benefit during minority, and afterwards to *give them the residue*. The executors could not *apply* them without a power to lease, to manage, or dispose of them; and they could not *give* the residue unless they had it to give. It might very reasonably then be held that they took the fee. But at all events, they could not apply them for the benefit of the childrn without having *a power of sale* if necessary—and the test of the necessity was their discretion—*as they might see best*. They have exercised their discretion, admittedly in a fair and honest manner, for a purpose clearly within their competence, and I know of no principle that would justify me in endeavouring to overrule it: *Lyons* v. *Blenkin* (*b*); *French* v. *Davidson* (*c*).

Judgment.

(*a*) Lewin, 3d ed., 249. (*b*) Jac. 261. (*c*) 3 Madd. 396.

1875.

Grummett v. Grummett.

I do not think the case within the 12th Vic. This is not an application for a sale of the estate for maintenance, but the question is, whether executors with a power to sell, and a power to maintain, have properly spent the money for maintenance or not? The sum spent is admitted by the guardian of the infants to be reasonable, and there is no *data* from which I could say it was not reasonable. It seems to be a very moderate sum, and only about a third of what the Master has certified would be a reasonable allowance.

Judgment.

I was referred to *Re Hunter* (*a*), and *Edwards* v. *Durgen* (*b*), as conclusive authorities against the executors here. But the former was the case of an intestacy, and in the latter there was no power to maintain; so that in neither had the personal representatives authority to spend money for maintenance by direction of the owner, and in that all important point they differ from the present. I do not understand the Chancellor in *Re Hunter* to have asserted that past maintenance was never to be allowed, but that from the peculiar circumstances of that case he would not there sanction it. And in *Goodfellow* v. *Rannie*, (*c*) he recognizes the right, and that was a case of an administrator also.

I think the executor here, *John Grummet*, must be allowed the $679.86, paid for maintenance in his accounts; from this will be deducted the $139.84, in his hands. All parties to have their costs, not already provided for, out of the estate. In other respects the ordinary decree.

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(*a*) 14 Gr. 680. (*b*) 19 Gr. 101. (*c*) 20 Gr. 425.

1875.

## MURPHY v. MASON.

*Will—Distribution—Partition.*

Where an estate consisted in large part of personalty, and by the will of the testator the whole was to be divided among his children on the youngest attaining twenty-one, all of whom took vested interests on their attaining majority, and in the event of the death of any before the period of distribution, leaving issue, the share of the one so dying was to go to his children, share and share alike:

*Held*, that until the youngest child attained twenty-one, the adult parties were not entitled to call for a partition or distribution of the property.

This bill was filed by the children devisees under the will of *Daniel Murphy* against the trustees of the estate, and against the widow of the testator, praying for a partition of the trust estate. Three of the plaintiffs were adults, and three were infants.

Statement.

The will of *Daniel Murphy* is partly set out *ante* volume xx, page 575, where *Strong*, V. C., held that each child, on attaining 21, took a vested interest in his share of the residue of the estate.

After bequeathing certain legacies, the testator devised all his real estate and residue of personalty to the trustees upon trust to sell the real estate and leaseholds at their discretion, and to collect and get in the personalty, and out of the proceeds of sales and collections the trustees were to pay debts, funeral expenses, and legacies, and after payment thereof invest the residue, with power to vary and change the investments: and that the annual income of investments and rents of realty (which the trustees were empowered to lease till sold) should go and be in trust (after payment of legacies), 1st. To pay his wife $150 a year for the maintenance of each child, until each should attain 15 years; and after that, if a son, and sent from home to school, &c., to be increased to $250; and from five years after the death of the tes-

1875.

Murphy v. Mason.

tator, till the youngest child attained 21, his wife was to receive $400 additional for maintenance, &c., of his children. The trustees were to invest any residue of annual income, and accumulate it at compound interest, and should stand possessed of the accumulations, funds, and securities upon the same trusts as they held the funds producing such income, with power to the trustees to give to each child, on attaining 21, a sum of $1000. The testator further directed that when his youngest child should attain 21, his trustees should first retain out of the trust estates, and invest as aforesaid, a sufficient sum to yeld at least $400 a year, which was to be paid to his wife for her separate use during her natural life; and that all the rest and residue of his real and personal estate which should remain after retaining the last-mentioned sum, should be divided equally among all his children share and share alike; and the sum invested for the benefit of his wife should, after her death, be likewise equally divided among his children. And lastly, he directed, that should it so happen that any of his children should die before the said distribution, and leaving a family, him or her surviving, in that event, his or her children so surviving should receive equally among them the share which his said son or daughter would have been entitled to receive if living at the time of distribution. The bill further stated the appointment of *Daniel S. Murphy*, one of the plaintiffs, and of *Mason* and *Murray*, the defendants, as trustees, in place of those named in the will, and that the plaintiffs were each entitled to one-sixth share in the residue of the real and personal estate, and prayed to have the trust estate partioned.

Statement.

The defendant, the widow, by her answer, expressed her consent to the partition, but submitted her rights to the protection of the Court.

The trustees also submitted their rights and interests to the protection of the Court.

1875.

Murphy v. Mason.

The cause came on to be heard by way of motion for decree.

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

Dec. 9th. Argument.

The case has already been before the Court for the construction of the will under which the plaintiffs claim to be entitled, and the judgment of *Strong*, V. C., reported in 20 Grant, finds that each child is entitled to a vested interest on attaining the age of twenty-one. The fact that one of the present parties interested may die leaving issue who will succeed to the interest of their parent is no ground of objection to a division of the estate being ordered. This was clearly decided in *Wilson* v. *Slade* (*a*) to form no obstacle to a present distribution taking place.

Mr. *Gibson*, for the trustees. In any event the Master should be directed to inquire if the proposed partition would be for the benefit of persons not now *in esse*. Besides, security ought to be given to secure the interest of the remainder-man; and also to provide for the contingency of adult parties disposing of their interests before the period of distribution arrives.

The other cases cited are mentioned in the judgment.

Jan. 19th. Judgment.

PROUDFOOT, V. C.—[After setting forth the facts,]— I think the record improperly framed, by joining the adults and infants as co-plaintiffs. The interests of the infants are plainly at variance with those of the adults, and ought to have been represented by different solicitors.

But this, in the view I take of the will, is of small importance, for I think the bill must be dismissed.

The testator directs the division to take place only

(*a*) 6 Ves. 497.

1875.

Murphy v. Mason.

when the youngest child attains 21, and directs the conversion of the estate, and its investment and accumulation of the income and of rents till conversion, and the payment of certain charges out of the income of the estate in gross.

I quite concur in the decision of Vice Chancellor *Strong*, that the children take vested interests on attaining 21; but these are subject to be divested on dying, leaving a family, before the youngest attains 21, in which case the children shall take equally their parent's share.

Judgment.

Were any one now *in esse* entitled under that contingent clause, so far from the adults being entitled to have their share assigned to them, the person so entitled would have a right to require the fund to be secured in Court. As in the case of *The Governesses' Benevolent Institution* v. *Rusbridger* (*a*), where a testator bequeathed £12,000 upon trust for his daughter, her husband and children successively, but in case no child should attain 21 upon trust for the plaintiffs, the plaintiffs were held entitled to have the money brought into Court. Here the trustees represent the interests of those who may come into *esse* and be entitled under this clause, and it is essential for their protection to retain the estate in hand or pay it into Court.

The provisions for accumulation would be frustrated by dividing the estate now.

None of the cases cited for the plaintiffs authorize any such decree. In *Gaskell* v. *Gaskell* (*b*) the plaintiff was tenant in tail in possession, with remainders to his first and other sons successively in tail, of an undivided moiety of certain estates, and the defendant was tenant for life, with similar remainders to his sons in tail of the other

(*a*) 18 Beav. 467. (*b*) 6 Sim. 643.

undivided moiety, and it was held that the decree was binding on the issue in tail, though not yet *in esse*. In *Hobson* v. *Sherwood* (*a*) it was held that a tenant for life, in possession, determinable on his marriage, in one-fifth of an estate, was entitled to partition. In *Wills* v. *Slade* (*b*) the bill was filed by a tenant for life and his four infant children, entitled in remainder to an undivided moiety of certain messuages, against the persons entitled to the other undivided moiety, and it was held no objection that other children might be born to the tenant for life and become entitled, along with those already born, to an interest in the remainder.

All these cases were cases of a present interest in possession, not like the present, where a condition unfulfilled precedes the right to possession. They were all cases of partition, and therefore only real estate was concerned where the title would appear on the instruments. Here a considerable portion of the estate is personalty, and if once it got into the hands of the legatees there would be no security for its being forthcoming, if the contingency should occur.

Judgment.

I have no hesitation in dismissing this bill. And as I do not think it has been invited by any language in the will, and has been supported by no authority, it will be dismissed with costs, to be paid by the adult plaintiffs. The infants being joined, though improperly as plaintiffs, have no costs apart from the adults; and I do not think their share in the estate should be burdened with any.

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(*a*) 4 Beav. 184.

(*b*) 6 Ves. 498.

1875.

## VICKERS v. SHUNIAH.

*By-Law—Bonus to Railway Company—Municipal Council.*

The Act incorporating the Municipality of Shuniah, gave it all the powers of townships under the general municipal law, and in other sections authorized the Council to make assessments for necessary expenses, and for the establishment of a lock-up house, and the salary of a constable:

*Held*, that this language did not prohibit the Council from passing a by-law granting a bonus to a Railway Company, as the right of doing so when exercised rendered the payments under it *necessary* expenses. The fact that the railway intended to be benefited was not named, and was really not in existence when the vote on the question was to be taken, constituted no objection to the passing of a by-law for the purpose.

Where a municipality has legally a right to pass a by-law granting a sum of money, it would seem premature to apply to restrain the by-law being submitted to the ratepayers, as they might refuse to approve of the by-law.

*Helm* v. *Municipality of Port Hope*, *ante* page 273, distinguished.

Sept. 28th. Mr. *Cattanach*, for the plaintiff, moved for an injunction in the terms of the prayer of the bill, which appear in the judgment.

Mr. *C. Moss*, contra.

Sept. 29th. Judgment. PROUDFOOT, V.C.—In this case I am asked to grant an injunction to prevent the Municipal Council of Shuniah from submitting to the people a by-law granting a bonus of $35,000 to a Railway Company, on two grounds, viz., that it is *ultra vires* of the Municipality, and that the by-law is not in proper form.

The argument on the first ground is, that the Act of Ontario incorporating Shuniah (*a*), although by the 2nd section giving it all the powers of townships under the general municipal law of the Province, yet, by the 24th,

(*a*) 36 Vic., ch. 50.

1875.

Vickers v. Shunish.

25th, and 26th sections, limits that power so as to confine their right to make assessments to those required for *necessary expenses*, and for the establishment of a lock-up house, and the salary of a constable. I do not construe the Act as prohibiting giving a bonus to a railway. Under the 2nd section it is admitted they have this right, and if they exercise it then the payments under it become *necessary* expenses under the 24th section.

The other ground is, that the by-law does not name any specific railway company to whom it is to be paid. It purports to enact, "That it shall and may be lawful for the said Municipal Council to grant aid by way of bonus to the amount of $35,000 to the company that shall or may construct and build the said connecting or branch railway from within Prince Arthur's Landing to or within the limits of, Fort William or some point on the Kamanistiquia river, provided the said company be approved of by the said Municipal Council;" and *Bate* v. *Ottawa* (*a*) is cited in support of the position that it must be a grant to a specified company. That was the case of a grant to an individual of $1,000, out of the funds of the Corporation, without the assent of the ratepayers, in consideration of his having paid that sum at the instance of the Council towards the expense of a preliminary survey. But there is nothing to shew that the Company must be actually in existence when by-law passed. And I see nothing to prevent the ratepayers delegating, if they choose, the selection of the railway company to the Council. It is quite possible that no company would be formed unless assured of a bonus, and the by-law may be the cause of calling one into existence. It is a reasonable provision to give the Council power to determine whether a company then existing or to be formed, should be entrusted with the bonus.

Judgment.

(*a*) 23 U. C. C. P. 32.

1875.

Vickers v. Shunlah.

It was objected that this ground was not taken in the Bill, but I think it a proper case in which to permit an amendment if desired.

It was further objected that the application was premature, and that until the by law has been voted on, the Court should not be asked to interfere. As I am against the plaintiff on the other ground, it is, perhaps, not necessary to say anything on this subject; but the strong inclination of my opinion is, that the plaintiff is premature. It may be that the electors will refuse to approve the by-law; and it would seem time enough to ask for the aid of the Court when it has been approved. The decision of the Court in *Helm* v. *The Port Hope Municipality* (*a*) is not against this view. It was admitted there that the proposed by-law was not authorized by any Act of the Legislature, and that a popular vote was wanted for some ulterior purpose, and the Court granted an injunction to prevent its being submitted to a vote. It may be quite correct to restrain a Council from such procedure, but it does not touch the present case, in which, I think, the by-law is not *ultra vires*.

Judgment.

Motion refused, with costs.

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(*a*) *Ante* page 273.

## PATERSON v. STROUD. 1875.

*Administration of Justice Act*, 1873, (*O*)—*Further directions and costs—Practice—Transferring case to Chancery.*

Where in an action or other proceeding at law, the Court or Judge is of opinion that the same can be more conveniently dealt with in Chancery, and, therefore, orders the cause to be transferred to that Court, the Court or Judge so transferring the cause cannot reserve further directions or costs, or direct what accounts shall be taken; the whole matter must thenceforward be dealt with by the Court of Chancery.

Where, instead of transferring, the Court of Law directs accounts to be taken by an officer of the Court of Chancery, the officer's report must be filed with the officer of the Court where the pleadings are filed; and appeals from the reports are to be heard, and final decree pronounced, by the Court so directing the accounts.

Oct. 13th.

Statement.

This action, instituted in the Queen's Bench, came on for trial at the sittings for the County Court of the County of York, on the 22nd May, 1875, pursuant to an order of the 28th April, 1875, when it was ordered and decreed that it should be referred "to the Master of the Court of Chancery, at Toronto, to take the accounts in question between the plaintiff and defendant, mentioned or referred to in the pleadings, or in any way in question in the cause; and that further directions and the question of costs be reserved until after the Master shall have made his report;" and that subject to that decree the cause should be transferred to the Court of Chancery, and that all future proceedings be taken therein; and that the proper officer of that Court (of Common Law) do transmit all pleadings and papers filed there to the Clerk of Records and Writs in the Court of Chancery.

That order was taken into the Chambers of the Master in Chancery, who declined to proceed upon it, because a Court of Common Law could direct accounts to be taken by a Master in Chancery only under the 11th section of the Administration of Justice Act, 1873, which applies to cases not transferred to the Court of Chancery: And

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because where a cause is transferred to the Court of Chancery under the 9th section of the Act, it is for that Court to decide what accounts shall be taken, and by what officer, and whether further directions and costs should be reserved or not.

The plaintiff appealed from the decision of the Master so refusing to proceed.

Mr. *J. H. McDonald*, for the appeal, contended that the Master was clearly wrong in refusing to proceed under the order, as it followed closely that in *Williams* v. *Williams*, made by Mr. Justice *Strong*: that the Judge had the option of making the order under both sections of the statute if he thought it would conduce to the ends of justice.

Mr. *Bull*, contra. The Judge should either have made an order directing the Master to take the accounts under the 11th section of the Act, or have transferred the cause to this Court, and allowed it to deal with the whole case under the 9th section; the accounts were such as could not conveniently have been taken by the Court of Law, and the Judge simply followed the case of *Williams* v. *Williams*, as he was requested to do. In that case it is true the Master took the accounts directed, but he would not have done so had his attention been drawn to the several sections of the Act, under which the proceeding is taken.

Oct 14th. Judgment.

PROUDFOOT, V.C.—The order here follows the form in a previous case of *Williams* v. *Williams*. But that does not seem to have been disputed, at all events no question was raised upon it.

The 9th section of the Act enacts, that in case it appear to a Court of Common Law, or a Judge thereof, that any equitable question raised in any action or other

proceeding at law, cannot be dealt with by that Court, so as to do complete justice between the two parties, or for any other reason may be more conveniently dealt with in Chancery, the action may be transferred to the Court of Chancery; and by section 10, the officer of the Common Law Court is to annex together all the pleadings and papers, and transmit them with the order of transference to such officer of the Court of Chancery as the order shall direct.

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Paterson v. Stroud.

These sections evidently contemplate that the whole equitable question is to be dealt with by the Court of Equity. If the Court of Law could not conveniently do complete justice between the parties, the matter was to be transferred to equity. It never could have been the intention that a partial decree should be made in one Court, to be supplemented by the proceedings in the other.

Judgment.

The 11th and immediately following sections apply to cases where a Court of Law thinks it proper that accounts should be taken by an officer of the Court of Chancery, instead of transferring the cause to the Court, it may direct them to be taken by an officer of that Court. When the accounts are taken the report is to be filed with the officer of the Court where the pleadings are filed, and appeals from the report are to be heard by that Court. In that case the final decree is to be made by the Court directing the accounts.

The inconvenience of having a partial decree made by one Court and a final decree by another, is so obvious that I cannot suppose the Legislature ever intended to confer such a power. If the equity cannot be conveniently dealt with at law it is to be sent to be dealt with in Chancery. It must be left to Chancery to determine what is the proper mode of dealing with it, what accounts should be taken, whether the whole costs

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are to be reserved, or only a portion of them, or none of them, and in these respects to deal with the subject on the principles that prevail in that Court. To permit the Court of Law, which finds itself incompetent to do complete justice, to say that all the accounts shall be taken, and that all the costs shall be reserved, may seriously cramp the Court of Chancery in doing justice, and prevent it from exercising the salutary power of directing the incidence of the costs of the proceedings.

I think the Master was perfectly right, and dismiss this appeal. But as the order was made in conformity with a precedent, where so few exist, it will be dismissed without costs.

I was then asked to direct the taking of the accounts, but that I cannot do upon this application. The order must be reformed.

Judgment.

If the cause be transferred under section 9, the defendant must have an opportunity of contesting the right to an account or modifying the evidence of it. The defendant says, that relying on the inability of the plaintiff to get on at law, he did not set out his real defence on the record, and wishes an opportunity of setting it out in this Court. I am inclined to think he ought to have set out his whole defence in the pleadings at law, and if he is desirous of adding to the pleas other defences, it must be the subject of a special application,

If accounts shall merely be directed under section 11, this Court will have nothing further to say to it.

## PARSILL v. KENNEDY. 1875.

*Administration suit—Rents—Costs.*

One of several children of an intestate instituted proceedings against her mother, the administratrix, and the administrator of the estate, seeking an account of the personalty, and also of the rents and profits of the real estate, which it was proved had been received by the administratrix alone, none having been paid to the administrator. The accounts taken in the Master's office shewed that in respect of the personal estate, the personal representatives had properly expended $400 more than they had received; and that the administratrix had expended the rents so received by her in supporting the plaintiff and the other children of the intestate; and that all the parties interested therein, other than the plaintiff, had released the administratrix from all liability in respect thereof; which release the plaintiff had also promised to join in, but subsequently refused to execute. The Court, under the circumstances, though it could not deprive the plaintiff of her share of the rents, ordered her to pay the administrator his costs of suit; and also to pay to the administratrix her costs, less so much thereof as was occasioned by her resisting the claim of the plaintiff to the rents.

Hearing on further directions. The facts sufficiently appear in the head-note and judgment. October. 6.

Mr. *Wells*, for the plaintiff.

Mr. *Moss*, for the personal representatives.

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

PROUDFOOT, V.C.—The plaintiff, without asking an account, takes proceedings for an administration of the estate of the intestate. The usual accounts of the personal and real estate were directed. As to the real estate, the administrator and administratrix could have no liability in that character; but it was suggested they had received the rents. October 14. Judgment.

Upon taking the accounts of the personal estate, it appears that the estate is indebted to the administrator and

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Parsill v. Kennedy.

administratrix in $400 and upwards, and that personal property to the value of $200 is outstanding.

The administratrix, who is the mother of the plaintiff and her brothers and sisters, received the rents to the amount of $5614, and has properly expended $979.44. She is entitled to $1544 of this as dowress, leaving a balance due by her of $3089 on that account. And she and the administrator claimed that she was not liable to account for the remainder by virtue of an agreement with the plaintiff and her other children, who were all adult, that she should have it without account, as it had been spent in supporting the family. The administrator received none.

Judgment.

The Master reports that no agreement, binding upon the plaintiff, such as the alleged, was proved before him, although it was talked about; and that after the institution of these proceedings all the persons interested except the plaintiff released the administratrix from any claim on account of the rents. The infant parties are children of one of the persons who executed the release, and are bound by his act.

So far as the personal estate is concerned the account has turned out wholly in favour of the defendants, and it is to be presumed that had an account been asked it would have been so made to appear before proceedings taken, and so, much of the costs of the suit been saved. The plaintiff has been content to drive the defendants to an account in which, so far as regards the property, their representative character entitled them to deal with, she has entirely failed. In respect to that the plaintiff cannot have her costs, and must pay those of the administrator and administratrix: *Ottley* v. *Gilby* (*a*).

As to the rents of the realty, the case is somewhat dif-

(*a*) 8 Beav. 602.

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ferent. The defendants can only be liable so far as they have respectively received them. The administrator received none, and is chargeable with none. Whatever costs he may have been put to in defending himself from the attempt to charge him with them, the plaintiff must pay. To make any costs come out of the estate, is to relieve the plaintiff at the expense of those who were not desirous of any suit, who were satisfied with the management of the estate, and who have in fact since released their claims.

In regard to the administratrix, the suit is an ungracious and hard one. She received the rents under an impression that all the children had assented to it, and had bound themselves to release her. The money was spent in the maintenance of the family, who remained with her until their majority. The Master finds "that since the institution of the suit the plaintiff and her husband agreed, that if they received from the administratrix a statement that she had used all the rents and profits for her own use, and all the other members of the family signed a release, they would do so also. Such a statement was sent by the said defendant to the plaintiff, and all the other members of the family did sign a release, but the plaintiff and her husband did not join therein."

Judgment.

As the plaintiff has not released, I cannot deprive her of her share in the rents; but the nature of the case, and the violation of her agreement to release, justify me in giving the costs of the suit to the administratrix as against the plaintiff, deducting therefrom so much as was occasioned by resisting the claim to the rents.

1875.

## ROBSON V. JARDINE.

*Will, construction of—Legacies charged on lands—Merger of legacy—Personal or general charge on devisee—Costs.*

A testator devised all his estate, real and personal, to his wife for life, and after her death the real estate was to be equally divided between one of his sons and one of his daughters; the daughter to have all his personal estate also. In the event of the death of either without heirs, his or her share was to be divided between the other children of the testator. Several pecuniary bequests were made, which were to be paid by the son and daughter, by instalments, commencing one year after they should "have come into possession hereby given." The daughter married and died during the life of the widow, leaving her husband tenant by the curtesy, but no child her surviving. The widow subsequently died, and thereupon the tenant by the curtesy recovered possession of his deceased wife's share in ejectment. More than a year after the death of the widow, a daughter of the testator, one of the legatees named in his will, filed a bill for the payment of the arrears of her legacy;

*Held*, in the events that had happened, that there was no merger of any portion of her legacy, by reason of her interest in the deceased daughter's share; that the devisees took the land subject to and charged with the payment of all the legacies which were not personal or general charges against the devisees; and the defendants—the son and the tenant by the curtesy—having resisted the claim of the plaintiff, were ordered to pay the costs of the suit; there being no assets of the testator out of which they could be paid, and the questions raised not being those of construction within the rule allowing the costs of their solution to be charged on the estate of the testator.

Statement. *Nicol MacIntyre* died on the 10th May, 1868, having first duly made and published his last will and testament, of which the following is a copy:—

"This instrument witnesseth that I, *Nicol MacIntyre*, of the township of Pickering, county of Ontario, in the province of Ontario, and Dominion of Canada, being of sound and disposing mind, memory, and understanding, do make, publish, and declare this to be my last will and testament, hereby revoking and making null and void all former last wills and testaments by me hereto-

1875.

Robson v. Jardine.

fore made. My will is, first, that my funeral charges and just debts be paid by my executors hereinafter named. The residue of my estate and property which shall not be required for the payment of my just debts and funeral charges, and the expenses attending the execution of this my last will, and the administration of my estate, I give, devise, and dispose thereof as follows, to wit:—

"I give and devise to my beloved wife *Mary* all my household furniture, money, personal effects, and real estate, to be used by her and for her benefit during her life, said real estate comprising the north quarter of lot number thirty-one in the fifth concession of the township of Pickering aforesaid, save and except one acre on the south east corner of said lot, and owned by *Hector Beaton*, and one half-acre on the north west corner owned by *Benjamin Doten*. After the decease of my wife *Mary* I desire, and my will is, the said real estate be divided equally by a dividing line east and west, and the north portion thereof given to my daughter *Annabella*, and the south portion to my son *Dugald MacIntyre*; and also that all my loose property and personal effects I desire shall be given to my said daughter *Annabella MacIntyre*.

Statement.

"I also give and bequeath to my daughter *Flora Robson*, the sum of two hundred dollars; to my daughter *Catharine Young*, one hundred dollars; to my son *Archibald*, one hundred dollars; and to my daughter *Eliza Johnson*, one hundred dollars; to my daughter *Rachel Beaton*, one hundred dollars; to my daughter *Margaret Brown*, one hundred dollars; and to the children of my deceased daughter *Anne Matthews*, the sum of one hundred dollars, divided equally amongst them, in all six children, named as follows:—*Auville*, *Margaret*, *Mary*, *Rachel*, *Annabella*, and *Emma*; all of the above payments or legacies to be paid to the respective parties by my daughter *Annabella* and my son *Dugald*, to whom my real estate as aforesaid is be-

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queathed; and the said payments I hereby desire shall be made at the rate of ten per cent. yearly, and not to become due or payable until one year after my wife *Mary's* decease, or until one year after my children *Annabella* and *Dugald* shall have come into possession hereby given them; also, that said payments be made without interest, and be equally borne by *Annabella* and *Dugald* my children as aforesaid; and, further, my desire is, that should my son *Dugald* die without heirs, the property hereby given shall remain for the use of his widow during her life, after which it shall be divided as seems best between the rest of my children; and also, should my daughter die without heirs, the property hereby demised shall revert in the same way.

"And I do nominate and appoint my friends *William Percy*, *John Sleigh*, and *Donald McPhee*, to be the executors of this my last will and testament.

Statement.

"In witness whereof I, the said *Nicol MacIntyre*, have hereto subscribed my name and affixed my seal, this ninth day of October, in the year of our Lord 1867.

*Nicol MacIntyre.*"

*Annabella MacIntyre* afterwards married the defendant *David Jardine*. She died intestate and without issue on the 19th May, 1870.

The testator's widow died on the 8th August, 1870. Subsequently *David Jardine* brought ejectment against the tenant in possession of the land, claiming to be tenant by the curtesy, and succeeded in his action (*a*).

The plaintiff *Flora Robson*, one of the legatees named in the will, filed her bill against *Jardine* and the brothers and sisters of *Annabella Jardine*, claiming that her legacy was charged on the above land, the share given to *Annabella* being liable for one half, and asking for payment of arrears, and in default a sale of *Annabella's* share.

(*a*) Jardine v. Wilson, 32 U. C. R. 498.

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The defendant *Jardine*, by his answer, set up that as tenant for life he was not bound to pay any part of the legacies: that as *Annabella* had died without issue, and the plaintiff was one of the parties entitled in remainder, the amount of her legacy charged upon *Annabella's* share had merged in her estate in remainder; and that in any event the legacy was a general charge on *Annabella*, and not a charge on the land.

Sep. 15.

Mr. *McMichael*, Q. C., and Mr. *A. Hoskin*, for the plaintiff.

There was no merger, because the plaintiff's legacy was $200, and the legacies of the others were less (*a*).

Argument.

The legacies are charged on the land, because the testator says: "The residue of my estate and property which shall not be required for the payment of my debts, &c., I give, devise, and dispose thereof as follows." The legacies are a part of this residue, and if not charged on the land, there is nothing out of which to pay them. Then the expression, "To whom my real estate as aforesaid is bequeathed," when he directs the legacies to be paid by *Dugald* and *Annabella*, shews he intended they should pay them out of the land; also the legacies were not payable until a year after they got possession of the lands.

Mr. *Beaty*, Q. C., and Mr. *J. C. Hamilton*, for *Jardine*.

Mr. *Hoskin*, Q. C., for infants.

The following cases were referred to: *Clark* v. *Clark*, (*b*), *Jones* v. *Jones* (*c*), *Broad* v. *Bevan* (*d*).

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(*a*) *Burton* on Real Property, 464. (*b*) 17 Gr. 17.
(*c*) 15 Gr. 40. (*d*) 1 Russ. 511.

1875.

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October 2.

BLAKE, V.C.—I think the cases warrant the conclusion that, where a testator gives real estate to one, whom he directs to pay a legatee named in the will a sum of money, and the devisee accepts the devise, he takes the premises on the condition that he pays the legatee; and the land is in his hands subject to this burden, and liable for the fulfilment of this obligation. In this manner the legatee obtains a charge on the realty claimed by the devisee, which the legatee can enforce in this Court.

Judgment.

There are many cases which deal with the question of a charge on the person of the devisee, and of an implied charge on the realty devised, amongst which are: *Baby* v. *Miller* (*a*), *Clark* v. *Clark* (*b*), *Henwell* v. *Whitaker* (*c*), *Awbrey* v. *Middleton* (*d*), *Goodtitle* v. *Maddern* (*e*), *Alcock* v. *Sparhawk* (*f*), *Elliot* v. *Hancock* (*g*), *Clowdsley* v. *Pelham* (*h*), *Goodright* v. *Allin* (*i*), *Doe d. Pratt* v. *Pratt* (*j*), *Wheeler* v. *Howell* (*k*), *Greville* v. *Brown* (*l*), *Thorman* v. *Hillhouse* (*m*), *Davis* v. *Gardiner* (*n*), *Parker* v. *Fearnley* (*o*), *Lypet* v. *Carter* (*p*), *Allan* v. *Gott* (*q*), *Collins* v. *Lewis* (*r*), *Burton* v. *Powers* (*s*), *Dolton* v. *Hewen* (*t*), *Smith* v. *Butler* (*u*), *Waddell* v. *Waddell* (*v*). The matter is also discussed in *Redfield* on Wills, vol. 2, p. 208 et seq.; *Hawkins* on Wills, p. 284 et seq.; 2 *Jarman* on Wills, p. 560 et seq. The rule laid down by Mr. *Jarman* is, "Where, however, the executor is devisee of real estate, a direction even to him to pay debts or legacies will cast them upon the realty so devised."

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(*a*) 1 E. & A. 218.
(*b*) 17 Gr. 17.
(*c*) 3 Russ. 343.
(*d*) 2 Eq. Ca. Ab. 4[illegible] 16.
(*e*) 4 East 496.
(*f*) 2 Vern. 228.
(*g*) 2 Vern. 143.
(*h*) 1 Vern. 411
(*i*) 2 W. Bl. 1041.
(*j*) 6 Ad. & El. [illegible].
(*k*) 3 L. & J. 198.
(*l*) 7 H. of [illegible]89
(*m*) 5 Jur. N. S. 563.
(*n*) 2 P. Wm. 187.
(*o*) 2 S. & S. 592.
(*p*) 1 Ves. Sr. 5[illegible].
(*q*) L. R. 7 Ch. 443.
(*r*) L. R. 8 Eq. 70[illegible].
(*s*) 3 K & J. 170.
(*t*) 6 Mad. 14.
(*u*) 1 Jo. & La. 692.
(*v*) 6 Dow 279.

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Mr. *Story* says (*a*) "If a testator directs a particular person to pay, he is presumed, in the absence of all other circumstances, to intend him to pay out of the funds with which he is intrusted, and not out of the funds over which he has no control." (*b*).

On the argument of the case I failed to see how the plaintiff's legacy had been merged or extinguished. I remain of the opinion that it is still a charge on the premises. There never could have been more than a partial merger or extinguishment, as the chargees were interested in the remainder in proportions differing from those in which they were interested in the charges.

The plaintiff has no present estate in the land. As to one-half of it her estate depends on her brother *Dugald* dying childless, and as to the other the life estate of *David Jardine* intervenes between her charge and her enjoyment of the land (*c*). I do not mean to say that even if this difficulty were removed the charge would be gone, but with this estate intervening the charge cannot sink into the land, and it remains, therefore, unextinguished and capable of being enforced, (*d*).

Judgment.

Very many of the cases on the subject are collected in *Watson's* Compendium, vol. i., page 621.

The plaintiff is entitled to a declaration that the legacies form a charge on the premises in question: to an order for payment of the amount, which can be inserted in the decree; in default to a sale of the premises and payment. The distribution of the balance of

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(*a*) Sec. 1247, vol. II.

(*b*) See also note 5, to *Roper* on Legacies, 576, et seq.

(*c*) See. 32 U. C. R. 498.

(*d*) See *Mayhew* on Merger, pp. 1 to 6 and 121 and 124; *Burton* on Real Property, p. 464.

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the proceeds of sale after payment of the amounts found due the legatee can be made the subject of a further application.

Judgment.

The defendants *Jardine* and *Dugald McIntyre* who have resisted this payment must pay the costs of the litigation, as there are no other assets of the testator out of which they can be paid, and this is not a question of construction within the rule which allows the estate of the testator to be burdened with the expense of its solution.

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## CARRADICE v. SCOTT.

*Will, construction of—Executory devise—Fee simple.*

A testator devised all his estate, real and personal, to trustees for the support and maintenance of his wife during her widowhood, and of his daughter until she should attain twenty-one; and directed, in case she should survive her mother, that the trustees might convey to the daughter on her attaining majority, but in no case was she to have control of the property until after marriage or death of her mother; and further that "even after death or marriage of my said dear wife, and after the majority of my said daughter, my said trusees may still continue to manage said estate, and allow her the yearly proceeds arising therefrom only, till they shall see proper to give the management thereof to my said daughter. * * * In the event of the death of my said daughter without leaving lawful issue of her own body to survive her, I order and direct that my said trustees shall sell and convey said estate after the death or marriage of my said dear wife, and that they divide the proceeds arising from such sale, and the rest of the personal property that may then belong to my estate, equally among all my brothers and sisters. * * * But if my said daughter live, said lands and premises shall be preserved for her and her heirs and assigns for ever." The widow died shortly before the daughter attained twenty-one; the daughter was married, but had no issue, and the object of the suit was to compel the trustees to convey the estate to her.

*Held*, that on the death of the mother, and the daughter attaining twenty-one, she took an estate in fee simple, subject to the dis-

cretion of the trustees as to the time of conveying the same, and not an estate in fee, with an executory devise over; but whether the trustees chose to exercise the discretion vested in them of conveying the estate to her or retaining it in their hands, for the purpose of managing it, she was entitled to the whole proceeds; and the management of the estate must be exclusively for her benefit.

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Carradice v. Scott.

The testator was married, and had only one child, the plaintiff. By his will he devised and bequeathed his property to the defendants, making ample provision for the benefit of his wife during life or widowhood, and especially for his daughter.

He gave his property, real and personal, to his executors and trustees for the proper maintenance and support of his wife so long as she should remain his widow, and of his only child the plaintiff, with power to lease his real estate and to dispose of his personal estate as they might see proper and consider most beneficial for his estate, and most to the advantage of his wife and daughter; and from the rents of realty and proceeds of personalty directed them to maintain and support comfortably his wife and daughter. Upon the death or marriage of his wife the trustees were to hold the property in trust for his daughter for her maintenance and support till twenty-one, and as soon after his wife's death or marriage and the majority of his daughter as his trustees should see proper, they might grant to his daughter all the right, title, and interest, and all the control of said land and premises and personal property, but the daughter was not to be entitled to such control till her mother's marriage or death. "And even after the death or marriage of my said dear wife, and after the majority of my said daughter, my said trustees may still continue to manage my said estate and allow her the yearly proceeds arising therefrom only, till they shall see proper to give the management thereof to my said daughter." He expressed his will to be that his wife and daughter should live on the yearly rent of his farm and

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on the proceeds of the personal property, and that the land should be reserved for his daughter.

Having thus made provision for his daughter surviving her mother, the testator proceeded to say: "In the event of the death of my said daughter without leaving lawful issue of her own body to survive her, I order and direct that my said trustees shall sell and convey said real estate after the death or marriage of my said dear wife, and that they divide the proceeds arising from such sale, and the rest of the personal property that may then belong to my estate, equally among all of my brothers and sisters then alive, or the children of such as may be dead, in such a manner that the children of such as may be dead, if any, shall receive the share that would have belonged to their parent had he been alive." He then gave his trustees "after the death of my said daughter, and after the death or marriage of my beloved wife," power to sell, &c. "But if my said daughter live, said land and premises shall be preserved for her, and her heirs and assigns for ever."

The wife died about a month before the daughter attained her majority. The daughter, the present plaintiff, married, but had no issue.

Sept. 1.

Argument.

Mr. *Moss*, Q. C., for the plaintiff. There should be no difficulty in the construction of this will. In the case of the death of the daughter before the widow of the testator without issue, then there would be a devise over to the brothers and sisters. So long, however, as the testator's wife remains his widow, he devotes the whole of the income towards the maintenance of his widow and daughter; he then provides for the contingency of his widow marrying. In case of the marriage of his widow or her death before the daughter attains twenty-one, the testator provides for her support during her minority.

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The widow, if she remains unmarried, is to have the management of the property after the majority of the daughter. In case of the death of the daughter before the widow, without issue, the widow was still to be supported during her widowhood, and after her death or marriage the property was to be sold, and the proceeds divided amongst the brothers and sisters of the testator.

Mr. *Laidlaw*, for the defendants, the executors, said that the executors desired a construction of the will before exercising their discretion to make a conveyance to the daughter, referring to *In re Coe's* trusts(*a*) as to the discretion of the executors. [PROUDFOOT, V.C.—That is not a case analogous to the present. In this case the discretion seems to be simply, whether the executors will or will not exercise a purely ministerial act.] Should the Court decide in favour of the construction put upon the will by the plaintiff, they are prepared at once to convey to the plaintiff.

Mr. *Bain*, for the brothers and sisters of testator.—This is an estate in fee, with an executory devise over. Under the case of *Chisholm* v. *Emery* (*b*) this is clearly an executory devise. The language in that case, in which it was held there was an executory devise, is very similar to the language of the will in this case.

PROUDFOOT, V. C.—A doubt has been suggested by the defendants whether the plaintiff takes an estate in fee simple, or an estate in fee with an executory devise over. Sept. 2. Judgment.

It has been argued, on the one hand, that the clause providing for the death of the daughter without issue is co-extensive with the devise to her, and that her death at any time without issue brings the devise over into operation, and that the proceeds of the sale being divi-

(*a*) 4 Kay & Johnson 199. (*b*) 18 Gr. 467.

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sible among persons *in esse* points, not to an indefinite failure of issue, but to a failure at the time of her death (*a*), and therefore that her estate is an estate in fee, subject to an executory devise; and, further, that even if otherwise, the trustees have a discretionary power as to conveying the estate, with which the Court will not interfere.

On the other hand, it is said that the provision in case of the daughter dying without issue only applies to such death in the life, or widowhood, of the wife; that the sale was only to take place *after the death or marriage of the wife;* and the event upon which the sale was to depend must have preceded such death or marriage, and in this I concur. The recent cases of *O'Mahoney* v. *Burdett* and *Ingram* v. *Soutten* (*b*) have decided that the general rule is, that the failure of issue in such a case refers to the death of the first taker and not to that of the tenant for life, reversing what had been laid down as the rule in *Edwards* v. *Edwards* (*c*), but this only applies in the absence of other circumstances and directions in the will which are inconsistent with that construction. There are here circumstances inconsistent with that construction. The testator shews great anxiety to secure the real property to his daughter. It is not to be sold for maintenance; the wife and daughter are to live on the rents, so as to preserve it for the daughter. He provides for the case of the daughter surviving the wife, when the whole is to be conveyed to her on her majority in the discretion of the trustees, which I will notice further on. No disposition is made of the estate in case the trustees do not convey; and then the clause in question is inserted, which, providing for the sale after the wife's marriage or death, seems to be intended to apply to the contingency of the daughter's death before

Judgment.

(*a*) Chisholm *v.* Emery, 18 Grant 467.
(*b*) L. R., 7 H. L. C., 388 and 408. (*c*) 15 Beav. 357.

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that time: *O'Mahoney* v. *Burdett* (*a*). The conclusion of the sentence, that if his daughter live the land should be preserved for her and her heirs and assigns, points to the same intention, as in this case the having issue is not a condition of possessing the estate. Issue is required, if she die before the wife; but simple existence is all that is required after that time. And this construction renders the will complete as embracing the several contingencies in relation to the daughter—1st, She was to be maintained till her majority; 2nd, Upon her majority the land was to be conveyed to her; 3rd, If she died without issue before her mother's death or marriage the land was given over; 4th, If she survived that period, whether she had issue or not, a case not previously provided for, as it might happen during her minority, she was to be entitled (the first clause having only provided for maintenance during minority).

Judgment.

There is no reason assigned in the will for vesting a discretion in the trustees—there is no suggestion now of any necessity for such a provision—there is no devise of the estate in the event of this discretion being exercised in not conveying the estate.

It is well settled that if there be only one beneficiary the special trust becomes a simple one. As if a fund be given to trustees to accumulate till *A.* attain twenty-four and then to transfer the gross amount to him, yet *A.* on attaining twenty-one may call for immediate payment as the only person entitled. *Saunders* v. *Vautier* (*b*).

But if there be a discretion given to the trustees to do or not to do a particular thing at their discretion, this Court has no jurisdiction to control its exercise, if their conduct be *bonâ fide*, and not influenced by improper motives (*c*).

(*a*) L. R. 7 H. L. 405. (*b*) Cr. & Ph. 240; Lewin, 3rd ed., 597.
(*c*) Lewin, 3rd ed., 588.

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The testator has chosen to give them a right to manage the property after the daughter attains her majority, till they shall see proper to give her the management of it. This does not expressly authorize them to refuse to convey, but if they convey they would not be in a position to manage the estate and receive the rents, and therefore it seems to me there is an implied power to exercise their discretion by refusing to convey. Some reasons may be imagined for conferring such a power, arising from the sex of the devisee, and the possibility of an advantage to her in case of her marriage. It is clear, however, that the plaintiff is entitled to all the proceeds of the estate, and the management must be entirely for her benefit. And I understood the counsel for the trustees to say, that if the will were construed as the plaintiff contended, the trustees would convey to her.

Judgment.

Some complaint is made of the conduct of the trustees in managing the estate, but this may be inquired into before the Master under the ordinary reference.

I shall declare the plaintiff entitled to the fee simple of the said estate and to the personal estate, subject to the discretion of the trustees as to the time of conveying the same; the power of managing and discretion, as to putting plaintiff in possession, extends to the whole estate, real and personal, and to the annual income or proceeds thereof to be paid to her.

Accounts of the estate to be taken.

Costs, to the hearing, out of the estate, reserving subsequent costs.

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## DEMOREST v. HELME.

*Specific performance—Time of the essence of the contract—Defence at law.*

In June, 1869, *D.* agreed to sell and convey to *H.* 278 acres of land for $2780, payable by certain instalments, at certain specified times; the agreement signed by the parties expressing that time was "to be of the essence of the bargain." In January, 1871, *H.*, by a similar instrument, agreed to sell to the plaintiff 100 acres for $1000, to be paid to *D.*, upon the terms contained in the said recited agreement; and the plaintiff then paid *D.* $60 on account. Both *H.* and the plaintiff were admitted into possession of their lands, on the execution of the respective agreements, and so continued until 1874. In February of that year both *H.* and the plaintiff were in arrear, nothing having been paid since 1871, and *D.* complained to *H.* of this, and of the manner in which the premises were managed, and it was then agreed between *D.* and *H.* that *D.* should bring an action of ejectment, *H.* agreeing to pay the costs thereof, and all arrears of purchase money, together with an increased rate of interest. Ejectment was accordingly brought by *D.* against *H.* and the plaintiff; but before the summons was served, or the plaintiff was aware of the proceeding, he paid to the attorney of *D.* $100, who indorsed a receipt for the amount on the agreement between *H.* and the plaintiff as a payment "on within agreement:" *H.* took no steps to defend the ejectment, and *D.* recovered judgment therein, although the plaintiff appeared, and tried to defend for his 100 acres; and a writ of possession was issued, and delivered to the sheriff, with directions to give possession to *H.*, for *D.*, which was done accordingly, and *H.* was continued in possession under an arrangement for an extension of the time for payment of principal and interest. On a bill filed by the plaintiff against *H.*, *held*, under these circumstances, that the receipt by *D.* of the $100 after default, had waived the condition making time of the essence of the contract; but that having either omitted to set up these facts in defence of the ejectment, or that having so set them up, they did not form an answer to the proceeding, the Court refused to open up the question after the adjudication at law, and dismissed the bill with costs.

Statement.

On the 30th June, 1869, *Robert Dennistoun* agreed to sell to the defendant *James Helme* lots lettered A, in the 3rd and 4th concessions of Bexley, containing 278 acres, for $2780; $1000 cash, six months' interest on the 1st of January, 1871, at six per cent., and interest at the like rate on the 1st of January, 1872,

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1873, 1874, being in all interest for three-and-a-half years, and the principal sum in five equal annual instalments on the 1st day of January in the five following years, with like interest at the date of each payment on the whole sum due. Time to be the essence of the bargain.

On the 9th of January, 1871, *Helme* and *Demorest* executed a memorandum of agreement, reciting the contract between *Helme* and *Dennistoun*, and that *Helme* had agreed to sell and assign to *Demorest* 100 acres of the land, describing them, and then proceeded: "Now these presents witness, that in consideration of the premises, and of one dollar in hand, paid by the said *Demorest* to the said *Helme*, he, the said *Helme*, doth bargain, sell, assign, and set over unto the said *Demorest* all his right, title and interest in said 100 acres of land, subject, however, to the payment therefor to *Robert Dennistoun* of

Statement.

$1000, upon the terms contained in said recited agreement."

And *Demorest* covenanted with *Helme* to pay the said sum of $1000 to the said *Dennistoun* at the same times, and in the same manner, as the balance of the purchase money was required to be paid as aforesaid.

On the same 9th of January, 1871, *Demorest* paid to *Dennistoun* $60 towards payment of the purchase money, according to the terms of the agreement.

Both *Helme* and *Demorest* had been admitted into possession of the lands which they had purchased, on the execution of the agreements regarding them, and remained in possession until *Demorest* was ejected, in June, 1874.

*Demorest* paid nothing more before the 21st of February, 1874, and *Helme* was also much in arrear with

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*Dennistoun*. *Dennistoun* had been over the premises in the winter of 1873-4, and found, he said, a great deal of waste, and told *Helme* he must stop the matter. *Helme* said *Demorest* was the person committing waste; and it was then arranged that *Dennistoun* was to bring an action of ejectment, of which *Helme* was to pay the costs, and all arrears, and interest at 8 per cent. The action was to be brought to eject *Demorest*, and put *Helme* in possession.

In pursuance of this agreement an action of ejectment was brought by *Dennistoun* against *Helme* and *Demorest* on the 21st of February, 1874, but before the summons was served, and before he knew of its having been issued, *Demorest* made, on the 24th February, a payment to *Dennistoun* of $100, a receipt for which was indorsed by *Dennistoun's* attorney on the agreement between *Demorest* and *Helme* as a payment *on within agreement*.

Statement.

To this action *Helme* made no defence; *Demorest* appeared, and gave notice of claiming title to the 100 acres, by virtue of the agreement with *Helme*. Judgment was recovered by *Dennistoun* against both defendants, and a writ of possession was delivered to the Sheriff, with directions to give possession to *Helme* for *Dennistoun*, which he did. *Helme* remained in possession under an arrangement by which the time for payment of principal and interest was extended.

*Demorest* thereupon filed this bill against *Helme*, praying that the contract between them might be specifically performed, and that *Helme* might be ordered to restore the possession of the 100 acres to *Demorest*, and that the damages sustained by *Demorest* by reason of the proceedings in ejectment might be paid by *Helme*.

The cause came on for hearing before Vice Chancellor *Proudfoot* at the sittings of the Court at Lindsay, in the autumn of 1875.

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Mr. *Maclennan*, Q.C., for the plaintiff. Although time was originally of the essence of the contract, yet the vendor, *Dennistoun*, having seen fit to accept payment of the $100 after all the default had been made and even proceedings had been instituted in ejectment, any default that had occurred was thereby waived, and re-established the agreement. In any view, *Helme*, who was the plaintiff's vendor, is still in possession, claiming under an agreement varying somewhat, it is true, from the original bargain, and he cannot be heard to impeach the plaintiff's claim to a specific performance.

Mr. *Dennistoun*, and Mr. *Hudspeth*, for the defendant. It is admitted that time was made of the essence of the original agreement between *Helme* and *Dennistoun*, and the contract between plaintiff and *Helme* was simply a partial assignment of defendant's interest under that agreement, and thus time was in fact made of the essence of the plaintiff's agreement also. It is admitted that the arrangement with *Helme* was made to get rid of plaintiff's claim. The ejectment, however, rescinded the agreement, and any waiver might have been set up on the trial of that action. Having failed to set it up, the Court will not now entertain a suit founded on any such claim.

Sep. 25.

Judgment.

PROUDFOOT, V. C.—I think, by the instrument executed by the defendant and the plaintiff, of the 9th of January, 1871, which is under seal, the defendant not only agreed to sell and assign, but did actually convey all his equitable interest, or equitable estate, in the 100 acres, and that no further conveyance was necessary to divest him of his interest. After the execution of that instrument the plaintiff was in a position, on paying the purchase money to *Dennistoun*, to demand from him a conveyance of the legal estate, to which the defendant needed not to be a party.

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By the original agreement between *Dennistoun* and the defendant time was of the essence of the contract, and I do not doubt that it remained of the essence of the contract after the transfer of the equitable estate in part of the land to the plaintiff.

It is clear, however, that this condition, making time of the essence of the contract, was waived by the receipt of the $100 by *Dennistoun* after default. The receipt of the money is acknowledged as a payment on the agreement with plaintiff long after he was in default, thereby treating the agreement as still subsisting. It is true, the payment was made after the summons issued, but that would not prevent its being made available in the action: *C. L. P. A., Sec.* 97.

Judgment.

By the 4th section of the Administration of Justice Act, 1873, any defendant in an action of ejectment may state by way of defence any facts which entitle him, on equitable grounds, to retain possession; and by section 8 the Court may, at the trial of any action, make such decree or order as the equitable rights of the parties may require.

Each of the defendants then had equitable rights to specific performance as against *Dennistoun*, and these might have been adjudicated upon and determined in the action of ejectment. The waiver of the time for payment set up the agreement, and entitled the defendants to have it enforced, as in an ordinary suit for specific performance.

I do not think it necessary to say whether the form of the claim of title set up by *Demorest* was sufficient to enable him to bring his rights before the Court for adjudication; as, if the claim was sufficient for that purpose then there is the judgment of a Court of competent jurisdiction against him; if it was not sufficient, it might

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have been so, and his neglect to plead properly at law is no ground for invoking equitable relief. The object of the recent legislation on the administration of justice, as expressed in the Act, was "for causing complete and final justice to be done in all matters in question in any action at law," and by conferring power of dealing with equitable rights in the Common Law Courts to prevent the necessity of recourse to the Court of Equity for their protection or enforcement. This design would be frustrated if suitors were permitted to neglect the assertion of their rights in any action in a Court competent to adjudicate upon them. Under the former system it was held that the neglect to set up a defence at law gave no equity to come into this Court; *Carpenter* v. *The Commercial Bank* (*a*), *Harrison* v. *Nettleship* (*b*), *Morrison* v. *McLean* (*c*). And it has been decided under the recent Act that this Court will not, at the instance of a defendant in an action at law, entertain a bill to restrain such action on the ground that the defendant has an equitable defence: *Kennedy* v. *Bown* (*d*), *McCabe* v. *Wragg* (*e*).

Judgment.

Nor do I think it necessary to decide whether relief would have been granted had the dealing between *Helme* and *Demorest* rested merely in an agreement to sell, as in that case the Court of law would have been asked to grant specific performance between co-defendants. But as in my view *Helme* had conveyed to *Demorest* his right, this question does not arise.

It was urged also, on behalf of the plaintiff that as actions of ejectment only determine the right to possession, and that judgment in them is no bar to other actions of a like kind, the plaintiff ought not to be pre-

(*a*) 2 Grant, E. & A., 111.
(*b*) 2 M. & K. 423.
(*c*) 7 Grant 167.
(*d*) 21 Grant 95.
(*e*) 21 Grant 97.

cluded from asserting his right. Since the Administration of Justice Act has enabled equitable rights to be set up as a defence in such actions, this argument has lost its force. 1875. Demorest v. Helme.

Bill dismissed with costs.

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## HOPE v. DIXON.

*Specific performance—Contract in writing—Statute of Frauds—Clerk of agent—Ratification.*

The clerk of a vendor's agent, by his direction, wrote to *T.*, an intending purchaser, "Mr. *H. D.* won't take less than $30 a foot for ground on Beverley street:" terms, &c., (setting them forth) *T.* answered this: "Your memorandum offering me three hundred and odd feet of land on Beverley street, by a depth of one hundred and fifty feet, at the price of $30 per foot frontage, duly received. I will take the land at that price, and now offer terms, viz.: one-fifth cash, and the balance in four yearly payments, with interest at eight per cent. I should like the right of getting any one-sixth part of the land released from the operation of the mortgage, by paying one-sixth of the mortgage money, and the interest accrued thereon." This was answered by the clerk of the agent, by his directions, "Your acceptance of my offer of three hundred and odd feet on Beverley street, by a depth of one hundred and fifty feet, for thirty dollars ($30) per foot to hand. Will accept your terms, namely (repeating them), "on the following conditions" (as to investigation of title, production of deeds, &c.):

*Held*, that these letters did not form such a memorandum in writing as took the case out of the operation of the Statute of Frauds.

The agent of the vendor asked permission to remove a building off the premises, the subject of the alleged contract; and his solicitors asked for papers from the vendee's solicitor, in order to prepare answers to certain questions of the plaintiff as to title, &c.

*Held*, that these were not such acts as would ratify an agreement not otherwise binding on the vendor.

The general rule is, that clerks of an agent are not agents of the principal.

The bill in this case was filed by *William Hope* against *Benjamin Homer Dixon*, setting forth that in Statement.

1875.

Hope v. Dixon.

March, 1874, the defendant had agreed to sell to the plaintiff certain lands in the City of Toronto, heing lots Nos. 1, 2, 3, and 4, on the east side of Beverley street, according to a plan which was registered in the registry office as plan "D, 168," for the sum of $30 a foot, on Beverley street, the alleged agreement being contained in certain letters, signed by the defendant and plaintiff, except the consent of the plaintiff to the conditions proposed by the defendant's agent in the letter of the 10th of March, 1874, which consent the plaintiff gavo verbally, and not in writing.

The letters were in the following terms, viz.:

TORONTO, March 5, 1874.

Messrs. *Hope* and *Temple*, Toronto.

GENTLEMEN:—Mr. *Homer Dixon* won't take less than $30 a foot for ground on Beverley street. Terms of payment—one-fourth cash, balance in four equal instalments, with interest at 8 per cent. per annum.

Statement.

Yours truly,

H. S. MARA,
Per W. D.

TORONTO, March 9, 1874.

*H. S. Mara*, Esq., Toronto, Agent.

DEAR SIR:—"Your memorandum, offering me 300 and odd feet of land on Beverley street, by a depth of 150 feet, at the price of $30 per foot frontage, duly received. I will take the land at that price, and now offer terms, viz., one-fifth in cash, and the balance by four yearly payments, with interest at 8 per cent. I should like the right of getting any one-sixth part of the land released from the operation of the mortgage by paying one-sixth of the mortgage money, and the interest accrued thereon."

Your truly,

W. HOPE.

1875.

Hope v. Dixon.

TORONTO, March 10, 1874.

Mr. *W. Hope.*

DEAR SIR:—Your acceptance of my offer of the three hundred and odd feet on Beverley street, by a depth of one hundred and fifty feet, for thirty dollars ($30) per foot, to hand. Will accept your terms, namely, one-fifth cash; balance in four yearly instalments, at 8 per cent. interest, on the following conditions, that the purchaser to investigate the title at his own expense, that the vendor shall not be called upon for abstract of title, copies of the title deeds, or any evidence, except what he may have in his possession.

Yours truly,

H. S. MARA,
Per W. D.

Statement.

That at this date the plan had not been recorded, but the defendant, by his agent, pointed out the lots on a map to the plaintiff, and consulted and spoke to him concerning a lane at the rear of the lots: that after the agreement the defendant's agent requested plaintiff to allow defendant to remove certain buildings from the lots, which defendant had not intended to sell, to which the plaintiff assented, and the same were accordingly removed; that in accordance with the conditions of agreement the plaintiff investigated the title, and the solicitors of the defendant produced all deeds, &c., relating to the land in their possession. The bill alleged a refusal by the defendant to convey, and prayed a specific performance of the agreement, and further relief.

June 10th.

At the hearing it was admitted that the letters of the 5th and 10th of March were written by the clerk of *Mara*, and by his direction, and that he (*Mara*) was agent for the defendant; but an objection was raised that one *Boulton*, who was a co-trustee with the defendant, should also have been a defendant, the property being held by them in trust for third parties.

1875.

Hope v. Dixon.

Mr. *Huson Murray* for the plaintiff. The letters constitute the contract between the parties, and the defendant ought to be ordered to perform it. The signature of the clerk of the agent to the letters is quite sufficient. If that were held not sufficient, then the subsequent ratification by the agent would cure that defect (*a*); if not, it would work a very great hardship on the plaintiff. The objection that *Boulton* is not a party is not fatal, as it is proved that *Dixon* was the acting trustee.

Mr. *Leith*, for defendant. There is no contract here that will satisfy the statute. The rule is, that clerks of agents are not agents for the principal (*b*). The subsequent ratification spoken of cannot cure this. The property to be sold is not sufficiently defined. *Boulton* should be a party, and the suit is, therefore, not properly constituted. The bill, according to the latest authorities, ought to be dismissed.

June 11th.

Judgment.

PROUDFOOT, V. C.—The contract of which specific performance is sought, if contract there be, is to be found in the letters set out in the bill.

The letter of the 5th March, 1874, addressed to Messrs. *Hope & Temple*, is admitted to have been written by a clerk of *H. S. Mara*, who was the agent of Mr. *Dixon*, and informs them that Mr. *Dixon* would not take less than $30 per foot for ground on Beverley Street, one-fourth cash, balance in four instalments with interest at 8 per cent.

The next letter is from the plaintiff to *Mara* on the 9th March, 1874, and says—

[The Vice Chancellor here read the letter as above set forth.]

(*a*) Fry, s. 355. (*b*) Fry, s. 358.

1875.

Hope v. Dixon.

On the 10th March, *Mara's* clerk writes in his name, accepting offer and terms, and adds a stipulation that the purchaser is to investigate the title at his own expense; that the vendor shall not be called upon for abstract of title, copies of title deeds, or any evidence except what he may have in his possession.

The owner's name only appears in the first letter. The second does not, I think, refer to that letter, or incorporate it in any way—it refers to some other offer or memorandum, which specified the number of feet on Beverley street, 300 and odd, and the depth, 150 feet, neither of these appearing in the first.

The third letter does not refer specifically to any letter, but it repeats the offer of the plaintiff as stated in the second, and accepts the terms.

Judgment.

I do not think these writings satisfy the Statute of Frauds. It is essential that the writing should contain the names of the parties (*a*), the subject matter, and the price. The name of the owner does not appear in this contract. Nor do I think the subject sufficiently ascertained. If any term had been introduced by which the number of feet on Beverley Street could be ascertained —had it said all my land on Beverley Street, or all the land I have power under a certain deed to sell—it would probably have sufficed, on the principle that *id certum est quod certum reddi potest* (*b*). *Jenkins* v. *Green* (*c*), is distinguishable on the ground pointed out by Mr. *Leith*, that the whole land to be leased was specified, and the whole quantity excepted was specified—here there is no specification of the quantity so as to enable the Court to say how many feet were sold.

The other objection, that the letters are signed by

(*a*) Fry, s 208, 221. (*b*) Fry, s. 212.
(*c*) 27 Beav., 437.

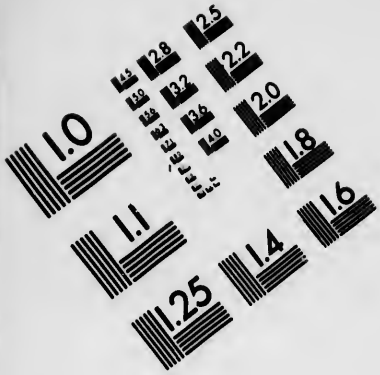
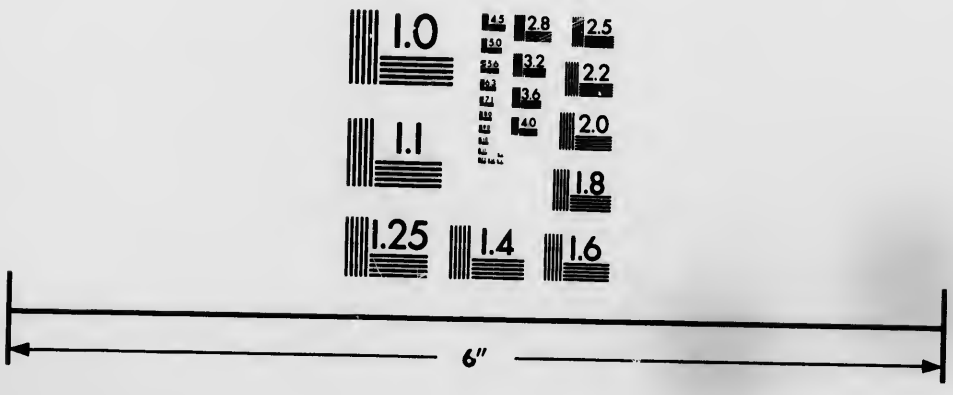
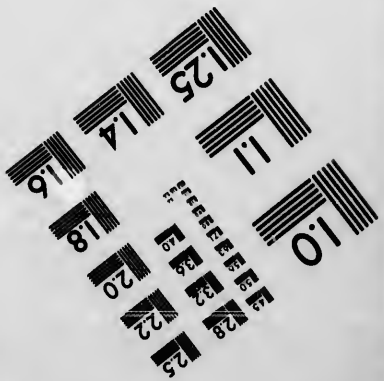




**IMAGE EVALUATION**
**TEST TARGET (MT-3)**





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1875. Hope v. Dixon.

*Mara's* clerk only, seems also fatal (*a*). The case of an auctioneer's clerk is an exception resting on the principle of necessity or convenience, or upon the assent of vendor and purchaser at the sale. But the general rule is, that the clerks of agents are not agents for the principal.

Mr. *Murray*, however, cited *Fry* s. 355 as establishing that a subsequent ratification by the *agent* of the clerk's agreement would suffice. The section in *Fry*, and the cases cited, do not assert or establish any such proposition. They refer to a ratification by the *principal* of the agent's contract. The acts of ratification relied on were the plaintiff's acts, not those of the defendant. The bill, indeed, alleges that the agent of defendant requested leave to remove a building, and that his solicitors asked for the papers at one time to answer certain questions of plaintiff, but these are not such acts as amount to a ratification.

Judgment.

The property in the case was vested in two trustees, of whom the defendant was one. The answer insists that *Mara* was the agent of both, and if any agreement were signed it should bind both. This resolves itself into a question of parties, and were it of any use I would permit an amendment, giving *Boulton*, of course, an opportunity of answering. But as on the other points my opinion is against the plaintiff, the bill will be dismissed.

Bill dismissed with costs.

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(*a*) Fry, 358.

1875.

## CASEY v. HANLON.

*Specific performance—Qualified agreement to sell—Administration of Justice Act—Damages.*

A lease contained an agreement that "the said lessor hereby agrees to give to the said lessee the first privilege of purchasing the said premises at any time within four years from the date hereof, at the price of one thousand dollars, payable in five yearly instalments:"

*Held*, that there was an absolute agreement to sell which the lessee had a right to enforce at any time within the period named; and was not a qualified agreement to sell on the terms mentioned, only in case the lessor desired to sell.

Under section 32 of the Administration of Justice Act of 1873, this Court has cognizance of all the rights of all the parties arising out of an agreement; and if either is entitled to damages the Court ought to ascertain them. In this view, in a suit for specific performance, to which the plaintiff was found not entitled, a reference was directed to inquire as to damages sustained by a purchaser by reason of breach of the contract, and also as to damages sustained by the vendor by reason of breach of convenants in the instrument constituting the agreement.

Statement.

This bill was filed by a lessee against his lessor for specific performance of an option to purchase the demised premises contained in the lease dated the 1st October, 1872. The agreement was in the following terms: "*And the said lessor hereby agrees to give to the said lessee the first privilege of purchasing the said premises at any time within four years from the date hereof, at the price of one thousand dollars, payable in five yearly instalments.*"

The answer set out several covenants in the lease, to be performed by the lessee, amongst others—to clear and make ready for crop in each summer the portion chopped the previous winter, under a penalty of $100 to be paid to the lessor on any failure to comply with the covenant—the lessor to have the privilege of taking any wood he might require for firewood, and to have the right

1875. Casey v. Hanlon.

of way to get it out,—and the lessee to leave on the premises any improvements he might put on, free of charge.

The defendant also swore that he did not agree to sell the said land to the plaintiff, and that all he agreed to do was, to give the plaintiff the first privilego of purchasing the land for $1000, in the event of his wishing to sell within four years from the date of the lease. The defendant claimed that if the clause in the lease gave the plaintiff the right to purchase and compel its execution, that it was not as intended between the plaintiff and him, and asked that it might be reformed, and further set up that the plaintiff had not kept his covenant to clear each summer what was chopped the previous winter, and claimed damages for the breach.

The cause came on for hearing before *Proudfoot*, V. C., at the sittings of the Court a[illegible]dsay, in the autumn of 1875.

Mr. *Dennistoun*, and Mr. *Hudspeth*, for the plaintiff.

Mr. *Hector Cameron*, Q. C., for the defendant.

At the hearing it was argued that the clause in the lease regarding the purchase, on its true construction, only bound the defendant, in case he wished to sell, to give the option of purchasing to the plaintiff, and that the phrase, *the first privilege*, was only susceptible of that construction.

The cases cited are mentioned in the judgment.

Sept. 2. Judgment.

PROUDFOOT, V. C.—[After setting forth the facts]. If the right to specific performance were only in question, I would not think it necessary to determine the point raised, as I think it clearly established that the

defendant was under the impression that he had only agreed to the extent he admits, and that, if the construction is adverse to him, he was under such a mistake as would absolve him from the liability to perform it specifically. *McDonell* v. *McDonell* (*a*).

1875.

Casey v. Hanlon.

Under the former practice, the course under such circumstances was to dismiss the bill without costs, leaving the parties to their remedy at law. But under the Administration of Justice Act, 1873, s. 32, this court has cognizance of all the rights arising out of the agreement, and, if the plaintiff be entitled to damages, ought to ascertain them. It hence becomes necessary to ascertain the true sense of the agreement, and I am of opinion that by it the plaintiff had an option to purchase at any time during the four years mentioned. To give the plaintiff *the first privilege* of buying is equivalent to saying that he might buy at any time during the four years, and that the defendant would not prejudice that right by selling to any one else. Not a word is said about limiting this right by the will of the defendant, and I cannot infer it from the use of the word *first*. I was referred to the case of *Stocker* v. *Dean* (*b*) as an express authority in favour of the defendant, but on consulting the report I find the agreement was in express terms confined to the case of the owner wishing to sell. And had the agreement here contained similar language, there would have been no doubt of the construction to be placed on it; but it is no authority for the position for which it was cited.

Judgment.

The evidence for the reformation of the agreement failed to establish a case of mutual mistake, which could alone justify it. The mistake was that of the defendant alone. The plaintiff was of the belief that the agreement was as I have construed it to be.

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(*a*) 21 Gr. 342.

(*b*) 16 Beav. 161.

1875.

Casey v. Hanlon.

The answer relies on the breach of the plaintiff's covenants as a ground for seeking damages, but at the hearing it was urged that the breach of these covenants was a bar to the right of exercising the option. It is quite true that the parties might have made that a condition precedent to the exercise of the option, but they have not done so, and it is difficult to understand why the plaintiff might not be at liberty to take the land at the stipulated price, though deteriorated by the breach of the covenants. *Weston* v. *Collins* (*a*), to which I was referred, only establishes that the payment of the price may be made a condition precedent to the exercise of the option.

The right of the plaintiff to damages was not discussed at the hearing. That he may be so entitled would seem to be established by *Malins* v. *Freeman* (*b*), notwithstanding the mistake of the defendant. But I do not think it would be proper to discuss that matter further without giving the defendant an opportunity of being heard. I therefore give the plaintiff an opportunity of setting down the case within a month to discuss that question.

Judgment.

The defendant has given evidence of breaches of covenant by the plaintiff which is sufficient to give him an inquiry as to the amount.

At present I pronounce no farther decree. There will be no costs to the hearing, and if the plaintiff does not set down the case within a month, an inquiry will be directed as to the damages sustained by the defendant by reason of the breach of the covenants in the lease.

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The case was afterwards set down, pursuant to leave reserved in the foregoing judgment, for the 19th October,

(*a*) 11 Ju. N. S. 190. (*b*) 2 Keen 25.

1875, when the following decree was pronounced: "Inquiry as to damages sustained by plaintiff by reason of breach of contract—also inquiry as to damages sustained by defendant by reason of breach of the covenants in the agreement. No costs to either party to the hearing. This to be without prejudice to the plaintiff's right (if any) to ask the costs to the hearing by way of damages. Further directions and subsequent costs reserved."

1875.

Casey v. Hanlon.

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## Re Robertson—Robertson v. Robertson.

*Suit by infants—Assets out of jurisdiction—Vesting order—Equitable estates—Land warrants.*

The infant heirs of an intestate who were resident in this Province obtained the usual administration order against the administratrix, their mother, and in proceeding thereunder in the Master's office it appeared that the intestate was, at the time of his death, possessed of considerable real and personal estate in Ontario, and also of several bounty land warrants for lands in Manitoba, which had been duly assigned to him by the recipients thereof from the Government of the Dominion, which were sold under the decree on further directions. On a special case being submitted for the opinion of the Court:

*Held*, that this Court, under the circumstances, had power to sell these warrants, and could order the parties interested in the estate to join in a conveyance thereof; or the Court might, in its discretion, grant the usual order vesting the same in the purchaser: the principle being that if a person selects a tribunal in which to sue for the enforcement of his rights, he cannot afterwards that the judgment of that tribunal is not binding on him: and the general rule being also clear that infants, like adults, are bound by proceedings in a suit in which they are plaintiffs: and that, to any proceedings that might be taken in the Courts of Manitoba, the decree and proceedings in this Court would be an answer, and bind the parties and estop them from disturbing any title acquired under the sale.

A vesting order operates on equitable as well as legal estates.

This was a special case submitted for the opinion of the Court upon the following facts:— Statement.

1875.

Robertson v. Robertson.

*Donald Robertson*, in his lifetime of Queenston, in this province, died intestate at Ottawa in March, 1873, leaving a widow (the defendant) and several infant children (the plaintiffs).

At the time of his death he was the assignee of five bounty land warrants, which were in the following form :—

"No. 0565. Dominion of Canada. No. 0565."

"Department of Militia and Defence."

"It is hereby certified, that under the order of the Governor in Council of the 25th of April, 1871, granting bounty land to certain officers and soldiers who have rendered military service to the Dominion, Corporal *Arthur Mannix*, of the 2nd or Quebec Battalion of Rifles, Red River Expedition Force, is entitled to locate one hundred and sixty acres, being one certain quarter section, upon any of the Dominion lands subject to sale at one dollar per acre.

Statement.

Given under my hand and seal of office this fourth day of November, 1872.

GEORGE FUTVOYE,
*Deputy of Minister of Militia and Defence.*

J. S. DENNIS,
*Surveyor General.*

The defendant was administratrix of the intestate. Besides these bounty land warrants, the intestate died possessed of real and personal property in Ontario. This suit was brought by the plaintiffs, by their next friend, against the administratrix, for the administration of the estate, real and personal, of the intestate, and an order to that effect was obtained. The decree on further directions, of the 5th of May, 1875, contained the following provision: "And this Court doth further order and decree that the interest of the intestate in the lands in the Province of Manitoba be sold in like manner by and with the approbation of the said Master, who is to

settle the conveyance to the purchaser in case the parties differ about the same, and that the purchasers do pay their purchase money into Court to the credit of this cause, and that the Registrar at St. Catharines do execute the conveyances on behalf of such infants as may appear to him of too tender age to execute the same."

Under this decree the bounty land warrants were sold to Mr. *Alfred Hoskin*, who paid his purchase money into Court. An assignment was executed to Mr. *Hoskin* by the defendant and the plaintiffs (except the plaintiff *Hugh Alexander Robertson*, who was at the time out of the jurisdiction). Mr. *Hoskin* obtained a vesting order from the Court, vesting in him the interest of *Hugh Alexander Robertson*. Mr. *Hoskin* then filed copies of the decree, and report on sale, the assignment and vesting order, with the Minister of the Interior, and asked to be admitted and recognized by the department as the assignee of the five bounty land warrants. This application was submitted by the Minister of the Interior to the Minister of Justice, who advised the department "That Mr. *Hoskin* be informed that it is not possible to recognize his claim under the transfer and vesting order from the infant children of *Donald Robertson*, unless upon a case stated, or some other proceeding, or some application in the suit, in which the question is fairly brought up, there shall be a judicial decision to the effect that the conveyance and vesting order were effectual to transfer the interests of the children." Mr. *Hoskin* then applied to the Court for payment back of his purchase money, but this the Court declined to grant, and directed a case to be stated for the opinion of the Court. The order in Council of the 25th of April, 1871, referred to in the warrant set out above, contained this provision: "Each officer and man who is, or has been in the 1st or Ontario, or in the 2nd or Quebec Battalion of Rifles now stationed in Manitoba (whether in the service or depot companies, and who has not been

Statement.

1875.

Robertson v. Robertson.

dismissed therefrom), shall be entitled to a free grant, without actual residence, of one quarter section."

Mr. *A. Hoskin*, in person, referred to *Paget* v. *Ede* (*a*), *Penn* v. Lord *Baltimore* (*b*), *Toller* v. *Carteret* (*c*), *Maunder* v. *Lloyd* (*d*), 35 Vic., ch. 23 (Canada), secs. 25, 69, sub-secs. 12 and 13 of sec. 33, secs. 65, 71 and 72; 37 Vic., ch. 19 (Canada), sec. 16; and submitted to any order the Court might make.

Mr. *Maclennan*, Q. C., for plaintiffs, contended that all they had sold was the interest of *Donald Robertson*, and that the purchaser could not call upon the plaintiffs to do anything more; it being the duty of the purchaser to obtain the consent of the department to the transfer. That the vesting order was right. That the interest of the parties being an equitable one, no assignment or vesting order was necessary. The decree of the Court and Master's report on sale were sufficient to pass the title. That the decree was right, and the Court had power to order the warrants to be sold.

Judgment.

PROUDFOOT, V. C.—A suit had been instituted and an order obtained for the administration of the estate of *Donald Robertson*, who had died intestate.

The order was obtained by the children, the heirs-at-law of the intestate, who, when proceedings were first instituted, were all infants. Of the assets of the intestate, there were certain bounty land warrants which he had purchased, and each of which entitled him to locate 160 acres, being one quarter section, upon any of the Dominion lands, subject to sale at $1 per acre. "Dominion lands" mean the lands included in Manitoba and the North West Territories (*e*). Assignments of such

(*a*) L. R. 18 Eq. 118.
(*b*) 1 Ves. Snr. 444.
(*c*) 2 Ver. 494.
(*d*) 2 J. & H. 718.
(*e*) 35 Vic. c. 23, S. 1 (C.).

1875.

Robertson v. Robertson.

warrants are not perfect till recognized by the Department of the Interior, and the assignments to the intestate were so recognised. By the decree on further directions, the Court ordered that the interest of the intestate in the lands in the Province of Manitoba be sold with the approbation of the Master, and the Registrar was to execute the conveyances on behalf of such infants as were of too tender age to execute them.

The warrants were sold under this direction to Mr. *Hoskin*, who paid the purchase money into Court, as required by the decree. Mr. *Hoskin* also prepared a conveyance to be executed by all the plaintiffs except one, who was out of the jurisdiction, which was executed, and a vesting order was obtained of the share of the one out of the jurisdiction, and the warrants were delivered to the purchaser.

Judgment.

On application, however, to the Minister of the Interior to recognise these assignments, he referred the matter to the Minister of Justice, who caused the purchaser to be informed that it was not possible to recognise his claim under the transfer from the infant children of the intestate and vesting order unless upon a case stated or some other proceeding, or some application in the suit in which the question is brought up, there shall be a judicial decision to the effect that the conveyance and vesting order were effectual to transfer the interests of the children.

Mr. *Hoskin* thereupon moved for payment of the purchase money out of Court, which I declined to order, as the Minister of Justice had not refused to recognise the claim, but only required the opinion of the Court, and I directed the motion to stand over, to come on with the hearing of a case to be presented.

A case has now been stated, and, with the motion, has been argued.

1875.

Robertson v. Robertson.

The jurisdiction of the Court to grant relief where the parties to the record, or the property, the subject of the litigation, are, territorially, out of the jurisdiction, was much considered in the case of *Grant* v. *Eddy* (*a*), and it was held that all parties anywhere out of the jurisdiction, and no matter where the property in dispute may be located, may be proceeded against under our Act and Orders. In *Drummond* v. *Drummond* (*b*), Sir *George Turner*, L. J., says: "The question is not against whom, or under what circumstances, or with relation to what property, the Legislature of a country may be justified in authorizing the process of its Courts to be served out of the jurisdiction of those Courts, but whether the Legislature of the country has not in fact authorized the process of the Court to be so served."

Judgment.

As to the effect of a judgment obtained by such a proceeding, it seems that if a competent Court has jurisdiction over the cause, it is binding, and will be enforced in other countries. If the defendant, for instance, appear and defend the action in the foreign Court, he will not be permitted afterwards to say that it proceeded upon an erroneous view of the law of England: *Godard* v. *Gray* (*c*). But where a Dane, resident in France, brought an action against two other Danes, resident in London, and obtained a judgment for default of appearance, according to the practice of the French Courts, the defendants not being subjects of, or residents in France, it was not enforced in the English Courts, for there was nothing imposing on the defendants the duty of obeying the judgment. The Court discusses the case of a judgment obtained in England against a foreigner sued under the provisions of the Common Law Procedure Act, and that judgment being sued on in the Courts of the United

(*a*) 21 Gr. 45, 55, 57.
(*b*) L. R. 2 Chy. 32.
(*c*) L. R. 6 B. R. 139.

States. They say, "The question for the United States Court would be, can the Island of Great Britain pass a law to bind the whole world? We think in such case the answer would be, No, but every country can pass laws to bind a great many persons; and therefore the further question has to be determined whether the defendant in the particular suit was such a person as should be bound." And on this point the Court say: (1.) "If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think its laws would have bound them. (2.) If the defendants had been at the time when the suit was commenced resident in the country so as to have the benefit of its laws protecting them, * * we think its laws would have bound them. (3.) If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them. * * (4.) Again, we think it clear upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him." *Schibsby* v. *Westenholz* (*a*).

Judgment.

And, in like manner, when an Englishman was a shareholder in a foreign company by whose articles of association all disputes regarding the affairs of the company arising during liquidation should be submitted to the jurisdiction of the French Court, a judgment obtained in the French Court according to the law of France, of which the defendant had in fact no notice, was held conclusive. Per Lord *Cairns*, C. To all intents and purposes it is as if there had been an actual and absolute agreement by the defendant, and that if it were necessary to bring an action against him on the part of the

(*a*) L. R. 6 B. R. 155.

1875.

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company, the service of the proceedings at the office of the Imperial Procurator, if no other place were pointed out, would be good service: *Copin* v. *Adamson* (*a*).

In the present case, at the time when the suit was commenced, all the parties were resident in, and subjects of, Ontario, and would be bound by the first and second rules above laid down.

But besides, the order in this case directing the sale of the interest vested in the plaintiffs, was obtained at their instance; they themselves applied to the Court to administer the estate, they set the machinery in motion, and must be held bound by all the proceedings regularly taken to obtain and complete the sale, and are therefore within the 4th rule in *Schibsby* v. *Westenholz*. It is true they were then infants, but the general rule is clear that infants are bound by proceedings in a suit in which they are plaintiffs. *McDougall* v. *Bell* (*b*), *Chambers* on Infants, 772, and cases there.

Judgment.

By the Chancery Act, s. 63, the Court has power to make a vesting order wherever it might have ordered a conveyance to be executed. That is part of the ordinary practice of the Court, and when the plaintiffs ask the Court to sell their property, there can be no question that they might have been ordered to execute a conveyance.

I apprehend, therefore, according to the principles established by the cases cited, that to any proceeding by the heirs in the Courts of Manitoba, the decree and proceedings in this Court would bind them, and estop them from disturbing any title acquired under this sale.

It was argued that a vesting order only operates on legal estates, and that the legal estate here being in the Crown, it was unnecessary and inoperative.

(*a*) L. R. 1 Exch. D. 17. (*b*) 10 Gr. 283, 285.

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I do not assent to this proposition. The 63rd section, above cited, defining the effect of the order, says it shall have the same effect both at law and in equity as if the legal *or other estate* in the property had been actually conveyed. And in the Trustee Act of 1850, the word *lands* includes tenements, hereditaments, &c., *whatever be the estate or interest therein*. And by the Trustee Extension Act of 1852, the Court, when it has made an order for the sale of an estate for any purpose, may make an order vesting *any estate* which the Court may think fit in the purchaser. When all parties having a beneficial interest, and the legal estate, are before the Court, no order is necessary for vesting the equitable estate, for that is bound by the decree, and the legal estate may be conveyed. *Re Williams* Estate (*a*). But when the legal estate is not represented, I apprehend, that a conveyance or vesting order applicable to the equitable estate must be obtained.

Judgment.

It was further contended that what the purchaser bought was the interest the intestate had, and that has been conveyed to him, and that it is incumbent on him to procure the recognition of the Crown to the transfer. I do not think so. The interest of the intestate has not been effectually conveyed till the transfer has been recognized by the Government.

I shall therefore refuse the motion to pay out, and answer the special case—1. The Court has jurisdiction to direct the warrants to be sold, as per the decree of the 5th May, 1875, though the plaintiffs are infants. 2. The Court had jurisdiction to grant the vesting order.

Mr. *Hoskin* does not ask costs. There will be no costs to either party.

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(*a*) 5 De G. & S. 515.

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## Attorney General v. Keily.

*Injunction suit—Decree—Petition—Nuisance.*

In 1873 an injunction was granted restraining The Toronto Street Railway Company, on the ground of nuisance, from using their railway, unless by a day named the defendants should put the same in a good and sufficient state of repair, to the satisfaction of an engineer named, who, on the day appointed, reported the railway in such a state of repair as the decree in the cause required. Two years afterwards the said railway, as also other lines laid in the meantime by the same company, had, as was alleged, been allowed to go into such a state of disrepair as to become again a nuisance to the public, whereupon a petition was filed by the relators, alleging these facts, and claiming the benefit of the decree.

*Held*, that as the decree had already been complied with, a new information must be filed to obtain the relief now asked.

Statement.

In this case, *Strong*, V. C., made a decree on the 18th March, 1873, declaring "that the Street Railway in the pleadings mentioned in its present insufficient and incomplete state of repair, is an illegal obstruction of the streets of the city of Toronto, on which the same is laid down, and doth constitute a public nuisance by reason thereof, and ought to be abated," and ordered and decreed the same accordingly.

An injunction was ordered to issue restraining the defendants from continuing to obstruct the streets, and from continuing the said railway, and from maintaining the said nuisance, &c., unless the defendants should on or before the 1st September then next, put the said railway in a good and sufficient state of repair, to the satisfaction of *Walter Shanly*, Esq., an engineer, agreed upon by the parties.

On the 1st September, Mr. *Shanly* reported the railway to be in such a state of repair as was required by the decree.

A petition was now filed in the name of the Attorney General, at the relation of *John F. Lash* and

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others, in the nature of a supplemental bill in aid of the decree, claiming the benefit of the decree, and alleging, that since the certificate of Mr. *Shanly*, the road had been allowed to go into a state of great disrepair; and that the defendants had laid down further lines of railway which had not been laid in compliance with the statutes, and these had also been allowed to get into disrepair; and praying that the informant might be declared entitled to the benefit of the former proceedings, and that the railway, in its then condition, might be declared a nuisance, and praying relief accordingly.

Dec. 1.

Mr. *Bethune* and Mr. *Moss*, for the relators.

Mr. *Ferguson*, for the defendants, *Keily* and *Heyman*.

Mr. *Bain*, for the defendants, *The Street Railway Company*.

Mr. *Biggar*, for the defendants, *The City of Toronto*.

Dec. 2.

Judgment.

PROUDFOOT, V. C.—[After stating the facts as above set forth]—When the decree of March, 1873, was made, the only railway then constructed was from Bloor street along Yonge street to the market, and along Queen street from Yonge street, to the Asylum, and it could not and did not profess to affect lines that might be afterwards constructed. I apprehend it to be quite clear that as to these subsequently constructed lines the petition must fail.

As to the lines then in existence the decree declares them a nuisance, and enjoins their use or continuance unless by a certain day they are put in a complete state of repair. It contains no direction as to what ought to done in the event of subsequent dilapidation. The whole scope and aim seems to have been to have them

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made to comply with the requirements of the statute on 1st September, 1873. This probably resulted from the decision of *Mowat* V. C., as against this company, when he held that he had no jurisdiction to compel the repair of a road—that the remedy was by indictment. It was a nuisance which might be ordered to be abated. This seems to have been the meaning of Vice Chancellor *Strong's* decree: this is a nuisance to be abated, but I will give you till the 1st of September to remedy it. For some years since then the road has been in such repair as not to call for application to the Courts. More recently it has got into such disrepair that it no longer complies with the requirements of the statute, and has again become a nuisance. But this is a new nuisance, not that which was struck at by the former decree. To obtain the benefit of the former decree would, therefore, give no aid to the informant. That decree was complied with, became *functus officio*, and no liberty to apply, no supplemental bill can carry it beyond that. There may be a hundred answers to the nuisance now complained of that would not have been available to it.

Judgment.

I think the informant must file a new information, and that this petition must be dismissed.

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(*a*) 14 Gr. 673.

1875.

## CANADA PERMANENT LOAN AND SAVINGS SOCIETY v. MACDONNELL.

*Pleading—Parties—Mortgagor—Tenants.*

To a bill upon a mortgage for relief by sale or foreclosure a tenant of the mortgagor is a proper party, in order that he may redeem if he desires to do so, or in case of default of payment be ordered to deliver up possession.

This was a bill filed against the widow, heirs-at-law, and tenant of the deceased mortgagor, and prayed a sale in case of non-payment, and that an order might forthwith issue directing the tenant to deliver up possession. The 6th clause of the bill was as follows:

"The defendant *John Macdonnell* is now in occupation of said lands, and in receipt of the rents and profits thereof, having entered thereon subsequently to the execution of the plaintiffs' mortgage and subject thereto, and as a tenant of the mortgagor, and said *John Macdonnell* has not accounted and does not account to the plaintiffs for the use and occupation of said lands, and said lands are unprofitable; and the plaintiffs submit that they are entitled to the possession of said lands, and to the order of the Court, directing said defendant to deliver up to them such premises."

The infant defendants filed a demurrer on the ground of multifariousness.

June 2.

Argument.

Mr. *Hoskins*, Q.C., for the demurring defendants, contended that the matters in respect of which the infant defendants and the defendant *Macdonnell* were respectively interested were totally distinct the one from the other, and not such as entitled the plaintiffs to join them as co-defendants.

Mr. *Beverley Jones*, contra.

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The established rules of the Court warrant the plaintiffs here in bringing the tenant before the Court, in order that his rights may be bound; or if he desire it, to afford him an opportunity of redeeming the plaintiffs.

June 9.

BLAKE, V. C.—The infant defendants demur to this bill as being multifarious, and they allege that it is exhibited against them and *John Macdonnell* the tenant for several and distinct matters and causes, in respect of many of which they, the infants, are not in any way interested or concerned.

It was argued that as the tenant had no right to redeem, and was made a party merely to obtain possession of the premises, the bill was clearly multifarious, as it embraced a foreclosure against three defendants, and an ejectment against another defendant who had no interest in the foreclosure, and there was therefore the union, not of a foreclosure and ejectment against the same defendants, but of a suit against some defendants, and an action at law against another not interested in the suit.

Judgment.

I do not think this is the true position of the parties. It is not necessary to dispose of the question whether a tenant is in all cases a necessary party in a suit to foreclose or eject; it is sufficient for the purposes of this demurrer to determine whether a tenant is a proper party to such a suit.

In *Story's* Eq. Pl. (s. 193) there is the following statement: "And here the same general doctrine may be asserted, that all persons, whose interests are to be affected or concluded by the decree, ought to be made parties." Mr. *Calvert* says (p. 287): "If a mortgagee in possession makes a lease, and the lessee is made defendant to a redemption bill, he cannot demur."

The view taken in *Keech* v. *Hall* (*a*), is made the foundation of a paragraph in the various works on ejectment: "Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself or get a friend to do it. The tenant stands exactly in the situation of the mortgagor."

Mr. *Spence* says (*b*): "Generally, any person entitled to the pernancy of the profits may redeem. A tenant for years may put himself in the place of the mortgagor, and either himself redeem or get a friend to do it for him."

Mr. *Coote* (p. 334) says: "If he proceeds to evict the lessee, yet the lease being a valid demise of the equity of redemption, will entitle the lessee to redeem the mortgage, and will at all events be binding on the mortgagor, and all persons claiming under him;" and at page 517, "a tenant, it is said, may redeem, or procure one to redeem for him."

Judgment.

In *Fisher* the rule is laid down as follows (*c*): "The lessee of the mortgagor, claiming under a beneficial lease, though it be made after the mortgage, may redeem, the lease being good against the mortgagor." Lord *Redesdale* lays it down that (*d*), "The interests of persons claiming under the possession of a party whose title to real property is disputed, as his occupying tenants under leases, are not deemed *necessary* parties; though, if he had a legal title, the title which they may have gained from him cannot be prejudiced by any decision on his rights in a Court of Equity in their absence; and though if his title was equitable merely, they

(*a*) Dougl. 31.
(*b*) 2 Spence 646, 661.
(*c*) 1 Fisher 314.
(*d*) Mitford 201.

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may be affected by a decision against that title. * * If therefore it is intended to conclude such rights by the same suit, the persons claiming them must be made parties to it; and where the right is of a higher nature, such as a mortgage, the person claiming it is usually made a party." See also *Jones* v. *Meredith* (*a*), 2 *Fonblanque* 269, 2 *Cruise* 82.

I think here that the mortgagees had a right, if they pleased, to add the tenant as a party, and to allow him to redeem, and that they were perfectly justified, in place of bringing an action of ejectment against the defendants, or any one of them, to ask that they or either of them should be compelled to deliver up possession of the premises. It is not the case of adding a defendant simply to ask against him relief not prayed against other defendants, but it is the asking incidental relief against one of the defendants properly before the Court, and having an interest in the other matters in respect of which the suit is brought. I think the demurrer should be overruled.

Judgment.

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(*a*) Bunb. 346.

1875.

## RATHBUN V. CULBERTSON.

*Sale under execution of lands, subject to several mortgages—Subject to a charge for maintenance—Registration Acts, 1846 and 1868.*

The principle established by the cases of *Donovan* v. *Bacon*, *Ante* volume xvi., p. 472, and *Re Keenan*, 3 Chancery Chambers Reports 285, that the equity of redemption in mortgage premises is not saleable under execution where the same are subject to several mortgages in the hands of several mortgagees, does not apply where the mortgages are by several owners of distinct portions of the estate, and the same are held by one and the same mortgagee, or are in the same hand.

Where lands are subject to a charge for maintenance, the interest of parties beneficially interested therein, subject to such charge, is saleable under execution.

Although portions of township lots have been laid off into village lots, this forms no objection to an undivided interest in the township lots, as originally described, being sold under execution; and the purchaser at sheriff's sale is entitled to hold the interest acquired under such sale, notwithstanding the sheriff's deeds, so far as they concern the village lots, do not comply with the provisions of the Registration Acts of 1846 (9 Vic., ch. 34) and 1868 (31 Vic., ch. 20, Ont.), the latter of which prohibits the registration of deeds of any portions of lots so laid out, unless they conform to the plan of the property registered under such Act.

Statement.

The bill in this case was filed by *Hugo Burchardt Rathbun* and *Edward Walker Rathbun*, praying to restrain one of the defendants, *Archibald Culbertson*, from proceeding to sell the lands in question, in which the plaintiffs claimed to be entitled to five-eighths undivided shares under a deed of conveyance from *John Stevenson* of three undivided eighth shares, and by two several deeds of conveyance from two of the heirs and devisees of *John Culbertson*, deceased.

As to the three-eighths conveyed by *Stevenson*, it appeared that *Stevenson* had bought them at sheriff's sale under an execution issued on a judgment recovered by himself against three of the devisees and heirs, on

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whose shares, at the time of instituting proceedings against his debtors, he held a mortgage from each on his undivided portion.

The cause came on for the examination of witnesses and hearing at the sittings of the Court at Belleville in the autumn of 1874.

The other facts sufficiently appear in the judgment.

Mr. *Wallbridge*, Q. C., Mr. *Moss*, Q. C., Mr. *Fitzgerald*, Q. C., and Mr. *Boyd*, for the plaintiffs.

Mr. *Maclennan*, Q.C., and Mr. *Denmark*, for defendants.

January 16. PROUDFOOT, V. C.—The questions reserved at the hearing were whether the interest of the judgment debtors was saleable at law under execution, and

Judgment. whether the sheriff conveying only by description as township lots passed the town lots.

The execution debtors were entitled to lands under their father's will; they had severally mortgaged these to *Stevenson*, and afterwards became jointly liable on a note to *Stevenson* on which the judgment was recovered. The legal title in some lands of the testator was suffered to descend, subject to a charge for maintenance, and each of the defendants was entitled to one-eighth as an heir-at-law. The sheriff sold the right, title, and equity of redemption of all the defendants in all the lands, and *Stevenson* became the purchaser.

The equities of redemption were saleable unless the principle of *Donovan* v. *Bacon* (*a*), and *Re Keenan* (*b*) applies, where it was held that equities of redemption were not saleable where there was more than one mort-

(*a*) 16 Grant 472. (*b*) 3 Ch. Ch. R. 285.

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gage. But it is clear those cases only apply where the mortgages are to different mortgagees, or in different hands. *VanKoughnet*, C., says (*a*): "The language of the 258th section (C. L. P. A.) would be wide enough to cover such a sale, but read in connection with the 259th section, it seems to me that the Legislature was intending to deal with the simple case of one mortgagor and one mortgagee, and that they did not intend the equity of redemption to be sold where there was more than one mortgagee; for while they declare in this latter section that any mortgagee may purchase, they provide that he shall give to the mortgagor a release of the mortgage debt; whereas if any other person becomes the purchaser he shall pay off the mortgage debt, or perhaps the mortgage debts, if the clause had reference to such a purchaser only. But it would be meeting out scant justice to the mortgagor, that where a mortgagee, if he become the purchaser, should alone be required to release his own debt, for he of course could not release debts charged on the estate due to another, yet that a stranger purchasing must pay off all the incumbrances." Here the mortgages are all in one hand, and the mortgagors are entitled to have all the mortgages released. There is only one mortgagor of each parcel, and one mortgagee, and the *scant justice* likely to arise where there are several mortgages in different hands is avoided.

Judgment.

As to that portion of which the legal estate descended, it was contended that the power in the executor to sell for maintenance, &c., converted the estate of the heirs into a trust to feed the power, and that it was not saleable. It is clear that the legal estate descended to the heirs, subject to a charge for maintenance; and to use the language of *Draper*, C. J., in *Parke* v. *Riley* (*b*): "That they had a beneficial interest is not questioned, and I cannot understand why the judgment creditor

(*a*) 16 Gr. 473. (*b*) 3 E. & A. 226.

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cannot sell the legal estate subject to, and with the benefit of the existing equities."

It was further argued that a portion of the township lots having been long since laid out into village lots, these were so separated from the township that the sale by the sheriff of the interest of the debtors in the township lots passed no interest in the village lots. The Registry Act of 1868 (31 Vic., c. 20, sec. 75, Ont.), which provides for the registration of surveys of such lots, and applies as well to lands already subdivided as to those to be subdivided, directs that where the land has been so surveyed that the same *cannot, by the description, be easily or plainly identified*, a plan is to be registered, and all instruments affecting the land, or any part of it, executed after the plan, shall conform thereto, otherwise it shall not be registered. This Act would seem to apply to cases where a part of the land subdivided has been sold, and cannot be identified without reference to the plan, but where the whole original lot is sold, or an interest in it, the objection would not hold. It has been decided that a grant of "all my right, interest, and estate of, in and to the estate of G. M." passed all the estate of the grantor therein without describing the lands: *O'Neil* v. *Carey* (*a*). And an Act and warrant under the Scottish Bankruptcy Act, transferring "the whole of the estates and effects heritable and moveable, and real and personal, wherever situated," without specifying the lands, may be registered: *Robson* v. *Carpenter* (*b*). The present Chancellor, then Vice Chancellor, saying: "I am prepared to hold 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." Both these cases, however, were subject only to the provisions of the Registration Act of 1846

Judgment.

(*a*) 8 U. C. C. P. 339. (*b*) 11 Grant 293.

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(9 Vic., c. 34); and the 33d section of that Act, providing for the subdivision of lots, contains no clause prohibiting the registering of deeds that do not conform to it, as the 75th section of the Act of 1868 does; and it may be that in a contest between registered owners some difficulty might be experienced in dealing with the subject. But whatever may be the effect in such a case, and however it may impose a difficulty on the grantee in registering his conveyance, I think there is nothing to prevent him acquiring the title.

The decree will therefore be for the plaintiffs, with costs.

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## ROMANES v. HERNS.

*Mortgage, &c—Improvements—Delay in claiming—Practice.*

A foreclosure suit had been instituted in 1865, and brought to a conclusion; after which, in 1866, to supply a defect in the first suit a second one was brought, and the report of the Master obtained therein in December, 1868, which was appealed against and a reference back ordered. In proceeding under this order, in 1875, the personal representative of the mortgagee, who had died during the pendency of the appeal, claimed a sum of $2,937, with interest, for permanent improvements, but for which the mortgagee had never put forward any claim during the proceedings under the original decrees. The Master having refused to entertain the claim, a petition was presented to the Court praying for an order to be allowed to prove such claim notwithstanding the delay; but the Court, in view of all the circumstances, refused the application, and dismissed the petition with costs. The circumstances under which a claim may be made for improvements by a mortgagee while in possession: and the effect of the statute 36 Vic. ch. 22, Ont., in respect of improvements made on the lands of others through mistake as to the ownership considered.

Statement.

A petition in this case was presented by the executors and devisees of the will of the late Rev. *George Romanes*, praying for leave to prove before the Master

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certain claims for improvements made on the mortgaged premises under the following circumstances:

*Thomas Herns*, in 1850, was the owner of lot 5, in the 3rd concession of Fredericksburg, and in January of that year, conveyed fifty acres of it to his son *Ebenezer Herns*.

In 1861 *Thomas Herns* mortgaged the whole lot to the Rev. *George Romanes*, to secure payment of £1,000 and interest at 8 per cent.; the interest payable half-yearly, and the principal on 1st July, 1866; and on 10th July, 1863, *Thomas Herns* mortgaged this lot and a gore of fifty acres to *Alexander Campbell*, to secure $573.58, payable on 1st June, 1864, with interest at 8 per cent., which, in December, 1864, was assigned by *Campbell* to the Rev. *George Romanes*.

Statement.

In 1865 *Romanes* filed his bill for foreclosure against *Thomas Herns*, and in that suit *Alexander Campbell* and one *Henry Allison*, a mortgagee of *Ebenezer Herns*, were made defendants in the Master's office, and a final order of foreclosure was obtained therein, in October, 1865.

For some unexplained reason *Ebenezer Herns* was not made a party to that suit, and the foreclosure, therefore, was not binding on him.

Early in 1866 *Romanes* took proceedings to have his title quieted under the Quieting Titles Act, and in February of that year made an affidavit, in which *Ebenezer Herns's* title was referred to; and he was served with notice of the proceedings, and on 11th April, 1866, his claim asserting title to the fifty acres conveyed to him in 1850 by *Thomas Herns*, was served on the agents of *Romanes's* solicitors.

The proceedings under that Act seemed to have been dropped.

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On the 22nd May, 1866, *Romanes* made a lease of the whole lot and the gore to one *Russell*, at a rent of $254 per annum, for six years, from the 1st March, 1866, who agreed to spend $900, to be advanced by *Romanes*, in reconstructing and repairing, and putting in habitable condition the house and barn on the lands, and *Romanes* covenanted in the lease to sell the land to *Russell* for $6,200, payable in twelve annual instalments from 1st March, 1872; which time was afterwards extended for three years.

*Russell* went into possession under the lease, and finding a larger expenditure was necessary to make the property tenantable and productive, asked and obtained from *Romanes* authority to do whatever he considered necessary and proper, and he made improvements of a permanent character, as he stated, to the value of $2,937.

In September, 1866, the present suit was instituted by *Romanes* to supply the defect in the former one, and foreclose *Ebenezer Herns*, and a decree was made postponing his deed to the plaintiff's mortgage. The account was taken in the Master's office, and the report made in December, 1868. No claim was then made by the plaintiff for improvements. The report was appealed from on other grounds, and it had been sent back to the Master for review.

Sep. 28.

Argument.

Mr. *Attorney General Mowat*, in support of the petition, referred to *Fee* v. *Cobine (a)*, *Parkinson* v. *Hanbury (b)*, *Shaw* v. *Tims (c)*, *Neesom* v. *Clarkson (d)*.

Mr. *Cassels*, contra, cited *Bright* v. *Boyd (e)*, *Gummerson* v. *Banting (f)*, *Hawn* v. *Cashion (g)*.

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(*a*) 11 Ir. Eq. R. 406.
(*b*) L. R. 2 E. & I., App. 1.
(*c*) 19 Gr. 496.
(*d*) 2 Hare 163.
(*e*) 2 Story's Rep. 605.
(*f*) 18 Gr. 516.
(*g*) 20 Gr. 518.

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Sep. 29.

PROUDFOOT, V. C.—No explanation is given of the reason for not making any claim for improvements further than that it was owing to some inadvertence or misunderstanding; and it is added that even if such claim had been made it is doubtful if it could have been sustained to the full extent prior to the Act of the Ontario Legislature, 36 Vic., ch. 22.

This statute enacts that in every case in which any person has made, or may make, lasting improvements on any land under the belief that the land was his own, he shall be entitled to a lien on the same to the extent that the land has been enhanced in value by such improvement.

The statute is out of the question in this case. *Russell* is no party to this suit, but the improvements were made by him under arrangement with *Romanes*, who now claims them ; and I am satisfied that *Romanes* knew of *Ebenezer Herns's* title or claim before he made the lease.

Judgment.

Convinced of this knowledge of *Romanes*, I feel bound to disregard all those cases cited to me in which persons have been allowed for improvements made under the belief that they were the true owners. *Parkinson* v. *Hanbury* (*a*), *Shaw* v. *Tims* (*b*), *Fee* v. *Cobine* (*c*), *Neesom* v. *Clarkson* (*d*), and the common law cases cited of *Lindsay* v. *McFarling* (*e*), and *Patterson* v. *Reardon* (*f*), must have proceeded on a similar principle. It is impossible to hold that *Romanes* could have considered himself the absolute owner in view of the proceedings he was taking under the Quieting Titles Act; and this bill itself seems to have been filed before much, if any, of the improvements were actually made.

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(*a*) L. R. 2 E. & I. A. 1
(*b*) 19 Gr. 496.
(*c*) 11 Ir. Eq. Rep. 406
(*d*) 2 Hare 163.
(*e*) Drap. R. 6.
(*f*) 7 U. C. R. 326.

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*Sedgwick* on Damages 125 (Ed. 1847) states the American rule to be, to allow a set-off for improvements against rents in an action for mesne profits—but it is only to the *bonâ fide* occupant.

The question then resolves itself into what improvements a mortgagee in possession is entitled to claim.

The amount secured by the plaintiff's mortgage is $4,573.58, and interest at 8 per cent.; and the sum claimed for improvements is $2,937.

These consist of :—

| | | |
|---|---|---|
| Farm house, costing | | $650 |
| Barn | | 400 |
| Wood house, cow stable and shed, driving house, &c. | | 320 |
| Rail fence | $200, | 302 |
| Picket and board fence | $102, | |
| Ditching | | 240 |
| Orchard | | 125 |
| Removing stones and bringing land into a fit state for cultivation | | 900 |
| | | $2,937 |

Judgment.

The rule laid down in *Sandon* v. *Hooper* (*a*), is that the mortgagee will not be allowed for such lasting improvements made on his own authority as are not necessary to preserve, though they may increase, the value of the estate. The mortgagee has no right to lay out money in increasing the value of the property which may be done in such a way as to make it impossible for the mortgagor to redeem. For such expenditure, therefore, he must get the consent of the mortgagor, or must have given notice which has been acquiesced in. That case has always been recognized as correctly stating the law applicable to such circumstances. Here there is no

(*a*) 6 Beav. 246.

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suggestion of any such consent having been obtained or notice acquiesced in. In *Harrison* v. *Jones*, (*a*) *Esten*, V. C., held that the ordinary rule in regard to mortgagees in possession did not justify an allowance in respect of a dwelling house built on the mortgaged premises without the consent of the mortgagor.

But *Constable* v. *Guest* (*b*) was referred to as establishing the rule that improvements ought to be allowed to the amount of the rents charged. The present Chancellor, before whom that case came, thought it premature to express any decided opinion as to what ought to be allowed, but expressed the inclination of his opinion to be that, to the extent the improvements had increased the rentable value, with which the mortgagee has been charged, it would be reasonable to allow for them, but there was no decision to that effect. And the true conclusion to be drawn from that expression of opinion would be that in taking the accounts the mortgagee should only be charged with rent at the unimproved value, and not allowed for the improvements.

Judgment.

There is then to be considered the fact of no claim having been made for these improvements in the proceedings before the Master, and, therefore, no suggestion then that the rent was increased on account of them. The appeal from the report on other grounds, and the lapse of so many years without a complaint on that ground, all tend to shew that there was either no right to these improvements, or that it was deliberately abandoned. It is true that on this petition an affidavit has been made by the tenant that he would not have taken the place except on the terms mentioned in the lease, which includes an authority to spend $900 on improvements. But there is great danger in allowing such a claim at this distance of time, on such evidence,

(*a*) 10 Gr. 99 (*b*) 6 Gr. 510.

when for years the person really liable, and who is now dead, made none. I am not satisfied that the $254 rent was intended to represent the improved value. 1875. Romanes v. Herns.

It was stated on the argument that a large quantity of wood cut by the tenant was not charged to the mortgagee. I do not know that there is any evidence of this; but it is not improbable that this may be the explanation of no claim being made for the improvements.

On the whole I do not think this to be a case in which it would be proper to permit evidence to be given of improvements as prayed by the petition.

The petition is dismissed, with costs. Judgment.

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*Corporation—Managing Director—Railway Company—Parties—Demurrer—Administration of Justice Act.*

Where a suit is necessary to obtain from the directors or officers of an incorporated company an account of their dealings with the company, or to recover from them, or any other person, property or money of the corporation, the only proper plaintiff is the company itself.

Where one shareholder of a railway company filed a bill on behalf of himself and all other shareholders (except a defendant) against the company and its managing director, alleging that the managing director had virtually the appointment of a majority of the directors, and thus controlled the action of the company; and charging that such managing director had misappropriated large amounts of the company's funds, and had also been guilty of several other acts of misconduct, which, if true, were properly subjects for the cognizance of a Court of Equity, and in respect of which the directors had omitted to call him to account, but the plaintiff failed to shew that the consent of the directors or of the shareholders could not be obtained to institute proceedings in the name of the company, a demurrer to the bill for want of equity as well as for want of parties, filed by the company and the managing director, was allowed.

Such an objection to the frame of a bill is not a mere "formal objection," such as is intended to be provided for by the Administration of Justice Act of 1873, section 49.

To such a bill the Attorney-General, though a *proper*, is not a *necessary* party.

*Hamilton* v. *The Desjardins Canal Company*, ante volume i., page 1, and *Paterson* v. *Bowes*, ante volume iv., page 170, referred to, approved of, and followed.

*Brogdin* v. *The Bank of Upper Canada*, ante volume xiii., page 544, distinguished.

Statement. The bill in this cause was filed by *James Saurin McMurray*, on behalf of himself and all other shareholders and corporators of the defendants, *The Northern Railway Company of Canada*, except the defendant *Frederick William Cumberland*, against *The Northern Railway Company of Canada* and the said

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*Frederick William Cumberland*, setting forth that (1) By an Act of Parliament of Canada, passed in the twelfth year of Her Majesty's reign, (chapter 196), a company was duly incorporated for the purpose of constructing and working a railway from Toronto to Lake Simcoe and thence to Lake Huron. * * (3) The capital stock of which was £750,000, divided into shares of £5 each. (4) Soon afterwards the stock was taken up by a large number of persons, who thereupon became the shareholders or corporators of the company, and the number of such shareholders and corporators was very large, and many of them unknown to the plaintiff, and it would be impossible to make them all parties to the bill. (5) Shortly thereafter the company was organized, and the railway was built and equipped, and had been in operation continuously for the last twenty years. (6) That by several acts the name of the company was from time to time changed, and by 38 Victoria, chapter 65, the name was further changed to the "Northern Railway Company of Canada." (7) That plaintiff was the holder and owner of a number of shares of the capital stock of the said company. (8) By the provisions of the several Acts of Parliament relating to the company, the governing body was a board of directors elected annually by the shareholders and bondholders, and the defendant *Cumberland* was and had been for about fifteen years the general manager of the company and its affairs, and the same had been managed by him practically, without any control or supervision on the part of the shareholders, or any person interested in the proper management and property of the company. (9) For the construction and equipment of the railway, large sums of money were borrowed at interest, amounting to the sum of £550,000, or thereabouts, for the greater part of which bonds were issued, payable at a future day, and were outstanding in the hands of a large number of persons. (10) In the year 1859, the interest on the bonds was in default, and an Act was passed,

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granting to the bondholders powers to vote at the meetings for the election of directors, &c. The bondholders had ever since controlled the election, voted for and elected the board of directors, and also the said *Cumberland*, who had represented their interests, and was kept in by them. After the passing of the said Act, the affairs of the company improved, the interest had been paid regularly on the bonds, yet the bondholders had continued to elect the board of directors and the said *Cumberland* as general manager. (11) The bonds being good security, and interest paid regularly, the board elected by the bondholders as aforesaid had been indifferent, and had paid no attention to the management of the affairs of the company, and had left the same entirely without any practical control in the hands of the defendant *Cumberland*. (12) That during the time of his administration as aforesaid, of the affairs of the company, the defendant *Cumberland* had been guilty of numerous breaches of duty and trust, as such general manager, in applying the funds and property of the said railway to illegal and improper purposes, in converting the same to his own use and benefit, and to the use and benefit of other persons, and in other ways; some instances of which misconduct were in the bill set forth. (13) Ever since the opening of the said road, more than fifteen years before, the freight and passenger traffic and business of the said company had been very large, involving a very large annual income and expenditure; and large sums had been annually laid out and expended in the erection of buildings, shops, stations, and elevators, and in the construction of works to be used for the railway, and for repairs and otherwise, all which had been expended without check or control by the defendant *Cumberland*. (14) While the said *Cumberland* was such general manager of the said company, he did contrary to his duty become and was secretly interested with the contractors in certain large contracts made by the said company, with divers persons for the erection of docks and eleva-

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tors for the said company, and received very large sums of money as and for a share of the profits of the said contracts, for which said sums of money so received for such profits the said *Cumberland* ought to account to the company, but he had not done so. (15) The said *Cumberland* had in like manner been secretly interested with the contractors in divers other large contracts for other works done for the said company, and received large sums for profits. (16) By reason of the secret interest of the defendant *Cumberland* in such contracts, the same were obtained by each contractor on their own terms and without competition, whereby great loss was sustained by the company. (17) The said *Cumberland*, improperly and contrary to his duty, borrowed or otherwise withdrew from the funds of the company, under his control, the sum of $1000 to pay for stock which he had subscribed for in a certain corporation, called the Mail Printing and Publishing Company, and other companies, and he had never replaced the said sum. (18) The said *Cumberland*, improperly and contrary to his duty, borrowed or otherwise withdrew from the funds of the company a large sum of money to pay private subscriptions which he had made to certain testimonials to certain public men, and he had never replaced or repaid the same. (19) The said *Cumberland* invited to, and entertained the party known as the English Cricketers at an excursion over the road of the company, and improperly and contrary to his duty borrowed or otherwise withdrew from the funds of the company under his control the necessary amount to pay for the same; and he had many times in like manner given excursions to various county and city councils, and other persons, and had also many times entertained aldermen of the city of Toronto, and had improperly and contrary to his duty, paid the expenses thereof out of the funds of the Company under his control. (20) The said *Cumberland*, improperly and contrary to his duty, borrowed or otherwise withdrew from the funds of the

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company, under his control, large sums of money, and invested the same in the purchase of certain interests or shares in his own name, and for his own use and benefit, in certain steamers, known as the Emily May, Cumberland, Chicora, and others, and also in the building and management of the Couchiching Hotel, and took men out of the shops of the company to work at and in the said steamers and hotel. (21) The said *Cumberland*, improperly and contrary to his duty, had caused large sums of money belonging to the company to be expended in the purchase of certain lands at Allandale and elsewhere, at exorbitant prices, and far beyond the real value thereof; and that he was secretly interested in the said transactions, and received a share of the purchase money for his own use and benefit. (22) The said *Cumberland*, improperly and contrary to his duty, caused large sums of money belonging to the company to be paid to certain members of Parliament and friends of his for certain pretended services rendered to the company; and for painting and other contracts not necessary or required for the real benefit of the company. (23) The said *Cumberland*, improperly and contrary to his duty, borrowed or otherwise withdrew from the funds of the company under his control, certain sums of money for the purpose of purchasing stock in his own name and for his own benefit in certain banks and other companies. (24) The said *Cumberland*, improperly and contrary to his duty, borrowed or otherwise withdrew from the company under his control a certain sum of money and paid the same to certain shareholders of the company, and other persons, as an inducement to stay, stop, or compromise a certain suit then threatened to be commenced and prosecuted against the company, and himself, by certain of the shareholders, for an account of his dealings with the affairs of the company; and he gave the said shareholders certain other advantages at the expense of the company, as a consideration for such

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compromise. (25) The said *Cumberland*, improperly and contrary to his duty, during the time aforesaid, issued a large number of free passes over the said road to persons who were friends of his, and who afterwards travelled over the said road free, and without paying the usual or any fare therefor, whereby, large sums of money had been lost, which would otherwise have been received for such fares. (26) The said *Cumberland* had frequently stipulated for, and received from divers persons, a percentage or other reward for his own use for the carriage of freight, by the company, for the said persons, and also, a per centage on the premiums for the insurance against fire of the property of the company. (27) The said *Cumberland*, also, at divers times, improperly and contrary to his duty, borrowed or withdrew from the funds of the company under his control, certain large sums of money, which were applied and expended by him to promote the election to parliament of himself and other persons. (28) The said *Cumberland*, at various times, improperly and contrary to his duty borrowed or withdrew from the funds of the company, under his control large sums of money, which were applied and expended by him to defeat certain by-laws granting a bonus to other companies; and also in improper and unnecessary applications to Parliament, and in lobbying and promoting such applications. (29) The said *Cumberland*, improperly and contrary to his duty, made and applied to his own use a large per centage on the last loan made by the bondholders of the company; and the valuation for the repairs of the said road were made by persons who had been promised contracts by *Cumberland*, and the parties got the contracts without any competition, and shared with him the profits made by the contracts. (30) The said *Cumberland*, improperly and contrary to his duty, allowed certain officers of the company at various times to over draw their salaries, and the amounts had never been returned to the company. (31) On account of such mis-conduct, breaches of trust

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and improper applications of moneys of the company, by the said *Cumberland*, no dividends had been paid on the capital stock of the company, and the plaintiff and other holders thereof had been greatly injured, and large sums of money had been lost in each year of his management, to the company, which would otherwise have been received, and he had never repaid any of the said moneys, or made good any of the said breaches of trust. (32) No full or proper examination of the accounts of the company, kept by the said *Cumberland*, had ever been made by or on behalf of the company, or the stockholders; and, although audits had been had, they had been merely formal, and had been made by the nominees of *Cumberland*, and the said accounts were full of false and erroneous charges and other errors, and many transactions were therein incorrectly entered and others were omitted; and that the accounts as audited did not correctly represent the affairs or transactions of the company for any one year of the management of the said *Cumberland*. (33) Ever since the year 1856, when, by an Act of Parliament of that year, voting powers were conferred upon the bondholders, the board of directors had always been virtually elected by the said *Cumberland*, and the board of directors and *Cumberland* had always since the said year, in fact, represented the bondholders; and the stockholders had not during the time aforesaid had any practical representation, control, or influence in the management of the company, and the affairs of the same had been managed entirely without regard to the interests of the stockholders. (34) The directors of the company or the majority of them, being from time to time virtually appointed by the defendant *Cumberland*, and under his control, had never called him to any account for the misconduct set forth, and they would not do so; and the plaintiff and the other shareholders had no means of redress, save by this suit. The bill further alleged (35) that various efforts had been made

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by divers stockholders of the company to obtain full information of the management of the affairs of the company, but such efforts had invariably been frustrated by the acts and influence of *Cumberland*; and that about a year before applications were made by certain shareholders to the board of directors, and the defendant, *Cumberland*, for an inspection of the accounts and affairs of the company, but through the influence of *Cumberland*, such inspection was denied and refused. (36) Lately, proceedings were threatened by certain shareholders to obtain an account of the affairs of the company, but the same were prevented and stopped by *Cumberland* who improperly made private agreements for compensation out of the funds of the company to the parties. (37) By reason of the transactions aforesaid, and various other matters which the plaintiff could not state with sufficient detail, but which would appear on an examination of the books of the company, the defendant *Cumberland* was indebted to the company in a very large sum of money, all which he ought to account for and make good to the company; and the Bill prayed Statement.

(1) That an account might be taken of the property and funds of said company and of the application and disposal thereof by *Cumberland*, including all the receipts and disbursements since the time that he became general manager. (2) An account of all moneys lost to the company owing to the improper conduct, breaches of trust and improper use and application of the moneys of the company, by *Cumberland*. (3) That *Cumberland* might be ordered to pay and make good to the company the said losses and whatever might be found due to the company from him upon taking the said account, and for further and other relief.

The defendants severally demurred on the grounds of want of equity, and for want of parties—alleging that the directors of the Railway Company should have been made parties.

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Mr. *J. Hillyard Cameron*, Q. C., and Mr. *G. D. Boulton*, for the defendants, the Company. In addition to the objection, that the Director s should have been made parties, contended that even if that objection were removed, the bill would not be properly framed. The bill being filed by the plaintiff on his own behalf, and on behalf of all the other shareholders, except the defendant *Cumberland*, is clearly erroneous, as there are two sets of shareholders as mentioned in the 24th and 36th paragraphs of the bill, who, having interests antagonistic the one to the other, both cannot be parties plaintiffs, and the plaintiff should have excepted the one class or the other. Then again, the Government should be a party, as they have a lien on the road to the amount of £500,000; the Act creating this lien being referred to in the 6th paragraph of the bill. The Directors should be parties in their individual capacity; the 33rd paragraph of the bill itself shews the necessity of this. The plaintiff shews no equity to maintain this suit. The Company itself, if the statements of the bill are correct, should have instituted proceedings, not any single shareholder. The prayer of the bill, so far as the Directors are concerned, cannot be granted on the plaintiff's asking: this could be done only at the instance of the Company itself. It is not shewn that the Company were ever asked that *Cumberland* should give an account. When the charge is against an officer of the corporation, it must be upon the action of the Company that he is called to an account—not on that of any shareholder: *Foss* v. *Harbottle* (*a*), *Gray* v. *Lewis* (*b*). No reason is assigned why the Company should not have taken the initiative; and it is not alleged that they refused to do so. Nothing is charged in the bill that the Company could not inquire into at a general meeting; certainly they have the power to compel the Managing Director to give an account of his dealings

Argument.

(*a*) 2 Hare 461. (*b*) 43 L. J. Chy. 281.

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with the affairs of the Company; besides, there is no allegation in the bill shewing when the alleged misdeeds were done. The bondholders who are charged, in effect, with acting in collusion with the defendant *Cumberland*, are not represented here: *Russel* v. *The Wakefield Water Works Co.* (*a*); *Harman* v. *Gooding* (*b*). The Government lien takes precedence of the rights of the shareholders; and before the Company can claim any of the benefits intended to be conferred by the Act, 38 Vic., ch. 75, the interest on the Government lien must be paid; clearly, to prevent multiplicity of suits, the Government should have been made a party to the suit. The plaintiff, being a shareholder, should have sought redress at the annual meetings of the shareholders; and if he chose not to do so, the Court will not encourage him by sustaining this suit, particularly as he does not allege, or shew, that he has sustained any personal loss. From the statements of the bill itself it is evident that all the acts complained of must have taken place years ago; and if so, the plaintiff should not have delayed so long in taking steps to obtain the redress he now claims to be entitled to. Under the circumstances the Court will not grant the plaintiff an inquiry extending back so long as the bill now asks. If the suit is not against the Directors, it cannot be sustained against the Managing Director: *Mozley* v. *Alston* (*c*), *Graham* v. *The Birkenhead, &c., Railway* (*d*), *The York & Midland Railway Company* v. *Hudson* (*e*).

Argument.

Mr. *Moss*, for defendant *Cumberland*. The demurrer here raises the question how far a servant of a corporation is liable to anyone other than the corporation of which he is the servant: the servant is in fact only liable to his employers. In order to entitle a

(*a*) 44 L. J. Ch. 496.
(*b*) 3 DeG. & S. 407.
(*c*) 1 Ph. 790.
(*d*) 2 McN. & G. 146.
(*e*) 16 Beav. 490.

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shareholder to the relief here asked, he must shew that he has failed to obtain it through the medium of the Directors after applying to them to institute proceedings for the purpose. The bill does not allege that the plaintiff has ever asked the Company to make *Cumberland* accountable in any way; and no general meeting of the shareholders has ever been convened or sought by the plaintiff, to be convened in order that they might pronounce upon the matters complained of: *Hamilton* v. *Desjardins Canal Company* (*a*). Neither does the bill allege that the defendant *Cumberland* is either a director, shareholder, or bondholder. The Directors are members of the corporation, and if they can be considered as represented by the plaintiff, then we have this anomalous state of things presented here, that they in fact are filing a bill complaining of themselves. If, on the other hand, it should be desired to shew that the Directors are antagonistic in their interests to the shareholders, they cannot possibly be represented by the plaintiff, and therefore should be defendants to represent themselves: *Clarke* v. *Archibald* (*b*); *McBride* v. *Lindsay* (*c*).

Argument.

Mr. *A. Campbell*, for the same defendant. It is not shewn by this bill that the shareholders have ever been asked to put the process of the law in motion to call the defendant to account for the alleged misdeeds; all, or nearly all, of which are void or voidable: some of them in fact being incapable of confirmation. Neither is it alleged that the shareholders have ever been informed or are at all aware of them; and nothing is alleged to shew that this defendant controls the Directors in the commission of the acts complained of. For all that is here stated, it may be that the Directors, if made aware of the alleged grounds of complaint, would be themselves the first to take action in the matter; and there is no

(*a*) 1 Gr. 1. (*b*) 17 L. J. N. S. Ch. 140. (*c*) 9 Hare 574.

doubt that, if any substantial grounds existed for the charges being made, they would be the first to set the law in motion. It is impossible to argue with any show of success that it would not be to the advantage of the shareholders as also of the bondholders, that proceedings, instead of being taken by a single shareholder, should be instituted by the Company itself: *Atwood* v. *Merryweather* (*a*), *Bagshaw* v. *The Eastern Union Railway Company* (*b*).

Mr. *Maclennan*, Q, C., Mr. *McCarthy*, Q. C., and Mr. *Huson Murray* in support of the bill. The general ground of want of equity has not been touched upon by the defendants. Where a demurrer is filed for want of parties, the general rule is, that it should be shewn who the parties are that should be added; but this has not been done in this instance. It is conceded by the plaintiff that the usual course in a case of this kind is, that the bill should be filed by the corporation itself; but this is an exceptional case. None of the authorities go the length of saying that an application must be made to the Board of Directors, for them to take the proceedings, or to allow the individual shareholder to sue, before he can file such a bill. *Russell* v. *The Wakefield Water Works Co.* (*c*), shows clearly that in case an application to the shareholders would be futile, it is not necessary that a party complaining should go through the form of making such application. The fourth paragraph of this bill shews that the plaintiff here is properly before the Court, and the Act gives the bondholders no powers further than that of voting. Here, from the statements of the bill, it is shewn that the governing body of the corporation is completely under the control of the managing director, and, consequently, no application to them for permission to use their name for the purposes of this

Argument.

(*a*) 37 L. J. Ch. 35; L. R. 5 Eq. 464 *n*. (*b*) 7 Hare 114.
(*c*) 32 L. T. 685.

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litigation would be of any avail. Under these circumstances, *Paterson* v. *Bowes* (*a*), is a clear authority to shew that the individual stockholder may be the plaintiff. Besides this bill may be, in fact, looked upon as one filed by the company itself, for if the company really did their duty in the matter, they would be the plaintiffs on the record; and, if necessary, the company can now be applied to for the purpose of allowing their name so to be made use of.

The objection that as the plaintiff claims to represent all the parties the directors are thereby included, and thus the anomaly is presented of the directors suing themselves is set at rest by the decision of the Court in *Winch* v. *The Birkenhead, &c., Railway* (*b*). The same objection was taken by counsel in the case of *Carroll* v. *Perth* (*c*), but the Court overruled it, and held that the bill there was properly framed. Suppose for a moment that the corporation here was the party complaining; who then would have to be brought before the Court? Clearly no one other than the defendant *Cumberland*. He, therefore, cannot be heard to raise this objection. *Gray* v. *Lewis* (*d*), *Lindley* on Partnership, 966.

Argument.

There can be no contribution as between wrongdoers so that the other shareholders, who, it is alleged, have been paid moneys of the company improperly by *Cumberland*, are not necessary parties; although possibly they might have been proper parties to such a proceeding at this. There cannot be any doubt, from the statements of this bill, which, of course for the purposes of the present argument, this defendant admits to be true, that unless the plaintiff puts the company in motion they will take no action in the matter. So far as the objection that creditors of the company should be

(*a*) 4 Gr. 170.
(*b*) 5 Deg. & S. 562.
(*c*) 10 Gr. 64.
(*d*) L. R. 18 Ch. 1049.

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parties goes, it is only necessary to say that if such were held to be a rule there never would be an end to suits like this. In this view, therefore, the Attorney General, as representing the claims of the Government, should not be considered a necessary party, although, no doubt, he would have been a proper party, and no objection on the ground of the improper misjoinder of parties could have been sustained.

It is almost impossible to distinguish this case from *Paterson* v. *Bowes* in its circumstances. There it was alleged that the Mayor, the alleged wrongdoer, had such influence over the members of the Council that any application to them for redress would be useless; and here, substantially the same allegations are made, in respect of Mr. *Cumberland's* influence controlling the board of directors of the railway company. On this branch of the case *Brogdin* v. *The Bank of Upper Canada* (*a*), and *Salomans* v. *Laing* (*b*), have a strong bearing. The former case is a distinct authority for not requiring the Attorney General to be made a party; and no one can read the decisions of the Courts in England, as well as in this country, without being impressed with the fact that demurrers for want of parties are every day viewed with less favor by the Courts; and as far as possible discouraged. Be[illegible]s, in this case, any benefit that can accrue to the shareholders by reason of the present suit, must to a still greater extent accrue to the Government, as they have a lien prior to the shareholders. Putting the case at the lowest, *Cumberland* must be at least treated as a trustee, for all parties beneficially interested, and, if so, then the case comes under the rules enunciated by the Court in *Armstrong* v. *The Church Society* (*c*), and *Boulton* v. *The Church Society* (*d*); and at all events if the Court can gather that he occupies any position

Argument.

(*a*) 13 Gr. 544.
(*b*) 12 Beav. 377.
(*c*) 13 Gr. 552.
(*d*) 14 Gr. 123.

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other than a mere servant, it will consider that the bill is properly framed. *Coleman* v. *The Eastern Counties Railway Co.* (*a*), *Richardson* v. *Hastings* (*b*).

Mr. *G. D. Boulton* for the company in reply. The plaintiff should have filed the bill on behalf of himself and all the other shareholders except the directors. The directors must be parties; otherwise any shareholder may file a bill and make them responsible: *Munch* v. *Cockerell* (*c*), *Attorney General* v. *The Corporation of Leicester* (*d*). The case of *Paterson* v. *Bowes*, so strenuously relied on by the other side, is, in reality, against the plaintiff's contention, as there was in that case a distinct allegation that the plaintiff applied to the governing body of the corporation of Toronto, for permission to take proceedings, which application had been met by a refusal either to act themselves or allow the plaintiff in the case to do so, although indemnity against costs was tendered. But here even an application to the directors—the governing body of this company—would not suffice; such application must also be made to the shareholders and refused before the plaintiff will be allowed to act individually; which application could have been made at any of the general meetings of the company, but which the plaintiff has studiously refrained from doing. There is no precedent for a bill such as the present being filed against an officer of an incorporated company by any of the individual corporators.

Argument.

Mr. *Moss*, for the defendant *Cumberland*, in reply. There is no allegation in the bill that the Directors will not do their duty; all this is left to be inferred from the allegation that they have been elected by the influence of Mr. *Cumberland*. In *Winch* v. *Birkenhead* the Court merely held that, on the motion for an injunction

(*a*) 10 Beav. 1.
(*b*) 11. Beav. 17.
(*c*) 8 Sim. 219.
(*d*) 7 Beav. 176.

which the bill prayed for, the Directors were not necessary parties.

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SPRAGGE, C.—There can be no question, that if the charges made by this bill are true, they are proper subjects for the cognizance of a Court of Equity. I must take them to be true for the purposes of this demurrer; but, of course, for the purposes of this demurrer only.

The chief question argued is, whether the plaintiff, who sues on his own behalf as a shareholder in the Northern Railway Company, and on behalf of all other shareholders (except the defendant *Frederick William Cumberland*), is in a position to maintain this suit; in other words, whether this suit, framed as it is, is properly framed. The defendant *Cumberland* is, throughout the bill, styled General Manager of the company; the governing body is said to be a Board of Directors, elected annually by the shareholders and bondholders, and it is alleged that the defendant *Cumberland* is, and has been for the last fifteen years, the General Manager of the company and its affairs; that the same has been managed by him practically without any control or supervision on the part of the shareholders, or any person interested in the proper management and property of the said company." Paragraphs 10 and 11 explain the reason of this. [His Lordship here read paragraphs 10 and 11.]

Judgment.

The bill then sets forth a number of instances of misconduct on the part of the defendant *Cumberland*, some of them of a very grave character, and some of them, admittedly, of such a nature as to be incapable of confirmation.

The parties made defendants are the company itself, a corporation, and Mr. *Cumberland*. There are demurrers by both, and the contention of each is, that the suit

1875. should be by the corporation: and this, as a general rule, is not denied; but it is contended for the plaintiff that the bill shews a state of circumstances which takes this case out of the general rule.

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I have already referred to some allegations in the bill bearing in some degree upon that point, but the allegations mainly relied upon are those contained in the 33rd and 34th paragraphs; and the 35th is also referred to. [His Lordship here read the 33rd paragraph.]

This paragraph points to such a constitution of the governing body as leaves the shareholders without practical representation on the board, and points also to an entire neglect of their interests. Taken in connection with the previous paragraphs already referred to, it amounts to this, that the bondholders, receiving their interest, are satisfied, and are indifferent to the interests of the shareholders, that, in some way, not explained, but I will assume it to be by proxies, they enable the defendant *Cumberland* to elect the Board of Directors, and that he does thereby elect them, and that the consequence has been neglect of their interests. [His Lordship here read paragraph 34.]

Judgment.

This paragraph states, as a consequence of this constitution of the board, that the directors have never called Mr. *Cumberland* to account for his acts of misconduct set forth in the bill, and adds, "and they will not do so." It is observable that this paragraph qualifies the statement in paragraph 33, that the Board of Directors have been virtually elected by Mr. *Cumberland* by the words "or the majority of them." I must then, acting upon the well-known rule of reading pleadings against the pleader, taking the two paragraphs together, read the allegation as being, that the majority of the directors have been, from time to time, and at present are virtually appointed by Mr. *Cumberland*, and under his con-

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trol. Then comes the allegation that "they will not call him to account." This cannot be read as meaning anything else than that it is a conclusion from the premises. It cannot be taken as an allegation of a substantive fact known to the plaintiff, and upon which the Court is to act. It cannot, in the nature of things, be known to the plaintiff, nor to any one. It is mere matter of opinion, of no value whatever in itself. It may be a just inference from the premises, and if it is so, the Court will draw that inference. [His Lordship read the 35th paragraph.]

This is the only allegation of any application *having been made* to the directors, of any kind. The first part of the paragraph is very general; the second part does not allege that the directors were informed that the inspection asked for had any connection with the acts of misconduct alleged in the bill, or that in fact such was the object of the inspection. Its only value is its affording evidence of the undue influence, and what, if true, would be the unwholesome influence exercised by the defendant *Cumberland* in the management of the company.

Judgment.

Before commenting further upon these allegations, I will refer to some of the leading English cases, and the leading cases in Canada upon the point.

I will say in the first place, that I do not think it by any means a matter of indifference whether a suit of this nature is instituted by the corporate body, whose funds are said to have been misapplied, and who has the *primâ facie* right to complain of misconduct, or whether the suit is by a corporator.

Lord Justice *James*, in *Gray* v. *Lewis* (*a*), was very explicit upon this point. He says "The bill should not

(*a*) L. R. 8 Ch. 1050.

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have been filed by a shareholder on behalf of himself and all others the shareholders. It is very important, in order to avoid oppressive litigation, to adhere to the rule laid down in *Mozley* v. *Alston (a)*, and *Foss* v. *Harbottle* (*b*), which cases have always been considered as settling the law of this Court, that where there is a corporate body capable of filing a bill for itself, to recover property either from its directors or officers, or from any other person, that corporate body is the proper plaintiff, and the only proper plaintiff. One object of incorporating bodies of this kind was, in my opinion, to avoid the multiplicity of suits which might have arisen where one shareholder was allowed to file a bill on behalf of himself and a great number of other shareholders. The shareholder who first filed a bill might dismiss it; and if he was a poor man the defendant would be unable to obtain his costs; then another shareholder might file a bill, and so on. It was also stated to us in the course of the argument that even after the plaintiff had dismissed his bill against a particular defendant, a fresh bill might be filed against the defendant so dismissed. Therefore, there might be as many bills as there are shareholders multiplied into the number of the defendants. The result would be fearful, and I think the defendant has a right to have the case made against him by the real body who are entitled to complain of what he has done. * * * I think it is of the utmost importance to maintain the rule laid down in *Mozley* v. *Alston* and *Foss* v. *Harbottle*."

Judgment.

In *Foss* v. *Harbottle*, which is emphatically the leading case upon this point, Sir *James Wigram* held it to be a matter of great importance that the corporate body itself should be plaintiff in the suit. The object of the bill is summarized in the judgment of this Court in *Hamilton* v *The Desjardins Canal Company* (*c*).

(*a*) 1 Ph. 790. (*b*) 2 Hare 461. (*c*) 1 Gr. at. 27.

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"In *Foss* v. *Harbottle*, the bill was filed by several persons, on behalf of themselves and all other shareholders of the Victoria Park Company except the defendants (the directors), against the directors. The facts of the case are voluminous and complicated; but it will be sufficient for our present purpose, to remark that the company had been incorporated for the constructing a public park in Manchester: that the bill disclosed a series of the most flagrant frauds, by which the defendants, after the company had been projected, had purchased up the lands designed for the park, with a view to their subsequent sale to the company at greatly increased prices; that they had procured themselves to be elected directors, and had then purchased from themselves for the company these same lands, at a large profit; that the funds of the company not sufficing to pay the purchase money, the directors proceeded to mortgage the lands of the company, for the purpose of raising the requisite funds; and that, although the capital expressly required by the statute had not been subscribed. The plaintiffs in this bill sought to escape from the general rule (according to which the company ought to have been plaintiffs), by an allegation that no mode existed of putting the corporation, as a corporation, in motion, inasmuch as the only mode of calling a general meeting was by means of a notice served upon the directors; and as that body had, by death or otherwise, been reduced below the limited number, there existed, in fact, no body of directors upon whom notice could be served. Upon these and other grounds, which I need not now enumerate, the plaintiffs sought to establish the right to sue in the form adopted."

Judgment

There were very serious difficulties in the way of instituting a suit in the name of the company. It was alleged that out of five directors three had become bankrupt, and that the remaining two did not constitute a board, and difficulties were stated in

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the way of calling a general meeting of the shareholders in order to the institution of the suit, but Sir *James Wigram* felt so much the importance of adhering to the rule that he was, it is not too much to say, astute in meeting the difficulties suggested.

"I pause here to examine the difficulty which is supposed by the bill to oppose itself to the body of proprietors assembling and acting at an extraordinary general meeting. The 48th section of the act says, that a certain number of proprietors may call such a meeting by means of a notice to be addressed to the board of directors, and left with the clerk or secretary, at the principal office of the company, one month before the time of meeting, or the board is not bound to notice it. The bill says that there is no board of directors properly constituted,—no clerk,—no principal office of the company,—no power of electing more directors,—and that the appointment of the clerk being in the board of directors, no clerk can in fact now be appointed. I am certainly not prepared to go the whole length of the plaintiff's argument founded upon the 48th section. I admit that the month required would probably be considered imperative; but is not the mode of service directory only? Could the board of directors *de facto*, for the time being, by neglecting to appoint a clerk or have a principal office, deprive the superior body, the body of proprietors, of the power which the act gives that body over the board of directors? Would not a notice in substance,—a notice for example such as the 129th section provides for in other cases, be a sufficient notice? Is not the particular form of notice which is pointed out by the 48th section a form of notice given only for the convenience of the proprietors and directors? And if an impediment should exist, and, *a fortiori*, if that impediment should exist by the misconduct of the board of directors, it would be difficult to contend with success that the powers of the corporation are to be paralyzed,

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because there is no clerk on whom service can be made. I require more cogent arguments than I have yet heard to satisfy me that the mode of service prescribed by the 48th section, if that were the only point in the case, is more than directory. The like observations will apply to the place of service; but as to that, I think the case is relieved from difficulty by the fact that the business of the company is stated to be principally conducted at the office of the solicitor, for I am not aware that there is anything in the statute which attaches any peculiar character to the spot designated as the principal office. In substance, the board of directors *de facto*, whether qualified or not, carry on the business of the company at a given place, and under this Act of Parliament it is manifest that service at that place would be deemed good service on the company. If that difficulty were removed, and the plaintiff should say, that by the death or bankruptcy of directors, and the carelessness of proprietors, (for that term must be added), the governing body has lost its power to act, I should repeat the inquiries I have before suggested, and ask whether, in such a case also, the 48th section is not directory, so far as it appears to require the refusal or neglect of the board of directors to call a general meeting, before the proprietors can by advertisement call such a meeting for themselves? Adverting to the undoubted powers conferred upon the proprietors, to hold special general meetings without the consent and against the will of the board of directors, and the permanent powers which the body of proprietors must of necessity have, I am yet to be persuaded that the existence of this corporation (for without a lawful governing body it cannot usefully or practically continue) can be dependent upon the accidents which at any given moment may reduce the number of directors below three. The board of directors, as I have already observed, have no power to put a veto upon the will of any ten proprietors who may desire to call a special general

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meeting; and if ten proprietors cannot be found, who are willing to call a special general meeting, the plaintiffs can scarcely contend that this suit can be sustained. At all events, what is there to prevent the corporators from suing in the name of the corporation? It cannot be contended that the body of proprietors have not sufficient interest in these questions to institute a suit in the name of the corporation. The latter observations, I am aware, are little more than another mode of putting the former questions which I have suggested. I am strongly inclined to think, if it were necessary to decide these points, it could not be successfully contended that the clauses of the Act of Parliament which are referred to are anything more than directory, if it be, indeed, impossible from accident to pursue the form directed by the Act. I attribute to the proprietors no power which the Act does not give them: they have the power, without the consent and against the will of the directors, of calling a meeting, and of controlling their acts; and if by any inevitable accident the prescribed form of calling a meeting should become impracticable, there is still a mode of calling it, which, upon the general principles that govern the powers of corporations, I think would be held to be sufficient for the purpose (*a*)."

Judgment.

He then expresses the opinion that there was a board of directors *de facto*, and so no obstacle in the way of calling a meeting of proprietors.

"The foundation upon which I consider the plaintiffs can alone have a right to sue in the form of this bill must wholly fail, if there has been a governing body of directors *de facto*. There is no longer the impediment to convening a meeting of proprietors, who by their vote might direct proceedings like the present to be taken in the name of the corporation (*b*)."

(*a*) Pp. 495-6-7.

(*b*) P. 499.

This was followed in our own Court in *Hamilton* v. *Desjardins Canal Company*. The alleged delinquents in that case were the directors, and this was the language of the Chancellor, Mr. *Blake*: "We are of opinion, therefore, both upon reason and authority, that the majority of shareholders in an incorporated company have a right to use the corporate name in a suit instituted for the purpose of impeaching the acts of its directors, when those acts are either illegal, unauthorized or fraudulent. And we are further of opinion, that having such right, they are bound to adopt that course, unless indeed the majority of the corporators refuse to lend their sanction, or unless no means exist of ascertaining the wish of such majority. In either of these events, it would be competent to the corporators to sue in their individual capacity, but then they would be bound to disclose upon the record the circumstances which necessitated the departure from the ordinary mode of proceeding."

Judgment.

*Paterson* v *Bowes* (*a*), a later case in this Court, was no departure from *Hamilton* v. *Desjardins Canal Company*, inasmuch as what was pointed out in the earlier case as necessary to make the exception was alleged in the bill in the later case; the allegation being that there were no means of legally ascertaining the will of the majority of the ratepayers or inhabitants of the city in respect of the matters in question, and also, that through the influence and continual misrepresentations of the Mayor—the alleged delinquent—the Common Council *has refused to take*, and will not take any steps to compel the Mayor to account or to allow the plaintiffs or any ratepayers to use the corporate name or seal for the purposes of a suit against the Mayor.

I am also referred by counsel for the plaintiff to *Brogdin* v. *The Bank of Upper Canada* (*b*). Upon

(*a*) 4 Gr. 170.

(*b*) 13 Gr. 544.

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that case I may observe that it proceeded upon a distinction which would not, as I read the late English cases, be now held a valid ground for bringing a suit in this Court in the name of shareholders. The decision itself, however, I apprehend, was right upon another ground—that it was an act of the corporation itself that was impeached by the bill, and the corporation was properly made a defendant, and could not have been plaintiff in the suit; and the same was, I take it, the ground or the principal ground upon which *Bagshaw* v. *The Eastern Union R.W. Co.* (*a*), referred to in that case, was decided.

That case is one of a class of cases in which the suit cannot be by the corporation itself, because the act sought to be restrained or remedied is the act of the corporate body itself. That was the ground of decision in *Winch* v. *The Birkenhead, Lancashire & Cheshire Junction R.W. Co.* (*b*), to which I was referred by Mr. *Maclennan*. *Salomons* v. *Lang* (*c*), is another case of the same class, and there are others. *Russell* v. *The Wakefield Water Works Co.* (*d*), the latest case upon the point, would perhaps apply the general rule to cases where a corporation has, by its governing body, done some act of which the corporators have a right to complain as an illegal act. That, however, is not material in this case, as the remedy sought here is not against the corporation or its governing body, but against a servant of the corporation.

Judgment.

The Master of the Rolls in that case adopted the statement of the general rule enunciated by Lord Justice *James*, in *Grey* v. *Lewis*, "Where there is a corporate body capable of filing a bill for itself to recover property either from its directors or officers, or any other person,

(*a*) 7 Hare 131.
(*b*) 5 DeG. & S. 562.
(*c*) 12 Bea. 377, 383.
(*d*) 44 L. J. Ch. 496.

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that corporate body is the proper plaintiff, and the only proper plaintiff."

That this is the general rule is indeed conceded; but it is contended that the circumstances alleged in the bill, to which I have already referred, are sufficient to take the case out of the general rule. Sir *George Jessel*, in the late case at the Rolls, has stated the exceptions to the rule, in terms agreeing substantially with the cases to which I have referred, but more fully. The plaintiff in this case seeks to bring himself within one of the exceptions, which is thus stated by Sir *George Jessel*: "Another exception is the case of *Atwood* v. *Merryweather*, in which the corporation was controlled by the evil-doer, and would not allow its name to be used as plaintiff in the suit. It was said that justice required that the majority of the corporation should not appropriate to themselves the property of the minority, and then use their own votes at the general meeting of the corporation, to prevent their being sued by the corporation; and consequently, in a case of that kind, the corporators who form the minority may file a bill on their own behalf to get back the property or money so illegally appropriated. It is not necessary that the corporation should absolutely refuse, by vote, at the general meeting, if it can be shewn either that the wrong-doer had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shewn that there has been a general meeting, substantially approving of what has been done, or if it can be shewn from the acts of the corporation as a corporation, distinguished from the acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that it is evident that they do not intend, and are not willing, to sue. In all those cases the same doctrine applies, and the individual corporator may maintain the suit."

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Sir *George Jessel* says, it is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shewn that the wrongdoer had command of the majority of votes, so that it would be absurd to call the meeting. It must be upon this, if at all, that the plaintiff can frame his bill as it is framed.

Judgment.

I must be able to see from the allegations in the bill that it would be futile to ask—I will say in the first place—the directors of this company for their sanction to a bill in the name of the corporation calling the defendant *Cumberland* to account for the acts charged in this bill; that it would be an idle form; that it would be, as Sir *George Jessel* puts it; "absurd." Can I see this? It is not alleged that any of the acts charged have been approved by the present directors, or by those who were directors from time to time when they were done, or that any of the directors had any knowledge of the acts being done. Can I say that if brought to the notice of the present board, and an investigation in this Court asked for, it would be refused? If there is ground for these charges, or indeed for almost any of them, it would be a breach of duty on the part of the directors to refuse an investigation in a suit properly framed. I cannot assume that they will be guilty of such breach of duty. The reasons given to me for seeing this are that the majority of the directors have been, and are, virtually appointed by the alleged wrongdoer, and have not called him to account. The term majority implies that some of the directors have not been virtually appointed by him. If there is an independent minority, still less can I see that it would be futile—"absurd"—to ask the board of directors for such an investigation as is sought by this bill. I may suspect that a board, constituted as this is alleged to be, would prefer not to be asked, but it is a difficult thing to venture to refuse, and I should perhaps do them injustice to assume that they would give their assent even unwillingly.

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But, supposing a refusal by the directors—does that authorize a bill by a shareholder? None of the cases warrant such a proposition. It must be the shareholders, the corporators themselves, that must refuse, or it must be shewn that the sense of the corporators cannot, for some reason, be taken. This is apparent from the cases that I have cited. I would refer particularly to the language of Sir *James Wigram* in *Foss* v. *Harbottle*. He speaks of there being directors *de facto*, and so "no longer an impediment to convening a meeting of proprietors, who by their vote might direct proceedings like the present to be taken in the name of the corporation," and he speaks of the annual general meeting of the company that must have been held under the provisions of the Act of incorporation.

In this case there must have been meetings of the shareholders at the times required by the Acts affecting this company, and the Acts make provision for calling special general meetings at the instance of shareholders. This bill contains no single allegation upon which I could be asked to say that the plaintiff would ask in vain at a meeting of shareholders for such an investigation through this Court, as is sought by this bill.

Judgment.

My opinion, therefore, is, that the allegations in the bill, as they stand, do not shew sufficient reason for this suit being instituted by a shareholder. At the same time I hold it to be perfectly clear that the shareholder is not without remedy. I entirely subscribe to what was said by Sir *George Jessel*, in the late case at the Rolls, that "If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private character, and asking in such character the protection of those rights to which in their corporate character, they were entitled, I cannot but think that the principle so forcibly laid down by Lord *Cottenham*

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These observations would, of course, apply with the same force if the injury to the corporation were not by one of its members, but by one of its officers or servants. I may add, though it is not necessary for the decision of this case, that as to acts *ultra vires*, and so void and incapable of confirmation, a shareholder may, I incline to think, file a bill in the name of the corporation, and I apprehend that it must be so, simply on the plain ground that the rights of the minority or of any one shareholder cannot be overborne by the will of a majority: *Atwood* v. *Merryweather* (*b*). Whether a shareholder before filing such a bill must seek the assent of the directors, and, failing that, the assent of the other shareholders before filing such a bill, I express no opinion; there are reasons both ways, but I feel clear that failing to obtain such assent he has a right to file such a bill.

Judgment.

I incline to think, with the late Chancellor in *Brogdin* v. *The Bank of Upper Canada*, that the Attorney General is not a necessary party, and that if his presence be necessary in taking the accounts, he may be made a party in the Master's office. I agree that he would not be an improper party. The cases in which the Attorney General has been held to be a necessary party to suits in respect of charities or as representing public other than pecuniary interests, have no application in cases of this nature. I am of opinion that the directors are not necessary parties. No relief is sought against them; and, if the bill be, as in my opinion it ought to be, a bill by the company itself, the directors, as a portion of the corporators, will be parties.

(*a*) 4 My. & Cr. 619 S. C., 10 L. T. Rep. Chy. 138.
(*b*) L. R. 5 Eq. 468.

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The frame of the bill being on behalf of all other shareholders and corporators with the one exception of Mr. *Cumberland*, is objected to as improper, while the bill charges neglect of duty on the part of the directors. It is pointed at as an anomaly that they are made plaintiffs by representation in a bill complaining of themselves. The anomaly is rather apparent than real; they are trustees, and they are made to join with others in stating *inter alia* that they have been negligent trustees, not that they have connived with the alleged wrongdoer against whom relief is sought; but that they have not been vigilant in looking after him and his dealings in the affairs of the company. This negligence may or may not have been sufficient to charge them with complicity; the bill does not say that it is, and does not make them defendants. If not made defendants, they ought not to be excepted from the general body of corporators on whose behalf the suit is brought, and there is no real anomaly in trustees joining with *cestuis que trust* in a bill complaining of wrongful acts of an agent, even where the bill states that the trustees were negligent in not watching and checking the acts of the agent. The same observations apply in general to the charge of corrupt dealings between Mr. *Cumberland* and certain shareholders not named. It is not alleged indeed that these shareholders were trustees, but they are not made defendants, and that being the case, they could not properly be excepted from being plaintiffs by representation. It is nevertheless an anomaly; and an anomaly incident to the faulty frame of the bill. If the company in its corporate capacity were plaintiff, the suit would be free from such anomaly.

Judgment.

It is objected that the bondholders should be parties. Mr. *Maclennan's* answer is, that they are only creditors, and that creditors are not necessary parties to such a suit; and in that, as a general rule, I think he is right. It is another question whether the directors, *qua* direc-

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tors, should not be made parties in the Master's Office, or some one or two of them to represent their interest, they being constituents of the directors, and not being corporators; but that is a point with which I have nothing to do upon this demurrer.

My attention was not directed in argument to section 49 of the Administration of Justice Act of 1873: "No proceeding, either at law or in equity, shall be defeated by any formal objection." I only notice it to say that it has not been overlooked by me, and I have no doubt that it was not referred to by counsel for the plaintiff from the conviction that the objection to the frame of the bill is not a mere "formal objection;" and in that I entirely concur.

The demurrer that the suit is not properly framed, is allowed; but as some of the grounds of demurrer are not allowed, I follow the general rule to give no costs to either party. The demurrer allowed was indeed taken *ore tenus*, and is not a demurrer for want of equity in the ordinary meaning of the term, but only in the sense of the plaintiff, upon the allegations in his bill, not being himself entitled to complain of the matters, which, if complained of by the Company in which he is a shareholder, would undoubtedly be proper subjects for inquiry and relief in a Court of Equity.

Judgment.

I am of opinion that the plaintiff should have leave to amend.

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## SMITH v. COLEMAN.

*Will, construction of—Period of distribution—Costs—Vendor and purchaser.*

A testator devised his lands to his wife "to have and to hold the said premises with the appurtenances unto the said *J. S.*, for and during her natural life, and afterwards unto the surviving children of my cousin *T. S. S.*, to be divided, share and share alike:"

*Held*, that the period of distribution was after the death of the tenant for life—the wife; and that the children of *T. S. S.* who were living at that date or their issue were the only parties entitled to the estate.

The rule, which authorizes the payment out of the estate of the costs of all parties interested in obtaining the construction of a will, does not apply to a case where a purchaser refuses to complete his purchase of lands from a person claiming title under such will. In such a case the purchaser, if the question is decided against him, will, as in ordinary cases, have to pay the costs of the litigation necessary for obtaining the decision of the Court, upon the question of title.

Statement.

This was a suit for specific performance by vendors against a purchaser. It appeared that the owner of the lands in question, the late *Joseph Smith* made his will, dated 19th March, 1850, and died 26th April, 1850; and that the will was duly proved, 27th May, 1850.

The devise under which the plaintiffs claimed to be entitled to sell was: "I give and devise into my beloved wife *Jane Smith*," the lands in question, "to have and to hold the said premises with the appurtenances unto the said *Jane Smith*, for and during her natural life, and afterwards unto the surviving children of my cousin *Thomas Simpson Smith*, to be divided, share and share alike."

The plaintiffs were the surviving children of *Thomas Simpson Smith* above mentioned. It appeared that one of the daughters of *Thomas Simpson Smith* had married and died during the lifetime of the testator's widow,

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Mrs. *Jane Smith*, leaving one child, *William Lanley*, her surviving. The purchaser objected to complete the title, solely on the ground of this infant's interest, contending that on the death of his mother he became entitled to his mother's undivided share.

The cause came on by way of motion for decree.

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Mr. *Gordon*, for the plaintiffs, referred to *Cripps* v. *Wolcott* (*a*) as shewing that the period at which the parties interested were to be ascertained was the death of *Jane Smith*, the tenant for life; and that the plaintiffs, being the only children of *Thomas Simpson Smith* who were alive at the death of the tenant for life, were entitled to the whole of the lands devised. He also referred to *Wordsworth* v. *Wood* (*b*), *Littlejohns* v. *Household* (*c*), *Haddesley* v. *Adams* (*d*), *Howard* v. *Collins* (*e*), *Peebles* v. *Kyle* (*f*).

Argument.

Mr. *Proctor*, for the defendant. The devise here was to the children of the cousin as a class, and therefore on the death of his mother the infant became entitled to his mother's share or interest in the estate: which was a vested interest on the death of the testator, and nothing has since occurred to divest the interest the mother then took. He referred to and commented on *Adams* v. *Robarts* (*g*), *Re Theed's Trusts* (*h*), *Evans* v. *Evans* (*i*), *Re Bennett's Trusts* (*j*), *Home* v. *Pillans* (*k*), *Marcon* v. *Alling* (*l*), *Fearne* on Reminders, vol. i., pp. 241-3-5; *Jarman* on Wills, vol. i., p. 278.

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(*a*) 4 Mad. 13.
(*b*) 1 H. L. at. 152.
(*c*) 21 Beav. 29.
(*d*) 22 Beav. at 273.
(*e*) L. R. 5 Eq. 349.
(*f*) 4 Gr. 333.
(*g*) 25 Beav. 658.
(*h*) 3 K. & J. 375.
(*i*) 25 Beav. 81.
(*j*) 3 K. & J. 280.
(*k*) 2 Myl. & K., at 21.
(*l*) 5 Gr. 562.

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BLAKE, V.C.—I think that under this will the period of distribution is the time of the death of the tenant for life; some force must be given to the word "surviving." It must be referred to the word "afterwards," which would be properly read as "after the death of," and, therefore, we have a clause whereby a tenancy for life is given to the widow, and after her death the premises go to the children who survive that period; without the word "surviving" the effect of the will would be, to give vested interests to all the children alive at the death of the testator, and the period of division alone would be postponed until the happening of this event. The interest would be vested, the possession of it alone postponed.

It is impossible to reconcile the decisions on the subject. There is no doubt that the more recent cases differ much from the older ones on the point of the period of vesting. In *Neathway* v. *Reed* (*a*), Lord Chancellor *Cranworth* says: "According to the old principles of law the rule was, that the period of vesting should be at the moment of the testator's death. Now, however, in putting a construction upon the word 'surviving,' reference is had to the intention of the testator as discovered from the whole will. In my opinion where an estate is given to a person for life, and after his death to his 'surviving' children, those only who survive the tenant for life will take." In the same case Lord Justice *Turner* says "Now it is an established rule, that, if possible, some effect must be given to every word of the will. If the gift had been to *Catharine Neathway* for life, and after her decease to her children without the word surviving, the children living at the testator's death would have taken. I think that some effect must be given to the word 'surviving,' and that it must mean, surviving *Catharine Neathway*."

Judgment.

In *Re Gregson's* estate (*b*), it was held that the rule

(*a*) 3 De G. M. & G. 18. (*b*) 2 De G. J. & S. 428.

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as above laid down as to personalty applied also to realty. In that case Lord Justice *Turner* after laying down the well known rule that "the words of a devise are to be construed according to their common and ordinary meaning, and in the sense in which they would be understood by persons of common understanding," proceeds, "The word 'survivors' is a term of relation. It must have reference to some particular period of time. It is in this will placed in immediate connection with the death of the testator's widow, the tenant for life under the will, 'and on my wife's decease my will is that the above freehold property shall be divided share and share alike, amongst the following persons, or the survivors of them.'. No other period of time, except that of the death of the wife, is referred to by the testator. There is not in this clause, or, indeed, in any part of the will, any reference to the period of the testator's own decease. According to the ordinary and grammatical meaning of the word 'survivors,' it ought, therefore, as it seems to me to be referred to the death of the tenant for life. * * * Where, therefore, a testator uses words of survivorship with reference to his devisees, the words ought not, as I conceive, to be construed as referring to the event of the devisees dying in the testator's life time, if there be any other period to which they can reasonably be referred. * * * The cases upon this subject are, indeed, irreconcilable, and in saying so, I am only repeating what has been frequently said by other Judges. * * * In * * * *Young* v. *Roberts*, the House of Lords, appears to me to have held very decidedly that the general rule must be taken, that survivorship is to be referred to the period of distribution." Again, the Lord Justice continues, "In this almost painful conflict of authorities, we must consider the reasons of the conflicting decisions. * * * The law is subordinate to the intention. It comes into force only when the intention has been ascertained, and it cannot, as it seems to me,

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constitute the medium by which the intention is to be ascertained. * * I think that the words of a will ought to be construed according to their natural and ordinary meaning, unless they are qualified by context, or there be a settled rule of law affixing a different meaning upon them."

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After going over a large number of cases I cannot find any that seem to express more clearly than those from which I have quoted, that which appears to me to be the current of modern authority on the question which I am discussing. They accord with the rule as laid down in this Court in *Peebles* v. *Kyle* (*a*). I am of opinion that the plaintiffs are entitled to a decree for specific performance with costs, against the defendant,—the only question raised before me being whether or not under this will the plaintiffs were entitled to the estate they claimed. I am not aware of any rule which would absolve the defendant from payment of costs. Where a party claiming an interest under a will asks for its construction, there, as a general rule, the general estate of the testator pays for the opinion given as to what the testator meant, but I am not aware of any authority which goes so far as to say where a purchaser contracts with a devisee for the purchase of a piece of land, and then denies his title under the will, that the devisee is obliged to establish his position at his own cost, or that the purchaser can cast upon the general estate of the testator the expense of a litigation in which he has failed; a rule reasonable on many grounds amongst beneficiaries under a will cannot be extended to those occupying the position of outsiders or third parties. I think the costs must be borne, as is ordinarily the case in adverse litigation, that is, by the person failing therein.

Judgment

(*a*) 4 Gr. 334.

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CASS v. THE OTTAWA AGRICULTULAL INSURANCE COMPANY AND OTHERS.

*Corporation—Demurrer—Parties.*

An insurance company was incorporated by statute with a capital of $500,000, and by the Act it was provided that when $100,000 was subscribed and 10 per cent. paid up, a general meeting of the shareholders might be called and directors elected; but the company was not to commence business until at least $50,000 of its capital stock should be paid up. It appeared that the $50,000 required by the Act had been paid into the Minister of Finance, who had thereupon granted a license to the company to transact insurance business; but that the money had been borrowed for the purpose of being so deposited: that the 10 per cent. payment on stock subscribed for had not been paid in cash, but notes of hand taken from several of the subscribers therefor; and that the $50,000 of the stock required by the statute to be paid up had not been so paid. One of the stockholders, who had paid his deposit in cash, thereupon filed a bill setting up these facts and seeking to restrain the company from carrying on business under their charter until at least the $50,000 was paid up.

*Held*, on demurrer that (1) That the bill was properly filed by the shareholder alone, and that the same need not be on behalf of himself and others; (2) That *The Attorney General* was not a necessary party; and (3) That the shareholders who had paid their deposits by promissory notes were not necessary parties.

Statement.

The bill in this case was filed by a single shareholder in the Insurance Company, and stated that the company were incorporated by the Dominion Statute, 37 Vic., c. 89, for effecting contracts of insurance, against fire or lightning, on buildings, barns, and outbuildings, with their contents and other detached property. The third section of the statute declared that the capital stock should be $500,000. The seventh section declared that when and so soon as $100,000 of the said capital stock should have been subscribed, and 10 per cent. thereof paid in, the provisional directors might call a general meeting of the shareholders, at which the shareholders should elect fifteen directors, who should constitute a board of directors, and should hold office until

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the first Wednesday in January, in the year following; provided the said company should not commence business until at least $50,000 of its capital stock should be paid up. The eighth section declared that the instalments on shares should be payable at periods of not less than three months interval, and no instalment should exceed 5 per cent.

The bill further stated that the plaintiff was a shareholder in the company and had subscribed for five shares of the capital stock, and had paid 10 per cent. on his shares in cash. That he paid this on the faith and in the belief that all the other shareholders in the said company had paid, or would pay, before the said company commenced operations, 10 per cent. on the shares subscribed for by them, in cash.

That after $100,000 of the capital stock had been subscribed, the provisional directors called a general meeting of the shareholders on the 18th March, 1875, when the defendants other than the company and the secretary, were elected directors: After the election the directors chose the defendant the Hon. *James S. Read*, to be president, the defendant *Robert Blackburn*, to be vice-president, and the defendant *James Blackburn*, to be secretary of the company.

Statement.

In August, 1875, the directors deposited $50,000 to the credit of the Receiver General, and, thereupon, received a license from the Honorable the Minister of Finance of the Dominion of Canada, to transact the business of insurance within Canada.

The plaintiff charged as the fact was that the sum of $50,000 of the capital stock had not yet been paid up, but, that notwithstanding, the said company had commenced business: that the company made a call of 10 per cent. on the capital stock before commencing business, and had made no other call.

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That divers shareholders of the company, instead of payment of the 10 per cent. call in cash, delivered to the company promissory notes made by the said shareholders for the amount of the call, and the company received these notes as payment, and had reckoned them as cash in estimating the amount of capital stock paid up.

The bill named fifty-four shareholders who had thus paid in promissory notes, and alleged that there were many others who had done so likewise.

That the notes of seven of those named were dishonoured at maturity, and were lying dishonoured in the hands of the company, and that many others were also in the company's hands dishonoured.

Statement.

The plaintiff submitted that the 10 per cent. should have been paid under the statute in cash.

The plaintiff further charged, as the fact was, that the defendants had borrowed money on the credit of the company, to make the said deposit of $50,000, with the Receiver General, but from whom he had been unable to discover; and submitted that it had been illegal and *ultra vires*, and any further borrowing for such or the like purposes should be restrained.

That the taking of these promissory notes as cash was a fraud upon the plaintiff and other shareholders who had paid in cash, and was a fraud upon the public at large.

The bill prayed a declaration that the payment of shares in promissory notes was illegal and improper; that the borrowing of money by the defendants, on the credit of the company, in the manner and for the purposes before mentioned was illegal and improper; that

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an injunction should issue to restrain the defendants from carrying on the business of the company until at least $50,000 of the capital stock had been paid up in cash, or that the defendants, the directors, should be personally decreed forthwith to pay and satisfy in money the whole amount of the said promissory notes, and in default that an injunction might issue for the purposes aforesaid, or to restrain carrying on business till the hearing.

The defendants filed a demurrer on two grounds :

(1) Because the bill was filed by *Cass* alone, and not on behalf of himself and others.

(2) Because the Attorney General was not a party.

The defendants also demurred *ore tenus.*

(3) Because the shareholders who had paid in notes should be represented.

(4) Because the company were the proper plaintiffs, and

(5) For want of equity.

Argument.

Mr. *Cassells*, in support of the demurrer, referred to *Paterson* v. *Bowes* (*a*), *Armstrong* v. *The Church Society* (*b*), *Howland* v. *McNab* (*c*), *Cooper* v. Earl *Powis* (*d*), *White* v. *The Cœrmarthen Railway Company* (*e*), *Russell* v. *The Wakefield Water Works* (*f*), *Menier* v. *Hooper's Telegraph Works* (*g*), *Hoole* v. *The Great Western Railway Company* (*h*), *Mozley* v. *Alston* (*i*), *Bryce* on *Ultra Vires*, p. 493, 505, contending that the shareholders, or some of them, who were alleged to have given promissory notes in payment of their subscriptions

(*a*) 4 Gr. 170. (*b*) 13 Gr. 552. (*c*) 8 Gr. 48.
(*d*) 3 D. & S. 638. (*e*) 1 H. & M. 786. (*f*) 44 L. J. Ch. 96.
(*g*) L. R. 9 Ch. 50. (*h*) L. R. 3 Ch. 262. (*i*) 1 Phil. 790.

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for stock ought to have been made parties, and the suit ought to have been instituted by the company itself, and not by a single shareholder; although he conceded that one shareholder may take proceedings on behalf of himself, and all other shareholders having a right to complain; and a single corporator may sue where he clearly establishes a case of *ultra vires*. Here the plaintiff may rely on *Simpson* v. *The Westminster Hotel Company* (*a*); but see this case as reported in 2 DeG. F. & J. 141.

The statements of the bill amount in effect to an allegation that the directors have committed a wrong upon the shareholders, and to the public at large; in this view of the case *The Attorney General* ought certainly to have been a party to the suit, in order to protect the public interests.

Argument.

The bill in the 14th paragraph alleges the giving of promissory notes by the shareholders, and if the plaintiff desires a declaration that the payments made in this manner were illegal, then the parties so giving notes ought to have been made parties; *Shelford* on Joint Stock Companies, 138. The plaintiff must either have them before the Court, or rest entirely on his bill as between himself and the directors; but he cannot call upon the directors to make good the amount; the company itself is the proper party to do so.

Mr. *Bethune*, contra. The demurrer, for want of equity, is clearly not sustainable, as the plaintiff alleges that the provisions of the Act under which the company was incorporated have not been complied with. The company were certainly acting illegally in accepting promissory notes in payment of their stock. If they can legally do this, they may accept any thing else they please in payment: *Pellatt's* Case (*b*). What the Legis-

(*a*) 8 H. L. 712.

(*b*) L. R. 2 Ch. 527.

lature intended, and the words of the Act clearly mean, was, a payment by subscribers in cash.

It is alleged that the plaintiff is the only one who has paid up in cash; if so, he is entitled to say to the company, you are not to go on with the business until the cash deposit is made: *Elder* v. *The New Zealand Land Improvement Company* (*a*). In point of law the course pursued by the company is *ultra vires*; this being so the plaintiff has a right to call for the aid of this Court in restraining them from further action: *Jones* v. *Garcia Del Rio* (*b*), *Croskey* v. *The Bank of Wales* (*c*), *Fawcett* v. *Laurie* (*d*), were also cited.

PROUDFOOT, V. C.—[After setting forth the facts as above.]—The demurrer admits that there is a legal prohibition to commence business until $50,000 of the capital stock has been paid up; that only one call of 10 per cent. has been made; that promissory notes have been taken by the company as cash from many of the shareholders for this call, and that many of these notes were dishonoured and in the hands of the company; and that the money to make the necessary deposit with the Receiver General has been borrowed by the defendants (*i.e.*, all the defendants) on the credit of the company.

Jan. 3, 1876.

Judgment.

As only one call has been made of 10 per cent. the whole stock must have been taken up if the $50,000 has been paid on the stock subscribed for, the capital being $500,000. The amount of the dishonored notes must have been procured in some other way, and the admission is, that it has been procured by borrowing on the credit of the company. Whether it be competent for the company to accept notes as cash or not, I take it to be quite clear that borrowing money on the credit of the

(*a*) 30 L. T. N. S. 285.
(*b*) T. & R. 297.
(*c*) 4 Giff. at 330.
(*d*) 1 Dr. & S. 192.

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company to pay the 10 per cent. is beyond the powers of the company; and that is not a compliance with the requirement of the statute that 10 per cent. be paid; and that under such circumstances the company had no right or authority to assume to commence business—that it is a fraud upon the Act.

As to the taking of promissory notes for the call, I think it is also beyond the powers of the company. Cases have occurred in which it has been held that taking money's worth, e. g., a steamboat, *Howland* v. *Macnab* (*a*), or goods, *Pellatt's* Case, L. R. 2 Ch. 527, would be as good as a cash payment, unless expressly required to be paid in cash. But the *Niagara Falls Road Company* v. *Benson* (*b*), and *Nelson and Nassagaweya Road Company* v. *Bates* (*c*), are authorities that promissory notes are not sufficient.

Judgment.

The acts complained of being in my opinion *ultra vires;* has an individual shareholder a right to sue without suing on behalf of himself and the other shareholders except the defendants? There is no doubt that it is competent for one shareholder to institute a suit on behalf of himself and co-shareholders, for the purpose of obtaining relief in respect of illegal acts done or contemplated by directors. And most of the cases have been framed in that form: 2 Lind. Part 964 (3rd ed.), and cases there cited, *Paterson* v. *Bowes* (*d*), *Howland* v. *Macnab* (*e*).

In *Armstrong* v. *The Church Society* (*f*), *Mowat*, V. C., is said to have gone a step further, and held that the plaintiff must sue in that way. The acts complained

(*a*) 8 Gr. 47; Jones's Case, L. R. 6 Ch. 48; Drummond's Case, L. R. 4 Ch. 772; Re Raglan Hall Colliery Co., L. R. 5 Ch. 346; Pell's Case, L. R. 5 Ch. 11; Fothergill's Case, L. R. 8 Ch. 270; Maynard's Case, L. R. 9 Ch. 60.

(*b*) 8 U. C. R. 567.

(*c*) 12 U. C. R. 586.

(*d*) 4 Gr. 170.

(*e*) 8 Gr. 47.

(*f*) 13 Gr. 552.

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of were such as might entitle the corporation to relief against its officers, but did not absolutely, and of necessity, fall under the description of void transactions. The corporation might elect to adopt them, and hold the officers bound by them. In other words, the transactions admitted of confirmation at the option of the corporation. The corporation itself, in ordinary circumstances, might have been the plaintiffs. And in *Cooper* v. Earl *Powis*, (*a*), the bill was to restrain the company from applying to Parliament for an alteration of their charter, a matter which was clearly capable of confirmtion by the company.

Judgment.

In *Mozley* v. *Alston* (*b*), so often cited on questions of this nature, and to which I was referred, the bill was filed by two shareholders, not on behalf, &c., against a company and the directors, charging improper conduct on the part of the directors in refusing to affix the seal of the company to a resolution of the shareholders to oppose a bill in Parliament for the union of the company with another company; and complaining of irregular conduct in the election of the directors, alleging that twelve out of eighteen directors were illegally in possession of the office. Upon the latter ground the Chancellor held that the Court had no jurisdiction. Upon the former complaint he held that it was an injury to the corporation itself, and the corporation should have been plaintiffs, quoting with approval the decision in *Foss* v. *Harbottle* (*c*). It was a matter capable of confirmation by the whole body of shareholders, and the bill alleged that a large majority of them approved of the objects of the bill, so that there was no difficulty in the way of setting the corporation in motion. The marginal note is calculated to mislead. It is true, as there stated, that the plaintiffs could not impeach the *illegal* transaction there attacked, but it was not because they were mere shareholders, but that the Court had no jurisdic-

(*a*) 3 DeG. & S. 688. (*b*) 1 Phill. 790. (*c*) 2 Hare. 461.

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tion on the subject complained of. There is nothing in the case to show that to attack an illegal transaction, the plaintiffs must represent all the shareholders except those implicated in it.

These cases do not seem to me to establish the proposition that where the acts are void as not authorized by the act of incorporation, and admit of no confirmation, that an individual corporator cannot sue. And, on the other hand, in *Hoole* v. *The Great Western Railway Company* (*a*) Lord *Cairns* says (*b*): "I have a very strong opinion that a member of a company may maintain a bill against the corporation and the executive to restrain them from doing an act which is *ultra vires*, and, therefore, illegal;" and at p. 277, *Rolt*, L. J., says "If the act complained of is illegal, as I think it is, I do not at present see why any single shareholder should not be at liberty to file a bill to restrain the company from exceeding their powers:" And in *Russell* v. *The Wakefield Water Works Company* (*c*), Sir *George Jessel*, M. R., expresses the rule in similar terms, and refers to *Simpson* v. *The Westminster Palace Hotel Company* (*d*), as a decision to the same effect. The bill in this last case seems to have been filed on behalf of the shareholders, but Lord *Campbell* says "That any single shareholder has a right to resist any act that is *ultra vires*, and a Court of Equity will interpose on his behalf by injunction."

Judgment.

I think this ground of demurrer must be overruled.

It is next objected that the Attorney General is a necessary party to the suit; that the public interests are concerned, the bill alleging the conduct complained

(*a*) L. R. 3 Ch. 262. (*b*) At p. 272.

(*c*) 44 L. J. N.S. Ch. 496; S. C., L. R. 20 Eq. 474. See also McDougall v. Gardiner, L. R. 1 Ch. D. 13 (reported since judgment given).

(*d*) 8 H. L. 712.

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of to be a fraud upon the public. (Bill, section 20.) The decisions in *Paterson* v. *Bowes* (*a*), and *Boulton* v. *The Church Society* (*b*), dispose of this objection, to which may be added *Guelph* v. *Canada Company* (*c*). In the latter case the injury complained of was one not only affecting the plaintiffs, but in a lesser degree the public. The Chancellor said "Now, it cannot be denied that the inhabitants of Guelph have a peculiar interest in the market place. The infringement complained of would obviously inflict a special injury on the inhabitants of Guelph. A private individual sustaining special damage is allowed to file a bill of this sort; and it is difficult to understand why this municipality should not have the same right." In the present case the possible injury to the public is remote, and of that vague and indefinite character that would be difficult to define, or on which to predicate a prayer for relief. The injury to the company and to the plaintiff is direct and immediate, and I see no reason why the Attorney General should be deemed the necessary plaintiff, or a necessary party. The clauses of the Act respecting Insurance Companies afford no ground for the contention. That Act provides that only certain companies may carry on insurance in Canada,—requires a deposit with the Receiver General of a certain amount,—provides for the issue of a license,—and directs an inspection annually of their affairs, and appoints a mode of procedure for the suspension or cancellation of the license, by report to the Minister of Finance, and by him to the Governor in Council. But this is a special jurisdiction for the protection of the public from "Bubble" Insurance Companies, and does not at all interfere with the ordinary jurisdiction of the Courts to regulate the affairs of such companies or to prevent them from committing acts not authorized by their charter.

Judgment.

This objection must also be overruled.

(*a*) 4 Gr. 170.
(*b*) 14 Gr. 123.
(*c*) 4 Gr. 633.

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It is further contended that some of the shareholders who have paid the call by their promissory notes ought to be parties; and were the suit brought for the investigation of conduct of the directors, improper and fraudulent it may be, but such as the whole body of shareholders might condone and ratify, or were it for relief which practically involves the dissolution of the company, and an account and application of the funds, the cases would justify a demurrer on this ground: *Lund* v. *Blanshard* (*a*). Where a call had been made on the shareholders for payment of a debt improperly incurred, and a number of shareholders had paid the call, some of these were held to be necessary parties. In *Sharp* v. *Day* (*b*), often cited in cases of this kind, the plaintiff sought to have an account of voluntary subscriptions raised for the discharge of the liabilities of an abandoned railway company, to which the plaintiff had refused to contribute "It belongs exclusively to the subscribers, and if he wishes to enforce any supposed claim with respect to it, he cannot, I conceive, do this by representing or uniting himself with them, but must proceed adversely against them, and in such a manner as to give them an opportunity of properly defending their rights:" *Lovell* v. *Andrew* (*c*) was a case of an abandoned railway project, and the directors had repaid to some of the shareholders a certain sum per share; the plaintiff had not received any sum on his shares, and sought by his bill an account and application of the receipts and payments of the directors, and a distribution of the funds. It was held that the plaintiffs could not represent those who had received payment on their shares, and that they should be made defendants.

Judgment.

Upon this, as on several other of the matters argued on this demurrer, the law is in a state of transition, and cannot yet be considered as definitely settled. "The rule which requires all parties interested to be parties,

(*a*) 4 Hare 9. (*b*) 1 Phill. 790. (*c*) 15 Sim. 581.

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has been relaxed to meet the exigencies of modern times :" *Mozley* v. *Alston* (*a*). And modifications may be expected from time to time as circumstances may require. The distinction between cases of irregularity and of illegality are plain and distinct; and while in the former it may be reasonable enough to require the persons concurring in, or assenting to, the irregular proceeding to be present, the same reason does not apply to the latter, for no concurrence or assent, no acquiescence or ratification can render valid what is beyond the powers of the company to undertake or perform.

I am content to rely upon the opinion of Lord *Cairns*, in *Hoole* v. *Great Western Railway* (*b*), that in cases of illegality the company sufficiently represent all the members of the corporation other than the plaintiff.

In most of the cases it will be found that the objection has arisen where the plaintiffs assumed to represent all but the directors guilty of the misconduct, and the decisions were that they could not represent those who had interests adverse to themselves. That reasoning does not apply where the plaintiff has a right of suit irrespective of the other shareholders, as in this case I think he has.

Judgment.

It is lastly insisted that there is no equity as the company ought to be the plaintiffs; that the suit is brought for the purpose of compelling payment by the directors of the notes improperly taken by them, and which have been dishonoured, *i.e.*, to bring into the coffers of the company the 10 per cent. that ought to have been paid there. If it were only the act of the directors that was impeached, this might be a valid objection. But the charge in the bill is that the company received the promissory notes; that the company accepted them as payment; that they are now in the company's hands dishonoured; and that the company have

(*a*) 1 Ph. 790. (*b*) L. R. 3 Chy. 262, 272.

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borrowed the money to make the deposit with the Receiver General: *McMurray* v. *The Northern Railway Company and Cumberland*, ante p. 476, to which I was referred, before the Chancellor, is no authority for the present contention. The learned Judge expressly distinguishes it from the class of cases where the act complained of is that of the company itself. He says that *Bagshaw* v. *Eastern Union Railway Company* (*a*), "is one of a class of cases in which the suit cannot be by the corporation itself, because the acts sought to be restrained or remedied is the act of the corporate body itself. That was the ground of decision in *Winch* v. *The Birkenhead, Lancashire and Cheshire Junction Railway Company* (*b*); and *Salomons* v. *Laing* (*c*), is another of the same class, and there are others." And referring to *Brogdin* v. *The Bank of Upper Canada* (*d*), he says "The decision itself, however, I apprehend was right upon another ground—that it was an act of the corporation itself that was impeached by the bill, and the corporation was properly made a defendant, and could not have been plaintiff in the suit."

Judgment.

So far as the bill seeks to have the directors ordered to pay the amount of the dishonoured notes, relief of that kind cannot be administered in this suit, but only in a suit in which the company is plaintiff. But that is an alternative form of relief, and is asked in case an injunction do not issue to restrain the defendants from carrying on the business until $50,000 be paid. And it is a rule that if the plaintiff is entitled to *any* relief, however small, the demurrer will be overruled: *Saunders* v. *Richardson*, (*e*), *Innes* v. *Mitchell* (*f*).

All the demurrers are overruled, with costs.

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(*a*) 7 Hare 114.
(*b*) 5 DeG. & S. 562.
(*c*) 12 Bea. 377, 383.
(*d*) 13 Gr. 544.
(*e*) 2 Drew. 128.
(*f*) 4 Drew. 57.

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## Rose v. Anger.

*Exchange of lands—Defective title—Rescission.*

Where two owners of land effect an exchange, and mutual conveyances are executed between the parties, and one of them loses the estate conveyed to him in consequence of the want of title in his grantor, he is not obliged to resort to an action on the covenants in the deed conveying the property to him; but may file a bill in this Court for a rescission of the bargain, and a restoration of the lands conveyed by him.

This was a suit by *Margaret Anne Rose* against *William Henry Anger* and *Sarah Ann Anger*, his wife, claiming a reconveyance of a lot of land in the village of Trenton, and repayment of $230, with interest, under the following circumstances:

Statement.

The plaintiff was the owner of a lot of land on Marmora street, in Trenton, and the defendant *Sarah Ann Anger* was the apparent owner of a lot on Bridge street, in the same village. They agreed to an exchange of their properties, the plaintiff to give, in addition to her lot, cash and chattels to the extent of about $230. The defendants stated that, at the time of the exchange, they told the plaintiff that it was alleged that the premises agreed to be transferred to her, did not belong to the female defendant, but that they were the property of the husband, and that some of his creditors were taking proceedings to realise their claims against him out of this property; that, as a matter of fact, the property belonged to the wife, that it had been, in good faith, bought and paid for by her, and that certain proceedings commenced against them must consequently fail; that on this statement the exchange was completed, deeds were passed between them, and the defendants insisted that the plaintiff was not entitled to a rescission in the case of failure of title, or to any relief except that which might be given on the covenants in the conveyance made to her by the defendants.

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It appeared that the creditors had proceeded against the defendants, who defended the suit, and it was proved that the transaction between the defendants was, so far as creditors were concerned, fraudulent; and the creditors were taking steps under the decree made in their favor to sell the property conveyed to the plaintiff, and the same would, thereunder, be entirely lost to the plaintiff, as she had no defence to the proceedings.

The cause came on for the examination of witnesses and hearing at the sittings of the Court, at Belleville, in the spring of 1875, when the facts above mentioned were clearly established.

Mr. *Bethune*, for the plaintiff.

Mr. *Dickson*, for the defendants.

May 19th. Judgment.

BLAKE, V. C.—It was argued for the plaintiff that, as this is the case of an exchange of properties, the usual rule as to the rights of parties who may have accepted a conveyance does not apply. I do not think this fact, as the law stands at present, is one which benefits the plaintiff. The following is the statement of Mr. *Davidson*, in his work on conveyancing as to this subject (*a*). "As an exchange operating at common law previously to the 31st of December, 1844, conferred a right of re-entry on the lands given, in case of eviction from those taken in exchange, it becomes necessary, on a sale of lands which were thus taken in exchange to shew the title not only of those lands to be sold, but also of those which were given in exchange for them: *Bustard's* Case 4 Rep. 121. This operation of an exchange was taken away by the 7 and 8 Vict., cap. 76, sec. 6, and the 8 and 9 Vict. cap. 106, sec. 4."

(*a*) Vol. I. p. 463, and note.

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Section 10 of C. S. U. C., cap. 90, enacts that neither the word "grant" nor "exchange" shall create any warranty or covenant by implication. It is true that the effect of the word "give" is not referred to here as it is in the imperial statute; but as the words "exchange" and "grant" were the potent words which gave effect to the rule, I presume that here, as in England, an exchange since the passing of the above enactment, puts the parties in respect of the matter under discussion, in the same position that they would occupy in the case of an ordinary sale and purchase. The statement in Sir *Edward Coke's* Reports (*a*) is, "That in every exchange lawfully made, this word *excambium* implies itself *tacite* a condition, and also a warranty, the one to give re-entry, and the other voucher and recompense, and all in respect of the reciprocal consideration, the one land being given in exchange for the other; but it is a special warrantry, for upon the voucher, by force of it, he shall not recover other land in value, but that only which was by him given in exchange; for inasmuch as the mutual consideration is the cause of the warranty, it shall, therefore, only extend to land reciprocally given and not to other land; and this warranty runs only in privity, for none shall vouch by force of it, but the parties to the exchange or their heirs, and no assignee."

Judgment.

There is no doubt that the defendants fraudulently misrepresented to the plaintiff the true state of matters; that the plaintiff had not the means of ascertaining the truth of the statements made by the *Angers* which were in respect of matters, lying to a great extent, if not entirely within their knowledge. They stated that there was no fraud in the transactions by which the wife became apparently possessed of this property; and on the faith of this representation the plaintiff bought. As a matter of fact this was not true. If the plaintiff had the means of ascertaining the truth or falsity of this statement, then, I think, that the maxim *caveat emptor* re-

(*a*) 4 Rep. 121.

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quired her to investigate the matter, and if she did not choose to do so, she must take the consequences. I understand the rule to be, that if one party makes a statement of fact to another, which is, to the knowledge of the person making it, false, the truth or falsity of which the person to whom it is made, has no means of ascertaining, and on the faith of that statement a purchase is completed, the Court will rescind such a transaction where impeached by the person imposed on. Such a case forms an exception to the general rule that where a party has so far closed the transaction as that he has accepted a conveyance, there he is left to his remedy on his covenants, on which alone he must rely for protection against defects in his title.

Judgment.

In *Clare* v. *Lamb* (*a*), which was an action at law, in which the defendant failed to recover back the purchase money which was lost to him, there was ignorance without fraud on the part of the vendors, the defendants. That case was decided chiefly on the statement of the law as laid down by Lord *St. Leonards*. But although the passages quoted sustain that decision, yet at page 552 of the 14th edition of *Sugden's* V. & P., it is shewn that there are exceptions in favour of the purchaser, "Although the purchase money has been paid, and the conveyance is executed by all the parties, yet, if the defect do not appear on the face of the title deeds, and the vendor was aware of the defect and concealed it from the purchaser, or suppressed the instrument by which the incumbrance was created, or on the face of which it appeared, he is in every such case guilty of a fraud, and the purchaser may either bring an action on the case, or file his bill in equity for relief." See also *Brunskill* v. *Clarke* (*b*), *Seney* v. *Porter* (*c*), *McRory* v. *Henderson* (*d*), *Edwards*

(*a*) 32 L. T. N. S. C. P. 196.
(*b*) 9 Gr. 430.
(*c*) 12 Gr. 546.
(*d*) 14 Gr. 271.

v. *McLeay* (*a*), *Conybeare* v. *New Brunswick Railway Company* (*b*), *Attwood* v. *Small* (*c*). 1875.

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Notwithstanding the coverture of the defendant *Sarah Anger* under the old law, this transaction could hardly have stood, on the principle laid down in *Savage* v. *Foster* (*d*), *Vaughan* v. *Vanderstegen* (*e*), *Leary* v. *Rose* (*f*), *Re Shaver* (*g*); but under the recent enactments as to married women I do not see that the one defendant stands in a better position than the other. I think the plaintiff is entitled to a decree for rescission; to a reconveyance, to repayment of $230 and interest, and the costs of the suit. Both the defendants received the proceeds of the exchange, and therefore the order for repayment must be against both of them.

Judgment.

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## KERR v. READ.

*Insolvent—Demurrer—Discovery—Parties—Practice.*

An insolvent who has made an assignment under the statute is not a proper party to a bill in respect of transactions occurring before his insolvency, notwithstanding the bill seeks to obtain information of facts which are unknown to any one, other than the insolvent; although if it were shewn that he had been engaged in fraudulent transactions whereby he had acquired property, it would seem he might be made a party; and that, although the property so acquired had, by the operation of law, been transferred to his assignee.

Under no circumstances is it proper to make an insolvent a defendant for the purpose of discovery only.

A proper mode of taking an objection to a person being made a defendant is, by demurrer to the bill; he need not wait until he is examined, and then object to the questions put to him.

The bill in this case was filed by *John Kerr* against *John Breckenridge Read*, *Alexander C. Chewitt*, his

(*a*) 2 Swa. 287.
(*b*) 1 De G, F. & Jo., 572.
(*c*) 6 Cl. & Fin. 232.
(*d*) 9 Mod. 35.
(*e*) 2 Drew. 379.
(*f*) 10 Gr.
(*g*) 3 Ch. Ch. 379.

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wife and infant children, together with *William C. Chewitt*, defendants, setting forth (1.) that *William C. Chewitt* and one *Walker R. Brown*, had voluntarily assigned their estate and effects to the plaintiff under the provisions of the Insolvent Act, for the benefit of creditors; (2.) that *James G. Chewitt*, father of the defendants *Alexander* and *William*, having been possessed of a large amount of property, real and personal, died on the 7th December, 1862, having first made his will dated 2nd June, 1858, whereby he devised his whole estate to his said sons (whom he also appointed his executors), upon trust to convert and get in the whole of such estate, and after retaining £4,500, to be applied for a special purpose declared in such will, the trustees were to divide the residue into four equal parts, one of which was to be invested for the benefit of his widow during her life; and after her death such fourth part or share was to be divided between the trustees equally for their own benefit; (3.) that by an agreement bearing date 1st April, 1865, the said *Alexander C. Chewitt* for a valuable consideration sold and conveyed to *William C. Chewitt*, absolutely, all his interest in such fourth share for his own use and benefit, and the said *Alexander* thereupon ceased to have any claim thereto (except as trustee) * * *; (5) that shortly after the death of *James G. Chewitt* it was ascertained that such fourth part or share would be about £4.000, which amount was invested under the provisions of the will, but in what way or upon what securities the plaintiff was wholly ignorant of; (6.) that by a deed of settlement of 31st December, 1867, *William C. Chewitt* conveyed to the defendant *Read* all his (*W. C.'s*) beneficial or equitable title, interest, &c., in the said fourth share or interest without prejudice to his legal interest as trustee, and which said beneficial interest the defendant *Read* was to hold upon trust either to permit the same to remain upon the securities in which it should be invested upon the death of their mother; or during the life of the said *Alexander C.*

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*Chewitt* with his consent in writing, and after his death then at the discretion of the trustee or trustees for the time being, call in and compel payment of such fourth share and reinvest the same in the manner therein mentioned, and to pay the annual proceeds of the said trust moneys to the said *Alexander C. Chewitt* during his life, and after his death to his wife during her life, and after the death of the survivor of them in trust for the children or remoter issue of the said *Alexander C. Chewitt*, upon such conditions and restrictions as he should appoint; and in default of appointment in trust for such children; (7.) that *Read* accepted the trust under the said instrument, and the persons interested thereunder were the defendants *Alexander C. Chewitt*, his wife and children; (8.) that no money or other consideration passed to *William C. Chewitt* for such fourth share, and the conveyance thereof was wholly voluntary, although pretended that some consideration passed to the said *W. C. Chewitt* for his beneficial interest therein; (9.) that by certain other deeds of settlement and grant executed at the same time, the said *William C. Chewitt* granted and conveyed to one *John Bradford Cherriman* other and the greater portion of his property and effects, amounting in value to $50,000, in trust for the benefit of the settlor and his family. At the time of such conveyance the settlor was largely indebted, and was contemplating and was about to enter into co-partnership with the said *Walker R. Brown*, under the style or firm of "*W. R. Brown & Co.*," in the business of Bankers and Brokers, which, as *W. C. Chewitt* knew, was one of great risk, and which partnership was shortly afterwards entered into; and it was with the fraudulent view and intention of protecting and securing such settled property from his creditors, and from any liabilities he might incur in such business of banker and broker, that the said instruments were executed. (11.) That *William C. Chewitt* retained these assignments in

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his possession until about the 13th July, 1868, when he caused such as required registration to be registered, and notwithstanding the execution thereof he dealt with and treated the properties embraced therein as his own. (12.) That about the said month of July, 1868, the firm of *W. R. Brown & Co.*, had, through their speculations in gold and otherwise, become hopelessly insolvent, and were in fact in insolvent circumstances, which fact being known to *William C. Chewitt*, he caused the deeds to be registered, and at the same time delivered to the defendant *Read* the one in which *Alexander C. Chewitt* was, as above stated, interested. (13.) That *William C. Chewitt* kept concealed the fact of his having made such disposition of his property, well knowing that its publicity would prevent his obtaining credit; and he held himself out to the public, and particularly to those with whom he and said *Brown* dealt, as being possessed of an immense amount of real and personal estate, derived from the estate of his father, and from his own trading and speculations, and he obtained credit, and was trusted accordingly * * * (15.) That at the time of the assignment in insolvency to the plaintiff the liabilities of *W. R. Brown* and *W. C. Chewitt* amounted to $120,000, and their assets to $8,000 only. (16.) That *W. C. Chewitt* was aware before entering into partnership with *Brown* that the latter had speculated greatly beyond what his capital would justify, and had assisted him in sundry ways in carrying on his said business; and in consequence of their advertisements after entering into the said co-partnership they had induced several persons to deal with, and entrust them with their means, and unless the said deeds of trust were set aside their creditors would not receive twenty cents on the dollar of those claims. (17.) That *W. C. Chewitt* was well acquainted with business, and fully aware of the risks run by persons speculating in gold. (18). That *W. C. Chewitt*, at the time of such voluntary settlements, was heavily indebted, both on his

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own account and as surety; and was also engaged in gold speculations, as aforesaid, and intended to continue such speculations; and apprehending that misfortune might overtake him, determined to put his property beyond the reach of his creditors by means of such assignments. (19.) That the defendants claimed that the deed to *Read* was made in good faith, and that the defendants, other than the defendant *W. C. Chewitt*, were entitled to hold the property thereby conveyed. (20.) That the property so settled was of the value of $65,000, or thereabouts. (21.) That the deed of the 31st December, 1867, to *Read*, of such fourth share or part was made with the fraudulent view of benefiting the defendant (*W. C. Chewitt*), and protecting the same from his creditors, as well as others that he might become indebted to, in the course of his business as such banker.

(21 *a*). The bill further charged that the said *William C. Chewitt* is well acquainted with all the transactions aforesaid, and those referred to in the answers of the defendants *John Breckenridge Read* and *Alexander C. Chewitt* to the original bill filed in this cause, and charged that he was a proper party to this suit, for the purpose of making a discovery of facts connected with the the matters aforesaid, and that plaintiff could not safely proceed to a hearing without such discovery. (21 *a I.*) that some of the matters, concerning which discovery was sought from the defendant *William Chewitt*, were as to the alleged consideration for the said assignment of said one-fourth share or interest referred to in paragraph eight of the bill, and of the circumstances connected with the claim of *Martha S. Chewitt*, the widow, to the alleged consideration; when the said alleged consideration, if any, was received by the said *William C. Chewitt*, and whether the same, or what is alleged by the defendants to have constituted the same, was not settled or arranged otherwise than in connection with the settlement of such one-forth share or interest so

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assigned to the defendant *Read*; and whether there was any agreement such as set out in the answers of the defendants *Read* and *Alexander Chewitt* relative to such claims, with the particulars respecting such agreement, if any; also the circumstances relating to, and the consideration paid or given by the defendant *William C. Chewitt* to the defendant *Alexander C. Chewitt*, or on his account or behalf, for the assignment to the said *William C. Chewitt* of the share of the one-fourth share or interest to which the said *Alexander C. Chewitt* was entitled under the will of the said testator; also the negotiations for and the circumstances relating to the assignment to the defendant *Read* of such one-fourth share or interest; also particulars of the property to which the said defendant *William C. Chewitt* was entitled or which he was possessed of at the time of such assignment or settlement, and of the disposition made by him thereof, and also of the debts which he the said *William C. Chewitt* owed at the said time, and generally as to the position of his business or affairs at the said time, and whether he contemplated any change in his said position or business, or intended incurring any further or additional liability, at or about the said time; and what changes he did in fact afterwards make in his business and what other engagements and responsibilities he subsequently assumed until the time of his said insolvency, which discovery "concerning the said matters in this paragraph set forth is essential to the proper determination of this case; and is obtainable from no one else but the said *William C. Chewitt*, and without the knowledge thereof your orator will be unable to prove the necessary facts against the other defendants."

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The bill further charged that the said fourth share had never been invested, as directed by the will of the testator; and that the defendants *W. C.* & *A. C. Chewitt* had invested the same on personal securities only, and that they claimed a right, and threatened and intended

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to dispose thereof; but the plaintiff submitted that they should be restrained from getting into their hands the moneys constituting such one-fourth share; and further, that the said deed of trust of said fourth share was fraudulent and void, and ought to be set aside.

The prayer of the bill was, amongst other things, that the deed to the defendant *Read* might be declared fraudulent and void as against the plaintiff as such assignee, and as against the creditors of *W. C. Chewitt*, and the same set aside and cancelled; and that the plaintiff, as such assignee, might be declared beneficially entitled to the share so assigned, subject to the life estate of the widow: that the defendants *W. C. Chewitt* and *Alexander C. Chewitt* might be restrained from collecting or getting in the said moneys: that the plaintiff might be declared entitled to discovery from the said *W. C. Chewitt*, and that he might be ordered to make discovery of all circumstances in his knowledge relating to the same, and for further and other relief.

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The defendant *William C. Chewitt*, as to so much of the bill as sought to charge him with having fraudulently, and with intent to defeat, delay, and hinder his creditors, assigned and conveyed to the defendant *Read* the said fourth share, and as sought discovery from him in respect thereof, demurred for want of equity.

A demurrer had been filed by the same defendant to the original bill on a similar ground, which had been submitted to by the plaintiff, who thereupon amended his bill, the principal part of the amendments being contained in paragraphs 21*a* and 21*a* I., which are above set forth in full.

Mr. *Attorney-General Blake*, and Mr. *Moss*, for the demurrer, referred to *Wilson* v. *Chisholm* (*a*), *Gilbert* v. *Lewis* (*b*), contending that both of these cases are

(*a*) 11 Grant 471. (*b*) 1 DeG. J. & S. 46.

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against the insolvent being a party to a suit to set aside a fraudulent conveyance. See the portion of the Lord Chancellor's judgment at page 51 of the latter case. The allegations must be such as to lead the Court to the conclusion that there will be a failure of justice unless there is a preliminary discovery, before the insolvent will be allowed to be joined as a party. The general rule is, that you may join a person who is a party to a fraud, and this merely for the purpose of obtaining payment of costs; but one exception to that rule is that in such a case an insolvent cannot be added; and the only exception which can be grafted upon this exception is, that there will be a failure of justice unless the insolvent is a party for the purpose of discovery. *Weise* v. *Wardele*(*a*) shews that the current of authority is for limiting the cases in which a party to a fraud can be joined for the payment of costs. We ask the Court therefore to determine (1) that, as a general rule, in no case can an insolvent be added as a party; and (2) that if he can be joined, it is only in a case where there would be a failure of justice if he were not before the Court.

Argument.

Only the parties interested in the matters in question are proper parties to a bill for discovery: *Daniell's* Chancery Practice, 280-1. *Hayball* v. *Shepherd* (*b*), decides that a bill for discovery cannot be filed except in aid of an action at law. See also *VanHeythusen's* Equity Draughtsman, p. 485. So far as this insolvent is concerned, the bill is one purely for discovery. The bill, being one for discovery, must be in the forms of bills of this kind before the general orders of 1853.

Mr. *Attorney-General Mowat* contra. The Court must look at the bill as a whole to see whether there is sufficient to entitle the plaintiff to the discovery. The trustee should be bound to tell all the circumstances and facts connected with the validity of the assignment made

(*a*) L. R. 19 Eq. 171. (*b*) 12 Grant 426.

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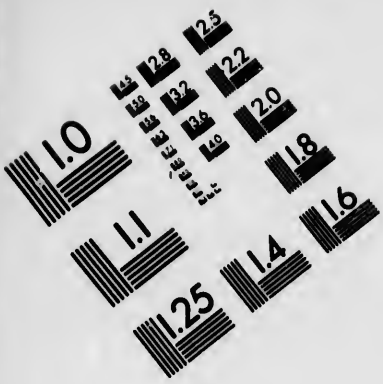
by him. The questions bearing upon the validity or invalidity of the instrument are peculiarly within the knowledge of the trustee. The discovery is also necessary in assisting with the proofs afterwards. The mere praying for costs against a party will en[illegible] the plaintiff to make him a party to the suit, and [illegible]e discovery required can be obtained. In cases of fraudulent assignments by a debtor, the creditor can make the debtor (the assignor) a party, and he can be examined most minutely as to all the circumstances connected with the alleged fraudulent assignment.

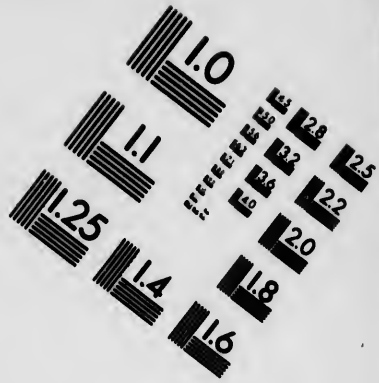
The principle in this last-mentioned class of cases applies to the case here. If the defendant *William C. Chewitt* has made a fraudulent transfer of this property, he is chargeable with the costs; if he has made a proper transfer he will be entitled to receive his costs.

Argument.

We contend that the defendant who demurs in this case is not only a proper party, but a necessary party. The plaintiff is interested in the fund of $16,000, subject to the life estate of the widow, and is entitled to have a discovery from this defendant of what he has done with the fund. There would be a failure of justice if the plaintiff did not get the discovery he seeks. It was just as easy to make specific charges in the bill as general charges, and on demurrer the statements in the bill are taken as true. It is shewn in the bill that the information now sought is needed for the purposes of the suit, and so that there may not be a failure of justice.

Another question is, whether the defendant should demur to the discovery? Is not the proper course for him to object when the questions are put to him? As long as it appears from the bill what the discovery is sought in respect of, it is sufficient. It is not necessary to set out the interrogatories in the bill.

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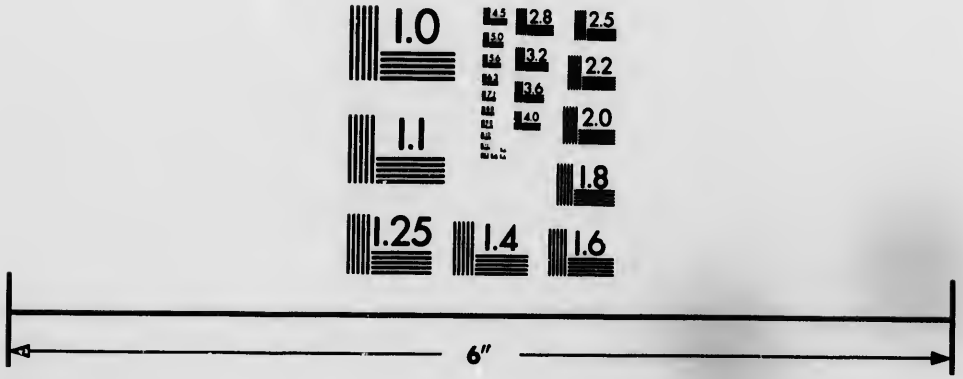




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See *Gilbert* v. *Lewis* (*a*), where the language of the Lord Chancellor is explicit as to where a bankrupt could be made a party for the purpose of discovery.

Mr. *Attorney-General Blake*, in reply. All the discovery that is needed could be obtained in the insolvency proceedings by any creditor. 1 *Daniell* 534 sets at rest the question as to whether a party can demur to the discovery. The former demurrer admitted that the defendant *W. C. Chewitt* was a proper party in his representative capacity. In submitting to that demurrer the plaintiff admitted that the defendant was not a proper party in his individual capacity. *Wilson* v. *Chisholm* (*b*) shews that the statements in the bill asking discovery were very similar to those here.

Argument.

The mere fact that a question may arise as to whether the defendant may or may not be ordered to pay costs, is not sufficient to warrant the plaintiff in making him a defendant when it so clearly appears that the only object in so adding him is to obtain a discovery from him. If it were, then, on the like principle, a plaintiff might in any case add as a party defendant any one conversant with the facts of the case, but who declined to communicate those facts to the plaintiff. It is out of the question here to contend that on the allegations in this bill there will be a failure of justice unless the plaintiff gets the discovery he seeks from *William C. Chewitt*.

Sep. 29.

Judgment.

PROUDFOOT, V. C.—The question raised by this demurrer is, whether an insolvent, who is properly a party to the suit, as a trustee of the estate under which he derived the property, alleged to have been fraudulently assigned by him to defeat his creditors, can be required to make a discovery of the matters set forth in the bill (paragraphs 21a and 21a I); or, in other words, whether he is a

(*a*) 1 DeG J. & S. 47 at p. 50. (*b*) 11 Gr. 471.

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proper party to the bill for the purpose of extracting such discovery. For so far as that object is concerned he must be considered as made a party to the suit in two distinct capacities, one as trustee of the estate under which he derived his property, and the other as an insolvent charged with having made a fraudulent conveyance.

It is true, that he need not answer this part of the bill, but that would only postpone the discussion to a later period, when he might demur to questions put to him on examination. I think it is open to him to take the objection now, and that he need not wait till examined to make the objection (*a*).

The statements in the bill which it is contended entitle the plaintiff to the discovery are, that the insolvent is well acquainted with all the transactions stated in the bill and referred to in the answers of the other defendants, and that the plaintiff cannot safely proceed to a hearing without such discovery (*b*).

Judgment.

That some of the matters concerning which discovery is sought from the insolvent are, as to the alleged consideration for the assignment of the property to defendant *Read*, and of the circumstances connected with the claim of *Martha S. Chewitt* to the alleged consideration, when the said consideration was received by the insolvent, and whether it was not settled otherwise than in connection with such assignment, &c.; and this information is obtainable from no one else but the insolvent, and without the knowledge thereof the plaintiff will be unable to prove the necessary facts against the other defendants.

No relief is sought against the insolvent in his individual capacity. The plaintiff only asks a discovery

(*a*) 1 Dan., C. P., 534. (*b*) s. 21a, s. 21a I.

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to enable him to frame his case for establishing the facts as against the other defendants.

For the purpose of this demurrer our insolvent law is considered by both parties to have the same effect as the bankruptcy laws in England.

To permit an insolvent to be made a party to a suit for any purpose, after the law has divested him of all interest in the property, violates one of the elementary rules of equity pleading, that no one is a proper party who has no interest in the property in question (*a*). An exception has been made from this rule, if there is any charge of fraud connected with the transaction in which the agent, or steward, or attorney, or solicitor, or arbitrator (the persons with regard to whom this point can arise), participate, and it is so charged in the bill, then he may properly be made a party. For if no other decree can be made against him, he might be [illegible]eed to pay the costs of the suit if his principal should be insolvent (*b*).

Judgment.

Judge *Story* then notices that another exception has been sometimes made upon a ground not entirely satisfactory, and which may now be considered of very doubtful authority. It is the case of a bankrupt, in which it is admitted that although he ought not generally to be made a party to a suit against his assignees touching his estate, yet if in such a bill any discovery of his acts before he became a bankrupt is sought, he may properly be joined and compelled to make the discovery (*c*). For this he quotes *Mitf.* Eq. Pl. 161, and in a note adds: The whole doctrine has been shaken if not overturned in *Whitworth* v. *Davis* (*d*), and *Griffin* v. *Archer* (*e*).

(*a*) Story Eq. Pl., s. 231. (*b*) Story Eq. Pl., s. 232.
(*c*) s. 233. (*d*) 1 V. & B., 548.
(*e*) 2 Anst. 478, cited 2 Ves., p. 643.

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In *Griffin* v. *Archer* the bankrupt and five others became bound for a Sheriff's officer, to indemnify the Sheriff. Some losses were incurred, which were wholly satisfied by the bankrupt and four of the others. The assignees brought an action against the fifth, who filed the bill charging that upon a full disclosure from the bankrupt it would appear that the assignees had no demand against the plaintiff, but without such disclosure the plaintiff could not defend himself against the action. A demurrer by the bankrupt was allowed.

In *Whitworth* v. *Davis*, Sir *Thomas Plumer* examined the general question if a bankrupt was a proper party for discovery, and came to the conclusion that he was not. He cites *Trenton* v. *Hughes* (*a*) for the broad principle that would exclude the bankrupt, viz., that a person who has no interest and is a mere witness against whom there could be no relief, ought not to be a party.

Judgment.

In neither of these cases does there seem to have been a charge of fraud made. It remains to consider how far such a charge affects the question, and what the nature of the fraud must be.

The authority relied upon in support of this bill is an expression of Lord *Westbury* in *Gilbert* v. *Lewis* (*b*): "I am by no means disposed to hold that a bankrupt who antecedently to his bankruptcy has been engaged in a fraudulent transaction, whereby he has acquired property, may not be made a party to a bill for discovery, even although the property has been transferred by law to his assignees. If the discovery be sought merely as incidental to the relief, then he not being a necessary party in respect of that relief, may demur to the portion of the bill seeking it, and therefore to the discovery which is sought merely as incidental to it."

(*a*) 7 Ves., 287. (*b*) 1 D. J. & S., 88, 50.

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In that case Sir *W. Page Wood*, V.C., had said that he found no authority for the general doctrine that a bankrupt who has committed a fraud before his bankruptcy, is on that ground alone a proper party to a suit against the assignees in respect of the transaction. And it having been argued before him that if the impeached transaction were set aside as fraudulent, the effect would be to make the bankrupt a trustee of the property *ab initio*, and therefore that he had an interest that did not pass to the assignees, he held that this was not sufficient to make him a proper party.

In *Gilbert* v. *Lewis* the bankrupt had by fraudulent means obtained certain annuity deeds to be executed to him which the bill sought to have set aside. The right to the annuities had apparently passed to the assignees, and the observations of Lord *Westbury* are to be read in connection with that fact, and with the opinion of the Vice Chancellor, which was before him on appeal. In the passage I have quoted from his judgment, he intimates his dissent from the general conclusion of the Vice Chancellor that not even fraud would in any case justify making the bankrupt a party. He says, if the discovery is not merely incidental to the relief, he may be made a party. But if incidental only to the relief, then he may demur. Now the discovery will be merely incidental to the relief, if no decree can be made against the bankrupt. If relief can not be had against him, he is a mere witness. Lord *Westbury* held there were no sufficient allegations of fraud in the bill, and as there could therefore under the circumstances of that case be no decree against the bankrupt, he was not a proper party for the purpose of discovery.

Judgment.

That Lord *Westbury's* judgment is applicable only to the case of a fraudulent acquisition of property, or acts by which he might acquire it, is evident from the language of the judgment and from the circumstances of

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that case. During the argument the case of *King* v. *Martin* (*a*) was cited to him, where the bankruptcy was a fraudulent contrivance to defeat the plaintiff. Both in that instance and in *Gilbert* v. *Lewis* if the fraud alleged were established, the effect would have been to re-vest the property in the bankrupt, and a decree might then have been made against him. Establishing the fraud would have established the interest of the bankrupt in the property. The discovery then would not have been merely incidental to the relief, but would have given the right to a decree against the bankrupt. This, to my mind, forms a marked and a material distinction between that case and the present. Here, supposing the fraud established, no decree can be made against the insolvent. The discovery is merely incidental to the relief, which is to be had against third parties.

There are two cases apparently at variance with this view, but on examination will be found to confirm it. In *Jones* v. *Bins* (*b*) a bill was filed upon a mortgage; three days after the bill was filed the mortgagors went voluntarily into bankruptcy. The mortgagors pleaded the bankruptcy as a bar to the relief and discovery, and it was allowed, with leave to amend, the Master of the Rolls thinking the bankruptcy a contrivance to defeat the suit. If the fraud in that case were established the property would return to the mortgagors, against whom a decree might be made. And in the *Metropolitan Bank* v. *Offord* (*c*), a mortgage suit, the defendant pleaded a deed valid under the bankruptcy Acts prior to the filing of the bill. One of the trustees disclaimed all interest, and the other could not be found. *James*, V.C., allowed the plea with leave to amend by making the assignees parties, or showing a reason why they should not be made parties. If the trustees disclaimed, the bankrupt would be a necessary party as the owner of the estate.

Judgment.

(*a*) 2 Ves., 640. (*b*) 33 Beav., 362. (*c*) L. R., 10 Eq., 393.

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The class of cases to which I was referred as furnishing a clear analogy in favor of the bill, viz., a bill by an execution creditor against the debtor who had fraudulently assigned his property to defeat the execution, rest upon the same distinction. The debtor is made a party, but why? Not to obtain discovery merely, but because if the fraud is established the property is taken from the assignee; it reverts to the debtor, and is then made available for the benefit of the creditor.

*Wilson* v. *Chisholm* (*a*) was a bill framed similar to this in regard to parties against the insolvent, and trustees to whom he had conveyed property with a fraudulent design to defeat creditors, and the beneficiaries under that deed. The insolvent demurred, and the demurrer was allowed on the authority of *Gilbert* v. *Lewis*. The learned Judge who decided it noticing that Lord *Westbury* did not hold that a demurrer by a bankrupt would lie where the bill was framed for the express purpose of obtaining a discovery from him, and contained allegations showing that unless the discovery sought from him were given, there would be a failure of justice. This observation of Lord *Westbury's* was made during the course of the argument, and the counsel in answer to it quoted the case of *King* v. *Martin* above noticed, when Lord *Westbury* replied, "There the bill stated the existence of a supersedable bankrupty," showing that he had in contemplation the limitation, contained subsequently in the judgment, to the case of a fraudulent transaction whereby he has acquired property; for by superseding the bankruptcy the property returned to the bankrupt.

Judgment.

It was contended further that the insolvent might be made a party in order to have costs against him as actor in a fraud. *Weise* v. *Wardle* (*b*) answers this objection. The bankrupt was made a party in that case as having made a fraudulent conveyance to his son, and it was

(*a*) 11 Gr., 471. (*b*) L. R., 19 Eq., 171.

argued that any party to a fraudulent transaction may be made a defendant to a suit impeaching the transaction for the purposes of discovery and payment of costs. The Master of the Rolls allowed the demurrer of the bankrupt, saying that the practice as it now exists applies only to the cases in which the defendant is an agent (including an attorney or solicitor,) or an arbitrator.

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But if we give to Lord *Westbury's* language the wide interpretation put upon it in *Wilson* v. *Chisholm*, do the allegations in the present bill come up to its requirements? In *Gilbert* v. *Lewis* there were allegations that certain annuity deeds were obtained by the bankrupt as the result of a fraudulent contrivance and were fraudulently obtained, but the circumstances constituting the fraud were no further stated than that the deeds were without consideration, and that the pretended consideration did not pass.

Judgment.

The statements in the present bill go much further than in that, in alleging a fraudulent design in the insolvent of conveying away his property in contemplation of a partnership in a hazardous business—the retention of the deeds in his possession—dealing with the property as his own, &c.; and if the nature of the fraud was such as, if established, would revest the estate in the insolvent, I would be inclined to hold the case sufficiently stated in the record. But there is nothing to shew that a *failure of justice* will result from not having a discovery from the insolvent prior to what may be extracted from him as a witness at the hearing. It was said to be *necessary* to get at the facts in this way to enable the plaintiff to shape his case, and prepare his evidence. No doubt it would be very convenient to do so, and so it would to know what all the witnesses to be called will say; but that has never been held a sufficient reason for making a witness a party. But in truth the plaintiff need suffer no damage on this ground. The Insolvent

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Act provides (*a*), the most ample and ready means for the examination of the insolvent, at the instance of the assignee or any creditor, as to his estate and effects. The plaintiff can obtain by that means all the information sought by this bill. If instead of adopting that mode, the plaintiff is to be permitted to proceed on this bill, it will be at greatly increased expense. The answers could not be read against the co-defendants, and the only use of them would be to extract further information, or instructions, for the further prosecution of the suit that can be got in a much simpler mode.

I do not think, therefore, that the bill shews a case that a failure of justice will result from not getting the discovery sought, in the manner desired.

I have not thought it necessary to consider the objection to the frame of the bill for not containing interrogatories, as for the reasons stated I think the demurrer must be allowed on the more general ground.

Judgment.

Demurrer allowed, with costs.

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(*a*) 1869, s. 100.

## *Re* WHITE, KERSTEN v. TANE. 1875.

*Voluntary gift—Undue influence—Fraud.*

The testator, who died in April, 1867, had been a captain in the army, and was represented as a man of intelligence and business capacity, although addicted to habits of intemperance. He had no relatives other than the plaintiffs and the defendant, the latter,—a minister of the Church of England,—being the brother of his wife, who had died in the previous autumn. Soon after her decease the testator, who was then resident in London, sent for the defendant, who resided at Brockville, to come to him in order to assist him with his affairs. This the defendant did, and, amongst other things, consulted the solicitor of the testator as to the state and condition of his affairs; and a power of attorney was prepared by the solicitor and executed by the testator authorizing the defendant to sell and dispose of sundry articles of furniture and other effects, which he did. Two days after this the testator made his will bequeathing to the defendant all his pictures, jewellery, trinkets, and wearing apparel; and to his brother, *G. W.*, one of the plaintiffs, all his silver-plate bearing his family crest. Of the residue of his estate, real and personal, he gave one-half to *G. W.* and the other half he gave to the other plaintiffs his nieces; and appointed the defendant executor. Next day the testator executed a transfer of a policy of insurance on his life to the defendant; the instructions for this instrument, as well as for the will, having been given by the testator personally to his solicitor, who testified as to the testator's thorough competency to execute both. The defendant was present with the testator when instructions for the transfer were given to the solicitor, and so remained until the instrument was executed. The testator died within six months afterwards, and the insurance money was paid to the defendant. The solicitor in his evidence stated that he was not informed as to the object of the transfer, which was absolute in form and for a nominal consideration, but that he understood it was by way of security for some advance or debt. The defendant did not prove the will, or obtain probate thereof until June, 1874, and on the 12th of October of that year the plaintiffs obtained an administration order, and sought in proceeding thereunder to compel the defendant to refund the insurance money, on the ground that the transfer of the policy had been obtained by fraud or undue influence, or was intended merely as in aid of the will or as a security: but the Court [reversing the decision of the Master] *Held* that the circumstances of the case were not such as to lead to the presumption that the defendant had been guilty of any fraud or undue influence in obtaining such assignment, and that he was not bound to give evidence that the testator voluntarily and deliberately performed the act, knowing its nature and effect.

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This was an appeal by the defendant from the report of the Master, under the circumstances stated in the head-note and judgment.

Sep. 16th.

Mr. *Moss*, for the appeal.

Mr. *Ewart*, contra.

The cases cited are mentioned in the judgment.

Oct. 20th.

Judgment.

BLAKE, V. C.—The defendant was the brother-in-law of *Matthew White*, deceased, who died about the 23rd of April, 1867. *Matthew White* lost his wife in the preceding month of October, and he then resolved to leave his former residence, and live in the city of London. The defendant, shortly after the death of his sister Mrs. *White*, went to London and assisted the deceased in disposing of his property. To enable him the better to attend to the sale of the stock and furniture, the deceased gave the defendant a power of attorney, dated the 1st of November, and he, with the assistance of Mr. *Emery*, the auctioneer, carried out this object of the testator. On the 4th day of the same month, the deceased assigned a policy on his (the deceased's) life for £306 15*s*. sterling to the defendant. He had on the 3rd of the same month made his will, in which he gave to the defendant his "pictures, jewellery, books, trinkets, and wearing apparel," and to the plaintiff *George White* all his "silver plate bearing his family crest," and directed the residue of his estate real and personal to be divided, half to the same plaintiff, and the other half to the plaintiffs *Bertha* and *Mina Kersten*. It is under this will that the plaintiffs claim the property of the deceased, while they allege that the defendant is bound to repay the amount received on the life policy under the before mentioned assignment, which had been applied to his own use more than seven years before the present proceedings in this Court were taken. The deceased, who was a captain in the Royal Canadian

Rifles, is described as an intelligent and capable man, although of intemperate habits, which had no doubt grown very much upon him. Mr. *Shanly* was the solicitor employed in the preparation of the will, the power of attorney, and the assignment. No gentleman in the profession knows better his duty as an adviser under the circumstances which existed when these transactions were being carried out, and no one would be less likely than he to allow these matters to be consummated were anything wrong thereby sought to be accomplished, or were his client from any reason rendered unable to comprehend that which he was doing. Mr. *Shanly* says that prior to this time the deceased had on several occasions consulted him, more as a friend than a client: that he saw him two or three times about the matter in question: that he was a man of considerable mental ability: that he spoke in quite a sensible, business-like way about his affairs: that he considered him quite competent to execute both will and assignment; and that he would not have allowed him to do it had he not been so. The defendant proved the will, in which he was named executor, and in taking the accounts of the estate the Master has charged him with the amount received from the Insurance Company, "because," as he says, "of the rule that in every transaction in which a person obtains by voluntary donation a benefit from another, it is necessary, if the transaction be afterwards questioned, that he should prove that the donor voluntarily and deliberately performed the act knowing its nature and effect, and such has not been proved before me. No evidence has been given before me of any fraud on the part of the defendant."

Judgment.

There certainly was not anything unreasonable in the deceased, when he was making a general disposition of his property, and when, owing to the death of his wife and his being childless, he had no nearer objects of his bounty than his brother and nieces, giving to his brother-

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in-law, who was befriending him, an assignment of a life policy, the premiums on which he may not have been prepared to keep up. It may at the same time have been present to his mind that if he lived much longer he might be dependent on the defendant, and this may have served as a reason for making over, as he did, an asset which was burdensome to himself, but which, in the hands of his brother-in-law, would make him feel less disinclined to accept of the bounty which it was stated he was ready to extend to him. There is no evidence of fraud or impropriety of any kind on the part of the assignee in the obtaining of the assignment in question. The defendant did not occupy to the deceased the relationship which, as laid down in *Huguenin* v. *Basely* (*a*), *Hunter* v. *Atkins* (*b*), and *Cooke* v. *Lamotte* (*c*), casts upon the person obtaining a benefit the necessity of proving that the grantor willingly, and knowing full well what he was about, without any exercise of the dominion or control which his position might have enabled the grantee to exercise over him, signed the instrument which evidences the gift. There is no doubt that the rule has been wisely extended so as to cover, not only the well known instances of guardian and ward, solicitor and client, trustee and *cestui que* trust, and the like, but all cases in which, owing to the position of parties, it follows that a controlling influence may be brought to bear by the one on the other. When once this relationship has been established, the result inevitably is, that the onus is cast on the grantee to support the transaction. In order, however, to the invoking of this rule in one's favour, the position of the parties must be clearly defined, and nothing less than such a state of circumstances as convinces the mind, not of the actual exercise of the power, but of the opportunity of using it, if the party feels so inclined, will be sufficient to shift the burden of proof, in order to the establishment of

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(*a*) 3 My. & K. 113. (*b*) 14 Ves. 296. (*c*) 15 Beav. 284.

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the transaction, from the grantor to the grantee. To my mind, it is out of the question to say that because a clergyman goes to assist his brother-in-law, a captain, when he is in need of his aid, and takes from him a power of attorney the better to enable him to dispose of certain chattels, the Court is to conclude the clergyman has obtained such control over the captain as that a transaction between them cannot stand, without explanation by some outside evidence. By extending the wise and salutary rule laid down in *Huguenin* v. *Basely* so as to embrace such transactions as the present, you cause the wisdom of the rule itself to be questioned, you cast suspicion on arrangements never intended to be touched by those who originally laid down the principle in question, and check men from coming forward to the assistance of their friends and relatives, who know that in mixing themselves up in their business they will be liable to a scrutiny in which the Court will begin with the assumption that the transaction in which they have been engaged is, so far as they are concerned, fraudulent. It is to be remembered that here we find no objection by the testator to the assignment made, and that it is not until seven years from his death have elapsed that the defendant is asked to support the transaction—that the property assigned was burdensome to the assignee, and not of much value—that Mr. *Shanly*, the solicitor of the deceased, deposes to the deceased being competent to execute the assignment—that the paper was one so simple that there could not have been any difficulty in comprehending its nature and effect; and that the defendant is not asking the Court to assist him in enforcing the instrument, but the plaintiffs are demanding back the money which has been received under it.

Judgment.

The view of Lord *Brougham* is thus expressed in *Hunter* v. *Atkins* (*a*): "Mr. Alderman *Atkins* is either

(*a*) 3 Myl. & K. 113, 134.

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to be regarded in the light of an agent confidentially entrusted with the management of Admiral *Hunter's* concerns—a person, at least, in whom he reposed a very special confidence—or he is not. If he is not to be so regarded, then a deed of gift, or other disposition of property in his favour, must stand good unless some direct fraud were practised on the maker of it; unless some fraud, either by misrepresentation or by suppression of facts, misled him, or he was of unsound mind when the deed was made." Again, at page 152: "Can any influence which the alderman may be supposed to have possessed over him invalidate such a deed, without a tittle of proof beyond what is derived from the fact itself of its effect being to give him a preference over near connections, and from the relation of navy agent and the habits of friendship that subsisted between them, those habits furnishing at the same time an explanation of the favour and affection shewn, without having recourse to any supposition of undue practices? But if, on such grounds, a deed so prepared and so executed is to be set aside, few assuredly of the acts of men, dealing with their own affairs, are safe, and the law which enables all who are of sound mind to dispose of their property no longer exists but in name." The rule which Lord *Brougham* there laid down for his guidance is (p. 141): "The circumstances of each case, therefore, are to be carefully examined and weighed, the general rule being of a kind necessarily so little capable of exact definition, and on the result of the inquiry we are to say, has, or has not, an undue influence been exerted—an undue advantage taken?"

Judgment.

The Court had strayed a long way from this sound rule by setting aside voluntary settlements which contained no power of revocation, as witness *Coutts* v. *Ackworth* (*a*), *Wallaston* v. *Tribe* (*b*), *Everett* v. *Everett* (*c*);

(*a*) L. R. 8 Eq. 548. (*b*) L. R. 9 Eq. 44. (*c*) L. R. 10 Eq. 405.

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but Lord *Hatherley* in *Philips* v. *Mullings* (*a*), affirming the decree of Vice Chancellor *Stuart*, again brought back matters, in this respect, to their old position. In *Hall* v. *Hall* (*b*), Vice Chancellor *Malins*, considering himself bound so to do by the authorities, very unwillingly set aside the instrument there impeached. In that case, the counsel supporting the bill placed their title to relief on this ground: "We do not allege any fraud; our case is, that those who rely on the settlement must shew the settlor was well advised as to it, and thoroughly acquainted with all its bearings, when she executed it." But while setting aside the deed there the Vice Chancellor states, "It is necessary that fraud, surprise, or mistake should be proved before a voluntary settlement can be set aside." When the case came up on appeal Lord Justice *James* disapproved of the broad proposition laid down by the Master of the Rolls, in *Mountford* v. *Keene* (*c*), and approves of his judgment in *Toker* v. *Toker* (*d*). "The law of this land," says the Lord Justice, "permits any one to dispose of his property gratuitously, if he pleases, subject only to the special provisions as to subsequent purchasers and as to creditors. The law of this land permits anyone to select his own attorney to advise him, but it seems very difficult to understand how this Court could acquire jurisdiction to prescribe any rule that a voluntary conveyance, executed by a person of sound and disposing mind, free from any fraud or undue influence of any kind, and with sufficient knowledge of its purport and effect, should be void because the attorney of his own selection did not advise him to insert a power of revocation, or did not take his express direction as to the insertion or omission of such a power." In that case the deed differed in two material points from the instructions given to the solicitor who prepared it, and it

Judgment.

(*a*) L. R. 7 Ch. 244. (*b*) L. R. 10 Eq. 365. (*c*) 19 W. R. 708.
(*d*) 31 Bea. 629, and 3 DeG. J. & S. 487.

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was still allowed to stand. It is true that in *Philips* v. *Mullings* there is this very broad and general statement (p. 246): "It is clear, for instance, that anyone taking any advantage under a voluntary deed, and setting it up against the donor, must shew that he thoroughly understood what he was doing, or at all events was protected by independent advice." Now, in the first place, the case is not decided on this proposition, the laying down of which was not necessary to the disposition of the cause. The Chancellor goes on to describe the settlor as a young man of "extravagant and improvident habits," and adds "Those who induce a young man of this description to execute such a deed are bound to shew either that the deed is in all respects proper, or, if the deed contains anything out of the way, that he understood and approved of it." In the second place, the closing remarks of the judgment modify those with which it begins. "All that the law requires in a deed of this description is, that it should be effective, and should not contain any extraordinary clauses, unless these clauses are shewn plainly and distinctly to have been brought to the notice of the settlor, and to have been understood by him. It is not necessary to shew that the usual clauses inserted by conveyancers were explained; but any unusual clauses must be shewn to have been brought to his notice, explained and understood." From this, then, we are at liberty to conclude that where the transaction is evidenced by the usual instrument, the Court will, without evidence on the subject, take for granted that the grantor comprehended what he was doing when he signed it, and that it is only in case there be anything "extraordinary" in the deed that it is necessary to shew that any explanation was made of the contents of the paper.

Judgment.

*Cooke* v. *Lamotte* (*a*) is usually quoted as a case of undue influence. There the manner in which the bond was

(*a*) 15 Beav. 234.

procured was not satisfactory. It had never been read over by the aunt, and had been prepared by the solicitor named by the nephew, who alone instructed him. The Master of the Rolls makes use of this general language (p. 240): "In every transaction in which a person obtains, by voluntary donation, a benefit from another, it is necessary that he should be able to establish that the person giving him that benefit did so voluntarily and deliberately, knowing what he was doing, and if this be not done the transaction cannot stand." In *Hoghton* v. *Hoghton* (*a*), decided by the same Judge the following year, this language is thus qualified: "I am of opinion, as I lately held, in a case of *Cooke* v. *Lamotte*, that whenever one person obtains by voluntary donation a large pecuniary benefit from another, the burden of proving the transaction is righteous—to use the expression of Lord *Eldon* in *Gibson* v. *Jeyes*—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." So that, according to this authority, in order to shift the onus of proof from grantor to grantee, the "voluntary donation" must be of a "large pecuniary benefit."

Judgment.

In *Bentley* v. *Mackay* (*b*) the Master of the Rolls upheld the deed, and he there says (p. 149): "I apprehend that the grounds upon which a deed is set aside wholly or partially, are either fraud, or influence, or mistake." In *Toker* v. *Toker* (*c*), the same Judge sustained the transaction, saying, "The law of this Court is very strict on the subject of voluntary deeds: it gives no assistance to the completion of them, but at the same time it does not lay down as a rule that they are always void, and the mere alteration of intention is not sufficient to induce this Court to interfere and cancel an instrument which was fully understood and deliberately executed by the grantor."

(*a*) 15 Beav. 278. (*b*) 31 Beav. 143.
(*c*) 31 Beav. 629, 3 DeG. J. & S. 487.

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There are a great many cases on the subject in *May*, pp. 445-448, *Kerr* on Injunction, p. 48, 1 Dart 15, *Joyce* on Injunction, p. 618, *Watson's* Compendium, vol. 1, 280 to 285, *Story's* Eq. Jur. secs. 793, 973, 987, 1040, 1196-8.

I have gone through most of these, and find that in addition to the voluntary nature of the transaction, in each of them, another element is introduced, such as fraud, improvidence, mistake, or the like, on which the case has turned. In some cases passages are cited from *Wilmot*, p. 6, 61, 69, where the gift has been immoderate, as if some line should be drawn between liberality and profusion; and I think it may be inferred that amount merely may, in a voluntary transaction, be such evidence of improvidence as to shift the onus of proof to the recipient of the bounty. I am unable to come to the conclusion that the present is brought within any of the rules laid down in these cases, which require me to set aside the transaction which the plaintiffs impeach.

Judgment.

Looking at the fact that the deceased was making a general settlement of his affairs, at the position of the parties, at the fact that the life policy was not of any great pecuniary value and was subject to a payment which the deceased could not well afford to make, that the testator went to his own solicitor and gave him the instructions which were carried out, that the transaction was one so simple that the testator could easily comprehend it, and that for seven years the matter has not been questioned, I think the proper result to be drawn from the circumstances is, that the testator knew perfectly what he was doing when he assigned over this policy to the defendant, and then intended to make him a present of it, and this being so this Court has no power to impeach the transaction; and therefore the appeal must be allowed, with costs.

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[This appeal was subsequently reheard before the full Court, when the present decision was affirmed.]

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## LOUTH v. THE WESTERN OF CANADA OIL LANDS AND WORKS COMPANY (Limited.)

*Practice—Receiver—Liquidator—Suit in England and Canada for the same object.*

The holder of bonds of a joint stock company (limited), after instituting proceedings in the Court of Chancery in England, for the sale of the partnership property, which was situated in Canada, and after the appointment of a receiver in England of the estate in England and Canada, filed a bill in this Court for the like purpose, and this Court appointed the agent of the receiver, receiver here; after which it appeared that the company went into liquidation, the liquidator being the same person as had been appointed receiver in England. The plaintiff, after an amendment of his bill stating these proceedings, moved for a decree in the terms of the prayer of his bill; but the Court refused to make any decree until it was shewn what the position of matters was in England, and the steps about to be taken there, so as to avoid any conflict between the two Courts, and mould the order here to give the appropriate relief, without interfering with the steps which were being taken in England for the same object.

Statement.

The plaintiff in this case was an English holder of bonds or debentures of the company, and had filed a bill in the Court of Chancery in England on behalf of himself and others, the bondholders of the company, seeking for a sale of the property of the company in Canada, and, until such sale could be effected, that a receiver of the estate and effects of the company in Canada might be appointed.

One *Kemp* had been appointed receiver in the suit in England, and he had appointed *Clark Edward* his agent in Canada to manage the estate. The plaintiff, acting on the advice of counsel, applied in this suit for the appointment of a receiver in Canada in aid of the proceedings in England, and Vice-Chancellor *Strong* made an order appointing the same *Clark Edward* receiver here. The plaintiff by his bill in this suit, as well as by that filed in England, prayed a sale of the property and effects of the company.

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Afterwards the case came on before Vice-Chancellor *Proudfoot*, upon a motion for decree, and on its being suggested to him that, since the pronouncing of the order by Vice-Chancellor *Strong*, the company had gone into liquidation in England, he directed that the cause should stand over until the official liquidator—who was the same Mr. *Kemp*—should have an opportunity of appearing in this Court. Thereupon the plaintiff amended his bill in this Court, thereby setting forth the liquidation proceedings, and the case then came on again upon a motion for decree before *Blake*, V. C.

Argument.

Mr. *Cattanach*, for the plaintiff. The plaintiff here is entitled to proceed in this country to procure the appointment of a receiver, and such proceeding was actually necessary here in order to the protection of the assets, as well by way of aid to the proceedings in England as independently for the purpose of obtaining a sale of the assets of the company. Being a bondholder the plaintiff has a right to take all proceedings that may be necessary for the protection and realization of the estate, and the Courts of this country are the proper forum in which to apply. Besides this there are persons who claim to be incumbrancers on the estate as being execution creditors, and their rights should be adjudicated upon according to the *lex loci rei sitæ;* and here the reasons for the Court making the order asked are stronger than in most cases of this nature, as the liquidator, who represents the company and all those beneficially interested, is really before the Court.

The Court in England can act only *in personam*, not *in rem*; while in this Court the several claimants have a right to call for and insist upon a distribution by the Courts here; and the property being situate here Canadian creditors cannot be compelled to resort to England to establish their claims, but will be entitled to have their remedies applied here.

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The liquidator is only an officer of the Court. The estate does not pass to him as it does to the assignee in bankruptcy; and being only an officer, his powers are limited in a foreign country as a receiver's are; and the necessity which existed for getting a receiver appointed here, to protect the estate, applies much more strongly when the further step is to be taken of selling a property which is subject to executions at the suit of Canadian creditors over whom the liquidator could exercise no control, without the aid of this Court, which there is a technical difficulty in his invoking.

No application has been made in the liquidation proceedings to stay this suit, and it is clearly the established practice in England that a liquidation order could not be effectually set up as an objection to going on; that in fact nothing short of a stop order made in the liquidation proceedings would be listened to.

Argument.

On the English authorities the plaintiff would be entitled to go on with his suit in England notwithstanding the liquidation proceedings; and, therefore, he should not be prevented from going on here; and as the plaintiff is so entitled he should not be compelled to take proceedings in his suit in England to lay a foundation for proceeding here. He referred to *Wilson* v. *The Natal Investment Co.* (*a*), *Gray* v. *Roper* (*b*), *Thomas* v. *Wells* (*c*), *Re St. Cuthberts Lead Co.* (*d*), *Perry* v. *The Oriental Hotels Co.* (*e*), *Re The Panama and New Zealand Co.* (*f*), *Kellock's* Case (*g*), *Re Great Ship Co. Exp. Perry* (*h*), *Re The Oriental Inland Steam Co.* (*i*), *Morris* v. *Chambers* (*j*), *Houlditch* v. Marquis of *Donegal* (*k*), *Cox* on Joint

(*a*) 33 L. J. Ch. 312.
(*b*) L. R. 1 C. P. 694.
(*c*) 16 C. B. N. S. 526
(*d*) W. N. 1866 p. 90, on appeal.
(*e*) L. R. 5 Ch. 420.
(*f*) L. R. 5 Ch. 318.
(*g*) L. R. 3 Ch. 769.
(*h*) 33 L. J. Ch. 245.
(*i*) L. R. 9 Ch [illegible].
(*j*) 26 Beav. 253.
(*k*) 8 Bligh N. S. 501.

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Louth v. Western of Canada Oil Lands and Works Co.

Mr. *Cassells*, for the liquidator, made no objection to the order going, but submitted the question for the consideration of the Court whether it was necessary that any proceedings should be taken; citing *In re The General Company for Promotion of Land Credit* (*a*), *Smith* v. *Henderson* (*b*).

Mr. *Hoskin*, Q.C., for the trustees of the bondholders.

Nov. 1st. BLAKE, V. C.—According to the statements in the bill, *Kemp* has been appointed in England receiver and manager of the estate, both real and personal, in England and in Canada, and *Edward* has been there appointed the agent in Canada of such receiver. In aid of this officer (the receiver)—*Edward* has been appointed by the Canadian Court receiver in Canada of the same estate. Since such appointment

Judgment. *Kemp*, the receiver, has been appointed official liquidator of the estate. In a case such as the present, I do not think it would be proper for this Court to interfere in respect of property controlled by the English Court, as is that here. Although independent relief is asked by the present bill, the suit is one in aid of the proceedings in England, and the shape the assistance to be given here should take will depend on what has been done by the Court of Chancery in England or in the liquidation proceedings. There must be no conflict between the two Courts, and in order to prevent this I must have evidence to shew the position of matters in England, and the steps about to be taken there, so as to mould the order here to give the appropriate relief to the plaintiff, and at the same time not interfere with the steps which are being taken in England with the same object. The

(*a*) L. R. 5 Ch. 380. (*b*) 17 Gr. 6.

cause may stand over in order to prove these facts: on its being again mentioned the costs of the present application can be disposed of.



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## CURTIS v. COLEMAN.

*Plaster bed—Tenants in common.*

Where one of several tenants in common, of a plaster bed, was in sole possession of the property, and had sold portions of the plaster, an account of his receipts therefrom was ordered in favour of his co-tenants.

It appeared that the plaintiffs and defendant were jointly interested in 200 acres of land, which they joined in a division of, reserving, however, a plaster bed thereon, which was situated on the portion allotted to the defendant, who thereby remained in exclusive possession of such plaster bed. During his possession he disposed of a quantity of the plaster, but refused to account to his co-tenants for any part of the sums received therefor. The plaintiffs thereupon filed a bill, praying for an account, a sale of the joint property, and distribution of the proceeds. Statement.

The case came on to be heard before *Blake*, V. C., at the sittings of the Court at Hamilton, in the Spring of 1875.

Mr. *Attorney General Blake* and Mr. *Moss*, Q. C., for the plaintiffs.

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

The following authorities were referred to, and commented on by counsel: *Dougall* v. *Foster* (*a*), *Rice* v. *George*(*b*), *Bell* v. *Wilson* (*c*), *Clegg* v. *Clegg* (*d*), *Bentley*

(*a*) 4 Gr. 319. (*b*) 20 Gr. 221.
(*c*) L. R. 1 Ch. 303. (*d*) 3 Giff. 322.

1875.
Curtis v. Coleman.

v. *Bates* (*a*), *Baily* v. *Hobson* (*b*), *Bagot* v. *Bagot* (*c*), *Henderson* v. *Eason* (*d*), *Griffies* v. *Griffies*, (*e*), *Kerr* on Injunctions (*f*), *Proudfoot* v. *Bush* (*g*), *Goodenow* v. *Farquhar* (*h*), *Job* v. *Potton* (*i*)., 4 & 5 Anne, ch. 16, sec. 27.

June 9th.

BLAKE, V.C.—I have looked into the authorities cited to me in this case, and am of opinion that where one tenant in common files his bill against his co-tenant, for a partition and an account of the profits of the estate in question, the plaintiff is entitled to such account where it is shewn that the defendant has received a greater share from the estate than that to which he is entitled, by the sale of that which composes the property, whether it be turf, brick-clay, plaster or other such material. Here there is an actual receipt from a third party by one of the co-tenants by a sale of the plaster forming the material of which the land is composed. If one tenant in common is responsible to his co-tenant for his share of the rents received from one who enjoys, without deteriorating the premises, I think it is *a fortiori* that such tenant in common should be made liable, where the amounts received by him are obtained by the eating away of the estate.

Judgment.

I think the plaintiff is therefore entitled to the account asked since the expiration of the lease—that is the 17th June, 1872—and a declaration of the interests of the parties in the estate, as set out in the bill, and to a sale of the premises, and a distribution of the proceeds in the usual way, after payment of the costs of the suit.

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(*a*) 4 Y. & C. 181.
(*b*) L. R. 5 Ch. 181.
(*c*) 32 Bea. 599.
(*d*) 17 Q. B.
(*e*) 8 L. T. N. S. 758.
(*f*) Pp. 257, 284.
(*g*) 7 Gr. 518.
(*h*) 19 Gr. 614.
(*i*) L R. 20 Eq. 84.

1875.

## Re Grant v. Eastwood.

An award cannot be impeached on the ground that it is erroneous in either law or fact unless the error appears on the face of the award.

The cases in which the Court will interfere are confined to those where such an error so appears; or where there has been corruption, fraud, or excess of jurisdiction; or the arbitrators making the award admit the mistake.

The award, the subject of the present application, was made on a reference agreed to between the parties to the suit of *Grant* v. *Eddy*, reported ante, volume xxi, page 45. It was shewn by the evidence taken upon the motion that the arbitrators had carefully considered and weighed the matters in question between the parties, and as the result thereof had found the defendants liable to the plaintiffs for $42,523.93, for which amount they made an award in his favour, which was now moved against on the grounds stated in the judgment.

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

Mr. *Boyd*, contra.

Sept. 15th. Judgment.

Blake, V.C.—The arbitrators in this matter state in their award that they have disposed of all the matters in difference between the parties, with the exception of four items, which were by consent of all withdrawn from them.

On its face the award is final, and is a complete finding on all the matters referred to the arbitrators. No mistake of law or fact appears on the award, nor has any fraud or corruption been alleged by those seeking to disturb the determination at which the arbitrators have arrived. It has, however, been argued that: (1) as the arbitrators refused to permit evidence to be given in support of a claim for damages; (2) and to entertain the claim at all; (3) and determined that the applicants

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were personally liable for the $42,523.93 awarded ; the award should not be allowed to stand.

The arbitrators concluded that the claim in question was one which could not be sustained, as the damages were too remote and could not be charged against the plaintiff. This being so, they were justified in refusing to sit taking evidence in respect of a matter which, after the expenditure of time and money consequent upon the examination of witnesses on the point, could not be made an item in the defendant's claim against the plaintiff. I do not find any ground on this head for impeaching the award.

There is much to be said in favour of the personal liability of those objecting to the award. Looking at the agreement on which the plaintiff bases his claim, and at the dealings of the trustees thereunder, I cannot say

Judgment.

that there is not ground for concluding that the defendants came under a personal liability to the plaintiff in respect thereof. But even if I were much more doubtful than I am on the question, I do not see that I could, under the authorities, interfere with the conclusion at which the tribunal, appointed by these parties, has arrived. In order to obtain certain supposed benefits, these litigants have withdrawn the matters pending before the Courts, and submitted them to the arbitrament of three gentlemen. The ordinary tribunals of the land seem from year to year to limit the cases in which, under these circumstances, they will interfere with the judgment rendered. An award cannot be impeached before them, on the ground that it is an erroneous decision in law or fact, when the alleged error does not appear on the face of the award. The cases in which the Court will interfere seem to be confined to those in which the mistake of law or fact is apparent on the face of the award, or where there has been corruption, fraud, or excess of jurisdiction, or where the arbitrator himself

admits the mistake, and, as it were, asks the aid of the Court to set it right. Here, on examination, one of the arbitrators says "The arbitrators arrived at the amount of their award from a careful consideration, and weighing the matters alleged in the action at law between the parties, and of the submission purporting to contain a copy of the proceedings in equity, and from the papers, evidence, and documents laid before us; we made a statement of the items under which we made our award, which I now produce." He does not pretend that there was any error or mistake, and does not ask or assent to the interference of the Court. Since the argument of the motion two cases have been reported which shew that it must be refused: the one *Dinn* v. *Blake* (*a*), the other *Re Harper and the Great Western Railway Company* (*b*). The application is refused with costs.

1875.

Re Grant v. Eastwood.

Judgment.

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(*a*) L. R. 10 C. P. 388. (*b*) L. R. 20 Eq. 39.

1875.

## WESTERN CANADA LOAN AND SAVINGS SOCIETY v. HODGES.

*Building society—Terms of redemption.*

By one of the rules of a building society it was provided that "If any member shall desire to have his property discharged from a mortgage to the society before the expiration of the full time for which it has been taken, he shall be allowed to do so on payment of all re-payments, any fines, and other sums due in respect thereof up to the time of redemption * * and of the present value of future re-payments, calculated to the end of the term, and discounted at such rate of interest and on such terms as the directors may determine." The effect of a person obtaining a loan from the society was, that he became a member of the society, and as such assented to all the rules thereof. Therefore where a suit was instituted upon a mortgage by reason of default having been made in repayment, the Court *held* the society had the right to say upon what terms the future re-payments should be computed, and that if the society saw fit to do so they could insist on repayment of the whole amount of the mortgage, which included the principal sum and interest for the whole period the mortgage had to run.

Statement

One *Nancy Hodges* borrowed from the plaintiffs, a building society, $800, and to secure this amount and interest, executed to them a mortgage on the lands in question for $1400, payable in ten equal annual instalments of $140 each, the sum secured by the mortgage thus embracing principal and interest, although expressed in the instrument itself to be for principal only. The mortgage contained the usual proviso that in default of payment of any portion of the moneys secured thereby, the whole amount secured should become payable. By the terms of the instrument the mortgagor came within the rules of the society. Shortly after the execution of the mortgage the mortgagor died, leaving infant heirs-at-law interested in the equity of redemption. Only one instalment of the mortgage money was paid, and in consequence of the default in subsequent payments the society filed their bill praying for payment of $1410.90 principal, interest, and fines, and in default of payment a sale of the estate; and at the hearing the usual decree

1875.

Western Canada Loan &c., Society. v. Hodges.

was made, the registrar being directed to take the account. On proceeding to take the account, it was urged on behalf of the infant that as $1400, the alleged consideration stated in the mortgage, embraced both principal and interest for the period the mortgage had to run, and as only five years of the ten had elapsed, that, in respect of the remaining five years, the plaintiffs were not entitled to charge interest: that the account should be taken upon the basis of $800, being the principal money: that interest should be charged thereon from the date of the mortgage to the time to be appointed for payment by the decree, and credit should be given for the instalments paid. Parties not agreeing before the registrar as to the mode of taking the account, by consent, the question was spoken to before *Blake*, V.C., who had made the decree.

Mr. *Tizard*, for the plaintiffs.

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

June 16th.

BLAKE, V. C.—The consideration, as expressed in the mortgage, is a sum of $800, then paid by the mortgagees to the mortgagors.

Judgment.

The mortgage is to be void on payment of $1,400, in ten equal annual instalments, together with all fines imposed by the society on the mortgagors on account of their shares or of default in payment, according to the society's rules, "provided that in default of the payment, for six months, of any portion of the money hereby secured, the whole principal and interest hereby secured shall become payable."

If this were a mortgage between individuals, and default were made in its payment, and proceedings were taken in this Court to foreclose, on taking the account the Registrar would ascertain the rate of interest reserved, charge the principal money and interest there-

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on for the period the amount advanced has earned interest, and on payment of the sum thus found would allow redemption. The proviso inserted here would not aid the mortgagee in recovering money which the sum he had loaned had not earned. The whole amount secured is the principal sum, and the interest thereon for the time which the mortgagee has allowed it to remain in the hands of the mortgagor. On a loan of $10,000, to be repaid at the expiration of ten years, with interest, meantime, at 10 per cent. payable annually, with such a proviso as is found here, at the end of the first year the mortgagee could not claim $10,000 for principal money, and $10,000 for interest, as being the amount secured by the mortgage, and therefore due to him. The principal money had not earned this interest. The interest was the price of forbearance. That which was the consideration for the interest, the forbearance of the mortgagee, is not given to the mortgagor. He chooses to recall the loan. He is not satisfied with the recovery simply of so much as may actually be overdue, but he chooses to adopt the other alternative, and withdraw the money from the person to whom he has lent it, and doing so, I do not think he can charge the borrower as if he had allowed the money to remain in his hands, and thus earn the profit agreed, under the circumstances, to be paid. This rule does not seem to be confined to cases, other than those in which building societies are mortgagees, for in *Wilson* v. *Upper Canada Building Society* (*a*), the Court uses the following language, at page 213: "Now, a proviso in any instrument for interest being paid on the sum advanced and secured, is always construed as meaning on so much thereof as from time to time remains due." *In re Goldsmith, Ex parte Osborne* (*b*), in the power of sale reserved in the mortgage, it was declared that after the sale the mortgagees "in the next place should retain all such subscriptions, fines, and other sums of money and payments which should be

Judgment.

(*a*) 12 Gr. 206.

(*b*) L. R. 10 Ch. 41.

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then due, or which would afterwards become due in respect of the said shares during the then remainder of the said period of seven years, it being agreed by the said parties thereto, that in case any such sale should take place, all the moneys which would at any time afterwards become due from *Goldsmith*, his executors, &c., in respect of the said shares, according to the rules of the said association, should be considered as then immediately due, and payable." In dealing with that case Lord *Cairns* says: "Interest implies forbearance, and therefore when the whole is paid there can be no interest. * * * With regard to the future, you cannot include under 'moneys, which would at any time afterwards become due,' any fines; no more can you include payments in respect of interest, for interest can only arise in respect of a principal sum remaining outstanding and forborne. Therefore my conclusion is, that everything due in respect of monthly instalments and fines at the time of the sale must be retained; and then it must be ascertained how much of the monthly payments represents the principal, and how much interest; and it will then appear how much of the principal remained unpaid." Sir *William James* concurred in this judgment; and Sir *George Mellish* adds: "Interest could never become due, if the principal was paid off, and therefore interest could not be said to be moneys which would become due in respect of the shares, according to the rules of the association."

Judgment.

In some building societies rules are made as well for the case of voluntary redemption by the mortgagor as for the taking of proceedings to realize the mortgage moneys adversely to him. The society, in *Matterson* v. *Elderfield* (*a*), was one of that class, and there the Lord Chancellor *Hatherley* stated (*b*): "It is clear from the authorities cited that the rules of this society are not unusual, and we must be bound by their literal mean-

(*a*) L. R. 4 Chy. 207. (*b*) p. 214.

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ing. Not finding anything in them to shew that the directors are authorized to make any rebate, I must reverse the decision of the Vice Chancellor."

In that case a special provision was made for a rebate in case of the mortgagor redeeming, which was omitted in the rule settling the application of the money realized in case of a sale by the company. It was held, that in case of a sale the rule as to a rebate did not apply, and that the mortgagees were entitled to recover the whole amount secured by the mortgage, as well that in arrear as the sums to accrue due after the date of the sale.

I do not think that this case can be entirely reconciled with the later case to which I have referred. It is not satisfactory to find from the report, that *Matterson* v. *Elderfield* was not cited in *Re Goldsmith*, and we have not therefore anything to guide in the conclusion, whether it was distinguished or overruled. It seems to me that the Chancellor and Lords Justices took the same view as Vice Chancellor *Giffard*, as to the terms on which interest is made payable, and that these four learned Judges differed from the opinion formed by Lord *Hatherley* on that question.

Judgment.

A mortgagor may make such stipulations as will enable him, as against mortgagees, to treat the amount to be repaid by the mortgagor as all principal money, to be repaid by specified payments, and to provide, that in default of the payment of one of these instalments, all of them become due; or that in case of redemption this right shall be exercised only on certain specified terms: See *Goodhue* v. *Widdifield* (*a*), *Sterne* v. *Beck* (*b*). Such an arrangement must, however, be found expressed with perfect clearness in the instrument securing the loan, or in the rules which are made a part of the contract between the parties. In the present case it is treated as a

(*a*) 8 Gr. 531. (*b*) 1 DeG. J. & S. 595.

loan of $800, and the mortgage refers to the interest secured by it. Then, in the proviso for sale, the mortgage money is to be applied, "in the next place, to pay, and satisfy the principal sum of money and interest hereby secured or mentioned, or intended so to be, or so much thereof as shall remain due and unsatisfied up to, and inclusive of the day whenever the said principal sum shall be paid and satisfied."

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The instrument then does not, to my mind, make such provision as would enable the mortgagees to collect from the mortgagors the whole amount of principal and interest set forth in the mortgage deed.

But when the mortgagors obtained this loan they became members of the plaintiffs' company, and assented to the rules of the society, as regulating, amongst other matters, this loan. The last clause of No. 17 of these rules is as follows: "And when any sale shall take place of any property mortgaged to the society, the directors shall have power to retain and apply so much of the principal money as will be necessary to pay the same sum as would be required to redeem the property, pursuant to the provisions contained in these rules; together with all other payments, moneys, and expenses due to the society, and to pay the surplus thereof to the mortgagor." I do not think I can limit the words, "any sale," to such sales as may take place outside of this Court, but I must hold that this regulation applies to any sale made for the purpose of realizing the amount secured by the mortgage, whether under the power of sale reserved or otherwise. When a sale takes place, the amount to be received by the company is "so much of the principal money as will be necessary to pay the same sum as would be required to redeem the property, pursuant to the provisions contained in these rules." Now, the rule applicable to the redemption of mortgages is No. 24, "If any member shall desire to have his property discharged

Judgment.

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from a mortgage to the society, before the expiration of the full term for which it has been taken, he shall be allowed to do so on payment of all repayments, any fines, and other sums due in respect thereof up to the time of redemption of such mortgage, and of the present value of the future repayments, calculated to the end of the term, and discounted at such rate of interest, and on such terms as the directors may determine." It is true that order 15 provides that "The directors shall have the power to regulate the amounts applicable for advances, the time and manner of making the same, the interest and bonus payable thereon, and the time and amount of the repayments to be made in respect thereof." But this rule regulates the making of the advance, and its terms, and not its repayments, in case payment before the period expressly limited in the mortgage be made, and does not therefore assist in the consideration of the matter, except as shewing the complete power given to the directors in dealing with the concerns of the company.

Judgment.

If then I am correct in my conclusion that rule 24 is applicable to this case, is there any reason why I am not to hold the mortgagors to the terms therein expressed as those on which they have agreed to accept of the sum loaned, and on which it is to be repaid in case the premises be sold? On what principle can I now make some agreement for the parties other than that which they chose to enter into? There is no pretence of pressure, misunderstanding, or other ground on which the Court at times relieves in mortgage cases. It is not pretended that the plaintiffs are acting in an arbitrary manner, and refusing the defendants the benefits to which they may be entitled by a fair and honest working out of the regulation in question. This rule seems expressly to recognize the unreasonableness of demanding all the principal and all the interest whether earned or not. The postponed payments, because they have not, owing to

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their being called in before the period at which they were made payable by the original calculation, earned the interest specified in the mortgage, and ought to be "discounted at such rate of interest as the directors may determine." This seems to withdraw the case from the class represented by *Re Goldsmith*, and to bring it within that in which the Court has determined that such an association, as a building society, is bound by the reasonable rules laid down by those entrusted with the duty of regulating its affairs. I think that the mortgage and rules, taken together, amount to a contract, whereby it is agreed that a sum of money may and will be paid back in a certain manner, but if the terms of this obligation are not fufilled, then, that it is left to the governing body of the association to fix the terms on which the money will be accepted. I do not find any reason for interfering with such an arrangement: *See Thompson* v. *Hudson* (*a*). See also *Silver* v. *Barnes* (*b*), *Mosley* v. *Baker* (*c*), *Burbidge* v. *Cotton* (*d*), *Seagrave* v. *Pope* (*e*), *Re St. George's Building Society* (*f*), *Sparrow* v. *Farmer* (*g*), *Smith* v. *Pilkington* (*h*), *Fleming* v. *Self* (*i*), *Parker* v. *Butcher* (*j*), *Croft* v. *Graham* (*k*).

Judgment.

I think the Registrar bound to take the account in the manner in which, as I understand, he has been taking it.

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(*a*) L. R. 4 E. & I. Ap. 1.
(*b*) 6 Bing. N. C. 180.
(*c*) 6 Ha. 87; 3 DeG. M. & G. 1032.
(*d*) 5 DeG. & Sm. 17.
(*e*) 1 D. M. & G. 783.
(*f*) 4 Drew. 154.
(*g*) 26 Beav. 511.
(*h*) 1 DeG. F. & Jo. 120.
(*i*) 3 DeG. M. & G. 997.
(*j*) L. R. 3 Eq. 762.
(*k*) 2 DeG. J. & S. 155.

1875.

## WATSON v. MASON. [IN APPEAL.*]

*Composition deed—Insolvency.*

**The decree pronounced on rehearing as reported, ante page 180, reversed on appeal.**

This was an appeal by the defendant, *John James Mason*, from a decree of the Court of Chancery, made on rehearing, as reported, ante page 180, where the facts are fully set forth.

Dec. 17th. Mr. *Mackelcan*, for the appeal. The stipulation for the payment of an increased amount by *George Magill*, in the event of his insolvency, was in the nature of a penalty, and cannot therefore be enforced against him: *Thompson* v. *Hudson (a)*. Before that time he was not indebted to the creditors of *Edward* and *Robert Magill*; but the new firm of *Edward* Argument. and *George Magill* purchased an undivided moiety of the assets of the former firm, the new firm paying for these assets at the rate of fifteen shillings in the pound upon the liabilities of the old firm. The stipulation that this price should be increased in the event of the new firm becoming insolvent is void, as contrary to the policy of the insolvency laws: *Ex parte Mackay (b)*.

The new firm cannot be regarded as being substantially the same as the old firm of *Edward* and *Robert Magill*, so as to make the notes given by the new firm a conditional payment only of a larger debt for which they were already liable. *George Magill* gave security for the payment of these notes by a conveyance, in trust, to the plaintiffs, of his private estate, which was never

* *Present.*—DRAPER, C. J.; SPRAGGE, C.; BURTON and PATTERSON, JJ.

(a) L. R. 2 Eq., 612, 2 Ch. 255, 4 H. L. I. (b) L. R. 8 Ch. 643.

1875.

Watson v. Mason.

before liable to the creditors of *Edward* and *Robert Magill*, and he also, as a member of the new firm, purchased large quantities of goods, which never were subject or liable to the debts of the old firm. The defendants, who are creditors of the old firm, now seek to rank against those assets, amongst others, for the full amount of the original debts of the old firm: *Rose* v. *Rose* (*a*).

The agreement here contains no covenant that *Edward*, *George*, and *Robert Magill*, or any or either of them, will in any event pay the additional twenty-five per cent.; but is in effect a consent by them, on behalf of the future creditors of *Edward* and *George Magill*, that in the event of the estate of the new firm going into insolvency, these future creditors will permit the defendants to claim an amount out of the estate which the members of that firm, if solvent, would never have been liable to pay; and in any event they could only be entitled to rank as creditors for the twenty-five per cent. on the insolvent estate of *Edward* and *George Magill*, upon giving up to the assignee of that estate all securities held by them for the payment of the composition notes, which securities they do not offer to give up. The third question should be therefore, answered in the negative; but if not so answered, it should be declared and provided that the securities taken by the plaintiffs for such composition notes, and all moneys realized therefrom, should be handed over to the defendant *Mason*, to be distributed *pro ratâ* amongst all the creditors of the estate of *Edward* and *George Magill*, before a claim can be made against that estate by any of the other defendants, for the debts of the old firm.

Argument.

The agreement also stipulates that in the event of the insolvency of *Edward* and *George Magill*, the ori-

(*a*) Amb. 331.

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ginal debts of *Edward* and *Robert* shall revive, or rather become a claim against *Edward, George,* and *Robert,* and therefore the third question should be answered in the negative; or it should be declared that such claims may be proved only as the joint debts of *Edward, George,* and *Robert Magill.*

Argument.

Mr. *R. Martin* for the creditors. The creditors are entitled to receive from the trustees, *Watson* and *Waddell,* out of the moneys in their hands, the full amount of the composition notes and interest, and only the residue of such moneys, over and above the amount so required to pay all the composition notes and interest, and all expenses of the trustees in realizing the same, should be transferred and delivered by the trustees to the appellant. The respondents, the creditors, are entitled to prove against, and rank upon such insolvent estate for the residue of their claims against *Edward* and *George Magill,* and the firm of *E. & G. Magill*; and the appellant, as the assignee of such insolvent estate, is liable to pay the creditors out of such insolvent estate.

The appellant only represents the creditors of *Edward* and *George Magill,* who became such creditors subsequently to the composition deed sought to be impeached, and so long a period having elapsed since the execution thereof, without the same being impeached, he has no *locus standi* in Court to do so: *Collins* v. *Burton* (*a*), *Bailie* v. *Grant* (*b*), *McKewan* v. *Sanderson* (*c*), *In re Cheeseborough, Ex parte Hitchcock* (*d*), *Newton* v. *Ontario Bank* (*e*), *Ex parte Vere* (*f*), *Ex parte Hodge* (*g*), *In re McRae* (*h*), *Ex parte Bennett* (*i*),

(*a*) 4 De G. & J. 612.
(*b*) 9 Bing. 121.
(*c*) 42 L. J. Chy. 296.
(*d*) 40 L. J. Bancky. 79.
(*e*) 13 Gr. 652, affirmed in appeal, 15 Gr. 283.
(*f*) 19 Ves. 93.
(*g*) 20 W. R. 978.
(*h*) 15 Gr. 408.
(*i*) 2 Atk. 527, case 313.

*Ex parte Brook* (*a*), *Re Willis* (*b*), *Nunon* v. *Wilsmore* (*c*), *Morrison* v. *Steer* (*d*), *Bissel* v. *Jones* (*e*), *Brittlestone* v. *Cooke* (*f*), *In re Richmond Hill Hotel Company, Ex parte King* (*g*), *Lancaster* v. *Elce* (*h*), *Dalglish* v. *McCarthy* (*i*), *Ex parte Lyon* (*j*), *Johnson* v. *Barratt* (*k*) *Coles* v. *Turner* (*l*), *Bailey* v. *Bowen* (*m*). Secs. 18, 57, 58, 60, 94 & 95 of the Insolvent Act of 1869, were referred to.

Mr. *Edward Martin*, for the trustees.

Jan. 14, 1876.

SPRAGGE, C.—The question in this case is, between trustees representing the creditors of *Robert* and *Edward Magill*, who were partners in business, and whose partnership ceased in December, 1868, and the assignee of the insolvent estate of *Edward* and *George Magill*. The circumstances attending the discontinuance of the business of the former firm, and the formation of a new firm, and the agreement of the creditors of the old firm with that firm, and with the new firm, are set forth at length in the special case.

Judgment.

The new firm of *Edward* and *George Magill* was not, in any proper sense, a continuation or modification of the old firm. It was essentially a new partnership, and different words are used in the agreement of 22nd December, to express what was intended, "that *George Magill* shall form a copartnership with *Edward Magill*."

*George* was, theretofore, a stranger in the business; and in legal effect it made no difference that the person with whom he entered into partnership had been a

(*a*) 6 De G. M.& G. 771.
(*b*) 4 Exch. 530.
(*c*) 8 T. R. 521, 530.
(*d*) 32 U. C. R. 182.
(*e*) 38 L. J. Q. B. 2.
(*f*) 6 Ell. & Bl. 296.
(*g*) L. R. 4 Eq. 566, affirmed in appeal, L. R. 3 Chy. 10.
(*h*) 31 L. J. Chy. 789.
(*i*) 19 Gr. 578.
(*j*) 41 L. J. Banky. 41.
(*k*) 4 H. & C. 16.
(*l*) 35 L. J. C. P. 169.
(*m*) 37 L. J. Q. B. 61.

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partner in a firm then and thereby dissolved; the legal consequences were the same as if the person with whom he formed a partnership had been, like himself, a stranger to the business theretofore carried on by *Robert* and *Edward Magill*.

This was, in my judgment, the true position of *Edward* and *George*; and it is most important to bear it in mind, because it is a cardinal point in the case, whether there was any debt due by them, antecedent to that created by the agreement of December, and the giving of the notes by *Edward* and *George*, i. e., a cardinal point, apart from the question whether the agreement, under which the creditors of *Robert* and *Edward* claim, is not a fraud upon the insolvency laws.

In *Thompson* v. *Hudson* (*a*), Lord *Hatherley* stated the two classes of cases, the one where the additional sum which is stipulated to be paid is in the nature of a penalty, and the other where it is not. In that case, the sum to be paid in the event of default was held not to be a penalty, but the principles upon which the Lord Chancellor, and the other learned Lords who gave judgment in the case, proceeded, shew that unless the larger sum to be paid on default be an antecedent debt, it is in the nature of a penalty.

Judgment.

Lord *Hatherley* says: "I take the law to be perfectly clear upon these matters which we have to consider with reference to this and the subsequent agreements, namely, that where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage or be it by way of stipulation that in case of its not being paid at the time appointed a larger sum shall become payable, and be paid, in either of those cases equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the

(*a*) L. R. 4 H. L. 1. 15.

property pledged, or any augmentation of the debt as a penal provision, on the ground that equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the nature of a penal provision, against which equity will relieve when the object in view, namely, the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty and a forfeiture against which equity will relieve. Now, that being clear on the one hand, it is equally clear on the other, that, where there is a debt due, and an agreement is entered into at the time of that debt having become due and not being paid, in regard to farther indulgence to be conceded to the debtor, or farther time to be accorded to him for the payment of the debt, or in regard to his paying it immediately, if that be a portion of the stipulations of the agreement, or at some future time which may be named, and the creditor is willing to allow him certain advantages and deductions from that debt, as well as to extend the time for its payment, if adequate and proper security in the mind of the creditor be afforded him as his part of the bargain, in respect of which he is to make these concessions, then it is perfectly competent to the creditor to say: 'If the payment be not made *modo et formâ* as I have stipulated, then forthwith the right to the original debt reverts, and it is to be open to me to proceed with reference to the original debt, and to exercise all those powers which I possess for compelling payment of the original debt; in other words, I am entitled to be replaced in the position in which I was when this agreement, which has been now broken, was entered into.'"

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Judgment.

Lord *Westbury* says: "It is impossible to hold that money due by contract can be converted into a penalty. A penalty is a punishment, an infliction, for not doing, or for doing something; but if a man submits to receive,

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at a future time and on default of his debtor, that which he is now entitled to receive, it is impossible to understand how that can be regarded as a penalty. I have not, therefore, the least hesitation in stating that (if the Master of the Rolls is rightly reported), it could not have been present to him at the moment when he delivered his judgment, that the rest of the debt still remained due by contract, and that what was due by contract could not be a penalty. * * But the penalty and the liquidated damages in that case were not an antecedent debt due upon a contract for a valuable consideration, but were a conventional sum put in by the parties, plainly for the purpose of securing the performance of the agreement contained in the engagement between them. There is, therefore, nothing at all corresponding to the case where the creditor says to his debtor, 'If you pay me punctually on a given day a smaller sum of money, I will take it in discharge of the whole, but if you fail in doing so, my title to the original debt shall in no respect be prejudiced by this agreement.'"

Judgment.

So also Lord *Colonsay*: "It is a reservation of an existing right. It is not the emergence of a right that never had any existence at all, except on the violation of the agreement which was made. It is merely the reservation of what is the just and honest right of the party, which he was willing to waive to a certain extent, provided his debtor would do certain things; but if the debtor fails in doing those things, then that right which belongs to the creditor shall continue to belong to him, and he may enforce it."

The question then is, to which of the two classes, dealt with in the judgment of Lord *Westbury*, does this case belong? There could be no right of reverting to an original debt (to quote from Lord *Hatherley*) where no original debt existed between the party to pay and the party to receive payment.

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There was only the one debt from *Edward* and *George* to the creditors. That debt, it is true, was based upon a calculation of what was due by *Robert* and *Edward* to the creditors; but what was due by *Robert* and *Edward* was not due by *Edward* and *George*; it was no more than the basis of a calculation to arrive at what *Edward* and *George* should pay to the creditors as the price of the assets, which *Robert* and *Edward* and their creditors agreed should be transferred to *Edward* and *George;* it was a purchase of those assets by *Edward* and *George*, and the calculation based upon the old debts was only a mode of ascertaining the price. For that price so ascertained, and for nothing else, did *Edward* and *George* become *debtors* to the *creditors*.

They did not even agree to pay a larger sum in any event. It was not stipulated that upon default a larger sum should become payable; and even upon continued default, and the trustees realizing money by sale of real estate pledged as security, it was still only the same sum that was to be paid, and any surplus was to be paid to *Edward* and *George*.

Judgment.

It was only in one event that the creditors were to be entitled to a larger sum, that event being, the insolvency of *Edward* and *George*, and the stipulation was, that in that event they should be entitled to rank on the estate of *Edward* and *George* for the full amount of their debts against *Robert* and *Edward*; the effect of this would be to make *Edward* and *George* debtors for a sum for which they never had been debtors to these creditors.

*Rose* v. *Rose* (*a*), cited by Mr. *McKelcan*, is a peculiar case, and to some extent in point. *Rose*, the father, was tenant for life of an estate, and his son had the remainder in fee. The father was indebted to

(*a*) Amb. 311.

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his brother in the sum of £4053, and a mortgage was given to secure the amount. Subsequently the brother agreed that he would throw off £500 of the debt, if payment of the reduced amount were made by a certain day, and it was, at the same time, agreed by articles entered into by the father and the son, that the brother, the creditor, should be put into possession, and that a receiver should be appointed who should receive the rents. The condition upon which the creditor agreed to reduce the debt was broken, by the father himself receiving a portion of the rents from the tenants. The father died; and the question was, whether the son was entitled to redeem upon paying the reduced amount of the debt, and Lord *Hardwicke* held that he was so entitled, upon the ground that the son was induced to enter into the articles by the abatement. As to him the full debt was regarded as a penalty, while as to the father it could not have been so regarded. The mortgage was by the father, the son having made to him a conveyance of his estate to enable him to raise money to pay his debts; there was therefore no direct debt from the son to the creditor. Lord *Hardwicke* seems to have fastened upon the circumstance of the son being a party to the articles giving possession upon the abatement by the creditor as a ground for relief.

Judgment.

My opinion, further, is, that the stipulation in question is an agreement in fraud of the insolvency laws. In *re Murphy*, a bankrupt (*a*), a bond for payment of £800 was given to the trustees of a marriage settlement, and it was stipulated in the settlement that it was to be payable in the event of the death of the obligor; or, he being a trader, in the event of "his failing in his circumstances." He became a bankrupt. Lord *Redesdale* was of opinion that the bond could not be admitted to

(*a*) 1 S. & Lef. 44.

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be proved against the bankrupt estate. He pronounced the whole effect of the clause to be to avoid the operation of the bankrupt laws; adding, "And then the question is, whether a person can be admitted to prove as a creditor, on the foundation of an instrument contrived for the purpose of defeating the effect of the bankrupt laws, where the only ground of the claim is an instrument executed for the purpose of giving a right against creditors, which would not exist against the bankrupt if he were solvent. All the cases in England have held this to be a fraud upon the bankrupt laws which cannot be supported: nor really can anything, where the contingency is an act of bankruptcy, and where the demand does not arise till an act of bankruptcy committed, be provable under it, because it did not exist before it."

Judgment.

I will refer further upon this point only to the case of *Ex parte McKay* (*a*). The patentee of an invention sold his patent in consideration of royalties to be paid to him by the purchaser; the purchaser, at the same time, made a loan to the patentee of £12,500; and it was agreed that one half of the royalties should be retained by the purchaser towards satisfaction of the debt; and it was further provided—and upon this the question in the case arose—that in certain events, one of them being the bankruptcy of the patentee, the whole of the debt should immediately become due, and the creditor should be entitled to retain the whole of the royalties, until the debt was satisfied. It was contended that this provision was a fraud upon the bankruptcy laws, and void; and it was so held.

The ground of the decision applies, in my opinion, directly to the case before us. The language of Lord Justice *Mellish* is: "In my opinion a man is not allowed by stipulation with a creditor to provide for a different

(*a*) 8 L. R. Chy. 643.

1875. distribution of his effects in the event of bankruptcy, from that which the law provides. It appears to me that this is a clear attempt to evade the operation of the bankruptcy laws." And his lordship, after referring to to the language of Lord *Eldon*, in *Higginbotham* v. *Holme* (*a*), adds : "That is to say, as I understand it, a person cannot make it part of his contract, that in the event of his bankruptcy he is then to get some additional advantage, which prevents the property being distributed under the bankruptcy laws. It is certainly remarkable (he goes on to say), that there is apparently no reported case in which this has been decided with reference to a creditor in an ordinary mercantile transaction; but that seems to me an *à fortiori* case" (*b*).

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The case before us appears to me *à fortiori* to the case cited. The provision in this case was for more than a different distribution of effects in the event of insolvency; it was for an actual addition to the amount of the debt, due on the sale of the assets to *Edward* and *George Magill*. It comes directly within the principle of a case put by Lord Justice *James*, where he says that he does not see why, if what was done in that case could be done, it might not be done in every case. "Why, in fact, every article sold to a bankrupt [meaning to a trader], should not be sold, under the stipulation, that the price should be doubled in the event of his becoming bankrupt."

Judgment.

My opinion therefore is, with great respect for the judgment of the Court appealed from, that the decree made by that Court, on rehearing, should be reversed.

The decree, on original hearing, appeal book, p. 8, seems correct as to costs.

BURTON, J.—The great difficulty I have experienced in this case is, in regarding the transaction as in effect

(*a*) 19 Ves. at 92. (*b*) Page 648.

a composition by the creditors with *E. & G. Magill*, as the Vice Chancellor seems to consider it, instead of a sale of the assets of the former firm to them at a fixed sum.

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If the transaction had been with *George Magill* alone, instead of with himself and one of the partners in the old firm, there could be no question that it would, so far as he was concerned, be regarded as a sale simply, whatever might be the effect of a default in payment as regards the original debtors.

My experience has not lead me to the conclusion that commercial creditors err greatly on the side of generosity; and I think it may be assumed, that when they sold to the new firm of which *George Magill* was a member, at 75c. on the amount of the liabilities, they were obtaining the full value of the goods; and that they preferred a sale of that kind, with security, to forcing the assets to sale under the insolvency proceedings then pending.

Judgment.

I do not regard this as a composition in the ordinary sense of that term, but assuming it to be so, the only effect of a default would be to remit the creditors to their original rights, as against their old debtors *Robert* and *Edward Magill*.

Their claim would not be enlarged as against *George Magill* by mere operation of law, even if the agreement had been silent, but his obligation is defined by the instrument itself.

The learned Vice Chancellor states his views of the facts thus: "So that here we had an actual indebtedness of 20*s.* in the £., against a firm, the retirement of one partner without withdrawing any of the assets, the introduction of another partner, *and an agreement*

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I confess that I fail to see any such agreement. Granting that by operation of law the original debt revived against the old firm, the conditions upon which the reduced sum was agreed to be accepted not having been complied with, the agreement by which alone the liability of *George Magill* is to be regulated makes no such provision, but in express terms provides in the event of default, *not* that the debt should be increased, but that the power of sale should come into operation, and the trustees should be at liberty to sell the lands and other securities, *and apply the proceeds among the creditors who have come in under the conveyance,* and on payment and satisfaction of the said notes (namely the notes given for the purchase), to re-convey such portion of the lands as remained unsold to *Edward* and *George Magill* respectively.

Judgment.

I take it then to be quite clear that if insolvency had not intervened, but default had simply been made in payment at the stipulated times, and the trustees had under the power of sale realized the amount of the notes, they could have been compelled to re-convey the lands unsold.

But this is placed beyond all doubt by a further clause in the agreement, which, though somewhat unintelligible by reason of the omission of some words, does provide, that in the event of *Edward* and *George Magill* becoming insolvent before all the notes are paid, the creditors should be entitled to rank on the estate of *E. & G. Magill* for the full amount of their respective claims against *Magill Brothers,* less any sum previously paid.

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This is the only clause of the whole agreement in which any reference is made to the purchasers or new firm becoming responsible for the debts of the old. It is clear to my mind that mere default in payment at the day, created no liability on the part of the purchasers to pay more than the stipulated purchase money, and but for the accidental circumstance of *Edward Magill* being associated in the purchase, there would not be a doubt on the subject. *George Magill* was never liable for more than the 75c., but he and *Edward* consent that the estate shall be liable in the event of their becoming insolvent.

It may be quite possible that, on default in payment, the right of the creditors to claim in full against the partners of *Magill Brothers* may have revived; the inclination of my mind is, that in the face of this arrangement and the express agreement regulating the rights and liabilities of the parties, it would not, but that is not material to the present inquiry. It is clear that the right of the creditors to receive the additional 25c. was intended to arise only on the insolvency, and then as against the estate.

Judgment.

And this brings us to the question of whether a debt not previously in existence, but which is called into being only on the insolvency occurring, can be proved, or whether such an arrangement must not be regarded as a fraud upon the insolvent laws.

If this had been a case, such as is supposed, of a debt which had revived previously to the insolvency by reason of the composition not having been met, there could I apprehend be no doubt of its being proveable. The creditors could, in that case, have enforced their claim by suit, previously to the insolvency, and would, therefore, be in the same position as any other creditors; but when no debt existed previously to the insol-

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vency, and where the only ground of the claim is an instrument executed for the purpose of giving a right against creditors, which would not exist against the invent if solvent, I apprehend no case can be found to support it.

*Ex parte Murphy (a)*, referred to by the learned Chancellor, is a direct authority against such a debt being proveable, where the contingency is the act of bankruptcy, and where the demand does not arise until after bankruptcy committed.

Judgment.

PATTERSON, J.—The material facts are, that *Edward* and *Robert Magill*, who carried on business under the firm of *Magill* and *Brother*, became insolvent; proceedings in insolvency were commenced, and at a meeting of creditors an arrangement was made, which was carried out by a deed, dated 24th December, 1868, the general effect of which was, that *Robert Magill* retired from the firm, taking no assets with him, and a new partnership was formed between *Edward* and *George Magill*, under the firm of *E. & G. Magill*, who were to continue the business with the assets of the old firm, and who agreed to pay the creditors of the old firm seventy-five per cent. of the debts due to them; for which they gave their promissory notes at three, six, nine, twelve, and fifteen months, and which notes they secured by conveyances of land to Messrs. *Watson & Waddell*, as trustees. In case of default in payment of the notes, the trustees had power to sell the lands or any part of them, and, after paying all the notes, they were to reconvey to *George* and *Edward Magill*. And there was a further provision, on which the questions now arise, viz., that in case the new firm should become insolvent before all the notes were paid, the creditors should be entitled to rank on the estate of the new firm for the full amount of

(a) 1 S. & L. 44.

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their claims against the old firm, less whatever sums had been in the meantime paid them, on account of their debts, by *E. & C. Magill.*

Upon this the insolvency proceedings were dropped; the new firm went on with the business, contracted new debts, and became insolvent before the notes were all paid.

The question is, what are the rights of the old creditors? It was held by Vice Chancellor *Strong*, that they were restricted to the amount secured by the notes, and that the provision for enabling them to rank, in the event of the insolvency of the new firm, for the full amount of their debts, was in fraud of the insolvency laws, and was void.

On rehearing, it was held that the provision in question was not void, either as in fraud of the insolvency laws, or as a penalty; and that the creditors were entitled to rank for the full amounts of their original claims which remained unpaid at the time of the insolvency of the new firm; but, as I gather from the judgment of Vice Chancellor *Blake*, upon terms of giving up, for the benefit of the estate generally, the security which was held by the trustees.

Judgment.

The appeal is from the decree on re-hearing.

The decree is complained of by both sides: by the old creditors, because they are not allowed to hold the security for the extra twenty-five per cent., as well as the seventy-five per cent., originally secured; and by the assignee in insolvency because the old creditors are not confined to the amount of the notes they hold.

I do not consider it necessary to discuss the various questions argued before us, as in my opinion the decree of Vice Chancellor *Strong* was correct.

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I think the clear effect of the deed is, to assume to enable the creditors to rank on the insolvent estate of *E. & G. Magill* for an amount for which *E. & G. Magill*, if they had continued solvent, would never have been liable; and for which, in fact, they never were liable. Any different view must result from a mistaken apprehension of the facts stated in the case. We are not informed what was the value of the assets of the old firm, nor are we told that the new firm took those assets at seventy-five per cent. of their nominal value, or at what valuation they took them. The amount secured to the creditors is calculated not upon the value of the assets, but upon the amount of the debts. We are neither told that the new firm ever agreed to assme any liability, beyond the amount of the notes which they gave, nor that they received an equivalent for any greater liability.

Judgment.

There is an incomplete sentence in that part of the deed which is now particularly in question: viz., "In case the said parties hereto of the second part shall become insolvent before all the said promissory notes have been paid, then the original debt of all the said parties who may now accept such composition against the said *Edward Magill* and *George Magill* and *Robert Magill* * * * and they shall be entitled to rank on the said estate of said *E. & G. Magill* for the full amount of their respective claims against the said firm of *Magill Brother*," &c.

If the hiatus were filled with the words "shall revive," some countenance would be afforded to the suggestion that *George Magill* had been in some way liable for the "original debts;" or that, by some process of novation, they had become debts due by *E. & G. Magill.* We have, however, no warrant for supplying those words: other words would fit in equally well, as, e.g., "shall become payable," or shall be taken to be debts

of *E. & G. Magill.*" It is not impossible that the hiatus occurred by reason of the difficulty in selecting an expression which would not be open to misconstruction We have to take the case as we find it: and, so taken, it has only the effect which I have already given to it. 1875. Watson v. Mason.

The authorities cited by the learned Vice Chancellor, in his judgment on the rehearing, to which may be added *Re Murphy (a)*, clearly establish that if the effect of the deed is, as I understand it to be, it must be held to be inoperative to enable the creditors to rank for the twenty-five per cent.

On this ground I agree that the appeal should be allowed, and the decree made by Vice Chancellor *Strong* affirmed.

I think the costs of this appeal, and of the rehearing, between solicitor and client, should be included in the costs of all parties, to be paid out of the funds in the hands of the trustees, as this appeal is a proceeding in the cause; and the special case contains a consent that the costs shall be so paid. Judgment.

DRAPER, C. J., concurred in the views expressed by the Chancellor.

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(a) 1 Sch. & Lef. 44.

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## MASON v. SCOTT—[In Appeal].*

*Arbitration—Lease—Parol Evidence—Statute of Frauds—Collateral agreement.*

*Held* on appeal, [reversing the judgment of the Court of Chancery as reported ante volume xxi. pages 166 and 629] that a verbal stipulation and agreement by a lessor, as to improvements to be constructed by him upon demised premises, could not be established by parol so as to add to or vary the lease, although it was proved that without such verbal promise and agreement the lease would not have been accepted.

Such an agreement to be proveable by parol must not only be collateral to, and independent of the written one, but it must be consistent with, and not vary it. The terms of the lease in this case bound the lessee to do what, by the alleged parol agreement, was to be done by the lessors, and there was one agreement only founded on one consideration, not two distinct independent agreements:

*Held*, that such alleged agreement was not admissible in evidence.

*Held*, also, that as the agreement concerned an interest in land it required to be in writing under the Statute of Frauds, and could not be proved by parol.

Argument.

This was an appeal by the trustees *Mason*, *Murphy*, and *Murray*, from an order of the Court of Chancery, as reported ante volume xxi. pages 166 and 629, where the facts of the case are fully set forth.

Mr. *Boyd* and Mr. *Mackelcan* for the appellants. The agreement which it is sought to establish here, and which is referred to in the third paragraph of the case stated, cannot be established by parol evidence. The indenture of lease duly signed and sealed by the parties contains material covenants as to the various works, improvements and repairs to be made or done by the respective parties upon the premises; and to permit parol evidence to be given that either of the parties also agreed to do works or make other improvements upon these premises, would certainly be such an adding to, or varying of, the terms of the sealed instrument, as the law will

* *Present*—BURTON and PATTERSON, JJ., HARRISON, C. J., and MOSS, J.

not permit to be done by parol testimony: *Losee* v. *Kezar* (*a*), *O'Neil* v. *Lingham* (*b*).

If the promise which is here alleged to have been made can be added to the terms of the present lease, no agreement under seal can be relied on as a protection against pretended additional promises concerning the subject of the sealed agreement. It is true that although the well established rule that parol evidence is not admissible to add to or vary the terms of a document under seal has not been abrogated, yet cases have arisen where evidence has been allowed to be given of agreements that were collateral only to the deed. As instances of this *Morgan* v. *Griffith* (*c*), *Erskine* v. *Adeane* (*d*), may be referred to.

If the constructing of a dam on the demised premises can be said to be a collateral matter only, then all the covenants in the lease about repairs and improvements must be collateral agreements, and not essential or material parts of the instrument. In the judgment of Vice Chancellor *Blake* the building of this dam is spoken of as one of the burdens which the lease entailed, while at the same time parol evidence was admitted respecting it, on the ground that it formed no part of the lease. If it were shewn by parol evidence that the lease was accepted on the faith, agreement, and understanding that the dam should be built, it might possibly be construed as a condition to be performed before the execution of the lease should be deemed complete; but such parol condition or understanding cannot be treated and sued upon in the same manner as if it were a covenant in the lease, which is the effect of the judgment in favor of the respondent. Argument.

In any view of the case, however, the new trustees, the appellants, cannot be held liable upon any verbal promise, made by the former trustees, to build a dam

(*a*) 5 U. C. C. P., 234.
(*b*) 9 U. C. C. P., 14.
(*c*) L. R. 6 Ex. 70.
(*d*) L. R. 8 Ch. 756.

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upon the demised premises. In the agreement of reference the appellants expressly deny all liability in respect of the damages claimed for the breach of such alleged agreement, yet this same reference is held to be an admission of liability on the part of the appellants to pay any damages that might have arisen from such breach.

It is true the arbitrator has found that without the new dam the mill privilege and flour mill, demised by the lease, were practically valueless, and, therefore, so long as the lease continued, the respondent would be liable for rent for which he received no adequate return. The appellants were the assignees of the reversion and the only persons to whom the lease could be surrendered, and they relieved the respondent by accepting a surrender of the lease, allowing him for all improvements he had made; and yet, it would seem, that this act of favour to the respondent is held to be a sufficient reason or consideration for making the appeallants personally liable to pay him $2,400, for which he could otherwise have had no claim upon them.

Argument.

Mr. *Ferguson* and Mr. *Meyers*, contra. The arbitrator has found that the lease referred to in the special case was executed by the parties thereto, on the faith, agreement, and understanding of the agreement referred to in the third paragraph of the special case, and that the same would not have been entered into but for such agreement; consequently such evidence was admissible to prove that agreement as one collateral to the lease and that upon which it was based. *Lindley* v. *Lacey* (*a*), *Mason* v. *Brunskill* (*b*), *Smith* v. *East India Co.* (*c*), *Malpas* v. *London & South Western Railway Co.* (*d*), *Morgan* v. *Griffith* (*e*), *Lewis* v. *Robson* (*f*). These cases establish that the evidence is admissible to prove

(*a*) 17 C. B. N. S. 578.
(*b*) 15 U. C. R. 300.
(*c*) 16 Sim. 76.
(*d*) L. R. C. P. 336.
(*e*) L. L. 6 Ex. 70.
(*f*) 18 Gr. 395.

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the agreement, which is collateral to, and does not conflict with or vary, the terms of the lease.

*Cherrier*, *Stevenson*, and *Murphy*, the former trustees, entered into the lease and agreement, as executors and trustees of *Daniel Murphy*, and became liable as such for any breach of the conditions of the lease and agreement, and the estate of *Murphy* became bound by the acts of the executors and trustees, and liable to make good any loss arising upon the breach of the conditions of the lease or agreement.

The estate of *Daniel Murphy*, respresented at first by *Cherrier*, *Stevenson*, and *Murphy*, and subsequently by the appellants, has received the benefit of the covenants contained in the lease, to be kept and performed by the lessee, and is, therefore, liable in the hands of the present trustees, for any breaches of the agreement by the former representatives of the estate; assets of the estate sufficient to answer the respondent's claim being admitted by the appellants.

Argument.

*Robson* v. ——————— (*a*), *Riddell* v. *Sutton* (*b*), *Worthington* v. *Barlow* (*c*). In *re Wansborough*, *Wansborough* v. *Dyer* (*d*), clearly establish the principle that these trustees having signed the submission to arbitration, thereby rendered themselves personally responsible for any sum the arbitrator might award; and here the respondent having surrendered the lease and yielded up possession of the premises on the understanding and agreement that his claim should be referred to arbitration, and that any damages awarded him would be paid, it would be inequitable now to permit the appellants to take the benefit of such agreement without, at the same time, being responsible for the liabilities thereby incurred.

(*a*) 2 Rose 50.
(*b*) 5 Bing. 200.
(*c*) 7 T. R. 453.
(*d*) 2 Chitt. Rep. 40.

1875. BURTON, J.—This is an appeal from a decision of the Court of Chancery.

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The question at issue arose on a special case stated by
Jan. 22, 1876. an arbitrator for the opinion of that Court, under the provisions of the Common Law Procedure Act.

The arbitrator found, that certain parties then trustees under the will of *Daniel Murphy*, and as such seized of a property at Bronte, known as the Bronte mill property, consisting of a farm and mill privileges capable of being rented in two parcels, were desirous of renting it.

The whole was greatly out of repair, and the portion known as the mill property, which had then recently been used as a paper mill, was also in bad condition, and the trustees had determined to restore it to a flour mill, for which purpose it had been originally built, and to fit it up with good machinery, and make *the water power*
Judgment. *available by proper works.* The farm also was in bad order, and required extensive improvements, and these improvements—in which term, I apprehend, he intends to include the alterations in the mill and dam—he finds were absolutely necessary in the interest of the estate to save the property from destruction, and make it produce an income.

In the negotiations which took place between the trustees and the respondent, it was agreed that they should put the mill into good order, as a merchant and grist mill, and *build within a reasonable time a fixed or permanent dam* across the creek, on which the mill was built, so as to control and utilise the whole body of the stream, and *on this basis the negotiations proceeded*, but before the lease was executed the respondent agreed to take the farm as well as the mill property proper, and to make certain improvements upon it which are specified in the lease. In all other respects the original agreement remained unaltered.

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The arbitrator further finds that there was a verbal agreement, such as is above referred to, and that the dam referred to was, in fact, required for making the water privileges and flour-mill available, and without which he finds the privilege and flour-mill were valueless. He finds also that the lease was prepared in its present form on the understanding and agreement that such dam should, within a reasonable time, be built by the trustees, and, thereafter, kept in repair by the respondent: that at the time of the execution of the lease no actual words were used by way of promise or agreement, but it was executed by all parties on the faith, agreement and understanding that the dam would be built as stipulated, and that otherwise it would not have been executed.

He finds also that at the time of the negotiations, and when the lease was signed, there was an old dam on the creek in a ruinous condition, and from that and other causes which had arisen since its original construction in 1866, it was insufficient to drive the mill.

Judgment.

That after the execution of the lease two of the trustees were removed by decree of the Court of Chancery, and replaced by *Mason* and *Murray*, who with the other trustee *Murphy* are the parties to the reference and the appellants now before us.

In the agreement of reference—after a recital of the lease and the claim made by the respondent that the previous trustees had made such an agreement as is here set out, and that he claims damages for the breach of such agreement, and that the appellants denied all liability in respect thereof, and claimed arrears of rent and damages for non-performance and breach of covenants—the respondent, in consideration of the covenants and agreements therein contained, surrendered the lease and gave up possession, and then the parties to the re-

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ference mutually agreed to refer the said claims and the value of the surrender in view of the improvements made by *Scott* the respondent upon the demised premises, and getting such possession, and all other matters in difference to the arbitrator, who found that the respondent had broken his agreement both in non-payment of rent and non-performance of covenants, and assessed the damages for such breach, and having found the value of the surrender, set one off against the other; and then as to the claims made by the respondent in reference to the parol agreement he finds the facts, which I have above recited, and states the following questions for the opinion of the Court, viz. :

First : Under the circumstances set forth could the existence of an agreement of the nature referred to be established by oral evidence ; and

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Second : If so, are the present trustees, the appellants here, liable for the breach of such agreement. And then directs that if both these questions are found in the affirmative the appellants should pay to the respondent the sum of $2,400 as damages, together with costs, but if the Court should be of opinion that the appellants are not liable, then that the respondent should pay the costs.

Both questions were answered by the Court of Chancery in the affirmative, although the learned Judges differ in their reasons for arriving at that conclusion.

It may, perhaps, be doubtful whether the arbitrator intends to find that there was a verbal agreement as to the leasing of the premises, including in that agreement, *inter alia*, the stipulation to erect the dam within a reasonable time after the execution of the lease, and that for some reason, not explained, it was omitted from the written lease, all parties understanding that notwithstanding its execution this portion of the agreement

would be carried out; or whether the agreement as to the dam was a separate agreement or stipulation made and entered into or insisted upon as a condition of executing the lease, and, though not expressly referred to in words at the time the lease itself was signed, forming in fact such a condition apart from the original negotiations and agreement.

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The inclination of my mind, after many repeated examinations of the learned arbitrator's case, is that the whole was one agreement; that for some reason, not explained, that portion of it which related to the building of the dam was omitted from the writing, all parties then intending that the portion omitted should be carried out, but that there never was any distinct and separate agreement apart from the original negotiations upon the faith of which the lease was executed; but assuming that the case may be read as finding in effect that the lease was executed upon the distinct representation that the trustees would build the dam, and that it was on the basis of that collateral agreement being performed that lease was signed, I find very great difficulty in coming to the conclusion, apart from the reasons which will be presently stated by my brother *Patterson*, that evidence of the agreement is receivable.

Judgment.

It is not easy, perhaps, to reconcile some of the recent decisions and notably that in *Mann* v. *Nunn* (*a*) with previous cases, but this, at all events, is clear, that whether the agreement be a collateral agreement or not it is not receivable in evidence if any of its stipulations add to or vary the terms of the deed itself.

No doubt, says Lord Justice *Mellish* in the case of *Erskine* v. *Adeane* (*b*), as a rule of law, if parties enter into negotiation affecting the terms of a bargain, and

(*a*) 30 L. T. N. S. 526.

(*b*) 8 Ch. App. 756.

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afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or any other deed, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself.

The agreement sought to be established by parol evidence in this case, in addition to the agreement on the part of the trustees to build the dam, which, after its erection, would form part of the premises demised, contains an agreement on the part of the tenant thereafter to keep it in repair—adding, therefore, a new agreement to the lease. I am of opinion, therefore, that this first question should be answered in the negative, as should also the second.

Judgment.

The learned counsel for the respondent admitted that he was unable to refer to any authority for the position, that the existing trustees, *qua* trustees, are bound by the agreement of the former ones. In other words, that the estate is bound, and was driven, as I understand, to admit that the liability, if any, was a personal liability on the part of the new trustees, which could only become a burden upon the estate indirectly, when they came to pass their accounts for money disbursed by them in the execution of the trust.

It is, I think, quite clear that up to the 9th March, 1874, there was no liability on the part of the new trustees. What, then, has occurred to make them liable since? It is quite true that whilst denying all liability for any breach of the agreement made by their predecessors in the trust, they consented to leave that question and all other matters that were in dispute between

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them to the award of Mr. *Martin*, and if that gentleman, having been made the Judge of all questions either of law or fact, had in pursuance of his power awarded unconditionally the sum of $2,400 as damages for the breach of that verbal agreement, they would have been bound personally by his finding, and must have sought their indemnity from the estate; in the same way as the respondent would have been absolutely bound and concluded by a finding that they were not liable; but the arbitrator has declined to take upon himself this responsibility, and has referred the question for solution to the Court, and we have now to decide whether, assuming the agreement to be a valid one, the present trustees are liable at law or in equity for its performance, or subject to damages for its breach. Their liability cannot be extended, by the agreement entered into to refer, beyond what they have expressly agreed to. It amounts to nothing more than this, to my mind." We admit that such an agreement as you allege was made with our predecessors, was made, but we deny all liability on account of it. We are willing to accept a surrender of the lease, and we will leave the question of our liability, and if found liable, the amount of that liability, as well as the value of the surrender and your improvements, and the claim we have against you, to arbitration;" and they, no doubt, thereby exposed themselves to the risk of being made personally liable for the breach of that agreement. I quite agree with the learned Vice-Chancellor when he states that these appellants, when entering into this agreement of reference, made themselves personally liable for any award which might be made against them, but the arbitrator, *quoad* this particular matter, has made no award, but has referred the question of liability to the Court; and in the shape in which it comes before us, that question must be decided apart from any new liability assumed by the agreement itself.

Judgment.

The mere surrender of the lease would not affect the

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liability of these trustees; so far as we can see the surrender may have been as, or more, beneficial to the tenant than to them, but whether beneficial or otherwise, all that the trustees consented to do was, to leave the value of that surrender, as well as their own liability, to the arbitrator: if he had awarded against them they could not have complained, as they voluntarily agreed to forego their position, and submit themselves to his decision, but as he has failed to award upon that question we have merely to decide whether they were liable at the time the agreement of reference was made.

I also agree that it was quite competent to the arbitrator to take the whole question of the collateral agreement and the damages resulting from it into consideration, and to deal with them as fully as if the present trustees had entered personally into that agreement, but he has declined to do so; and as the simple question of their liability, apart from the agreement, is left to us, much as we may regret the result we are compelled to arrive at, I see myself no way of avoiding the conclusion that the second question must be answered in the negative, and the appeal, therefore, should be allowed.

Judgment.

PATTERSON, J.—This is an appeal from an order of the Court of Chancery upon a case stated by an arbitrator.

The reference is between *Mason*, *Daniel Murphy* and *Murray*, described as executors and trustees under the will of the late *Daniel Murphy*, of the first part, and *Scott* of the second part.

It recites a lease dated 1st June, 1871, from *Cherrier*, *Stevenson*, and *D. Murphy*, acting as executors and trustees under the will of *Daniel Murphy*, to *Scott*, of the "lands and premises, water privilege, and flouring mill therein mentioned, known as the Bronte Mill Pro-

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perty, for the term and upon the covenants and agreements therein contained:" that *Scott* claims that the said executors and trustees of the said mill, parties to the said lease, undertook, promised, and agreed to build and finish, within a reasonable time, a good substantial dam, required for making the water privilege and flouring mill available to *Scott* in carrying on his business as a miller and dealer in grain: that *Cherrier* and *Stevenson* have been removed from the office of trustee and executor, and *Mason* and *Murray* appointed in their room and stead: that *Scott* claims damages for the breach of the alleged agreement, and the parties of the first part deny all liability in respect thereof, and claim arrears of rent and damages for non-performance and breach of covenants. And it is witnessed that *Scott*, in consideration of the covenants and agreements thereinafter contained, surrenders to the parties of the first part, executors and trustees as aforesaid, the indenture of lease, for the residue of the term yet to come and unexpired, and delivers to them immediate possession of the lands and premises. And the parties further agree to refer the said claims and the value of the surrender of the term, in view of the substantial and permanent improvements made by *Scott* and the immediate delivery of possession, and all other matters in difference.

Judgment.

The arbitrator found in favour of the trustees for $1288.30, for breach of covenant to pay rent and other covenants: and found in favour of *Scott* for a similar amount, "as and for the value of the surrender of the term, in view of the substantial and permanent improvements made by *Scott* upon the lands and premises, and the immediate delivery of possession thereof:" and directed those sums to be set off one against the other. And then as to *Scott's* claim, he states a case for the opinion of one of the Courts.

The statement of the case is in the following terms:

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[His Lordship here read the statement as set out, *ante* vol. xxi. page 166.]

The lease is made part of the case before us.

The case was first heard before Vice Chancellor *Proudfoot*, who found in favour of *Scott* on both the questions submitted, holding that the agreement was established; as to which, I suppose, we are concluded by the arbitrator's finding, if it is held that parol evidence is admissible; and holding that the agreement was collateral to the lease, and parol evidence therefore admissible; and holding that the present trustees *qua trustees* are bound by the agreement of the former ones—treating the parties to the agreement as being the *Murphy* estate on the one hand, and *Scott* on the other, and the award as affecting the trustees only in their representative character, and not personally. On the rehearing of the case the Chancellor agreed, on the authority of *Morgan* v. *Griffith* (*a*), in holding the agreement to be collateral, and held the present trustees bound, not as representatives of the estate, but personally; holding, as I understand his judgment, that the effect of their agreement with *Scott*, and the taking of the surrender, was to make them, by their own agreement, personally liable in case it was found that the original trustees had been liable.

Judgment.

Vice Chancellor *Blake* agrees with the Chancellor in the result, but upon different grounds from those relied on by either of the other Judges. He holds that the arbitrator had full power to modify the lease, should the facts of the case warrant it; or if there were matters collateral to the lease, to take them into consideration, and to deal as fully therewith as if the appropriate steps had been taken at law, or in equity, to work out the

(*a*) L. R. 6 Ex. 70.

various rights of the parties. I understand this to mean, that if the arbitrator found (which he might properly do on parol evidence) that there was the alleged agreement, and that the lease ought to be reformed by embodying it, he had power to treat the lease as if so reformed; and the learned Vice Chancellor afterwards, in accordance with this view, speaks of the agreement to build the dam as a burden entailed by the lease. He does not, however, treat the present trustees as liable as assignees of the reversion to perform the covenant so supposed to be carried into the lease, for he expressly holds that no liability attached to them until the 9th March, 1874, the date of the agreement set out, when, by their own act in accepting the surrender, and making the agreement, they undertook a liability which they were not previously under.

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The result of the decree is to hold the present trustees personally responsible for the payment of $2,400 for damages in respect of the failure to build the dam. From this decree the trustees appeal.

Judgment.

I am unable to agree with the learned Chancellor and Vice Chancellor, who hold that when the trustees executed the agreement of March, 1874, and accepted the surrender of the term, they thereby assumed any liability in respect of the failure to build the dam, although their agreement to refer was doubtless wide enough to include any burden to which the award should find them liable.

They deny all liability in respect of the claim for the dam. To establish a liability against them two things required to be determined—first, that the alleged agreement was made; and secondly, that these trustees were liable to perform it. If those matters were determined against them, undoubtedly they bound themselves to abide by the award; but I read the agreement, not as conceding or assuming a liability to perform the under-

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taking of their predecessors in the trust, but as stating that as one of the matters in difference which they submitted for adjudication. This view does not shut out their liability in case the result of the award should be that the lease ought to be treated as reformed by the insertion of the covenant to build the dam, and that the burden of that covenant passed to them, provided the reference is wide enough to give the arbitrator power to deal in that manner with the question, and provided he has in effect so dealt with it; as to which points I at present express no opinion.

The first point to be considered is whether the alleged agreement could be proved by parol evidence, not for the purpose of reforming the lease, which I do not propose to consider, but for the purpose of establishing it as an agreement upon which an action at law could be sustained.

Judgment.

If parol evidence is admissible, it must be upon the ground that the agreement is collateral to the lease; and it cannot be denied that the cases of *Morgan* v. *Griffith* (*a*), *Erskine* v. *Adeane* (*b*), and *Mann* v. *Nunn* (*c*), seem to be strong authorities in support of that view. It has to be shewn that the agreement is collateral to the lease, and also to the agreement for the lease, so as to take it out of the rule which forbids to vary a written instrument by verbal evidence, and to prevent the application of the Statute of Frauds.

I find some difficulty in understanding the exact state of facts which the case presents, and am not sure that I apprehend correctly what the arbitrator has intended to convey.

Three paragraphs of the case stated, 1, 2, and 3, contain the finding as to the agreement. Paragraph 1

(*a*) L. R. 6 Exch. 70. (*b*) L. R. 8 Chy. 756.
(*c*) 30 L. T. N. S. 526.

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states that the trustees found it necessary, in the interest of the estate, to save the property from destruction, and make it produce an income, that the mill should be restored as a flour-mill, fitted up with good machinery, and the water-power made available by proper works. Paragraph 2 informs us that negociations took place for a lease to *Scott* of the mill property, and it was agreed (that is, as I understand, as part of the negociations) that the trustees should put the mill in good order as a merchant and grist-mill, and build within a reasonable time a permanent dam, so as to control and utilize the whole body of the stream, and on this basis the negotiations proceeded; but before the execution of the lease it was agreed that *Scott* should take a lease of the farm as well, and "in all other respects the original agreement remained unaltered."

Judgment.

So far the substance of the statement is, that the parties had come to a verbal agreement, that the trustees were to let to *Scott* the mill property and the farm, and were to repair and refit the mill, and build a dam.

In paragraph 3 the fact is again stated that the trustees verbally agreed with *Scott* to build the dam within a reasonable time after the execution of the lease. I do not take this to be a statement of a new agreement, or anything more than a repetition of what was stated in paragraph 2. It is to be noted that there is no statement of when, or how near to the time when, the lease was prepared, this agreement was arrived at. The arbitrator then goes on to say "That the lease was prepared in its present form on the said understanding and agreement that a dam of the nature aforesaid was to be built as aforesaid, and thereafter to be kept in repair by the said *James Scott*; but there is no evidence of any actual words used by way of promise or agreement of the nature aforesaid at the time of the actual execution or delivery of the said lease, but the said lease was exe-

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cuted, delivered, and accepted by all the parties thereto on the faith, agreement, and understanding that a good and substantial dam of the nature and character aforesaid would be built as aforesaid, and within a reasonable time as aforesaid; and but for this faith, agreement, and understanding, the said lease would not have been executed and accepted."

The precise effect of this last passage is not very apparent. The statement that the lease was prepared in its present form (that is, omitting all reference to the agreement to build the dam, and repair the mill) "on the understanding and agreement" that the dam should be built, can scarcely have been intended to convey that they said nothing of that agreement because the agreement existed; although that seems to be the meaning of the words used. From the whole passage together the statement amounts, I think, to this, viz., that after the negotiations had resulted in the verbal agreement previously mentioned, nothing more is proved to have been said about the building of the dam; that although the lease was prepared in its present shape, and executed by all parties, nothing is proved to have been said, in connection with the execution of the lease, on the subject of the agreement to build the dam; yet all parties understood that the original agreement remained in force, and was to be performed, and that so far were they from intending to abandon that agreement, that they would not, on either side, have become parties to the lease if they had not understood that the whole of the original arrangement was to contiuue in force.

Judgment.

I cannot find anything in the arbitrator's statement to indicate that the agreement respecting the dam was ever understood or intended by the parties to be separated from the original agreement of which it formed a part, and to form a separate collateral agreement. I see no separate consideration to support a separate agreement;

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I am not to draw inferences of fact from the facts stated. I am to decide what the law is as applicable to the facts found by the arbitrator. I do not find any statement that there ever was an agreement made embracing the building of the dam except the original verbal agreement for a lease; and although I find the statement that the execution of the lease was not intended to do away with that agreement, in the particular in question, I find no separation of that one from the other terms of the verbal agreement, except that the other terms, or some of them, were embodied in the lease, while this one was not.

When we come to consider how far the fact of the execution of the lease interferes with the right to prove the agreement by verbal evidence, it may be of consequence to determine whether the parties are shewn to have intended that this part of the original agreement should not be reduced to writing, and whether, therefore, it can be said that the lease was not to contain the whole agreement between them. On the question of the Statute of Frauds the execution of the lease may not be a material fact. If the agreement in question can only be asserted as a part of the entire agreement originally made, as in my opinion is the effect of the case stated, we have to consider in the first place, was that agreement within the statute? and secondly, does anything which has taken place exclude it from the operation of the statute?

Judgment.

Originally, there can be no question that the agreement was for an interest in land, and so within the fourth section of the statute. As far as appears, all the terms of the agreement were performed except this one to build the dam. The lease was given and accepted, and the mill was repaired, though no covenant to repair it was inserted in the lease, but the dam was not built. If the lessee were proceeding for specific performance,

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there is clearly enough shewn to entitle him to a decree, in the part performance which has been established. We are, however, considering the legal position, as the liability of the trustees must be of the nature of a legal obligation, if this award for $2,400 is to be sustained against them.

The authorities clearly establish that no action at law could be sustained under the circumstances before us.

Although a promise to build a dam, like a promise to build a house, may not be within the statute, yet the agreement for the lease clearly was within it, and the agreement being entire, must all fall together. This is decided by many cases, as e. g. *Chater* v. *Becket* (*a*), *Thomas* v. *Williams* (*b*), *Wood* v. *Benson* (*c*), Earl of *Falmouth* v. *Thomas* (*d*), *Vaughan* v. *Hancock* (*e*), *Mechelen* v. *Wallace* (*f*), *Kelly* v. *Webster* (*g*).

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In *Morgan* v. *Griffith* (*h*), and *Erskine* v. *Adeane* (*i*), no question of the Statute of Frauds seems to have been discussed. In *Angell* v. *Duke* (*j*), it was held on demurrer to the declaration, that the promise there set out, which was a promise of the same nature as in *Mechelen* v. *Wallace*, viz., to repair a house, and to send furniture into it, after the plaintiff should have become tenant of it, was not within the statute, because it was not associated with any agreement made at the same time for an interest in land, although it was made to take effect in case the plaintiff should afterwards become tenant. The distinction is somewhat refined, and not very readily apparent; but all the learned Judges expressly affirm the rule established by the cases I have cited, and distinguish the promise they were dealing with as being made

(*a*) 7 T. R. 201. (*b*) 10 B. & C. 664. (*c*) 2 C. & J. 94.
(*d*) 1 C. & M. 89. (*e*) 3 C. B. 766. (*f*) 7 A. & E. 49.
(*g*) 12 C. B. 283. (*h*) L. R. 6 Exch. 70. (*i*) L. R. 8 Ch. 756.
(*j*) L. R. 10 Q. B. 174.

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antecedently to the agreement for the interest in land, and as an inducement to the plaintiff to enter into such an agreement. *Lush*, J., says: "If it had been part of the terms that the defendant agreed to let, or the plaintiff agreed to take, I quite agree the whole would have been void, as not being in writing; but there is no such statement." And the other Judges express themselves to the same effect. The case of *Mann* v. *Nunn* (*a*), resembled that before us in its general facts, but is probably distinguishable by the circumstance that the promise was made in immediate connection with the signing of the lease. In the Law Journal report the facts are thus stated: "At the time of the negotiations for letting the messuage it was in an unfinished condition, and before, and at the time of signing the agreement the defendant verbally promised the plaintiff that if the latter would become his tenant, proper drains should be put in, the water laid on, a water-closet built, and the messuage altogether finished, fit for habitation." It was held that this promise was a distinct agreement, collateral to the lease; and taking it in this view, it was held that the agreement to do the repairs was not within the Statute of Frauds. Nothing is decided contrary to the law as settled by the cases to which I have referred, unless the case can be taken as a decision of a point, which does not seem from either of the reports of the case to have been alluded to; viz., that although the promise to do the repairs may not have been itself within the statute, yet, if that promise was in consideration of an agreement to take a lease, which agreement was within the statute, an action would nevertheless lie upon the promise. The reports of the case in the Law Journal and Law Times differ so much that it is evident that neither is a full report of what the learned Judges may have said, and it is probable that the question of the statute was really dealt with in a view of the contract

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(*a*) 43 L. J. C. P. 241, & 30 L. T. N. S. 526.

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similar to that taken in *Angell* v. *Duke* (*a*). The case cannot, in any view, be taken as intending to overrule a series of decisions extending over a century; and as to the question of the contract being collateral, the decision is questioned in *Angell* v. *Duke* on the motion in that case to set aside a nonsuit.

It is also well settled that the circumstance that that part of a verbal agreement which is within the statute is executed, does not cure the defect in respect of the other part: *Cocking* v. *Ward* (*b*), *Hodgson* v. *Johnson* (*c*), and *Johnstone* v. *Cowan* (*d*), are authorities for this, in addition to the cases previously cited.

We may next consider whether (setting aside the question of the Statute of Frauds) this agreement to build the dam can be said to be collateral to the lease, so as to allow verbal evidence of it; although if the statute applies, this consideration may not be material.

Judgment.

There could be but little room for question on this point, if it were not for the decisions in *Morgan* v. *Griffith* (*e*), *Erskine* v. *Adeane* (*f*), and *Mann* v. *Nunn* (*g*). Those cases are, however, all distinguishable, on the ground that the agreements there in question were deliberately and intentionally kept separate from the leases, or were never intended to form part of the entire agreement between the parties. In the present case nothing of that sort appears. As I have already pointed out there was here, originally, one agreement, which embraced repairs to the mill, and the erection of the dam, as well as the letting of the premises. No intention to separate this part of the agreement from the [illegible] appears, nor is there any separate consideration shewn to support a separate

(*a*) 32 L. T. N. S. 320.
(*b*) 1 C. B. 858.
(*c*) 1 E. B. & E. 685.
(*d*) 25 U. C. R. 470.
(*e*) L. R. 6 Ex. 70.
(*f*) L. R. 8 Ch. 756.
(*g*) 30 L. T. N. S. 526.

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agreement. It is not stated that there was a separate promise in consideration of *Scott* becoming, or agreeing to become tenant. That is the character of the consideration on which it was held in the cases of *Morgan* v. *Griffith*, *Erskine* v. *Adeane*, and *Mann* v. *Nunn*, that the separate or collateral promise rested. I do not profess to understand very clearly how such a consideration is gathered from the facts in those cases as a separate consideration.

An agreement to take a lease seems to me to be an agreement to pay rent and perform covenants, which is the whole essence of what the lessee undertakes. And if, in consideration of the agreement of the lessee to pay the rent and perform the covenants, the lessor agrees to let the premises and do a collateral act, I cannot readily see how the collateral act is supported by a separate consideration. The difficulty in finding a separate consideration is greater under the facts in *Mann* v. *Nunn* than under those in the other two cases, where there was never at any time an agreement or intention that the lease should cover the agreement which was held to be collateral, and where the agreements were, not to do something upon the premises by way of alteration or addition, but only to remove a nuisance which affected the full enjoyment of them, and on this point *Mann* v. *Nunn* is spoken of with disapproval in *Angell* v. *Duke* (*a*). Judgment.

In *Angell* v. *Duke*, although it was held on demurrer that the declaration did not disclose a contract within the Statute of Frauds, yet, when the facts were shown upon the trial, it was held that the agreement to send furniture into the house was not collateral. The language of *Mellor*, J., (reported in 32 L. T. N. S., at p. 321) is very applicable to the case before us. He says:

(*a*) 32 L. T. N. S. 320.

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"There is one contract; the house is the same; the rent is the same, and the general terms the same. During the negotiations it appears to have been suggested that some more furniture should be put in, but afterwards a written contract is made affecting the house, affecting the furniture, and affecting the rent, and to this agreement the plaintiff is attempting to add an additional term."

My opinion is, that the contract to build the dam was not collateral to the lease, and that on this ground, as well as by reason of the Statute of Frauds, verbal evidence of it was inadmissible.

I do not allow myself to be pressed in coming to this conclusion by any apprehension of doing injustice by depriving the respondent of the benefit of an established agreement.

Judgment.

I cannot regard the agreement as established without leaving out of view, not only the rules of law which exclude the verbal evidence, and the wisdom and propriety of which has never been questioned, but the reason why written evidence was required by the Statute of Frauds, and the reason of the yet earlier rule which forbids to vary, by parol, the effect of an instrument in writing. The finding of the arbitrator necessarily imports only that if verbal evidence is admissible, then the effect of the verbal evidence is what he states; and it is our duty to regard as untrue, or as not proved to be true, whatever allegations, falling within the rules in question, depend for proof on verbal testimony.

So far, I have considered the case as it would have stood if the original trustees were the parties to the litigation, and I have expressed my opinion that the present trustees did not, by their acts or agreement, assume by way of contract any liability to perform the contracts

of their predecessors; *a fortiori*, I hold that they did not assume any liability to pay damages for the defaults of their predecessors. The effect of this award is, to make the trustees liable to pay $2,400 damages for a breach of contract which is not found or shewn to have been committed by them, but which, if we may at all exercise our judgment on a matter of fact, would seem clearly to have occurred before their time. The lease is dated 1st June, 1871; it is said that the dam was to be built in a reasonable time; the premises are said to have been comparatively valueless without the promised improvements; and the new trustees were not appointed until the end of October, 1872. The breach of the agreement to build in a reasonable time must surely have occurred before the last-mentioned date.

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I agree with the majority of the Court below that the finding is against the trustees personally. Whether the arbitrator would or would not have had power to reform the lease, or to adjudicate upon it as if reformed, it is, I think, clear that he has not done so. Had he done so, he would doubtless have dealt with the whole matter, so as to do justice to the trustees by protecting them from liability for the fault of others, and would probably have made it clear that the estate, and not the trustees personally, were to make good the respondent's damage. I give no opinion as to whether the reference is sufficient to bind the estate; or if so, whether the matter may not yet be referred back to the arbitrator; or whether, on such a reference back, or in any independent proceeding, the respondent would be entitled, as against the estate, to relief in respect of the dam. Our present decision goes no further than that the trustees now before us cannot, on the facts stated, be held personally liable, and that the effect of the award is to hold them liable personally.

Judgment.

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HARRISON, C. J.—I regret to say that, with the most sincere desire to aid the respondent, and the most sincere respect for the opinions of the learned Judges of the Court of Chancery, I am unable, consistently with the rules of evidence applicable to this case, to concur in the decision of the Court of Chancery.

In my opinion, after a careful perusal of the authorities cited on the argument and others to which I have referred, the first question must be answered in the negative.

The question is in effect whether, on the facts stated, the existence of an agreement of the nature referred to in the third paragraph of the case can be established by oral evidence.

The decision of this question demands a reference to the old rule of evidence, that oral testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument, and to some cases which are supposed to be exceptions to the rule.

Judgment.

The rule, as pointed out by the learned Chancellor in his quotation from *Addison* on Contracts, "has its foundation in the general rules of evidence, and was a rule of the common law before the Statute of Frauds and Perjuries was in being."

It is thus stated by Lord *Tenterden*: "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not to say because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as part of the contract:" *Kain* v. *Old et al* (*a*).

(*a*) 2 B. & C. at 634.

The rule, as said by *Martin*, B., is, that if parties make a bargain, and that is put into writing, then that the writing is the bargain: *Emery* v. *Parry* (*a*).

The rule is the same in Equity.

In *Woolam* v. *Hearn* (*b*), Sir *William Grant* said: "By the rule at law * * parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry that the rule of law was adopted. Though the written agreement does not contain the terms, it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any parol can supply."

Judgment.

The parties to the lease in question made a bargain. There was a subsequent writing. The writing contains promises on the part of each party to the lease as the consideration for the performance of the promises by the other party. If it do not contain all the promises on the part of the lessors, the omission of one such promise cannot, I think, consistently with the rule to which I have referred, be made the foundation of an action or suit as upon an independent bargain. The parties never intended to make more than one substantial bargain, and that bargain has passed into writing. That bargain involves mutual promises of greater or lesser importance. The real difficulty in the case is, the omission from the writing of one of the terms of the bargain. The cause of the omission is not explained.

A defendant against whom specific performance is sought in Equity, may in answer insist upon mistake,

(*a*) 17 L. T. N. S. 152.

(*b*) 7 Ves. at 218.

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and may adduce oral evidence to establish his defence, and this upon the ground that a Court of Equity will receive evidence to shew that it is inequitable to enforce the contract: Marquis of *Townshend* v. *Stangroom* (*a*), cited by Mr. *Boyd* in his able argument. See further—*Davies* v. *Fetton* (*b*), per Lord *St. Leonards*, *Manser* v. *Back* (*c*), per *Wigram*, V.C., *Wood* v. *Scarth* (*d*). But it is now well settled in England that Courts of Equity will refuse to receive oral testimony in favour of a plaintiff to rectify a written agreement of which he seeks specific performance: *Woolam* v. *Hearn* (*e*), also cited by Mr. *Boyd*. See further—*Clinan* v. *Cook* (*f*), *Clewes* v. *Higginson* (*g*), *Higginson* v. *Clowes* (*h*), *Attorney General* v. *Sitwell* (*i*), *Breynton* v. *London & North Western R. W. Co.* (*j*), per Lord *Cottenham*.

Judgment.

The case of *Smith* v. *East India Co.* (*k*), mentioned in the judgment of the Court below, is not at all inconsistent with the foregoing principles.

In that case the plaintiff was at law *primâ facie* entitled to recover, and could only be prevented by the setting up of his bond in the nature of set-off or a cross action, against which latter he was entitled to defend himself by shewing the equitable circumstances on which he relied. It was as if, under the present improved mode of procedure, the action were at law with a plea of set-off of the bond, and an equitable replication thereto, shewing that on the facts stated it was inequitable to set up the bond as an answer to the action. All that the Court did was to restrain the East India Company from setting up the bond as an answer to the action. The

(*a*) 6 Ves. 328.
(*b*) 2 Dru. & War. 225.
(*c*) 6 Hare 443.
(*d*) 2 Kay. & J. 33.
(*e*) 7 Ves. 211.
(*f*) 1 Sch. & Lef. at 38, 39.
(*g*) 1 Ves. & B. 524.
(*h*) 15 Ves. 516.
(*i*) 1 Y. & Col. Ex. R. 559, 583.
(*j*) 2 Coop. at 114.
(*k*) 16 Sim. 76.

plaintiff did not need to adduce the oral testimony to support his action against the East India Company. He only needed it to prevent defendants succeeding in their cross action, in the nature of set off (*a*). This distinction is plainly pointed out by the learned Chancellor in the Court below.

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Now, so far as the respondent is concerned in the present proceedings, he is aggressive. He is setting up the oral agreement as the foundation of the claim for the recovery of damages, and if entitled to do so, either in a Court of Law or Equity, must do so on some authority other than *Smith* v. *East India Company*.

I fully understand the cases which decide that oral testimony may be given to shew that, owing to some oral agreement, a written agreement, though signed, is not to take effect as an operative agreement till the happening of some event which did not happen, and this on principles analogous to the doctrine of Escrow. The cases of *Davis* v. *Jones* (*b*), *Pym* v. *Campbell* (*c*), *Furness* v. *Meek* (*d*), and *Wallis* v. *Littell* (*e*), are good illustrations of this principle. They rest on a foundation which is quite intelligible, and in no manner impinge the rule preventing the admission of oral testimony to contradict, vary, add to, or subtract from the terms of a written contract acted upon by both parties. In a proper case I would have no difficulty in applying them. But in this case, where the lessee entered under the lease and acted under it, he certainly cannot contend that it never took effect. The doctrine of Escrow, therefore, cannot aid him in his present contention.

Judgment.

It might, however, be broadly contended on his behalf, on the authority of *Harris* v. *Rickett* (*f*), *Mason* v.

(*a*) See Parsons v. Crabb, 34 U.C. R. 186.
(*b*) 17 C. B. 625.
(*c*) 6 E. & B. 370.
(*d*) 27 L. J. Ex. 34.
(*e*) 11 C. B. N. S. 369.
(*f*) 4 H. & N. 1.

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*Brunskill* (*a*), *Clark* v. *Sanford* (*b*), that the lease was not intended to be anything more than an act done in pursuance of an oral agreement, and was never designed to be the agreement between the parties. But I think the lease here must be looked upon in a very different light to the bill of sale in *Harris et al.* v. *Rickett*, the assignment in *Mason* v. *Brunskill*, or the transfer of stock in *Clark* v. *Sanford*. It is impossible to look upon the lease as a simple act done in pursuance of a bargain. Looking at the various covenants therein contained, and looking at the conduct of the parties thereunder, it must, I think, on the authority of the cases both at law and equity, which I have already mentioned, be deemed the bargain passed into writing between the parties.

Judgment.

The only ground on which the respondent can, with any appearance of reason, argue that the oral agreement is admissible, is the ground on which Mr. *Ferguson*, in his able argument, fairly and frankly put it, viz., that the oral agreement is, on the authority of the cases which he cited, *Lindley* v. *Lacey* (*c*), *Morgan* v. *Griffith* (*d*), *Erskine* v. *Adeane* (*e*), *Mann* v. *Nunn* (*f*), *Angell* v. *Duke* (*g*), to which may be added *Walter* v. *Dexter* (*h*)—*collateral*, (whatever that word means), to the written agreement between the parties, and may, on the authority of the cases cited, be proved by oral testimony, even in an action brought by the respondent for a breach of it.

I agree with the cases cited on behalf of the respondent to the extent that there *may* be oral agreements collateral to written agreements made contemporaneously between the same parties, which are admissible as the

(*a*) 15 U. C. R. 300.
(*b*) 25 U. C. C. P. 256.
(*c*) 17 C. B. N. S. 578.
(*d*) L. R. 6 Ex. 70.
(*e*) L. R. 8 Ch. Ap. 756.
(*f*) 30 L. T. N. S. 526.
(*g*) L. R. 10 Q. B. 174.
(*h*) 34 U. C. R. 426.

foundation for suits at Law or in Equity. But the difficulty is, to apply such a rule to a case like the present. How can an agreement be collateral to another when the one undivided and indivisible consideration is the foundation of both? (*a*) For what was the respondent to pay rent? He says not for the demised premises with the old dam, but for the demised premises with a new dam, to be erected by the lessors. His complaint, in truth, is, that it is attempted to be imposed on him the payment of the whole rent reserved by the lease, although the lessors never did that which, on their part, ought to have been done as part of the consideration for his promise to pay the rent—that is to say, the erection of the dam. Because they did not do this, and because, notwithstanding, it is now sought to hold him liable for the whole rent payable under the lease, he claims to alter the lease, as I shall presently shew, by the insertion of a covenant to build a new dam and to recover damages for non-performance of that covenant. How is it possible, under these circumstances, and in the face of this contention, to hold that the agreement to build the dam was only collateral to the agreement contained in the lease? I cannot hold that everything is collateral which the parties in the particular case, in supposed furtherance of justice, either without reason or against reason, choose to call collateral. I cannot hold that to be collateral which, although directly connected with the subject matter of the contract which has been reduced to writing, and part of the consideration for the performance of the promises of one of the parties to the contract, is, for some reason not explained, omitted from the written contract.

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Judgment.

I do not feel at all disposed to extend the exceptional doctrine of collateral agreements beyond where I can find rational support for it. It is right enough when confined

(*a*) See *Hodgson* v. *Johnson*, 1 E. B. & E. 685.

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within proper limits. In some of the cases cited on behalf of the respondent, it has I think been allowed to expand beyond its proper limits. I certainly concur with *Angell* v. *Duke*, as reported in 32 L. T. N. S. 320, rather than with *Mann* v. *Nunn*, as reported in 30 L. T. N. S. 526.

An agreement to be collateral to another, within the meaning of the Rule of Evidence laid down in *Lindley* v. *Lacey* and the cases following it, ought not in my opinion to contain terms which, *if inserted* in the written agreement, would *thereby vary it*, the written agreement.

Judgment.

The lease is expressed to be made under the statute respecting short forms of leases. It contains a covenant to repair on the part of the lessee. This, according to the extension words in the statute, is an obligation "to *amend* and *keep* the said demised premises in good and substantial repair," &c. And this, according to *Payne* v. *Haine* (*a*), involves the obligation to *put* them in that condition. The arbitrator finds that when the lease was signed there was an old dam in the mill creek in a ruinous condition. This is the dam which under the covenants now contained in the lease the lessee is to put and keep in repair. If this obligation, or the much greater obligation of building an entirely new dam, were cast on the lessors by admission of oral testimony, the lease would thereby be essentially varied.

In this view it appears to me clear that the proposed evidence of the oral agreement must be rejected.

If through mutual error a written contract be not made to express the whole agreement between the parties, the proper course is, for the party dissatisfied to take the proceedings necessary to reform the contract,

(*a*) 16 M. & W. 541.

instead of suing upon the omitted part, and calling it collateral when it is not so. 1875.

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I can easily imagine a case where an oral agreement may with propriety be said to be collateral to a written agreement made contemporaneously between the same parties. Suppose the sale of a farm for $4,000. Suppose contemporaneously a sale between the same parties of a span of horses for $150, not reduced to writing. The agreement for the sale of the horses might, in the case supposed, be well said to be collateral to the agreement for the sale of the farm. It is true that the parties are the same, but the subject matter of each contract is different, and the consideration for each contract is also different. But suppose the agreement was for the sale of the farm and span of horses for $4,000, and the writing made no mention of the horses, I should feel great difficulty in holding that the sale of the horses was so collateral to the agreement for the sale of the farm, as to enable the vendee, without reforming the written contract, and without any allegation or proof of fraud, to sue for non-delivery of the horses. Judgment.

I have not overlooked the statement in the judgment of Vice-Chancellor *Blake*, to the effect that under the reference it was not for the arbitrator merely to decide what the position of the parties might be under the lease, but such full powers were given as would enable him to modify the lease should the facts of the case warrant it. I am sorry to say I am unable to agree in this statement. I see nothing in the agreement of reference which confers on the arbitrator power to modify the lease. There is no such power expressly given; and there is nothing therein stated from which I am at liberty to infer such a power.

As said by *Cockburn*, C. J., in *Angell* v. *Duke* (*a*):

(*a*) 32 L. T. N. S., 320.

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"To allow the plaintiff to recover in this action would be to allow a parol agreement to conflict with a written agreement afterwards entered into * * * Something passes between the parties during the course of the negotiations, but afterwards the plaintiff enters into a written agreement to take the house, and furniture in the house, which is specified. Having once executed that without making the terms of the alleged parol agreement a part of it, he cannot afterwards set up the parol agreement."

Besides, I think the weight of authority is against the admission of the evidence in this case of the oral agreement: See *Angell* v. *Duke* (*a*), *Lewis* v. *Robson* (*b*), *Losee* v. *Kezar* (*c*), *O'Neill* v. *Lingham* (*d*), *Gilpin* v. *Green* (*e*), *Noble* v. *Spencer* (*f*), *Evans* v. *Roe* (*g*), Mayor of *London* v. *Sandon* (*h*).

Judgment.

I should have been much better pleased to have come to a contrary conclusion, but am unable to do so consistently with the proper application of the Rule of Evidence, which excludes oral testimony varying a written contract. In this respect I feel, as the learned Judges did who decided *Abrey* v. *Crux* (*i*), but must do as the learned Judges in that case did, adhere to the law made for the general benefit of suitors, although bearing unjustly in the particular case.

To allow the respondent's contention in this case to prevail, would in my opinion be to fritter away, if not to destroy, the plain terms of an old and well-established Rule of Evidence, which is or ought to be common alike to Courts of Law and Equity.

(*a*) 32 L. T. N. S. 320.
(*b*) 18 Grant 395 in Appeal.
(*c*) 5 U. C. C. P. 234.
(*d*) 9 C. P. 14.
(*e*) 7 U. C. R. 587.
(*f*) 27 U. C. R. 210.
(*g*) L. R. 7 C. P. 138.
(*h*) 26 L. T. N. S. 86.
(*i*) L. R. 5 C. P. 37.

This expression of opinion renders unnecessary any opinion from me on the second question submitted. 1875. Mason v. Scott.

The appeal must, I think, for the reasons I have given, be allowed with costs.

Moss, J.—I understand the arbitrator by his first question to ask the opinion of the Court whether, under the circumstances stated in his award, oral evidence was admissible to establish the alleged agreement as the foundation of a claim by the respondent for pecuniary damages against the appellants. I agree that the Court is not asked to declare whether such evidence would have been admissible with a view to the reformation of the lease. This seems apparent from the nature of the second question, from the adjudication in the event of affirmative replies by the Court, and indeed, from the whole scope of the award. The first point with reference to this question, which seems to invite attention, is, whether this agreement falls within the rule of the common law which under certain conditions forbids the reception of oral testimony to contradict, vary, or alter a written instrument. It is scarcely necessary to remark, except for the purpose of keeping the boundaries of this rule firmly in view, that it was confined to cases where by direction of law, or by compact, the written instrument was made the authentic and sole memorial. The rule never operated to exclude evidence of a distinct, collateral, independent agreement, although made between the same parties and at the same time. The rule is thus enunciated in *Addison* on Contracts: "If an oral agreement and an agreement in writing have been made, whether contemporaneously or not, upon two distinct independent matters, and the one does not conflict with or alter the other, both may stand, and the oral bargain may be enforced as well as the contract in writing." Mr. *Taylor*, perhaps more precisely, says: "The rule does not prevent parties to a written contract Judgment.

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from proving that either contemporaneously or as a preliminary measure they had entered into a distinct oral agreement on some collateral matter." This is, in my opinion, an accurate statement of the rule, as it has been acted upon from the earliest period at which the law of evidence was reduced to precise formulæ. The modern cases which have shewn the greatest liberality in the reception of parol evidence with reference to a subject matter touched by a written instrument, have never assumed to trench upon the general rule, but have admitted the oral testimony because, in the opinion of the Court, it related to a distinct, independent, collateral agreement, and did not alter, vary or contradict a written instrument, which had been made the appropriate memorial of the whole agreement between the parties. The question, therefore, is reduced to this: Is the agreement to build the dam distinct from, and collateral to that embodied in the lease? If not, it is incapable of proof by parol. It must be admitted that some of the modern cases have treated as collateral certain agreements which at first sight would present to ordinary minds the appearance of adding to or varying a written instrument in violation of the old established rule. But upon examination I think it will be found that none of these cases (except perhaps *Mann* v. *Nunn*) involve any departure from this rule, or establish any novelty in principle. *Wallis* v. *Littell*, *(a)*, which was relied on by the respondent is no more than an application of the doctrine which admits proof that an instrument is not a deed but an escrow. The oral agreement was received in evidence because it operated in suspension, and not in defeasance, of the written agreement.

Judgment.

The case of *Lindley* v. *Lacey* (*b*), has been sometimes thought hard to reconcile with the rule,

(*a*) 11 C. B. N. S. 369. (*b*) 17 C. B. N. S. 578.

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but it does not seem to me to present any real difficulty. A brief statement of the facts will, I think, suffice to shew that the agreement sued upon was wholly collateral to, and independent of the written document. The defendant had underlet certain premises to the plaintiff, and sold him the furniture therein. The plaintiff having become embarrassed, and being sued for a debt of £25 by one *Chase*, applied for assistance to the defendant, who promised that if he would refrain from calling his creditors together, as he contemplated and would induce the head landlord to forbear to press for payment of the rent then due, for which the defendant remained liable, he would settle this suit. The plaintiff did not call his creditors together, and the landlord does not seem to have pressed for the rent. After some further negociations it was agreed that the defendant should re-purchase the furniture and re-take the premises. A written agreement as to the purchase was drawn up, which did not contain any promise by the defendant to settle the action. Before this was signed, the plaintiff said to the defendant: "Am I to understand that *Chase's* bill is to be settled, because that is the ground-work of the whole?" To this the defendant replied, "Yes, I will see it settled." The defendant having failed to settle the suit, and the plaintiff's goods having been sold under execution, he brought an action upon the parol agreement, and was held entitled to recover. Now, it appears to me, that this may have been fairly treated as wholly unconnected with the written agreement. It was a bargain originally founded upon a consideration perfectly independent of the defendant's purchase, which was the subject matter of the writing. That consideration was executed by the plaintiff's refraining from calling his creditors together and inducing the landlord not to press for the rent. If he had not sold the furniture to the defendant, he might equally have been entitled to hold him responsible for the consequences of neglecting to settle *Chase's* suit. The Court

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further seemed to hold that under the circumstances established in evidence, the oral agreement was preliminary to, and constituted a condition upon which the performance of the written agreement was to depend. In either view, a decision that it could be enforced did not widen the passage for the reception of parol evidence in the future. Still less could this effect be attributed to *Malpas* v. *London and South Western R. W. Co* (*a*), for the note in that case was clearly not intended to embody all the terms of the contract. No doubt the cases of *Morgan* v. *Griffith* and *Erskine* v. *Adeane*, which were relied upon for the respondent, present more difficulty. But in one respect at least these cases are clearly distinguishable, for in each the Court gave great weight to the fact that the lease was only signed by the lessee on the distinct promise *then* made, that the unexpressed stipulation should be observed—a circumstance which is wanting in this case. Moreover, in each of these

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cases it appears that the stipulation in question was deliberately omitted from the writing; which, therefore, was not intended to contain the whole agreement between the parties; and without recapitulating the statements of the arbitrator, I shall merely say that I agree with my brother *Patterson*, that there is not in them any finding that there was a separate agreement as to the building of the dam, not intended to form part of the lease. There was one agreement by the lessors for a certain consideration, and one agreement by the lessee for a certain consideration. I cannot discover any statement that there were two distinct independent agreements by the lessor, formed upon separate considerations. The language quoted by my learned brother from *Angell* v. *Duke*, seems to be singularly applicable.

I also concur in the opinion which my brother *Patterson* has expressed, of the effect of the Statute of Frauds

(*a*) L. R. 1 C. P. 336.

upon the respondent's right to rely upon this alleged agreement. As bearing upon that view of the case, as well as upon the applicability of the general rule of evidence, I may refer to *Seago* v. *Deane* (*a*), which was not cited in any of the modern cases, but appears to me to be very much in point. The plaintiff sued the defendant upon a promise, that in consideration of her becoming his tenant, he would pay her £20 to repair the house and make certain alterations. The lease, under which plaintiff entered, did not contain this agreement. The defendant was held liable, because in the opinion of the Court a declaration or promise by him to pay the amount was equivalent to an account stated, but in giving judgment, that eminent Judge, *Best*, C. J., said, "If this agreement were part of the consideration for the plaintiff's engagement under a lease, and it did not appear as part of the terms of the lease, the omission could not be supplied by parol evidence. The agreement, too, as concerning an interest in land, ought to have been in writing;" referring, as appears from his subsequent observations, to the Statute of Frauds. Every word of this citation appears to be applicable to this case. If an agreement to pay money towards the making of repairs and alterations requires to be in writing, so must an agreement to make the repairs and alterations themselves.

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*Mann* v. *Nunn* may be distinguishable from this case, on the ground that a distinct promise to make the improvements was entered into upon the signing of the lease, but it seems hardly necessary to consider it very critically after the discredit cast upon it by *Angell* v. *Duke*.

But even if this agreement were collateral or independent, in the same manner as the agreements enforced

(*a*) 4 Bing. 459.

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in some of the modern cases, it may be excluded by the universally recognized limitation, that the parol agreement cannot be proved if it conflicts with the written document, although it would be provable if the writing were silent on the subject or consistent with the parol agreement. This agreement appears to be in conflict with the lease for the reasons pointed out by my brother *Burton*, although upon this point I think it unnecessary to express any decided opinion.

The decisions in our own Courts are in favour of the appellants' contention. In *Losee* v. *Kezar* (*a*), the plaintiff sought to recover from the defendant, as administratrix of one *Alvin Kezar*, who had been his landlord, the value of certain repairs upon the demised premises. The lease was in writing, not under seal, and the plaintiff's case was, that there had been a verbal agreement for the payment of the value of the repairs. At the trial he tendered evidence that, at the time the written instrument was executed, there was a verbal agreement of this character, but the evidence was rejected. A subsequent parol agreement was proved, and the plaintiff had a verdict, with leave reserved to the defendant to move for a nonsuit. The Court held that the plaintiff must fail, saying: "It is contrary to the authorities to qualify or add to the written instrument by parol evidence of other or additional provisions made concurrently, and involved in the same transaction." The report of *O'Neill* v. *Lingham* (*b*), is so meagre that it is difficult to determine when the agreement for repairs was alleged to be made, but the most probable conclusion appears to be that it was contemporaneous. It was held that this was an attempt to introduce "a new element into the sealed agreement."

Judgment.

*Mason* v. *Brunskill* (*c*), was relied upon by the

(*a*) 5 U. C. C. P. 234. (*b*) 9 U. C. C. P. 14.
(*c*) 15 U. C. R. 300.

respondent as an authority in his favor. Neither the circumstances of that case, nor the *ratio decidendi*, support that view. The plaintiff sought to recover from the defendants a sum of money, being the proportion of premium on the unexpired period of a policy of insurance upon a vessel which he had sold . The treaty had commenced with a written proposal by the plaintiff to sell the vessel at a certain price upon terms of credit, but distinctly stipulating that the proportion of the premium should be paid in cash. This proposal having been verbally accepted by the defendants, the plaintiff executed an ordinary bill of sale, which did not mention the insurance, or the stipulation as to the premium, and it was upon the absence of such reference that the defendants relied, as a means of enabling them to evade payment of the proportion of the premium. One can scarcely help wondering that so preposterous a contention was deemed worthy of serious consideration. The Court held that the agreement in question was "Something collateral and not at all inconsistent with anything contained in the assignment, which stated only the price given." This does not seem to me to afford much assistance to the respondent. The case of *Lewis* v. *Robson* (*a*), which was also referred to, does not lay down any doctrines at variance with the rule which we are applying to this case.

Judgment.

I have no doubt, therefore, that the first question should be answered in the negative.

This conclusion, strictly speaking, renders it unnessary to answer the second question, but as it was much discussed before us, it may be be proper for me to state that in my opinion this question also, should receive a negative answer. I agree with *Blake*, V. C., that up to the 9th of March, 1874, there was no liability

(*a*) 18 Gr. 395.

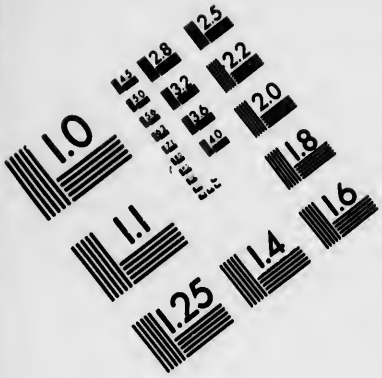
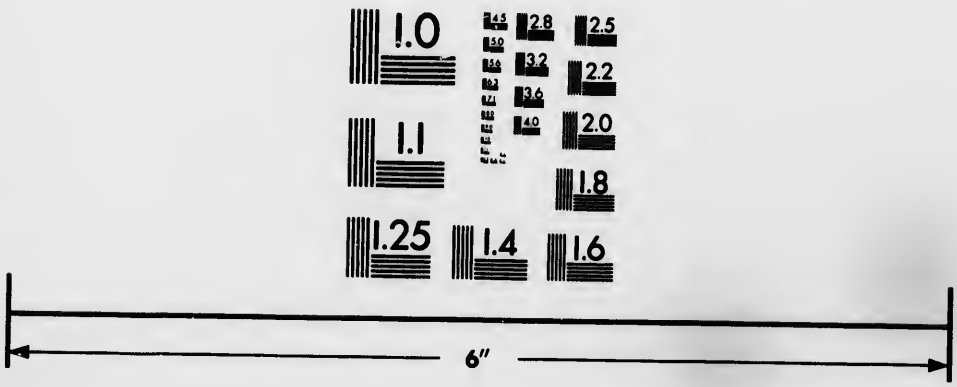
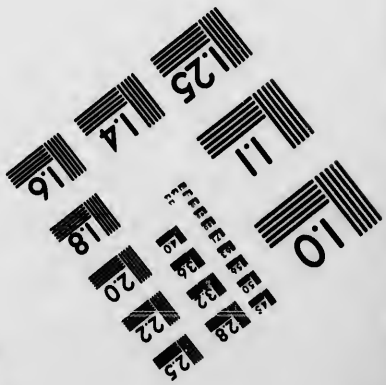




**IMAGE EVALUATION**
**TEST TARGET (MT-3)**





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1875.

Mason v. Scott.

on the part of the appellants; but I am unable to concur in his view, that at that date by an acceptance of a surrender of the lease, and a resumption of possession, they rendered themselves liable on the agreement that the claim for compensation for the failure to build the dam, should be included in the reference with the other matters in dispute.

I think, with great respect, that the appellants, by the terms of the submission, did no more than appoint the arbitrator the tribunal for determining whether before the submission they were liable. That question the arbitrator might have determined adversely to them, in which case they might have been without relief on account of the difficulty of reviewing the decision of an arbitrator; but the arbitrator having referred the question to the Court, it was bound to deal with it according to the rights of the parties, as they existed when the submission was made. This is an entirely distinct point from that with which it seems to have been a little confounded, namely, the liability of the appellants as individuals, if they are liable at all.

Judgment.

I agree that the appeal should be allowed.

# INDEX

TO THE

# PRINCIPAL MATTERS.

4. Where, instead of transferring, the Court of Law directs accounts to be taken by an officer of the Court of Chancery, the officer's report must be filed with the officer of the Court where the pleadings are filed; and appeals from the reports are to be heard, and final decree pronounced, by the Court so directing the accounts. *Ib.*

5. Under section 32 of the Administration of Justice Act of 1873, this Court has cognizance of all the rights of all the parties arising out of an agreement; and if either is entitled to damages, the Court ought to ascertain them. In this view, in a suit for specific performance, to which the plaintiff was found not entitled, a reference was directed to inquire as to damages sustained by a purchaser by reason of breach of the contract, and also as to damages sustained by the vendor by reason of breach of covenants in the instrument constituting the agreement.

**Casey v. Hanlon, 445.**

See also "Railway Company," 2.

## ADMINISTRATION SUIT.

One of several children of an intestate instituted proceedings against her mother, the administratrix, and the administrator of the estate, seeking an account of the personalty, and also of the rents and profits of the real estate, which it was proved had been received by the administratrix alone, none having been paid to the administrator. The accounts taken in the Master's office shewed that in respect of the personal estate, the personal representatives had properly expended $400 more than they had received; and that the administratrix had expended the rents so received by her in supporting the plaintiff and the other children of the intestate; and that all the parties interested therein, other than the plaintiff, had released the administratrix from all liability in respect thereof; which release the plaintiff had also promised to join in, but subsequently refused to execute. The Court, under the circumstances, though it could not deprive the plaintiff of her share of the rents, ordered her to pay the administrator his costs of suit; and also to pay to the administratrix her costs, less so much thereof as was occasioned by her resisting the claim of the plaintiff to the rents.

**Parsill v. Kennedy, 417.**

## ADULTERY, DEFENCE OF.

See "Alimony," 1.

## AFTER ACQUIRED PROPERTY.

See "Will," 7.

## ALIMONY.

1. To a bill for alimony, the husband alleged, as a ground of defence, that the plaintiff had been guilty of adultery. The evidence of the actual commission of the crime was distinct and positive by the brother and brother-in-law of the husband, who had watched on the outside of the house where the plaintiff resided with her husband, on the night that the alleged act of adultery was said to have been committed. These two witnesses also proved that the language used by the parties was of an obscene and offensive character; and there was the fact that letters of an objectionable nature had been discovered as passing between the plaintiff and a young man against whom the husband had warned his wife, and had forbidden her to associate with. The Court, under the circumstances, gave credence to the statements of these two witnesses, although without their evidence the case would not have been more than one of the very gravest suspicion; and this although the plaintiff and the partner in her guilt swore positively that no such act had ever been committed.

**Campbell v. Campbell, 322.**

2. The nature of the evidence to be accepted in such cases, and the rules to be observed in the consideration of it, discussed.

*Ib.*

See also "Husband and Wife," 1.

## AMENDMENT AT THE HEARING.

Where in a suit against trustees to enforce a sale the bill did not distinctly set forth the terms and conditions of the sale to the testator, but, there was no doubt what they were intended to be, the Court allowed the bill to be amended at the hearing, and made the decree as asked.

**Delisle v. McCaw, 254.**

Where at the hearing of a suit to enforce a purchase made by a testator against the trustees under his will, it was made to appear that there were not funds of the estate wherewith to pay the amount of purchase money due, and the widow of the testator offered to purchase, in her own name, the property at a price which was considered beneficial for the estate, a direction to that effect was inserted in the decree, in order to avoid the necessity of a petition being presented to the Court for that purpose, after the usual decree should have been made. *Ib.*

## ANNUITIES.

Where the income of an estate, which was made applicable to the payment of annuities, had, for some years, been insufficient

## APPEAL FROM MASTER.



## ARBITRATION.



See also "Parol Evidence."

## ARCHITECT.

See "Mechanics' Lien Act," 4.

## ASSETS OUT OF JURISDICTION.

See "Infants," 2.

## ASSIGNEE, JURISDICTION OF.

See "Insolvency," 1.

## BONUS TO RAILWAY COMPANY.

See "By Law."

## BRIDGE COMPANY.

A Company was incorporated to construct a bridge across the Niagara River, which bridge was to be "as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railway trains;" and the Company completed such bridge so far as to permit of the running of railway trains across it. The time limited for the completion of the structure for the passage of ordinary carriages, had not elapsed, when the Bridge Company leased such bridge to a railway Company, who were daily running trains across it; but no commencement was made with that portion of the bridge intended for the purpose of ordinary traffic, &c. An information was filed seeking to restrain the lessees, from using the structure for railway traffic, until it was put in a condition to be used for ordinary passenger traffic, but a demurrer thereto for want of equity was allowed.

*Quære*, if even the time allowed for the completion of the bridge for ordinary traffic had elapsed, whether the Court would have interfered by injunction, the work which had been done, having been done by authority of law, and the relief prayed being such as would, in the event of the order of the Court being disobeyed, have necessitated the destruction of that portion of the works already completed.

**The Attorney General ex rel. Jarvis v. The International Bridge Co., 298.**

## BUILDING SOCIETY.

By one of the rules of a building society it was provided that "If any member shall desire to have his property discharged from a mortgage to the society before the expiration of the full time for which it has been taken, he shall be allowed to do so on payment of all re-payments, any fines, and other sums due in respect thereof up to the time of redemption * * and of the present value of future re-payments, calculated to the end of the term, and discounted at such rate of interest and on such terms as the

directors may determine." The effect of a person obtaining a loan from the society was, that he became a member of the society, and as such assented to all the rules thereof. Therefore where a suit was instituted upon a mortgage by reason of default having been made in repayment, the Court *held* the society had the right to say upon what terms the future re-payments should be computed, and that if the society saw fit to do so they could insist on repayment of the whole amount of the mortgage, which included the principal sum and interest for the whole period the mortgage had to run.

**Western Canada Loan and Savings Society v. Hodges, 566.**

## BY-LAW.

The Act incorporating the Municipality of Shuniah, gave it all the powers of townships under the general municipal law, and in other sections authorized the Council to make assessments for necessary expenses, and for the establishment of a lock-up house, and the salary of a constable:

*Held*, that this language did not prohibit the Council from passing a by-law granting a bonus to a Railway Company, as the right of doing so when exercised rendered the payments under it *necessary* expenses. The fact that the railway intended to be benefited was not named, and was really not in existence when the vote on the question was to be taken, constituted no objection to the passing of a by-law for the purpose.

**Vickers v. Shuniah, 410.**

## CAPITA, PER, OR PER STIRPES.

See "Will," 6.

## CHARITABLE BEQUEST.

*M. W.* by her will directed all her real estate, except one house, to be converted into money, and out of the proceeds to pay sundry legacies and bequests. And to the town of Whitby she gave and bequeathed *solely out of her personal estate*, two sums of $4000, and $200 "for the purpose of establishing and maintaining in the said town of Whitby a Public Library and Mechanics' Institute, to be dedicated to and be under the control of the said Corporation of the said town of Whitby." The testatrix left very little, if any, chattel property, and the bequests could be paid only out of the proceeds of the sale of the realty or from moneys secured upon mortgage:

*Held* (1) that the sums so bequeathed were charitable bequests, and as such were void under the Statutes of Mortmain; and (2)

that the amount thereof fell into the residue, which was disposed of by the will, and was not distributable amongst the next of kin of the testatrix.

The Corporation of the Town of Whitby v. Liscombe, 203.

[Affirmed on Appeal, 24th March, 1876. See post vol. XXIII., p. 1.]

## CHARGES ON LAND.

See "Volunteers."

## CHATTELS.

Where the Court has possession of a matter in which real estate is concerned, it will, if chattel property form part of the subject matter in dispute, deal with that also by injunction for the purpose of preserving the same *in medio*, without reference to the rule as to the Court not interfering with chattels unless they are of special value, or form the subject of a trust.

Penman v. Somerville, 178.

## CLASS, BEQUEST TO.

See "Will," 9.

## CLERKS.

[OF AGENTS.]

The general rule is, that clerks of an agent are not agents of the principal.

Hope v. Dixon, 439.

## COLLATERAL AGREEMENT.

See "Parol Evidence."

## COMMISSION.

See "Trusts, Trustee, &c," 4.

## COMPOSITION.

Two traders, *E. & R.*, having become insolvent, an agreement was entered into between them and their creditors, whereby it was stipulated that *R.* should retire from the partnership and

*E. & G.* should form a new co-partnership, and that the creditors of *E. & R.* should accept the notes of the new firm for fifteen shillings in the pound of their claims. By the deed of composition it was expressly agreed that in the event of *E. & G.* becoming insolvent before the notes securing the fifteen shillings in the pound were paid their original debts should revive against *E. & G.* and *R.*, and that the creditors should be entitled to rank on the estate of *E. & G.* for the full amount of their respective claims against the firm of *E. & R.*, less any sum which might have been paid them by *E. & G.* on account of said debts. Before the notes were all satisfied *E. & G.* were compelled to make an assignment in insolvency.

*Held*, on rehearing [reversing the order of V. C. STRONG], that the creditors were entitled to prove against the estate of *E. & G.* for the full amount of their original claims against *E. & R.*, giving credit for such sums as had been paid to them by *E. & G.* in respect of the composition notes; and that the agreement for the revivor of the original demands was not in the nature of a penalty.

Watson v. Mason, 180.

Reversed on Appeal, ..... ..... 574.

## CONFLICT OF EVIDENCE.

See "Vendor and Purchaser," 1.

## CONTEMPT.

1. A party is in contempt although no attachment may have actually issued; the contempt consisting in the disobedience to an order of the Court, and the fact of the disobedience having been made to appear to the satisfaction of the proper officer who has made an order for an attachment to issue.

Mitchell v. Mitchell, 23.

2. A party though in contempt is always allowed to take any defensive proceeding in the cause. *Ib.*

## CONTRACT IN WRITING.

See "Specific Performance," 3.

## CONVERSION.

See "Will," 9.

## CORPORATION.

1. Where a corporation, constituted under the statutes, ch. 63, C. S. C., and 29 Vic. ch 21, had purchased lands, and, without

having disposed thereof, allowed the period named in the declaration of the shareholders, for the continuance of the company, to expire, it was *held* that the corporators ceased to have any interest in the lands, and could not maintain any suit in respect thereof; and that the lands had reverted to the grantors.

Lindsay Petroleum Co. v. Pardee, 18.

2. Where a suit is necessary to obtain from the directors or officers of an incorporated company an account of their dealings with the company, or to recover from them, or any other person, property or money of the corporation, the only proper plaintiff is the company itself.

McMurray v. The Northern Railway Co., 476.

3. An insurance company was incorporated by statute with a capital of $500,000, and by the Act it was provided that when $100,000 was subscribed and 10 per cent. paid up, a general meeting of the shareholders might be called and directors elected; but the company was not to commence business until at least $50,000 of its capital stock should be paid up. It appeared that the $50,000 required by the Act had been paid into the Minister of Finance, who had thereupon granted a license to the company to transact insurance business; but that the money had been borrowed for the purpose of being so deposited: that the 10 per cent. payment on stock subscribed for had not been paid in cash, but notes of hand taken from several of the subscribers therefor; and that the $50,000 of the stock required by the statute to be paid up had not been so paid. One of the stockholders, who had paid his deposit in cash, thereupon filed a bill setting up these facts and seeking to restrain the company from carrying on business under their charter until at least the $50,000 was paid up.

*Held*, on demurrer, (1) That the bill was properly filed by the shareholder alone, and that the same need not be on behalf of himself and others; (2) That *The Attorney-General* was not a necessary party; and (3) That the shareholders who had paid their deposits by promissory notes were not necessary parties.

Cass v. The Ottawa Agricultural Insurance Co., 512.

## COSTS.

See "Administration of Justice Act," 3, 4.
"Administration Suit."
"Formâ Pauperis."
"Hearing."
"Vendor and Purchaser," 1, 2.
"Will," 14.

## DAMAGES.

See "Administration of Justice Act," 2.

## DECREE.

See "Injunction," 2.

## DEFECTIVE TITLE.

See "Exchange of Lands."

## DEFENCE AT LAW.

See "Specific Performance," 2.

## DEMURRER.

See "Bridge Company."
"Corporation," 3.
"Married Women's Act," 2.
"Railway Company," 1.
"Railway, Contract to Construct."

## DEVISEES.

[OPTION TO PAY FOR SHARES OF.]

See "Will," 5.

[PERSONAL OR GENERAL CHARGES ON.]

See "Will," 14.

## DISTRIBUTION.

See "Will," 8, 9, 13, 16.

## EQUITABLE ESTATE.

A wife's conveyance of her equitable estate is valid without the husband joining in the conveyance; and the husband having the legal title vested in him, the wife's vendee was held entitled to a decree against the husband for a conveyance.

Adams v. Loomis, 99.

See also "Infants," 2.
"Vesting Order."

## EQUITIES.

See "Lessor and Lessee."

## EQUITY OF REDEMPTION.

[RELEASE OF.]

See "Mortgage," &c., 2.
"Sale of Lands under Execution," &c.

## EVIDENCE ACT, 1873, (O.)

See "Execution of Will."

## EVIDENCE.

[AT THE HEARING.]

Where the evidence at the hearing was the same as that given on a motion for injunction, and the Judge before whom it was made granted the injunction, the Court, at the hearing, made the injunction perpetual, although doubting whether the facts, as shewn in the cause, were not sufficient to entitle the defendant to an entire rescission of the agreement, on proper proceedings being taken for that purpose.

Gillies v. Colton, 123.

## EXCHANGE OF LANDS.

Where two owners of land effect an exchange, and mutual conveyances are executed between the parties, and one of them loses the estate conveyed to him in consequence of the want of title in his grantor, he is not obliged to resort to an action on the covenants in the deed conveying the property to him; but may file a bill in this Court for a rescission of the bargain, and a restoration of the lands conveyed by him.

Rose v. Anger, 525.

## EXECUTION OF WILL.

A devise by a testatrix, who died in 1860, to a married woman, whose husband was one of the two witnesses to the execution of the will, *Held* void, notwithstanding the provisions of the Evidence Act of 1852 (16 Vic., ch. 19).

Crawford v. Boyd, 398.

## EXECUTORS.

[POWER TO SELL.]

See "Will," 12.

## EXECUTORY DEVISE.

See "Will," 15.

## FEE SIMPLE.

See "Will," 15.

## FORECLOSURE.

See "Insolvency.
"Mortgage," &c., 4, 5.

## FORMA PAUPERIS.

The rule is that where a plaintiff sues in *forma pauperis* he will not be ordered to pay costs of any indulgence granted him during the progress of the cause. Where, therefore, such a plaintiff brought his suit to a hearing, which was defective for want of parties, the Court ordered it to stand over to add them, and directed that the question of costs of this indulgence should stand over and be disposed of on the hearing of the cause.

Parr v. Montgomery, 176.

## FRAUDS, STATUTE OF.

See "Parol Evidence."
"Principal and Agent," 1.

## FURTHER DIRECTIONS AND COSTS.

See "Administration of Justice Act," 3, 4.

## GRANTOR.

[LANDS REVERTING TO.]

See "Corporation." 1.

## HEARING.

[COSTS OF POSTPONING.]

Although, as a general rule, where a party has made diligent efforts to obtain the attendance of a witness within the jurisdiction, and has been unable to do so, the costs of postponing the hearing will be costs in the cause, still where the plaintiff ascertained on Sunday that a witness, who was his mother, was confined to her bed, and unable to attend at the sittings which

began on the Tuesday following, but failed to give notice of this fact to the defendant, a motion made by the plaintiff to postpone the hearing was granted only on the terms of his paying the costs.

McMillan v. McDonald, 362.

## HUSBAND AND WIFE.

The compromise of a suit for alimony is a sufficient valuable consideration for a deed from the husband to the wife.

Adams v. Loomis, 99.

## ILLEGAL BY-LAW.

See "Municipal Institutions' Act," 1.

## IMPEACHING AWARD.

See "Arbitration," 1.

## IMPROVEMENTS.

The circumstances under which a claim may be made for improvements by a mortgagee while in possession: and the effect of the statute 36 Vic. ch. 22, O., in respect of improvements made on the lands of others through mistake as to the ownership considered.

Romanes v. Herns, 469.

## INDEFINITENESS.

See "Will," 10.

## INFANTS.

1. It is important that the next friend of an infant should be a disinterested person in proceedings taken to sell an estate in which the infant has an interest. Where, therefore, the mother, who had a claim against the estate, filed a bill as next friend asking for a sale of the property, the Court refused to make the decree: but retained the bill in order that other parties to the cause, if so advised, might apply to make themselves plaintiffs and the infant a defendant.

Berry v. Berry, 202.

2. The infant heirs of an intestate who were resident in this Province obtained the usual administration order against the administratrix, their mother, and in proceeding thereunder in the

Master's office it appeared that the intestate was, at the time of his death, possessed of considerable real and personal estate in Ontario, and also of several bounty land warrants for lands in Manitoba, which had been duly assigned to him by the recipients thereof from the Government of the Dominion, which were sold under the decree on further directions. On a special case being submitted for the opinion of the Court:

*Held*, that this Court, under the circumstances, had power to sell these warrants, and could order the parties interested in the estate to join in a conveyance thereof; or the Court might, in its discretion, grant the usual order vesting the same in the purchaser: the principle being that if a person selects a tribunal in which to sue for the enforcement of his rights, he cannot afterwards say that the judgment of that tribunal is not binding on him: and the general rule being also clear that infants, like adults, are bound by proceedings in a suit in which they are plaintiffs: and that, to any proceedings that might be taken in the Courts of Manitoba, the decree and proceedings in this Court would be an answer, and bind the parties and estop them from disturbing any title acquired under the sale.

**Re Robertson, Robertson v. Robertson, 449.**

## INJUNCTION.

1. The rule of this Court is never to interfere by injunction except when it can do so usefully and effectually.

**The Attorney-General, ex rel. Jarvis v The International Bridge Co., 298.**

2. In 1873 an injunction was granted restraining The Toronto Street Railway Company, on the ground of nuisance, from using their railway, unless by a day named the defendants should put the same in a good and sufficient state of repair, to the satisfaction of an engineer named, who, on the day appointed, reported the railway in such a state of repair as the decree in the cause required. Two years afterwards the said railway, as also other lines laid in the meantime by the same company, had, as was alleged, been allowed to go into such a state of disrepair as to become again a nuisance to the public, whereupon a petition was filed by the relators, alleging these facts, and claiming the benefit of the decree.

*Held*, that as the decree had already been complied with, a new information must be filed to obtain the relief now asked.

**Attorney-General v. Kiely, 458.**

See also "Administration of Justice Act," 2.
"Chattels."
"Municipal Council."
"Municipal Institutions' Act."

## INSOLVENCY.

1. Traders, who had been in business for about eight months, and were at the end of that time in insolvent circumstances, had sent an order for goods to their largest creditor, whose account against the firm had increased to double the amount it was originally agreed that it should be, which goods were packed up, but not sent for some days, when one of the firm waited on the creditor, taking with him a list of debts due the firm, intending, by arrangement with his partner, to offer to assign to the creditor such of these accounts as the creditor should select, and he accordingly made such offer on being asked if he could pay any money on account, and the creditor having made such selection a transfer of the claims was accepted by the creditor.

*Held*, that this was sufficient pressure on the part of the creditor to prevent the assignment being considered as a preferential one within the Act.

Keays v. Brown, 10.

2. Under the Insolvent Act of 1869, the jurisdiction of this Court to decree foreclosure upon a mortgage is not taken away, and a mortgagee must still proceed in this Court to obtain such relief against the official assignee of the mortgagor, there being no proper machinery in the Insolvent Court under which foreclosure can be obtained or for serving parties out of the jurisdiction, or for calling in parties to establish their claims upon the mortgage premises.

Henderson v. Kerr, 91.

3. A trader, who was indebted to the amount of $8000 and claimed to have assets, consisting of stock-in-trade, book and other debts due to him, to the amount of about $8,500, agreed with one of his creditors to sell off his entire stock-in-trade, procure notes therefor and hand the same over to the creditor in discharge of his claim, which was accordingly done by the the debtor to an amount of about $6,000; leaving only the book debts, which, it was shewn, would pay not more than 25 per cent. on the claims of the remaining creditors. At this time about one half of the claim of the creditor so paid off was not due:

*Held*, that under the circumstances this was a preferential assignment within the meaning of the Insolvent Act, and as such fraudulent and void against the general body of creditors: and that it could not be supported as having been procured by pressure.

Davidson v. McInnes, 217.

See also "Composition."

## INSURANCE.

See "Trusts, Trustee", &c., 3.
"Mortgage," &c., 6.

## INTEREST.

See "Administration of Justice Act," 1.
"Annuities."
"Appeal from Master, 3.
"Mortgage," &c., 1.

## INTERPLEADER.

See "Administration of Justice Act," 1.

## LANDS REVERTING TO GRANTOR.

See "Corporation," 1.

## LANDS SUBJECT TO CHARGE FOR MAINTENANCE.

[SALE OF, UNDER EXECUTION.]

Where lands are subject to a charge for maintenance, the interest of parties beneficially interested therein, subject to such charge, is saleable under execution.

Rathbun v. Culbertson, 465.

## LAND WARRANTS.

See "Infants," 2.

## LEASE.

See "Parol Evidence."

## LEGACIES CHARGED ON LANDS.

See "Will," 14.

## LESSOR AND LESSEE.

A lessee, after he had taken possession under his lease, agreed verbally with the lessor to erect at his own expense a rough-cast addition to a brick tenement then on the premises, with the privilege of selling or removing such addition. The lessee accordingly built such addition, and afterwards transferred his interest to the defendant. The lessor subsequently sold and conveyed the

fee to the plaintiff subject to this lease, and by the lessee "assigned to *B.*" (the defendant, who was then in possession.) The defendant being about to sell and remove such addition, the plaintiff took proceedings to restrain him from so doing, claiming the same as part of his freehold, but :

*Held*, that the plaintiff was bound not only by the terms of the lease, but took subject to any other rights or equities existing between the original lessor and lessee, including such verbal agreement to permit the removal of the addition.

Close v. Belmont, 317.

## LIQUIDATOR.

See "Suit in England and Canada," &c.

## MAINTENANCE.

See "Will," 12.
"Lands Subject to Charge for," 1.

## MARKING EXHIBIT.

In registering a claim under the Mechanics' Lien Act the claimant made an affidavit verifying it, and referred thereto as marked "A," but no such mark was upon it : *Held*, that this did not invalidate the registry.

Currier v. Friedrick, 243.

## MARRIAGE.

[CONSIDERATION OF.]

See "Specific Performance," 1.

## MARRIED WOMEN'S PROPERTY ACT.

1. *Semble*, that such portions of the Married Women's Property Act, 1872, as would deprive parties of their vested rights, if held to affect women married before its passing, should be so read as not to interfere with such rights ; while the portions of the Act which have not this effect should go into operation as regards women married before, as well as after, the second of March, 1872.

Adams v. Loomis, 99.

2. In a proceeding against a married woman to obtain a conveyance of property vested in her, it is not necessary to join her husband as a party. Where, therefore, a trader in contemplation

## MARSHALLING ASSETS.



## MASTER, MASTER'S OFFICE.



## MECHANICS' LIEN ACT.

due him for making plans and specifications for, as also superintending the erection of, buildings for the owner.

Arnoldi v. Gouin, 314.

## MENTAL CAPACITY.

See "Will," 2.

## MERGER.

See "Mortgage," &c., 2.
"Will," 14.

## MISREPRESENTATION.

See "Vendor and Purchaser," 1.

## MORTGAGE, MORTGAGEE, MORTGAGOR.

1. A mortgage had been transferred to a trustee to secure certain notes of the mortgagee, one of which, after several years, was found in the hands of the assignee of the mortgage, and a suit having been instituted upon the mortgage by the trustee and the party interested in the note, it was *held*, that to the extent of the amount remaining due on the mortgage, including six years' interest, the party beneficially interested was entitled to recover the amount of the note and interest for the whole period the note had run.

Scatcherd v. Kiely, 8.

2. Under the statute 14 & 15 Vic., ch. 45, (Con. S. U. C., ch. 87), a mortgagee has a right to get in the equity of redemption in any way without thereby merging his security, and thus enabling a puisne incumbrancer to compel him to pay off such puisne incumbrancer's claim; therefore, where a first mortgagee took from the mortgagor a release of the equity of redemption, the consideration therefor being expressed to be the amount due on the mortgage for principal and interest, "and in satisfaction thereof," to the intent that the mortgagee "may hereafter hold and enjoy the said land and premises * * freed from the proviso of redemption;" and the mortgagor covenanted for further assurance, and that he had done no act to incumber:

*Held*, Per Curiam—[reversing the decree of the Court below, as reported ante volume xxi., page 242]—that the security of the first mortgagee was not thereby merged, and that the only relief a subsequent incumbrancer was entitled to, was that of redeeming the first mortgagee.—[STRONG, J., dissenting.]

Hart v. McQuesten, [In Appeal] 133

3. A mortgage was created by *D.* in favour of two brothers, who executed an agreement apportioning the amount secured between them, and afterwards joined in an assignment of the security to *M.* in trust, as to the first instalment, to pay the same equally to the mortgagees, one of whom, *J.*, subsequently conveyed his interest in the mortgage to *H.* (the plaintiff), for the benefit of creditors. The other mortgagee subsequently acquired the equity of redemption, went into possession of the premises, and succeeded in satisfying the amount of the mortgage money other than the first instalment thereof. *M.* executed a discharge of the mortgage under the statute, declaring that *D.* had paid all moneys secured by the mortgage. In fact *D.* never paid any portion of the money, and the first instalment never was paid by any one, and *J.* was indebted to his co-mortgagee to a greater amount than his share of the first instalment would come to. *M.* died, and a bill was filed against his personal representatives by *H.* calling upon them to pay the share of the first instalment coming to *J.* Under these circumstances the Court *held* that the estate of *M.* was bound to make good the amount to which *J.* was proved to have been entitled, although no want of *bona fides* could be imputed to *M.*

**Howland v. McLaren, 231.**

4. Although the fact of a mortgagee having obtained a final order of foreclosure, does not preclude him from suing for the mortgage money, still it would seem that the mortgagor is not entirely helpless, as he may offer to pay the mortgage, and if the mortgagee declines receiving the money the Court would restrain him from afterwards suing for the mortgage debt.

**Munsen v. Hauss, 279.**

5. If after a mortgagee has obtained a final order of foreclosure he has mortgaged the estate, that fact alone will not deprive him of the right to sue for the mortgage money, if, at the time of bringing the action, he has paid off the mortgage created by himself, and is in a position to reconvey the estate: neither does the fact of his having allowed the premises to fall into decay prevent him from suing. *Ib.*

6. The owner of land mortgaged the same, and, in pursuance of a covenant in the deed, insured the buildings on the land. The policy provided that the loss, if any, should be paid to the mortgagees. The buildings were shortly afterwards destroyed by fire, and the insurance moneys paid to the mortgagees, who assigned the mortgage to trustees of the Insurance Company, and they thereupon proceeded to foreclose.

*Held*, on appeal, by a puisine incumbrancer, from the report of the Master, that the plaintiffs were not bound to give credit for the amount paid to the mortgagees.

**Westmacott v. Hanley, 382.**

7. To a bill upon a mortgage for relief by sale or foreclosure a tenant of the mortgagor is a proper party, in order that he may redeem if he desires to do so, or in case of default of payment be ordered to deliver up possession.

Canada Permanent Loan and Savings Society v. Macdonnell, 461.

8. A foreclosure suit had been instituted in 1865, and brought to a conclusion; after which, in 1866, to supply a defect in the first suit a second one was brought, and the report of the Master obtained therein in December, 1868, which was appealed against and a reference back ordered. In proceeding under this order, in 1875, the personal representative of the mortgagee, who had died during the pendency of the appeal, claimed a sum of $2,937, with interest, for permanent improvements, but for which the mortgagee had never put forward any claim during the proceedings under the original decree. The Master having refused to entertain the claim, a petition was presented to the Court praying for an order to be allowed to prove such claim notwithstanding the delay; but the Court, in view of all the circumstances, refused the application, and dismissed the petition with costs.

Romanes v. Herns, 469.

See also "Administration of Justice Act," 2.
"Improvements."
"Sale of Lands subject to Mortgages."
"Trusts," &c., 3.

## MORTMAIN.

See "Charitable Bequest."
"Will," 1.

## MUNICIPAL COUNCIL.

Where a municipality has legally a right to pass a by-law granting a sum of money, it would seem premature to apply to restrain the by-law being submitted to the ratepayers, as they might refuse to approve of the by-law.

*Helm* v. *Municipality of Port Hope, ante* page 273, distinguished.

Vickers v. Shuniah, 410.

See also "By-Law."

## MUNICIPAL INSTITUTIONS' ACT.

1. This Court has jurisdiction to restrain a Municipal Corporation from obtaining the vote of the ratepayers in favor of a by-

law, which, if passed, would be illegal without Legislative sanction, and which sanction such vote was intended to aid, in obtaining in an informal and unauthorized manner.

**Helm v. The Corporation of the Town of Port Hope, 273.**

2. Where, the corporation of the Town of Port Pope were about submitting, to the vote of the ratepayers, a by-law authorizing the Harbour Commissioners of that town to issue debentures to the amount of $75,000 to aid in completing a railway, but which debentures the corporation had not legally the power of directing to be issued, the Court restrained the corporation from proceeding to take such vote. *Ib.*

## NEXT FRIEND.

See "Infant," 1.

## NUISANCE.

See "Injunction," 2.

## OPTION.

[TO PAY FOR SHARES OF DEVISEES.]

See "Will," 5.

## PAROL AGREEMENT.

See "Principal and Agent," 1.
"Trusts," &c.

## PAROL EVIDENCE.

*Held* on appeal, [reversing the judgment of the Court of Chancery as reported *ante* volume xxi., pages 166 and 629] that a verbal stipulation and agreement by a lessor, as to improvements to be constructed by him upon demised premises, could not be established by parol so as to add to or vary the lease, although it was proved that without such verbal promise and agreement the lease would not have been accepted.

**Mason v. Scott [In Appeal] 592.**

2. Such an agreement to be provable by parol must not only be collateral to, and independent of the written one, but it must be consistent with, and not vary it. The terms of the lease in this case bound the lessee to do what, by the alleged paro

agreement, was to be done by the lessors, and there was one agreement only founded on one consideration, not two different independent agreements:

*Held*, that such alleged agreement was not admissible in evidence.

*Held*, also, that as the agreement concerned an interest in land it required to be in writing under the Statute of Frauds, and could not be proved by parol. *Ib.*

## PARTIES.

See "Corporation," 2, 3.
"Married Women's Act," 2.
"Mortgage," &c., 7.
"Railway Company."
"Railway Contract to Construct."
"Trusts," &c., 1.

## PARTITION.

[TIME OF.]

See "Will," 13.

## PARTNERSHIP.

See "Patent of Invention."

## PATENT OF INVENTION.

The holder of patents for improvements in certain agricultural implements agreed to assign to the defendant the exclusive right to sell these implements, but not to manufacture them; and in certain contingencies he also agreed to assign the patents themselves. In fact the patents were invalid, for want of novelty, and the defendant having reassigned any interest he had in the patents, claimed the right to manufacture the implements for his own benefit.

*Held*, that owing to the agreement between the parties, and their dealings with each other thereunder, the defendant was estopped from questioning the validity of the patents.

*Held* also, that the effect of such agreement was not to constitute the defendant a partner, but to give him an interest in the patents, and that he was not a mere licensee of the patentee.

Gillies v. Colton, 123.

## PENALTY.

See "Composition."

PER CAPITA OR PER STIRPES.

See "Will," 6.

PETITION.

See "Injunction," 2.

PLASTER BED.

See "Tenants in Common."

POWER OF EXECUTORS TO SELL.

See "Will," 1.

PRACTICE.

See "Administration of Justice Act," 3, 4.
"Amendment at the Hearing."
"Appeal from Ruling of Master," 1, 2.
"Contempt," 1, 2.
"Evidence."
"Formâ Pauperis."
"Hearing, Costs of Postponing."
"Injunction."
"Marking Exhibit."
"Mortgage," &c., 7, 8.
"Præcipe Decree."
"Specific Performance," 1.
"Suit in England and Canada," &c.

PRÆCIPE DECREE.

Since the passing of the Order (435) of 20th December, 1865, the Registrar has the power of issuing any decree on præcipe in mortgage cases, that the Court would, previously to that order, have made upon a hearing *pro confesso*.

Kirkpatrick v. Howell, 94.

PREFERENTIAL ASSIGNMENT.

See "Insolvency, 1, 3.

PRESSURE.

See "Insolvency," 1, 3.

## PRINCIPAL AND AGENT.

1. Where it was shewn by evidence that the defendant had agreed to attend and buy in a property, offered for sale by auction, as the agent of the plaintiff and for his benefit: *Held*, notwithstanding the Statute of Frauds had been set up as a defence and there was not any writing evidencing the agreement, that the plaintiff was entitled to a decree to carry out the agreement.

Ross v. Scott, 29.

2. The general rule is that the clerks of an agent are not agents of the principal.

Hope v. Dixon, 439.

See also "Specific Performance, 3.

## PURCHASE BY TRUSTEE.

See "Trusts," &c., 2.

## QUALIFIED AGREEMENT TO SELL.

See "Specific Performance," 4.

## RAILWAY COMPANY.

1. Where one shareholder of a railway company filed a bill on behalf of himself and all other shareholders (except a defendant) against the company and its managing director, alleging that the managing director had virtually the appointment of a majority of the directors, and thus controlled the action of the company; and charging that such managing director had misappropriated large amounts of the company's funds, and had also been guilty of several acts of misconduct, which, if true, were properly subjects for the cognizance of a Court of Equity, and in respect of which the directors had omitted to call him to account, but the plaintiff had failed to shew that the consent of the directors or of the shareholders could not be obtained to institute proceedings of the name of the company, a demurrer to the bill for want of equity as well as for want of parties, filed by the company and the managing director was allowed.

McMurray v. The Northern Railway Co., 476.

2. Such an objection to the frame of a bill is not a mere "formal objection," such as is intended to be provided for by the Administration of Justice Act of 1873, section 49. *Ib.*

3. To such a bill the Attorney-General, though a *proper*, is not a *necessary* party. *Ib.*

See also " Bridge Company."

## RAILWAY, CONTRACT TO CONSTRUCT.

A Railway Company entered into a contract for the construction of their road, which was to be completed and in perfect running order by the 1st of January, 1875; and to be paid for partly in cash and Municipal bonds, partly in bonds or debentures of the Company, and partly in guaranteed shares or stock of the Company; and the contractors entered upon the construction of the work, but owing to financial difficulties, they were obliged to suspend in 1873, and in August, 1874, they made a deed of composition with their creditors, and *J.* was appointed the official assignee. After the time appointed for the completion of the work, the assignee and the contractors filed a bill in their joint names against the Railway Company, asking that the contract might be performed by the Company, offering on their own part to perform it, and seeking to restrain the Company from entering into any new contract for the work with any other person, and from making, signing, or issuing any stock or bonds of the Company, until the stock or bonds to which the plaintiffs were entitled, were issued to the assignee. A demurrer for want of equity and for misjoinder of plaintiffs was allowed; the rule of the Court being that it will not decree the specific performance of works which the Court is unable to superintend; and that an insolvent or bankrupt cannot be joined as a co-plaintiff with his assignee.

**Johnson v. The Montreal and City of Ottawa Junction Railway Co., 290.**

## RATIFICATION.

The agent of the vendor asked permission to remove a building off the premises, the subject of the alleged contract; and his solicitors asked for papers from the vendee's solicitor, in order to prepare answers to certain questions of the plaintiff as to title, &c.

*Held*, that these were not such acts as would ratify an agreement not otherwise binding on the vendor.

**Hope v. Dixon, 439.**

## RECEIVER.

See " Suit in England and Canada," &c.

REDEMPTION SUIT.

See "Administration of Justice Act," 1.

———, TERMS OF.

See "Building Society."

REGISTRATION ACTS 1846 AND 1868.

Although portions of township lots have been laid off into village lots, this forms no objection to an undivided interest in the township lots, as originally described, being sold under execution; and the purchaser at sheriff's sale is entitled to hold the interest acquired under such sale, notwithstanding the sheriff's deeds, so far as they concern the village lots, do not comply with the provisions of the Registration Acts of 1846 (9 Vic., ch 34) and 1868 (31 Vic., ch 20, Ont.,) the latter of which prohibits the registration of deeds of any portions of lots so laid out, unless they conform to the plan of the property registered under such Act.

Rathbun v. Culbertson, 465.

REGISTRATION OF CLAIM.

See "Mechanics' Lien Act," 1, 2.

REMOVAL OF BUILDING.

See "Lessor and Lessee."

RENTS.

See "Administration Suit," 1.

RESCISSION.

See "Exchange of Lands."

RESIDUE.

See "Charitable Bequest."
"Will," &c., 7.

REVERTING.

See "Corporation," 1.

## REVIVOR OF DEBT.

[ON DEFAULT.]

See "Composition."

## SALE.

See "Administration of Justice Act," 2.

## SALE OF LANDS UNDER EXECUTION.

[SUBJECT TO SEVERAL MORTGAGES.]

The principle established by the cases of *Donovan* v. *Bacon*, *ante* volume xvi., p. 472, and *Re Keenan*, 3 Chancery Chambers Reports 285, that the equity of redemption in mortgage premises is not saleable under execution where the same are subject to several mortgages in the hands of several mortgagees, does not apply where the mortgages are by several owners of distinct portions of the estate, and the same are held by one and the same mortgagee, or are in the same hand.

Rathbun v. Culbertson, 465.

See also "Lands subject to charge for maintenance."

## SETTING ASIDE ALLEGED WILL.

See "Will," 2.

## SETTLEMENT OF SUIT.

See "Husband and Wife."

## SOLICITOR, DUTY OF, ON TAKING INSTRUCTIONS FOR WILL.

See "Will," 3.

## SPECIFIC PERFORMANCE.

1. The owner of land promised the father of the plaintiff that if he would marry his daughter he would give him 50 acres of land ; and after the marriage he did execute a bond to him for a conveyance thereof reciting the payment of $300 as the consideration therefor. The bond also contained a recital that the obligor desired that the land should go to the female issue of his daughter and her husband. The obligee having died, a suit to compel the specific performance of the agreement was filed by his infant heiress, to which the obligor set up the defence of want of

consideration ; as also a denial of having executed the bond. At the hearing *Blake*, V. C., refused to allow a supplemental answer to be filed setting up a defence as to the estate agreed to be conveyed ; and being of opinion that there was an adequate consideration, made a decree for specific performance of the agreement with costs ; which, on rehearing, was affirmed with costs.

## Boyd v. Shouldice, 1.

2. In June, 1869, *D.* agreed to sell and convey to *H.* 278 acres of land for $2780, payable by certain instalments, at certain specified times ; the agreement signed by the parties expressing that time was "to be of the essence of the bargain." In January, 1871, *H.* by a similar instrument, agreed to sell to the plaintiff 100 acres for $1000, to be paid to *D.* upon the terms contained in the said recited agreement ; and the plaintiff then paid *D.* $60 on account. Both *H.* and the plaintiff were admitted into possession of their lands, on the execution of the respective agreements, and so continued until 1874. In February of that year both *H.* and the plaintiff were in arrear, nothing having been paid since 1871, and *D.* complained to *H.* of this, and of the manner in which the premises were managed, and it was then agreed between *D.* and *H.* that *D.* should bring an action of ejectment, *H.* agreeing to pay the costs thereof, and all arrears of purchase money, together with an increased rate of interest. Ejectment was accordingly brought by *D.* against *H.* and the plaintiff ; but before the summons was served, or the plaintiff was aware of the proceeding, he paid to the attorney of *D.* $100, who indorsed a receipt for the amount on the agreement between *H.* and the plaintiff as a payment "on within agreement :" *H.* took no steps to defend the ejectment, and *D.* recovererd judgment therein, although the plaintiff appeared, and tried to defend for his 100 acres ; and a writ of possession was issued, and delivered to the sheriff, with directions to give possession to *H.* for *D.*, which was done accordingly, and *H* was continued in possession under an arrangement for an extension of the time for payment of principal and interest. On a bill filed by the plaintiff against *H.*, *held*, under these circumstances, that the receipt by *D.* of the $100 after default, had waived the condition making time of the essence of the contract ; but that having either omitted to set up these facts in defence of the ejectment, or that having so set them up, they did not form an answer to the proceeding, the Court refused to open up the question after the adjudication at law, and dismissed the bill with costs.

## Demorest v. Helme, 433.

3. The clerk of a vendor's agent, by his direction, wrote to *T.*, an intending purchaser, "Mr. *H. D.* won't take less than $30 a foot for ground on Beverley street ;" terms, &c., (setting them forth)

*T.* answered this: "Your memorandum offering me three hundred and odd feet of land on Beverley street, by a depth of one hundred and fifty feet, at the price of $30 per foot frontage, duly received. I will take the land at that price, and now offer terms, viz.: one-fifth cash, and the balance in four yearly payments, with interest at eight per cent. I should like the right of getting any one-sixth part of the land released from the operation of the mortgage, by paying one-sixth of the mortgage money, and the interest accrued thereon." This was answered by the clerk of the agent, by his directions, "Your acceptance of my offer of three hundred and odd feet on Beverly street, by a depth of one hundred and fifty feet, for thirty dollars, ($30) per foot to hand. Will accept your terms namely (repeating them), "on the following conditions" (as to investigation of title, production of deeds, &c.):

*Held*, that these letters did not form such a memorandum in writing as took the case out of the operation of the Statute of Frauds.

Hope v. Dixon, 439.

4. A lease contained an agreement that "the said lessor hereby agrees to give to the said lessee the first privilege of purchasing the said premises at any time within four years from the date hereof, at the price of one thousand dollars, payable in five yearly instalments:"

*Held*, that this was an absolute agreement to sell which the lessee had a right to enforce at any time within the period named; and was not a qualified agreement to sell on the terms mentioned, only in case the lessor desired to sell.

Casey v. Hanlon, 445.

See also "Vendor and Purchaser."

STATUTE OF FRAUDS.

See "Principal and Agent," 1.
"Specific Performance," 3.

SUING FOR MORTGAGE MONEY.

See "Mortgage," &c., 4, 5.

SUIT BY INFANTS.

See "Infants," 2.

SUPPLEMENTAL ANSWER.

See "Specific Performance," 1.

## SUIT IN ENGLAND AND CANADA.

[FOR SAME OBJECT.]

The holder of bonds of a joint stock company (limited), after instituting proceedings in the Court of Chancery in England, for the sale of the partnership property, which was situated in Canada, and after the appointment of a receiver in England of the estate in England and Canada, filed a bill in this Court for the like purpose, and this Court appointed the agent of the receiver, receiver here; after which it appeared that the company went into liquidation, the liquidator being the same person as had been appointed receiver in England. The plaintiff, after an amendment of his bill stating these proceedings, moved for a decree in the terms of the prayer of his bill; but the Court refused to make any decree until it was shewn what the position of matters was in England, and the steps about to be taken there, so as to avoid any conflict between the two Courts, and mould the order here to give the appropriate relief, without interfering with the steps which were being taken in England for the same object.

Louth v. The Western of Canada Oil Lands and Works Company (Limited), 557.

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An insolvent who has made an assignment under the statute is not a proper party to a bill in respect of transactions occurring before his insolvency, notwithstanding the bill seeks to obtain information of facts which are unknown to any one, other than the insolvent, although if it were shewn that he had been engaged in fraudulent transactions whereby he had acquired property, it would seem he might be made a party; and that, although the property so acquired had, by the operation of law, been transferred to his assignee.

Kerr v. Read, 529.

Under no circumstances is it proper to make an insolvent a defendant for the purpose of discovery only. *Ib.*

A proper mode of taking an objection to a person being made a defendant is, by demurrer to the bill; he need not wait until he is examined, and then object to the questions put to him. *Ib.*

[At the hearing subsequently before the Chancellor, the bill was dismissed with costs upon the merits.]

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## TENANTS.

See "Mortgage," &c., 7.

## TENANTS IN COMMON.

Where one of several tenants in common, of a plaster bed, was in sole possession of the property, and had sold portions of the plaster, an account of his receipts therefrom was ordered in favour of his co-tenants.

**Curtis v. Coleman, 561.**

## TIME OF THE ESSENCE OF THE CONTRACT.

See "Specific Performance," 2.

## TOWN, TRUSTEES OF.

See "Trusts," &c., 4.

## TOWNSHIP LOTS.

See "Registration Acts," 1846 and 1868.

## TRANSFERRING CASE TO CHANCERY.

See "Administration of Justice Act," 3, 4.

## TRUSTS, TRUSTEE AND CESTUI QUE TRUST.

1. Where the whole of the testator's property, real and personal, and the whole control of it, were vested in trustees subject to the trusts declared by the will, it was *held* not necessary to make any of the *cestuis que trust* parties to a suit for the purpose of enforcing a contract of purchase which the testator had entered into during his life time.

**Delisle v. McCaw, 254.**

2. The rule in Equity is, that the trustee buying the trust estate will be compelled to complete the purchase if considered for the advantage of those beneficially interested; but a trustee who had procurred the estate to be bid in at auction, so as to prevent its being, as he considered, sacrificed, was *held* not bound to perfect the purchase; as it is the duty of the trustee to take steps to prevent the estate being sold at an undervalue; and this, although he erred in his judgment as to the value of the property offered for sale, as also as to the means adopted to prevent it.

**Heron v. Moffatt, 370.**

3. A trustee, unlike a mortgagee, is entitled to insure the trust property, and charge the premiums paid against it, without any express stipulation to that effect in the instrument creating the trust. *Ib.*

[Subsequently affirmed on the hearing before the Chancellor.]

4. Trustees of a municipality are entitled, under the general provisions of the Act of 1874 (37 Vic., ch. 9. Ont.,) to a commission on moneys passing through their hands as compensation for their care and trouble in the management of the trust.

**In Re The Commissioners of the Cobourg Town Trust, 377.**

See also "Mortgage," &c., 1, 3.

## UNDUE INFLUENCE.

See "Voluntary Gift."

## VACATION.

See "Appeal from Master," 1.

## VALUABLE CONSIDERATION.

See "Husband and Wife."
"Specific Performance," 1.

## VENDOR AND PURCHASER.

1. The plaintiffs sought to set aside their purchase of a grist mill from the defendant, on the ground of false representations knowingly made to them by the defendant, and relied upon by them, as to the state of repair in which the mill was, and as to the water supply and the capacity of the mill for grinding. The evidence affirming and denying these representations were equally positive and explicit on either side. It appeared, however, that the purchase was not a hasty one: that the plaintiffs were and professed to be competent judges of the subject matter, one being a miller and the other an engineer: that they examined for themselves and made inquiries: that they were more eager to buy than the defendant was to sell; and that the conduct of the plaintiffs —which under the conflict of evidence was assumed to be the safest guide—was inconsistent with their assertion of a warranty, for they did not at first set it up, but asked to be relieved as a favor, and at one time it was agreed that they should pay $1,000 to be let off the bargain. Under all the facts, which are more fully set out in the judgment, the Court refused to set aside the contract; but, as the evidence tended to shew a want of condor on the defendant's part, and a disingenuous exaggeration of the condition and capacity of the property, the bill was dismissed without costs.

**Henry v. Pindar, 257.**

2. The rule, which authorizes the payment out of the estate of the costs of all parties interested in obtaining the construction of a will, does not apply to a case where a purchaser refuses to complete his purchase of lands from a person claiming title under such will. In such a case the purchaser, if the question is decided against him, will, as in ordinary cases, have to pay the costs of the litigation necessary for obtaining the decision of the Court upon the question of title.

Smith v. Coleman, 507.

## VERBAL AGREEMENT TO BUILD.

See "Lessor and Lessee."

## VESTED INTEREST.

See "Will," &c., 8, 9.

## VESTED RIGHTS.

See "Married Women's Property Act."

## VESTING ORDER.

A vesting order operates as well on equitable as on legal estates.

Re Robertson, Robertson v. Robertson, 449.

## VOLUNTARY DEED.

See "Husband and Wife."

## VOLUNTARY GIFT.

The testator, who died in April, 1867, had been a captain in the army, and was represented as a man of intelligence and business capacity, although addicted to habits of intemperance. He had no relatives other than the plaintiffs and the defendant, the latter,—a minister of the Church of England,—being the brother of his wife, who had died in the previous autumn. Soon after her decease the testator, who was then resident in London, sent for the defendant, who resided at Brockville, to come to him in order to assist him with his affairs. This the defendant did, and, amongst other things, consulted the solicitor of the testator as to the state and condition of his affairs; and a power of attorney was prepared by the solicitor and executed by the testator authorizing the defendant to sell and dispose of sundry articles of furniture and other effects, which he did. Two days after this he testator made his will bequeathing to the defendant all his

pictures, jewellery, trinkets, and wearing apparel; and to his brother *G. W.*, one of the plaintiffs, all his silver-plate bearing his family crest. Of the residue of his estate, real and personal, he gave one-half to *G. W.* and the other half he gave to the other plaintiffs, his nieces; and appointed the defendant executor. Next day the testator executed a transfer of a policy of insurance on his life to the defendant; the instructions for this instrument, as well as for the will, having been given by the testator personally to his solicitor, who testified as to the testator's thorough competency to execute both. The defendant was present with the testator when instructions for the transfer were given to the solicitor, and so remained until the instrument was executed. The testator died within six months afterwards, and the insurance money was paid to the defendant. The solicitor in his evidence stated that he was not informed as to the object of the transfer, which was absolute in form and for a nominal consideration, but that he understood it was by way of security for some advance or debt. The defendant did not prove the will, or obtain probate thereof until June, 1874, and on the 12th of October of that year the plaintiffs obtained an administration order, and sought in proceeding thereunder to compel the defendant to refund the insurance money, on the ground that the transfer of the policy had been obtained by fraud or undue influence, or was intended merely as in aid of the will or as a security: but the Court [reversing the decision of the Master] *Held* that the circumstances of the case were not such as to lead to the presumption that the defendant had been guilty of any fraud or undue influence in obtaining such assignment, and that he was not bound to give evidence that the testator voluntarily and deliberately performed the act, knowing its nature and effect.

Re White, Kersten v. Tane, 547.

## VOLUNTEERS.

[LIABILITY OF ESTATE IN RESPECT OF CHARGES ON LAND SETTLED ON.]

Lands were conveyed to the son of the testatrix, and he, as to part thereof, stated in writing that he held it in trust for his mother for her life, and after her death for her daughters, *H.* and *M.* in fee. The son created a mortgage upon the whole property, and by the writing acknowledging the trusts—to which the testatrix was a party—it was agreed that £600, part of the mortgage money, should be charged on that part of the mortgage premises settled on the daughters. *Held*, that this sum was payable as a debt out of the estate.

Wilson v. Dalton, 160.

WILL, CONSTRUCTION OF, &c.

1. A bequest issuing out of realty to Queen's College for the founding of a Bursary, is a charitable bequest within the Mortmain Acts, and therefore void.

Ferguson v. Gibson, 36.

2. The Court, in adjudicating upon the question of the mental capacity of a testator, will give effect to the evidence thereof given by the medical attendants rather than to that of others particularly those benefited by the will; where, therefore, a testator in January, 1871, while in full possession of his mental faculties, made a will whereby he directed all his property to be invested, and one-half of the proceeds thereof paid to his widow during widowhood, and the other half to his sister, and in the event of issue, then that the issue, widow and sister should share the same equally; and on the child, if a son, attaining twenty-five, or if a daughter, attaining twenty-one, or marrying, that then one-half of all the estate (real and personal) should go to such child absolutely: and afterwards, (on the 5th July, 1873), whilst the testator was on his death-bed, another will was signed by him, without consultation with the wife and without her knowledge, whereby he gave one-third of his estate absolutely to his sister, and directed the residue to be invested, and out of the proceeds to pay his mother $1,600 a year as a first charge thereon, and to his widow $800 a year during life. The residue of his estate he gave to his child on attaining twenty-one; the reason stated by the parties benefited thereunder, and the solicitor who drew it, for the testator making such second will, being that his wife was likely soon to become a mother, and that he desired to make provision for the expected issue. The testator died on the 12th of July, and in the results which followed, the sixteen hundred dollars a year given to his mother would absorb nearly, if not quite, all the income of the estate not given to his sister. The testator and his wife were shewn to have lived on the most friendly and affectionate terms, and that there was not any intention, on his part, to deprive her of any benefits given by the former will. The widow, by this second will, was named as executrix, though not so under the prior one, and being guided by her husband's relatives, and informed by them that she was entitled to a third of the estate, and being without any independent advice, joined with the executors in proving the will; but, six months afterwards, becoming aware of her true position thereunder she filed a bill charging that the same had been obtained by undue influence exercised over the testator while he was incapable of properly understanding the effect of the dispositions he was making of his property. Some of the parties benefited by such will swore that at the time of signing it the testator was clear in his intellect, and understood perfectly well

what he was about; whilst the medical attendants swore that at that date he was in an almost comatose state, and had been rapidly becoming so for some days previously, and that from the first to the fifth of July his mind was not in such a state as to be capable of any continuous action. The Court, under these circumstances, refused to allow the paper to stand as his will: but considering that, owing to the fact of the widow having proved the will,—though not sufficient to preclude her from afterwards impeaching it—the parties claiming under it were justified in litigating the question, gave them, as well as the widow, their costs out of the estate.

Wilson v. Wilson, 39.

3. Where a solicitor, when receiving instructions for the preparation of a party's will, is made aware of the object the testator has in view, but the language used will not effectuate that end, it is the duty of the solicitor to call the testator's attention to the fact, and to point out to him wherever the words used fail in carrying out the known intentions of the testator: it is erroneous to suppose that the solicitor properly discharges his duty by simply taking down the directions given by the testator without reference to their effect upon the provisions it was alleged the testator desired to make with regard to his family and estate.

*Ib.*

4. By a codicil to her will the testatrix stated that "It is my intention to build upon the two acres * * and in case of my death before the completion of the house, I desire that it may be completed and furnished according to my present plans and intentions, which are known to my family. * * My son *William* I wish to have five hundred pounds, to be paid to him by my executors. What is here is to stand prior to everything in my said will." By the same codicil the testatrix gave annuities to two daughters:

*Held*, that the payment of the amount needed for the furnishing of the house, the annuities to the daughters, and the legacy of five hundred pounds to the son, were first charges on the estate, after payment of debts; and that the parties entitled to these several charges would, in the event of the estate ultimately proving deficient, be bound to abate ratably.

Wilson v. Dalton, 160.

5. A testator, in 1840, devised all the income of his estate to his widow until his eldest son attained twenty-one, for the support of herself; and the maintenance, education, and support of all his children during their minority; and as each attained twenty-one he or she was to be allowed a proportion of the annual income, after making ample provision for the support of his wife during her widowhood; and after the youngest child attained

twenty-one, and the death or marriage of the widow, he gave all his estate, real and personal, amongst all his children in equal proportions; and should any child die without issue and under age, such child's share to be divided amongst the others. The testator further directed that, should a majority of his sons think proper to pay to each of his daughters the sum of five hundred pounds currency in lieu of their share of the estate, the payment thereof should be taken by them in full of their respective shares of the property devised to them. After the death of the testator, one of his daughters died intestate, and without issue, after having attained the age of twenty-one. Subsequently to the making of this will the testator acquired real estate of considerable extent and value.

*Held*, that, in the absence of any act whereby the right was lost, the time for the majority of the sons to exercise the option of paying the daughters the five hundred pounds each, was the period of distribution of the *corpus* or principal; and that in the meantime the daughters were entitled to their shares of the actual income of the estate, and that this option on the part of the sons applied to the share of the deceased daughter as well as to the shares of the other daughters. *Held*, also, that the after-acquired realty was not affected by the provisions of the will, and that the same was to be partitioned amongst the several parties interested therein.

Laidlaw v. Jackes, 171.

6. A testator, in 1856, devised certain lands to *M.*, and in case of her death without issue, then to the heirs of *C.* & *E.*, "to be equally devided between them." *C.* died, after the testatrix, leaving five children. *M.* died after *C.*, without issue. *E.* survived at the date of the hearing, having one child living.

*Held*, that the period of distribution was upon the death of the first taker *M.*, so that those were entitled who were then the heirs of *C.* & *E.*, and that they took *per capita* and not *per stirpes*.

Sunter v. Johnson, 249.

7. Although a will speaks from the death of the testator, and so would carry after-acquired lands, yet where a testator devised all the remainder of his real estate to his wife, and then proceeded to enumerate the lands comprised in such remainder, it was *held* that after-acquired lands did not pass as part of the residue.

Crombie v. Cooper, 267.

8. A testator devised all his estate ("lands and chattels") to his mother for life, and after her death to his sister, *P. H.*, absolutely, charged with legacies to several persons. One of the legatees died after the testator, but before his mother, the tenant for life.

*Held*, that the legacy did not lapse, but was a vested interest in the legatee, and as such went to his personal representative.

Pollard v. Hodgson, 278.

9. A testator gave to his wife the house which he possessed, with all the appurtenances thereof, and the house and town lot in, &c., "*and sixteen cords of good sound firewood yearly during her life time ;*" such houses and lot to go to his only brother after the decease of his wife. He also bequeathed to his wife the interest of all money and securities for money that he might be possessed of at the time of his death, after payment of debts and funeral expenses ; and the value of one-third of his personal property, being composed of * * and all other implements and utensils of husbandry ; and after his wife's death directed his money to be divided among his cousins, viz., the family of his uncle *J. F.*, the family of *J. S.*, &c.

He then devised certain lands to his brother, being the only wooded lands he was possessed of : and by a codicil left $200 to his wife in addition to the legacy given by the will. On a bill filed to obtain a construction of the will,

*Held*, that the annual supply of firewood did not form a charge upon any of the lands of the testator, but was to be provided for the widow out of the personalty ; that the widow took absolutely one-third share of all the property other than money and securities for money, and not one-third of the enumerated articles only ; and that the income of the other two-thirds up to the period of division belonged to those who were or might become entitled to the property.

*Held* also, that the gift of his money was to the cousins as a class, and that those living at his death took vested interests liable to be divested to the extent required to let in other cousins, of the families named, coming into existence before the death of the widow, the period of distribution ; and that as the testator directed his wife to have one-third of the value of his property, which could only be ascertained by a sale, it was the duty of the executors to make such conversion ; and as the gift was not to take effect till the death of the wife, the money the testator thereby meant to dispose of was not merely the money he possessed at the time of his death, but money belonging to his estate at the time of his wife's death, when all the personal estate would be, or ought to be, in the shape of money.

Ferguson v. Stewart, 364.

10. A testator directed the residue of his estate to "be distributed at the discretion of his executors to the support of Christianity throughout the world, such as Bible, tract, missionary societies, and institutions of learning of the Baptist denomination :

*Held* a valid bequest, and one which could not be objected to on the ground of indefiniteness.

Anderson v. Kilborn, 385.

11. The testator having been interested in having a place of worship, of which he was a deacon, completed, told the building committee to collect all they could from the other members, and that he would see the building paid for; and the committee, relying on this assurance, completed the edifice, and incurred liability for the expense, and were out of pocket a considerable amount.

*Held*, that the executors were at liberty to discharge this sum out of their testator's estate. *Ib.*

12. A testator devised his lands, charged with payment of debts, to his wife for life, and in the event of her death or marriage, to his children, "to be held for them until they come of age by the executors hereinafter named, to be applied for their use and benefit in the way and manner as the said executors shall see best and when the above children shall come of age the residue of the above property shall be given to the children in equal shares." The executors were not expressly authorized to sell, but the testator had directed that his wife should not have power to dispose of any part of the property without the consent of his executors.

*Held* (1), that the necessary implication from these words was, that she had power to sell with their assent: and the executors and executrix,—the widow,— having sold the real estate and applied a large portion of the proceeds in the support and maintenance of the children:

*Held* (2), that the sale was valid, and that the executors were entitled to be allowed the amount so expended for maintenance, which was moderate, in passing their accounts in the Master's office: and *semble*, that the fact of the debts having been charged on the lands, implied a power in the executors to sell.

Grummet v. Grummet, 400.

13. Where an estate consisted in large part of personalty, and by the will of the testator the whole was to be divided among his children on the youngest attaining twenty-one, all of whom took vested interests on their attaining majority, and in the event of the death of any before the period of distribution, leaving issue, the share of the one so dying was to go to his children, share and share alike:

*Held*, that until the youngest child attained twenty-one, the adult parties were not entitled to call for a partition or distribution of the property.

Murphy v. Mason, 405.

14. A testator devised all his estate, real and personal, to his wife for life, and after her death the real estate was to be equally

divided between one of his sons and one of his daughters ; the daughter to have all his personal estate also. In the event of the death of either without heirs, his or her share was to be divided between the other children of the testator. Several pecuniary bequests were made, which were to be paid by the son and daughter, by instalments, commencing one year after they should "have come into possession hereby given." The daughter married and died during the life of the widow, leaving the husband tenant by the curtesy, but no child her surviving. The widow subsequently died, and thereupon the tenant by the curtesy recovered possession of his deceased wife's share in ejectment. More than a year after the death of the widow, a daughter of the testator, one of the legatees named in his will, filed a bill for the payment of the arrears of her legacy ;

*Held*, in the events that had happened, that there was no merger of any portion of her legacy, by reason of her interest in the deceased daughter's share ; that the devisees took the land subject to, and charged with the payment of all the legacies which were not personal or general charges against the devisees ; and the defendants—the son and the tenant by the curtesy—having resisted the claim of the plaintiff, were ordered to pay the costs of the suit ; there being no assets of the testator out of which they could be paid, and the questions raised not being those of construction within the rule allowing the costs of their solution to be charged on the estate of the testator.

Robson v. Jardine, 420.

15. A testator devised all his estate, real and personal, to trustees for the support and maintenance of his wife during her widowhood, and of his daughter until she should attain twenty-one ; and directed, in case she should survive her mother, that the trustees might convey to the daughter on her attaining majority, but in no case was she to have control of the property until after marriage or death of her mother ; and further that "even after death or marriage of my said dear wife, and after the majority of my said daughter, my said trustees may still continue to manage the said estate, and allow her the yearly proceeds arising therefrom only, till they shall see proper to give the management thereof to my said daughter. * * * In the event of the death of my said daughter without leaving lawful issue of her own body to survive her, I order and direct that my said trustees shall sell and convey the said estate after the death or marriage of my said dear wife, and that they divide the proceeds arising from such sale, and the rest of the personal property that may then belong to my estate, equally among all my brothers and sisters. * * * But if my said daughter live, said lands and premises shall be preserved for her and her heirs and assigns for ever." The widow died shortly before the daughter attained

# ORDERS OF THE COURT OF APPEAL.

20th FEBRUARY, 1876.

XLIII. Appeals from County Courts shall be heard at the Sittings of the Court of Appeal next after the giving of the decision appealed from, unless otherwise ordered by the Court of Appeal or a Judge thereof.

XLIV. The appellant shall set down the appeal for hearing, by delivering to the Registrar of the Court of Appeal, at least fourteen days before the Sittings at which the matter is to be heard, four Appeal Books for the use of the Judges of the Court of Appeal, such Appeal Books shall, if written, be written on brief paper, and on only one side of the paper; and, if printed, shall be printed on good paper, on one side of the paper only, and in demi-quarto form, with small pica type leaded; and each book shall contain a copy of the pleadings, evidence, and other matters which have been certified by the Judge of the Court appealed from, together with the appellant's reasons of appeal. The copy certified by the Judge in pursuance of the statute may be accepted as one of the four Appeal Books, if it complies with the above mentioned requisites.

XLV. The appellant shall, at least eight days before the Sittings at which his appeal is to be heard, serve the respondent with notice of the setting down of the appeal, and with a copy of his reasons of appeal.

XLVI. Unless the foregoing rules are complied with the appeal shall not be heard, unless the Court shall, on application made upon two days notice to the respondent, otherwise order.

XLVII. The costs to be taxed and allowed upon appeals from County Courts shall be on the same scale as heretofore allowed upon appeals to the Courts of Queen's Bench and Common Pleas.

WM. H. DRAPER, C. J.
GEO. W. BURTON, J.
C. S. PATTERSON, J.
THOMAS MOSS, J.